

Queensland Family and Child Commission Submission

To: Royal Commission into Institutional Responses to Child Sexual Abuse

Date: 12 October 2016

Topic: Criminal Justice

Submission summary:

The Queensland Family and Child Commission (QFCC) is pleased to provide a submission to the Royal Commission into Institutional Responses to Child Sexual Abuse addressing key aspects of the consultation paper, *Criminal Justice*.

The QFCC would like to take this opportunity to recognise the extensive research and consultation undertaken by the Royal Commission and many other agencies across Australia addressing opportunities to improve the criminal justice system relating to child sexual abuse.

This submission will focus on providing the Royal Commission with information on initiatives currently underway in Queensland, and support related to specific key suggestions and considerations raised within the consultation paper.

Given the QFCC mandate is much broader than the terms of reference for the Royal Commission, our recommendations and advice have relevance supporting children who have experienced abuse.

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Extending the ‘grooming’ offence

The QFCC welcomes the Royal Commission’s investigations into grooming offences across Australia.

The QFCC welcomes the opportunity to clarify the provision of grooming offences across Australia. The term ‘grooming’ refers to activities undertaken by adults to gain the trust of a child in order to take sexual advantage. Grooming offences allow the courts to prosecute an offender, and therefore protect children from potential offences of harm or abuse, before an incident occurs. While all states and territories across Australia have offences in relation to grooming, these differ between the different jurisdictions.

Most jurisdictions across Australia have introduced grooming offences relating to communication between an adult and a child. In Queensland, it is an offence to engage in conduct, not just communication, related to grooming by an adult in relation to a person under, or believed to be under, 16 years of age.¹ The critical aspect of grooming as an offence is the intention of the offender to facilitate a sexual act, which distinguishes grooming from innocuous contact between an adult and a child.

Victoria has further extended its provisions against grooming, by making it an offence to groom a person who has care or supervision of, or authority over, a child.² This makes it a crime to groom an adult in order to gain access to a child. These measures – extending the definition of grooming to include conduct beyond communication, and providing for an offence of grooming adults who have responsibility for a child – are also supported by a growing body of evidence in the academic literature on child sexual abuse, which analyse the broader methods used by abusers to gain access to and the trust of children.³

The QFCC supports the Royal Commission’s research into this topic, and looks forward to its final recommendations, which may help to guide the states and territories toward a consistent legal definition of grooming.

¹ *Criminal Code Act 1999* (QLD), s218(b).

² *Crimes Act 1958* (VIC), s49(b).

³ For example, Bennett, N. & O’Donohue, W., 2014, ‘The construct of grooming in child sexual abuse: conceptual and measurement issues’, *Journal of Child Sexual Abuse*, 23(8); Craven, S., Brown, S., and Gilchrist, E., 2006, ‘Sexual grooming of children: Review of literature and theoretical considerations’, *Journal of Sexual Aggression*, 12(3); McAlinden, A., 2006, ‘Setting ‘em up: personal, familial and institutional grooming in the sexual abuse of children’, *Social & Legal Studies*, 15(3).

Third-party offences

The QFCC supports consideration of the option of third-party offences, along the lines of Victoria's 'failure to report' and 'failure to protect' laws. These should be specific, targeted laws, to avoid overburdening child protection systems with high numbers of unsubstantiated reports.

The QFCC recommends the Royal Commission consider the findings of the Queensland Child Protection Commission of Inquiry report, *Taking Responsibility: A Roadmap for Queensland Child Protection*, regarding measures to reduce over-reporting in child protection systems.

The discussion paper makes mention of a range of third-party offences, which are intended to encourage people to report a belief or suspicion of child abuse. These range from mandatory reporting laws, which are widespread within Australia and internationally, to universal 'failure to report' and 'failure to protect' laws in Victoria, and a 'concealing a serious indictable offence' law in New South Wales. While third-party offences and mandatory reporting encourage citizens to notify authorities about suspected abuse, they can also lead to over-reporting, which makes child protection systems less efficient, and can cause damage to families unnecessarily reported.⁴

In Queensland, the *Child Protection Act 1999* requires mandatory reporters to notify Child Safety if they form a reportable suspicion. A reportable suspicion is a reasonable suspicion that a child has suffered, is suffering or is at an unacceptable risk of significant harm caused by physical or sexual abuse, and may not have a parent able or willing to protect them from harm.

Mandatory reporters under section 13E of the *Child Protection Act 1999* in Queensland are:

- teachers
- doctors
- registered nurses
- police officers with child protection responsibilities
- a person performing a child advocate function under the *Public Guardian Act 2014*.

In addition, under section 13F of the *Child Protection Act 1999*, Child Safety employees and employees of licensed care services are mandated to report a reportable suspicion. Under this section, a reportable suspicion is a reasonable suspicion that a child has suffered, is suffering or is at an unacceptable risk of significant harm caused by physical or sexual abuse.

In December 2013, the Queensland Government accepted a recommendation from the Queensland Child Protection Commission of Inquiry report⁵ to amend section 22 to the *Child Protection Act 1999*, which previously offered protection from liability for a person acting 'honestly' who gave information about harm or the risk of harm. The *Child Protection Reform Amendment Act 2014* changed the criteria, to give protection to a person acting 'honestly and reasonably', as a measure to reduce over-reporting.⁶

⁴ Queensland Child Protection Commission of Inquiry, 2013, *Taking Responsibility: A Roadmap for Queensland Child Protection*, <http://www.childprotectioninquiry.qld.gov.au/publications>, accessed 11 October 2016, p. 68.

⁵ Queensland Government, 2013, *Queensland Government response to the Queensland Child Protection Commission of Inquiry final report*, <https://www.communities.qld.gov.au/resources/reform-renewal/gg-response-child-protection-inquiry.pdf>, accessed 11 October 2016.

⁶ Queensland Child Protection Commission of Inquiry, 2013, *Taking Responsibility: A Roadmap for Queensland Child Protection*, <http://www.childprotectioninquiry.qld.gov.au/publications>, accessed 11 October 2016, p. 95.

The QFCC recommends the Royal Commission consider the findings of the Queensland Child Protection Commission of Inquiry in relation to over-reporting, to ensure that any new provisions to encourage notification do not unnecessarily add to overburdened child protection systems.

The Queensland Government has also recently accepted recommendations from a report by the Queensland Law Reform Commission to change legislative mandatory reporting provisions to include key professionals in the early childhood education and care sector.⁷

Unlike some other states and territories, there is no penalty under the *Child Protection Act 1999* for not making a report. Some professionals may be breaching a code of conduct that apply to them, however this is not legislated.⁸

In Victoria, a 'failure to report' law applies universally, to all citizens. It requires a citizen, who has formed a reasonable belief that a sexual offence has been committed against a child in Victoria, to report information about that offence to police. This law was introduced in 2014, in response to the *Betrayal of Trust* report by Victoria's Parliamentary Family and Community Development Committee.⁹ As this law is a relatively recent development, it is difficult to assess its effectiveness at present.

Some international examples of third-party offence laws that may be worth considering. In the United States, a number of states have passed universal mandatory reporting laws. Academic studies have shown that these laws may or may not increase the number of reports made by citizens relating to child abuse, but many reports made by citizens will refer to neglect rather than significant harm.¹⁰

Such studies suggest broad universal mandatory reporting laws may not be an effective means to identify children who have suffered physical or sexual abuse. Yet by focussing specifically on sexual abuse, Victoria's 'failure to report' law may prove more effective than many of its international counterparts. The QFCC would welcome a full analysis of the operation and effectiveness of the Victorian law.

Victoria's 'failure to protect' law also acts as a targeted offence. It is aimed at people who work in positions of authority within organisations tasked with protecting children. These people will commit an offence if they know a child in the organisation's care is at risk of abuse committed by an adult associated with that organisation, if they have the power or responsibility to reduce or remove the

⁷ Queensland Government, 2016, *Queensland Government response to the Queensland Law Reform Commission report Review of Child Protection Mandatory Reporting Laws for the Early Childhood Education and Care Sector*, <https://www.communities.qld.gov.au/resources/childsafety/child-protection/queensland-government-response-to-queensland-law-reform-commission-report.pdf>, accessed 5 October 2016.

⁸ Queensland Law Reform Commission, 2015, *Review of Child Protection Mandatory Reporting Laws for the Early Childhood Education and Care Sector*, http://www qlrc.qld.gov.au/_data/assets/pdf_file/0012/458886/qlrc-report-73.pdf, accessed 5 October 2016.

⁹ Family and Community Development Committee, 2013, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non Government Organisations*, http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Report/Inquiry_into_Handling_of_Abuse_Volume_1_FINAL_web.pdf, accessed 5 October 2016.

¹⁰ Kruse, K. and DeLong-Hamilton, T., 2015, 'Comparing reports of suspected child maltreatment in states with and without Universal Mandated Reporting', *Children and Youth Services Review*, 50; Pelusci, V., Vandervort, F., Lewis, J., 2016, 'Does changing mandated reporting laws improve child maltreatment reporting in large U.S. counties?', *Children and Youth Services Review*, 66.

risk, but they negligently fail to do so.¹¹ This is also a targeted offence, and the QFCC would welcome more information about its effectiveness and its applicability to other jurisdictions.

¹¹<http://www.justice.vic.gov.au/home/safer+communities/protecting+children+and+families/failure+to+protect+offence>, accessed 7 October 2016.

Civil liability on institutions

The QFCC supports a wider discussion of the extension of civil liability on institutions responsible for protecting children, in addition to considering the option of new criminal offences.

The QFCC supports a wider discussion of the extension of civil liability on institutions responsible for protecting children. This could be in addition to criminal offences, like Victoria's 'failure to protect' laws. A combination of criminal and civil measures, supported by evidence from Australian and international best practice, could serve to ensure instances of harm are reported as early as possible, and victims of abuse can access compensation from an institution which failed in its responsibility for keeping them safe.

The Queensland Parliament is currently considering two Bills relating to civil litigation:

- Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016; and
- Limitation of Actions and Other Legislation (Institutional Child Sexual Abuse) Amendment Bill 2016.

These Bills remove civil statutory time limits for personal injury action arising from child abuse and recognised the retrospective effect of these amendments.¹² Such measures recognise the impact of barriers to reporting child sexual abuse and reflect that time should not impede a victim's ability to seek legal redress.¹³

The QFCC supports the Royal Commission exploring the opportunities to clarify civil liability laws further, to ensure victims of abuse can access compensation where appropriate, whether alone or in addition to institutional offences.

¹² Queensland Family and Child Commission 2016, Submission to the Legal Affairs and Community Safety Committee, *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016 and the Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016*, 7 October 2016

¹³ Queensland Family and Child Commission 2016, Letter to the Legal Affairs and Community Safety Committee, *Limitations of Actions Inquiry*, 15 September 2016

Reducing the burden on witnesses

The QFCC welcomes a discussion on extending special measures to reduce the burden on witnesses, particularly children and young people.

The QFCC supports discussion on improving measures to reduce the burden on witnesses giving evidence in cases of child abuse. The interests and wellbeing of children is of paramount importance in the child protection system, and it is vital that we extend this protection to children and adults who are giving evidence in court proceedings.

As noted in the discussion paper, Queensland currently offers special measures for special witnesses. Special witnesses are children under the age of 16 years, people with mental, intellectual or physical impairments, or people likely to suffer severe emotional trauma or intimidation. Special measures include screens, closed court, separate rooms, support persons, video recording, and a range of court directions. In sexual offence proceedings, a witness under 16 years of age can access further special measures, which include prerecording the entirety of the child's evidence, or giving evidence through audiovisual technology or using a screen.

The QFCC welcomes research into extending these special measures in order to ensure that witnesses can give evidence in ways which are least likely to cause harm or suffering. Ensuring consistent technical standards in audiovisual recording, such as maintaining listenable volume and unbroken videoconferencing links, would help the court use the evidence gained through special measures. The use of intermediaries is also worth exploring in more detail, as this may provide further opportunities to ensure clear and considerate communication between the court and the witness.