

Your Ref:
Our Ref: 784

26 October 2018

Ms Kathrine Morgan-Wicks
Secretary
Department of Justice

Email: secretary@justice.tas.gov.au

Dear Secretary

Re: Criminal Code and Related Legislation Amendment Bill 2018

Thank you for the opportunity to comment on the draft *Criminal Code and Related Legislation Amendment Bill 2018*.

I understand the draft Bill reflects the Tasmanian Government's commitment to introduce a Bill to implement a number of the recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission).

My comments, which are not intended to be exhaustive or to address technical drafting issues, are set out below. Generally speaking I support the policy intent of the proposed amendments, except in relation to those amendments which would introduce a new crime of failing to report a serious offence as set out below.

Amendments to the *Criminal Code Act 1924*

The draft Bill proposes a number of amendments to the *Criminal Code Act 1924* (Criminal Code), one of which is to introduce a new crime of failing to report a serious offence. Although I support the introduction of a failure to report offence, I have some concerns and/or queries about some of these proposed amendments. In my respectful opinion, the overall policy intent of the proposed failure to report offence is unclear. As drafted, the Bill raises a number of significant policy issues which require further consideration and explanation, particularly where the approach proposed differs from that recommended by the Royal Commission. I outline below some of my concerns with the Bill as drafted, noting that this is not an exhaustive list.

The Royal Commission recommended the introduction of a new criminal offence of failure to report which was targeted at child sexual abuse in an institutional context.



Specifically, the Royal Commission recommended¹ :

Recommendation 33

Each state and territory government should introduce legislation to create a criminal offence of failure to report targeted at child sexual abuse in an institutional context as follows:

- a. The failure to report offence should apply to any adult person who:
 - i. is an owner, manager, staff member or volunteer of a relevant institution – this includes persons in religious ministry and other officers or personnel of religious institutions
 - ii. otherwise requires a Working with Children Check clearance for the purposes of their role in the institution but it should not apply to individual foster carers or kinship carers.
- b. The failure to report offence should apply if the person fails to report to police in circumstances where they know, suspect, or should have suspected (on the basis that a reasonable person in their circumstances would have suspected and it was criminally negligent for the person not to suspect), that an adult associated with the institution was sexually abusing or had sexually abused a child.
- c. Relevant institutions should be defined to include institutions that operate facilities or provide services to children in circumstances where the children are in the care, supervision or control of the institution. Foster and kinship care services should be included (but not individual foster carers or kinship carers). Facilities and services provided by religious institutions, and any services or functions performed by persons in religious ministry, should be included.

However the draft Bill appears to outline an offence of failing to report which differs - in some respects, quite significantly - from the Royal Commission recommendation outlined above. These differences include the following:

- a. The Royal Commission's "failure to report" offence would apply in relation to the *sexual abuse of a child by an adult associated with that institution*. However, the draft Bill proposes that the reporting obligation would exist in relation to a range of serious crimes additional to sexual offences, regardless of the context in which the offence occurred; for example, it appears that the obligation would apply in relation to wounding or causing grievous bodily harm, manslaughter or murder (see the definition of "reportable offence" in proposed s105A (1) of the draft Bill).

¹ Royal Commission into Institutional Child Sexual Abuse – *Criminal Justice Report* page 50.



- b. The Royal Commission's failure to report offence would apply where the relevant adult fails to report to police in circumstances where they know, suspect, or should have suspected that an adult associated with the institution was sexually abusing or had sexually abused a child. The test proposed in the draft Bill is based on *a person forming a reasonable belief that a reportable offence has been committed and who fails, without reasonable excuse, to disclose that information to a police officer as soon as practicable*. In my opinion, this is a very "high bar" and would make it difficult for there to be a successful prosecution.
- c. Furthermore, the draft Bill proposes that "a reasonable excuse" which excuses a person from disclosing information would include that the person "*fears on reasonable grounds that, as a consequence of disclosing the information, he or she will be subject to intimidation or harassment*". This is in my opinion far too uncertain and broad in its potential application and may operate to compound the difficulty I raise in the preceding paragraph of obtaining a successful prosecution.
- d. The Royal Commission's "failure to report" offence proposed placing an *obligation on adults relevantly involved in the institutional care of or provision of service to children* [my emphasis]. However, the draft Bill appears to place the reporting obligation on everyone - including children². In other words, the draft Bill would appear to contemplate **a child** being charged with the crime of failing to disclose information relating to a reportable offence (clause 7 proposed s105A(2) which provides that "*a person is guilty of a crime.....*"). If I am correct in this conclusion, I cannot support this aspect of the draft Bill. I note that the Royal Commission was clear in its view that the failure to report offence should only apply to adults³:

However, we are satisfied that the failure to report offence should apply only to persons who are aged 18 or older. We recognise that people under 18 years of age may hold relevant roles in some institutions. However, we consider that the failure to report offence should only be capable of being committed by adults.

Imposition of the obligation on all adults to report that a relevant offence has been committed raises a range of significant policy considerations which, in my opinion, require further and more detailed consideration.

- e. The draft Bill appears to contemplate the possibility of **a victim** (including a child) of a reportable offence also being charged with a crime for not disclosing information relating to a reportable offence (clause 7 proposed s105A(2)). Again, if I am correct, I cannot support this aspect of the draft Bill.

² Noting of course the relevance of the age of criminal responsibility and the application of the *doli incapax* presumption.

³ Royal Commission Criminal Justice Report Parts III – VI page 210.



I support the proposal that a member of the clergy of any church or religious denomination is not entitled to refuse to disclose relevant information on the grounds that the information was communicated to that member of the clergy during a religious confession.

I can indicate my in principle support for the balance of the Criminal Code amendments.

Amendments to the *Children, Young Persons and Their Families Act 1997*

In principle support.

Amendments to the *Sentencing Act 1997*

In principle support.

Amendments to the *Police Offences Act 1935*

In principle support.

Amendments to the *Evidence (Children and Special Witnesses) Act 2001*

While I can indicate my support for the proposal to extend the definition of an affected child to include a child '*who is giving evidence, or is to give evidence in respect of a child sexual offence*', it is not clear to me why the proposed definition of 'child sexual offence' does not extend to include sexual offences committed in relation to a child such as an offence against section 133 of the Criminal Code (incest), or an offence against section 125A of the Criminal Code (maintaining a sexual relationship with a young person). I am therefore not entirely certain that the proposed definition is sufficiently broad and would welcome the opportunity to clarify this aspect of the draft Bill.

Conclusion

I congratulate the Tasmanian Government for its commitment to progress implementation of recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

I am available to clarify my comments above and I look forward to the next draft of this important Bill.

Yours sincerely

David Clements

Interim Commissioner for Children and Young People

cc Minister for Human Services

cc Attorney-General and Minister for Justice