

# BETRAYAL OF TRUST: FACT SHEET

## The new organisational duty of care to prevent child abuse

The Victorian Government believes it is important that organisations are subject to a well-defined legal duty to prevent child abuse within organisations.

A statutory duty of care under the *Wrongs Amendment (Organisational Child Abuse) Act 2017* (see Part XIII of [Wrongs Act 1958](#)) has been created to ensure there is a clear legal duty placed on organisations to take reasonable steps to minimise the risk of child abuse, perpetrated by organisational representatives.

This means a child abuse survivor (plaintiff) will have a clear cause of action when commencing legal proceedings against an organisation for the sexual and/or physical abuse of a child. It is then up to the organisation to prove that it took reasonable precautions to prevent the abuse.

This duty provides clarity for both organisations and survivors of abuse.

### 1. Why is the duty necessary?

The Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations delivered the [Betrayal of Trust](#) report on 13 November 2013. One of the matters considered by the Parliamentary Inquiry was whether law reform was required to help prevent and respond to child abuse in organisations.

The Betrayal of Trust report found that perpetrators of child abuse in organisations often obtained credibility, trustworthiness, and easy access to children from their position within the organisation. It also found that instances of organisational child abuse have been facilitated by the trusting relationships that are created by a perpetrator's association with an organisation.

While it was already possible under the law for an organisation to be liable for child abuse committed by its personnel, the circumstances in which this liability could be established was both unclear and limited. The Betrayal of Trust report stated that:

- organisations should have a clear legal duty to take appropriate measures to minimise the risk of abuse that arises because of the creation of relationships of trust for which they are responsible, and
- there is a clear need to recognise the legal obligation of organisations to reasonably ensure the safety of children who come into contact with their members".

The Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) has made similar recommendations.

The duty allows organisations to be held liable for child abuse, and it also encourages organisations to take reasonable precautions to prevent abuse.

# BETRAYAL OF TRUST: FACT SHEET

## 2. What is the duty?

A stand-alone statutory duty of care has been created to allow an organisation to be held liable in negligence for certain contexts of organisational child abuse. This does not alter other duties under the law of negligence, vicarious liability, or non-delegable duties.

Under the duty, organisations are required to take reasonable precautions to prevent the abuse of a child by an individual associated with the organisation while the child is under the care, supervision or authority of the organisation.

If child abuse occurs, the organisation is presumed to have breached the duty unless it proves it took 'reasonable precautions' to prevent the abuse.

## 3. Which organisations are subject to the duty?

The duty applies to all organisations that exercise care, supervision or authority over children, and are capable of being sued.

This includes, but is **not limited to**:

- community service organisations providing services to children
- out-of-home care services
- religious bodies
- government agencies or departments providing services for children
- education and care services (such as childcare centres, family day care services, kindergartens and outside school hours care services)
- schools and other educational institutions
- sporting groups
- youth organisations
- local councils
- charities and benevolent organisations providing services for children
- housing services and homeless services
- health services including public and private hospitals
- drug and alcohol treatment services
- disability services providers.

The above list of example organisations is not exhaustive. The duty applies to any organisation that exercises care, supervision or authority over children.

Organisations that are not capable of being sued can nominate a legal entity to act as a proper defendant for child abuse claims.

The term 'authority' includes 'ostensible authority' because it is important to cover situations where organisational personnel have leveraged the trust created by their position of authority in order to commit

# BETRAYAL OF TRUST: FACT SHEET

abuse. Organisations should consider the ways that persons in positions of organisational authority can misuse that authority to, for example, groom a child for later abuse.

The Government is currently developing further law reforms to implement separate recommendations from the *Betrayal of Trust* report on the legal status of unincorporated organisations.

#### 4. What types of abuse are organisations required to prevent under the duty?

Under the duty, organisations exercising care, supervision or authority over children must take reasonable precautions to prevent sexual abuse and/or physical abuse of a child.

##### Sexual abuse

Some examples of sexual abuse include sexual penetration, sexual touching, or taking part in a sexual act.

##### Physical abuse

Some examples of physical abuse include the infliction of physical violence, beating, burning, torture, cruelty, and assault with objects.

The courts will determine the meaning of physical abuse, given each incident of abuse will have its individual circumstances.

Guidance of what actions or omissions could constitute physical abuse can be drawn from sources such as the *Betrayal of Trust* report and the Royal Commission.

#### 5. For whose conduct are organisations liable?

The duty relates to child abuse committed by an individual associated with the organisation.

Individuals associated with the organisation can include, but is **not limited** to:

- employees
- volunteers
- office holders
- contractors
- ministers of religion
- religious leaders
- foster or kinship carers.

Organisations cannot avoid their duty by delegating their care, supervision or authority of children to other organisations. For example, if a school sends its students to a privately run camp and a member of the camp's staff abuses a student, the school is required to prove that it took reasonable precautions to prevent that abuse.

#### 6. Who bears the responsibility for proving the claim?

Previously, the person bringing the civil claim (plaintiff) against the organisation had responsibility (onus of proof) for proving that the abuse occurred and the organisation is liable.

# BETRAYAL OF TRUST: FACT SHEET

Under the duty, this responsibility is reversed. This means that once a plaintiff proves that child abuse within the scope of the duty has occurred, the onus of proof shifts onto the organisation, which is deemed to have breached the relevant duty unless it can prove that it took 'reasonable precautions'.

## 7. What are reasonable precautions?

'Reasonable precautions' has not been defined to allow organisations to flexibly take the necessary steps that are suitable for them. This might depend on a range of factors such as the nature of the organisation, the role of the perpetrator in that organisation, and the relationship between the organisation and the child.

Organisations will need to consider the necessary steps that are suitable for them. As examples, the following measures are what courts have previously considered to be reasonable precautions in the context of organisational child abuse:

- employment screening and referencing checking
- supervision and training
- implementing systems to provide early warning of possible offences
- random and unannounced inspections to deter misconduct, and
- encouraging children and adults to notify authorities or parents about any signs of aberrant or unusual behaviour.

A court's interpretation will vary depending upon the facts of each individual claim. For instance, the standard of what is reasonable may be lower in circumstances where an organisation may not have had direct control over either the child in question, or the perpetrator of the abuse.

## 8. Preventing the abuse in question

While common law requires organisations to prevent child abuse generally, the duty expands on this by requiring organisations to prove that 'reasonable precautions' were taken to prevent the child abuse in question. It is important to require examination of the specific circumstances surrounding the incident of abuse, in order to ensure that organisations proactively turn their minds to the ways in which perpetrators of abuse can misuse their positions within organisations to commit child abuse. However, examining the abuse in question may also involve an examination of general risk prevention practices.

## 9. From when does the duty apply?

The duty commenced on 1 July 2017. It will only apply to sexual abuse and/or physical abuse of a child that has occurred on or after this date.

For other civil claims involving other forms of child abuse, the pre-existing common law continues to apply.

## 10. Further information

To ensure compliance with the duty, organisations should make appropriate assessments based on the nature of their organisations and develop any internal policies or protocols to best minimise risks. There are existing regulatory mechanisms which could assist in guiding organisations about prevention and response on child abuse. These include the Child Safe Standards, the reportable conduct scheme, and the Working with Children Check.

# BETRAYAL OF TRUST: FACT SHEET

For information in relation to community service and other organisations, see [Appendix A](#). For information in relation to schools and related organisations, see [Appendix B](#).

## **Appendix A – Community service and other organisations**

### *Child Safe Standards*

The Child Safe Standards (the Standards) are compulsory minimum requirements to create and maintain a child safe environment and better protect children from the risks of abuse and apply to **organisations** that provide services for children.

The Standards aim to drive cultural change in organisations so that protecting children from abuse is embedded in everyday thinking and practice.

Community service organisations that provide services to children are required to comply with the Standards. Complying with the Standards will help organisations demonstrate they have taken appropriate actions to identify and reduce or remove risks of child abuse. Further information about the Standards can be found on the Department of Health and Human Services website:

<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/child-safe-standards-resources>

<http://www.dhs.vic.gov.au/facs/bdb/fmu/service-agreement/4.departmental-policies-procedures-and-initiatives/4.25-child-safe-standards>

The Commission for Children and Young People is responsible for monitoring organisations' compliance with the Standards and has a range of resources to help organisations available on its website:

<http://www.ccyp.vic.gov.au/child-safe-standards/index.htm>

Departmentally-funded organisations are still required to comply with all terms and conditions set out in their service and funding agreements, including compliance with the Human Services Standards, as relevant, and safety screening checks such as:

- obtaining Working with Children Checks for relevant staff
- undertaking a Disqualified Carer Check on all prospective out-of-home carers
- registering a carer on the Carer Register
- revoking a carer's registration when ceasing to be a carer.

Further information on safety screening is available here:

<http://www.dhs.vic.gov.au/facs/bdb/fmu/service-agreement/4.departmental-policies-procedures-and-initiatives/4.6-safety-screening-for-funded-organisations>

# BETRAYAL OF TRUST: FACT SHEET

## *Reportable conduct scheme*

A Victorian reportable conduct scheme commenced operation on 1 July 2017, and is administered by the Commission for Children and Young People.

The scheme requires organisations that have a high level of responsibility for children to report allegations of child abuse and child related misconduct to the Commission for Children and Young People. Certain community service organisations funded by the Department of Health and Human Services will be covered by the scheme.

Central oversight of how organisations respond to allegations of reportable conduct will help embed a child-safe culture across all organisations.

Further information about the reportable conduct scheme, including a full list of organisations covered by the scheme, is available on the websites of the Commission for Children and Young People and the Department of Health and Human Services:

- <https://ccyp.vic.gov.au/reportable-conduct-scheme/>
- <http://www.dhs.vic.gov.au/about-the-department/plans,-programs-and-projects/projects-and-initiatives/children,-youth-and-family-services/creating-child-safe-organisations>

## *Working with Children Checks*

The Working with Children Check is one of the safety measures organisations need to put in place to protect children from sexual and physical harm.

- <http://www.workingwithchildren.vic.gov.au/home/resources/>

A list of additional resources can be found on the website for Commission for Children and Young People, including tip sheets on what to look for in a child safe organisation: <https://ccyp.vic.gov.au/child-safety/resources/guides-and-information-sheets/>

A guide to creating child safe organisations can be found on the Commission for Children and Young People's website: <https://ccyp.vic.gov.au/assets/resources/ChildSafeGuide.pdf>.

# BETRAYAL OF TRUST: FACT SHEET

## **Appendix B – Schools and related organisations**

Further information about the Child Safe Standards for schools, early childhood services and other education providers is available from the websites of the Department of Education and Training and the Victorian Registration and Qualifications Authority:

- <http://www.education.vic.gov.au/protect>
- <http://www.vrqa.vic.gov.au/childsafe/Pages/Home.aspx>

### *PROTECT*

A regulatory landscape surrounding child safety, to protect children and young people from abuse, underpinned by the Child Safe Standards:

- <http://www.education.vic.gov.au/about/programs/health/protect/Pages/default.aspx?Redirect=1>

### *VRQA Child Safe Standards resources*

Information on what the Child Safe Standards mean for schools, other organisations, students and parents

- <http://www.vrqa.vic.gov.au/childsafe/Pages/resources.aspx>

### *Quality Assessment and Regulation Division fact sheet*

Fact sheets and other resources to assist approved providers, and education and care services comply with the requirements of the National Quality Framework

- <http://www.education.vic.gov.au/childhood/providers/regulation/Pages/nqfactsheets.aspx>

### *Duty of care page*

Information on the nature of the legal duties owed by teachers and school staff towards students

- <http://www.education.vic.gov.au/school/principals/spag/safety/pages/dutyofcare.aspx>

# BETRAYAL OF TRUST: FACT SHEET

## *Volunteer Checks*

Information on how to ensure volunteers approved to work with children meet legal requirements

- <http://www.education.vic.gov.au/school/principals/spag/community/pages/volunteers.aspx>

## *Mandatory reporting*

Information on how to ensure school staff are aware of their roles and responsibilities in protecting the safety and wellbeing of children and young people and to understand their reporting obligations.

- <http://www.education.vic.gov.au/school/principals/spag/safety/Pages/childprotectobligation.aspx>

## *Supervision*

Information on how to ensure schools satisfy their duty of care in supervising students

- <http://www.education.vic.gov.au/school/principals/spag/safety/pages/supervision.aspx>