Queensland Catholic Education Commission
Level 3, 143 Edward Street, Brisbane Qld 4000
GPO Box 2441, Brisbane Qld 4001
Ph +61 7 3316 5800 Fax +61 7 3316 5880
email: enquiries@qcec.catholic.edu.au
www.qcec.catholic.edu.au
ABN: 57 525 935 419

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

December 2019

The Queensland Catholic Education Commission (QCEC) welcomes the opportunity to provide a submission on the *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019* (the Bill), which was introduced into Queensland Parliament on 27 November 2019.

QCEC is the peak strategic body with state-wide responsibilities for Catholic schooling in Queensland. This submission is provided on behalf of the five Diocesan Catholic school authorities and 17 Religious Institutes and other incorporated bodies which, between them, operate a total of 306 Catholic schools that educate more than 149,000 students in Queensland.

It is noted that the amendments being proposed in the Bill are designed to implement recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) in its *Criminal Justice Report.* QCEC is committed to ensuring that the Royal Commission findings and directions on making institutions child safe are fully implemented, and therefore supports in general changes being made to realise the Royal Commission recommendations.

Of the amendments being introduced by the Bill, the two most relevant to the operation of schools are the proposed new failure to report offence and the failure to protect offence. This submission will comment specifically on these provisions, given the impact their introduction will have on schools and school staff.

Current School Legislative Requirements

Currently, in Queensland there are a number of legislative requirements imposed on schools which require them to have in place appropriate processes to deal with and report harm or potential harm to students, including sexual abuse, namely:

a. The *Education (General Provisions) Act 2006* which requires all school staff to report sexual abuse, reasonable suspicion of sexual abuse or likely sexual abuse of a student to the Queensland Police Service.

b. The *Child Protection Act 1999* which requires registered teachers to report a reasonable suspicion that a child has suffered, is suffering, or is at unacceptable risk of suffering, significant harm caused by physical or sexual abuse where there may not be a parent able and willing to protect the child from the harm.

c. The *Education (Accreditation of Non-State Schools) Act 2017* and *Regulation 2017* which requires non-government schools to have and to implement written processes about dealing with harm or allegations of harm to students. This is a requirement for accreditation.

d. The *Education (Queensland College of Teachers) Act 2005* which requires schools to notify the Queensland College of Teachers about allegations and outcomes of investigations into allegations related to harm or likely harm to a child due to a teacher's conduct, or to dismissal of a teacher in circumstances that call into question the individual's competence to be employed as a teacher.

e. The *Working with Children (Risk Management and Screening) Act 2000* and *Regulation 2011* which mandates that schools have in place a risk management strategy setting out, among other matters, the school's policies and procedures for handling disclosures or suspicions of harm, including the reporting of harm.

The student protection training provided to Catholic school staff and volunteers across Queensland focuses on ensuring that there is common and effective understanding of these legislative obligations and the procedures to be followed to make sure they are met.

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.

In respect of the matters on which a report must be made, with the addition of the new failure to report offence, the legislation in Queensland applicable to schools will define this in four different ways:

a. *The Education (General Provisions) Act 2006* requires reporting if a student has been, is suspected of being, or is likely to be, **"sexually abused";**

b. The *Child Protection Act 1999* mandates reporting if a child has suffered, is suffering, or is at unacceptable risk of suffering, **"significant harm caused by physical or sexual abuse"**; and **"may not have a parent able and willing to protect the child from the harm"**;

c. Other relevant legislation refers to **"harm",** as defined by the *Child Protection Act 1999;*

d. The new failure to report offence requires reporting if there is reasonable belief that a **"child sex offence"** is being or has been committed.

Similarly, the threshold for reporting will be defined in different ways across the different pieces of legislation:

a. Under the *Education (General Provisions) Act 2006*, reporting must occur if a staff member **"becomes aware"** or **"reasonably suspects";**

b. The *Child Protection Act 1999* requires that a relevant person (including a teacher) **"forms a reasonable suspicion";**

c. The new failure to report offence applies when an adult **"gains information that causes"**, or **"ought reasonably to cause"** the person to believe that a **"child sexual offence"** has been committed.

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.

Students Aged 18 Years

Under the provisions of the Bill all adults who gain information that causes them to hold a reasonable belief that a child sexual offence is being or has been committed against a child under 16 years will have an obligation to report that matter to police.

In Queensland, a larger number of students will reach the age of 18 years in Year 12 as from 2020. This is a result of the introduction of the preparatory (Prep) year of education in 2007 and corresponding changes to school starting age.

The situation of 18-year-old school students in relation to the new failure to report offence requires careful consideration.

The Bill will mean that these students will have reporting obligations. It is unclear what consequences this will have for schools' management of the issues involved. For example, are schools (or parents) required to train and manage the reporting obligations of school students 18 years of age under the Bill? The circumstances of student peer-to-peer consensual sexual relations will also raise a range of matters that will require careful consideration. For example, the Bill creates reporting obligations for 18-year-old students which may require them to lodge reports in relation to the activities of their peers. The Parliament should consider the potential impacts of extending mandatory reporting obligations on school students who are 18 years, particularly as they will be in their final year of schooling and should be focussed on their Year 12 studies.

Lack of Position of Authority Offence

While new reporting arrangements will apply to all adults under the Bill, including 18-year-old students, the Bill does not address the issue of position of authority offences in Queensland. In Queensland, for example, it is not a criminal offence for a student over 16 years to maintain a sexual relationship with an adult teacher. The relationship may be regarded as inappropriate and have consequences for the teacher's employment, but the existence of the relationship itself is not a criminal offence. Other States have introduced offences to address these scenarios. QCEC has recently written to the Queensland Attorney General to urge that consideration be given to the introduction of such an offence in Queensland.

As the Bill currently stands, it does not address the lack of criminal consequences for sexual activity between a student (over 16 years) and a staff member. Theoretically, a 50-year-old staff member may have sexual relations with a 16-year-old student, provided it was consensual. Therefore, under the Bill:

a) a student (18 years old) could 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);

b) a student (18 years, 1 month) could be charged with a criminal offence (unlawful carnal knowledge for having sexual relations with a student who is 15 years, 11 months;

c) a 50-year-old staff member is not committing a criminal offence when having sexual relations with a student who is 16 years old (unless grooming or similar offences can be established).

Dealing with Historical Allegations

Following the Royal Commission, educational institutions in Queensland are receiving applications through the National Redress Scheme and claims under the *Personal Injuries Proceedings Act 2002 (Qld)*. Extensive enquiries are regularly undertaken by schools and school authorities yielding little or no evidence because of the period of time which has elapsed since the alleged abuse, or the death of the alleged perpetrator. In these circumstances it will be difficult to determine whether or when a matter would reach the threshold of "gains information which causes or ought reasonably to cause the person to believe" or a "reasonable belief".

Where a claimant brings an action under the *Personal Injuries Proceedings Act 2002*, the institution against which the claim is brought has a right to seek further and better information which may assist in determining if the reporting threshold created by this Bill has been met.

Section 229BC (4) of the Bill sets out the reasonable excuses which will apply in respect of the failure to report offence. Subsection 229BC (4) (a) specifies as a reasonable excuse that:

> *The adult believes on reasonable grounds that the information has already been disclosed to a police officer.*

In relation to historical matters, where the claim is received under the *Personal Injuries Proceedings Act 2002*, the claimant is usually legally represented, and enquiries can be made through the legal representative about whether the matter has been reported to the police. In some circumstances where the matter has not been reported to the police, the claimant communicates through their legal representative a specific request that the police not be notified and asks that this request be respected. This is often expressed as a desire on the part of the claimant not to be retraumatised by being subjected to a criminal enquiry.

In the case of claims brought under the National Redress Scheme, the institution is generally not provided with any information about whether the claimant has reported the matter to police or has any objection to it being reported to police. Further, the institution is generally not able to contact the claimant directly to enquire about whether the matter has been reported to police or if the applicant has any objection to it being reported to police.

Under the Bill, the institution would have to report such matters, even if it was against the wishes of the victim who may be retraumatised by contact from the police.

Other matters

In relation to current matters, where information comes to the attention of a school staff member or volunteer that a child may have been or may be at risk of sexual abuse, the staff member or volunteer may typically confer with other staff members at the school or employed by the school's governing body, in respect of the information that has come to their attention.

The *Education (General Provisions) Act 2006* provides clarity about the person or role holder that has the mandatory obligation to report. The "first person" provides this report to the "Principal" or "Director of the Governing Body" and that person is required to report to police. Additionally, if the report has been given to the Principal, the report must also be provided to the "Director of the Governing Body".

The reporting provisions within this Bill do not currently provide a pathway through a person with a significant level of training, authority and experience, for the reports to be made to police. While subsection 229BC(4) provides that reporting the matter under the *Education (General Provisions) Act 2006* provides a reasonable excuse – the *Education (General Provisions) Act 2006* provisions only apply to staff members, and therefore volunteers would have to report under the new offence provisions with none of the support that was deemed necessary to provide to school staff under the *Education (General Provisions) Act 2006* reporting process. It could also result in the volunteer reporting to police, but failing to report to the school leadership team or the Director of the Governing Body, potentially resulting in students being at risk of harm if the alleged offender's employment or volunteer status is not able to be reviewed and appropriately managed because information has not been provided to the appropriate people.

Failure to Protect Offence

As with the failure to report offence, issues of inconsistent use of terminology and lack of alignment between different pieces of relevant legislation also apply to the proposed failure to protect offence.

Section 229BB of the Bill states that an accountable person commits a crime if:

> *The person knows there is a **"significant risk"** that another adult (the alleged offender) will commit a child sex offence in relation to a child.*

Under the *Child Protection Act 1999* a report must be made to the chief executive when there is a reasonable suspicion that ***"a child may be in need of protection",*** which is defined in section 10.

Under the *Education (General Provisions) Act 2006,* a report is required when there is a reasonable suspicion that a child is ***"likely"*** to be sexually abused. This third definition relevant to a school setting is more consistent with the *Child Protection Act 1999* definition of "*unacceptable risk*", being that significant harm is "*probable not just possible*".

Again, 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.

Thank you for your consideration of this submission. Should you wish to discuss the issues raised, please contact Mr Chris Woolley, Chief Operating Officer, QCEC [redacted].

Dr Lee-Anne Perry AM
Executive Director