Strengthening child sexual abuse laws – Submissions Justice Strategy and Policy
Department of Justice
GPO Box 31

Sydney NSW 2001
Email: policy@justice.nsw.gov.au (with the subject 'Strengthening child sexual abuse laws')

To Whom It May Concern:

Please find below my submission in response to some of the questions (12 and 23-25) you have raised in your discussion paper. I would be happy to answer further questions. Please note that while I work for The University of Notre Dame Australia which is a Catholic institution, I am not a member of the Catholic Church.

Sincerely

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. Q12. Should the repeal of the limitation period for certain child sexual assault offences committed against females aged 14 and 15 years be made retrospective as recommended by the Royal Commission?

. Retrospective legislation is offensive to the rule of law. That is because we are all taken to know the law and it is arbitrary to subject people to laws that they did not and could not know at a past time. Though some commentary has suggested that the High Court has held that the enactment of retrospective law does not offend either the Australian Constitution or the common law in Australia's version of sovereign parliamentary government,[1] compliance with

[1] *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501. However note that this case did not decide that retrospective laws were always legal. The ratio of the case was more simply that the High Court had power under s 51 (vi) and (xxix) of the *Constitution* to amend Australian war crimes laws to accord with

the rule of law requires responsible government to resist the temptation to enact laws that breach this principle. Though the proposed amendments may avoid breaching the separation of judicial power required of all Australian courts which ever exercise federal judicial power, there is no way to prevent such laws being challenged on that basis. It would be more patient and also more consistent with the rule of law if these changes were drafted to operate prospectively. When government exercises legislative restraint in deference to sound principle, respect for the rule of law is enhanced.

. Q23. Should the Royal Commission's model for a targeted failure to report offence be adopted? If yes, how should it be adapted for NSW?

. The Royal Commission's treatment of the need for targeted failure to further report child abuse including child abuse within institutions was flawed. In all its hearings, the Royal Commission identified very few cases of institutional child abuse since Queensland introduced its 'blue child protection card' regime in 1998 (the Queensland model).[2] It is submitted that the Queensland model has prospectively cleaned up institutional child abuse in Australia. While NSW was slow to implement the Queensland model, the implementation of checks for all volunteers and employees who work with children in accordance with the Queensland model has reduced the risk of child abuse so much that there is no need for the additional laws which the Royal Commission recommended. The Royal Commission's failure to recognise the utility and success of the Queensland model has led it to recommend unnecessary legislation.

. The success of the Queensland model in eradicating institutional child

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international practice. While two judges said that retrospective laws could not be valid regardless of what s 51(xxix) said (Deane and Gaudron JJ), only Toohey J said that this amendment did not amount to retrospective law since the conduct retrospectively criminalised by the 1988 amendment to the *War Crimes Act 1945* (Cth) was always morally culpable as had also been the finding in *R v Kidman* (1915) 20 CLR 425. The majority agreed that specific Bill of Attainder would be invalid because it would offend the separation of judicial power set out in Chapter III of the *Constitution*.

[2] Royal Commission, *Analysis of Claims of Child Sexual Abuse with respect to Catholic Church institutions in Australia*, June 2017, 21 (figure 3).

sexual abuse since 1998 also makes the Royal Commission's recommendation that religious confession privilege should be abrogated in child abuse cases unnecessary. While this NSW discussion paper does not ask questions about those recommendations, the Royal Commission's targeted failure to report offence could interfere with religious confession privilege under section 127 of the *Evidence Act 1995* (NSW) unless it were made clear that religious confessional material was untouched by the new law. The Royal Commission recommended that religious confession privilege in child abuse cases should be abrogated because it had heard evidence of child abuse disclosures from both victims and perpetrators of child abuse during its hearings.[3] It also observed that the abrogation of religious confession privilege could be justified under international law (specifically Article 18(3) of the *ICCPR*) because that was necessary to protect the rights and freedoms of children.[4] Because the Queensland 'blue child protection card' regime has eradicated child abuse in the Australian jurisdictions which have adopted it, it cannot be said that the abrogation of religious confession privilege is necessary to protect children. Children have been satisfactorily protected by the Queensland model since 1998. The Royal Commission's assertion that the abrogation of religious confession privilege is justified because it heard evidence of child abuse disclosures from both victims and perpetrators of child abuse during its hearings is under-theorised and suggests that the Royal Commission did not adequately reflect on the evidence it had gathered. While some victims may have disclosed child abuse during communications connected with the confessional, such disclosures do not constitute confessions because victims of sin are not guilty of sin in the theology of any religion that practices religious confession. There is thus no need for religious confession privilege to be abrogated in respect of disclosures made by victims. As to the Royal Commission's assertion that perpetrators of child abuse disclose that abuse in the confession, it is evident from careful review of the Royal Commission's evidence that it accepted the evidence of those perpetrators it heard at face value including the affidavit of Father Michael Joseph McArdle before the Queensland

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[3] <https://www.childabuseroyalcommission.gov.au/getattachment/aa9249f1-b490-4b26-9772-a1ddb36e85d4/Failure-to-report-offence>.
[4] Ibid.

Court of Appeal when seeking sentence reduction as reported in John Cornwell's book, *The Dark Box.*[5] Neither Cornwell nor the Royal Commission took notice of the self-serving sentence reduction context. McArdle's evidence was not contradicted because of the nature of the hearing and it was rejected by the Queensland Court of Appeal when it rejected McArdle's request for a more lenient sentence.[6] That failure to take notice is the more surprising since both Cornwell and the Royal Commission were aware of Dr Marie Keenan's Irish Research that found that child abusing priests who alleged they confessed, never confessed enough information to enable the priest receiving the confession to identify the sexual partner in any case as a child.[7] Accepting that Keenan's research was accurate, the Ryan Commission in Ireland thus rejected arguments that would have seen religious confession privilege abrogated to require the disclosure of child sexual abuse information that was never given.

. It is submitted that NSW should also consider another aspect of the Irish response to child abuse which was not adequately considered in the Royal Commission's evidence or recommendations before concluding its review of the advisability of the legislative changes recommended by the Royal Commission. When the Irish Minister for Justice announced the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Bill in 2012, he confirmed it was necessary to close a loophole in current law and to ensure there was no cloak of secrecy surrounding offences against vulnerable members of Irish society.[8] But the resulting legislation made it a defence for many persons working with the child concerned if they (or the child) did not think it would be in the best interests of that child to report the matter.[9] The Royal Commission appears to have taken a different view of

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[5] John Cornwell, *The Dark Box*, *A Secret History of Confession* (New York, Basic Books, 2014).

[6] *R v McArdle* [2004] QCA 7.

[7] Marie Keenan, *Child Sexual Abuse and the Catholic Church: Gender, Power and Organizational Culture* (Oxford University Press, 2012), 162-164.

[8] 'Minister Shatter announced publication of Bill to further strengthen child protection', *Department of Justice and Equality*, <http://www.justice.ie/en/JELR/Pages/PR12000117>.

[9] Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Bill 2012 (Ireland), <http://www.irishstatutebook.ie/eli/2012/act/24/enacted/en/html>.

the best interests of the child and did not interrogate the reasoning of the Ryan Commission in Ireland where the best interests of the child are concerned.

. Q24. Should the failure to report an offence be made partially retrospective as the Royal Commission recommends?

. For the reasons stated above in answer to questions 12 and 23, I submit that it is not necessary and would not be wise for NSW to pass any new failure to report offence let alone a retrospective offence. It is submitted that current NSW legislation protecting children and requiring the reporting of child abuse is more than sufficient to protect children so long as NSW retains a child protection card system which follows the Queensland model. It is also not in the bests interests of social justice or compliance with the doctrine of separation of judicial power in NSW that any retrospective laws be passed.

. Q25. Should protection be afforded to people who make disclosures of child sexual abuse?

. Disclosures of child sexual abuse should take account of the wishes of the child concerned.

. Q26. Should the Royal Commission's model for a targeted failure to protect offence be adopted? If yes, how should it be adapted in NSW?

. No for reasons already stated.