

BETRAYAL OF TRUST: FACT SHEET

The new 'failure to disclose' offence

Fact sheet for Department of Human Services staff and funded organisations

A new offence for failure to disclose child sexual abuse came into force on 27 October 2014. This offence has been introduced as part of the *Crimes Amendment (Protection of Children) Act 2014*, in response to a recommendation from the report of the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations, *Betrayal of Trust*.

The new offence requires that any adult (aged 18 and over) who holds a reasonable belief that a sexual offence has been committed in Victoria by an adult against a child (aged under 16) disclose that information to police (unless they have a reasonable excuse).

This fact sheet is intended to clarify reporting obligations for Department of Human Services (DHS) staff and funded organisations. It should be read together with the general fact sheet on the new 'failure to disclose' offence available on the [Department of Justice website](#).

1. Does the new offence change my obligations in relation to reporting to police?

The simple rule is: if you have a reasonable belief that a sexual offence has been committed by an adult against a child in Victoria, you must report that belief to Victoria Police.

In many circumstances, DHS staff and funded organisations are already required to report sexual offences against a child to police, for example under *Protecting Children: Protocol between Department of Human Services – Child Protection and Victoria Police* (Child Protection Protocol); the *Critical Client Incident Management Instruction*; and the *Instruction on Responding to Allegations of Physical or Sexual Assault* (RAPSA).¹

¹Under *Protecting Children: Protocol between Department of Human Services – Child Protection and Victoria Police* (2012) and existing procedures, child protection practitioners already have an obligation to notify police where they receive a report relating to, or a disclosure of, child sexual abuse. Under the *Critical Client Incident Management Instruction* (technical update, 2014), service providers are required to report to police alleged criminal acts that occur 'during service delivery'. The new offence means that all service providers are now required to report to police all incidents involving a sexual offence against a child, regardless of whether the offence occurred during service delivery.

The *Instruction on Responding to Allegations of Physical or Sexual Assault* (technical update, 2014) (RAPSA) supplements the *Critical Client Incident Management Instruction* by providing additional instructions where the incident involves physical or sexual assault. Under the RAPSA, there is a mandatory requirement to report sexual assaults against certain clients to police. This includes assaults where the client is a statutory child protection client; resides in out-of-home care; resides in a residential service directly managed by DHS; or is in receipt of a funded disability service.

Any allegations of criminal conduct by DHS employees and contractors must also be promptly reported to Victoria Police under the *Reporting Employee Criminal Conduct Policy* and the protocol between Victoria Police and the department, *Reporting Employee Criminal Conduct*.

BETRAYAL OF TRUST: FACT SHEET

The new offence applies to all adults, not just professionals who work with children. This means that **all DHS staff and funded organisations are now required to report to police where they hold a reasonable belief that a sexual offence has been committed by an adult against a child in Victoria**. This obligation applies regardless of:

- the type of service the child is receiving
- whether the offence occurred during service delivery or
- whether the child is a client of the department or funded organisation at all.

2. Does the new offence change my reporting obligations under the Critical Client Incident Management Instruction?

The reporting requirements of the *Critical Client Incident Management Instruction* remain unchanged. The new offence does not change the reporting obligations of DHS and funded organisation staff in relation to reporting of critical incidents to **DHS**.

If the allegation involves a client and meets the criteria of the *Critical Client Incident Management Instruction*, DHS and funded organisation staff are still required to report the incident to DHS using the Client Incident Report form.

The new offence does change the reporting requirements of some DHS and funded organisation staff in relation to reporting information about sexual abuse of children to **police** (see Question 1).

3. What if I have already reported the abuse to DHS (Child Protection)?

It is a reasonable excuse for not reporting under the offence if the person believes on reasonable grounds that the information has already been disclosed to police by another person and they have no further information. This ensures that:

- people are not required to report the same information to different organisations; and
- multiple people within the same organisation are not required to report the same information to police.

Consequential amendments to the *Children, Youth and Families Act 2005* (CYF Act) reinforce DHS' current practice of passing on all allegations of child sexual assault to police. **It is therefore a reasonable excuse for not reporting to police if a person reasonably believes a report has been made to DHS (Child Protection) and they have no additional information.**

Child Protection intake workers may advise people reporting child sexual abuse that they have fulfilled their obligations under the offence by reporting to DHS (Child Protection).

Similarly, if a person working in an organisation reasonably believes that another person within the organisation has reported the information to police, then the first person will have a reasonable excuse for not reporting to police. It is important for organisations to have procedures in place for reporting allegations of sexual abuse to police which clearly set out staff members' roles and responsibilities. This will minimise duplication of reporting and ensure staff are protected from liability under the offence if they do not report.

BETRAYAL OF TRUST: FACT SHEET

4. How does the new offence differ from mandatory reporting?

The new offence differs from mandatory reporting under the CYF Act because:

- it applies to all adults, not just certain professionals who work with children;
- it is limited to the reporting of sexual abuse. Mandatory reporters are required to report suspected physical and sexual abuse;
- it requires the person to report a suspected crime to police, rather than reporting a concern about a child needing protection to DHS (Child Protection); and
- the suspected sexual offence must be reported even if the child's parents are acting to protect the child.

5. What if a person discloses knowledge of child sexual abuse to me but doesn't want me to report it?

If someone discloses information about a sexual offence against a child to you, and they are not the victim of the offence, you are required to report this information to police, unless you have a reasonable excuse for not reporting. You should advise the person of your obligation to report this information to police, and tell them about their own obligations under the failure to disclose offence as well as the relevant defences.

If the person who discloses the information is the victim of the offence, you are not required to disclose this information to police **provided that the person is over 16** and requests that the information not be reported (see also Questions 8 and 9).

6. What is the 'fear for safety' defence and what does it mean for women and children experiencing family violence?

One situation where a person may have a reasonable excuse for not reporting is where the person fears on reasonable grounds for the safety of any person (apart from the perpetrator) if they disclosed the information to the police, and the failure to disclose was a reasonable response in the circumstances. This is most likely to be relevant in the context of family violence, where a woman may fear for her own or her child's safety if she discloses information about sexual abuse to the police. If or when a woman feels safe enough to report, she may have an obligation to report the offence.

Victoria Police has developed procedures and training for their members about use of the offence. The training is delivered to specialist sexual offence investigators and considers issues specific to family violence. Charges for this offence will only be able to be authorised by senior specialist officers who are suitably qualified. Police and prosecutors are also required to apply the Director of Public Prosecutions' Policy on the Prosecutorial Discretion. This policy sets out that a prosecution may only proceed if there is a reasonable prospect of conviction and prosecution of the charge is required in the public interest.

7. What if a woman experiencing family violence discloses information about child sexual abuse to me but doesn't want me to report it?

If you are working with a woman experiencing family violence and information about a sexual offence against a child emerges, you are required to report this information to police, unless you have a reasonable excuse for not reporting. You should advise the woman of your obligation to report this information to police. If it appears she may have known about the offence against the child, you should tell her about her obligations under the failure to disclose offence and the relevant defences. You should make clear that the intent of the

PAGE 3

FAILURE TO DISCLOSE OFFENCE:
FACT SHEET FOR DEPARTMENT OF HUMAN SERVICES STAFF AND FUNDED ORGANISATIONS

BETRAYAL OF TRUST: FACT SHEET

offence is to protect children, not to further victimise or impact on the safety of women experiencing family violence, and that Victoria Police understands the situation of women in these circumstances.

You may have a reasonable excuse for not reporting if you reasonably fear for the safety of the woman who disclosed the information, or for the safety of her children, if you report. However, the decision not to report must be reasonable in the circumstances. For example, if action could be taken to protect the woman and/or her children from danger, it may not be considered reasonable not to report.

Even if you believe you have a reasonable excuse for not reporting, you should consider any ongoing risk to the child, and decide whether other action (for example, a report to child protection) should be taken to protect them.

8. What if a child discloses to me that they have been abused and doesn't want me to report the offence to police?

The new offence respects the position of a victim who does not want the offence disclosed and who is sufficiently mature to make that judgment. The obligation to report therefore does not apply where the information about the sexual offence **comes directly from a victim** who has turned 16 years of age and who requests that the information not be disclosed to police. However, this exception does not apply where the victim is aged under 16 years, or is aged over 16 years and has an intellectual disability and does not have the capacity to make an informed decision about whether or not to report (see Question 9).

9. What if a person with an intellectual disability discloses information to me about sexual abuse?

The exception in Question 8 **does not apply** where the victim has turned 16, but has an intellectual disability at the time of disclosing the information and does not have the capacity to make an informed decision about not reporting. That is:

- if a person over 16 who has an intellectual disability (and lacks capacity to make an informed decision about reporting) discloses sexual abuse that occurred **before they turned 16**, you are still obliged to report to police.
- reporting of a sexual offence against a person with an intellectual disability who is **over 16 at the time of the sexual offence** is **not** covered by the failure to disclose offence. However, mandatory reporting requirements specified in the Responding to Allegations of Physical or Sexual Assault (technical update, 2014) apply in relation to disability clients in receipt of funded disability services.

10. What if someone discloses information about child sexual abuse to me during counselling or medical treatment?

There is an additional exception to the offence where a child under 16 discloses the information to a registered medical practitioner or counsellor during treatment. However, consistent with their obligations as mandated reporters, **registered medical practitioners will still be required to report to DHS (Child Protection) if they form a reasonable belief that a child has been sexually abused and is in need of protection**. Counsellors should consider any ongoing risk to the child and their ethical and policy obligations, and decide whether other action (for example, a report to child protection) should be taken to protect the child.

BETRAYAL OF TRUST: FACT SHEET

If an adult provides information to a medical practitioner or counsellor regarding the abuse of a child, the medical practitioner or counsellor is required to disclose that information to police unless another exemption applies.

Further information:

If you require further information, please contact the Royal Commission Response Branch on 9096 0684 or royalcommissionresponse@dhs.vic.gov.au