Submission by personnel of Zimmerman Services of the Catholic Diocese of Maitland-Newcastle in response to the NSW Government Discussion Paper on strengthening child sexual abuse laws in NSW

This submission represents the views of individual personnel within Zimmerman Services, the specialist child protection service for the whole of the Diocese of Maitland-Newcastle ('Diocese') which includes the Catholic Schools Office and related systemic schools of Maitland-Newcastle, CatholicCare Social Services Hunter Manning, St Nicholas' Early Education Centres and the parishes of the Diocese. This submission is not sanctioned by nor does it purport to speak for any other individual or service within the Diocese, nor the Diocese itself.

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RESPONSE TO SECTION 6
ADDRESSING DIFFICULTIES ARISING FROM HISTORIC CHILD SEXUAL OFFENDING

Maureen O'Hearn is the Coordinator for the Healing and Support programme for survivors of institutional child sexual abuse committed within the Diocese.

In relation to prosecuting and defending cases of historic child sexual abuse the recommendation for reform is:

> ***"To introduce a legislative provision to allow the prosecution to rely on the offence with the lowest maximum penalty where the alleged date range includes more than one offence."***

Ms O'Hearn supports this recommendation in principle but it is unclear how by introducing this change it would actually impact on a case when there was a legislative change during the date range. There still exists some confusion that even if there was a date change in relation to the offence during a trial is the charge dismissed completely or would it still stand with the lowest maximum penalty? This needs to be clarified in more detail.

This change doesn't address the issue of diminished memory around the offences. Details of the offence need to be clear but so often the peripheral memory of a complainant giving evidence about historical sexual abuse is confused. Often a complainant may be confused about places, time of year, what clothes they were wearing etc. but very clear about the details of the offence as this is what stays etched in their mind. Ms O'Hearn recommends that changes occur in legislation that allows a Judge in his summing up to give directions to jurors about the weight of the peripheral evidence being less than the evidence of details of the actual offence.

In relation to sentencing historic child sexual assault offenders currently an offender is sentenced in accordance with the sentencing trends that existed at the time that the offence was committed. The recommendation for reform is that NSW adopt the Royal Commission's recommendation that in historic child sexual abuse matters an offender is sentenced by applying current sentencing principles but the maximum penalty that would be applicable is the lower of the current penalty or the maximum applicable at the time of the offence.

Ms O'Hearn agrees with this proposed reform.

It is acknowledged that the understanding of the effects of child sexual abuse has increased over the years and with the usual delay in reporting these matters usually there is quite a significant time between the offence and the trial/sentencing. Whilst not all complainants wish to see their offender punished, punishment, deterrence and acknowledgement of the harm caused do need to be in line with current thinking and knowledge of the harm caused.

In relation to limitation period for prosecution of some offences Sect 78 of the Crimes Act 1900 (repealed) provided for a limitation period of 12 months for the prosecution of certain sexual assault offences if they are alleged to have been committed against a female aged 14 or 15 years. This section was repealed in 1992 but the repeal was not retrospective.

Ms O'Hearn agrees that legislation should be introduced to give the repeal of the limitation period for certain child sexual offences committed against females aged 14 and 15 years and that this be made retrospective as recommended by the Royal Commission.

RESPONSE TO SECTION 9
STRENGTHENING OFFENCES AGAINST YOUNG PEOPLE UNDER CARE

Lisa Wollschlager is an investigator in the Prevention and Response Team of Zimmerman Services, undertaking investigations of Diocesan personnel, including under Part 3A Ombudsman Act.

Ms Wollschlager's position is that all States and territories in Australia should align the definition of special care offences. In agreement with the position of the Royal Commission into Institutional Responses of Child Sexual Abuse ('Royal Commission'), the existence of authority in the relationship is sufficient for an offence to have been committed. This is the current position in NSW.

There is room to strengthen this legislation in expanding the definitions of persons in authority and in the definition of offences that constitute a 'sexual offence' under this provision.

As identified by the Royal Commission, the current definition of 'special care' as outlined in the NSW legislation should not be narrowed or removed. However, there is the opportunity to extend the definition to other forms of relationships where the accused is in a position of authority or power over the alleged victim. Other forms of relationships may include adoptive parents. It is noted that biological parents are covered by the offence of incest; no such provision appears to extend to adoptive parents.

The definition of authority could also be extended to teachers who are not directly involved in the provision of education of a student but rather are at the same school and the relationship with the student was borne from this source.

Additionally, in relation to (c) *the offender has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim;* this could be more clearly defined with the addition of *whether paid or volunteer.*

The range of offences could also be extended to include all types of sexual offences including indecent conduct to cover non-penetrative sexual offences.

RESPONSE TO SECTION 10
INTRODUCING SPECIFIC OFFENCES OF FAILING TO PROTECT AND FAILING TO REPORT

Sean Tynan is the Manager Zimmerman Services with responsibilities including the provision of child protection advice to the Diocesan leadership and management of civil claims for compensation brought by survivors of institutional child sexual abuse committed within the Diocese.

In response to question 23 Mr Tynan does not believe it is in the public interest to pass statutes to criminalise an individual's failure to report actual or suspected or what a reasonable person should have suspected was child sexual abuse occurring in an institutional context.

Mr Tynan proposes an alternate possibility for the exclusion of those persons where there is a finding (to the civil standard) of having failed to report, from remaining in positions where they work with children or manage those that do.

In response to Question 24 Mr Tynan does not support any attempts to retrospectively apply current standards to historic contexts.

In response to question 25 Mr Tynan supports the exploration of extending protections for persons making disclosures of child sexual abuse in an institutional context. Mr Tynan notes that both section 25H Ombudsman Act and section 29 Children and Young Persons (Care and Protection) Act provides protections to reporters. Further, the current oversight arrangements by the NSW Ombudsman acts as a significant and effective deterrent to any institutional leadership that may consider making any threat or taking actual adverse action against an individual.

In response to question 26 Mr Tynan supports NSW exploring the adoption of 'failure to protect' statutes similar to those proposed by the Royal Commission.

Addressing an Historic Problem that is Largely Resolved.

Perhaps the most important legacy of the Royal Commission is the extraordinary shift of culture that has been achieved; people are now significantly more aware of child sexual abuse, understanding of the harm caused and willing to openly discuss and confront it.

The Catholic Diocese of Maitland-Newcastle ('Diocese') has made an enduring commitment to address the legacy of child sexual assaults that occurred in the Diocese, including the settlement of claims for civil damages brought by survivors. The claims are historic in nature, the pattern of offending that occurred within the Diocese follows the pattern established in the Royal Commission, a normal distribution bell curve cantered on the 1970's with a virtual cessation of known child sexual assaults by the mid 1990's. As cultural understanding and acceptance of particular conduct changed, so did the prevalence of offending.

One of the questions asked by some survivors, often as part of their settlement conference that (hopefully) avoids litigation and produces a negotiated settlement of the claim, is 'Could it happen now?' The fear that the nature of the child sexual abuse the survivor had endured, could still occur

today is real and pressing for some. The Paedophile Inquiry detailed an endemic culture of minimisation or disbelief of allegations, placing the perceived 'good of the institution' before the child who had been allegedly abused, being adult focused when responding. Should a child (or the child's carer) have made a criminal complaint of child sexual abuse, the subsequent experience of the criminal justice system was largely negative, as highlighted by a number of reports, notably ALRC Report 114 / NSWLRC Report 128 (2010) and NSWLRC Report 101 (2003).

During the period when the majority of institutional child sexual abuse occurred and there was wholesale failure to report, societal attitudes, reinforced by the conduct of the relevant social institutions, was against victims' reporting abuse or pursuing justice for the crimes committed. That is no longer the case. In 2017 the social norms in NSW supports the reporting of child sexual abuse allegations. As a rule, children have a better understanding of their rights, including a right to have their voice heard and a propensity to use that voice at an earlier age. Children have access to technology that allows their voice to be heard in multiple modalities than would have been the norm a generation earlier. The Diocese expends significant resources on promoting a culture of reporting concerns for children with all employees and clergy; which is true for most responsible institutions in NSW providing services to children.

Hearing and understanding the costs borne by survivors and their families, the demand for change from the parishioners, clergy and employees of the Diocese ('internal stakeholders'), the pressure of public opinion, the ongoing costs of addressing the Diocese's legacy of harm along with the ongoing work of the Royal Commission; have all created an irreversible and fundamental shift in the understanding of the Diocese. The Diocese, as with other Catholic entities across NSW and the ACT, are aware that it is in the Church's best interest to ensure there is full and prompt disclosure of any alleged 'institutional child sexual abuse' to the appropriate statutory authorities, including NSW Police. It is only by prompt and full disclosure that further reputational harm to the Church can be reduced.

Nonetheless, it must be conceded that there are individuals and isolated and fringe communities within the broader Catholic Church (as with other large religious and community institutions) which remain highly insular and resistant to reporting any allegations of abuse or criminality against their members to external authorities. It is dubious that imposition of criminal statues for failing to protect would significantly alter the behaviours of such groups.

Unintended Consequences

The 1997 Royal Commission into the New South Wales Police Service Final Reports Volumes IV - V (The Paedophile Inquiry) adduced extraordinary evidence and made powerful and disturbing findings in relation to systemic, organised paedophilia across multiple statutory, religious and community institutions. Consequently, NSW enacted a number of 'child protection' laws, including the Children and Young Persons (Care and Protection) Act 1998 ('Act'). The Act included provisions in section 27 that made the failure to report by mandatory reporters a criminal offence (maximum penalty 200 units) and, in section 23, established a broad and relatively low threshold for reporting 'risk of harm' to children.

Mr Tynan believes these two factors were the principal contributors to the rates of child protection reports being made to the NSW Department of Community Services ('DoCS') almost tripling within a few years of their introduction. Over this same time there was no evidence that the actual rates of abusive conduct experienced by children increased proportional to the increased rates of reporting. The consequence of this reporting effect was to overwhelm the systems established by DoCS [the Child Protection Helpline].

Leading up to the implementation of the 'post Wood' legislation (2000-1) Mr Tynan was seconded to DoCS Head Office, working in the team responsible for implementation of the Act and establishing the Helpline. As part of the preparatory work there were a series of information and training sessions and Mr Tynan recalls multiple conversations with soon to be 'mandatory reporters', voicing their resentment at being 'threatened' by criminal sanction and saying words to the effect that they would "not take any chances and just report everything". The evidence supports the belief that sufficient persons did indeed 'report everything' and to such a degree that, for some years, the child protection system in NSW was partially compromised and overwhelmed by large numbers of reports about matters that were not appropriate for statutory authorities to be involved in.

As is noted by the Discussion Paper, Justice Wood was appointed to lead a Special Commission of Inquiry into Child Protection Services of NSW which led to a number of relevant reforms of the Act, including revisions to sections 27, making it the 'duty' of as mandatory reporter to report and raising the threshold for reporting in section 23 to 'risk of significant harm'.

It is highly probable that the criminalisation of reporting obligations for alleged child sexual abuse within institutions and the lowering of the threshold to include the test of 'suspected' or 'should have suspected' child sexual abuse, will result in a similar rapid and uncontrolled increase in the numbers of complaints made to the NSW Police Force. It is equally probable that the rapid increase in reports will not result in a proportional increase in alleged abusers being charged and will result in the expenditure of significant police resources to deal with people 'reporting everything'.

Selective Targeting at 'Institutional Sexual Abuse' is Unsustainable

As has been noted, the Royal Commission has been the trigger for a fundamental shift in public awareness and readiness to address issues of child sexual abuse. Most people are now aware that the majority of child sexual abuse occurs in the familial or 'extra institutional' context. To attempt to enact reporting laws restricted to the institutional context would be difficult to justify, as there is no obvious rationale to support such a distinction. Currently section 316 of the Crimes Act 1900 makes no distinction as to a citizen's obligations not to conceal serious indictable offences.

It would be untenable for NSW Parliament to enact laws excising a citizen from an obligation to report suspected child sexual abuse because those suspected crimes were committed in the home or extra institutional context. Any such application would demand universal application.

An Alternative Model for Imposing Sanctions on Persons Failing to Report Child Sexual Abuse in the Institutional Context

The Royal Commission posed the following justification for the criminalisation of failing to report institutional child sexual abuse:

Institutions may face a conflict between their duty to protect children and their interest in protecting the reputation of the institution, and the existence of a criminal offence may encourage them to report.

If accepted, submissions made earlier in this paper have:

- Refuted the contemporary need for the existence of a criminal offence to overcome any assumed institutional interest not to report child sexual abuse;
- Raised serious concerns as to the unintended deleterious effects the threat of criminal sanctions could have on the quantity and quality of criminal complaints made to NSW Police Force; and
- Questioned the appropriateness of restricting the criminalisation of failing to report to the institutional context when the majority of child sexual abuse occurs in the extra institutional context.

Institutional behaviour is the aggregation of multiple individuals engaged to act on behalf of the institution; with some individual's conduct being significantly more impactful or influential than others. It is in the public interest to promote and support individuals to report actual or suspected incidents of child sexual abuse. This will not be effectively or efficiently achieved by the criminalisation of those individuals failing to report.

NSW has pre-existing mechanisms that could be modified to increase an individual's motivation to report whilst providing significant adverse consequences for failing to do so. By 1 April 2018 all workers in NSW deemed to be in child-related work (who are not eligible for an exception). The Child Protection (Working with Children) Act 2012 ('WWCC Act') requires that an individual must have a valid working with children check (WWCC), verified by their employer, prior to being able to engage in 'child-related work'. The WWCC scheme is administered by the Office of the Children's Guardian ('OCG').

The current situation may be summarised as follows: Part 3A of the Ombudsman Act 1974 requires particular statutory and community institutions to conduct inquiries into any alleged 'reportable conduct' committed by an employee against a child. The Ombudsman's Office oversights and reviews the institution's inquiries to ensure the efficacy of inquiries conducted. If the alleged conduct is sustained and involves "sexual misconduct committed against, with or in the presence of a child, including grooming of a child" or "any serious physical assault of a child", section 35 of the WWCC Act requires that the relevant institution reports the matter to the OCG who then conducts an independent risk assessment to determine whether the individual who committed the sustained conduct, poses a risk to the safety of children. Should the OCG determine that the individual does pose a risk, that individual is bared from having a WWCC.

Comparative to establishing novel criminal statutes, the requisite modifications to part 3A Ombudsman Act and the WWCC Act would be relatively straightforward. Ombudsman oversight under Part 3A would need to expand to capture all persons engaged in 'child-related work'; a position advocated by the Catholic Bishops of NSW and ACT in a letter to the NSW Attorney-General dated 24 November 2015. Current evidence adduced by the Royal Commission supports the belief that the NSW 'Reportable Conduct' scheme has achieved significant and abiding improvements in the levels of child protectiveness within those institutions that are within the Ombudsman's scope.

The modified regime should ensure that an allegation that any person acting on behalf of an institution that provides child-related work, failed to report alleged child abuse [not just child sexual abuse], should be deemed a reportable allegation under Part 3A Ombudsman Act. Should the allegation be sustained, the individual should be subject of mandatory reporting to the OCG who then conducts an independent risk assessment of the individual who failed to report. Discussion will be required to establish guidelines to assist the OCG in applying an appropriate assessment of risk. The assessment of risk properly allows for proper consideration of prior pattern (historic failure to report).

The net effect of the proposed alternate scheme would be to achieve the desired prioritisation of reporting abuse over institutional self-protectiveness without imposing the significant financial burdens of conducting a criminal investigation and subsequent trials. The burden of proof is significantly lowered from the criminal to civil standard and the expenditure of resources to conduct the inquiry rests with the institution. Lastly, should the matter be established, the state does not face the additional potential costs of housing those given a custodial sentence, in the civil process the affected person carries the financial burden, with the risk of loss of employment (perhaps their entire career).

Adoption of the proposed model does risk some increase of reports of little or no value or relevance, as a consequence of affected employees ensuring they 'professionally protect' themselves from being the target of investigation and potentially forfeiting their ability to work with children. Prior to implementing any such proposal would require assessment of current resourcing levels to both the NSW Ombudsman and Office of the Children's Guardian.

RESPONSE TO SECTION 12
DECRIMINALISING CONSENSUAL 'SEXTING'

Michelle McEntyre and Zoë Trypas are investigators in the Prevention and Response Team of Zimmerman Services, undertaking investigations of Diocesan personnel, including under Part 3A Ombudsman Act.

The integration of technology and social media by young people into their personal and sexual lives is recognised. However, it does not necessarily follow that an act should be decriminalised, or allowed, based on an acceptance that it happens. The discussion paper cites an Australian Institute of Criminology study that looked at the motivations for the participants sending a sexually explicit image of themselves. The motivations identified were spontaneous, and gave little consideration to the long term consequences, ie 'to be fun' and 'because I received one' and 'as a sexy present' and 'to keep them interested'.

These spontaneous and ill-considered motivations give little recognition to the potential harmful consequences of the sharing of a sexually explicit image which are noted in the discussion paper. The lack of consideration for potential consequences is consistent with research into the development of the adolescent brain which is understood not to have fully developed its ability to reason until the age of 25 years. This lends weight to the argument that a child may not be in a position to genuinely offer consent to the taking and/or sharing of sexually explicit images of themselves until the accepted age of adulthood, 18 years.

The vulnerability of children who take and share a sexually explicit image of themselves, without addressing the potential consequences of this action, was illustrated in the discussion paper at 12.17. Here it is noted that all of the images and videos examined of nude or semi-nude children aged 15 years or under had been harvested from its original upload location (and 89.9% of images depicting a person under 20 years) – indicating that protective steps were not taken to conceal the identity or location of the person who was the subject of the sexually explicit image.

The position taken in Commonwealth legislation (that at 16 years a person may consent to sexual intercourse but must be 18 years before they are able to consent to the taking and sharing of sexually explicit images) recognises the contrast in the potential consequences of recording sexually explicit images/acts which are then available for infinite future use with or without consent; as compared with a consensual act held (and then left) 'in the moment'.

In responding to voluntary and non-detrimental sexting behaviour there is a clear need for police delicacy and discretion. The proposed 'revenge porn' legislation requires the Director of Public Prosecutions to approve any prosecution of a child under 16 years. This is an additional discretionary safe guard that could be afforded in sexting situations.

Any reform to the legislation to address the practice of sexting needs to balance the risk of detrimental long term criminal consequences; with the risk of long term and detrimental social consequences for the individuals involved, as well as societal standards generally (for example

gender stereotypes and domestic violence). There should also be no erosion of the legislative protection for children from sexual exploitation which is the stated purpose of the legislation.

For these reasons support is offered to the Commonwealth, ACT, Northern Territory, Tasmania and Victoria position that child pornography material relates to a child who is, or appears to be, under 18 years. The defences around public benefit, law enforcement and scientific research should remain.

To address the over-criminalisation of activity between persons aged 18 years or under, the practice of police discretion in their response to consensual sexting behaviour should be encouraged, and include an assessment of any relevant history of the persons involved (repeat offences after police warnings for example). In addition, the Director of Public Prosecutions should be required to approve any prosecution of a child under 18 years for sexting offences.

Support is also offered for the defences as detailed in section 51M – 51P of the Crimes Act 1958 (Vic) (as amended on 1 July 2017) to be adopted in NSW.

To complement the legislative approach, options for persons under 18 years to be educated about the risks of the practice of sexting should be explored, for example the updating of the PDHPE curriculum to include this as a mandatory component.

RESPONSE TO SECTION 13
LIMITING CIRCUMSTANCES WHERE COMPLAINANTS GIVE EVIDENCE ON MULTIPLE OCCASIONS

Maureen O'Hearn is the Coordinator for the Healing and Support programme for survivors of institutional child sexual abuse committed within the Diocese.

In circumstances where the offender is under 18 years of age the matter is initially heard in the Children's Court before it is referred to a higher Court for trial. In these circumstances the Children's Court needs to hear all of the evidence in certain charges which means that the complainant has to give evidence twice – in the two different Courts.

Ms O'Hearn agrees with the Royal Commission recommendation that this be changed to ensure that child sexual abuse complainants are not required to give evidence on multiple occasions. A number of different options have been recommended by the Royal Commission but all have difficulties as acknowledged by them.

Ms O'Hearn suggest that Children's Courts could determine to commit a young person for trial or sentence in a higher court on tendered documents, without a hearing where the complainant is required to give evidence. This would reflect the current Local Court process for complainants when there is an adult offender.

RESPONSE TO SECTION 14
TENDENCY AND COINCIDENCE EVIDENCE

Maureen O'Hearn is the Coordinator for the Healing and Support programme for survivors of institutional child sexual abuse committed within the Diocese.

Generally, child sexual abuse occurs in private with no witnesses or any physical evidence. It is usually one person's word against another in relation to a time when one of these persons was a child. By allowing tendency evidence it will assist in giving the complainant some credibility as the jury can see that there is a tendency for the accused to have behaved in a certain way on other occasions.

Ms O'Hearn agrees that the approach to tendency and coincidence evidence that is proposed (Appendix E) be adopted.

Ms O'Hearn also agrees that there should be a reform of a presumption in favour of joint trials. However, it does not agree with the provision of the admissibility of evidence of prior charges of which the accused was acquitted. Such action could make the defence much more rigorous in cross examination of the complainant to challenge their credibility and reliability making an already difficult situation worse.

RESPONSE TO SECTION 15
IMPROVING AND CODIFYING JURY DIRECTIONS

Maureen O'Hearn is the Coordinator for the Healing and Support programme for survivors of institutional child sexual abuse committed within the Diocese.

The role of a trial judge is to ensure a fair trial and this includes directing the jury about the appropriate law and relevant facts. It may require warning the jury how not to reason and where particular care should be taken. Misdirection can result in a miscarriage of justice. Jury directions can be particularly complex and lengthy in child sexual abuse trials.

Ms O'Hearn agrees with the Royal Commission recommendation to permit and require judges to inform the jury about children and the impact of child sexual abuse.

Juries should be educated about the effects and usual behaviour of complainants in child sexual abuse matters. Such issues as delay in telling, reasons for not telling, the fact that a child returned to an abusive environment are often used by the Defence to cast doubt on the complainants' credibility. It is often put to a complainant that if this really happened why did they return or go on that second outing etc. People on juries who are unaware of typical behaviour of a victim of childhood sexual abuse begin to interpret this behaviour from a perspective of ignorance. These directions need to be standard such as a judge reading some brief and factual explanation of these behaviours that has been prepared by someone experienced and qualified in this area so that it is not open to interpretation from one Judge to another. Same fact sheet could be given to jurors to take with them when deliberating. As well as having some standard direction to be distributed to jurors, judges also need to undertake some trauma informed training around the issues of the impact of childhood sexual abuse.