

**RESEARCH PAPER ON THE JUSTICE
MISCELLANEOUS (ROYAL COMMISSION
AMENDMENTS) BILL 2022, s 126A**

Prepared for the purpose of providing the Tasmanian Law Reform Institute with advice regarding a proposed amendment to the Tasmanian *Criminal Code*.

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Summary

This paper considers the proposed amendment to the *Criminal Code 1924* (Tas) ('Code'), in the Consultation Draft of the *Justice Miscellaneous (Royal Commission Amendments) Bill 2022*, which adds s 126A to the Code to create a presumption that a person under the age of 17 or a person with a disability is unable to consent to sexual conduct with a person in a position of authority. This paper is confined to consideration of such a presumption in relation to a child or young person.

The paper first briefly explains the current Tasmanian law in relation to sexual offences against children and young people. It then explains the effect the presumption would have on the existing law. It notes that the presumption will apply where absence of consent is an element of the charge, namely rape (s 185), and sexual penetration of young person (s 124), indecent assault (s 127) and sexual act with a child or young person (s 125B) when the similar age defence applies. It will also be relevant to persistent sexual abuse of a child (s 125A) when one or more of the unlawful acts alleged (there must be three to satisfy the defence) requires proof of absence of consent. The paper argues that the proposed s 126A does not adequately implement the *Royal Commission's* recommendation to criminalise sexual conduct with a child perpetrated by a person in a position of authority. The issues with the proposed presumption include the following:

- The presumption does not clearly indicate whether the presumption is a presumption of incapacity to consent, or a presumption of absence of consent. If the presumption relates to capacity to consent, it means that the presumption can be rebutted by proving a capacity to consent and absence of consent remains an issue;
- The provision does not protect minors who are over the age of consent;
- The presumption currently will apply to minors who are perpetrators if they satisfy the elements of authority in s 126A;
- The presumption creates unnecessary complexity, particularly in cases where the similarity in age defences apply.
- The presumption has the potential to increase pleas of not guilty in cases where the presumption leads to a charge of rape being laid rather than penetrative sexual abuse of a child. Similarly, it will increase pleas of not guilty and factual disputes as to absence of consent at the sentencing stage in cases of persistent sexual abuse of child.

In contrast to the proposed amendment, all other jurisdictions in Australia, except for Queensland, have a standalone provision criminalising sexual conduct between a person in a position of authority and a minor. In these provisions, consent of the victim is not a consideration, and relevant defences to the offence are expressly provided. Implementing a standalone provision, instead of the presumption, should be considered because it is a clearer and more direct method of achieving the recommendations of the *Royal Commission*. The paper includes a discussion of the standalone offences in other jurisdictions with Appendices detailing some of these provisions.

Introduction

1. The purpose of this paper is to consider the implementation of the proposed amendment to the *Code* namely s 126A, proposed in s 7(b) of the *Justice Miscellaneous (Royal Commission Amendments) Bill 2022* (the Consultation Draft). Whilst this provision covers victims who are under 17 of age and person with a disability, this discussion is limited to the former.
2. This report is separated into four sections. The first section discusses the amendment, including the context and details of the proposed amendment. The second section reviews the current laws in Tasmania regarding sexual offences perpetrated against minors. The third section provides preliminary recommendations about the proposed addition of s 126A in the *Justice Miscellaneous (Royal Commission Amendments) Bill 2022*. The fourth section provides a jurisdictional analysis of equivalent offence provisions in other Australian jurisdictions as well as in the United Kingdom, Canada, and New Zealand to support the recommendations made in part three of the paper.

Proposed Tasmanian Amendment

3. Section 7(b) of the *Justice Miscellaneous (Royal Commission Amendments) Bill 2022* proposes to amend the *Code* by inserting s 126A into the *Code*, creating a presumption that a person under the age of 17 is unable to consent to sexual conduct with a person in a position of authority. The provision is included below:

126A. Presumption as to lack of consent to sexual conduct

(1) It is presumed, unless the contrary is proved, that a person under 17 years of age or a person with a mental impairment is unable to consent to sexual conduct with a person who is in a position of authority in relation to that person.

(2) For the purposes of subsection (1), a person is in a position of authority in relation to another person if, by reason of the position that they occupy within a ‘relevant organisation’,¹ within the meaning of section 125E, that person has –

(a) authority, power or control over the other person; or

(b) the trust of the other person; or

(c) the ability to achieve intimacy with the other person.

4. This Bill follows the Premier’s announcement in May 2022, that legislative amendments would be introduced to Parliament implementing a presumption that children and young people have not consented to sexual intercourse with adults in organisations who should be

¹ This is defined in proposed s 125E(6).

protecting them. In addition to the Premier's announcement, a written statement was released by the Tasmanian Attorney-General, Elise Archer, stating:²

Our Government does not accept that children or young people can 'consent' to sexual intercourse with their teachers, sports coaches, and people who hold roles in organisations that place them in a position of authority over children and young people.

To ensure that the criminal justice system recognises the vulnerability of children and young people, I will also be amending the Criminal Code to create a presumption that children and young people have not 'consented' to sexual intercourse with adults in organisations who should be protecting them.

This will bring the criminal law into line with community expectations, and make it easier for children and young people to achieve justice through the criminal justice system.

5. The amendment was announced in the context of the findings and recommendations of the *Royal Commission into Institutional Responses to Child Sexual Abuse*³ ('Royal Commission'), the ongoing *Commission of Inquiry into Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings* ('COI'), and the *Independent Inquiry into the Tasmanian Department of Education's Responses to Child Sexual Abuse*,⁴ which have uncovered the systemic sexual abuse of children within Tasmanian institutions. In the hearings for the COI,⁵ the Secretary of the Department of Justice clarified the amendment and the rationale for the amendment:⁶

The Royal Commission recommended in its Criminal Justice Report that state and territory governments should review any position of authority offences applying in circumstances where the victim is 16 or 17 years of age and the offender is in a position of authority in relation to the victim (Recommendations 27, 28 and 29).

Currently, Tasmania has no standalone 'position of authority' offence or crime. However, this category of offending is encapsulated within crimes such as rape and indecent assault but require [sic] the prosecution to prove that the alleged perpetrator was able to engage in sexual conduct with a child or young person on the basis of their position of authority. This will include, for example, circumstances where teachers, principals, scout leaders, tutors, sports coaches and the like engage in sexual conduct with children under their supervision.

Rather than introducing a standalone 'position of authority' offence to implement recommendations 27, 28 and 29 of the Criminal Justice Report, it is planned that amendments are made to the Criminal Code to create a presumption that any person aged under 17 years of age, or any person with a mental impairment, does not consent to sexual intercourse where the offender is in a position of authority in respect of the victim. This will mean that in

² Elise Archer 'New legislation to keep our children and young people safe' (Media Release, Attorney-General, 24 May 2022).

³ (Final Report, 15 December 2017).

⁴ Stephen Smallbone and Tim McCormack (Final Report, 7 June 2021).

⁵ Ginna Webster (Secretary, Department of Justice), Statement, *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings*, (Hearings, 8 July 2022).

⁶ *Ibid* [131], [499-501].

circumstances where a victim is a child, it can be considered reasonable to presume that their will is overborne where the sexual conduct involves a person in authority."

6. The relevant recommendations from the *Royal Commission* that the amendment seeks to address are as follows:⁷

27. State and territory governments should review any position of authority offences applying in circumstances where the victim is 16 or 17 years of age and the offender is in a position of authority (however described) in relation to the victim. If the offences require more than the existence of the relationship of authority (for example, that it be 'abused' or 'exercised'), states and territories should introduce legislation to amend the offences so that the existence of the relationship is sufficient.

28. State and territory governments should review any provisions allowing consent to be negated in the event of sexual contact between a victim of 16 or 17 years of age and an offender who is in a position of authority (however described) in relation to the victim. If the provisions require more than the existence of the relationship of authority (for example, that it be 'abused' or 'exercised'), state and territory governments should introduce legislation to amend the provisions so that the existence of the relationship is sufficient.

29. If there is a concern that one or more categories of persons in a position of authority (however described) may be too broad and may catch sexual contact which should not be criminalised when it is engaged in by such persons with children above the age of consent, state and territory governments could consider introducing legislation to establish defences such as a similar-age consent defence.

7. The above recommendations urge jurisdictions to recognise that a minor cannot consent to sexual conduct with a person in position of authority, and that the position of authority itself is enough to establish the offence. The recommendations also require that the legislative amendments should apply to all minors who are above the age of consent but have still not yet reached legal adulthood.
8. However, the operation of the proposed amendment in Tasmania will differ significantly from the outcomes sought by the recommendations. The proposed presumption only applies to victims under the age of 17 and operates as a presumption regarding consent, rather than a standalone offence. Due to its rebuttable nature, the consent of the victim remains a consideration when someone is charged with an offence that enlivens the presumption. These aspects of the amendment will be further discussed in section three of this paper, after an analysis of the current law in Tasmania.

⁷ *Royal Commission* (n 3), 'Final Report - Recommendations' 99.

Current Child Sexual Abuse Provisions in Tasmania

9. Currently, the law in Tasmania regarding unlawful sexual conduct is governed by the *Code*. In Tasmania, the age of consent to sexual conduct is 17 years of age. There is a standalone provision that specifically prohibits sexual intercourse with a minor:

124. Penetrative sexual abuse of child or young person

(1) Any person who has unlawful sexual intercourse with another person who is under the age of 17 years is guilty of a crime.

Charge: Penetrative sexual abuse of a child [*or* young person].

(2)

(3) The consent of a person against whom a crime is alleged to have been committed under this section is a defence to such a charge only where, at the time the crime was alleged to have been committed –

(a) that person was of or above the age of 15 years and the accused person was not more than 5 years older than that person; or

(b) that person was of or above the age of 12 years and the accused person was not more than 3 years older than that person.

10. The *Code* also includes an offence of indecent assault, which is used in instances where the behaviour includes assault of a sexual nature but does not include penetration. Unlike s 124, this provision protects adult and child victims. However, while consent is an element of the offence when a person over the age of consent is a victim, it is not an element of the offence if the victim is under the age of consent.

127. Indecent assault

(1) Any person who unlawfully and indecently assaults another person is guilty of a crime.

Charge: Indecent assault.

(2) In any case in which it is provided that the consent of a person to the act charged shall be a defence to a charge under section 124, the like consent to an act charged under this section given under the like conditions as to the age of the parties shall be a defence to a charge under this section.

(3) Except as hereinbefore provided, the consent of a person under 17 years of age shall be no defence to a charge under this section.

11. The following provision applies to sexual conduct with a child or young person that does not involve penetration or an assault. It has the same structure as s 124:

125B. Indecent act with child or young person

(1) Any person who does any indecent act with, or directed at, another person who is under the age of 17 years is guilty of a crime.

Charge: Indecent act with or directed at a child [*or* young person].

(2)

(3) The consent of a person against whom a crime is alleged to have been committed under this section is a defence to such a charge only where, at the time the crime was alleged to have been committed –

(a) that person was of or above the age of 15 years and the accused person was not more than 5 years older than that person; or

(b) that person was of or above the age of 12 years and the accused person was not more than 3 years older than that person.

12. Therefore, the *Code* clearly prohibits sexual conduct with a minor. The exceptions to ss 124, 125B and 127, in subsections 124(3), 125B(3) and 127(2) provide certain defences

depending on the age of the minor and the perpetrator. If the minor is 15 years or over and gave consent, a defence is available if the accused is no more than 5 years older than the victim. If the victim is 12-14 years old and gave consent, then there may be a defence if the accused is no more than 3 years older than the victim. The *Code* does not yet include a standalone provision that prohibits a person engaging in sexual conduct with a minor if the person is in a position of authority over the victim.

13. For minors who are 17 years of age, the only relevant offences regarding sexual conduct are indecent assault (included above) and rape:

185. Rape

(1) Any person who has sexual intercourse with another person without that person's consent is guilty of a crime.

14. However, these offences will not be proven beyond reasonable doubt if the victim, being 17 years of age, has consented to the intercourse or sexual behaviour. In Tasmania, consent can be vitiated if it is demonstrated that the victim consented because they were 'overborne by the nature or position of another person'.⁸ Establishing that consent has been vitiated for this reason has typically been quite difficult, and it has previously not been judicially accepted that a thirteen year old victim was overborne by the relationship between her and her foster father when submitting to sexual intercourse.⁹ Therefore, the fact that the offender is in a position of authority is currently not enough to demonstrate that a victim is overborne by the nature of the perpetrator's position.

15. Currently, the perpetrator's authority is only explicitly referred to following conviction. Section 11A of the *Sentencing Act 1997* (Tas) provides:

11A. Matters to be taken or not taken into account in sentencing certain sexual offenders

(1) In this section –

aggravating circumstance, in relation to a sexual offence, includes, but is not limited to, the following:

- (a) the victim being under the care, supervision or authority of the offender;

16. Therefore, the current provisions in Tasmania regarding child sexual abuse operate as follows:

16.1. If a victim is 17 years of age, a perpetrator in a position of authority will be charged with rape or indecent assault, and absence of consent will need to be proved such as by proving that the victim was overborne by the 'nature or position' of the offender. The position of authority will be considered an aggravating factor if the perpetrator is convicted.

16.2. If a victim is under the age of 17, a perpetrator in a position of authority can be charged with penetrative sexual abuse, indecent assault of, or indecent act with a minor, regardless of consent. However, the perpetrator will have a defence if they are of a similar age to the victim (see para 12 above) and the victim gave consent. Such a defence would be unavailable if the victim did not consent within the meaning of consent in s 2A of the Code, for example if they were overborne by the perpetrator's

⁸ *Code* s 2A(2)(e).

⁹ *Crisp* Unreported Serial No 74/1990 [10]; See also *Pafitis* [2000] TASSC 52, [11], [26].

nature or position. The relationship between the victim and the perpetrator will be considered an aggravating factor only after the perpetrator has been convicted.

- 16.3. A perpetrator in a position of authority who has sexual intercourse with a young person under the age of 17 can be charged and convicted of rape if the prosecution can prove absence of consent (e.g. because the young person lacked the capacity to consent or because they were overborne by the nature or position of the accused).

The Effect of the Presumption in the Consultation Draft

Primary operation of the presumption in the Tasmanian Code

17. Section 124, 125B and 127 of the *Code* already criminalise sexual conduct with a minor (under 17 years of age). Within ss 124, 125B and 127, consent is not a consideration if the victim is under 17 years of age, unless there is a defence relating to similar age. The introduction of the proposed amendment will operate to indicate to the prosecution that when the accused is in a position of authority they should change the relevant charge for sexual intercourse from s 124 to a charge that incorporates consent as an element, namely s 185 (rape). Therefore, where a person in a position of authority within a relevant organisation has sexual intercourse with a child (under 17), the relevant charge will be rape (s 185) because the presumption of inability to consent will apply. Because rape is a very serious charge, has greater stigma attached to it and attracts heavier sentences than penetrative sexual abuse of child or young person, charges involving an offender, who is a person in authority, will be more likely to be contested than if the perpetrator were charged with s 124. In addition, as is discussed below, exactly what is needed to raise the defence of ability to consent to rebut the presumption is not clear. However, if it is just a presumption of capacity to consent and capacity is proved by the accused, then that is not the end of the matter, and absence of consent will still need to be proved by the prosecution.

18. Regarding s 127, the *Code* expressly states that a person under the age of 17 cannot consent to sexual conduct with a person, unless a defence of a similar age is raised. Therefore, the *Code* already recognises that sexual conduct between an adult and a child, regardless of their relationship, is unlawful, unless they are of similar age. As a result, the presumption would only operate in circumstances where a perpetrator raises defence of consent and similar age, but is in a relevant position of authority regarding the victim. The position would be the same as with s 124, namely, if the accused proves capacity to consent, the prosecution will still have to prove absence of consent.

‘Sexual Conduct’ and the Interaction of the Presumption with similar age defences in s 124 125B and 127.

19. It is already a criminal offence under s 124 and 127 for someone to engage in sexual conduct with a person under the age of 17, unless the perpetrator has a defence of consent and similar age under ss 124(3) or s 127(2). This is also the case for the offence of ‘indecent

act with or directed at a child' created under s 125B. It is assumed that 'sexual conduct' is intended to cover the conduct proscribed by each of these sections.

20. Historically, the similar age defences provisions under ss 124(3), ss 125B(3) and 127(2) appear to have operated in circumstances where the validity of the consent itself has not been challenged by the prosecution. However, the focus on persons of authority within relevant organisations could mean that prosecutions are more likely, notwithstanding a similarity in age between the alleged offender. The onus will be on the alleged offender to prove that the child or young person was able to consent.

Application to minors who are perpetrators

21. As s 126A does not expressly apply to adult perpetrators only, the presumption in s 126A applies to minors who are perpetrators. In contrast, the proposed crime of failure by a person in authority to protect a child from sexual abuse in s 125E only applies if the perpetrator of sexual abuse is 18 years of age or older (see s 125E(i)). Therefore, where a 16 year old has sexual intercourse with a 15 year old, and the 16 year old has a position in a 'relevant organisation' (such as a sporting organisation) and satisfies the one of the elements under s 126A(2)(a)-(c), the presumption will apply, increasing the likelihood that a 16 year old will be charged with rape or indecent assault in circumstances where they would not previously have been criminally responsible because of the defence of consent (to rape) and similar age (to s 124). Given that this bill is intended to address the recommendations in the *Royal Commission*, which focuses on the sexual abuse perpetrated by adults in institutional settings, the current phrasing of the presumption may lead to a significant unintended operation of increasing the likelihood of criminalising minors.

Age of the Victim

22. The age limitation of the presumption to persons under 17 years of age corresponds to the age of consent in Tasmania. However, this does not address situations where young people, who are 17 years of age, are still engaged with institutions or organisations and have been groomed by people in positions of power and authority. This results in grooming behaviour and sexual conduct with young persons not being considered to be unlawful if the young person is 17 years of age when the sexual conduct commenced. Given the *Royal Commission's* recommendations that offences should extend to minors who are 17 years of age, the current amendment does not achieve its purpose of protecting all minors who are in Tasmanian institutions or organisations.
23. The other Australian and international jurisdictions considered below have recognised that power imbalances may still exist in the age groups that fall between the age of consent and the age of legal adulthood. Protecting minors from adults who exploit a position of authority by engaging in sexual conduct with them, including consensual sexual conduct, is an appropriate use of the criminal law. The proposed amendment fails to implement this recommendation of the Royal Commission.

The interaction between 126A(1) and 126A(2)

24. The current definition of a person of authority is that they occupy a position within a relevant organisation, as defined in s 125E(6) and that they either have authority, power or control over the other person; have the trust of the other person; or have the ability to achieve intimacy with the other person.
25. The phrasing of this provision means that a person in a position in a relevant organisation does not necessarily need to have authority over the victim for the presumption to apply. Instead, the presumption will apply to any person who, by virtue of their position in a relevant organisation, is able to achieve intimacy with a child or young person, regardless of their type or position of employment. It is also unclear whether the phrasing 'ability to achieve intimacy' incorporates anyone with an opportunity to achieve intimacy. Without further clarification, the phrasing of this provision is capable of encompassing a broad range of people.

The Presumption of inability to consent.

26. The phrasing indicates the presumption is rebuttable rather than irrebuttable as it applies unless 'the contrary is proved'. It is also clear from its terms that it is more than an evidentiary onus which would only require only a proper foundation for the defence with the onus proof remaining on the prosecution (as with the defence of automatism). So, the presumption has the effect of reversing the onus of proof and putting it on the accused. Presumably, the standard of proof would be on the balance of probabilities. However, without explicitly stating within the provision that the onus will be reversed and the standard of proof will be on the balance of probabilities, this aspect of the presumption will not be certain until it has been judicially interpreted.
27. Another issue is determining what is meant by a presumption that a person is 'unable to consent' to sexual conduct. On the face of it, this suggests that the presumption relates to capacity to consent. This is much narrower than a presumption of absence of consent. The presumption could be rebutted by the accused proving that the child or young person had the capacity to consent. This could be done by proving that the young person could understand the nature of the relevant act (Code s 2A(i) and the relevant case law) and was able to form a rational opinion on the matter (Code s 2A(h)). It would still leave open the question of whether they did in fact consent. If the presumption only relates to capacity to consent, then the prosecution would still have to prove absence of consent in a case of rape (beyond reasonable doubt) and consent would be a defence. This will create a complex legal inquiry into the nature of the consent and shift the focus away from the aim of criminalising sexual conduct with a minor perpetrated by a person in a position of authority.

Interaction with persistent sexual abuse of a child or young person and child exploitation offences

28. The presumption also has implications for other offences. Persistent sexual abuse (s 125A) requires proof of at least three unlawful acts. The presumption has potential relevance in relation to any offence which has absence of consent as an element. Therefore, if the prosecution alleges that one of these offences was rape, the presumption will be relevant. Furthermore, it will be relevant at the sentencing stage if the prosecution claim that one of those offences is rape. If it is not conceded by the defence, this will require evidence to be called and potentially cross-examining the child or young person to resolve the factual dispute.
29. The child exploitation material offences in the *Code* have a defence in s 130E to the effect that it is a defence if the material which is the subject of a charge depicts sexual activity between the accused person and person under the age of 18 that is not an unlawful act. If the accused person is a position of authority, there is loophole in the law with respect to a young person aged 17, and possibly those who are younger if similar age consent defences apply. The proposed presumption does nothing to address this gap in the law.

Interaction with civil litigation

30. In recent civil litigation, attempts have been made by the State to argue that consensual sexual conduct between a person in position of authority and a child did not constitute ‘sexual abuse’ under s 5B(1)(a)-(b) of the *Limitations Act 1974* (Tas), and therefore compensation could not be claimed for those historical incidents.¹⁰ If this is a sound argument, which is doubtful, it would be better addressed by an amendment to the *Limitations Act* and not through the *Code*.

Summary of main issues

31. In summary, the approach adopted in s 126A of the Consultation Draft is flawed. The major defects are:
- It is not a presumption of absence of consent but a rebuttable presumption that the ‘victim’ is unable to consent; if the accused proves capacity to consent, then the prosecution will still have to prove an absence of consent when this is an element of the crime (as in rape and indecent assault if the age difference consent defence applies).
 - The meaning of ‘ability to achieve intimacy’ by reason of the position in an organisation that the accused occupies is unclear.
 - Minors aged 17 years of age are not protected by the presumption.
 - Perpetrators who are minors are caught by the presumption.

¹⁰ Angela Sdrinis Legal “Tasmanian Government Relying on “Consent” of minors in Institutional Abuse Claims” (Media release, 11 April 2022).

- The presumption creates unnecessary complexity, particularly in cases where the similarity in age defences apply.
- The presumption has the potential to increase pleas of not guilty in cases where the presumption leads to a charge of rape being laid rather than penetrative sexual abuse of a child.

An Alternative Proposal

32. A much simpler means of protecting young people from sexual abuse by a person in a position of authority would be to create standalone crimes of sexual penetration and sexual assault of a person under the age of 18 years in care, supervision or authority (see the discussion below and examples in Appendix 1). Another possibility is to consider a way to push for a broader interpretation of the provision on the definition of consent in s 2A(2)(e) (a person does not freely agree if they agree or submit because of the nature or position of another person) to one which does not require an additional element such as inducement.¹¹ However, the difficulty with sexual abuse of a child or young person is that as a result of grooming, the young person can be sexualised or seduced, and when it comes to analysing individual sexual acts, an absence of free agreement can be difficult to prove. Therefore, dispensing with a requirement to prove absence of consent is likely to be a more effective solution.

A Radical Proposal

33. Sexual offence law reform has been bedevilled by the issue of consent for decades. Attempts to introduce an affirmative model of consent have met with limited gains in practice. If it is thought that the existing provisions in the *Code* coupled with a new standalone person in authority offence, as suggested above, still does not adequately deal with the problem identified by the *Royal Commission*, then a further step could be taken to reverse the onus of proof in relation to consent in all cases where absence of consent is relevant (e.g. rape). This would require the accused to prove consent or a mistaken belief in consent in cases rather the onus being on the prosecution to prove absence of consent or an honest and reasonable belief in consent. This was the position in relation the defence of mistake as to consent until in *Attorney General's Ref No 1 of 1989, Re Brown*,¹² the Court of Criminal Appeal reversed the decision in *Martin*.¹³

¹¹ To overturn such decisions as *Crisp* Unreported Serial No 74/1990 [10].

¹² [1990] Tas R 46

¹³ [1963] Tas SR 103

Jurisdictional Comparisons

Standalone offences of sexual conduct with a person under care, supervision or authority.

34. Each jurisdiction in Australia, with the exception of Queensland and Tasmania, has enacted separate offence provisions that pertain specifically to a person in a position of authority engaging in sexual conduct with a minor. As demonstrated in the discussion below, these offence provisions operate regardless of whether consent was given by the young person and apply to any young person who is under the age of 18, regardless of the recognised age of consent within the specific jurisdiction. The standalone provisions distinguish sexual intercourse from other sexual conduct and have certain defences that are expressly available. These provisions have been summarised below and are detailed in Appendix 1. This type of offence provides a clear legislative intention of criminalising sexual conduct perpetrated by a person in a position of authority, as recommended by the *Royal Commission*, and this structure clearly conveys how the provision operates, how it interacts with other provisions, and the available defences.

Definitions – Person in a position of authority compared to ‘relevant organisation’

35. From the outset, each jurisdiction, apart from Western Australia, has statutory definition of ‘person in a position of authority’ or outlines what relationships constitute a minor being in the ‘care, supervision or authority’ of another person. These provisions are relatively similar, non-exhaustive, and the following definition has been extracted from the *Crimes Act 1958 (Vic)*:

37 Care, supervision or authority

(1) Without limiting the circumstances in which a child is under the care, supervision or authority of a person, a person (A) has a child (B) under their care, supervision or authority if A is—

- (a) B's parent or step-parent; or
- (b) B's teacher; or
- (c) B's employer; or
- (d) B's youth worker; or
- (e) B's sports coach; or
- (f) B's counsellor; or
- (g) B's health professional; or
- (h) a person who has parental responsibility (within the meaning of the Children, Youth and Families Act 2005) for B; or
- (i) a religious or spiritual guide, or a leader or official (including a lay member) of a church or religious body, however any such guide, leader, official, church or body is described, who provides care, advice or instruction to B or has authority over B; or
- (j) an out of home carer (within the meaning given by section 74 of the Children, Youth and Families Act 2005) of B; or
- (k) a police officer acting in the course of their duty in respect of B; or
- (l) employed in, or providing services in, a remand centre, youth residential centre, youth justice centre or prison and is acting in the course of their duty in respect of B.

36. The definition of ‘care, supervision and authority’ in other jurisdictions is similar to the definition provided above. The Tasmanian definition of relevant organisation bears a strong resemblance to this definition and is included below:

relevant organisation means –

(a) an organisation that exercises care, supervision or authority over children, whether as its primary function or otherwise, and includes but is not limited to –

(i) a religious organisation ; and

(ii) a school; and

(iii) an education and care service within the meaning of the Education and Care Services National Law (Tasmania); and

(iv) a child care service as defined in section 3(1) of the Child Care Act 2001; and

(v) a hospital; and

(vi) a council; and

(vii) a State Service Agency; and

(viii) a sporting group; and

(ix) a youth organisation ; and

(x) a charity or benevolent organisation ; and

(xi) an organisation providing out-of-home care and accommodation services; and (xii) a community service organisation ; and

(b) an organisation that, in accordance with an agreement or arrangement with an organisation referred to in paragraph (a), is required or permitted to engage in activities associated with the care, supervision or authority over children exercised by the organisation

37. The Tasmanian definition and the other jurisdictions have primary differences. The first is that the Tasmanian definition refers to potential organisations/institutions that a person could be involved with to be a person ‘in a position of authority’. If the person occupies a position (and it could be any position) by reason of which they have authority power or control over the young person, or their trust or the ability to achieve intimacy with them, the presumption applies. In other jurisdictions, the legislature is clear in expressing the types of relationships that place a person in a position of authority or care with respect to the child. Therefore, in other jurisdictions, there is very little inquiry into what type of position a person must hold to be an eligible perpetrator. However, given that Tasmania refers to relevant organisations, inquiries may be need to be made regarding the nature of the position that a perpetrator holds that enables them to satisfy one of the three conditions in s 126A(2) in situations such as those discussed in paragraph 29.

38. Other points of difference are that the relevant organisation does not expressly include within its scope a parent or step-parent, or a person who has parental responsibilities, unless they are part of one of the relevant organisations listed above. The provision also does not expressly include an employer within the list. It follows that the list of situations in which the presumption operates is much more limited in some respects than the ‘under

supervision, care or authority crimes. However, it is broader in other respects because in the situations covered by s 126A(2)(b) and (c), neither supervision, care nor authority is required.

Summary of Relevant Offence Provisions in Australia

39. In Western Australia, South Australia, New South Wales, Victoria, the Australian Capital Territory, the Northern Territory and the Commonwealth, specific provisions criminalise sexual conduct between a minor who is over the age of consent, but under the supervision, care or authority of the perpetrator. Different jurisdictions also demonstrate a distinction between: intercourse and other sexual conduct and the penalty depending on the age of the minor. Defences are also expressly included in some jurisdictions where there is: mistake of belief of age, mistake of belief that the child was not under their care, supervision or authority, and/or if the age of the perpetrator is within a certain proximity to age of the victim.

40. The table below provides a simplified comparison of each jurisdiction and what defences are available. Appendix 1 provides the specific provisions for each jurisdiction.

Jurisdiction	Distinguishes between intercourse and other activity	Penalty distinguished due to the age of the victim	Explicit Defence of mistake of age	Explicit Defence of mistake of relationship	Defence of age proximity	Penalty for rape greater than authority provision
Commonwealth	Yes	No	Yes	No	No	Yes
Victoria	Yes	No	Yes	Yes	No	Yes
New South Wales	Yes	Yes	No	No	Yes	Yes
South Australia	Yes	No	Yes	No	Yes	Yes
Western Australia	Yes	No	No	No	No	Yes
Australian Capital Territory	Yes	No	Yes	No	Yes	Yes
Northern Territory	Yes	Yes	No	No	No	Yes

41. As the table demonstrates, all states and territories distinguish between sexual intercourse and other sexual conduct. However, because the provisions do not consider the consent of the victim, the penalty for this offence is lower than that of a rape conviction.

42. As demonstrated in Appendix 1, the prosecution does not need to prove that the sexual conduct occurred due to the nature of the person’s position. In Victoria, there is an explicit defence where a person was mistaken about their relationship to the child, however there is no equivalent explicit defence in any other jurisdiction.

43. In New South Wales, South Australia and the Australian Capital Territory, similar age defences apply to a person who is in a position of power but is within a certain age proximity to the young person.
44. As demonstrated in Appendix 1, all of the provisions from the other jurisdictions apply to young people who are under the age of 18, regardless of the age of consent in the relevant jurisdiction.

Jurisdictional Comparison - The United Kingdom

45. In the United Kingdom (UK), it is also an offence for a person in a position of trust to engage in sexual activity with a person who is under the age of 18, but above the age of consent. In the *Sexual Offences Act 2003* (UK), ‘touching’ includes penetration.¹⁴ The relevant provision regarding sexual activity is as follows:

16 Abuse of position and trust: sexual activity with child

- (1) A person aged 18 or over (A) commits an offence if—
- (a) he intentionally touches another person (B),
 - (b) the touching is sexual,
 - (c) A is in a position of trust in relation to B,
 - (d) where subsection (2) applies, A knows or could reasonably be expected to know of the circumstances by virtue of which he is in a position of trust in relation to B, and
 - (e) either—
 - (i) B is under 18 and A does not reasonably believe that B is 18 or over, or
 - (ii) B is under 13.
- (2) This subsection applies where A—
- (a) is in a position of trust in relation to B by virtue of circumstances within section 21(2), (3), (4) or (5), and
 - (b) is not in such a position of trust by virtue of other circumstances.
- (3) Where in proceedings for an offence under this section it is proved that the other person was under 18, the defendant is to be taken not to have reasonably believed that that person was 18 or over unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.
- (4) Where in proceedings for an offence under this section—
- (a) it is proved that the defendant was in a position of trust in relation to the other person by virtue of circumstances within section 21(2), (3), (4) or (5), and
 - (b) it is not proved that he was in such a position of trust by virtue of other circumstances,

it is to be taken that the defendant knew or could reasonably have been expected to know of the circumstances by virtue of which he was in such a position of trust unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know of those circumstances.

¹⁴ *Sexual Offences Act 2003* (UK) s 79(8).

(5) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years.

46. In comparison to the Australian jurisdictions with a similar provision, the UK offence only applies to perpetrators who are over the age of 18. The definition of position of trust is provided in Appendix 2. This includes any relationships that arise from the child being a ward of the state, attending an education institution, being detained, and any relationship arising from sport or religious practices, but not from employment.

47. Within the offence, subsection (3) provides the perpetrator an avenue to raise the defence of mistake of age.

48. In subsections (2) and (4), the perpetrator can also raise a defence as to mistake of the nature of the relationship with the child in the circumstances referred to in s 21(2)-(5). However, the presumption rests in the favour of the victim until demonstrated otherwise by the perpetrator.

49. Section 23 also provides a defence when the perpetrator and victim are married, and s 24 provides a further defence when lawful sexual conduct occurred before the person was placed in a position of trust. In comparison to the similar offence provisions in Australia, the UK provisions provides a more comprehensive approach to the offence, and includes considerations regarding the age of the perpetrator, defences pertaining to the age of the victim and their position, and whether the sexual conduct predates the perpetrator operating in a position of trust.

Jurisdictional Comparison - Canada

50. The *Criminal Code* (RSC 1985, c C-46) in Canada recognises that it is an offence for a person in a position of authority to engage in sexual conduct with a minor who is over the age of consent but under the age of legal adulthood. It states as follows:

Sexual exploitation

- **153 (1)** Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, and who
 - **(a)** for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person; or
 - **(b)** for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person.
- **Marginal note: Punishment**
(1.1) Every person who commits an offence under subsection (1)

- (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
 - (b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.
- **Inference of sexual exploitation**

(1.2) A judge may infer that a person is in a relationship with a young person that is exploitative of the young person from the nature and circumstances of the relationship, including

 - (a) the age of the young person;
 - (b) the age difference between the person and the young person;
 - (c) the evolution of the relationship; and
 - (d) the degree of control or influence by the person over the young person.
 - **Definition of young person**

(2) In this section, *young person* means a person 16 years of age or more but under the age of eighteen years.

51. The provision in Canada differs somewhat to the Australian and UK legislation. Although the Canadian case law has interpreted ‘touching’ to include penetration,¹⁵ there is no statutory definition of ‘position of trust or authority’. The test for this is instead defined in s 153(1.2) and further in case law, notably the case of *R. v Audet*.¹⁶ The extract below highlights the purpose of not inserting a statutory definition:¹⁷

The words “authority” and “trust” used in s. 153(1) must be interpreted in accordance with their ordinary meaning and the term “position of authority” must not be restricted to cases in which the relationship of authority stems from a role of the accused but must extend to any relationship in which the accused actually exercises such a power. In declining to include in s. 153(1) a list of the cases in which a person must refrain from sexual contact with a young person, Parliament intended to direct the analysis to the nature of the relationship between the young person and the accused rather than to their status in relation to each other. The definition of the terms “position of authority” and “position of trust”, like the determination in each case of the nature of the relationship between the young person and the accused, must take into account the purpose and objective pursued by Parliament. It will be up to the trial judge to take into account all the factual circumstances relevant to the characterization of the relationship between the two in order to determine whether the accused was in a position of trust or authority towards the young person or whether the young person was in a relationship of dependency with the accused at the time of the offence.

52. The absence of a statutory definition of position of trust and authority gives the Canadian courts wider discretion to decide whether there is a relationship of trust and power between the victim and perpetrator based on the specific factual scenario of each case. This is unlike the Australian and UK provisions, although the lists in these jurisdictions are non-exhaustive and therefore have scope to include judicial discretion.

¹⁵ See e.g. *R. v Aird*, 2013 ONCA 447.

¹⁶ [1996] 2 SCR 171.

¹⁷ *Ibid* 172-3.

53. As detailed in Appendix 3 and the provisions included above, the Canadian legislation has adopted a hard line towards sexual conduct of people in positions of authority:

53.1. The offence is punishable by a minimum amount of time that must be served in prison.

53.2. There is no defence of mistake of age unless the accused took all reasonable steps to ascertain the age of the victim.¹⁸ and no express defence regarding mistake about the perpetrator's position regarding the victim.

54. A general defence exists for engaging in sexual conduct where a perpetrator is within a certain age of the victim, similar to Tasmania's current provisions. However, this specifically does not include circumstances when the perpetrator is in a position of power and authority over the minor, even if the perpetrator is a minor themselves. Furthermore, a person who is 12 or 13 can still be charged with sexual misconduct under ss 151 or 152 (sexual interference and invitation to sexual touching), if they are in a position of trust and authority regarding the victim.

55. These offence provisions demonstrate the strictness of Canada's approach towards sexual behaviour perpetrated by people in positions of authority, and this is a much harsher approach compared to Australian jurisdictions and the UK legislation.

Jurisdictional Comparison - New Zealand

56. In New Zealand, the *Crimes Act 1961* does not have a specific provision that prohibits a person in a position of authority from engaging in sexual conduct with a person who is over the age of consent but under 18 years of age. However, their provisions pertaining to incest behaviour are more expansive than in Tasmania, and an offence is recognised when: the sexual behaviour is perpetrated by a family member, including a foster parent (and former foster parent), or a person with whom the victim lives; the perpetrator has power and authority over the victim; and the perpetrator has a responsibility for or significant role in the child's upbringing. The details of this provision have been included in Appendix 4.

57. Therefore, New Zealand does not yet have an equivalent provision to the proposed amendment to the Tasmanian *Code*.¹⁹ However, the New Zealand definition of family members in the provisions pertaining to the offence of incest is more expansive than in Tasmania and recognises role of authority in coercing consent in the context of family relations. By comparison, the proposed amendment in Tasmania does not recognise the role of authority and trust in family relationships.

¹⁸ See appendix 3.

¹⁹ See Appendix 4 for s 133 of the *Code*.

APPENDICES:

Appendix 1:

Comparison of standalone offences in other Australian jurisdictions

Please see additional document: Appendix 1 - Research Paper on the Proposed Amendment to Tasmanian Child Sexual Abuse Laws (Person in a Position of Authority).

Appendix 2:

Sexual Offences Act 2003 (UK)

21 Positions of trust

(1) For the purposes of sections 16 to 19, a person (A) is in a position of trust in relation to another person (B) if—

- (a) any of the following subsections applies, or
- (b) any condition specified in an order made by the Secretary of State is met.

(2) This subsection applies if A looks after persons under 18 who are detained in an institution by virtue of a court order or under an enactment, and B is so detained in that institution.

(3) This subsection applies if A looks after persons under 18 who are resident in a home or other place in which—

- (a) accommodation and maintenance are provided by an authority in accordance with section 22C(6) of the Children Act 1989 (c. 41) or section 81(6) of the Social Services and Well-being (Wales) Act 2014 or
- (b) accommodation is provided by a voluntary organisation under section 59(1) of the Children Act 1989

and B is resident, and is so provided with accommodation and maintenance or accommodation, in that place.

(4) This subsection applies if A looks after persons under 18 who are accommodated and cared for in one of the following institutions—

- (a) a hospital,
- (b) in Wales, an independent clinic,
- (c) a care home,
- (d) a community home, voluntary home or children's home,
- (e) a home provided under section 82(5) of the Children Act 1989,
- (f)
- (g) a place in Wales at which a care home service is provided,
- (h) premises in Wales at which a secure accommodation service is provided.

and B is accommodated and cared for in that institution.

(5) This subsection applies if A looks after persons under 18 who are receiving education at an educational institution and B is receiving, and A is not receiving, education at that institution.

(6)

(7) This subsection applies if A is engaged in the provision of services under, or pursuant to anything done under—

- (a) sections 8 to 10 of the Employment and Training Act 1973 (c. 50), or
- (b) section 68, 70(1)(b) or 74 of the Education and Skills Act 2008,

and, in that capacity, looks after B on an individual basis.

(8) This subsection applies if A regularly has unsupervised contact with B (whether face to face or by any other means)—

- (a) in the exercise of functions of a local authority under section 20 or 21 of the Children Act 1989 (c. 41) or section 76 or 77 of the Social Services and Well-being (Wales) Act 2014

(b)

(9) This subsection applies if A, as a person who is to report to the court under section 7 of the Children Act 1989 on matters relating to the welfare of B, regularly has unsupervised contact with B (whether face to face or by any other means).

(10) This subsection applies if A is a personal adviser appointed for B under—

- (a) section 23B(2) of, or paragraph 19C of Schedule 2 to, the Children Act 1989, or
- (aa) section 106(1) of the Social Services and Well-being (Wales) Act 2014 in respect of category 1 or 2 young persons within the meaning of that Act

(b)

and, in that capacity, looks after B on an individual basis.

(11) This subsection applies if—

- (a) B is subject to a care order, a supervision order or an education supervision order, and
- (b) in the exercise of functions conferred by virtue of the order on an authorised person or the authority designated by the order, A looks after B on an individual basis.

(12) This subsection applies if A—

- (a) is an officer of the Service or Welsh family proceedings officer (within the meaning given by section 35 of the Children Act 2004) appointed for B under section 41(1) of the Children Act 1989,
- (b) is appointed a children’s guardian of B under rule 6 or rule 18 of the Adoption Rules 1984 (S.I. 1984/265),
- (c) is appointed to be the guardian ad litem of B under rule 9.5 of the Family Proceedings Rules 1991 (S. I. 1991/1247)
- (d) is appointed to be the children’s guardian of B under rule 59 of the Family Procedure (Adoption) Rules 2005 (S.I. 2005/2795) or rule 16.3(1)(ii) or rule 16.4 of the Family Procedure Rules 2010 (S.I. 2010/2955),

and, in that capacity, regularly has unsupervised contact with B (whether face to face or by any other means).

(13) This subsection applies if—

- (a) B is subject to requirements imposed by or under an enactment on his release from detention for a criminal offence, or is subject to requirements imposed by a court order made in criminal proceedings, and
- (b) A looks after B on an individual basis in pursuance of the requirements.

22 Positions of trust: interpretation

(1) The following provisions apply for the purposes of section 21.

(2) Subject to subsection (3), a person looks after persons under 18 if he is regularly involved in caring for, training, supervising or being in sole charge of such persons.

(3) A person (A) looks after another person (B) on an individual basis if—

(a) A is regularly involved in caring for, training or supervising B, and

(b) in the course of his involvement, A regularly has unsupervised contact with B (whether face to face or by any other means).

(4) A person receives education at an educational institution if—

(a) he is registered or otherwise enrolled as a pupil or student at the institution, or

(b) he receives education at the institution under arrangements with another educational institution at which he is so registered or otherwise enrolled.

(5) In section 21—

• “authority”—

(a) in relation to England and Wales, means a local authority;

(b)

• “care home” means an establishment in England which is a care home for the purposes of the Care Standards Act 2000 (c. 14);

• “care home service” has the meaning given in Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016 (anaw 2)

• “care order” has—

(a) in relation to England and Wales, the same meaning as in the Children Act 1989 (c. 41); **F38**. . .

(b).

• “children’s home” has—

(a) in relation to England the meaning given by section 1 of the Care Standards Act 2000;

(b).

• “community home” has in relation to England the meaning given by section 53 of the Children Act 1989;

• “education supervision order” has—

(a) in relation to England and Wales, the meaning given by section 36 of the Children Act 1989;

(b)

• “hospital” means—

(a) a hospital as defined by section 275 of the National Health Service Act 2006, or section 206 of the National Health Service (Wales) Act 2006; or

(b) any other establishment—

(i) in England, in which any of the services listed in subsection (6) are provided; and

(ii) in Wales, which is a hospital within the meaning given by section 2(3) of the Care Standards Act 2000

- “independent clinic” has—
 - (a) the meaning given by section 2 of the Care Standards Act 2000;
 - (b).....
- “secure accommodation service” has the meaning given in Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016;
- “supervision order” has—
 - (a) in relation to England and Wales, the meaning given by section 31(11) of the Children Act 1989 (c. 41);
 - (b).....
- “voluntary home” has—
 - (a) in relation to England, the meaning given by section 60(3) of the Children Act 1989.
 - (b).....

(6) The services referred to in paragraph (b)(i) of the definition of “hospital” are as follows—

- (a) medical treatment under anaesthesia or intravenously administered sedation;
- (b) dental treatment under general anaesthesia;
- (c) obstetric services and, in connection with childbirth, medical services;
- (d) termination of pregnancies;
- (e) cosmetic surgery, other than—
 - (i) ear and body piercing;
 - (ii) tattooing;
 - (iii) the subcutaneous injection of a substance or substances into the skin for cosmetic purposes; or
 - (iv) the removal of hair roots or small blemishes on the skin by the application of heat using an electric current.

22A Further positions of trust

(1) For the purposes of sections 16 to 19, a person (A) is in a position of trust in relation to another person (B) if—

- (a) A coaches, teaches, trains, supervises or instructs B, on a regular basis, in a sport or a religion, and
- (b) A knows that they coach, teach, train, supervise or instruct B, on a regular basis, in that sport or religion.

(2) In subsection (1)—

- “sport” includes—
 - (a) any game in which physical skill is the predominant factor, and

(b) any form of physical recreation which is also engaged in for purposes of competition or display;

- “religion” includes—

(a) a religion which involves belief in more than one god, and

(b) a religion which does not involve belief in a god.

(3) This section does not apply where a person (A) is in a position of trust in relation to another person (B) by virtue of circumstances within section 21.

(4) The Secretary of State may by regulations amend subsections (1) and (2) to add or remove an activity in which a person may be coached, taught, trained, supervised or instructed.

Appendix 3:

Criminal Code (RSC 1985, c C-46)

Consent no defence

150.1 (1) Subject to subsections (2) to (2.2), when an accused is charged with an offence under section 151 or 152 or subsection 153(1), 160(3) or 173(2) or is charged with an offence under section 271, 272 or 273 in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.

Idem

(5) It is not a defence to a charge under section 153, 170, 171 or 172 or subsection 286.1(2), 286.2(2) or 286.3(2) that the accused believed that the complainant was 18 years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

Exemption for accused aged twelve or thirteen

(3) No person aged twelve or thirteen years shall be tried for an offence under section 151 or 152 or subsection 173(2) unless the person is in a position of trust or authority towards the complainant, is a person with whom the complainant is in a relationship of dependency or is in a relationship with the complainant that is exploitative of the complainant.

Exception — complainant aged 12 or 13

(2) When an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is 12 years of age or more but under the age of 14 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if the accused

(a) is less than two years older than the complainant; and

(b) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.

Marginal note: Exception — complainant aged 14 or 15

(2.1) If an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is 14 years of age or more but under the age of

16 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if the accused

(a) is less than five years older than the complainant; and

(b) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.

Appendix 4:

Crimes Act 1961 (NZ)

131 Sexual conduct with dependent family member

- (1) Every one is liable to imprisonment for a term not exceeding 7 years who has sexual connection with a dependent family member under the age of 18 years.
- (2) Every one is liable to imprisonment for a term not exceeding 7 years who attempts to have sexual connection with a dependent family member under the age of 18 years.
- (3) Every one is liable to imprisonment for a term not exceeding 3 years who does an indecent act on a dependent family member under the age of 18 years.
- (4) The dependent family member cannot be charged as a party to the offence.
- (5) It is not a defence to a charge under this section that the dependent family member consented.

131A Dependent family member defined

- (1) For the purposes of section 131, one person is a dependent family member of another person—
 - (a) if the other person has power or authority over him or her, and is—
 - (i) his or her parent, step-parent, foster parent, guardian, uncle, or aunt; or
 - (ii) a parent, step-parent, or foster parent of a person described in subparagraph (i); or
 - (iii) a child of his or her parent or step-parent; or
 - (iv) the spouse or de facto partner of a person described in subparagraph (i) or subparagraph (ii) or subparagraph (iii); or
 - (b) if they are members of the same family, whanau, or other culturally recognised family group, and the other person—
 - (i) is not a person referred to in paragraph (a); but
 - (ii) has a responsibility for, or significant role in, his or her care or upbringing; or
 - (c) if he or she is living with the other person as a member of the other person's family, and the other person is not a person referred to in paragraph (a), but has—
 - (i) power or authority over him or her; and
 - (ii) a responsibility for, or significant role in, his or her care or upbringing.
- (2) In subsection (1),—
 - aunt, in relation to a person, includes a half-sister of one of the person's parents
 - foster parent includes a former foster parent
 - guardian—
 - (a) means guardian by virtue of the Guardianship Act 1968 or the Oranga Tamariki Act 1989; and
 - (b) includes a former guardian
 - step-parent includes a former step-parent
 - uncle, in relation to a person, includes a half-brother of one of the person's parents.

133. Incest

(1) Any person who has sexual intercourse with another person knowing that other person to be his or her lineal ancestor, lineal descendant, or sibling, is guilty of a crime whether or not that other person has consented to such sexual intercourse.

Charge: Incest.

(2) Any person of or above the age of 16 years who, with consent, permits another person to have sexual intercourse with him or her knowing that other person to be his or her lineal ancestor, lineal descendant, or sibling, is guilty of a crime.

Charge: Permitting incest.

(3) This section applies whether or not the relationship between the persons is traced through lawful wedlock.

(4) In this section, *sibling* includes half-brother and half-sister.

Appendix 1:

Jurisdiction	Commonwealth: <i>Criminal Code (Cth)</i>	Victoria <i>Crimes Act 1958 (Vic)</i>	New South Wales <i>Crimes Act 1900 (NSW)</i>	South Australia <i>Criminal Law Consolidation Act 1935 (SA)</i>	Western Australia <i>Criminal Code (WA)</i>	Australian Capital Territory <i>Criminal Code 2002 (ACT)</i>	Northern Territory <i>Criminal Code (NT)</i>
Definition of person in authority	<p>272.3 (1) For the purposes of this Code, a person is in a position of trust or authority in relation to another person if:</p> <p>(a) the person is the other person's parent, step-parent, or grandparent; or</p> <p>(b) the person is the other person's foster parent, guardian or carer; or</p> <p>(c) the person is a teacher engaged in the education of the other person; or</p> <p>(d) the person is a religious official or spiritual leader (however described) providing pastoral care or religious instruction to the other person; or</p> <p>(e) the person is the other person's sports coach; or</p> <p>(f) the person is a medical practitioner, nurse, psychologist, other health professional (however described), counsellor or social worker providing professional services to the other person; or</p> <p>(g) the person is a member of a police force or police service, or a person employed or providing services in a correctional institution (however described), performing duties in relation to the other person; or</p> <p>(h) the person:</p> <p>(i) is an employer of the other person; or</p> <p>(ii) has the authority to determine significant aspects of the other person's terms and conditions of employment; or</p> <p>(iii) has the authority to terminate the other person's employment (whether the other person is being paid in respect of that employment or is working in a voluntary capacity).</p> <p>(2) Without limiting who is a grandparent of a person for the purposes of this section, a person (the first person) is the grandparent of</p>	<p>37 (1) Without limiting the circumstances in which a child is under the care, supervision or authority of a person, a person (A) has a child (B) under their care, supervision or authority if A is—</p> <p>(a) B's parent or step-parent; or</p> <p>(b) B's teacher; or</p> <p>(c) B's employer; or</p> <p>(d) B's youth worker; or</p> <p>(e) B's sports coach; or</p> <p>(f) B's counsellor; or</p> <p>(g) B's health professional; or</p> <p>(h) a person who has parental responsibility (within the meaning of the Children, Youth and Families Act 2005) for B; or</p> <p>(i) a religious or spiritual guide, or a leader or official (including a lay member) of a church or religious body, however any such guide, leader, official, church or body is described, who provides care, advice or instruction to B or has authority over B; or</p> <p>(j) an out of home carer (within the meaning given by section 74 of the Children, Youth and Families Act 2005) of B; or</p> <p>(k) a police officer acting in the course of their duty in respect of B; or</p> <p>(l) employed in, or providing services in, a remand centre, youth residential centre, youth justice centre or prison and is acting in the course of their duty in respect of B</p>	<p>73(3) For the purposes of this section, a young person (the "complainant") is under the special care of another person (the "accused person") if, and only if--</p> <p>(a) the accused person is any of the following who is not a close family member of the complainant--</p> <p>(i) the parent or the parent of a parent of the complainant,</p> <p>(ii) the guardian or authorised carer of the complainant,</p> <p>(iii) the spouse or de facto partner of a person referred to in subparagraph (i) or (ii), or</p> <p>(b) the accused person is a teacher at, or the principal or a deputy principal of, the school at which the complainant is a student, or</p> <p>(b1) the accused person performs work at the school at which the complainant is a student, in which the accused person has students at the school, including the complainant, under the authority of the accused person, or</p> <p>(c) the accused person has an established personal relationship with the complainant in connection with the provision of religious, sporting, musical or other instruction to the complainant, in which relationship the complainant is under the authority of the accused person, or</p> <p>(d) the accused person is a custodial officer of an institution of which the complainant is an inmate, or</p> <p>(e) the accused person is a health professional and the complainant is a patient of the health professional, or</p> <p>(f) the accused person--</p> <p>(i) performs work for an organisation that provides residential care to young persons placed in out-of-home care (within the meaning of the <i>Children and Young Persons (Care and Protection) Act 1998</i>), and</p> <p>(ii) has an established personal relationship with the complainant in connection with the provision of that residential care to</p>	<p>49(9) For the purposes of this section, a person is in a position of authority in relation to a person under the age of 18 years (the child) if—</p> <p>(a) the person is a teacher and the child is a pupil of the teacher or of a school at which the teacher works; or</p> <p>(b) the person is a parent, step-parent, guardian or foster parent of the child or the de facto partner or domestic partner of a parent, step-parent, guardian or foster parent of the child; or</p> <p>(c) the person provides religious, sporting, musical or other instruction to the child; or</p> <p>(d) the person is a religious official or spiritual leader (however described and including lay members and whether paid or unpaid) in a religious or spiritual group attended by the child; or</p> <p>(e) the person is a health professional or social worker providing professional services to the child; or</p> <p>(f) the person is responsible for the care of the child and the child has a cognitive impairment; or</p> <p>(g) the person is employed or providing services in a correctional institution (within the meaning of the Correctional Services Act 1982) or a training centre (within the meaning of the Young Offenders Act 1993), or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or</p> <p>(ga) the person is employed or providing services in a licensed children's residential facility (within the meaning of the Children and Young People (Safety) Act 2017), or a residential care facility or other facility established under section 36 of the Family and Community Services Act 1972, or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or</p> <p>(h) the person is an employer of the child or other person who has the authority to determine significant aspects of the child's terms and conditions of employment or to terminate the child's employment (whether</p>	<p>No definition provided</p>	<p>55A(2) Without limiting subsection (1), a young person is under the "special care" of a person if the person—</p> <p>(a) is a teacher at a school, or a person with responsibility for students at a school, and the young person is a student at the school; or</p> <p>(b) is a parent, step-parent, grandparent, foster carer or legal guardian of the young person; or</p> <p>(c) is a domestic partner of a person mentioned in paragraph (b); or</p> <p>(d) has an established personal relationship with the young person in relation to the provision of religious, sporting, musical or other instruction; or</p> <p>(e) is the young person's employer; or</p> <p>(f) provides professional counselling to the young person; or</p> <p>(g) is a health service provider and the young person is the person's patient; or</p> <p>(h) is a custodial officer and the young person is a young detainee in the officer's care, custody or control; or</p> <p>(i) is a carer for the young person if the young person has impaired decision-making ability; or</p> <p>(j) is otherwise responsible for the care, supervision or control of the young person.</p> <p>(3) Subsection (1) does not apply to a person if the person—</p> <p>(a) was married to the young person at the time of the alleged offence; or</p> <p>(b) is not more than 2 years older than the young person.</p>	<p>192(3) For this section, a person (the victim) is under the special care of another person (the offender) if the offender:</p> <p>(a) is the step-parent, guardian or foster parent of the victim;</p> <p>(b) is a school teacher and the victim is a pupil of the offender;</p> <p>(c) has established a personal relationship with the victim in connection with the care, instruction (for example, religious, sporting or musical instruction) or supervision (for example, supervision in the course of employment or training) of the victim;</p> <p>(d) is an officer at a correctional institution at which the victim is detained; or</p> <p>(e) is a health professional or other provider of health care or treatment and the victim is a patient or client of the offender</p>

	another person if the first person is a parent or step-parent of a parent or step-parent of the other person.		the complainant, in which relationship the complainant is under the authority of the accused person, or (g) the accused person-- (i) performs work for an organisation that provides refuge or crisis accommodation, and (ii) has an established personal relationship with the complainant in connection with the provision of that accommodation to the complainant, in which relationship the complainant is under the authority of the accused person.	the child is being paid in respect of that employment or is working in a voluntary capacity).			
Definition of Consent	<p>268.14 Crime against humanity—rape</p> <p>(3) In this section:</p> <p>consent means free and voluntary agreement. The following are examples of circumstances in which a person does not consent to an act:</p> <p>(a) the person submits to the act because of force or the fear of force to the person or to someone else;</p> <p>(b) the person submits to the act because the person is unlawfully detained;</p> <p>(c) the person is asleep or unconscious, or is so affected by alcohol or another drug as to be incapable of consenting;</p> <p>(d) the person is incapable of understanding the essential nature of the act;</p> <p>(e) the person is mistaken about the essential nature of the act (for example, the person mistakenly believes that the act is for medical or hygienic purposes);</p> <p>(f) the person submits to the act because of psychological oppression or abuse of power;</p> <p>(g) the person submits to the act because of the perpetrator taking advantage of a coercive environment.</p>	<p>36 Consent</p> <p>(1) For the purposes of Subdivisions (8A) to (8E), consent means free agreement.</p> <p>(2) Circumstances in which a person does not consent to an act include, but are not limited to, the following—</p> <p>(a) the person submits to the act because of force or the fear of force, whether to that person or someone else;</p> <p>(b) the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal;</p> <p>(c) the person submits to the act because the person is unlawfully detained;</p> <p>(d) the person is asleep or unconscious;</p> <p>(e) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;</p> <p>(f) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act; Note This circumstance may apply where a person gave consent when not so affected by alcohol or another drug as to be incapable of consenting.</p> <p>(g) the person is incapable of understanding the sexual nature of the act;</p> <p>(h) the person is mistaken about the sexual nature of the act;</p> <p>(i) the person is mistaken about the identity of any other person involved in the act;</p> <p>(j) the person mistakenly believes that the act is for medical or hygienic purposes;</p> <p>(k) if the act involves an animal, the person mistakenly believes that the act is for veterinary or agricultural purposes or scientific research purposes;</p> <p>(l) the person does not say or do anything to indicate consent to the act;</p>	<p>61HI Consent generally</p> <p>(1) A person consents to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.</p> <p>(2) A person may, by words or conduct, withdraw consent to a sexual activity at any time.</p> <p>(3) Sexual activity that occurs after consent has been withdrawn occurs without consent.</p> <p>(4) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.</p> <p>(5) A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity. Example— A person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.</p> <p>(6) A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with— (a) that person on another occasion, or (b) another person on that or another occasion</p> <p>61HJ Circumstances in which there is no consent</p> <p>(1) A person does not consent to a sexual activity if—</p>	<p>46—Consent to sexual activity</p> <p>(1) In this section— <i>sexual activity</i> includes sexual intercourse.</p> <p>(2) For the purposes of this Division, a person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity.</p> <p>(3) Without limiting subsection (2), a person is taken not to freely and voluntarily agree to sexual activity if—</p> <p>(a) the person agrees because of— (i) the application of force or an express or implied threat of the application of force or a fear of the application of force to the person or to some other person; or (ii) an express or implied threat to degrade, humiliate, disgrace or harass the person or some other person; or</p> <p>(b) the person is unlawfully detained at the time of the activity; or</p> <p>(c) the activity occurs while the person is asleep or unconscious; or</p> <p>(d) the activity occurs while the person is intoxicated (whether by alcohol or any other substance or combination of substances) to the point of being incapable of freely and</p>	<p>319. Interpretation</p> <p>(2) For the purposes of this Chapter —</p> <p>(a) <i>consent</i> means a consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means;</p> <p>(b) where an act would be an offence if done without the consent of a person, a failure by that person to offer physical resistance does not of itself constitute consent to the act;</p> <p>(c) a child under the age of 13 years is incapable of consenting to an act which constitutes an offence against the child.</p>	<p>50B Meaning of consent—pt 3</p> <p>In this part:</p> <p><i>consent</i>, to a sexual act, means informed agreement to the sexual act that is—</p> <p>(a) freely and voluntarily given; and</p> <p>(b) communicated by saying or doing something.</p> <p>67 When a person does not consent to an act</p> <p>(1) For a sexual offence consent provision, and without limiting the grounds on which it may be established that a person does not consent to an act mentioned in the provision, a person does not consent to an act mentioned in the provision if the person—</p> <p>(a) says or does something to communicate withdrawing agreement to the act either before or during the act; or</p> <p>(b) participates in the act because of the infliction of violence or force on the person, or another person, an animal or property; or</p> <p>(c) participates in the act because of a threat to inflict violence or force on the person, or another person, an animal or property; or</p> <p>(d) participates in the act because of extortion, coercion, blackmail, intimidation or a fear of public humiliation or disgrace of the person or another person; or</p> <p>(e) participates in the act because of a threat to mentally or physically harass the person or another person; or</p>	<p>192 Sexual intercourse and gross indecency without consent</p> <p>(1) For this section, consent means free and voluntary agreement.</p> <p>(2) Circumstances in which a person does not consent to sexual intercourse or an act of gross indecency include circumstances where:</p> <p>(a) the person submits because of force, fear of force, or fear of harm of any type, to himself or herself or another person;</p> <p>(b) the person submits because he or she is unlawfully detained;</p> <p>(c) the person is asleep, unconscious or so affected by alcohol or another drug as to be incapable of freely agreeing;</p> <p>(d) the person is incapable of understanding the sexual nature of the act;</p> <p>(e) the person is mistaken about the sexual nature of the act or the identity of the other person;</p> <p>(f) the person mistakenly believes that the act is for medical or hygienic purposes; or</p> <p>(g) the person submits</p>

		<p>(m) having given consent to the act, the person later withdraws consent to the act taking place or continuing.</p>	<p>(a) the person does not say or do anything to communicate consent, or</p> <p>(b) the person does not have the capacity to consent to the sexual activity, or</p> <p>(c) the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity, or</p> <p>(d) the person is unconscious or asleep, or</p> <p>(e) the person participates in the sexual activity because of force, fear of force or fear of serious harm of any kind to the person, another person, an animal or property, regardless of—</p> <p>(i) when the force or the conduct giving rise to the fear occurs, or</p> <p>(ii) whether it occurs as a single instance or as part of an ongoing pattern, or</p> <p>(f) the person participates in the sexual activity because of coercion, blackmail or intimidation, regardless of—</p> <p>(i) when the coercion, blackmail or intimidation occurs, or</p> <p>(ii) whether it occurs as a single instance or as part of an ongoing pattern, or</p> <p>(g) the person participates in the sexual activity because the person or another person is unlawfully detained, or</p> <p>(h) the person participates in the sexual activity because the person is overcome by the abuse of a relationship of authority, trust or dependence, or</p> <p>(i) the person participates in the sexual activity because the person is mistaken about—</p> <p>(i) the nature of the sexual activity, or</p> <p>(ii) the purpose of the sexual activity, including about whether the sexual activity is for health, hygienic or cosmetic purposes, or</p> <p>(j) the person participates in the sexual activity with another person because the person is mistaken—</p> <p>(i) about the identity of the other person, or</p> <p>(ii) that the person is married to the other person, or</p>	<p>voluntarily agreeing to the activity; or</p> <p>(e) the activity occurs while the person is affected by a physical, mental or intellectual condition or impairment such that the person is incapable of freely and voluntarily agreeing; or</p> <p>(f) the person is unable to understand the nature of the activity; or</p> <p>(g) the person agrees to engage in the activity with a person under a mistaken belief as to the identity of that person; or</p> <p>(h) the person is mistaken about the nature of the activity.</p>		<p>(f) participates in the act because of force or fear; or</p> <p>(g) is incapable of agreeing to the act because of intoxication; or</p> <p>(h) is mistaken about the identity of the other person; or</p> <p>(i) participates in the act because of fraudulent misrepresentation of any fact made by someone else; or</p> <p>(j) participates in the act because of an intentional misrepresentation by another person about the use of a condom; or</p> <p>(k) participates in the act as a result of an abuse of—</p> <p>(i) a relationship of authority, trust or dependence; or</p> <p>a professional relationship; or</p> <p>(l) does not have the capacity to agree to the act; or</p> <p>is unconscious; or</p> <p>(n) is asleep; or</p> <p>(o) is unlawfully detained or knows that another person is unlawfully detained.</p> <p>(2) A person also does not consent to an act with another person (the accused person) only because the person—</p> <p>(a) does not say or do something to resist the act; or</p> <p>consented to—</p> <p>(i) another act with the accused person; or</p> <p>(ii) the same act with the accused person at a different time or place; or</p> <p>(iii) the same act with a person other than the accused person; or</p> <p>(iv) a different act with a person other than the accused person.</p> <p>(3) If it is established that an accused person who knows, or is reckless about whether, the consent of another person to an act mentioned in a sexual offence consent provision has been caused by any of the circumstances set out in subsection (1) (a) to (o), the accused person is taken to know that the other person does not consent to the act.</p> <p>(4) An accused person is taken to know that another person does not consent to</p>	<p>because of a false representation as to the nature or purpose of the act.</p>
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			<p>(k) the person participates in the sexual activity because of a fraudulent inducement.</p> <p>(2) This section does not limit the grounds on which it may be established that a person does not consent to a sexual activity.</p> <p>(3) In this section— fraudulent inducement does not include a misrepresentation about a person’s income, wealth or feelings.</p>			<p>an act mentioned in a sexual offence consent provision if any belief that the accused person has, or may have, that the other person consents to the act is not reasonable in the circumstances.</p> <p>(5) For subsection (4), without limiting the grounds on which it may be established that an accused person’s belief is not reasonable in the circumstances, the accused person’s belief is taken not to be reasonable in the circumstances if the accused person did not say or do anything to ascertain whether the other person consented.</p>	
Offence Provisions	<p>272.12 Sexual intercourse with young person outside Australia—defendant in position of trust or authority</p> <p><i>Engaging in sexual intercourse with young person</i></p> <p>(1) A person commits an offence if:</p> <p>(a) the person engages in sexual intercourse with another person (the young person); and</p> <p>(b) the young person is at least 16 but under 18; and</p> <p>(c) the person is in a position of trust or authority in relation to the young person; and</p> <p>(d) the sexual intercourse is engaged in outside Australia.</p> <p>(4) Absolute liability applies to paragraphs (1)(b) and (d) and (2)(c) and (e).</p> <p>(5) Strict liability applies to paragraphs (1)(c) and (2)(d);</p> <p>272.13 Sexual activity (other than sexual intercourse) with young person outside Australia—defendant in position of trust or authority</p> <p><i>Engaging in sexual activity with young person</i></p> <p>(1) A person commits an offence if:</p> <p>(a) the person engages in sexual activity (other than sexual intercourse) with another person (the young person); and</p> <p>(b) the young person is at least 16 but under 18; and</p> <p>(c) the person is in a position of trust or authority in relation to the young person; and</p> <p>(d) the sexual activity is engaged in outside Australia.</p> <p>(4) Absolute liability applies to</p>	<p>49C Sexual penetration of a child aged 16 or 17 under care, supervision or authority</p> <p>(1) A person (A) commits an offence if—</p> <p>(a) A intentionally—</p> <p>(i) sexually penetrates another person (B); or</p> <p>(ii) causes or allows B to sexually penetrate A; or</p> <p>(iii) causes B—</p> <p>(A) to sexually penetrate themselves; or</p> <p>(B) to sexually penetrate another person (C); or</p> <p>(C) to be sexually penetrated by C; and</p> <p>(b) B is—</p> <p>(i) a child aged 16 or 17 years; and</p> <p>(ii) under A’s care, supervision or authority.</p> <p>(2) A person who commits an offence against subsection (1) is liable to level 5 imprisonment (10 years maximum).</p> <p>49E Sexual assault of a child aged 16 or 17 under care, supervision or authority</p> <p>(1) A person (A) commits an offence if—</p> <p>(a) A intentionally—</p> <p>(i) touches another person (B); or</p> <p>(ii) causes or allows B to touch A; or</p> <p>(iii) causes B—</p> <p>(A) to touch, or to continue to touch, themselves; or</p> <p>(B) to touch, or to continue to touch, another person (C); or</p> <p>(C) to be touched, or to continue to be touched, by C; and</p> <p>(b) B is—</p> <p>(i) a child aged 16 or 17 years; and</p> <p>(ii) under A’s care, supervision or authority; and</p>	<p>73 Sexual intercourse—young person between 16 and 18 under special care</p> <p>(1) Any person who has sexual intercourse with a young person who—</p> <p>(a) is under his or her special care, and</p> <p>(b) is of or above the age of 16 years and under the age of 17 years, is liable to imprisonment for 8 years.</p> <p>(2) Any person who has sexual intercourse with a young person who—</p> <p>(a) is under his or her special care, and</p> <p>(b) is of or above the age of 17 years and under the age of 18 years, is liable to imprisonment for 4 years</p> <p>73A Sexual touching—young person between 16 and 18 under special care</p> <p>(1) Any person who intentionally—</p> <p>(a) sexually touches a young person under the person’s special care, or</p> <p>(b) incites a young person under the person’s special care to sexually touch the person, or</p> <p>(c) incites a young person under the person’s special care to sexually touch another person, or</p> <p>(d) incites another person to sexually touch a young person under the first person’s special care, is guilty of an offence.</p>	<p>49—Unlawful sexual intercourse</p> <p>(5) A person who, being in a position of authority in relation to a person under the age of 18 years, has sexual intercourse with that person is guilty of an offence.</p> <p>Maximum penalty: Imprisonment for 10 years.</p> <p>56—Indecent assault</p> <p>(1) A person who indecently assaults another is guilty of an offence.</p> <p>Maximum penalty:</p> <p>(a) for a basic offence— imprisonment for 8 years;</p> <p>(b) for an aggravated offence— imprisonment for 10 years.</p> <p>(2) If the victim of the offence was at the time of the offence under the age of 14 years, the offence is an aggravated offence and it is unnecessary for the prosecution to establish that the defendant knew of, or was reckless as to, the aggravating factor.</p> <p>57—Consent no defence in certain cases</p> <p>(1) Subject to subsection (1a), a person under the age of 18 years will be taken not to be capable of consenting to an indecent assault committed by a person who is in a position of authority in relation to the person.</p> <p>(1a) Despite subsection (1), the alleged victim’s consent will be a defence to a charge of indecent assault if the accused was a person of a class described in subsection (4)(c) in relation to the alleged victim and proves that—</p> <p>(a) the alleged victim was, on the day on which the offence is alleged to have occurred, of or above the age of 17 years; and</p> <p>(b) the accused—</p>	<p>322. Child of or over 16, sexual offences against by person in authority etc.</p> <p>(1) In this section <i>child</i> means a child of or over the age of 16 years.</p> <p>(2) A person who sexually penetrates a child who is under his or her care, supervision, or authority is guilty of a crime and is liable to imprisonment for 10 years.</p> <p>(3) A person who procures, incites, or encourages a child who is under his or her care, supervision, or authority to engage in sexual behaviour is guilty of a crime and is liable to imprisonment for 10 years.</p> <p>Alternative offence: s. 322(4).</p> <p>(4) A person who indecently deals with a child who is under his or her care, supervision, or authority is guilty of a crime and is liable to imprisonment for 5 years.</p> <p>(5) A person who procures, incites, or encourages a child who is under his or her care, supervision, or authority to do an indecent act is guilty of a crime and is liable to imprisonment for 5 years.</p> <p>(6) A person who indecently records a child who is under his or her care, supervision, or authority is guilty of a crime and is liable to imprisonment for 5 years.</p>	<p>55A Sexual intercourse with young person under special care</p> <p>(1) A person commits an offence if—</p> <p>(a) the person engages in sexual intercourse with a young person; and</p> <p>(b) the young person is under the person’s special care.</p> <p>Maximum penalty: imprisonment for 10 years.</p> <p>(3) Subsection (1) does not apply to a person if the person—</p> <p>(a) was married to the young person at the time of the alleged offence; or</p> <p>(b) is not more than 2 years older than the young person.</p> <p><i>young person</i> means a person who is at least 16 years old, but not yet an adult.</p> <p>61A Act of indecency with young person under special care</p> <p>(1) A person commits an offence if—</p> <p>(a) the person commits an act of indecency on, or in the presence of, a young person; and</p> <p>(b) the young person is under the person’s special care.</p> <p>Maximum penalty: imprisonment for 7 years.</p> <p><i>Note</i> A reference to an offence includes a reference to a related ancillary offence, eg attempt (see Legislation Act, s 189).</p>	<p>127 Sexual intercourse or gross indecency involving child under 16 years</p> <p>(1) Any person who:</p> <p>(a) has sexual intercourse with; or</p> <p>(b) commits any act of gross indecency upon, a child who is under the age of 16 years is guilty of an offence and is liable to imprisonment for 16 years.</p> <p>(2) If the child is of or over the age of 10 years and under the age of 16 years and the offence is committed in any of the following circumstances, the offender is liable to imprisonment for 20 years:</p> <p>(a) the offender is in the company of another person;</p> <p>(b) the child is (whether generally or at the time of the commission of the offence) under the care of the offender;</p> <p>(4) It is a defence to a charge of an offence against this section to prove:</p> <p>(a) the child was of or above the age of 14 years; and</p> <p>(b) the accused person believed on reasonable grounds that the child was of or above the age of 16 years.</p> <p>128 Sexual intercourse or</p>

	<p>paragraphs (1)(b) and (d) and (2)(c) and (e).</p> <p>(5) Strict liability applies to paragraphs (1)(c) and (2)(d).</p>	<p>(c) the touching is—</p> <p>(i) sexual; and</p> <p>(ii) contrary to community standards of acceptable conduct.</p> <p>(3) Whether or not the touching is contrary to community standards of acceptable conduct depends on the circumstances.</p> <p>(4) For the purposes of subsection (3)—</p> <p>(a) the circumstances include—</p> <p>(i) the purpose of the touching; and</p> <p>(ii) whether A seeks or gets sexual arousal or sexual gratification from the touching;</p> <p>(b) the circumstances do not include—</p> <p>(i) whether B consents to the touching; or</p> <p>(ii) whether A believes that B consents to the touching.</p>		<p>(i) was, on that day, under the age of 18 years; or</p> <p>(ii) believed on reasonable grounds that the alleged victim was, on that day, of or above the age of 18 years.</p> <p>(2) Subject to subsection (3), no person under the age of seventeen years shall be deemed capable of consenting to any indecent assault.</p> <p>(3) Where the person is between the age of sixteen and seventeen years, his or her consent shall be a defence to a charge of indecent assault if the accused proves that at the time of the indecent assault—</p> <p>(a) he or she was under the age of seventeen years; or</p> <p>(b) he or she believed on reasonable grounds that the person was of or above the age of seventeen years.</p>	<p>(7) It is no defence to a charge under this section to prove the accused believed on reasonable grounds that the child was of or over the age of 18 years.</p> <p>(8) It is a defence to a charge under this section to prove the accused person was lawfully married to the child.</p>	<p>(2) Subsection (1) does not apply to a person if the person—</p> <p>(a) was married to the young person at the time of the alleged offence; or</p> <p>(b) is not more than 2 years older than the young person.</p> <p><i>Note</i> The defendant has an evidential burden in relation to the matters mentioned in s (2) (see Criminal Code, s 58).</p>	<p>gross indecency involving child over 16 years under special care</p> <p>(1) Any adult who:</p> <p>(a) has sexual intercourse with; or</p> <p>(b) commits any act of gross indecency upon,</p> <p>a child who is:</p> <p>(c) of or over the age of 16 years; and</p> <p>(d) under the person's special care,</p> <p>is guilty of an offence and is liable to imprisonment for 4 years.</p> <p>(2) If the child is of or over the age of 16 years and under the age of 17 years, the offender is liable to imprisonment for 8 years.</p>
Maximum Penalty	<p>Penalty for sexual intercourse: Imprisonment for 10 years;</p> <p>Penalty for other sexual conduct: Imprisonment for 7 years.</p>	<p>49C(2) A person who commits an offence against subsection (1) is liable to level 5 imprisonment (10 years maximum);</p> <p>49E(2) A person who commits an offence against subsection (1) is liable to level 6 imprisonment (5 years maximum).</p>	<p>See above: 73A Maximum penalty—</p> <p>(a) in the case of a young person who is of or above the age of 16 years and under the age of 17 years—imprisonment for 4 years, or (b) in the case of a young person who is of or above the age of 17 years and under the age of 18 years—imprisonment for 2 years</p>	<p>See above: Maximum penalty: 10 years imprisonment for sexual intercourse; Imprisonment for 8 years for a basic sexual assault offence and imprisonment for 10 years for an aggravated sexual assault offence.</p>	<p>See above: 10 years for penetration and 5 years for touching; Note: For s 321 offences: Child of or over 13 and under 16, sexual offences against – perpetrators in a position of power are liable to longer periods of imprisonment.</p>	<p>See above: 10 years for penetration and 7 years for act of indecency: .</p>	<p>See above: 8 years if the child is 16 years of age, 4 years if the child is 17 years of age, 20 years if the child is below 16 years of age: See above.</p>
Defence of Mistake of Age	<p>272.16 Defence based on belief about age</p> <p>(2) It is a defence to a prosecution for an offence against section 272.12 or 272.13 if the defendant proves that, at the time of the sexual intercourse or sexual activity, he or she believed that the young person was at least 18.</p>	<p>49X Defences to offences against children aged 16 or 17 or under 18—reasonable belief as to age</p> <p>(1) It is a defence to a charge for an offence against section 49C(1), 49E(1), 49G(1) or 49L(1) if, at the time of the conduct constituting the offence, A reasonably believed that B was 18 years of age or more.</p> <p>(2) It is a defence to a charge for an offence against section 49I(1) if, at the time of the conduct constituting the offence, A reasonably believed that C was 18 years of age or more.</p> <p>(3) It is a defence to a charge for an offence against section 49Q(1) or 49R(1) if, at the time of the conduct constituting the offence—</p> <p>(a) B was 12 years of age or more; and</p> <p>(b) A reasonably believed that B was 18 years of age or more.</p> <p>(4) A bears the burden of proving (on the balance of probabilities) the matter referred to in subsection (1), (2) or (3)(b).</p>	N/A	<p>(5a) It is a defence to a charge under subsection (5) if the accused was a person of a class described in subsection (9)(c) and proves that—</p> <p>(a) the person with whom the accused is alleged to have had sexual intercourse was, on the date on which the offence is alleged to have been committed, of or above the age of 17 years; and</p> <p>(b) the accused—</p> <p>(i) was, on the date on which the offence is alleged to have been committed, under the age of 18 years; or</p> <p>(ii) believed on reasonable grounds that the person with whom the accused is alleged to have had sexual intercourse was of or above the age of 18 years.</p>	<p>Defence explicitly not available: See above.</p>	<p>55A(4) It is a defence to a prosecution for an offence against subsection (1) if the defendant proves that the defendant believed on reasonable grounds that the young person was at least 18 years old.</p> <p>61A(3) It is a defence to a prosecution for an offence against subsection (1) if the defendant proves that the defendant believed on reasonable grounds that the young person was at least 18 years old.</p>	N/A

Defence of Mistake of Relationship	Strict Liability to the relationship applies: See sections 272.12(5); 272.13(5).	<p>49ZA Defences to offences against children aged 16 or 17—reasonable belief as to care, supervision or authority</p> <p>(1) It is a defence to a charge for an offence against section 49C(1), 49E(1), 49G(1) or 49L(1) if, at the time of the conduct constituting the offence, A reasonably believed that B was not under A's care, supervision or authority.</p> <p>(2) It is a defence to a charge for an offence against section 49I(1) if, at the time of the conduct constituting the offence, A reasonably believed that C was not under A's care, supervision or authority.</p> <p>(3) A bears the burden of proving (on the balance of probabilities) the matter referred to in subsection (1) or (2).</p>	N/A	N/A	N/A	N/A	N/A
Defence of Proximity of Age	N/A	N/A	<p>80AG Defence of similar age</p> <p>(1) It is a defence to a prosecution for an offence under section 66C (3), 66DB, 66DD, 73 or 73A if the complainant is of or above the age of 14 years and the age difference between the complainant and the accused person is no more than 2 years.</p>	Yes, see above.	N/A	Yes, see above.	N/A