

The Shopfront

YOUTH LEGAL CENTRE

Age of consent: issues for youth workers

1 What is the age of consent?

The crime of sexual assault is a familiar concept to most people. In general, it is a crime to have sexual intercourse with a person without their consent.

It is also a crime to engage in sexual activity with a child who is below the “age of consent”, whether they consent or not.

In New South Wales, the age of consent is fixed by law at 16 for both heterosexual and homosexual sex.

It is important to understand that it is not a crime for children under 16 to have sex! The law criminalises people who have sex with under-16-year-olds.

So, if an 18-year-old is having consensual sex with a 15-year-old, the 18-year-old is guilty of an offence and the 15-year-old is the victim.

The law gets confusing (and unworkable) where both partners are under 16. Technically, each one could be committing an offence against the other.

What happens in practice depends on the degree of age difference and power imbalance between the young people. If both are similar in age and the relationship appears to be consensual, it is unlikely that either would be charged with an offence. But if one person is significantly older than the other, or has abused or exploited them in some way, this person will probably be charged.

For young people in consensual relationships who are quite close in age, the situation has now improved with the introduction of a “similar age defence” on 1 December 2018 (see part 5 of this fact sheet).

2 Recent changes to the law

The *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 was passed by NSW Parliament on 20 June 2018.

This Act has made a number of amendments to the NSW *Crimes Act*. Many of these changes will assist young people who are involved in consensual sexual activity.

All of the amendments discussed in this fact sheet came into force on 1 December 2018.

The main amendments are.

- New offences of “sexual touching” and “sexual act” have been introduced to replace “indecent assault” and “act of indecency”. The offences involving “sexual intercourse” will remain largely unchanged.
- A “similar age defence” has been introduced.
- Changes to laws on sexting (see our fact sheet on *Cybercrime*).
- Courts now have more discretion about whether a juvenile offender ends up on the Child Protection Register (see our fact sheet on *The Child Protection Register*).

3 Offences involving under-age sexual activity

3.1 Definitions

“*Sexual intercourse*” is defined in section 61HA of the *Crimes Act*. It includes vaginal or anal penetration with a penis, another body part or an object. It also includes oral sex (fellatio or cunnilingus).

Before 1 December 2018, the *Crimes Act* used the terms “*act of indecency*” and “*indecent assault*”. From 1 December 2018, these terms have been replaced by “*sexual act*” and “*sexual touching*”.

“*Sexual touching*” is defined in section 61HB. It means touching another person with any part of the body or with anything else, in circumstances where a reasonable person would consider the touching to be sexual. It includes touching a person through clothes, sheets, etc.

The section sets out some things to be taken into account in assessing whether a reasonable person would consider the touching to be sexual. These include whether the area touched was the person’s genital or anal or breast area and whether the person doing the touching did so for the purpose of sexual gratification or arousal.

Touching “carried out for genuine medical or hygienic purposes” is not sexual touching.

“*Sexual act*” is defined in section 61HC. It means an act (other than sexual touching) carried out in circumstances in which a reasonable person would consider the act to be sexual. It could include, for example, exposing yourself or masturbating in front of someone.

The same guidelines apply for assessing what a reasonable person would consider to be sexual. It also excludes an act done for genuine medical or hygienic purposes.

“*Circumstances of aggravation*” include where:

- the offender uses a weapon to inflict or threaten actual bodily harm to the victim; or
- the offender is in company with other people; or
- the victim is under the authority of the offender; or
- the victim has an intellectual or physical disability; or
- the offender takes advantage of the victim being under the influence of drugs or alcohol; or
- the offender deprives the victim of their liberty before or after the offence; or
- the offender breaks into the victim’s home with intent to commit the offence or any other serious indictable offence.

3.2 Offences

These are some of the offences in the *NSW Crimes Act* involving sexual intercourse, sexual touching or sexual acts with children under the age of consent:

- a) Sexual intercourse with a child aged under 10 years (section 66A) – *maximum penalty life imprisonment*.
- b) Sexual intercourse with a child aged 10-13 years (section 66C(1)-(2)) – *maximum penalty 16 years imprisonment (20 years imprisonment in “circumstances of aggravation”)*.
- c) Sexual intercourse with a child aged 14-15 years (section 66C(3)-(4)) – *maximum penalty 10 years imprisonment (12 years imprisonment in “circumstances of aggravation”)*.

- d) Sexual intercourse without consent where victim is aged under 16 years (aggravated sexual assault) (section 61J) - *maximum penalty 20 years imprisonment.*
- e) Sexual touching of a child under 10 (section 66DA) – *maximum penalty 16 years.*
- f) Sexual touching of a child between 10 and 15 (section 66DB) – *maximum penalty 10 years.*
- g) Sexual act with or towards a child under 10 years (section 66DC) – *maximum penalty 7 years.*
- h) Sexual act with or towards a child between 10 and 15 (section 66DD) – *maximum penalty 2 years.*
- i) Aggravated sexual act with or towards child between 10 and 15 (section 66DE) – *maximum penalty 5 years.*
- j) Sexual act for the production of child abuse material with or towards a child under the age of 15 (section 66DF) – *maximum penalty 10 years.*
- k) Persistent sexual abuse of a child – this means an adult having an “unlawful sexual relationship” with a child under 16, i.e. a relationship involving two or more unlawful sexual acts (section 66EA) – *maximum penalty life imprisonment.*
- l) An adult procuring or grooming a child under 16 for unlawful sexual activity (section 66EB) – *maximum penalty 15 years imprisonment (for procuring) or 12 years (for grooming).*

There are also numerous offences involving child prostitution, grooming, pornography, “sexting” and other online activity. For more information, see our fact sheet on *Cybercrime*.

3.3 Defences

If a person is charged with one of the above offences involving a child under 16, the fact that the child consented is not usually a defence.

However, from 1 December 2018, consent will be a defence if the alleged victim is over 14 and there is less than two years age difference between the accused and the alleged victim (see part 5 of this fact sheet about the “*similar age defence*”).

An accused person may also be able to rely on a defence of “*honest and reasonable mistake of fact*”, if (s)he believed on reasonable grounds that the other party was 16 or over. What is reasonable would be decided on a case-by-case basis. If the alleged victim looked like they might be under 16, and the accused didn’t bother asking their age, this would probably *not* be reasonable. However, a person wouldn’t be expected to demand ID or proof of age from every prospective sexual partner.

4 “Special care” offences

Sometimes it is an offence to have sex with a child aged 16 or over, *even with their consent*.

It is an offence to have sexual intercourse with a young person aged 16 or 17 who is under a person’s “*special care*” (*Crimes Act* section 73). The maximum penalty for this offence is 8 years imprisonment (if the child is 16) or 4 years imprisonment (if the child is 17).

From 1 December 2018, sexual touching of a 16 or 17-year-old in special care is also an offence. The maximum penalty is 4 years imprisonment (if the child is 16) or 2 years imprisonment (if the child is 17).

Section 73 says that the victim is under the “*special care*” of the offender if, and only if:

- (a) the offender is the parent, grandparent, step-parent, guardian or authorised carer of the victim or the de facto partner of a parent, guardian or authorised carer of the victim, or
- (b) the offender is a member of the teaching staff of the school at which the victim is a student, or
- (c) the offender has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim, or
- (d) the offender is a custodial officer of an institution of which the victim is an inmate, or
- (e) the offender is a health professional and the victim is a patient of the health professional.

The list of relationships that amount to “special care” is very broad and could cause problems for young people who are working as tutors, sports coaches, teachers’ aides, etc. They could be criminalised for having a consensual relationship with a 16 or 17-year-old, even if they have no power or authority over them.

These problems have recently been recognised by a NSW Parliamentary Inquiry, which has recommended changing the definition to avoid criminalising genuine consensual relationships between young people of similar age.

5 The similar age defence

From 1 December 2018, there is now a “*similar age defence*”, set out in section 80AG of the *Crimes Act*.

The defence applies to people charged with offences under the following sections:

- 66C(3) (sexual intercourse with child aged 14 or 15)
- 66DB (sexual touching of child between 10 and 15)
- 66DD (sexual act with or towards child between 10 and 15)
- 73 (sexual intercourse with 16 or 17-year-old in special care)
- 73A (sexual touching of 16 or 17-year-old in special care)

The defence applies if:

- the alleged victim is 14 years or older; and
- the age difference between the accused person and the alleged victim is no more than two years.

Similar age defence - scenarios

Sam is 13 and Ali is almost 15. They are having a consensual sexual relationship. Is either of them committing an offence?

Technically they could each be both victim and offender, as they are both under 16.

If either of them is going to be charged with an offence, it would probably be Ali as (s)he is the elder of the two. However, it’s also possible that Sam could be charged.

Ali could *not* use the similar age defence, as the alleged victim Sam is under 14.

If Sam was charged, (s)he *could* use the defence because the alleged victim, Ali, is over 14, and there is no more than two years age difference between them.

A few months have passed. Ali is now 15 and Sam has just turned 14.

Again, both can still technically be considered both victim and offender.

Both Sam and Ali could now use the defence, as they are both 14 years or over with no more than two years age difference between them.

Two years have passed. Ali is now 17 and Sam is 16. Ali is coaching Sam's school football team.

Both Ali and Sam are now over the age of consent. However, Ali could potentially be charged with a "special care" offence.

If Ali is charged with this offence, (s)he could rely on the similar age defence.

6 Consequences of being found guilty of a child sex offence

People (including under-18s) who are found guilty of child sex offences can face serious consequences that stay with them for the rest of their lives. These include:

- Even if the court decides not to formally record a conviction, the NSW *Criminal Records Act* deems a finding of guilt to be a "conviction". Unlike most other convictions, a conviction for a sex offence can never be spent. See our fact sheet on *Convictions and Criminal Records*.
- Most people found guilty of child sex offences will end up on the Child Protection Register. See our fact sheet on *The Child Protection Register*.
- Adults who are convicted of child sex offences will automatically fail the Working With Children Check. Offences committed while under 18 will not automatically bar someone, but will trigger a risk assessment. See our fact sheet on *The Working With Children Check*.

Most of these laws are aimed at protecting children from paedophiles and sexual predators, but unfortunately they also catch children and young adults who have been involved in age-appropriate consensual sexual activity. Some of the recent amendments will help, but some aspects of the law are still unfair.

7 Under-age sex – do you have to report it to FaCS?

7.1 Mandatory reporting

Most people who work with children are mandatory reporters under the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

Section 27 of the Act requires you to make a report to Family and Community Services if:

- (a) you are employed in (or are responsible for) the delivery of certain services (e.g. health, education, accommodation, welfare, law enforcement) wholly or partly to children; and
- (b) you have reasonable grounds to suspect that a child under 16 is (or a class of children under 16 are) at risk of significant harm; and
- (c) those grounds arise during the course of your work.

7.2 Risk of significant harm

According to section 23 of the Act, a child or young person is "at risk of significant harm" when one or more of the following factors are present to a significant extent:

- (a) the child or young person's basic physical or psychological needs are not being met or are at risk of not being met,
- (b) the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child or the young person to receive necessary medical care,
- (b1) in the case of a child or young person who is required to attend school, the parents or caregivers have not arranged and are unable or unwilling to arrange for the child or young person to receive education;
- (c) the child or young person has been, or is at risk of being, physically or sexually abused or ill-treated,
- (d) the child or young person lives in a household where there have been incidents of domestic violence, and as a consequence, the child or young person is at risk of serious physical or psychological harm,
- (e) a parent or other caregiver has behaved in such a way towards the child or young person that the child or young person has suffered or is at risk of suffering serious psychological harm,
- (f) the child was the subject of a pre-natal report and the birth mother did not engage successfully with support services to eliminate, or minimise to the lowest level reasonably practical, the risk factors that gave rise to the report.

7.3 Application to under-age sex

Technically, an under-16-year-old involved in sexual activity is a victim of an offence.

Some people think this means the child is being sexually abused and is therefore "at risk of significant harm" as defined by the Act.

The more widely-held view (which we share) is that **consensual under-age sex does not necessarily amount to abuse or risk of significant harm** within the meaning of the Act. The introduction of the similar age defence will likely strengthen this position.

7.4 Child protection guidelines

The *NSW Inter-Agency Guidelines for Child Protection Intervention* make it clear that under-age sexual activity does not necessarily amount to abuse.

The latest version of the guidelines is at <https://www.facs.nsw.gov.au/providers/children-families/interagency-guidelines>.

These guidelines are based on a 2006 version which can still be found at <http://www.victimsservices.justice.nsw.gov.au/sexualassault/Documents/Child-Protection-Interagency-Guidelines.pdf>. This version makes it clear that under-age sexual activity does not necessarily amount to abuse.

This passage is from section 2.3.4 of the 2006 guidelines, "Indicators of sexual abuse":

"Physical and psychological coercion of children is intrinsic to child sexual assault and differentiates such assault from consensual peer sexual activity. Adults, young people and children who perpetrate child sexual abuse exploit the dependency and immaturity of children by misusing their power and encouraging children to be secretive."

The latest version of the guidelines links to the *Mandatory Reporter Guide* (2016). The section on "*Sexual abuse of child*" starting on page 84 suggests that sexual activity involving a child under 16 does not always amount to abuse. The guide includes a table setting out examples of age-appropriate sexual behaviours and indicators of sexual abuse: <https://reporter.childstory.nsw.gov.au/s/article/What-is-the-NSW-Mandatory-Reporter-Guide>.

8 Under-age sex – do you have to report it to the police?

8.1 Concealing a serious indictable offence

Section 316 of the *Crimes Act* (NSW) says that if:

- (a) a serious indictable offence has been committed; and
- (b) you know or believe it has been committed: and
- (c) you know or believe you have information which could materially assist in the apprehension, prosecution or conviction of the offender; and
- (d) you fail, *without reasonable excuse*, to bring this to the attention of the police or other appropriate authority;

you are guilty of an offence and could face up to 2 years imprisonment.

The maximum penalty increases to 5 years if you conceal the offence in return for a personal benefit. This could include being paid to keep your mouth shut, but would *not* include a situation where you are the victim and you agree not to go to the police if the offender makes good the loss or injury they have caused you.

A “*serious indictable offence*” is defined in section 4 of the *Crimes Act* as an offence punishable by imprisonment for 5 years or more. This would include most of the sex offences mentioned above.

The Act does not say what amounts to a “*reasonable excuse*”, but in our view it would probably include the need to protect trust and confidentiality with your client.

Further, the consent of the Director of Public Prosecutions (DPP) is required before prosecuting someone whose knowledge or information was obtained “in the course of practising or following a profession, calling or vocation prescribed by regulations for the purpose of this section”.

The professions prescribed by the regulations are: legal practitioners, medical practitioners, psychologists, nurses, social workers (including support workers for victims of crime and counsellors treating people for emotional or psychological conditions), members of the clergy of any church or religious denomination, researchers for professional or academic purposes, mediators and arbitrators.

Although “youth worker” and “health promotion worker” are not on the list of professions, it is likely that these types of workers would be treated in a similar way to social workers, counsellors or health professionals.

Even if you are charged, this does not necessarily mean you will be found guilty. You may succeed with an argument that client confidentiality gives you a reasonable excuse for not disclosing.

Of course, if you are concerned about being charged with this offence, or are unsure about whether to report a matter to the police, you should seek legal advice.

8.2 Offence of concealing child abuse

A new section 316A has recently been introduced into the NSW *Crimes Act*. From 31 August 2018, it is a crime to fail to report information about a “*child abuse offence*” to the police without a reasonable excuse.

This offence is very similar to the offence under 316.

The definition of “*child abuse offence*” is in section 316A(9) and includes a range of offences including sexual offences and physical assaults on children. It includes some offences which have maximum penalties of less than 5 years imprisonment (e.g. act of indecency) and therefore would not be “serious indictable offences” under section 316.

Similarly to section 316, the maximum penalty is 2 years imprisonment (or 5 years if you conceal the offence in return for personal benefit).

As with section 316, if you obtain the information in connection with practising a “profession, calling or vocation” prescribed by the regulations, you cannot be prosecuted for an offence under section 316A without the consent of the DPP.

Unlike section 316, there is a list of things that amount to a “*reasonable excuse*” under section 316A. These include, but are not limited to situations where:

- you believe on reasonable grounds that the information is already known to police, or
- you have already reported it to FaCS or the Ombudsman, or believe on reasonable grounds that someone else has done so, or
- you have reasonable grounds to fear for the safety of the victim or any other person (other than the offender) if the information were reported to police, or
- you were under 18 when you obtained the information, or
- the alleged victim was already an adult by the time you obtained the information, and you believe on reasonable grounds that (s)he does not wish the information to be reported to police.

8.3 Offence of failing to reduce or remove risk of child abuse

A new section 43B has recently been introduced into the NSW *Crimes Act*. From 31 August 2018, it is an offence if:

- you are an adult,
- you carry out work for an organisation (whether as an employee, contractor, volunteer or otherwise),
- the organisation employs an adult worker who engages in child-related work,
- there is a serious risk that the adult worker will commit a child abuse offence against a child who is (or may come) under the care, supervision or authority of the organisation,
- you know the risk exists,
- you have the power or responsibility to reduce or remove that risk,
- you negligently fail to reduce or remove that risk.

A “*child*” in this case means a person under 18.

A “*child abuse offence*” is defined in section 43B and includes a range of physical and sexual offences against children.

To do something “*negligently*” essentially means breaching your duty of care.

The maximum penalty for this offence is two years imprisonment.

9 Providing sexual health services – are you aiding or encouraging a crime?

It is an offence to “aid, abet, counsel or procure” the commission of a crime. This means assisting or encouraging someone to commit an offence.

Providing sexual health services (including prescribing contraception or performing a termination), condoms, lube, dams or sexual health information does *not* mean you are assisting or encouraging a young person to have sex, as long as the ultimate decision rests with the young person.

Also bear in mind that *a young person under 16 is not committing an offence by having sex (unless their partner is also under 16 and the similar age defence doesn't apply).*

The Shopfront Youth Legal Centre Updated December 2018

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The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills, in association with Mission Australia and The Salvation Army.

This document was last updated in December 2018 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.

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