

BETRAYAL OF TRUST: FACT SHEET

Failure to Protect: a new criminal offence to protect children from sexual abuse

In response to the Betrayal of Trust report the Victorian Government has strengthened laws to protect our children from sexual abuse and exposure to sexual offenders. This is in recognition of the shared community responsibility to protect children from abuse and to provide a safe environment for children to develop, learn and play.

A new criminal offence for failing to protect a child under the age of 16 from a risk of sexual abuse commenced on 1 July 2015.

The offence applies where there is a substantial risk that a child under the age of 16 under the care, supervision or authority of a relevant organisation will become a victim of a sexual offence committed by an adult associated with that organisation. A person in a position of authority in the organisation will commit the offence if they know of the risk of abuse and have the power or responsibility to reduce or remove the risk, but negligently fail to do so.

This offence encourages organisations to actively manage the risks of sexual offences being committed against children in their care to protect them from harm.

1. What is the offence of failing to protect a child from a sexual offence?

The offence provides that a person who:

- a. by reason of the position he or she occupies within a relevant organisation, has the power or responsibility to reduce or remove a substantial risk that a relevant child will become the victim of a sexual offence committed by a person of or over the age of 18 years who is associated with the relevant organisation; and
- b. knows that there is a substantial risk that the person will commit a sexual offence against a relevant child –

must not negligently fail to reduce or remove that risk.

2. What is a 'relevant organisation'?

The offence applies to people in authority within a *relevant organisation*. A relevant organisation is one that exercises care, supervision or authority over children, whether as part of its primary function or otherwise.

Relevant organisations include, but are not limited to:

- churches
- religious bodies
- education and care services (such as childcare centres, family day care services, kindergartens and outside school hours care services)
- licensed children's services such as occasional care services
- schools and other educational institutions

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- organisations that provide accommodation to children and young people, such as boarding schools and student hostels
- out-of-home care services
- community service organisations providing services for children
- hospitals and other health services
- government agencies or departments providing services for children
- municipal councils (for example those that deliver Maternal and Child Health services)
- sporting groups
- youth organisations
- charities and benevolent organisations providing services for children.

3. Who is a person in authority in an organisation?

A person in authority is someone whose, position within a relevant organisation, means that they have the power or responsibility to reduce or remove a substantial risk that a child under the age of 16 years, who is under their care, supervision or authority, may become the victim of sexual abuse committed by an adult associated with the organisation.

Whether someone is considered to be a person in authority will depend on the degree of supervision, power or responsibility the person has to remove or reduce the substantial risk posed by an adult associated with the organisation. People in authority will usually have the ability to make management level decisions, such as assigning and directing work, ensuring compliance with the organisation's volunteer policy and other operational arrangements.

Examples of people in authority may include residential house supervisors, CEOs, board, council or committee members, school principals, service managers and religious leaders. It may also apply to people with less formal involvement in an organisation. For example, a volunteer parent coach responsible for the supervision of a junior sports team may be a person in authority, even if their role is informal or limited.

4. Who is a relevant child?

A person in authority will commit an offence if he or she negligently fails to reduce or remove a substantial risk to a relevant child, or children. A 'relevant' child is a child under the age of 16 who is, or may come, under the care, supervision or authority of a relevant organisation.

The child does not need to be identified. This means that the risk is not that a particular child will become the victim of sexual abuse. Instead, the substantial risk could be posed to any child who is, or who may be in the future, under the organisation's care, supervision or authority.

5. Who is a 'person associated with' an organisation?

The offence requires a person in authority to act if they know that a person associated with their organisation poses a substantial risk to a relevant child. This may include a person who is an officer, office holder, employee, manager, owner, volunteer, contractor or agent of the organisation. This definition does not include a person who solely receive services from the organisation.

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For example, a parent of a child who is involved with receiving child protection services or who has a child in out-of-home care, and who may pose a risk of sexual abuse to a child, would not be considered to be 'associated with' the Department of Health and Human Services (DHHS) under the offence. Similarly, parents of children attending a school or service will generally only be 'associated with the organisation' if they are also engaged as a volunteer, for example to assist in the classroom or attend an excursion or camp. The offence relates to risk of sexual abuse by adults. Children under the age of 18 who pose a risk of sexually abusing other children are not covered by this offence.

6. What is a 'substantial risk'?

The offence requires a person in authority to reduce or remove a known 'substantial' risk that an adult associated with the organisation may commit a sexual offence against a relevant child. It does not make it a criminal offence to fail to address every possible risk that a sexual offence may be committed against a child.

There are a number of factors that may assist in determining whether a risk is a substantial risk. These include:

- the likelihood or probability that the child will become the victim of a sexual offence
- the nature of the relationship between a child and the adult who may pose a risk to the child
- the background of the adult who may pose a risk to the child, including any past or alleged misconduct
- any vulnerabilities particular to a child which may increase the likelihood that they may become the victim of a sexual offence
- any other relevant fact which may indicate a substantial risk of a sexual offence being committed against a child.

When determining whether a risk is substantial, the courts will consider a variety of factors, which may include those listed above. The courts will consider all the facts and circumstances of the case objectively, and will consider whether a reasonable person would have judged the risk of a sexual offence being committed against the child abuse as substantial. It is not necessary to prove that a sexual offence, such as indecent assault or rape, was committed.

7. When does a person 'know' there is a risk of child sexual abuse?

This offence requires a person in authority to act if they *know* that there is a substantial risk that a child may become the victim of a sexual offence. A person is generally taken to know that there is a risk if he or she is aware that it exists or will exist in the ordinary course of events. This is more than merely holding a tentative belief or suspicion.

However, it is expected that a person in authority will take steps to follow up on a suspicion or belief that children in their organisation were at risk of harm.

8. When does a person negligently fail to reduce or remove a substantial risk?

Under the offence, a person is taken to have negligently failed to reduce or remove a substantial risk if that failure involves a great falling short of the standard of care that a reasonable person would exercise in the same circumstances. The offence does not require a person in authority to eliminate all possible risks of child sexual abuse.

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For example, a person in authority who knows that an adult associated with the organisation poses a substantial risk to children, and moves that adult from one location in an organisation to another location where they still have contact with children, is likely to be committing the offence. Another example is where a person in authority employs someone in a role that involves contact with children, when the person in authority knows the employee left their last job because of allegations of sexually inappropriate behaviour involving children.

9. Does this criminalise mistakes made by adults who are caring for or working to protect children?

This law is aimed at protecting children and compelling those in authority to remove or reduce known substantial risks that children may become victims of sexual abuse.

As previously noted, the offence applies to a person in authority whose failure to protect a child from sexual abuse involves a great falling short of the standard of care that a reasonable person would exercise in the same circumstances.

The offence is unlikely to be committed where a person takes reasonable steps to protect a child from the risk of sexual abuse, for example, where an allegation is reported to appropriate authorities and the individual is removed from any role involving unsupervised contact with children pending an investigation.

10. What should a person in authority do to reduce or remove the risk of child sexual abuse posed by an adult associated with their organisation?

A person in authority in an organisation must take reasonable steps to reduce or remove a known substantial risk that an adult associated with their organisation will commit a sexual offence against a child.

For example:

- A current employee who is known to pose a risk of sexual abuse to children in the organisation should be immediately removed from contact with children and reported to appropriate authorities and investigated.
- A community member who is known to pose a risk of sexual abuse to children should not be allowed to volunteer in a role that involves direct contact with children at the organisation.
- A parent who is known to pose a risk of sexual abuse to children in a school should not be allowed to attend overnight school camps as a parent helper.

If you want to report a child in **immediate** risk or danger of a sexual offence please call Triple Zero (000).

11. How can you improve child safety in your organisation, and remove or reduce the risk of harm?

There are a range of measures that organisations can adopt to improve child safety and reduce the risk of harm to children. The child-safe standards provide a framework to assist in ensuring child safety in the organisation. Under the standards, organisations are expected to have policies, procedures and systems in place to protect children from abuse, including appropriate pre-employment screening arrangements and systems for reporting and responding to allegations of abuse.

Organisations are encouraged to create and implement risk management strategies suitable to their environment to reduce the risk of harm to children. These may include:

- Adopting a child safety policy that outlines a commitment to child safety and provides guidance on how to create a child safe environment.
- Enforcing a code of conduct that sets clear expectations about appropriate behaviour towards children and obligations for reporting a breach of the code.

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- Ensuring all new staff and volunteers are appropriately screened, including reference checks, before commencing employment with the organisation (in addition to Working with Children Checks or Victorian Institute of Teaching registration).
- Providing training to staff in prevention, identification and response to child safety risks, including reporting requirements and procedures

The Reportable Conduct Scheme commenced implementation on 1 July 2017 and requires organisations that have a high level of responsibility for children to report allegations of child abuse and how they have been investigated and managed centrally to the Commission for Children and Young People.

For further information and guidance on how organisations may reduce the risk of harm, refer to Appendix A and Appendix B of this fact sheet.

12. Does the offence criminalise members of the public who fail to protect a child from a risk of sexual abuse?

No — the failure to protect offence applies to people in authority within an organisation that exercises care, supervision or authority over children. It does not apply to parents or other individuals not connected to these organisations. However, as noted above, a parent who volunteers in an organisation (for example as a sporting coach) may be in a position of authority and subject to the offence.

A separate '[failure to disclose](#)' offence applies to any adult who fails to report a reasonable belief to Victoria Police that a sexual offence has been committed against a child under the age of 16, unless there is a reasonable excuse for not doing so.

13. How does the failure to protect offence interact with mandatory reporting obligations?

This offence is in addition to existing mandatory reporting obligations for specified staff under the *Children, Youth and Families Act 2005*. It applies to any person in authority within a relevant organisation, not just mandatory reporters.

14. What is the penalty for failing to protect a child?

The maximum penalty is five years' imprisonment.

15. How do I contact Victoria Police?

If you want to report a child in **immediate** risk or danger of a sexual offence please call Triple Zero (000).

If the report is not in relation to an immediate risk, contact your [local police station](#) or call Crime Stoppers on 1800 333 000.

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Appendix A – Reportable conduct scheme, Working with Children Checks and organisational duty of care

Reportable conduct scheme

A Victorian reportable conduct scheme will commence operation on 1 July 2017, and it will be administered by the Commission for Children and Young People.

The scheme will require organisations that have a high level of responsibility for children to report allegations of child abuse and child related misconduct to the Commission for Children and Young People. Certain community service organisations funded by the Department of Health and Human Services will be covered by the scheme.

Central oversight of how organisations respond to allegations of reportable conduct will help embed a child-safe culture across all organisations.

Further information about the reportable conduct scheme, including a full list of organisations covered by the scheme, is available on the websites of the:

- [Commission for Children and Young People](#)
- [Department of Health and Human Services](#)

Working with Children Checks

The [Working with Children Check](#) is one of the safety measures organisations need to put in place to protect children from sexual and physical harm.

A list of additional resources can be found on the website for Commission for Children and Young People, including:

- [tip sheets on what to look for in a child safe organisation](#)
- [a guide to creating child safe organisations](#)

Organisational duty of care

A new 'organisational duty of care to prevent child abuse' applies to any organisation that exercises care, supervision or authority over children in Victoria.

This duty of care creates a presumption of liability, such that certain organisations will need to prove that they took "reasonable precautions" to prevent child abuse if they are defending a legal claim.

The duty does not change existing duties that schools and teachers already have, but instead reinforces the importance of ensuring that schools take reasonable precautions to minimise the risk of child abuse.

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Appendix B – Child safe standards resources

The child safe standards (the standards) are compulsory minimum requirements to create and maintain a child safe environment and better protect children from the risks of abuse and apply to **organisations** that provide services for children.

The standards aim to drive cultural change in organisations so that protecting children from abuse is embedded in everyday thinking and practice.

The Commission for Children and Young People is responsible for monitoring organisations' compliance with the standards and has [a range of resources to help organisations](#) available on its website.

Community service organisations

Further information about the Standards for Community service organisations can be found on the Department of Health and Human Services website:

- [Child safe standards resources](#)
- [Child safe standards information in the Service Agreement Information Kit for Funded Organisations](#)

Departmentally-funded organisations are still required to comply with all terms and conditions set out in their service and funding agreements, including compliance with the Human Services standards, as relevant, and safety screening checks such as:

- obtaining [Working with Children Checks](#) for relevant staff
- undertaking a Disqualified Carer Check on all prospective out-of-home carers
- registering a carer on the Carer Register
- revoking a carer's registration when ceasing to be a carer.

Further information on [safety screening](#) is available on the Department of Health and Human Services website.

Schools, Early Childhood Services, VET and Higher Education and other Education Providers

Further information about the child safe standards for schools, early childhood services and other education providers is available from the websites of the [Department of Education and Training](#) and the [Victorian Registration and Qualifications Authority](#)

Fact sheets and other resources to assist approved providers and education and care services [comply with the requirements of the National Quality Framework](#) are also available from the Department of Education and Training.

As for community service organisations, departmentally-funded organisations education providers are still required to comply with all terms and conditions set out in their service and funding agreements.