



Submission from the
Truth Justice and Healing Council

Royal Commission into Institutional Responses to Child Sexual Abuse

Consultation Paper | Criminal Justice

8 November 2016



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Justice Peter McClellan AM
Chair
Royal Commission into
Institutional Responses to Child Sexual Abuse

Via email: solicitor@childabuseroyalcommission.gov.au

Dear Justice McClellan

As you know, the Truth Justice and Healing Council has been appointed by the Catholic Church in Australia to oversee the Church's response to the Royal Commission into Institutional Responses to Child Sexual Abuse.

We now provide the Council's submission in response to the Royal Commission's consultation paper on Criminal Justice.

Yours sincerely

Neville Owen
Chair
Truth Justice and Healing Council

8 November 2016



Our Commitment

The leaders of the Catholic Church in Australia recognise and acknowledge the devastating harm caused to people by the crime of child sexual abuse. We take this opportunity to state:

- Sexual abuse of a child by a priest or religious is a crime under Australian law and under canon law.
- Sexual abuse of a child by any Church personnel, whenever it occurred, was then and is now indefensible.
- That such abuse has occurred at all, and the extent to which it has occurred, are facts of which the whole Church in Australia is deeply ashamed.
- The Church fully and unreservedly acknowledges the devastating, deep and ongoing impact of sexual abuse on the lives of the victims and their families.
- The Church acknowledges that many victims were not believed when they should have been.
- The Church is also ashamed to acknowledge that, in some cases, those in positions of authority concealed or covered up what they knew of the facts, moved perpetrators to another place, thereby enabling them to offend again, or failed to report matters to the police when they should have. That behaviour too is indefensible.
- Too often in the past it is clear some Church leaders gave too high a priority to protecting the reputation of the Church, its priests, religious and other personnel, over the protection of children and their families, and over compassion and concern for those who suffered at the hands of Church personnel. That too was and is inexcusable.
- In such ways, Church leaders betrayed the trust of their own people and the expectations of the wider community.
- For all these things the Church is deeply sorry. It apologises to all those who have been harmed and betrayed. It humbly asks for forgiveness.

The leaders of the Catholic Church in Australia commit ourselves to endeavour to repair the wrongs of the past, to listen to and hear victims, to put their needs first, and to do everything we can to ensure a safer future for children.



Authorising Church Bodies

The following Catholic Church bodies have authorised the Truth Justice and Healing Council to represent them at the Royal Commission:

Dioceses

Archdiocese of Adelaide
 Archdiocese of Brisbane
 Archdiocese of Canberra-Goulburn
 Archdiocese of Hobart
 Archdiocese of Melbourne
 Archdiocese of Perth
 Archdiocese of Sydney
 Diocese of Armidale
 Diocese of Ballarat
 Diocese of Bathurst
 Diocese of Broken Bay

Diocese of Broome
 Diocese of Bunbury
 Diocese of Cairns
 Diocese of Darwin
 Diocese of Geraldton
 Diocese of Lismore
 Diocese of Maitland-Newcastle
 Diocese of Parramatta
 Diocese of Port Pirie
 Diocese of Rockhampton
 Diocese of Sale

Diocese of Sandhurst
 Diocese of Toowoomba
 Diocese of Townsville
 Diocese of Wagga Wagga
 Diocese of Wilcannia-Forbes
 Diocese of Wollongong
 Eparchy of Ss Peter & Paul Melbourne
 Maronite Catholic Diocese of St Maroun
 Military Ordinariate of Australia
 Personal Ordinariate of Our Lady of the Southern Cross

Religious Institutes

Adorers of the Blood of Christ
 Augustinian Recollect Sisters
 Augustinian Sisters, Servants of Jesus & Mary
 Australian Ursulines
 Benedictine Community of New Norcia
 Blessed Sacrament Fathers
 Brigidine Sisters
 Canons Regular of Premontre (Norbertines)
 Canossian Daughters of Charity
 Capuchin Friars
 Christian Brothers
 Cistercian Monks
 Columban Fathers
 Congregation of the Mission – Vincentians
 Congregation of the Most Holy Redeemer – Redemptorists
 Congregation of the Passion – Passionists
 Congregation of the Sisters of Our Lady Help of Christians
 Daughters of Charity
 Daughters of Mary Help of Christians
 Daughters of Our Lady of the Sacred Heart
 Daughters of St Paul
 De La Salle Brothers
 Discalced Carmelite Friars
 Dominican Friars
 Dominican Sisters of Eastern Australia & The Solomons
 Dominican Sisters of North Adelaide
 Dominican Sisters of Western Australia
 Faithful Companions of Jesus
 Family Care Sisters
 Franciscan Friars
 Franciscan Missionaries of Mary
 Franciscan Missionaries of the Divine Motherhood
 Franciscans of the Immaculate
 Holy Cross – Congregation of Dominican Sisters
 Holy Spirit Missionary Sisters
 Hospitaller Order of St John of God

Institute of Sisters of Mercy Australia & Papua New Guinea
 Loreto Sisters
 Marist Brothers
 Marist Fathers Australian Province
 Marist Sisters – Congregation of Mary
 Ministers of the Infirm (Camillians)
 Missionaries of God's Love
 Missionaries of the Sacred Heart
 Missionary Franciscan Sisters of the Immaculate Conception
 Missionary Sisters of Mary, Queen of the World
 Missionary Sisters of St Peter Claver
 Missionary Sisters of Service
 Missionary Sisters of the Sacred Heart
 Missionary Sisters of the Society of Mary
 Missionary Society of St Paul
 Oblates of Mary Immaculate
 Order of Brothers of the Most Blessed Virgin Mary of Mount Carmel (Carmelites)
 Order of Friars Minor Conventual
 Order of Saint Augustine
 Order of the Friar Servants of Mary (Servite Friars)
 Our Lady of the Missions
 Patrician Brothers
 Pious Society of St Charles – Scalabrinians
 Poor Clare Colettines
 Prelature of the Holy Cross and Opus Dei
 Presentation Sisters – Lismore
 Presentation Sisters – Queensland Congregation
 Presentation Sisters – Tasmania
 Presentation Sisters – Victoria
 Presentation Sisters – Wagga Wagga Congregation
 Presentation Sisters – WA
 Religious of the Cenacle
 Salesians of Don Bosco
 Salvatorian Fathers – Society of the Divine Saviour
 Secular Institute of the Schoenstatt Sisters of Mary
 Servants of the Blessed Sacrament

Sisters of Charity of Australia
 Sisters of Jesus Good Shepherd "Pastorelle"
 Sisters of Mercy Brisbane
 Sisters of Mercy North Sydney
 Sisters of Mercy Parramatta
 Sisters of Nazareth
 Sisters of Our Lady of Sion
 Sisters of St Joseph
 Sisters of St Joseph of the Apparition
 Sisters of St Joseph of the Sacred Heart
 Sisters of St Joseph, Perthville
 Sisters of St Paul de Chartres
 Sisters of the Good Samaritan
 Sisters of the Good Shepherd
 Sisters of the Holy Family of Nazareth
 Sisters of the Little Company of Mary
 Sisters of the Resurrection
 Society of African Missions
 Society of the Catholic Apostolate (Pallottines)
 Society of Jesus
 Society of St Paul
 Society of the Divine Word Australian Province
 Society of the Sacred Heart
 Sylvestrine-Benedictine Monks
 Ursuline Missionaries of the Sacred Heart
 Verbum Dei Missionary Fraternity

Other Entities

Australian Catholic Bishops Conference
 Catholic Religious Australia
 Catholic Church Insurance Limited
 National Committee for Professional Standards
 Professional Standards Office Tasmania
 Professional Standards Office NSW/ACT
 Professional Standards Office NT
 Professional Standards Office Qld
 Edmund Rice Education Australia
 Good Samaritan Education
 Kildare Ministries
 Loreto Mandeville Hall Toorak
 Trustees of Mary Aikenhead Ministries



The Truth Justice and Healing Council

The Catholic Church in Australia (the Church) welcomes the establishment of the Royal Commission into Institutional Responses to Child Sexual Abuse as an opportunity to acknowledge the truth about child sexual abuse within the Church, and to have these issues investigated and considered, objectively and publicly. It is an opportunity to bear witness to the suffering of the many victims of this abuse.



The Church is committed to cooperating with the Royal Commission, without reservation or qualification.

In February 2013 the Australian Catholic Bishops Conference (ACBC) and Catholic Religious Australia (CRA)¹ jointly established the Truth Justice and Healing Council (the Council) to coordinate and oversee the Church's overall response to and appearance at hearings of the Royal Commission.

The Council is a body of 11 people, with expertise spanning such fields as child sexual abuse, trauma, mental illness, suicide, psycho-sexual disorders, education, public administration, law and governance. The majority of Council members are lay, two of its members are bishops, and one of its members is a Brigidine sister. Two of the Council members are either themselves victims of abuse or have immediate family members who are victims. The Council provides independent advice to the ACBC and CRA, through a Supervisory Group, which is comprised of the Permanent Committee of the ACBC, and representatives of CRA. The Supervisory Group may accept or reject the advice.

The Supervisory Group endorses this Submission. The members of the Supervisory Group are listed on the Council website [here](#).²

The Council is chaired by the Hon Neville Owen, former judge of the Supreme Court of Western Australia and former HIH Royal Commissioner.

The other members of the Council are:

- Ms Elizabeth Proust AO, Deputy Chair, former Secretary to the Victorian Department of Premier and Cabinet, Chairman of the Bank of Melbourne and Nestlé Australia and member of other boards
- Archbishop Mark Coleridge, Archbishop of Brisbane
- Professor Maria Harries AM, Adjunct Professor at Curtin University, Research Fellow in Social Work and Social Policy at the University of Western Australia, Chair of Catholic Social Services Australia
- Professor Rosemary Sheehan AM, Department of Social Work, Faculty of Medicine, Nursing and Health Sciences, Monash University
- Hon Greg Crafter AO, former South Australian Minister of Education, Chair of National Catholic Education Commission
- Sr Maree Marsh, former Congregational Leader of the Brigidine Sisters and psychologist with Anti-Slavery Australia at the University of Technology Sydney, Faculty of Law

¹ CRA is the peak body, previously known as the Australian Conference of Leaders of Religious Institutes, for leaders of religious institutes and societies of apostolic life resident in Australia.

² <http://www.tjhcouncil.org.au/about-us/members-of-supervisory-group.aspx>



- Bishop Bill Wright, Bishop of the Diocese of Maitland-Newcastle
- Professor Greg Craven, Vice-Chancellor and President of the Australian Catholic University
- Mr Stephen Elder OAM, former Member of the Victorian Legislative Assembly and Parliamentary Secretary for Education and currently Executive Director of Catholic Education for the Archdiocese of Melbourne
- Dr Marian Sullivan, child and adolescent psychiatrist.

The CEO of the Council, Mr Francis Sullivan, has worked in government and private practice and has held positions as Secretary-General of the Australian Medical Association, Chief Executive of Catholic Health Australia and consultant to the Pontifical Council for the Pastoral Care of Health Care Workers at the Vatican. He is an Adjunct Professor at the Australian Catholic University.

The Council oversees the Church's engagement with the Royal Commission, including by:

- speaking for the Church in matters related to the Royal Commission and child sexual abuse
- coordinating the Church's legal representation at, and the Church's participation in, the Royal Commission.

The Council's role extends to:

- initiating research into best practice procedures, policies and structures to protect children
- assisting in identifying any systemic institutional failures that have impeded the protection of children
- providing information to the Royal Commission concerning the various procedures, policies and structures that have been successively put in place by Church organisations over the past 25 years to deal with complaints and instances of child sexual abuse and any improvements which might be made to them to provide greater protection for children
- seeking to promote lasting healing for the victims and survivors of abuse.

Dioceses and religious institutes (commonly referred to as congregations and orders) have given authorisations to the ACBC or CRA, authorising those bodies to represent and act for them in the engagement of the Church with the Royal Commission.

The ACBC and CRA have in turn delegated that authority to the Council. The Council therefore seeks to appear at the Royal Commission for all the authorising bodies, and speak with one voice for all of them.

Pursuant to these arrangements, the Council acts for all archdioceses and dioceses in Australia, with the exception of three of the Eastern Rite Eparchies, and for all the major religious institutes. The Council also acts for a number of other Catholic organisations including Catholic Church Insurance Limited (CCI).

For practical purposes, the Council ordinarily speaks for the whole Church: its dioceses, its religious institutes, its priests and religious, in the Royal Commission.



The Catholic Church in Australia today is an extensive and diverse religious organisation committed to worship, prayer and pastoral care. It is involved in providing pastoral, educational, health, human and social services across Australia.³

Notwithstanding that all the dioceses and religious institutes are autonomous and independent, each from the other, with no one central or controlling authority, and with each free to govern its affairs separately and independently, all are united in their support for the principles stated in the Commitment at the head of this Submission.

Those principles are also fully shared by all the innocent and high-minded priests and religious whose long years of devoted and selfless service have been admirable and who are heartbroken by the revelations of sexual abuse which have emerged in recent decades.

The Council's aim is to do everything in its power to ensure that the Royal Commission has available to it from the Church all the material that it needs for the work it seeks to do, so as to ensure that a light is shone on dark places and times and events, and to ensure that nothing is concealed or covered up in respect of what Church personnel did or failed to do.

The Council seeks to fulfil that role, on behalf of the Church, in a spirit of honesty, openness and genuine humility.

³ See Annexure B, TJHC Submission to Royal Commission Issues Paper No 2: Towards Healing, 30 September 2013
http://tjhcouncil.org.au/media/39435/30549468_2_TJHC-Towards-Healing-submission-30-Sep-2013.pdf



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Executive summary

In responding to the Royal Commission's Consultation Paper, *Criminal Justice*, the Council has chosen to confine itself to the matters addressed in Chapter 6 of the Consultation Paper. Most of the other matters addressed in the Consultation Paper are not of direct relevance to the Council.

In relation to the matters raised in Chapter 6 of the Consultation Paper, the Council submits that:

- There should be a nationally consistent criminal law provision in Australia requiring a person who has information leading the person to form a reasonable belief that a sexual offence has been committed against a child to disclose that information to the police unless the person has a reasonable excuse for not doing so.
- There may be merit in the enactment in all States and Territories of a provision equivalent to s 49C(2) of the *Crimes Act 1958* (Vic). However, an assessment should first be made of any adverse practical effects that the provision may have had in Victoria.
- It would not be appropriate to introduce into the criminal law a provision seeking to attach criminal liability to institutions in which child sexual abuse occurs.



Introduction

- 1 In its submission of 27 August 2015 in response to Royal Commission Issues Paper No. 8, *Police and Prosecution Responses*, the Council expressed the view that there should be a nationally consistent criminal law provision in Australia requiring third persons to report to the police suspected sexual offences against children.
- 2 The Consultation Paper, *Criminal Justice*, on which the Royal Commission now seeks submissions deals with that issue in the context of a broad discussion of the question whether, in the context of child sexual abuse in an institutional context, persons other than the perpetrator of the abuse should have some criminal liability for their action or inaction in respect of the abuse. Chapter 6 of the paper seeks submissions on:
 - Whether there should be a criminal offence in relation to failure to report and, if so, whether it should apply to all serious criminal offences, to child sexual abuse offences only or to institutional child sexual abuse offences only;
 - If a targeted reporting offence were to be introduced, how the elements of the offence should be formulated, including what the age should be from which a victim's wish that the offence not be reported should be respected, what standard of knowledge, belief or suspicion should apply and what exceptions or defences should apply;
 - Whether an offence of failure to protect should be introduced into the criminal law;
 - Whether the Victorian offence of failure to protect is appropriately targeted or whether it might have any unintended adverse consequences for the ability of institutions to provide children's services;
 - Whether it is desirable or necessary to make an institution itself criminally liable for child sexual abuse that occurs within the institution.
- 3 The Consultation Paper also seeks submissions on whether a criminal offence designed to protect whistleblowers who disclose institutional child sexual abuse from detrimental action would encourage reporting of the abuse.
- 4 This submission of the Council addresses each of those matters. The submission does not address the range of other matters covered by the Consultation Paper.

Scope of any offence relating to failure to report

- 5 The limitations and difficulties associated with the offence of concealing a serious indictable offence as set out in section 316 of the *Crimes Act 1900* (NSW) are discussed in the Consultation Paper. The Council would not advocate for such a general reporting offence to be duplicated in other jurisdictions. Indeed, given the limitations and difficulties associated with the provision, the Council sees merit in its repeal, as was recommended by the New South Wales Law Reform Commission in 1999.
- 6 That having been said, in relation to the devastating crime of child sexual abuse, Pope Francis has clearly stated:



The crimes and sins of the sexual abuse of children must not be kept secret for any longer. I pledge the zealous vigilance of the Church to protect children and the promise of accountability for all.

- 7 The need for appropriate reporting of child sexual abuse matters was taken up by the Pontifical Commission for the Protection of Minors, chaired by Cardinal Sean O'Malley, which on 15 February 2016 stated:

We, the President and Members of the Commission, wish to affirm that our obligations under civil law must certainly be followed, but even beyond these civil requirements, we all have a moral and ethical responsibility to report suspected abuse to the civil authorities who are charged with protecting our society.

- 8 In its submission to the Royal Commission in connection with Issues Paper No. 8, the Council proposed that there should be a nationally consistent criminal law provision in Australia requiring a person who has information leading the person to form a reasonable belief that a sexual offence has been committed against a child to disclose that information to the police unless the person has a reasonable excuse for not doing so.

Police reporting provision in Victorian Crimes Act

- 9 In response to the report of the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations, the *Crimes Act 1958* (Vic) was amended in 2014 to introduce a targeted provision for the reporting to police of possible sexual offences against children. Section 327 of that Act makes it an offence for an adult (whether in Victoria or elsewhere) who has information leading him or her to form a reasonable belief that a sexual offence has been committed in Victoria by an adult against a child to fail to disclose the information to a member of the Victoria Police.
- 10 The offence is subject to a number of exceptions, including:
- Where the information is given by the victim of the alleged abuse and that person is over 16 at the time of providing the information, is not suffering from an intellectual disability and requests that the information not be disclosed;
 - Where the information comes solely through the public domain.
- 11 While the provision does not prevent a person reporting to the police information from a person over 16 about a child sexual abuse offence allegedly perpetrated against the person, it respects the position of a victim who does not want details of the offending disclosed and is sufficiently mature to make that judgment.
- 12 In its submission to the Royal Commission in connection with Issues Paper No. 8, the Council expressed concerns whether this new provision in Victoria was adequate. The Council said that the fact that an obligation to report child sexual abuse did not apply in circumstances where the victim was now mature and requested that the information not be disclosed meant that the section did not meet the interests of child safety in a case where the alleged perpetrator might still be alive.



Provision proposed by the Council

- 13 It was that concern which led the Council to recommend to the Royal Commission the enactment of a differently worded police reporting provision, in the terms described in paragraph 8 above. The Council again makes that recommendation.
- 14 The provision should contain a defence of “reasonable excuse”, as does the Victorian provision. As indicated in its submission in connection with Issues Paper No. 8, the Council considers that a reasonable excuse might arise if the person concerned believed on reasonable grounds that the information had already been reported to the police.
- 15 The reporting provision in Victoria mentioned above also contains an exemption for information that is communicated on an occasion of privilege. This exemption would cover certain communications between a lawyer and his or her client and a communication that takes place in the context of a religious confession. A similar exemption should apply under the provision which the Council recommends.
- 16 The Council notes that, to the extent that mandatory reporting laws impose an obligation on ministers of religion to report suspected child abuse,⁴ the law provides an exemption if the information concerned is received during a religious confession.⁵

Targeted institutional child sexual abuse offence

- 17 The Consultation Paper refers to the recommendation made in January 2012 by the Protecting Victoria’s Vulnerable Children Inquiry (**Cummins Inquiry**) for an amendment of the Crimes Act to impose on ministers of religion and persons working in religious organisations a duty to report a reasonable suspicion that a child is being, or has been, physically or sexually abused by an individual within the organisation.⁶
- 18 The Council does not support such a provision. Persons who work in Church institutions must be subject to the law of the land in the same way as all other individuals in society. However, to single them out for special criminal liability would be unfair and unconscionable. There is no reason why institutional child sexual abuse should be made subject to different criminal reporting obligations than child sexual abuse generally.

Failure to protect

- 19 On 1 July 2015 a new criminal law provision came into force in Victoria imposing on individuals in positions of authority within institutions a duty not to negligently fail to reduce or remove a risk that a child will become the victim of sexual abuse committed by a person associated with the institution. The offence is set out in s 49C(2) of the *Crimes Act 1958* (Vic). The Royal Commission’s Consultation Paper refers to a fact sheet issued by the Victorian Government explaining aspects of the new law. Moving from one location to another an adult known to pose a substantial risk to children is one of the examples given in the fact sheet of when the offence might be committed.
- 20 A danger of a provision such as this is that it may cause institutions which deal with children to adopt risk-averse behaviours that are so onerous they restrict the capacity of the institutions to

⁴ The only State where such an obligation is imposed is South Australia (*Children’s Protection Act 1993* (SA), s 11(2)(ga))

⁵ *Children’s Protection Act 1993* (SA), s 11(4)

⁶ The report of the Cummins Inquiry recommended that an exemption should apply for information received during the rite of confession.



provide services to children. Because the provision is so new, it is too early to form a view on whether it is having this effect in Victoria.

- 21 The Council submits that the Royal Commission should recommend to Governments in Australia (other than Victoria) that they consider making a similar amendment to their criminal law, subject to examination of whether the provision has had adverse practical effects in Victoria.

Offences by institutions

- 22 The crime of failure to protect set out in s 49C(2) of the *Crimes Act 1958* (Vic) applies to individuals within an institution, not to the institution itself. What is now considered is whether the institution itself should be made criminally liable if child sexual abuse occurs within the institution. The model for this kind of corporate criminal responsibility is to be found in contexts such as work health and safety and environmental law.
- 23 The Council sees no merit in this approach for the following reasons:
- Criminal conduct is generally more properly targeted at the individual rather than the organisation in which the individual is engaged. The difficulties that have been shown to exist in applying principles of corporate criminal responsibility for work health and safety and environmental breaches are instructive;
 - The corporate model is inapt for Church institutions which are largely unincorporated associations and where priests and religious are not employees;
 - Institutional child sexual abuse often does not come to attention for years after its occurrence, by which time the institution and its management are likely to have substantially changed.
- 24 The Council notes that the authors of the Royal Commission's Research paper, *Sentencing for Child Sexual Abuse in Institutional Contexts* (July 2015) said that there might be symbolic benefit in criminal offences targeting institutions, even if they were not prosecuted.⁷ However, the Council submits that that approach to law-making is not one which should commend itself to the Royal Commission.

Whistleblower protection

- 25 The Council is not aware from any case studies of the Royal Commission involving institutions of the Catholic Church of circumstances where third parties felt intimidated from disclosing suspected child sexual abuse to the authorities. However, the Council is also aware of facts that have emerged in at least one case study pointing to collusion between police officers and representatives of the Church.⁸ Whether legislation is necessary as a means of preventing reprisal against persons who may disclose information about collusion or other behaviours that have the effect of concealing abuse is a matter on which the Council does not express a view. The matter might be sufficiently addressed if there existed in each jurisdiction in Australia an independent commission to investigate corruption by public officials, including the police.

⁷ P 219-220

⁸ In Case Study 28 (Ballarat) there was evidence of collusion in the Mildura region in the 1960s involving the police and Monsignor John Day.