

Committee on the Judiciary and Public Safety
Hearing on Bill 23-0095, the “Protecting Children Through Mandatory Reporting Amendment Act of 2019.”
Testimony of Naida Henao, NVRDC Strategic Advocacy Counsel
July 11, 2019

Thank you Chairman Allen, other Committee members, and staff for supporting this important issue. My name is Naida Henao and I am testifying today on behalf of the Network for Victim Recovery of DC (NVRDC) in my capacity as its Strategic Advocacy Counsel. NVRDC has provided holistic victim services, including free legal representation, advocacy, and case management to over 3,600 crime victims in the District, over 80% of whom are survivors of sexual assault. On behalf of those clients and all survivors of sexual abuse, we express our general support for the intent behind Bill 23-0095. While we all can agree on the importance of protecting DC’s children from sexual abuse, we also know that there are differing opinions on what should be balanced in consideration and furtherance of that goal. Today, NVRDC wishes to propose a unique approach to the Committee.

In nation-wide surveys on mandatory reporting,¹ especially as it relates to extending obligations to clergy members, NVRDC found that states generally chose one of two approaches: (1) to require mandatory reporting in all cases with the exception of information learned during

¹ Child Welfare Information Gateway, *Clergy as mandatory reporters of child abuse and neglect*, U.S. Department of Health and Human Services, Children's Bureau (2016), available at, <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/clergymandated/>.

religious or spiritual communications,² or (2) to require mandatory reporting with no exceptions provided.³⁴

To be candid, NVRDC likely shares the Committee’s struggle with balancing the importance of the safety and wellbeing of children against the religious beliefs of many DC residents. However, after careful consideration, the principles of offender accountability, survivor-defined justice and the safety of children guided our analysis to the proposal we make today. Rather than making a categorical exemption for clergy communications, NVRDC recommends that this Committee consider carving that exception in a manner that would only provide privilege to communications made by the victims of the crime and make the survivors the sole holders of that privilege.⁵ In other words, if a sexual abuse survivor discloses being abused to a clergy member, the survivor is in control of what happens with that information.⁶ The survivor can choose whether

² 33 states provide an exception for pastoral communications (also known as “penitent-clergy privilege.” Child Welfare Information Gateway. (2016). Clergy as mandatory reporters of child abuse and neglect. *See* Child Welfare Information Gateway, *Clergy as mandatory reporters of child abuse and neglect*, U.S. Department of Health and Human Services, Children’s Bureau (2016), available at, <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/clergymandated/>.

³ New Hampshire, North Carolina, Oklahoma, Rhode Island, Texas and West Virginia specifically deny the clergy-penitent privilege in child abuse cases. Child Welfare Information Gateway, *Clergy as mandatory reporters of child abuse and neglect*, U.S. Department of Health and Human Services, Children’s Bureau (2016), available at, <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/clergymandated/>.

⁴ While the courts of each state may offer more nuanced interpretations of these laws, it seems as though these categories typify the most common approaches.

⁵ Different jurisdictions have different laws about who holds the penitent-clergy privilege. Most jurisdictions allow for the penitent to hold the privilege, some allow for both parties to exercise control over it, few allow the clergy member alone to hold the privilege. However, to our knowledge, no state specifically reserves the privilege for the victim alone. The communicant owns the privilege in all but six states. *See* Christine P. Bartholomew, *Exorcising the Clergy Privilege*, 103 Va. L. Rev. 1015, 1031 (2017), http://www.virginialawreview.org/sites/virginialawreview.org/files/Bartholomew_Online.pdf

⁶ NVRDC acknowledges that extending this to survivors of all ages may not be practical due to a young child’s inability to grasp the legal implications of such a decision. For this reason, we suggest that applying our proposed amendment to survivors 16 years of age and older. *See* DC Code § 22-3002, 22-3008, 22-3009. However, given that our expertise is in adult survivors of sexual assault, we defer to youth advocates on what they feel is the most appropriate cut-off age.

or not to maintain the privilege, thereby allowing the survivor to determine whether the clergy member is permitted to report the abuse to the proper authorities or testify in court.

However, under NVRDC's proposed approach, this privilege would not be available for persons perpetrating, witnessing, or having knowledge of the abuse. As a service provider for sexual assault survivors in the District, NVRDC cannot support laws that would protect, and therefore enable, the sexual abuse of children. As has been expressed by advocates across the country,⁷ exempting spiritual communications from mandatory reporting is to provide an exception for religious institutions to operate outside the bounds of our government and our laws. This nation has seen the damage that comes from religious institutions using such power to hide and perpetuate abuse. As expressed by Angela Liddle, president and CEO of the Pennsylvania Family Support Alliance, offenders of sexual abuse cannot "simply be treated as sinners in need of repentance,"⁸ but as accused criminals that must face our justice system to account for their crimes. If this Committee chooses to uphold the Bill's religious exemptions to this law, the Committee, regardless of its intentions is ultimately sending the message that the protection of religious freedom takes precedent over the protection of children from sexual abuse.

In addition to our proposal for a narrow exemption for clergy privilege, NVRDC also respectfully requests that the Committee consider three additional recommendations. First, consider removing the proposed exception to mandatory reporting that applies to "personal

⁷ Letter from [Survivors Network of those Abused by Priests (SNAP)] and ECA [Ending Clergy Abuse(ECA)] to AG's Investigating Clergy Abuse, http://www.snapnetwork.org/letter_snap_eca_ags_investigating_clergy_abuse_jun19; Florida Sen. Lauren Book, *Clergy sexual abuse reporting rule does not go far enough to protect our children*, Miami Herald, Opinion (Jun. 11, 2019), available at, <https://www.miamiherald.com/opinion/op-ed/article231458058.html>.

⁸ Elaine S. Povich, *Clergy Child Abuse Reporting Laws Uneven, Leave Loopholes*, Pew Trusts: State Line (Jan. 24, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/01/24/clergy-child-abuse-reporting-laws-uneven-leave-loopholes>.

observations”⁹ made by clergy members during confession or penitential communications, which presumably would include a clergy member’s observations of physical injury or other signs of emotional distress in a child. The inclusion of “observations” as protected privileged materials is an unnecessary and uncommon¹⁰ expansion of the privilege that is not found in other jurisdictions. Second, NVRDC requests that the Committee amend Bill 23-0095 to require mandatory reporting for “sex trafficking of children.”¹¹ While the Bill currently lists child prostitution offenses,¹² it is important to correctly (and sensitively) classify the prohibited acts as a form of trafficking to avoid characterizing a child’s conduct of this nature as criminal or consensual.¹³ Third, we respectfully ask that the Committee consider expanding mandatory reporting requirements to the custodian of records at the various institutions listed in the Bill (e.g. daycares, doctors’ offices, schools, etc.). This expansion, as used in California,¹⁴ further increases the likelihood of institutional transparency and accountability.

⁹ Bill 23-0095, page 5 (“ministers shall not be required to report if the basis for their knowledge or belief is the result of a confession or penitential communication made by a penitent directly to the minister, or of any observations made by the minister in the course of that communication[.]”).

¹⁰ Christine P. Bartholomew, *Exorcising the Clergy Privilege*, 103 Va. L. Rev. 1015, 1038 (2017), available at: <https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1036&context=articles> (see Figure 6); Mary Harter Mitchell, *Must Clergy Tell--Child Abuse Reporting Requirements versus the Clergy Privilege and Free Exercise of Religion*, Minn. L. Rev. 723, 753 (1987), available at: <https://scholarship.law.umn.edu/mlr/1912> (“Although the statutes do not directly address the question whether such observations are privileged, most of them specifically protect confessions, communications, or admissions and thereby suggest by omission that there is no protection for noncommunicative information acquired in the course of discussion”); see also U.S. Department of Health and Human Services, Children’s Bureau, <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/clergymandated/>.

¹¹ DC Code § 22–1834, “Sex Trafficking of Children.”

¹² Bill 23-95, page 2, 3 (“An individual was a child [...] assisted, supported, caused, encouraged, commanded, enabled, induced, facilitated, or permitted to become a prostitute”).

¹³ Rights4Girls, *No Such Thing Campaign*, <http://rights4girls.org/wp-content/uploads/r4g/2018/01/No-Such-Thing-one-pager-Jan-2018.pdf>; Stella Dawson, *No such thing as a child prostitute, anti-trafficking groups say*, Reuters (Jan. 8 2015), available at, <https://www.reuters.com/article/us-trafficking-us-children/no-such-thing-as-a-child-prostitute-anti-trafficking-groups-say-idUSKBN0KH26920150108>; Malika Saada Saar, *There is no such thing as a child prostitute*, The Washington Post (Feb. 14, 2014), available at https://www.washingtonpost.com/opinions/there-is-no-such-thing-as-a-child-prostitute/2014/02/14/631ebd26-8ec7-11e3-b22712a45d109e03_story.html?utm_term=.6679486899b8.

¹⁴ Cal. Penal Code § 11166(d) and Cal. Penal Code § 11165.7(a)(32)-(33)(requiring “any custodian of records of a clergy member” to be included in mandatory reporting).

Conclusion

Similarly to other sex crimes, the percentage of child victims disclosing abuse is low--only 38%,¹⁵ meaning that the majority of child victims never report to the authorities. NVRDC supports survivor-defined justice and understands that there are reasons, many related to trauma and safety concerns,¹⁶ why victims do not report. However, when there is disclosure of abuse by perpetrators themselves, or other persons are aware of the abuse, mandatory reporting laws may be a viable way to connect those survivors with needed resources and prevent future occurrences of these crimes. For the aforementioned reasons, NVRDC requests that this Committee carefully consider the cost of allowing for a legal privilege that may ultimately grant protection to perpetrators of child sexual abuse at the cost of victims' safety and well-being.

Thank you very much for your time. I am happy to take any questions you may have.

¹⁵ Darkness to Light, *Child Sexual Abuse Statistics*, http://www.d2l.org/wp-content/uploads/2017/01/Statistics_6_Reporting.pdflast visited June 16, 2015).

¹⁶ See Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Female Victims of Sexual Violence, 1994-2010* (2013)(finding that 20% of victims who do not report to the police, choose not to do so out of fear of retaliation).