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

The Brisbane Rape and Incest Survivors Support Centre

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About the Authors

This law reform submission was researched and authored by UQ law students **Sarah Long and Linden Peacock** under the academic supervision of research fellow **Dr Simon McKenzie.** This submission was prepared for and on behalf of the Brisbane Rape and Incest Survivors Support Centre (BRISSC), a feminist not-for-profit service that provides support to women survivors of sexual violence. Student researchers and Dr McKenzie undertook this task on a *pro bono* basis, without any academic credit or reward, as part of their contribution to service as future members of the legal profession.

The UQ Pro Bono Centre and student researchers thank BRISSC for allowing us to contribute to its vital work.

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Dear Committee Secretary,

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

Thank you for the opportunity to comment on the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019. While we support some aspects of the proposed legislation, we have serious concerns with the expansion of the 'failure to report' offence to people outside of institutional contexts.

We are well placed to understand the potential impacts of this Bill. The Brisbane Rape and Incest Survivors Support Group (BRISSC) is a feminist not-for-profit service that provides support to women survivors of sexual violence. We value women's experiences, truths, lives and skills and provide a safe, confidential and supportive environment for women who have experienced rape and incest. We are aware of the often devastating effects of sexual violence and seek to give women as much control over their decisions and lives as possible. BRISSC also promote involvement in social action and community education.

The expansion of the failure to report offence to apply outside of institutional contexts will harm vulnerable people

The Criminal Code (Child Sexual Offences Reform) and Other Amendment Bill 2019 creates a 'failure to report' offence, which imposes a positive obligation on all adults to report child sexual abuse to the police. Under the proposal, a failure to report could result in imprisonment. We note that the proposal departs from recommendation 33 of the Royal Commission into Institutional Responses to Child Abuse ('Royal Commission'). This recommendation proposed the introduction of a failure to report offence targeted at child sexual abuse in an institutional context (*recommendation 33).*[1]

BRISSC strongly supports the protection of children from sexual abuse and understands the profound and often devastating impact it can have on survivors. Given the unique vulnerability of children and the difficulties they face with experiencing and disclosing abuse, the failure to report

[1] Commonwealth, Royal Commission into Institutional Responses to Child Abuse, *Final Report: Recommendations* (2017) 100.

child sexual offences by adults is a serious issue. However, BRISSC does not support the application of a failure to report offence outside of institutional contexts.

The expansion of this offence to apply to all adults will potentially harm vulnerable and marginalised members of the community. It will criminalise vulnerable groups of people who face significant barriers to reporting, particularly women who experience domestic violence, and impose an additional obstacle to getting help in such circumstances. Further, it may curtail women from disclosing to sexual violence support workers the level of violence and abuse in their lives. This strongly inhibits the efficacy of the work we are positioned to do here at BRISSC.

In these cases, a failure to report may not be a result of wilful ignorance, negligence, or a desire to prioritise reputation over a child's safety. Rather, there may be a lack of suitable social, emotional, financial and housing supports available to enable a woman to safely and appropriately report the child abuse in a domestic violence context. There may also be a fear or distrust of the police as a result of other reporting experiences.

The potentially detrimental effects of this offence cannot be justified. The universal failure to report offence is poorly targeted and therefore cannot successfully address the kinds of complex, systemic issues identified by the Royal Commission. Broadening the offence is also unlikely to increase rates of reporting in practice, and even if reports are made, they do not guarantee sufficient action. As such, the offence will not provide any substantial, meaningful or effective protection for children against abuse.

As particular professions already have mandatory reporting requirements for child sexual offences, it is instead more appropriate to similarly delineate a failure to report offence by profession, context and whether it is occurring in an institutional setting.

The "reasonable excuse" exception to criminal liability for failure to report is inadequate

The proposed legislation provides an exception for criminal liability if they have a "reasonable excuse" for their failure to report. This exception is inadequate and is unlikely to protect vulnerable people.

The legislation non-exhaustively provides examples of what constitutes a 'reasonable excuse,' including where an adult reasonably believes that reporting would endanger the safety of the adult or another person (other than the alleged offender) and that failure to disclose is a reasonable response in the circumstances.

There will be women who do not report child sexual abuse due to safety concerns. However, the exception fails to capture the nuanced ways in which violence and coercion can occur in relationships, and the impact this can have on the assessment the vulnerable person makes about their safety. For example:

- A woman in a domestic violence situation may not report their reasonably held belief that a child sex offence has occurred out of fear of physical retribution from the alleged offender carried out against themselves, the child or others.
- A woman may believe that reporting the abuse will lead to adverse child outcomes (e.g. the child is not removed from harm, the abuse is continued or intensified, or the child is placed in a new environment that is worse than their original environment); or
- A woman who experiences financial coercion from the alleged offender may fear that reporting will lead to poverty and/or homelessness, thus further endangering the safety of themselves or the child.

These examples show that vulnerable people may struggle to prove that a failure to report is "reasonable in the circumstances." What a court determines is 'reasonable' may not align with what a woman experiencing violence believes is reasonable for the safety of her child, herself, or another person while the abuse occurs.

Furthermore, defending a failure to report charge through the exception would require going through the court process, and carry significant emotional, practical and financial costs. Proving a belief that reporting would pose a risk to someone's safety will be difficult for women who have experienced violence, particularly having to persuasively recount traumatic moments in court. It may also have significant impacts on a victim's mental health, leading to further trauma, shame and humiliation.

Research demonstrates that a woman's assessment of her level of risk is a strong indicator of her actual risk.[2] It is therefore imperative that parliaments, police and courts listen to and respect the voices of women in vulnerable situations and understand that trauma and fear can impact a person's decision-making. The mandatory reporting offence fails to do this.

The design of the pilot of the intermediaries scheme must take account of the experience of participants from ATSI and CALD backgrounds

BRISSC supports the introduction of a Queensland intermediaries scheme to assist vulnerable children in the evidential process in court and police interviews.

Since the task of intermediaries is to optimise communication, it is paramount that a diverse range of communication styles is considered. This means the success of the scheme will depend on the steps taken to ensure that it can also properly assist witnesses from Aboriginal and Torres Strait Islander (ATSI) and Culturally and Linguistically Diverse (CALD) backgrounds. These concerns were also identified in the Tasmanian[3] and NSW[4] reports on the use of intermediaries.

The people included on the list of intermediaries should reflect the diversity of the Queensland community. It should include ATSI, CALD and male witness intermediaries to ensure the scheme can serve the diverse needs of vulnerable witnesses.[5] The best way to do this is to directly engage with ATSI and CALD communities to understand the potential barriers for participation in the scheme as an intermediary, and to ensure the appointment criteria allow for diverse recruitment.[6]

The intermediaries scheme should be expanded to support survivors of sexual violence and domestic violence

BRISSC suggests broadening the intermediaries scheme to make it accessible to victims of sexual violence and domestic violence.

Making intermediaries accessible to a wider group of witnesses will help vulnerable people give evidence, and in doing so assist courts hold perpetrators to account. For domestic violence victims, giving evidence is extremely difficult. It requires discussing traumatic and personal events in public

[2] Victorian Department of Human Services, *Specialist Family Violence Risk Assessment Participant Handbook* (2012) 17.
[3] Tasmanian Law Reform Institute (n4) 9.
[4] Cashmore and Shackel (n1) 8.
[5] Ibid.
[6] Ibid.

and in the presence of their perpetrator.[7] Victims may additionally struggle with the multiple proceedings involved in the trial process which heightens trauma and stress, particularly if the victim has no legal representation. Such difficulties may be worsened for Indigenous women and those from culturally and linguistically diverse backgrounds.[8]
Intermediary schemes have been successfully used in other states and generated positive outcomes for witnesses and the judicial process,[9] and assessments of the schemes have suggested they should be expanded to be available to vulnerable adults.[10] The Queensland Government should also consider expanding the scheme.

BRISSC requests to continue to be consulted in the development of the intermediaries scheme, and any plans for its expansion.

Thank you again for the opportunity to provide comment on this Bill.

Yours sincerely,
The BRISSC Collective

[7] Victorian Law Reform Commission, *Review of Family Violence Laws* (Report, 2006) 11.1.
[8] Australian Law Reform Commission, *Family Violence – A National Legal Response* (Report 114, 10 November 2010) 18.8.
[9] Judy Cashmore and Rita Shackel, *Evaluation of the Child Sexual Offence Evidence Pilot* (Final Outcome Evaluation Report, August 2018) 3.
[10] Ibid 7; Tasmanian Law Reform Institute, *Facilitating Equal Access to Justice: An Intermediary/Communication Scheme for Tasmania?* (Final Report no 23, January 2018) 6.

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