



# DISCUSSION PAPER

## **Royal Commission recommendations relating to the reporting of child sexual abuse with implications for the confessional seal**

Justice and Community Safety Directorate

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# DISCUSSION PAPER

## ROYAL COMMISSION RECOMMENDATIONS RELATING TO REPORTING OF CHILD SEXUAL ABUSE WITH IMPLICATIONS FOR THE CONFESSONAL SEAL

### INFORMATION ABOUT MAKING A SUBMISSION

Submissions can be sent to:

Email: JACSLPP@act.gov.au (with the subject “Criminal justice reform”)

Post: Child sexual abuse reform options – Submissions

Legislation, Policy & Programs

Justice and Community Safety Directorate

ACT Government

GPO Box 158

Canberra ACT 2601

It is requested that any submissions exceeding 30 pages include an executive summary.

Submissions must be received by close of business on **Friday 9 November 2018**. All submissions and comments will be treated as public, and may be published, unless the author indicates that it is to be treated as confidential. All requests for the submission to be treated confidentially will be respected and dealt with in accordance with any applicable laws, including freedom of information legislation.

## PURPOSE

The ACT Government has agreed in principle to implement recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) relating to the reporting of child sexual assault, which have implications for the confessional seal. This paper sets out background and issues for consideration to inform the implementation of the reforms recommended by the Royal Commission.

## BACKGROUND

### The Royal Commission and relevant recommendations

The Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) was established in response to allegations of sexual abuse of children in institutional contexts that had been emerging in Australia for many years. Over the course of its inquiry, the Royal Commission was contacted by over 16,000 individuals, heard personal stories from over 8,000 people, and received over 1,000 written accounts from survivors. In addition, it held public hearings, roundtables, and conducted extensive policy and research work. The Royal Commission released its Criminal Justice Report in August 2017, and its Final Report in December 2017.

The reports made a number of recommendations for legislative reform with implications for the treatment of the confessional seal. The main recommendations are as follows:

- > **Recommendation 33 of the [Criminal Justice Report](#)** recommends States and Territories create an offence for 'failure to report' child sexual abuse.
- > **Recommendation 35 of the Criminal Justice Report** recommends the application of a 'failure to report offence' to failure to report where child sexual abuse is disclosed during religious confessions.
- > **Recommendation 7.4 of the Royal Commission's [Final Report](#)** recommends that laws about mandatory reporting to child protection authorities should not exempt religious ministers from being required to report where they have relevant knowledge or suspicions based on information disclosed in, or in connection with, a religious confession.
- > **Recommendation 34 of the Criminal Justice Report** recommended that governments ensure that mandatory reporting schemes and any reportable conduct schemes have systems in place to ensure reports made under those schemes involving child sexual abuse are brought to the attention of police. Recommendation 34 further recommends that the failure to report offence should include defences that avoid the duplication of reporting under mandatory reporting and any reportable conduct schemes.

The ACT Government formally responded to all of the Royal Commission's recommendations in June 2018. The ACT Government accepted each of the four recommendations in principle, noting that further consultation is required in relation to the implementation of the recommendations.

# CURRENT ACT LEGISLATIVE FRAMEWORKS FOR REPORTING CHILD ABUSE

There are currently two legal schemes under which an individual may be compelled to report knowledge or suspicion of child sexual abuse. These are the mandatory reporting requirements under the Children and Young People Act 2008 (CYP Act) and the reportable conduct scheme under the Ombudsman Act 1989 (Ombudsman Act). Each of these is briefly summarised below.

## Mandatory Reporting Scheme

The ACT's mandatory reporting scheme imposes reporting obligations on certain professionals, who in the course of their work, form a belief that child abuse is occurring, or has occurred. The below table summarises the key elements of the scheme.

<b>Mandatory Reporting Scheme – Key Elements</b>	
<b>Relevant legislation</b>	<i>Children and Young People Act 2008</i>
<b>To whom is a report made?</b>	Child and Youth Protective Services (CYPS).
<b>Who is required to report?</b>	<p>Mandated reporters are groups of professionals who, because of their work, have unique access to and expertise to identify abuse more readily than the general community. They are (s365):</p> <ul style="list-style-type: none"> <li>• doctors</li> <li>• dentists</li> <li>• nurses</li> <li>• enrolled nurses</li> <li>• midwives</li> <li>• psychologists</li> <li>• school teachers</li> <li>• people authorised to inspect education programs used for home education of a child</li> <li>• police officers</li> <li>• school counsellors</li> <li>• childcare centre carers</li> <li>• people coordinating or monitoring home-based care for a family day care scheme</li> <li>• a public servant who works with children</li> <li>• the public advocate</li> <li>• an official visitor</li> <li>• people who, in the course of their employment, have contact with children and their families and are prescribed by regulation.</li> </ul>
<b>What circumstances require a report?</b>	<p>A report must be made where certain professionals, through the course of their work (whether paid or unpaid), believe on reasonable grounds a child is:</p> <ul style="list-style-type: none"> <li>• being or has been sexually abused; or</li> <li>• experiencing or has experienced non-accidental physical injury.</li> </ul>

	<p>There are certain situations where mandated reporters are not required to make a report. These are when the mandated reporter believes:</p> <ul style="list-style-type: none"> <li>• the specific matter has already been reported for the same reasons</li> <li>• the abuse was by another child</li> <li>• the parents are willing and able to protect the child from the reported abuse or neglect.</li> </ul>
<b>What are the consequences of a report?</b>	<p>When a report is received, CYPS will:</p> <ul style="list-style-type: none"> <li>• consider the report;</li> <li>• carry out an initial assessment of the matters raised to decide if the child needs care and protection; and</li> <li>• take the action considered appropriate in relation to the initial assessment.</li> </ul> <p>Action will not be taken where parents are aware of the abuse and willing and able to protect the child from the reported abuse or neglect.</p>

The mandatory reporting scheme does not specifically apply to ministers of religion, and does not therefore, specifically capture information disclosed during a confession. While a minister of religion may also be a mandated reporter in an alternative capacity (eg as a school counsellor), they will only be required to report information obtained through the course of the work for which they are a mandated reporter.

## Reportable Conduct Scheme

The ACT's reportable conduct scheme commenced on 1 July 2017 and governs how organisations prevent and respond to allegations of child abuse. The key difference compared to mandatory reporting, is that the reportable conduct scheme applies to *employers* and addresses employment-related child protection. It also covers a broader range of conduct compared to the types of child abuse which must be reported under mandatory reporting. Currently, in the event of any overlap between reporting requirements under the two schemes, two separate reports must be made. In addition, the ACT Ombudsman website advises that employers reporting through the reportable conduct scheme should make separate reports to ACT Policing or any other entity as required.

<b>Reportable Conduct Scheme – Key Elements</b>	
<b>Relevant legislation</b>	<i>Ombudsman Act 1989</i>
<b>To whom is a report made?</b>	The ACT Ombudsman
<b>Who is required to report?</b>	<p>The following employers are covered by the scheme:</p> <ul style="list-style-type: none"> <li>• all ACT Government Directorates</li> <li>• health services, such as hospital and ambulance services</li> </ul>

	<ul style="list-style-type: none"> <li>• kinship and foster care</li> <li>• residential care organisations</li> <li>• government and non-government schools</li> <li>• child care services</li> <li>• education and care services, such as after school care</li> <li>• religious organisations (noting there is an exemption for information disclosed in a religious confession until 1 April 2019).</li> </ul>
<p><b>What circumstances require a report?</b></p>	<p>An employer must notify the Ombudsman about any reportable conduct allegation or conviction involving an employee no later than 30 days after the employer becomes aware of the conduct. It does not matter whether or not the employee engaged in the conduct in the course of employment.</p> <p>Reportable conduct includes:</p> <ul style="list-style-type: none"> <li>• sexual offences and convictions where a child is a victim or is present</li> <li>• offences against the person, including physical offences and convictions, where a child is a victim or is present</li> <li>• ill-treatment of a child (including emotional abuse, hostile use of force/physical contact, neglect and inappropriate, restrictive intervention)</li> <li>• psychological harm</li> <li>• misconduct of a sexual nature</li> <li>• conviction, or finding of guilt, under a territory law or a state or Commonwealth law, involving reportable conduct</li> <li>• offences against the <i>Education and Care Services National Law Act 2011</i> (inappropriate disciplining or offences relating to protecting children from harm)</li> </ul>
<p><b>What are the consequences of a report?</b></p>	<p>After a report is made, an employer must investigate any allegations of reportable conduct and provide a final response to the Ombudsman. They must also report to other entities as required.</p>

The Ombudsman may ask for updates as to the progress of an investigation and may confer with the people conducting the investigation about the nature, conduct or progress of the investigation. This may include requests for relevant documents and information to be provided to the Ombudsman. In some cases, the Ombudsman may decide to attend any interviews conducted by, or on behalf of, the employer.

The Ombudsman will monitor the policies, practices and procedures of an employer for the prevention of child abuse and child related misconduct. An employer may be required to adjust their policies and procedures to reflect their new responsibilities under the scheme and educate employees about these.

The ACT Government expanded the reportable conduct scheme to include religious organisations in May 2018.<sup>1</sup> The ACT Government acknowledges the tension between the legislation and the religious laws of some churches that prevent their clerics from revealing what is disclosed in a formal confession. For this reason, the legislation includes a nine-month exclusion period for information disclosed during a confession while further work is progressed on legislative reforms about reporting of child sexual abuse. Information disclosed during a confession will be included within the scheme from 1 April 2019.<sup>2</sup>

## PROPOSED LEGISLATIVE CHANGES

Additional legislation and amendments to existing legislation are required in order to give effect to the recommendations of the Royal Commission. This will include amendments to the mandatory reporting provisions of the CYP Act and the adoption of a new failure to report offence.

Amendment may also be required to section 127 of the *Evidence Act 2011*. Section 127 operates to protect a member of clergy receiving a confession from being compelled to divulge that a religious confession was made, or the contents of a religious confession. Legislation either amending section 127, or excluding its operation in certain circumstances, will need to be made so as not to impede the practical operation of statutory requirements to report information relating to child abuse disclosed in a religious confession.

In addition, consideration will need to be given to whether additional amendments to the reportable conduct scheme or other legislation should be made to maximise harmonisation of the three sets of reporting obligations (failure to report offence, mandatory reporting and reportable conduct).

In summary, the following legislative changes will likely be required:

- a new failure to report offence

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<sup>1</sup> *Ombudsman Amendment Act 2018* (ACT).

<sup>2</sup> *Ombudsman Act 1989* (ACT) ss 52-53.

- application of mandatory reporting provisions to religious ministers, including where their belief about the sexual abuse of a child is based on information disclosed in a religious confession
- amendments relating to section 127 of the *Evidence Act 2011*
- possible additional amendments ensuring alignment between the failure to report offence, mandatory reporting provisions, and the reportable conduct scheme provisions.

## POSSIBLE LEGISLATIVE REFORM OPTIONS FOR IMPLEMENTING THE RECOMMENDATIONS

Potential legislative reform options for implementing the recommendations are outlined below. While these are included for the purposes of providing a starting point for discussion, stakeholders are welcome to suggest alternative options.

### New failure to report offence

Recommendations 33 and 35 of the Royal Commission's Criminal Justice Report are reasonably prescriptive in outlining the elements and scope of a failure to report offence. The recommendations are reproduced in full at [Appendix A](#). The ACT Government could adopt a failure to report offence that resembles, as closely as possible, the form recommended by the Royal Commission. However, stakeholders are invited to provide views on whether any departures from the Royal Commission's recommendation are warranted in the specific context of the ACT.

### Amendments to mandatory reporting laws

Ministers of religion are not listed as mandated reporters under the CYP Act. Recommendation 7.3 of the Final Report recommends that ministers of religion are made mandated reporters. Recommendation 7.4 recommends laws concerning mandatory reporting to child protection authorities should not exempt persons in religious ministry from being required to report knowledge or suspicions formed, in whole or in part, on the basis of information disclosed in or in connection with a religious confession.

Amending the list of 'mandated reporters' to include persons in religious ministry would be necessary to give effect to these recommendations.

The current mandatory reporting scheme requires the reporting of both physical and sexual abuse. Stakeholders are invited to provide views on whether:

- (a) the extension of mandatory reporting requirements to ministers of religion in a way which would not protect the confessional seal should be limited in scope to disclosures about child sexual abuse; or
- (b) the reporting obligations of ministers of religion should align with other mandated reporters and there should be no exemption from reporting knowledge or suspicions about child sexual abuse or other child abuse, irrespective of the source of the information on which that knowledge or suspicion is based.

## Section 127 of the Evidence Act 2011

Religious confessions are protected under section 127 of the *Evidence Act 2011*<sup>3</sup> which provides as follows:

### **127 Religious confessions**

- (1) *A person who is or was a member of the clergy of a church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.*
- (2) *Subsection (1) does not apply if the communication involved in the religious confession was made for a criminal purpose.*
- (3) *This section applies even if an Act provides—*
  - (a) *that the rules of evidence do not apply or that an entity is not bound by the rules of evidence; or*
  - (b) *that a person is not excused from answering a question or producing a document or other thing on the ground of privilege or any other ground.*
- (4) *In this section:*

**religious confession** means 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.

The practical effect of section 127 is that it limits the ability to detect, investigate and prosecute a failure to report offence or other offences (e.g. failure of a mandated reporter to report suspected child abuse as required, or failure by an employer to report reportable conduct to the ACT Ombudsman) where the report would be based on disclosures made in religious confessions. While a member of clergy will be a competent and compellable witness, and while they may be compelled to give evidence of any communications not being, or based on, confessions, they have the benefit of section 127 before courts and other investigative bodies with respect to any information disclosed during a confession.

There are two broad options for addressing the barriers posed by section 127 with respect to disclosures of sexual abuse in confessionals. The first option is to amend section 127 of the *Evidence Act 2011*, noting that the *Evidence Act 2011* is based on the national Uniform Evidence Law.

The second option is to specify within the failure to report offence and any other relevant offences that section 127 is not to apply to prosecutions for those offences.

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<sup>3</sup> Section 127 reflects the Uniform Evidence Law, and similar provisions protecting disclosure made in religious confessions are found in the laws of Victoria, Tasmania, the Northern Territory, New South Wales, and the Commonwealth.

## Other possible amendments to improve harmonisation

As noted above, the reportable conduct scheme has already been amended, so that the obligations of the scheme will extend to apply in respect of information disclosed during a confession from 1 April 2019.<sup>4</sup> However, stakeholders are invited to provide any views on whether additional amendments to the scheme are recommended in order to enhance consistency between the reportable conduct scheme, the failure to report offence, and amendments to mandatory reporting provisions.

Views are also welcome on whether amendments to any other legislation would also improve the practical operation of the scheme with respect to disclosures made during confessions.

## CONSTITUTIONAL AND HUMAN RIGHTS IMPACTS

During the course of the Royal Commission's work and following the release of its recommendations about reforms to the reporting of child sexual abuse and, in particular, its recommendations that no exemptions be provided in relation to information divulged in a religious confession, issues have been raised regarding the impact of the recommendations on the right to freedom of religion. The right to freedom of religion is protected under section 116 of the Australian Constitution, as well as section 14 of the *Human Rights Act 2004*.

Section 116 of the Constitution provides:

**116 Commonwealth not to legislate in respect of religion**

*The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion...*

Section 116 has possible application to the ACT because of its status as a territory, as opposed to a state.

Section 14 of the *Human Rights Act 2004* (HRA) provides:

**14 Freedom of thought, conscience, religion and belief**

- (1) *Everyone has the right to freedom of thought, conscience and religion. This right includes—*
  - (a) *the freedom to have or adopt a religion or belief of his or her choice; and*
  - (b) *the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.*
- (2) *No-one may be coerced in a way that would limit his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.*

Section 28 of the HRA provides that the rights which it protects may be subject to reasonable limits that be demonstrably justified in a free and democratic society. It provides as follows:

**28 Human rights may be limited**

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<sup>4</sup> *Ombudsman Amendment Act 2018* (ACT).

- (1) *Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.*
- (2) *In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:*
  - (a) *the nature of the right affected;*
  - (b) *the importance of the purpose of the limitation;*
  - (c) *the nature and extent of the limitation;*
  - (d) *the relationship between the limitation and its purpose;*
  - (e) *any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.*

In considering how the Royal Commission recommendations with implications for the confessional seal are implemented, it is relevant to consider other human rights which protect children's rights. The right to protection of family and children is particularly pertinent, as it provides that "Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind."<sup>5</sup> The right to the protection from torture and cruel, inhuman or degrading treatment is also relevant.<sup>6</sup>

Stakeholders are invited to provide their views on how the recommendations can be implemented in a way that appropriately recognises relevant human rights.

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<sup>5</sup> *Human Rights Act 2004 (ACT) s 11(2).*

<sup>6</sup> *Human Rights Act 2004 (ACT) s 10.*

## APPENDIX A – RELEVANT RECOMMENDATIONS

### **Recommendation 33 of the Criminal Justice Report**

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.

### **Recommendation 34 of the Criminal Justice Report**

State and territory governments should:

- a. ensure that they have systems in place in relation to their mandatory reporting scheme and any reportable conduct scheme to ensure that any reports made under those schemes that may involve child sexual abuse offences are brought to the attention of police
- b. include appropriate defences in the failure to report offence to avoid duplication of reporting under mandatory reporting and any reportable conduct schemes.

### **Recommendation 35 of the Criminal Justice Report**

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.

### **Recommendation 7.4 of the Royal Commission's Final Report**

Laws concerning mandatory reporting to child protection authorities should not exempt persons in religious ministry from being required to report knowledge or suspicions formed, in whole or in part, on the basis of information disclosed in or in connection with a religious confession.



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