



New South Wales

Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are as follows:

- (a) to create an offence of failing to reduce or remove the risk of child abuse,
- (b) to replace offences of indecent assault and act of indecency with offences of sexual touching and sexual act and to create a new offence of sexually touching where the alleged victim is a young person under the special care of the accused person,
- (c) to increase the penalty for persistent sexual abuse of a child to imprisonment for life and to provide that the offence occurs if there is an unlawful sexual relationship between the accused person and a child,
- (d) to introduce a new offence of grooming an adult to procure a child under his or her care for an unlawful sexual activity and to extend an existing offence of grooming a child,
- (e) to permit the prosecution of a child sexual offence where the exact date on which it occurred is uncertain and a change in the law or the age of the child makes it difficult to determine which offence to prosecute,
- (f) to require proceedings against children or young persons for offences relating to the production, dissemination or possession of child abuse material to be approved by the Director of Public Prosecutions and to provide exceptions and defences to those offences where the material depicts only the accused person or where the accused person is under the age of 18 years and a reasonable person would consider that its possession by the accused person is acceptable,
- (g) to create an offence of failing to report a child abuse offence,

- (h) to give retrospective effect to the repeal of a provision that prevents the prosecution of certain historical child abuse offences,
- (i) to permit a court when sentencing a person for a sexual offence that was committed when the person was a child to order that the person is not to be treated as a registrable person in respect of that offence,
- (j) to provide that in sentencing for historical child sexual offences the sentencing is to be in accordance with current sentencing patterns and practices,
- (k) to permit a Judge in a trial for a prescribed sexual offence to inform the jury as to certain matters relating to the reasons why there may be differences in a complainant's account,
- (l) to make a number of statute law amendments.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Crimes Act 1900 No 40

Schedule 1 [1] creates a new offence if a person, who carries out work for an organisation that employs an adult worker in child-related work, knows that there is a serious risk that the adult worker will commit a child abuse offence and negligently fails to reduce or remove that risk, but only if the person, by reason of the person's position in the organisation, has the power or responsibility to reduce or remove that risk. The maximum penalty is imprisonment for 2 years.

Schedule 1 [6] moves existing definitions of *sexual intercourse* and *cognitive impairment* into separate sections, moves an existing provision relating to consent to sexual intercourse into a separate section and extends the application of that provision to sexual touching and sexual acts and sets out what is meant by sexual touching and sexual acts. *Sexual touching* means a person touching another person in circumstances where a reasonable person would consider the touching to be sexual. *Sexual act* means any act (other than sexual touching) carried out in circumstances where a reasonable person would consider the act to be sexual. Anything done for genuine medical or hygienic purposes is not sexual touching or a sexual act. **Schedule 1 [4] and [48]** make consequential amendments.

Schedule 1 [7] omits existing offences relating to indecent assault and acts of indecency and replaces these offences with offences of sexual touching and sexual act. The replacement of existing offences against children is done by **Schedule 1 [16]**. An offence of sexual touching occurs if a person (the *alleged offender*), without the consent of another person (the *alleged victim*) and knowing that the alleged victim does not consent, sexually touches the alleged victim or incites the alleged victim to sexually touch the alleged offender or a third person or incites a third person to sexually touch the alleged victim. The maximum penalty is 5 years imprisonment. However, if certain circumstances of aggravation exist the maximum penalty is 7 years imprisonment. An offence of sexual act occurs if the alleged offender, without the consent of the alleged victim and knowing that the alleged victim does not consent, carries out a sexual act with or towards the alleged victim or incites the alleged victim to carry out a sexual act with or towards the alleged offender or a third person or incites a third person to carry out a sexual act with or towards the alleged victim. The maximum penalty is 18 months imprisonment. However, if certain circumstances of aggravation exist the maximum penalty is 3 years imprisonment. **Schedule 1 [16]** inserts similar sexual touching and sexual act offences where the alleged victim is a child. Sexual touching where the alleged victim is a child under 10 years of age has a maximum penalty of 16 years imprisonment. If the alleged victim is a child between 10 and 16 years of age, the maximum penalty is 10 years imprisonment. A sexual act where the alleged victim is a child under 10 years of age has a maximum penalty of 7 years imprisonment. If the alleged victim is a child between 10 and 16 years of age, the maximum penalty is 2 years

imprisonment (unless certain circumstances of aggravation exist, in which case the maximum penalty is 5 years imprisonment). If the alleged offender knows that the sexual act is being filmed for the production of child abuse material, the maximum penalty is 10 years imprisonment regardless of the age of the child. **Schedule 1 [17]** provides that a verdict of sexual touching of a child is an alternative verdict for a charge of sexual intercourse with a child. **Schedule 1 [5], [26], [39]–[45] and [47]** make consequential amendments.

Schedule 1 [34] creates a new sexual touching offence where the alleged victim is a young person between 16 and 18 years of age who is under the special care of the alleged offender such as where the alleged offender is an authority figure to the alleged victim. For example, a parent, teacher, custodial officer or health professional or where the alleged offender provides religious, sporting, musical or other instruction to the alleged victim. The maximum penalty for the new offence is 4 years imprisonment if the young person is between 16 and 17 years of age or 2 years imprisonment if the young person is between 17 and 18 years of age.

Schedule 1 [20] replaces an offence of persistent sexual abuse of a child with a new offence having a maximum penalty of life imprisonment. In order to convict a person for the offence the jury must be satisfied beyond reasonable doubt that an unlawful sexual relationship existed between the person and a child. An unlawful sexual relationship occurs if a person above the age of 18 years engages in 2 or more unlawful sexual acts with or towards a child over any period. The proposed offence extends to relationships occurring wholly or partly before the commencement of the proposed offence.

Schedule 1 [22] provides that the offence of an adult grooming a child for unlawful sexual activity will also occur if the adult provides the child with a financial or other material benefit with the intention of making it easier to procure the child for unlawful sexual activity with that adult or any other person.

Schedule 1 [23] creates a new offence where an adult provides another person with a financial or other material benefit with the intention of making it easier to procure a child under the authority of that other person for unlawful sexual activity with that adult or any other person. The maximum penalty is 6 years imprisonment if the child is under the age of 14 years or 5 years imprisonment in any other case. A prosecution for the new offence may only be instituted by or with the approval of the Director of Public Prosecutions.

Schedule 1 [46] provides for the prosecution of a sexual offence against a child in circumstances where the exact date on which the offending conduct occurred is uncertain. If the conduct occurred in a period and the alleged victim was a child for the whole of that period and at no time during that period was the alleged conduct not a sexual offence and because of a change in the law or the age of the child during that period the conduct would have constituted more than one sexual offence, then the person may be convicted for whichever of those offences has the lowest penalty regardless of when during that period the conduct actually occurred. **Schedule 1 [46]** also provides for a defence against prosecution for certain child sexual offences if the alleged victim is of or above the age of 14 years and the age difference between the alleged victim and the accused person is no more than 2 years.

Schedule 1 [50] and [51] provide that proceedings against persons under the age of 18 years for offences relating to the production, dissemination or possession of child abuse material may only be instituted by or with the approval of the Director of Public Prosecutions. **Schedule 1 [49]** makes a consequential amendment.

Schedule 1 [52] provides an exception to an offence of possessing child abuse material if the possession of the material occurs when the accused person was under the age of 18 years and a reasonable person would consider the possession of the material by the accused person as acceptable.

Schedule 1 [53] provides a defence to an offence of possessing child abuse material if the only person depicted in the material is the accused person. A defence is also provided to offences of producing or disseminating child abuse material if the production or dissemination occurs when

the accused person is under the age of 18 years and the only person depicted in the material is the accused person.

Schedule 1 [57] creates a new concealment offence if an adult knows, believes or reasonably ought to know that a child abuse offence has been committed and that he or she has information which might be of material assistance in securing the apprehension, prosecution or conviction of the offender and the person fails without reasonable excuse to bring the information to the attention of a member of the NSW Police Force. The maximum penalty for the offence is imprisonment for 2 years. Another offence is also created if a person solicits, accepts or agrees to accept any benefit in consideration for committing the new concealment offence. The maximum penalty for this other offence is imprisonment for 5 years. **Schedule 1 [54]–[56]** make consequential amendments.

Schedule 1 [58] inserts a Schedule of former sexual offences to avoid the need to repeat this information in a number of provisions of the *Crimes Act 1900*.

Schedule 1 [61] inserts a number of savings and transitional provisions consequent on the amendments made by the proposed Act. It also gives retrospective effect to the repeal of section 78 of the *Crimes Act 1900* by the *Criminal Legislation (Amendment) Act 1992*. That section placed a 12 month time limit on the prosecution of certain child sexual offences. While that section was repealed in 1992 it still worked to prevent prosecution for offences occurring before its repeal. That section is now repealed as if it were never enacted and so it is no longer a bar to any prosecution. **Schedule 1 [60]** makes a consequential amendment.

Schedule 1 [8], [25] and [31] omit redundant offences relating to attempts as section 344A of the *Crimes Act 1900* already deals with these. **Schedule 1 [26]** includes consequential amendments.

Schedule 1 [12]–[15], [28], [29] and [32] update provisions to ensure that the terms child (a person under the age of 16 years) and young person (a person of or above the age of 16 years and under 18 years) are used where appropriate.

Schedule 1 [2], [3], [9]–[11], [18], [19], [21], [24], [27], [33], [35]–[38] and [59] rename Division 10 of Part 3 of the *Crimes Act 1900* and restructure that Division by introducing Subdivisions dealing with different matters and move certain provisions, in order to make the Division easier to follow.

Schedule 1 [30] updates a reference to foster parent with authorised carer (the current terminology). **Schedule 1 [27]** includes a definition of *authorised carer*.

Schedule 2 Amendment of Child Protection (Offenders Registration) Act 2000 No 42

Schedule 2 [6] permits a court, that sentences a person for a sexual offence committed by the person when the person was a child, to make an order declaring that the person is not to be treated as a registrable person in respect of that offence (the *Child Protection (Offenders Registration) Act 2000* provides for certain obligations to be placed on registrable persons, including reporting obligations). The court may make an order only if the victim of the offence was under 18 years of age, the offender has not been convicted of certain other offences, the court does not impose a sentence of full-time detention or a control order in respect of the offence and the court is satisfied that the person does not pose a risk to the lives or sexual safety of children. **Schedule 2 [7] and [8]** make consequential amendments.

Schedule 2 [1]–[5] make amendments consequential on the amendments made to the *Crimes Act 1900* by Schedule 1.

Schedule 2 [9] inserts savings and transitional provisions consequent on the other amendments in Schedule 2.

Schedule 3 Amendment of Crimes (Sentencing Procedure) Act 1999 No 92

A court, in determining the appropriate sentence for the breach of a child sexual offence provision, is required to not take into account as a mitigating factor the good character or lack of previous convictions of the offender if it is satisfied that the factor concerned was of assistance to the offender in the commission of the offence. **Schedule 3 [4] and [5]** extend the definition of *child sexual offence* for the purposes of that requirement to include certain repealed child sexual offences.

Schedule 3 [6] sets out a number of additional requirements with respect to sentencing for sexual offences committed against children. These are that the sentence must be in accordance with the sentencing patterns and practices at the time of sentencing, not at the time of the offence, and the court must also have regard to the trauma of sexual abuse on children as understood at the time of sentencing. However, the standard non-parole period (if any) for the offence is the standard non-parole period that applied at the time of the offence, not at the time of sentencing.

Schedule 3 [1]–[3] and [7]–[10] make amendments consequential on the amendments made to the *Crimes Act 1900* by Schedule 1.

Schedule 4 Amendment of Criminal Procedure Act 1986 No 209

Schedule 4 [10] permits the Judge in a trial of a person for a prescribed sexual offence to inform the jury as to certain matters relating to the reasons why there may be differences in a complainant's account. The requirement arises if the Judge considers that there is evidence that suggests a difference in the complainant's account that may be relevant to the complainant's truthfulness or reliability.

Schedule 4 [1]–[9] and [11]–[19] make amendments consequential on the amendments made to the *Crimes Act 1900* by Schedule 1.

Schedule 5 Amendments to other legislation

Schedule 5 amends other legislation consequential on the amendments made to the *Crimes Act 1900* by Schedule 1.