

# Sexual Offences Against Adults and Children

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A New Regime

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# **SEXUAL OFFENCES AGAINST ADULTS AND CHILDREN: A NEW REGIME**

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## **I. Introduction**

1. In 2018, following the Royal Commission into Institutional Responses to Child Sexual Abuse, sweeping changes were made to Division 10 of the *Crimes Act* 1900 (NSW) relating to sexual offences. There are new offences, new defences, new definitions, new elements, and new penalties, including new standard non-parole periods. The amendments commenced on 1.12. 2018.
2. Because of the scope of the amendments, understanding these changes is necessary for practitioners in all areas of criminal practice. This paper aims to provide practitioners with a road map to the new provisions.
3. Because these amendments have been in force for less than a year, there has been little judicial consideration of them in the higher courts. Where possible, we have included cases considering the new provisions for assistance.

## **II. Change to the definition and application of consent provision (section 61HE)**

4. Previously, the consent provision in section 61HA included the meaning of consent, knowledge about consent, and negation of consent. The provision only related to sexual intercourse without consent (section 61I), and its aggravated forms (sections 61J and 61JA).
5. The new consent provision, section 61HE, also applies to sexual touching (previously indecent assault) and sexual act (previously act of indecency). It also includes their aggravated forms (sections 61KC, 61KD, 61KE, 61KF).
6. As explained in this paper, behaviour that constitutes the new offences of 'sexual touching' and 'sexual act' will be broader than the behaviour which would have satisfied the repealed 'indecent assault' and 'act of indecency' offences.

7. The expansion of consent provisions to more, and less serious offending, provides even wider scope for the behaviour that is criminalised by the new legislation.
8. The interaction of the broadened offences, and the applicability of consent provisions, means that any act:
  - a) 'carried out in circumstances where a reasonable person would consider the act to be sexual' (the new 'sexual act' definition, section 61HC);
  - b) with or towards a person;
  - c) who is deemed not to have consented, because of their substantial intoxication (section 61HE);renders a person liable to 18 months in prison (section 61KE). This hypothetical example demonstrates how substantial the changes are.
9. It is anticipated that the intoxication of an alleged complainant, and the reasonableness of a defendant's belief in a complainant's consent, will become commonly relevant to offences of sexual touching and sexual act in the way they are now commonly issues in offences of sexual intercourse without consent.
10. Having previously been almost exclusively reserved for the District and higher courts,<sup>1</sup> these issues will now be commonly considered in summary hearings in Local and Children's courts.
11. As these provisions have not yet been judicially considered, case law on the application of consent provisions to 61I offences may be of assistance to guide practitioners in the new 'sexual touching' and 'sexual act' offences.

### **III. Changes to offences**

12. The following offences are repealed:
  - a. Section 61L Indecent assault;

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<sup>1</sup> With the exception of 61I offences heard in the Children's Court, by way of summary hearing.

- b. Section 61M Aggravated indecent assault;
- c. Section 61N Act of indecency;
- d. Section 61O Aggravated act of indecency.

13. New offences of 'sexual touching' and 'sexual acts':

- a. Section 61KC Sexual touching [5 years];
- b. Section 61KD Aggravated sexual touching: [7 years; SNPP 5 years];
- c. Section 61KE Sexual act [18 months];
- d. Section 61KF Aggravated sexual act [3 years].

14. New offences relating to children:

- a. Section 66DA Sexual touching – child under 10 [16 years; SNPP 8 years];
- b. Section 66DB Sexual touching – child between 10 and 16 [10 years];
- c. Section 66DC Sexual act – child under 10 [7 years];
- d. Section 66DD Sexual act – child between 10 and 16 [2 years];
- e. Section 66DE Aggravated sexual act – child between 10 and 16 [5 years];
- f. Section 66DF Sexual act for production of child abuse material – child under 16 [10 years];
- g. Section 66EA- Persistent sexual abuse of a child [life imprisonment];
- h. Section 73A Sexual touching- young person between 16 and 18 under special care.

15. Section 61H (which defined sexual intercourse and other terms) and section 61HA (consent in relation to sexual offences) has become sections 61H – 61HE, defining a range of new terms including 'sexual touching' and 'sexual act' (sections 61HB and 61HC), 'cognitive impairment' (section 61HD) and consent (section 61HE). The acts which a person commits an offence by inciting have broadened (section 61H). None of the new offences are offences of specific intent pursuant to section 428B of the Crimes Act.

16. References in any Act or law to indecent assault are taken to include references to sexual touching, and to acts of indecency are taken to include references to sexual touching and sexual act, within their meanings in Pt 3, Div 10.

17. A table comparing old and new offences is attached as appendix 1 to the end of the paper.

## **Sexual Touching Offences**

18. Offences of 'indecent assault' have now been repealed and replaced with offences of 'sexual touching'.

19. The definition of 'sexual touching' is contained in section 61HB which states:

"Sexual touching" means a person touching another person:

- a) with any part of the body or with anything else, or
- b) through anything, including anything worn by the person doing the touching or by the person being touched,
- c) in circumstances where a reasonable person would consider the touching to be sexual.

20. Section 61HB(2) is a non-exhaustive list of matters to be taken into account in deciding whether a reasonable person would consider the touching to be sexual. These include factors; such as whether the area of the victim that was touched was the genital/anal/breasts area, whether the act was done to obtain sexual arousal or gratification, and whether any other aspect of the touching makes it sexual. Section 61(HB)(3) specifically states touching done for genuine medical or hygienic purposes is not sexual touching.<sup>2</sup>

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<sup>2</sup> This definition has not yet been considered in a criminal law context. Recently the Civil and Administrative Tribunal considered the new provision in *Hill v Medical Council of NSW* [2019] NSWCATOD 52. In that matter, the Tribunal considered an allegation that a doctor had inserted his finger into the rectum of an unconscious patient, at the invitation of another doctor but without the patient's consent. The Tribunal found it appeared unlikely this would be found to be an offence of Sexual Touching since there was no evidence of 'salacious, gratuitous or any other perverse purpose' by the doctor (at [79]).

## **Sexual touching (section 61KC)**

21. The new offence of sexual touching is contained within section 61KC of the Act. The provision makes it an offence for a person, without the consent of the victim (and knowing they do not consent) to intentionally sexually touch the victim, incite the victim to sexually touch them, incite a third person to sexually touch the victim, or incite the victim to sexually touch a third person. This offence carries 5 years imprisonment as a maximum penalty and no standard non-parole period.

## **Aggravated sexual touching (section 61KD)**

22. If an offence of sexual touching is carried out in company, if the victim has a serious physical disability or cognitive impairment, or was under the authority of the offender, the offence is aggravated (pursuant to section 61KD). These circumstances of aggravation are consistent with those that applied to the repealed act of indecency offence (section 61M). This is a Table 1 offence and carries a maximum penalty of 7 years imprisonment with a standard non-parole period of 5 years.

## **Sexual touching- offences relating to children**

23. Two new offences of sexual touching that relate specifically to children have been created under subdivision 6:

- a) **Sexual Touching - child under 10 (section 66DA)** is a Table 1 offence. It carries a maximum penalty of 16 years and a standard non-parole period of 8 years.
  
- b) **Sexual Touching – child between 10 and 16 (section 66DB)** is a Table 1 offence with a maximum penalty of 10 years and no standard non-parole period. This offence will be impacted by the new section 80AG (the similar age defence provision) which provides a defence to certain offences where the victim is 14 or over and the age difference is no more than 2 years.

24. As an observation, because sexual touching arguably includes kissing or 'heavy petting' it seems that this particular amendment has inadvertently criminalised young people kissing. An example of this is where a 14-year-old-accused is charged with sexual touching a child between 10 and 16, on the basis of kissing a 13-year-old.<sup>3</sup> Previously, it is unlikely this would have been viewed as criminal; the requirement for proof of the 'indecent' of an act provided some protection against the criminalisation of behaviour that does not breach community standards. Because the new offence of sexual touching does not require proof of 'indecent' it is arguable that the above scenario would be an offence.

### **Sexual touching of a child between the ages of 16 and 18 who is under the special care of the offender (section 73A)**

25. Section 73A creates a further offence of sexual touching of a young person between the ages of 16 and 18 who is under the special care of the offender. 'Special care' retains the definition from section 73 (which prohibits sexual intercourse in the same terms). The 'special care' relationship includes teachers and authorised carers, and these terms are defined in section 72B. The maximum penalty is 4 years if the victim is aged 16 and 2 years if the victim is aged 17. As with the section 73 offence, consent is not a defence to an offence under 73A.

### **Sexual Act Offences**

26. The term 'sexual act' is defined in the legislation under section 61HC as 'an act (other than sexual touching) carried out in circumstances where a reasonable person would consider the act to be sexual.'

27. Like the sexual touching definition, section 61HC(2) contains a non-exhaustive list of matters to be taken into account in deciding whether a reasonable person would consider act to be sexual. These include factors such as whether the area

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<sup>3</sup> The similar age defence of s 80AG would not apply to this scenario because the complainant is under the age of 14 years.



of the victim that was 'involved' was the genital/anal/breasts area, whether the act was done to obtain sexual arousal or gratification, and whether any other aspect of the act makes it sexual. As with sexual touching, section 61HC(3) creates a protection for medical workers and states "an act carried out for genuine medical or hygienic purposes is not a sexual act".

28. This new definition of 'sexual act' is potentially far wider than the definition of its predecessor, 'act of indecency', although the second reading speech asserts that it 'reflects the core of the common law meaning of indecency'. The new provision has not yet been judicially considered.

### **Sexual Act (section 61KE)**

29. The offence of 'sexual act' in section 61KE prohibits engaging in a sexual act *with or towards* another person without their consent, knowing that they are not consenting. It is a Table 1 offence and carries a maximum penalty of 18 months imprisonment with no standard non parole period.

### **Aggravated sexual act (section 61KF)**

30. If the offence of sexual act is carried out in company, if the victim had a serious physical disability or cognitive impairment, or was under the authority of the offender, the offence is aggravated (pursuant to section 61KF). These circumstances of aggravation are consistent with those that applied to the repealed Act of Indecency offence (section 61O). Aggravated sexual act is a Table 1 offence and carries a maximum penalty of 3 years imprisonment with no standard non-parole period.

### **Sexual Act - offences relating to children**

31. Three new offences of sexual act that relate specifically to children have been created under subdivision 6:

- a) **Sexual Act- Child under 10 (section 66DC)** is a Table 1 offence. It carries a maximum penalty of 7 years and no standard non-parole period.

- b) **Sexual Act- Child between 10 and 16 (s 66DD)** is a Table 1 offence. It carries a maximum penalty of 2 years imprisonment and has no standard non-parole period. Given the age of the victim in these offences, a lack of consent is not an element. The new similar age defence, pursuant to section 80AG, applies to this offence, where the complainant is 14 years or over and the age gap between the complainant and accused is less than 2 years (see below).
- c) **Aggravated Sexual Act - Child between 10 and 16 (section 66DE)** is a Table 1 offence. It carries a maximum penalty of 5 years imprisonment with no standard non parole period. The offence is made out when a sexual act has been carried out with a child between the ages of 10 and 16 and one or more of the following circumstances are present:
- a) at the time of, or immediately before or after, the commission of the offence, the alleged offender intentionally or recklessly inflicts actual bodily harm on the alleged victim or any other person who is present or nearby, or
  - b) at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument, or
  - c) the alleged offender is in the company of another person or persons, or
  - d) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender, or
  - e) the alleged victim has a serious physical disability, or
  - f) the alleged victim has a cognitive impairment, or
  - g) the alleged offender took advantage of the alleged victim being under the influence of alcohol or a drug in order to commit the offence, or

- h) the alleged offender deprives the alleged victim of his or her liberty for a period before or after the commission of the offence, or
- i) the alleged offender breaks and enters into any dwelling-house or other building with the intention of committing the offence or any other serious indictable offence.

The circumstances of aggravation for this offence are much broader than under section 61KF (aggravated sexual act) and section 61KD (aggravated sexual touching).

### **New iteration of Persistent Sexual Abuse of a Child (section 66EA)**

- 32. The new version of the offence of 'persistent sexual abuse of a child' criminalises an adult maintaining an 'unlawful sexual relationship' with a child.
- 33. The previous version of this offence under 66EA required proof of the accused committing three or more sexual offences against a child. The previous maximum penalty was twenty-five years imprisonment.
- 34. The amended section 66EA requires proof of two or more unlawful sexual acts with or towards a child. The maximum penalty is now life imprisonment. Proceedings for the offence can now only be instituted by or with the approval of the Director of Public Prosecutions.
- 35. The jury does not have to be satisfied of the particulars of the unlawful sexual acts, and they do not have to be agreed upon the same two or more sexual acts: section 66EA(5)(c).
- 36. The new section 66EA extends to a relationship that existed wholly or partly before 1 December 2018, provided the acts were unlawful sexual acts during the relationship period: section 66EA(7). Therefore, the offence does not criminalise behaviour that was not unlawful at the time it occurred; but it does operate to retrospectively expose the defendant to a higher penalty, and a different framing of the offence, than was in force at the time the unlawful alleged acts were committed.

37. In sentencing, a court must take into account the maximum penalty for the unlawful sexual acts: section 66EA(8).

38. A similar new provision was considered recently in the South Australian case of *R v M, DV* [2019] SASCF 59: The case is the first appellate judgment dealing with a version of the offence introduced following the recommendations of the Royal Commission. The case discussed three possible constructions of the nature of the 'relationship' contemplated by the section. By a majority of 2 to 1, it was determined that 'the *actus reus* of the offence is the maintenance of a relationship, which need not be a sexual one, *in which* (in the sense of *in the course of which*) an adult engages in two or more unlawful sexual acts with a child.'<sup>4</sup>

### **Grooming offence (section 66EB)**

39. The offence of grooming a child for unlawful sexual activity (section 66EB(3)) has been amended to include circumstances where an adult provides a child with 'financial or other material benefit', with the intention of make it easier to procure the child for unlawful sexual activity.

40. A new offence of grooming an adult has been created (section 66EC). This offence is aimed at criminalising the provision of financial or material benefit to an adult, with the intention of engaging in unlawful sexual activity with a child under the adult's authority.

41. The offence can only be commenced by or with the approval of the Director of Public Prosecutions. The maximum penalty is 6 years if the child is under 14, or 5 years in any other case.

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<sup>4</sup> Blue J at [48]. Whilst his Honour did not ultimately agree with this proposed construction, Kourakis J at [1] and Lovell J at [174] were of the view it was correct.

## **Failure to reduce/remove risk of child abuse (section 43B)**

42. A significant part of the reform was to introduce a ‘new, forward-looking offence covering failure to protect a child from abuse.’<sup>5</sup> The new section 43B creates an ‘offence where a person negligently fails to reduce or remove a risk of a child becoming a victim of abuse’.<sup>6</sup> There is a relatively detailed threshold of proof for this offence, as follows:

A person commits an offence if:

- (a) the person is an adult who carries out work for an organisation, whether as an employee, contractor, volunteer or otherwise (a position holder), and
- (b) the organisation is the employer of an adult worker who engages in child-related work, and
- (c) there is a serious risk that the adult worker will commit a child abuse offence against a child who is, or may come, under the care, supervision or authority of the organisation, and
- (d) the position holder knows that the risk exists, and
- (e) the position holder, by reason of the person’s position, has the power or responsibility to reduce or remove that risk, and
- (f) the position holder negligently fails to reduce or remove that risk.

43. The maximum penalty is 2 years’ imprisonment.

## **Concealing Child Abuse (section 316A)**

44. The new section 316A of the *Crimes Act* is directed at concealing child abuse. Parliament intentionally created a lesser *mens rea* element than ‘knowledge’ of the abuse (which applies to the general Conceal Serious Indictable Offence charge).<sup>7</sup>

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<sup>5</sup> Per second reading speech.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

45. The new section 316A creates an offence if the following three elements are satisfied:

(1) An adult:

(a) who knows, believes or reasonably ought to know that a child abuse offence has been committed against another person, and

(b) who knows, believes or reasonably ought to know that he or she has information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for that offence, and

(c) who fails without reasonable excuse to bring that information to the attention of a member of the NSW Police Force as soon as it is practicable to do so, is guilty of an offence.

46. 'Child abuse offence' is defined in section 316A(9). It is much broader than sexual offences, and includes most physical assaults except common assault.

47. If the concealed child abuse offence carries a maximum penalty of less than 5 years' imprisonment, the maximum penalty for concealing it is 2 years' imprisonment.<sup>8</sup> If the concealed offence carries a maximum penalty of 5 years imprisonment, or more, the maximum penalty for concealing it is 5 years' imprisonment.<sup>9</sup>

48. Nothing in the wording of the provision indicates the knowledge requirement around the maximum penalty for the abuse in question. Therefore, it is not clear how the applicable penalty would be determined where a concealer has incomplete information about the nature of the act, or the date the abuse was committed, and therefore the maximum penalty cannot be determined.

49. This new offence has higher maximum penalties than the general Conceal Serious Indictable Offence charge, section 316. Section 316 has intentionally

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<sup>8</sup> *Crimes Act 1900* (NSW), s316A(1)(a).

<sup>9</sup> *Crimes Act 1900* (NSW), s316A(1)(b).

been amended to exclude 'child abuse offences'.<sup>10</sup> This will affect whether section 316 will be available as an alternative offence to section 316A in charge negotiation.

50. Both the amended section 316 and new section 316A only criminalise conduct of adults. Children can no longer be prosecuted for concealing offences under sections 316 or 316A.

51. A non-exhaustive list of circumstances that will give rise to a 'reasonable excuse' for not reporting child abuse is provided in section 316A(2):

(2) For the purposes of subsection (1), a person has a reasonable excuse for failing to bring information to the attention of a member of the NSW Police Force if:

(a) the person believes on reasonable grounds that the information is already known to police, or

(b) the person has reported the information in accordance with the applicable requirements under Part 2 of Chapter 3 of the Children and Young Persons (Care and Protection) Act 1998 or believes on reasonable grounds that another person has done so, or

(c) the person has reported the information to the Ombudsman under Part 3A of the Ombudsman Act 1974 or believes on reasonable grounds that another person has done so, or

(d) the person has reasonable grounds to fear for the safety of the person or any other person (other than the offender) if the information were to be reported to police, or

(e) the information was obtained by the person when the person was under the age of 18 years, or

(f) the alleged victim was an adult at the time that the information was obtained by the person and the person believes on reasonable

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<sup>10</sup> Per second reading speech.

grounds that the alleged victim does not wish the information to be reported to police, or

(g) the information is about an offence under section 60E that did not result in any injury other than a minor injury (for example, minor bruising, cuts or grazing of the skin) and the alleged offender and the alleged victim are both school students who are under the age of 18 years, but only if the person is a member of staff of—

(i) a government school and the person has taken reasonable steps to ensure that the incident reporting unit (however described) of the Department of Education is made aware of the alleged offence, or

(ii) a non-government school and the person has taken reasonable steps to ensure that the principal or governing body of the school is made aware of the alleged offence.

52. Subsection (6) provides that proceedings are not to be commenced against a person who obtained the information ‘in the course of practicing or following a profession, calling or vocation prescribed by the regulations’, unless by or with the consent of the DPP. The applicable regulation is Regulation 4 of the *Crimes Regulation 2015*, which has been amended to reflect the new section. The regulation includes, *inter alia*, lawyers and clergy. Therefore, there are no explicit exceptions for these relationships, although conceivably these may be put forward as a reasonable excuse if the DPP brings proceedings for this offence.<sup>11</sup>

53. There are a number of implications of this offence. Most have existed since the broader offence of Conceal Serious Indictable Offence under s 316 was enacted

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<sup>11</sup>The second reading speech makes clear that parliament’s intention was to ensure it was possible that clergy members could be charged with the offence; per second reading speech. For some conceptual analysis of the previous iteration of s 316 as it relates to clergy concealing child sexual abuse, see *Wilson v Department of Public Prosecutions* (NSW) [2016] NSWSC 1458 and the appeal: *Wilson v Director of Public Prosecutions (NSW)* [2017] NSWCA 128.



in 1990,<sup>12</sup> but they bear revisiting; since section 316A has a specific focus and higher maximum penalties.

54. By its omission from the list of 'reasonable excuses' in section 316A(2)(g), section 316A may require a teacher to report a playground scuffle to police, if one of the students has reached the age of 18. In the same way, although a teacher has an explicit excuse not to report a schoolyard fight to police if they instead report to their own authorities, a parent of the school student who is assaulted does not have an explicit excuse on the basis they assume the teacher has made such a report.

55. There is no explicit exception for parents of children who report abuses to them. If parents decline to report an incident to police, because of a belief this would be best for the child (for example, if they take the view that reporting the incident would expose the child to further emotional harm, from participation in the criminal justice system), this would not protect the parents from prosecution for a Conceal Child Abuse offence. Perhaps it may be raised as a 'reasonable excuse' as a defence to the charge at hearing.

56. There is something of a tension between the option of a parent to object to giving evidence against their child in proceedings for an offence of Assault Occasioning Actual Bodily Harm on another child,<sup>13</sup> but still being liable to prosecution for not bringing information regarding the assault to the attention of police. Perhaps the availability of an objection to giving evidence if the matter came to court, will prove to be a 'reasonable excuse'. It may be a matter that would become particularly relevant in cases where a parent has information that one of their children commits a child abuse offence on another.<sup>14</sup>

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<sup>12</sup> Its lack of clarity was noted, for example, in *R v Crofts* (unreported, CCA (NSW), 10 March 1995. For further discussion on 316, see her Honour Beckett's 2015 paper, 'PUBLIC JUSTICE OFFENCES: Hindering investigations; concealing offences and attempting to pervert the course of justice', available from the CriminalCPD.net.au website.

<sup>13</sup> Per section 18 of the *Evidence Act 1995* (NSW).

<sup>14</sup> This issue of the availability of a s18 objection was considered in passing in *R v Spiteri-Ahern; R v Barber; R v Zraika (No 11)* [2017] NSWSC 1820 at [218] – [219]. In that case the court was 'prepared to accept... and without deciding the question, that an offence can occur in those circumstances.'

## **Accepting or Soliciting a Benefit for Concealing Child Sexual Abuse (section 316A(4))**

57. Section 316A(4) creates an offence for 'a person who solicits, accepts or agrees to accept any benefit... in consideration for doing anything that would be an offence under subsection (1).'

58. The maximum penalty for this offence is 5 years' imprisonment, where the abuse offence has a maximum penalty of less than 5 years, or 7 years, where the abuse offence has a maximum penalty of 5 years or more.

## **IV. Uncertainty about time when sexual offence against child occurred (section 80AF(1))**

59. Where:

- (a) it is uncertain as to when during a period conduct is alleged to have occurred, and
- (b) the victim was for the whole of that period a child, and
- (c) there was no time during that period that the alleged conduct, if proven, would not have constituted a sexual offence, and
- (d) because of a change in law or age of the child during that period, the alleged conduct, if proven, would have constituted more than one sexual offence during that period;

a person may be prosecuted in respect of the conduct under whichever of those sexual offences has the lesser maximum penalty, regardless of when during that period the conduct actually occurred: s 80AF(2).

## **V. New similar age defence (section 80AG)**

60. A new similar age defence applies to certain offences, where the victim is 14 or over and the age difference is no more than 2 years: section 80AG, *Crimes Act*.

61. This new defence was brought in in an attempt to reduce the criminalisation of young people who have sexual relations with other young people who are below

the legal age of consent but are otherwise consenting (see second reading speech).

62. The section states it is a defence to the following offences, if the alleged victim is 14 or above, and the age difference with the accused is no more than 2 years:

- i. s 66C(3) Sexual intercourse – child between 14 and 16 years
- ii. s 66DB Sexual touching – child between 10 and 16 years
- iii. s 66DD Sexual act – child between 10 and 16 years
- iv. s 73 Sexual intercourse – young person between 16 and 18 under special care
- v. s 73A Sexual touching – young person between 16 and 18 under special care

63. The prosecution has onus of proving beyond reasonable doubt that victim was less than 14 and that the difference in age is more than 2 years.

64. Given the similar age defence only requires the parties to be particular age(s), the defence applies regardless of the factual scenario of the alleged offence. However, in a case where the complainant was not consenting, the alleged offender would still be liable under other provisions; for example, 61I (sexual assault), 66KC (sexual touching), 61KE (sexual act). The similar age defence does not apply to these offences.

## **VI. Changes to sexting laws/child abuse material offences (sections 91G(6), 91H(3), 91HAA, 91HA(9), 91HA(10) & 91HA(11))**

65. There have also been significant reforms to Division 15A (which relates to child abuse material).

66. Sections 91G(6) and 91H(3) have been added; providing that proceedings for existing offences under sections 91G and 91H against child defendants can only be instituted by, or with the approval of, the DPP.

67. The new section 91HAA creates an exception (rather than a defence) to an offence under section 91H of possessing child abuse material. If the person in possession of the material was under 18 at the time of possession, and a reasonable person would consider the possession of the material by the accused as acceptable; the person is not guilty of the offence. In deciding whether the possession is acceptable, regard is to be had to the nature and content of the material; the circumstances in which the material was created or came into the accused's possession; the age, intellectual capacity, vulnerability of the child depicted in the material; the age, intellectual capacity and vulnerability of the accused; and the relationship between the accused and the child depicted.<sup>15</sup>

68. The following defences have been added to section 91HA:

- a) Subsection (9) creates a defence in proceedings for an offence of possessing child abuse material if the only person depicted in the material is the accused person;
- b) Subsection (10) creates a defence in proceedings for an offence of producing or disseminating child abuse material if:
  - a) the production or dissemination of the material occurred when the accused person was under the age of 18 years, and
  - b) the only person depicted in the material is the accused person.
- c) Subsection (11) states that material that depicts a person other than the accused person is taken, for the purposes of this section, to depict only the accused person if the material would no longer be child abuse material were the depiction of the accused person to be removed. Subsection (12) states the onus of proving under subsection (9) or (10) that material depicts the accused person and no other person lies with the accused person on the balance of probabilities.

## **VII. Changes to sentencing for historical child sexual offences (section 25AA)**

69. The new section 25AA *Crimes (Sentencing Procedure) Act* requires a court to sentence a defendant according to sentence patterns and practice at time of

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<sup>15</sup> The second reading speech makes reference to this provision being aimed at decriminalising the teenaged recipients of sexting by other teenagers.

sentence (not time of offence, as per common law). This section applies to any proceedings from proclamation: *R v Nicholson* [2018] NSWDC 347 (22 November 2018).

70. Note that the court is still bound by the maximum penalty at the time the offence was committed. In cases where the maximum penalty at that time was far less than the maximum penalty for the same conduct today, it will be important to balance the operation of section 25AA with the principle that the maximum penalty for an offence will represent the most serious example of that offence and offender.

71. For example, performing oral sex on a male child under ten would today constitute an offence of sexual intercourse with a child under ten, for which the maximum penalty is life imprisonment (section 66A *Crimes Act 1900* (NSW)). However, in 1980 this conduct constituted an offence of indecent assault on a male, and had a maximum penalty of 8 years' imprisonment.

72. As the second reading speech makes clear, the court will still be bound by the maximum penalty that applied at the time of the offence.

## **VIII. Changes to child sex offender registration (section 3C)**

73. Section 3C of the *Child Protection (Offenders Registration) Act 2000* was amended to create a discretion to treat child offenders as non-registrable persons. Sentencing courts now have a discretion when a sexual offence was committed by an offender who was a child at the time of the offence, to make an order declaring that the offender is not to be treated as a registrable person under the Act for that offence.

74. Various conditions must be met before an order is made. These conditions are set out in section 3C(3) and are as follows:

- a) the victim of the offence was under the age of 18 years at the time that the offence was committed, and

- b) the person has not previously been convicted of any other Class 1 offence or Class 2 offence, and
- c) the court does not impose in respect of the offence:
  - i. a sentence of full-time detention, or
  - ii. a control order (unless the court also, by order, suspends the execution of the control order), and
- d) the court is satisfied that the person does not pose a risk to the lives or sexual safety of one or more children, or of children generally.

75. This amendment applies to sentences passed after 1 December 2018, regardless of when the offence was committed.

**IX. Warning to the jury for inconsistencies in the complainant's account (section 293A)**

76. The new section 293A of the *Criminal Procedure Act* provides that judges may give a warning to the jury if there are differences in the complainant's account in prescribed sexual offence trial proceedings.

77. Where a judge considers there is evidence suggesting a difference in the complainant's account which may be relevant to their truthfulness or reliability, the judge may inform the jury of reasons why there may be differences in a complainant's account (section 293A(2)(a)); and that it is for the jury to decide whether or not any such differences are important in assessing the complainant's truthfulness and reliability (section 293A(2)(b)).

78. The section states the Judge may inform the jury that experience shows:

- a) people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time, and
- b) trauma may affect people differently, including affecting how they recall events, and
- c) it is common for there to be differences in accounts of a sexual offence, and

- d) both truthful and untruthful accounts of a sexual offence may contain differences, and
- e) it is up to the jury to decide whether or not any differences in the complainant's account are important in assessing the complainant's truthfulness and reliability.

79. There is no guidance provided for the exercising of the discretion to give the warning. The section simply provides the judge 'may' give the warning.<sup>16</sup>

## **X. Conclusion**

80. These new legislative provisions represent a substantial shift in the criminal law relating to sexual behaviour, and physical violence against children. As the law develops, the authors welcome contributions or questions about this paper, particularly regarding unexpected applications or interpretations. Correspondence can be sent to our email addresses: [Caitlin.Akthar@legalaid.nsw.gov.au](mailto:Caitlin.Akthar@legalaid.nsw.gov.au), or [Ruth.Carty@legalaid.nsw.gov.au](mailto:Ruth.Carty@legalaid.nsw.gov.au).

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<sup>16</sup> The provision has only been referred to in one published case, *R v Kertz* [2019] NSWDC 387. In that matter, Buscombe DCJ noted he had 'considered' 293A but did not find there were significant inconsistencies in the complainant's evidence. It is noted that 293A does not require any inconsistency to be 'significant' to enliven the section.

## Appendix 1

**Table: Old and New Offence Provisions**

Old offences	New offence
Indecent assault (s 61L)	<b>Sexual touching (s 61KC)</b> Max penalty: 5 years imprisonment
Aggravated indecent assault (s 61M(1))	<b>Aggravated sexual touching (s 61KD)</b> Max penalty: 7 years imprisonment SNPP: 5 years
Aggravated indecent assault (s 61M(2))	<b>Sexual Touching-child under 10 (s 66DA)</b> Max penalty: 16 years imprisonment SNPP: 8 years
Aggravated indecent assault (s 61M(2))	<b>Sexual Touching- Child between 10 and 16 (s 66DB)</b> Max penalty: 10 years imprisonment
Act of indecency (s 61N)	<b>Sexual act (s 61KE)</b> Max penalty: 18 months imprisonment
Aggravated act of indecency (s 61O(1A))	<b>Aggravated sexual act (s 61KF)</b> Max penalty: 3 years imprisonment
Aggravated Act of Indecency (s 61O(2))	<b>Sexual Act- Child under 10 (s 66DC)</b> Max penalty: 7 years imprisonment
Aggravated Act of Indecency (s 61O(1))	<b>Sexual Act- Child between 10 and 16 years (s 66DD)</b> Max penalty: 2 years imprisonment
Aggravated Act of Indecency (s 61O(1))	<b>Aggravated sexual act- Child between 10 and 16 years (s 66DE)</b> Max penalty: 5 years imprisonment
Aggravated Act of Indecency (s 61O(2A))	<b>Sexual act for production of child abuse material- child under 16 (s 66DF)</b> Max penalty: 10 years imprisonment
No comparable repealed offence	<b>Sexual touching- young person between 16 and 18 under special care (s 73A)</b> Max penalty: <ul style="list-style-type: none"> <li>• 4 years imprisonment if the victim is aged 16 years at the time of the offence</li> <li>• 2 years imprisonment if the victim is aged 17 years at the time of the offence</li> </ul>



<p><b>No comparable repealed offence</b></p>	<p><b>Grooming a person for unlawful sexual activity with a child under the person's authority (s 66EC)</b>  Max penalty:</p> <ul style="list-style-type: none"> <li>• 6 years imprisonment if the child is under the age of 14 years at the time of the offence</li> <li>• 5 years imprisonment in any other case</li> </ul>
<p><b>No comparable repealed offence</b></p>	<p><b>Failure to reduce/remove risk of child abuse (s 43B)</b>  Max penalty: 2 years imprisonment</p>
<p><b>No comparable offence (conduct previously prohibited by Conceal Serious Indictable offence, section 316)</b></p>	<p><b>Concealing Child Abuse (s 316A)</b>  Max penalty:</p> <ul style="list-style-type: none"> <li>• 2 years imprisonment if the offence that was concealed carried a maximum penalty of less than 5 years imprisonment</li> <li>• 5 years imprisonment if the offence that was concealed carried a maximum penalty of 5 years imprisonment or more</li> </ul>
<p><b>No comparable offence (conduct previously prohibited by Conceal Serious Indictable offence, section 316)</b></p>	<p><b>Accepting a Benefit for Concealing Child Abuse (s 316A(4))</b>  Max penalty:</p> <ul style="list-style-type: none"> <li>• 5 years imprisonment if the offence that was concealed carried a maximum penalty of less than 5 years imprisonment</li> <li>• 7 years imprisonment if the offence that was concealed carried a maximum penalty of 5 years imprisonment or more</li> </ul>