

Amendments to the *Crimes Act 1958* (Vic)

Offences relating to a child under 16 years

Grooming for sexual conduct with a child
Failure by a person in authority to protect a child from sexual offence
Failure to disclose sexual offence committed against a child

Earlier in 2014, the Victorian Parliament amended the *Crimes Act 1958* (Vic) relating to the offences of grooming, failing to report and failing to protect a child under 16 years.

The amendments are in operation from:

- 1 July 2014 (ss.49B, 49C), and
- 27 October 2014 (ss.327, 328, 329 and 330).

The amendments in operation from 27 October 2014 were intended to commence operation from 1 July 2015, however, on 7 October 2014, the Victorian Parliament announced the significantly earlier commencement date.

Access to legislation (<http://www.legislation.vic.gov.au/>):

- *Crimes Act 1958* (Vic)
- *Crimes Amendment (Grooming) Act 2014* (Vic)
- *Crimes Amendment (Protection of Children) Act 2014* (Vic)

OFFENCE

GROOMING FOR SEXUAL CONDUCT WITH A CHILD UNDER THE AGE OF 16 YEARS

New section 49B inserted into the *Crimes Act 1958* (Vic) (in operation from 1 July 2014) from *Crimes Amendment (Grooming) Act 2014* (Vic)

49B Grooming for sexual conduct with child under the age of 16 years

(1) In this section—

communication includes an electronic communication;

sexual offence means—

(a) an offence under Subdivision (8A), (8B), (8C), (8D), (8E) or (8EAA) of Division 1 of Part I or under any corresponding previous enactment; or

(b) an attempt to commit an offence referred to in paragraph (a); or

(c) an assault with intent to commit an offence referred to in paragraph (a).

(2) A person of or over the age of 18 years must not communicate, by words or conduct, with a child under the age of 16 years or a person under whose care, supervision or authority the child is (whether or not a response is made to the communication) with the intention of facilitating the child's engagement in or involvement in a sexual offence with that person or another person who is of or over the age of 18 years.

Penalty: Level 5 imprisonment (10 years maximum).

(3) For the purposes of subsection (2) and without limiting that subsection, a person who has a child under his or her care, supervision or authority includes—

(a) the child's parent or step-parent; and

(b) the child's teacher; and

(c) the child's legal guardian; and

(d) a religious official or spiritual leader (however described and including a lay member) who provides religious care or religious instruction to the child; and

(e) the child's employer; and

(f) the child's youth worker; and

(g) the child's sports coach; and

(h) an out of home carer (within the meaning of section 74 of the **Children, Youth and Families Act 2005**) in relation to the child; and

(i) a person employed in, or providing services in, a remand centre, youth residential centre, youth justice centre or prison who is acting in the course of his or her duty in respect of the child.

(4) For the avoidance of doubt, a person does not intend to facilitate a child's engagement in or involvement in a sexual offence with that person or another person where, if the child were to engage in or be involved in the sexual activity intended, that person or the other person would not commit a sexual offence because he or she would have a defence or satisfy an exception to that sexual offence.

(5) It is immaterial that some or all of the communication constituting an offence against subsection (2) occurred outside Victoria, so long as the child was in Victoria at the time at which that communication occurred.

(6) It is immaterial that the child was outside Victoria at the time at which some or all of the communication constituting an offence against subsection (2) occurred, so long as the

accused was in Victoria at the time of sending the communication or engaging in the conduct that constitutes the communication.

(7) It is immaterial that both the accused and the child were outside Victoria at the time at which some or all of the communication constituting an offence against subsection (2) occurred, so long as the intended sexual offence would occur in Victoria.

OFFENCE

FAILURE BY A PERSON IN AUTHORITY TO PROTECT A CHILD (under 16 years of age) FROM SEXUAL OFFENCE

New section 49C inserted into the *Crimes Act 1958* (in operation from 27 October 2014) from the *Crimes Amendment (Protection of Children) Act 2014*

49C Failure by person in authority to protect child from sexual offence

(1) In this section—

person associated with an organisation includes but is not limited to a person who is an officer, office holder, employee, manager, owner, volunteer, contractor or agent of the organisation but does not include a person solely because the person receives services from the organisation;

relevant child means a child (whether identifiable or not) under the age of 16 years who is, or may come, under the care, supervision or authority of a relevant organisation;

relevant organisation means—

(a) an organisation that exercises care, supervision or authority over children, whether as part of its primary functions or otherwise, and includes but is not limited to—

(i) a church; and

(ii) a religious body; and

(iii) a school; and

(iv) an education and care service within the meaning of the **Education and Care Services National Law (Victoria)**; and

(v) a children's service within the meaning of the **Children's Services Act 1996**; and

(vi) an out of home care service within the meaning of the **Children, Youth and Families Act 2005**; and

(vii) a hospital; and

(viii) a government department; and

(ix) a government agency; and

(x) a municipal council; and

(xi) a public sector body; and

(xii) a sporting group; and

(xiii) a youth organisation; and

(xiv) a charity or benevolent organisation; or

(b) an organisation that, in accordance with an agreement or arrangement with an organisation referred to in paragraph (a), is required or permitted to engage in activities associated with the care, supervision or authority over children exercised by the organisation referred to in paragraph (a);

sexual offence means—

- (a) an offence under Subdivision (8A), (8B), (8C), (8D), (8E) or (8EAA) of Division 1 of Part I or under any corresponding previous enactment; or
- (b) an attempt to commit an offence referred to in paragraph (a); or
- (c) an assault with intent to commit an offence referred to in paragraph (a).

(2) 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 that person will commit a sexual offence against a relevant child—must not negligently fail to reduce or remove that risk.

Penalty: Level 6 imprisonment (5 years maximum).

(3) For the purposes of subsection (2), a person negligently fails to reduce or remove a risk if that failure involves a great falling short of the standard of care that a reasonable person would exercise in the circumstances.

(4) For the avoidance of doubt, in a prosecution for an offence against subsection (2), it is not necessary to prove that a sexual offence has been committed.

(5) It is immaterial that some or all of the circumstances constituting an offence against subsection (2) occurred outside Victoria, so long as the relevant child was in Victoria at the time at which the substantial risk referred to in subsection (2)(b) occurred.

(6) It is immaterial that both the accused and the child were outside Victoria at the time at which some or all of the circumstances constituting an offence against subsection (2) occurred, so long as the sexual offence was at risk of occurring in Victoria.

OFFENCE

FAILURE TO DISCLOSE A SEXUAL OFFENCE COMMITTED AGAINST A CHILD (under 16 years of age)

New sections 327, 328, 329 and 330 inserted into the *Crimes Act 1958* (in operation from 27 October 2014) from the *Crimes Amendment (Protection of Children) Act 2014*

327 Failure to disclose sexual offence committed against child under the age of 16 years

(1) In this section—

interests includes reputation, legal liability and financial status;

organisation includes a body corporate or an unincorporated body or association, whether the body or association—

(a) is based in or outside Australia; or

(b) is part of a larger organisation;

sexual offence means—

(a) an offence under Subdivision (8A), (8B), (8C), (8D), (8E) or (8EAA) of Division 1 of Part I or under any corresponding previous enactment; or

(b) an attempt to commit an offence referred to in paragraph (a); or

(c) an assault with intent to commit an offence referred to in paragraph (a).

(2) Subject to subsections (5) and (7), a person of or over the age of 18 years (whether in Victoria or elsewhere) who has information that leads the person to form a reasonable belief that a sexual offence has been committed in Victoria against a child under the age of 16 years by another person of or over the age of 18 years must disclose that information to a member of the police force of Victoria as soon as it is practicable to do so, unless the person has a reasonable excuse for not doing so.

Penalty: 3 years imprisonment.

(3) For the purposes of subsection (2) and without limiting that subsection, a person has a reasonable excuse for failing to comply with that subsection if—

(a) the person fears on reasonable grounds for the safety of any person (other than the person reasonably believed to have committed, or to have been involved in, the sexual offence) were the person to disclose the information to police (irrespective of whether the fear arises because of the fact of disclosure or the information disclosed) and the failure to disclose the information to police is a reasonable response in the circumstances; or

(b) the person believes on reasonable grounds that the information has already been disclosed to police by another person and the first-mentioned person has no further information.

Example

A person may believe on reasonable grounds that the information has already been disclosed to police by another person if the person has made a report disclosing all of the information in his or her possession in compliance with mandatory reporting obligations under the **Children, Youth and Families Act 2005**.

(4) For the purposes of subsection (2) and without limiting that subsection, a person does not have a reasonable excuse for failing to comply with that subsection only because the person is concerned for the perceived interests of—

(a) the person reasonably believed to have committed, or to have been involved in, the sexual offence; or

(b) any organisation.

(5) A person does not contravene subsection (2) if—

(a) the information forming the basis of the person's belief that a sexual offence has been committed came from the victim of the alleged offence, whether directly or indirectly; and

(b) the victim was of or over the age of 16 years at the time of providing that information to any person; and

(c) the victim requested that the information not be disclosed.

(6) Subsection (5) does not apply if—

(a) at the time of providing the information, the victim of the alleged sexual offence—
(i) has an intellectual disability (within the meaning of the **Disability Act 2006**); and
(ii) does not have the capacity to make an informed decision about whether or not the information should be disclosed; and

(b) the person to whom the information is provided is aware, or ought reasonably to have been aware, of those facts.

(7) A person does not contravene subsection (2) if—

(a) the person comes into possession of the information referred to in subsection (2) when a child; or

(b) the information referred to in subsection (2) would be privileged under Part 3.10 of Chapter 3 of the **Evidence Act 2008**; or

(c) the information referred to in subsection (2) is a confidential communication within the meaning of section 32B of the **Evidence (Miscellaneous Provisions) Act 1958**; or

(d) the person comes into possession of the information referred to in subsection (2) solely through the public domain or forms the belief referred to in subsection (2) solely from information in the public domain; or

(e) the person is a member of the police force acting in the course of his or her duty in respect of the victim of the alleged sexual offence; or

(f) the victim of the alleged sexual offence has attained the age of 16 years before the commencement of section 4 of the **Crimes Amendment (Protection of Children) Act 2014**.

328 Protection of those who disclose under section 327

A disclosure made under section 327(2) in good faith—

(a) does not for any purpose constitute unprofessional conduct or a breach of professional ethics on the part of the person by whom it is made; and

(b) does not make the person by whom it is made subject to any liability in respect of it; and

(c) without limiting paragraphs (a) and (b), does not constitute a contravention of—

(i) section 141 of the **Health Services Act 1988**; or

(ii) section 120A of the **Mental Health Act 1986**.

329 Evidence and legal proceedings

(1) In any legal proceeding evidence may be given as to the information contained in a disclosure under section 327(2).

(2) However in a legal proceeding evidence that a particular matter is contained in information disclosed under section 327(2) or evidence that identifies the person who made that disclosure, or is likely to lead to the identification of that person is only admissible in the proceeding if—

(a) the court or tribunal grants leave for the evidence to be given; or

(b) the person who made the disclosure consents in writing to the admission of that evidence.

(3) A witness appearing in a legal proceeding must not be asked and, if asked, is entitled to refuse to answer—

(a) any question to which the answer would or might identify the person who made a disclosure under section 327(2) or would or might lead to the identification of that person; or

(b) any question as to whether a particular matter is contained in information disclosed under section 327(2)—

unless the court or tribunal grants leave for the question to be asked or the person who made the disclosure has consented in writing to the question being asked.

(4) A court or tribunal may only grant leave under subsection (2) or (3) if it is satisfied that the interests of justice require that the evidence be given.

330 Confidentiality

(1) If a disclosure is made under section 327(2), a person (other than the person who made it or a person acting with the written consent of the person who made it) must not disclose to any person other than a member of the police force or the Secretary (within the meaning of the **Children, Youth and Families Act 2005**) or any other person to the extent reasonably required for law enforcement purposes—

(a) the name of the person who made the disclosure; or

(b) any information that is likely to lead to the identification of the person who made the disclosure.

Penalty: Level 8 imprisonment (1 year maximum).

(2) Subsection (1) does not apply to a disclosure made to a court or tribunal in accordance with section 329.

(3) Part 4.4 of Chapter 4 of the **Children, Youth and Families Act 2005** applies to information disclosed under subsection (1) to the Secretary (within the meaning of that Act) as if it were a report under Division 2 of that Part."

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