Institutional child sexual abuse offences: failure to report and failure to protect

The Consultation Draft of the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019 (the Consultation Draft Bill) includes amendments to create **new third party offences** in relation to institutional child sexual abuse.

# What did the Royal Commission recommend?

The Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) Criminal Justice Report recommended that each state and territory government introduce legislation to create a criminal offence of failure to report targeted at child sexual abuse in an institutional context[[1]](#footnote-1) which specifically addresses religious confessions, including by applying to information disclosed in or in connection with a religious confession and excluding any existing excuse, protection or privilege in relation to religious confessions to the extent necessary to achieve this objective.[[2]](#footnote-2)

The Royal Commission also recommended the introduction of legislation to create a criminal offence of failure to protect a child within a relevant institution from a substantial risk of sexual abuse by an adult associated with the institution.[[3]](#footnote-3) The Royal Commission considered this offence necessary as it is not, and should not be thought to be, sufficient to wait until abuse occurs before the police are informed.[[4]](#footnote-4) The Royal Commission intended that the failure to protect offence reinforce the importance of prevention and attached appropriate criminal consequences to serious failures to take available steps to prevent abuse.

# What is Queensland proposing?

## New offence of failure to report

The Consultation Draft Bill contains amendments to introduce a new offence in the Criminal Code of *Failure to report belief of offence of sexual nature committed in relation to child* to address the unique difficulties of bringing to light child abuse in institutional settings.

The new offence will apply to an **accountable person,** that is, anadult (18 years or over)who is:

* working or volunteering within an institution, or
* a foster and kinship carer.

An **‘institution**’ is defined to include organisations that operate facilities or provide services to children, including religious institutions.

The offence also applies to **individual foster and kinship carers**.

The offence is committed where an accountable person fails to **report to police** any information that causes, or ought reasonably to cause, the person to believe a child sex offence is being or has been committed against a child by another adult, who is a foster or kinship carer or is associated with an institution or foster or kinship carer. The **child,** the subject of the offence, must be or must have been:

* under the care, supervision or control of an institution or foster or kinship carer; and
* under 16 years or, if the alleged offender is in a position of authority in relation to the child, aged 16 or 17 years.

A ‘**child sex offence’** is an offence of a sexual nature committed in relation to a child including, offences under Chapter 22 (Offences against morality) of the Criminal Code, such as offences relating to the making, distribution and possession of child exploitation material, and Chapter 32 (Rape and sexual assaults) of the Criminal Code.

The new offence will apply to any information received on or after commencement, even if that information relates to abuse that occurred before commencement.

## Penalty

A **maximum penalty of three years imprisonment** will apply to the new failure to report offence.

## New offence of failure to protect

The Consultation Draft Bill proposes a new offence in the Criminal Code of *Failure to protect child from child sex offence*.

Similarly to the new failure to report offence, the failure to protect offence will apply to adults working or volunteering within an **‘institution**’ and **foster and kinship carers**.

Under the failure to protect offence these **accountable persons** will be liable where:

* they know there is a significant risk that another adult, (who is a foster or kinship carer, or is associated with an institution or foster or kinship carer) will commit a child sex offence against a child; and
* they have the power or responsibility to reduce or remove the risk; and
* they willfully or negligently fail to reduce or remove the risk.

The offence will apply to a child that is or was under the care, supervision or control of an institution or foster or kinship carer and is or was:

* under the age of 16 years, or
* 16 or 17 years of age if the alleged offender is in a position of authority in relation to the child.

## Penalty

A **maximum penalty of five years imprisonment** will apply to the new failure to protect offence.

Consequential amendments

The Consultation Draft Bill makes **consequential amendments** to recognise the new failure to protect offence under the respective offence screening schemes in the *Disability Services Act 2006* and the *Working with Children (Risk Management and Screening) Act 2000*.

# What is the position in other jurisdictions?

A number of jurisdictions including New South Wales, Victoria and the Australian Capital Territory have broad offences that apply to people who fail to report child sexual abuse. The offences in these jurisdictions apply in an institutional context. Several jurisdictions have also enacted failure to protect offences.

# Religious confessions

Unlike jurisdictions operating under the Uniform Evidence Law, in Queensland there is no statutory evidential privilege applying to religious confessions. However, the Consultation Draft Bill contains amendments to make it clear the failure to report offence applies to any information disclosed in or in connection with a religious confession in line with the Royal Commission recommendations.[[5]](#footnote-5)

In some jurisdictions, recommendation 35 (relating to religious confessions in the context of the failure to report offence) remains under consideration. At the Council of Attorneys-General (CAG) meeting on 28 June 2019, it was agreed that a working group be established, to consider the Royal Commission’s recommendations relating to confessional privilege as it applies to laws for reporting child abuse with the working group to report back to CAG out-of-session in 3 months.

# Does the offence override existing reporting obligations?

The Consultation Draft Bill sets out within the new failure to report offence a non-exhaustive list of circumstances that constitute a ‘reasonable excuse’. Previous reporting under a different legislative provision is identified as one such reasonable excuse. Avoiding duplication of reporting under the Queensland mandatory reporting scheme is consistent with the Royal Commission’s recommendations.[[6]](#footnote-6)

Further reading

For more details on the Royal Commission recommendations: <https://www.childabuseroyalcommission.gov.au/media-releases/report-criminal-justice-released>

**Submissions on the Consultation Draft Bill are due by 5pm Friday, 20 September 2019 to** **childsexualoffencesreform@justice.qld.gov.au** **or GPO Box 149 BRISBANE QLD 4001. For more information visit** [**www.GetInvolved.qld.gov.au**](file:///C%3A%5CUsers%5Cwoodcj%5CDesktop%5Cwww.GetInvolved.qld.gov.au)

1. Recommendation 33 and 34 [↑](#footnote-ref-1)
2. Recommendation 35 [↑](#footnote-ref-2)
3. Recommendation 36 [↑](#footnote-ref-3)
4. Criminal Justice Report Parts III-VI 246. [↑](#footnote-ref-4)
5. Recommendation 35 [↑](#footnote-ref-5)
6. Recommendation 34. [↑](#footnote-ref-6)