

Legislation update for government agencies

New reporting obligations and offence provisions for child sex offences

21 July 2021

New offences which impose obligations to report and protect children from child sexual offences have recently come into effect.

In September 2020, Parliament passed the *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2020 (the Act)* following recommendations made in the Criminal Justice Report of the Royal Commission into Institutional Responses to Child Sexual Abuse.

The Act inserted several new offences into the Criminal Code, including the following:

- a) Failing to protect child from a child sexual offence (**Failure to Protect**);¹ and
- b) Failing to report belief of child sexual offence committed in relation to child (**Failure to Report**).²

The creation of these new offences means that certain persons (including government employees) have important positive obligations to reduce or remove the risk of a child being sexually offended against, and further, to report child sexual offences to the police – even when there is only a ‘belief’ that an offence has been committed.

The new offences came into effect on 5 July 2021.

Failure to Protect (s 229BB)

The Failure to Protect offence makes it an offence for an accountable person who has the requisite knowledge to ‘*wilfully or negligently fail to reduce the risk*’ that another adult (the alleged offender) will commit a child sexual offence.

Who does the offence apply to?

An ‘accountable person’ is broadly defined as an adult who is associated with an institution. An adult associated with an institution includes owners, managers, employees, volunteers as well as adults engaged in the delivery of a service to a child who is under the care, supervision or control of the institution.³

¹ *Criminal Code*, s 229BB.

² *Criminal Code*, s 229BC.

³ *Criminal Code*, s 229BB(3).

An 'institution' is broadly defined as an entity that provides services to children or operates a facility for, or engages in activities with, children under the entity's care, supervision or control.⁴ This specifically includes government agencies.⁵

When does the obligation to reduce or remove the risk arise?

The obligation to reduce or remove the risk of a child sexual offence only arises if certain circumstances are met.⁶ This includes that the accountable person has knowledge of a 'significant risk' that the alleged offender will commit a child sexual offence.⁷

The accountable person may form the requisite knowledge having regard to the circumstances of the case, including the following factors:

- a) the likelihood that the child will become the victim of a sexual offence;
- b) the nature of the relationship between the child and the alleged offender; and
- c) the background of the alleged offender (including any previous allegations of similar misconduct).

When does an accountable person wilfully or negligently fail to reduce or remove a risk?

The offence requires the accountable person to have wilfully or negligently failed to reduce or remove the risk.

Therefore, the accountable person's failure to take appropriate action must either be wilful or fall short of the standard of care that an ordinary, reasonable person in the situation of the accountable person would adopt.

What action should be taken to reduce or remove the risk?

The appropriate action that should be taken to reduce the risk that the alleged offender will commit a child sexual offence will depend on the circumstances (but may include contacting the police and/or directing that the alleged offender cease contact with the relevant child).

What is the penalty?

The Failure to Protect offence is a crime with a maximum penalty of five years imprisonment.

⁴ *Criminal Code*, s 229BB(4).

⁵ Examples of institutions— schools, government agencies, religious organisations, hospitals, child care centres, licensed residential, facilities, sporting clubs, youth organisations.

⁶ Those circumstances are prescribed in s 292BB(1) as being:

- (a) the person knows there is a significant risk that another adult (the alleged offender) will commit a child sexual offence in relation to a child;
- b) the alleged offender is associated with an institution or is a regulated volunteer;
- c) the child is under the care, supervision or control of an institution;
- d) the child is either under 16 years or a person with an impairment of the mind; and
- e) the person has the power or responsibility to reduce or remove the risk.

⁷ Knowledge of a significant risk involves a standard somewhere between a trivial risk and a risk likely to materialise.

Failure to Report (s 229BC)

The Failure to Report offence makes it an offence for an adult to fail to disclose information to a police officer as soon as reasonably practicable after gaining information that would cause the adult to believe that a child sexual offence is or has been committed against a child (without reasonable excuse).

Who does the offence apply to?

In contrast to the Failure to Protect offence, the Failure to Report offence applies to all adults, irrespective of the person's employment.

When does the obligation to report a child sexual offence to police arise?

The obligation to report a child sexual offence only arises if the following circumstances are met:

- a) the adult gains information that causes the adult to believe on reasonable grounds, or ought reasonably to cause the adult to believe, that a child sexual offence is being or has been committed against a child by another adult; and
- b) at the relevant time, the child is or was under 16 years or a person with an impairment of the mind.

Therefore, the offence requires the adult to have a "reasonable belief" that a child sexual offence is or has been committed.

A reasonable belief is a belief that a reasonable person would form in the same position and with the same information. For example, an adult may form a reasonable belief if a child disclosed that they have been sexually abused or the child displays signs of sexual abuse.

Reporting of offences that occurred in the past

The obligation to report information about child sexual offences only applies to information gained on or after 5 July 2021 (when the offence came into effect). This means the person does have to report information gained before 5 July.

However, the obligation still applies to any information gained after 5 July which relates to abuse that occurred before the commencement date.

What is a reasonable excuse for not reporting a child sexual offence to police?

The offence is subject to the absence of a reasonable excuse. However, the onus of raising a reasonable excuse rests with the adult.⁸ The provision contains a non-exhaustive list of reasonable excuses, some of which include:

- a) the adult believes on reasonable grounds that the information has already been disclosed to a police officer; or
- b) the adult has already reported the information under other provisions, or believes on reasonable grounds that another person has done or will do so;⁹ or

⁸ See the Explanatory Notes for the Bill (p. 16).

⁹ *Child Protection Act 1999*, chapter 2, part 1AA; *Education (General Provisions) Act 2006*, chapter 12, part 10; the *Youth Justice Act 1992*, part 8 or 9.

- c) the adult gains the information after the child becomes an adult (the alleged victim), and the adult reasonably believes the alleged victim does not want the information to be disclosed to a police officer.¹⁰

What is the penalty?

The Failure to Report offence is a misdemeanour with a maximum penalty of three years imprisonment.

Religious confession

In relation to both the new offences, it does not matter that the accountable person/adult gained the relevant knowledge/information during, or in connection with, a religious confession.

What are the implications of the new offences for government agencies?

The new offences apply broadly to accountable persons at institutions (such as employees of government agencies) and to adults generally. Therefore, government agencies should:

- a) ensure that all staff, volunteers and contractors are aware of their obligations in relation to protecting children and reporting child sexual offences to police; and
- b) review existing child protection policies and make any necessary amendments to ensure that they reflect the new obligations in relation to protecting children and reporting child sexual offences to police.

The new offences have also raised some concerns about the unintended consequences arising from the mandatory reporting requirements. In particular, the Queensland Law Society has asked the Attorney-General for clarification on how the positive reporting obligations will affect legal professional privilege and a legal practitioner's obligations of confidentiality to their client.¹¹

For further inquiries or assistance, please contact either Glen Cranny, Managing Director, on 3361 0240 or gcranny@gnl.com.au, or Harold Rafter, Lawyer, on 3361 0266 or hrafter@gnl.com.au.

¹⁰ *Criminal Code*, s 229BC(4).

¹¹ <https://www.qsproctor.com.au/2021/07/qls-seeks-clarity-on-new-criminal-code-offences/>.