

New legislation to strengthen child sexual abuse laws

Factsheet: details

The NSW Government has introduced reforms to strengthen child sexual abuse laws based on the Royal Commission's Criminal Justice Report.

In its Criminal Justice Report, the Royal Commission into Institutional Responses to Child Sexual Abuse commended many of NSW's practices in combatting sexual offending against children but also highlighted areas where NSW's laws needed to be amended.

The NSW Government is committed to addressing these shortcomings and has reformed laws to better protect children and improve outcomes for survivors. These changes have been made with the passage of the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (the Amendment Act) in June 2018. Provisions of the Amendment Act to introduce new offences for failure to reduce or remove a risk of child abuse, and failure to report child abuse, as well as amendments to sentencing procedures for historical child sexual abuse, commence on 31 August 2018. The remainder of the Amendment Act will commence shortly.

The reform package at a glance

- Restructure of Division 10 of Part 3 of the *Crimes Act 1900* ('the Crimes Act')
- Simplified offences and modernised terminology by transforming the offence of 'indecent assault' into **sexual touching** and the offence of 'act of indecency' into **sexual act**
- New offence of **failing to report** child abuse to Police, commencing on 31 August 2018
- New offence of **failing to protect** a child from abuse, commencing on 31 August 2018
- New offence of **grooming a parent or carer** to access a child, and a broader offence of grooming children

- New offence of **sexual touching of a child aged 16 or 17** who is **under special care**
- Amended offence of **persistent child sexual abuse of a child**
- New limited **similar age defence** and new limited '**sexting**' **defence and exception**
- New rule that courts sentencing historical child sexual offences **must apply current sentencing patterns and practices** and take into account our understanding of the lifelong impact and trauma of child sexual abuse, with effect from 31 August 2018
- New rule so an offender's **good character is not a mitigating factor** at sentencing for historical child sexual abuse matters
- Retrospective **repeal of an old limitation period under s 78** that is preventing some victims from obtaining justice
- New provision that allows **the judge to instruct the jury** about differences in the complainant's account
- New provision to enable the prosecution **to rely on the offence with the lower maximum penalty** where **the alleged conduct could be subject to more than one offence** because there was a change in the age of the complainant over the period of the alleged conduct and/or there was legislative reform over the period.

Restructure of Division 10

Division 10 of Part 3 of the *Crimes Act* has been restructured to take into account the new offences of sexual touching and sexual act, and other amendments under the reform package. It will make the *Crimes Act* easier to navigate.

- The name of the Division will be updated to be 'Sexual offences against adults and children'.

- The Division has been separated into 15 Subdivisions, with offences relating to adults where lack of consent must be proven clearly separated from offences against children.
- The provisions relating to consent have been moved from s 61HA to s 61HE. The content of the provisions remains the same, with the exception that they will apply to sexual touching and sexual act offences, in addition to sexual intercourse.

New structure of Division 10

Subdivision 1

Definitions

Subdivision 2-4

Sexual offences against adults

Subdivisions 5-9

Sexual offences against children

Subdivisions 10-11

Sexual offences against victims with a cognitive impairment or under special care

Subdivisions 12-15

Incest, bestiality, miscellaneous offences and procedural provisions

Simplified offences and new terminology

The existing terminology of ‘indecent assault’ and ‘act of indecency’ makes these offences (and the difference between them) difficult to understand and apply.

The offences will be simplified and transformed into *sexual touching* (involving physical contact) and *sexual act* (where there is no physical contact).

All matters that were previously an indecent assault will be covered by sexual touching. Some matters that were previously an act of indecency offence will now be covered by sexual touching, where there is physical contact with the victim. Offences that were an act of indecency where there is no physical contact with the victim will be covered by the sexual act offence. Offences that involve forcing or inciting the victim to touch themselves will be covered by the sexual act offences, as there is no physical contact between the victim and another person.

There is no change to the offences of sexual assault or sexual intercourse with a child, or to the offence of sexual assault by forced self-manipulation.

The definitions of both ‘sexual touching’ (s 61HB) and ‘sexual act’ (s 61HC) include a reasonable person test. Touching or an act will be sexual in circumstances where a reasonable person would consider the touching or act to be sexual. There is an exception to these offences when the conduct is for genuine medical or hygienic purposes to ensure these situations are not covered.

Sexual touching of children

Currently the offence of indecent assault of a child (s 61M(2)) covers a single age category, i.e. children under 16 years. The offence of committing an act of indecency with or towards a child is divided into two age categories, i.e. a child under 10 years and a child under 16 years. Sexual intercourse offences relating to children are also divided into different age categories.

The new sexual touching offences relating to children will be divided into two age categories.

Sexual touching of a child under 10 (s 66DA) will carry a maximum penalty of 16 years’ imprisonment and a standard non-parole period of 8 years. Sexual touching of a child between 10 and 16 will carry a maximum penalty of 10 years’ imprisonment.

Sexual touching of a child under special care (s 73A)

Currently, the special care offence under s 73 of the *Crimes Act* only covers acts of sexual intercourse with a child under care. The new offence under s 73A will expand special care offences to also apply to non-penetrative sexual touching. The offence will protect children aged 16 and 17 years from inappropriate sexual contact with teachers, health professionals, authorised carers and others who have special care of the child.

The offence will be punishable by four years’ imprisonment where the victim is 16 years old and two years’ imprisonment where the victim is 17 years old.

Persistent child sexual abuse

The offence under s 66EA will be amended so that the offence applies to an adult who maintains an unlawful sexual relationship with a child under 16 years of age.

Maintaining an **unlawful sexual relationship** occurs when an adult engages in two or more unlawful sexual acts with a child over any period.

An unlawful sexual act is defined in s 66EA(15). It includes any act that constitutes, or could constitute if it were able to be properly particularised, any of the offences listed under the definition, and both current and historical forms of sexual offences.

Under the new form of the offence, modelled on the Queensland approach and consistent with the Royal Commission's recommendation, the prosecution is required to allege the particulars of the period of time over which the unlawful sexual relationship existed. The prosecution is not required to allege particulars of any unlawful act with the degree of particularity that would be necessary if the act were charged as a separate offence.

The **jury must be satisfied beyond reasonable doubt** that an **unlawful sexual relationship existed**. However, the jury is not required to be satisfied of the particulars of any unlawful sexual acts as it would be if the acts were charged separately, or reach a unanimous decision about which unlawful sexual acts constitute the unlawful sexual relationship.

The provisions requiring the approval of the Director of Public Prosecutions to commence proceedings and allowing reliance to be placed on acts outside NSW have been retained.

Section 66EA will apply to conduct that took place before s 66EA commences, so long as the conduct constituted an unlawful sexual act at the time.

The maximum penalty for the new form of the offence under s 66EA will be **life imprisonment**, increased from 25 years. This reflects the fact that sexual intercourse with a child under 10 (which carries a maximum sentence of life imprisonment) could be one or more of the unlawful sexual acts that constitute the unlawful sexual relationship for the purposes of the offence.

Broader grooming offences

The offence of grooming a child in s 66EB(3) has been broadened, so it covers any adult who offers a child a material or financial benefit with the intention of making it easier to access the child for unlawful sexual activity.

This broader offence will capture common grooming behaviour, like giving a child gifts or money, which can be used to gain a child's trust. The maximum penalty for the offence will remain the same, at 12 years' imprisonment if the child is under 14 years of age, and 10 years' imprisonment if the child is 14 or 15 years old.

A new offence of grooming an adult (in s 66EC) will cover situations where a person provides gifts or money to an adult with the intention of making it easier to access a child in the adult's care for unlawful sexual activity. The offence will be punishable by up to six years' imprisonment where the child is under 14 years of age, and five years' imprisonment where the child is 14 or 15 years old.

Failure to protect offence

The new section 43B of the Crimes Act commences on 31 August 2018. From this date, an adult working in an organisation that engages adult workers to engage in child-related work will commit an offence if he or she **knows** another adult working there poses a serious risk of abusing a child (under 18 years), he or she has the **power to reduce or remove the risk**, and he or she negligently **fails to do so**.

'Child-related work' is defined in the *Child Protection (Working with Children) Act 2012*. Organisations doing child-related work include, but are not limited to:

- Sporting clubs;
- Child care services;
- Education services; and
- Residential care services.

Note: an adult worker includes employees, contractors and volunteers.

The offence covers failures to protect against sexual or serious physical abuse and will be punishable by up to two years' imprisonment.

Failure to report offence

From 31 August 2018, all adults in NSW will be required to report information to Police if they **know, believe or reasonably ought to know** that a child (under 18 years of age) has been physically or sexually abused.

Failing to report information to Police without a reasonable excuse will be punishable by up to two years' imprisonment, or five years' imprisonment if the person has accepted a benefit in exchange for failing to report.

A person will not be guilty of the offence if he or she has a **reasonable excuse** for not reporting the information to Police*. Some examples of what constitutes a reasonable excuse include if:

- The offence has already been reported under mandatory reporting obligations, such as to the Child Protection Helpline or to the Ombudsman under the Reportable Conduct Scheme, or the person believes on reasonable grounds that another person has reported it;
- The person believes on reasonable grounds that the information is already known to Police;
- The victim is now an adult and doesn't want the offence reported;
- The person fears for his or her safety or another person's safety if he or she reports; or
- The information was obtained by the person when the person was under the age of 18 years.

The offence will apply to information about past offences but only where the knowledge or belief is formed after the commencement of this new offence.

The offence will apply to failing to report child abuse in place of the existing offence in s 316 (of concealing a serious indictable offence).

**The issue of whether the offence will apply when a person received the information from a religious confession is covered by uniform evidence law that applies in multiple Australian jurisdictions. Accordingly, a national approach is desirable. The NSW Government has referred the issue to the Council of Attorneys-General for consideration.*

New defences and exceptions

The new similar age defence, and 'sexting' exception and defence reflect current understanding about normal sexual development and experimentation amongst teenagers. The defences will ensure that consensual 'sexting' and sexual activity between peers of a similar age is not criminalised.

Similar age defence

The new similar age defence (s 80AG) will be a complete defence to sexual intercourse, sexual act and sexual touching offences, including special care offences, but will not apply to aggravated forms of these offences. For the defence to be available, the alleged victim must be at least 14 years of age, and the age difference between the alleged victim and the alleged offender cannot be more than two years.

'Sexting' defences

The new 'sexting' provisions relate to child abuse material (CAM) under Division 15A. CAM is defined in s 91FB. The provisions will cover situations where, for example, peers have taken, shared and kept nude photographs of themselves.

The exception (s 91HAA) will only apply to an offence of *possessing* CAM under s 91H if:

- The accused person is under the age of 18 years at the time of possession; and
- A reasonable person would consider the possession of the material acceptable having regard to certain matters listed in s 91HAA(b), such as the circumstances in which the CAM was created and the alleged offender's relationship with the person depicted in the CAM.

The defence (s 91HA(9)-(12)) will apply if:

- The CAM in the accused person's *possession* only depicts the accused; or
- The CAM *produced or disseminated*:
 - i. Only depicts the accused; and
 - ii. The production or dissemination occurred when the accused was under 18 years of age.

Where the CAM depicts a person other than the accused, it is taken to only depict the accused if, were the accused removed, it would no longer be CAM.

Uncertainty about time when sexual offence against a child occurred

Section 80AF will apply in proceedings for a sexual offence where the victim is a child. The provision will address the situation where the alleged offending spans over a period of time where there has been a change in the law and/or a change in the age of the child and, therefore, more than one offence may apply. The prosecution will be entitled to rely on the offence with the lesser maximum penalty for the entire period particularised.

- The offender is being sentenced for a sexual offence against a victim under 18 years of age and is not sentenced to full-time imprisonment or a full-time control order;
- The offender has not been previously convicted of any other Class 1 or Class 2 registrable offence; and
- The court is satisfied that the offender does not pose a risk to the lives or sexual safety of children (within the meaning of s 3H).

Other reforms in the Amendment Act

The Amendment Act also makes a number of other reforms to NSW's criminal laws, including:

- Removing unnecessary references to 'attempts' throughout Division 10 where reliance can be placed on the general attempt provision under s 344A of the Act; and
- Inserting new provisions into s 91G and s 91H so that the prosecution of a person under 18 years of age for an offence against those provisions cannot be commenced without the approval of the Director of Public Prosecutions.

Jury Directions

Section 293A will be inserted in the *Criminal Procedure Act 1986*. The provision allows the trial judge in proceedings for a prescribed sexual offence to provide educative information to the jury about differences in the complainant's account.

Changes to the *Crimes (Sentencing Procedure) Act 1999*

Two major changes have been made in relation to sentencing for child sexual offences:

- Section 21A(6) has been amended to ensure that the offender's good character cannot be taken into account in sentencing for historical offences as provided for under s 21A(5A); and
- From 31 August 2018, under s 25AA, a court imposing a sentence for a child sexual offence must sentence the offender in accordance with sentencing patterns and practices that exist at the time of sentencing, not those at the time of the offending. The court must also have regard to the trauma of sexual abuse on children.

Changes to the *Child Protection (Offenders Registration) Act 2000*

Under s 3C of the *Child Protection (Offenders Registration) Act 2000*, a court may order that a person who otherwise comes within the definition of a registrable person (s 3A) for the purpose of the Child Protection Register is not a registrable person. The discretion will be available where:

- The offender was under 18 years at the time of the offence;

What else is NSW doing?

The NSW Government has opted into a national redress scheme for survivors of institutional child sexual abuse.

A single national redress scheme was a key recommendation of the Royal Commission. NSW and Victoria were the first states to join the scheme, which will provide survivors with a redress payment of up to \$150,000, counselling and direct personal responses from institutions.

The NSW Government has also removed the limitation period for survivors to launch civil claims for compensation, and improved the Model Litigant Policy, which ensures a more compassionate approach to civil child abuse claims.

Support for survivors is available through:

- Lifeline 13 11 14
- 1800Respect 1800 737 732
- Blue Knot Foundation 1300 657 380
- MensLine Australia 1300 789 978