

Increased Mandatory Reporting Requirements in Victoria

Part 2

Victorians will soon experience a higher level of obligation in relation to the reporting the sexual abuse of children, as new legislation attempts to combat this devastating social issue.

Previously, the principal legislation in Victoria relating to mandatory reporting of child abuse was the *Children, Youth and Families Act 2005*. Under this legislation only a limited list of prescribed professionals were required to report 'children in need of protection'. These include a registered medical practitioner, a nurse, a teacher, a school principal, a member of the police force, a youth or social worker, a psychologist, a youth parole officer and a youth justice officer.ⁱ Notably, religious personnel were not 'mandated reporters' under the old legislation.

However, largely in response to community perception of institutional indifference to child sexual abuse, the Government has introduced the recent *Crimes Amendment (Protection of Children) Act 2014* ("CAPCA"). "The challenges of child sexual abuse and violence have been thrust into the public spotlight over recent years..." says Con Nottas, Partner of Hutchinson Legal. "A dramatic increase in community awareness of these previously "taboo" topics, backed up by significant media and community attention has definitely played a part in bringing about reform."

In 2012 the Victorian Government responded to community concerns, commissioning an inquiry into the issue. After conducting the inquiry, the Victorian Parliament's Family and Community Development Committee released the report, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisation*.ⁱⁱ Released in November 2013, the report included a number of recommendations that ultimately led to the drafting of the new legislation.

Mr. Nottas, said of the reform "The Victorian Government has recognised that Victorians have become increasingly concerned about the safety and welfare of our children and the need to actively protect them from the risk of sexual abuse."

The new legislation has introduced a raft of proposed measures protecting children from sexual abuse. Although predominantly aimed at persons of authority and responsibility within institutions, the reform also widens the obligations under previous legislation to include a community wide duty to report. The CAPCA was recently passed by Parliament and along with other minor changes, will add two new offences to the *Crimes Act 1958*.

Failure to Protect:

The Act will insert a new section 49C into the *Crimes Act* entitled "Failure by person in authority to protect child from sexual offence." The offence imposes a duty upon relevant persons within an organisation to remove or reduce the risk of a sexual offence against a child by an adult associated with the organisation if they are aware that there is a substantial risk that such an offence may occur. The relevant persons include those who hold positions of authority in an organisation that exercises care, supervision or authority over children, and who have the power or responsibility to reduce or remove the risk – this could include, but is not limited to, schools, churches and other religious organisations.

It is important that persons in positions of authority in these kinds of organisations take notice of the legislative changes and begin, if they haven't already, to implement strict policies and procedures to ensure the safety of children in their care. Failure to reduce or remove the risk could amount to a criminal offence that may attract a penalty of imprisonment for a maximum term of up to 5 years.



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The legislation recognises that the protection of children not only involves protecting those who have been abused from further abuse but also preventing abuse from occurring in the first place. Therefore, the Act will clearly set out that it is not necessary to prove that a sexual offence has been committed in order for a relevant person to have negligently failed to reduce or remove that risk.

Failure to Disclose:

The other major addition will be the insertion of a new section 327 into the *Crimes Act 1958* entitled 'Failure to disclose sexual offence committed against child under the age of 16 years'. The section requires any adult aware of information that leads them to reasonably believe that a sexual offence has been committed against a child under the age of 16 years by an adult to report the matter to police as soon as practicable.

Although the requirement applies to all adults, there are some exceptions, such as where the person reasonably fears for the safety of any person (other than the offender). However, failure to disclose the information because of concern for the interests of an organisation or the person believed to have committed or been involved in committing the sexual offence is not a reasonable excuse.

Section 327 also excludes certain "privileged" or "confidential communication" from the disclosure requirements, including religious confessions by the offender and statements by the victim to a counsellor or medical practitioner. However, these definitions (Part 3.10 *Evidence Act 2008* and s 32B *Evidence (Miscellaneous Provisions) Act 1958*, respectively) are very narrow. The exemption for confidential communication to counsellors is intended only to ensure that victims are not discouraged from disclosing information where such disclosure is part of the child's treatment or support mechanism.

Where an adult receives information from the victim about a sexual offence and the victim is 16 years or older at the time of providing the information, if the victim requests that the information not be disclosed, the adult is generally not required to report the matter (although some exceptions would apply, such as where the victim has an intellectual disability and does not have the capacity to make an informed decision about whether or not the information should be disclosed).

Organisations and individuals alike should ensure they are clear about what information they hold and whether or not they are required to report it to police, particularly in regards to information or knowledge dating back up to 16 years ago. The new legislation dictates that an individual who has knowledge or reasonable belief that a sexual offence has been committed against a child and that child is still under the age of 16 at the time the provisions commence operation, the individual will have a duty to disclose the information to police as soon as practicable regardless of whether the knowledge was received or the belief was formed before or after commencement of the new section 327.

However, whilst the legislation may require an individual to report information they have held for years, that same individual will not face any penalty for having previously failed to disclose that information to police prior to the commencement of the new legislation. In short, a person will not face a penalty if they report an offence promptly after the commencement of the relevant sections, regardless of how long he or she had known about an offence in the past.



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Protection of Those Who Report

The Act also creates a new section 330 of the *Crimes Act* which provides that if any person makes a disclosure to police pursuant to Section 327, it is an offence for another individual to reveal to any other person (other than police or the Secretary of the Department of Human Services) the name of or any other information that could lead to identification of the person who made the disclosure.

This is designed to protect the person who makes the disclosure from being identified. Furthermore, if a person makes a disclosure to police in good faith in compliance with the proposed sections above, they would be protected by statute against claims of unprofessional conduct or a breach of professional ethics. They would also be protected from any liability arising from the disclosure.

Although the legislation has been passed by both Houses of Parliament and given Royal Assent they are yet to become operative. The new offences may come into force at any time, and will become operative on 1 July 2015 at the latest, if not before.

In the meantime, says Mr. Nottas, "every organisation should ensure that it has a child protection policy that complies with legislation and guides it in fulfilling all legal obligations. Failure to uphold these new requirements could result in serious criminal prosecution."

For more guidance on how your organisation can comply with its reporting obligations contact Hutchinson Legal on 03 9870 9870.

Mr Nottas is a Partner at Hutchinson Legal. Hutchinson Legal is a Ringwood based law firm committed to providing quality legal services to their clients. Hutchinson Legal is committed to finding the best possible legal solution for their clients and providing the highest level of client support, communication and service from the initial consultation right through until the matter is resolved.

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The information provided in this article is General in nature and should not be considered Personal Advice. You should seek advice before making insurance decisions

We kindly thank Hutchinson Legal for providing this article for the benefit of our clients.



ⁱ *Children, Youth and Families Act 2005*, s182.

ⁱⁱ Family and Community Development Committee (FCDC) (2013) *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government*

Organisations, November, Melbourne, Parliament of Victoria, viewed 16 July 2014, <http://www.parliament.vic.gov.au/fcdc/inquiries/article/1788>.



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