

New legislation to strengthen child sexual abuse laws

Factsheet for service providers

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 strengthened.

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

- New offence of **failing to report** child abuse to police, commencing 31 August 2018
- New offence of a person in an organisation **failing to protect** a child from abuse, commencing 31 August 2018
- Revised sentencing provisions, under which an offender is to be sentenced according to the patterns and practices in place at the date of sentencing, not those in place at the date of offending, with effect from 31 August 2018
- New offence of **grooming a parent or carer** to access a child, and a broader offence of grooming children

- Simplified offences and new terminology to make key offences easier to understand, transforming the offence of 'indecent assault' into '**sexual touching**' and transforming the offence of 'act of indecency' into '**sexual act**'
- New offence of **sexual touching of a child aged 16 or 17** who is **under special care**
- New limited **similar age defence**
- New limited '**sexting**' defence.

Failure to protect offence

An adult working in an organisation that employs 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 of age), he or she has the **power to reduce or remove the risk**, and he or she negligently **fails to do so**.

The offence will be punishable by up to two years' imprisonment.

'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.

Failure to report offence

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 an offence punishable by up to two years' imprisonment. The penalty will be 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 he or she was under the age of 18 years.

The offence will only apply where the knowledge or belief is formed after the commencement date.

**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.*

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.

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

Sexual touching of a child aged 16 or 17 years of age who is under special care

This offence will expand special care offences to also apply to non-penetrative sexual touching. Currently, special care offences only apply where an adult has sexual intercourse with a child under his or her care. The offence will protect children aged 16 and 17 years of age 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 of age and two years' imprisonment where the victim is 17 years of age.

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 defence 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.

The new 'sexting' provisions relate to child abuse material (CAM). The provisions will cover situations where, for example, peers have taken, shared and kept nude photographs of themselves and others

'Sexting' exception

The exception will only apply to an offence of *possessing* CAM 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.

'Sexting' defence

The defence will apply if:

- The CAM in the accused person's *possession* only depicts the accused; and
- 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.

Broader grooming offences

A broader grooming offence will cover 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 of age.

A new offence of grooming an adult 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 that adult's care for unlawful sexual activity. The offence will be punishable by up to six years' imprisonment.

Other reforms in the Amendment Act

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

- Reordering the provisions in the legislation so it is easier for legal practitioners to navigate;
- Retrospective **repeal of an old limitation period** that is preventing some survivors from seeking justice; and
- New rule that courts sentencing in historical matters **must apply current sentencing standards** and take into account current understanding of the lifelong impact and trauma of child sexual abuse.

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

For more information

Visit the website at
www.justice.nsw.gov.au