Anglican Church Southern Queensland

24 December 2019

Committee Secretary
Legal Affairs and Community Safety Committee
Parliament house
George Street
BRISBANE QLD 4000

By email to: lacsc@parliament.qld.gov.au

Dear Secretary

Thank you for the opportunity to comment on the *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019* (the **Bill**).

The Anglican Church in Southern Queensland (**ACSQ**) generally supports the Criminal Justice Report recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

In the context of this Bill, the key elements that might affect ACSQ's operations are the proposed offences relating to failure to report and failure to protect. This submission focusses on those elements of the Bill.

Mandatory Reporting and Failure to Protect (recommendations 32 – 36)

ACSQ supports in principle mandatory reporting of child sexual abuse in an institutional context and the creation of offences relating to failure to report or to protect. In this submission, we set out some suggestions and comments on the detail of the Bill and where it might be improved, and some general comments about reform in this area.

National consistency

In our view, it is important to have national consistency in mandatory reporting and failure to report or protect offences related to child sexual abuse. We encourage the Queensland Government to proactively strive for consistency between all the States and Territories in this important area of reform. This will greatly benefit the protection of children.

There is a range of specific legislation across States and Territories relating to mandatory reporting of various types of abuse or neglect of children. These have differences in areas such as to who they apply, the range of offences or circumstances that must be reported and the state of mind the mandatory reporter must have, e.g. reasonable suspicion, reasonable belief, actual knowledge, reasonably ought to have suspected or known etc.

We encourage the Queensland Government to proactively strive for national legislative consistency beyond child sexual abuse reporting to reporting of all forms of abuse or neglect of children.

St Martin's House
373 Ann Street
Brisbane Q 4000

Phone: (07) 3835 2221
Fax: (07) 3831 1170
Email: registry@anglicanchurchsq.org.au

Postal Address:
GPO Box 421
Brisbane Q 4001

Confession

The use of confession as a formal rite in the Anglican Church is not as common as in the Roman Catholic Church. There is no expectation that a member of the Anglican Church would regularly make an express personal confession to a member of the clergy so the instances of confession as a formal rite are relatively rare.

Nevertheless, the General Synod of the Anglican Church has passed legislation which, in effect, allows clergy to comply with mandatory reporting laws relating to child sexual abuse or avoid committing a failure to report offence without breaching Church laws regarding confession. That legislation is now in force in ACSQ.

On our initial review of the Bill, there is no impediment in Anglican Church law in force in this diocese to any licensed member of the clergy in ACSQ being able to report information about a child sex offence gained during a confession.

The Bill

The submissions below deal with specific policy and drafting comments on Division 3 of Part 5 of the Bill which covers the failure to report and failure to protect offences. Suggested text amendments to the Bill are highlighted in yellow.

We have reviewed this part of the Bill from the perspective of a Church organisation that operates parish ministry, chaplaincies in places such as hospitals and prisons, schools, early learning centres and community welfare services, including work with vulnerable children and youth, and whose clergy, employees and volunteers may in their day to day practice be affected by the Bill. While we are not experts in criminal law, we have the benefit of some legal input.

We have not undertaken a forensic review of the remainder of the Bill but we support its stated intent of facilitating prosecutions of child sex offences, admission of propensity evidence and exclusion of good character evidence.

The Bill - Section 229BB (Failure to protect child from child sex offence)

We agree with the Royal Commission that all States and Territories should enact a failure to protect offence. We also agree that section 49O of the Crimes Act in Victoria provides a useful precedent.[1]

The examples in evidence at the Royal Commission of known perpetrators being moved on to other roles following complaints only for other children to be abused are compelling reasons for reform. Even though such behaviour would be an unthinkable outcome for any institution in the wake of the Royal Commission, providing a standard and a criminal sanction is an important means to eliminate this culture.

As we stated above, care must be taken when legislation sets out to substitute a legal duty which is enforced by a criminal sanction for a moral one unless there are overall substantial benefits to society in doing so. The construction of this proposed offence, being based on knowledge and being directed at persons with power and responsibility to reduce or remove risk, strikes a reasonable balance.

Our submissions below relate to some clarifications and improvements to the Bills. Many of these issues are addressed in section 49O of the Crimes Act in Victoria. We suggest that

[1] Criminal Justice Report III-VI, p245 (the Royal Commission considered a predecessor section 49C)

the Queensland Government consider modelling its failure to protect offence on the Victorian offence.

Proposed Amendment - Section 229BB (1)(a) – "significant risk" and "a child"

The Royal Commission adopted "substantial risk" in recommendation 36.

The Bill uses "significant risk". There is no explanation in the material why the Bill departs from recommendation 36 and the wording used in section 49O of the Crimes Act in Victoria which the Royal Commission considered.[2]

We think substantial is a more meaningful word in this context that will allow a court to give meaning to the degree of risk required and what knowledge is required about that risk.

When assessing risk, the usual elements considered are the probability of the event occurring and the consequences of the event occurring. A risk may have a low probability of occurring but have a dramatically adverse consequence. Another risk may have a high probability of occurring but have a mild consequence. If the highly adverse consequences of a child sex offence are taken as a given, the description of the risk in this offence should go to the probability of it occurring.

The meaning of "significant" goes to the importance of a matter or of its consequences. "Substantial" goes to the materiality and tangible nature of a thing, i.e. the subject is a matter or issue of substance, that is real and tangible and, in this context, likely to occur.

Paragraph (a) also refers to the risk of an offence being committed in relation to "a child". The subsequent provisions refer to "the child". This seems to suggest that the prosecution will need to prove there is an identifiable child at risk. In practice, an alleged offender may be a substantial risk to a group of children, such as a school student population.

We suggest section 229BB (1)(a) be amended as follows:

> *the person knows there is a substantial risk that another adult (the alleged offender) will commit a child sex offence in relation to a child (whether identifiable or not); and*

Further, we recommend that the Queensland Government produce clear guidance and case studies to assist accountable persons to assess and perform their obligations to protect children under this provision.

Clarification - Section 229BB (1)(a) – test for knowing there is a significant risk

We have taken the wording in section 229BB(1)(a), to not be an objective test in relation to an accountable person's knowledge of a significant risk. In other words, the prosecution must prove that the person actually knew there was a significant risk, not that a reasonable person should have known there was a significant risk.

In the context of this being a criminal offence related to mitigation of a risk of a future event, we think that some clarification would be helpful to say that if the person does not realise there is a significant risk, they will not be judged on the basis of what a reasonable person should have realised.

---

[2] Criminal Justice Report III-VI, p247

We consider this is important given the breadth of people who are accountable persons, although we acknowledge many of those people may not meet the test of having power or responsibility to reduce or remove risk.

We suggest that the Queensland Government publish guidance to the above effect.

Proposed Amendment - Section 229BB(1)(e) – "power and responsibility"

We suggest that paragraph (e) include words to clarify that the power and responsibility must arise in the institutional context:

> *the person, by reason of their role or function in the institution, has the power or responsibility to reduce or remove the risk; and*

Proposed Amendment - Section 229BB(1)(f) – "negligently" and "without reasonable excuse"

The proposed failure to report offence provides for the possibility of not-reporting where there is a reasonable excuse, but there is no equivalent in s 229BB.

We suggest that a reasonable excuse defence should be available for an accountable person who fails to reduce or remove a significant risk that recognises that in institutions, no one person may have total power or responsibility.

Also, the Royal Commission in recommendation 36 considered that the standard of negligence should be criminal negligence rather than civil negligence; it must involve a 'great falling short' of the standard of care that a reasonable person would exercise in the same circumstances.[3] Note also section 49O(3) of the Crimes Act of Victoria.

We suggest the following for section 229BB:

Amend paragraph (1)(f):

(f) the person, without reasonable excuse, wilfully or negligently fails to reduce or remove the risk.

Insert new subsections (2) and (3):

(2) For the purposes of subsection (1)(f), an accountable person negligently fails to reduce or remove a risk if that failure involves a great falling short of the standard of care that a reasonable person in the circumstances of the accountable person would exercise in the circumstances.

> *Note – The accountable person's circumstances may include their position, functions and responsibilities within the institution, their level of training and experience and their own personal circumstances but would not include any personal relationship with the alleged offender.*

(3) Without limiting what may be a reasonable excuse for subsection (1)(f), an accountable person has a reasonable excuse if —

(a) the person believes on reasonable grounds that another accountable person with power or responsibility has taken, or will take, action to reduce or remove the risk;

[3] Criminal Justice Report III-VI, p247

(b) the person believes on reasonable grounds that the institution already has in place and has implemented adequate risk management systems and procedures to reduce or remove the risk;

(c) the alleged offender ceases to be associated with the institution.

Proposed Addition – Protection from Liability

Unlike the proposed failure to report offence, the proposed failure to protect offence does not include any protection from liability for causes of action such as breach of privacy and defamation. The risk of such actions being brought against the accountable person who is taking steps to reduce or remove risk may prevent the effective mitigation of the risk through clear communication to others who are involved.

We suggest a new subsection:

(4) An accountable person who discloses information to another person concerning a known substantial risk under subsection (1)(a) for the purpose of reducing or removing the risk is not liable civilly, criminally or under an administrative process for making that disclosure.

Proposed addition – prosecution and territorial application

We suggest that the Queensland Government consider provisions similar to sections 49O(4), (5) and (6) of the Crimes Act of Victoria

The Bill - Section 229BB (Failure to Report)

The Criminal Justice Report discussed in detail section 327 of the Crimes Act in Victoria that makes it an offence for any adult to fail, without reasonable excuse, to report a reasonable belief that a child sex offence has been committed in Victoria, subject to a number of carve outs and exceptions.

ACSQ holds the view that the Queensland Government should seriously consider introducing such a provision in Queensland.

If introduced together with a public information campaign, the proposed section 229BC may have a positive effect in reporting of child sexual abuse and protection of children. The culture this drives is that no adult should walk past this behaviour.

Proposed amendment – Section 229BC(1)(a) – "...causes..., or ought reasonably to cause the adult to believe..."

Recommendation 33 of the Criminal Justice Report refers to "know, suspect or should have suspected".

The Bill uses belief as the test. This requires proof that the accountable person actually believed abuse was occurring or had occurred, or that a reasonable person in their position should have believed that.

While the introduction of an objective test goes some way toward resolving the possible difficulty in proving a person actually believed the information they had, and being able to avoid culpability by claiming they did not believe the information, the Royal Commission

was of the view that, having regard to the evidence it heard, the relevant standard should be "suspect, or should have suspected", adopting a criminal negligence standard.[4]

Care must be taken when legislation sets out to substitute a legal duty which is enforced by a criminal sanction for a moral one unless there are overall substantial benefits to society in doing so. Some may argue that by setting this test too low, such as by using suspicion rather than belief, general community members may question what is required to form a suspicion and how broad is the reporting obligation?

In the Royal Commission evidence, there are examples of complaints and reports which should have aroused suspicion, even if the person receiving that information did not believe abuse was occurring.

After hearing substantial evidence, the Royal Commission recommended an offence of failure to report based on suspicion. We agree with that recommendation and suggest a change to subsection (1)(a) (and consequential amendments to subsections (2) and (6)) as follows:

> *the adult gains information that causes the adult to suspect on reasonable grounds, or ought reasonably to cause the adult to suspect, that a child sex offence is being or has been committed against a child by another adult; and*

Proposed Amendment – Section 229BC(1) – "ought reasonably to cause"

We assume the words "ought reasonably to cause" are designed to introduce an objective element to the offence and adopt a standard of negligence. The Royal Commission considered that the standard of negligence should be criminal negligence rather than civil negligence; there would need to be 'gross negligence' or a 'great falling short' of the standard of care required.[5]

Also, we think that the objective standard should be applied by reference to what a reasonable person in the same position and circumstances as the adult would have believed.

In other words, when applying the reasonable person test, the court must take into account what the adult knew and the adult's position e.g. are they an employed trained counsellor with experience in trauma or are they a volunteer church cleaner with no relevant professional qualifications or experience? However, the circumstances to consider should not include the influence of a personal relationship between the adult and the alleged offender.

We suggest an additional subsection as follows:

> *For subsection (1)(a), in determining whether information gained by an* adult *ought reasonably to cause the* adult *to [suspect/believe] a child sex offence is being or has been committed against a child by another adult:*
>
> *a) it is relevant to consider what a reasonable person in the first mentioned adult's circumstances would have [suspected/believed]; and*
>
> *b) any failure must involve a great falling short of the standard of care that a reasonable person would exercise in the circumstances.*

[4] Criminal Justice Report III-VI, pp209-210
[5] Criminal Justice Report III-VI, p209

Note – The first mentioned adult's circumstances may include their position, functions and responsibilities within an organisation, their level of training and experience and their own personal circumstances but would not include any personal relationship with another adult who is the alleged offender.

I hope the above is of assistance to you in your ongoing important work in examining and implementing the Criminal Justice Report recommendations.

Yours sincerely

Tim Reid
General Manager