

Royal Commission research paper

Historical review of sexual offence and child sexual abuse legislation in Australia: 1788-2013 research paper



This summary of the Royal Commission’s ‘Historical review of sexual offence and child sexual abuse legislation in Australia: 1788-2013’ research paper has been prepared by the TJHC.

The review was prepared by the Australian Institute of Criminology¹ for the Royal Commission into Institutional Responses to Child Sexual Abuse, as part of its research program.

Two purposes of the review:

1. To develop an understanding of the socio-political context within which child sexual abuse legislation has developed in Australia and internationally, and
2. Provide an overview of the offences with which a person who sexually abused a child may have been charged during 1950-2013.

The definition of “child sexual abuse” adopted in the Report is the definition used in the Terms of Reference for the Royal Commission into Institutional Responses into Child Sexual Abuse:

“Involvement of dependent, developmentally immature children and adolescents in sexual activities that they do not fully comprehend, to which they are unable to give informed consent, or that violate the social taboos of family roles” (Kempe & Kempe 1978: 60).

Eighteenth century:

The concept of ‘childhood’ didn’t exist – children were seen as an extension of parents, and chattels of their fathers (this view enshrined in English canon law).

The use of corporal punishment by parents and teachers was widely encouraged.

Awareness and understanding of child sexual abuse was very limited.

There were very few English child sexual offences adopted in Australia during early settlement. These included:

- Forced sodomy of boys
- Forcible rape of girls under the age of ten years old.

Victorian conservatism and moral puritanism denied children’s sexuality as a phenomenon but emphasised the importance of protecting children from harm (including sexual harm) from others and from themselves.

¹ The review was authored by Hayley Boxall, Adam M Tomison and Shann Hulme.

Nineteenth century:

In the mid-1800s, awareness of child sexual abuse was increasing. Some government inquiries found that child prostitution and sexual abuse were common in some Australian settlements, particularly Sydney. These were attributed primarily to the cramped living conditions in the new colonies.

During this period, social welfare organisations began raising awareness of child prostitution.

The government continued to be ambivalent about assuming responsibility for providing child welfare and 'protection' services.

Issues of child sexual abuse were rarely raised unless there were associated issues involving physical abuse or neglect.

In the second half of the nineteenth century, early feminists and moral purity groups campaigned in Australia to have the age of consent raised from 13 to 16 years.

- 1883: New South Wales raised the age of consent to 14 years.
- 1892: Western Australia raised the age of consent to 14 years.
- 1899: Queensland raised the age of consent to 14 years.
- 1885: South Australia raised the age of consent to 16 years.
- 1891: Victoria raised the age of consent to 16 years.

At the same time, many Australian jurisdictions legislated to expand pre-existing sexual offence laws (for example, a number of jurisdictions, for the first time, made it an offence to procure a child for sexual purposes and for male teachers to have sexual relationships with their female students).

Twentieth century:

1900 – 1930s

The psychoanalytic community, through the work of Freud, contributed to the increase of the awareness of child sexual abuse. At the end of the 1800s, Freud, noticing that most of his female patients had histories of sexual contact with male adults as children, "posited that one of the underlying causes of hysteria was inappropriate sexual relations with adults during childhood – so called Seduction Theory)." (pp.5-6)

However, at the beginning of the twentieth century, due to significant pressure from his peers, Freud released a series of new papers that contradicted his previous work, and instead stated that his female clients who had recalled experiences of child sexual abuse had either fantasised the events because of unresolved sexual feelings towards their parents or had been the sexual aggressors in the first place.

Freud continued to deny the occurrence of child sexual abuse through the 1900s and 'took concerted efforts to repress the research of his peers, which appeared to contradict his now revised theory.' (p.6)

Early 1930s, Sandor Ferenczi, a psychoanalyst, released a paper arguing that child sexual abuse was a major source of trauma. He was urged to retract his findings by his peers (including Freud), which he refused to do. When he died in 1933, the psychoanalyst community suppressed his work.

- 1900: Western Australia increased age of consent from 14 to 16 years.
- 1910: New South Wales increased age of consent from 14 to 16 years.

1940s-1960s

Child abuse 'rediscovered' during this period and western democracies recognised child maltreatment as a societal-level concern rather than cases that occurred in isolation.

During this period, many statutory child protection and welfare departments were established in various jurisdictions. Governments also took greater responsibility for child welfare services.

Because child abuse could be detected using x-rays and photographs, a diagnosis of physical abuse was considered to be scientific. Child sexual abuse, in contrast, was more difficult to diagnose, because it couldn't be detected using traditional 'scientific' methods. There was also a general discomfort about discussing sexual matters of any kind.

"Between 1930s and 1970s, the prevalence and impact of child sexual abuse was in various ways marginalised, hidden and minimised. For example, in the 1940s and 1950s sexologist Alfred Kinsey released a number of books and papers suggesting that feelings of fear and confusion experienced by many child sexual victims was culturally based, and that the reaction of society (ie parents and family) to the incident was the traumatising factor, not the assault itself."(p.9)

Also the "new wave of 'sexual modernists' argued that sexual relations between children and adults may not be harmful or traumatic, but may actually be positive and a sought out experience by the children". (p.9)

1970s-2013

In the late 1960s and 1970s sexual violence, including child sexual abuse emerged as a significant social and political issue in Australia and overseas. Feminists raised awareness about adult survivors of rape and other sexual and physical assaults, and challenged historical understandings of child sexual abuse as infrequent acts perpetrated by sexual deviants.

Reporting of child sexual abuse increased during this period as well (attributed to the increase in awareness of child sexual abuse).

In the 1980s, state governments were commissioning inquiries into child sexual abuse, sexual violence more broadly and statutory child protection services.

1970s and 1980s all Australian jurisdictions began making significant amendments to their sexual offence and child sexual abuse legislation, in relation to:

- Use of gendered language
- Definition of sexual penetration/intercourse/carnal knowledge
- The decriminalisation of homosexual acts (except Tasmania)
- Offences where the accused is in a position of authority or trust
- Child abuse materials/child pornography/child exploitation materials; and
- Mandatory reporting laws (except WA and Vic).

During this time, several jurisdictions also trialled new ways of facilitating the engagement of victims of sexual violence with the criminal justice system, for example, piloting of specialist courts that handled only sexual assault matters, the introduction of forensic interviewing training for police officers investigating suspected cases of child sexual abuse, and changes to the way in which medical examinations of sexual assault victims were conducted.

The second part of the report provides an overview of the nine Australian jurisdictions and the different offences that a person convicted of child sexual abuse may have been charged with in the period 1950-2013.

The report lists the role of the League of Nations and United Nations in the development of the recognition of international child rights from 1924 (the *Declaration of the Rights of the Child 1924*) to 1989 (*The Convention of the Rights of the Child 1989*).