



## Criminal Justice report: Failure to report offence

### The failure to report offence

We recommend the introduction of a new criminal offence of failure to report targeted at child sexual abuse in an institutional context (*recommendation 33*). We recommend that the offence should apply:

- to any adult who owns or manages or who is a staff member or volunteer of a relevant institution, or who otherwise requires a Working with Children Check clearance for their role – but not to individual foster carers or kinship carers
- in relevant institutions, including institutions that operate facilities or provide services to children in circumstances where the children are in the care, supervision or control of the institution.

The offence would be committed if the person 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.

### How does it compare to existing offences?

Most child sexual abuse offences are aimed at perpetrators of abuse and they impose negative duties which require a person to refrain from doing an act.

The failure to report offence is aimed at third parties – that is, persons other than the perpetrator of the abuse. Also, it imposes a positive obligation to take action by making a report to police.

Imposing a positive obligation on third parties is warranted in relation to child sexual abuse because of the difficulties victims have in disclosing or reporting the abuse, the vulnerability of children, and the risk that perpetrators of child sexual abuse may have multiple victims and may continue to offend against particular victims over lengthy periods of time.

New South Wales and Victoria currently have offences which require persons to report to police.

- **New South Wales:** a person who *knows or believes* that a serious indictable offence has been committed and they have information which might be of material assistance to the police or prosecution must report the information to police or another authority. It is an offence to fail to do this without reasonable excuse. (*Crimes Act 1900 (NSW) s.316(1)*)
- **Victoria:** an adult who forms a *reasonable belief* that a sexual offence has been committed against a child by another adult must disclose that information to police, unless they have a reasonable excuse for not doing so. (*Crimes Act 1958 (Vic) s.327*)

We recommend a narrower offence targeted at institutions – rather than all persons or all adults, as under the existing New South Wales and Victorian offences. However, our recommended offence would require reporting in broader circumstances because it adopts a lower threshold for when reporting is required.



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### The test of 'know, suspect or should have suspected'

While the existing New South Wales and Victorian offences require *knowledge or belief* that abuse has been committed, we have recommended that the failure to report offence should apply if a relevant person at the institution *knows, suspects or should have suspected* that a child is being or has been sexually abused.

The standard of *should have suspected* requires a person to report where a reasonable person in the same circumstances as the person would have suspected. It allows for consideration of what the person knew and asks whether, with that knowledge and in those circumstances, a reasonable person would have suspected.

In line with the standard of criminal negligence, the offence would be committed on the basis that the person should have suspected only where there is a *great falling short* of what would be expected of a reasonable person.

We appreciate that including *should have suspected* imposes criminal liability for a failure to report a suspicion that the person did not form. However, we are satisfied that this is a necessary step to take, particularly in light of the evidence we have heard from a number of senior representatives of institutions effectively denying that they had any knowledge or had formed any belief or suspicion of abuse being committed in circumstances where their denials are very difficult to accept.

### Removing the exemption for religious confession

We recommend that the failure to report offence should apply in relation to information disclosed in or in connection with a religious confession, and that there should be no excuse, protection nor privilege in relation to religious confessions for the failure to report offence (*recommendation 35*).

We understand the significance of religious confession – in particular, the inviolability of the confessional seal to people of some faiths, particularly the Catholic faith. However, we heard evidence of a number of instances where disclosures of child sexual abuse were made in religious confession, by both victims and perpetrators. We are satisfied that confession is a forum where Catholic children have disclosed their sexual abuse and where clergy have disclosed their abusive behaviour in order to deal with their own guilt. We heard evidence that perpetrators who confessed to sexually abusing children went on to reoffend and seek forgiveness again.

We were told in submissions that any intrusion by the civil law on the practice of religious confession would undermine the principle of freedom of religion. In a civil society, it is fundamentally important that the right of a person to freely practise their religion in accordance with their beliefs is upheld.

However, that right is not absolute. This is recognised in article 18 of the *International Covenant on Civil and Political Rights* on the freedom of religion, which provides that the freedom to manifest one's religion or beliefs may be the subject of such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

The right to practise one's religious beliefs must accommodate civil society's obligation to provide for the safety of all and, in particular, children's safety from sexual abuse. Institutions directed to caring for and providing services for children, including religious institutions, must provide an environment where children are safe from sexual abuse. Reporting information relevant to child sexual abuse to the police is critical to ensuring the safety of children.

We have concluded that the importance of protecting children from child sexual abuse means that there should be no exemption from the failure to report offence for clergy in relation to information disclosed in or in connection with a religious confession.