



This fact sheet summarises the Ask LOIS webinar on this topic presented on 14 October 2020 by Fern Hoang, Solicitor, WLS NSW. To view this webinar for free, or to access other resources, visit www.asklois.org.au

This factsheet will cover the following:

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Age of consent - sex

The age of consent for sex in NSW is 16 years old. Under the *Crimes Act 1900* (NSW) (“the Crimes Act”), it is an offence to have sex with a child under the age of 16. Consent is not a defence to this offence.

The aim of this offence is to prevent sexual exploitation of children by older people.

Special Care Offences

Under section 73(3) of the Crimes Act, it is an offence to have sex with a young person aged between 16 and 18 who is under a person’s special care.

On 16 June 2020, the NSW Parliament passed the Crimes Amendment (Special Care Offences) Bill 2020 (“the Bill”) to toughen the special care offences. The special care relationships are listed below.

A young person is under the special care of another person if the offender is:

- Not a close family of the victim including:
 - The parent or grandparent of the victim;
 - The guardian or authorised carer of the victim;
 - The spouse or de facto partner of the parent, grandparent or authorised carer;
- A teacher, principal or deputy principal of the school;
- Performs work at the school at which the victim is a student, in which the offender has students at the school, including the victim, under the offender’s authority;

- Has an established personal relationship with the victim in connection with provision of religious, sporting, musical or other instruction to the victim, in which the victim is under the offender’s authority;
- Custodial officer of an institution where the victim is an inmate;
- Health professional and the victim is a patient of the health professional;
- Performs work for an organisation that provides out-of-home care and has an established personal relationship with the victim and the victim under the offender’s authority;
- Performs work for an organisation that provides refuge or crisis accommodation and has an established personal relationship with the victim and the victim under the offender’s authority.

Similar Age Defence

The similar age defence can be used if:

- The alleged victim is 14 years or older, and
- The age difference between the accused person and the alleged victim is no more than 2 years.

This defence can be used for the following offences:

- Sexual intercourse with a child between 14 and 16;
- Sexual touching of a child between 10 and 16;
- Sexual act with or towards a child between 10 and 16; and
- Sexual intercourse or sexual touching of a young person under 16 and 18 under special care.

This defence cannot be used if the person has been charged with the aggravated forms of these offences.

Sexual Assault

There are four sexual assault offences:

- Sexual act;
- Sexual touching;
- Sexual assault; and
- Aggravated sexual assault.

Sexual assault is any unwanted sexual behaviour by a person, or group of people, against another without their consent. Consent must be given freely and voluntarily by a

person who has capacity to give consent. A person must have reasonable grounds to believe the other person freely and voluntarily consents.

Consent is not given if:

- Lack of consent is clearly communicated;
- The perpetrator is reckless as to whether consent is given, for example:
 - Victim is asleep;
 - Victim is under the influence of drugs or alcohol;
 - Victim is pressured or threatened.
- The victim is not able to legally consent, i.e. under the age of 16; and
- Victim has a cognitive impairment.

Sexting

It is an offence to access, possess or distribute child abuse material. Young people who distribute sexually explicit photos or videos of themselves or each other could possibly be guilty of producing and distributing child pornography.

There are provisions in place relating to child abuse material and cover situations where peers have taken, shared or kept nude photographs of themselves and others. This is known as the “sexting exception”. A person does not commit an offence of possessing child abuse material if:

- The possession of such material occurred when the accused person was under the age of 18 years; and
- A reasonable person would consider the possession of such material as acceptable having regard to the following:
 - Nature and content of the material;
 - Circumstances in which the material was produced and came into the possession of the accused person;
 - Age, intellectual capacity, vulnerability or other relevant circumstances of:
 - The child;
 - Accused person at the time that the material came into their possession; and
 - Accused person at the time the material first came to the attention of a Police Officer;
 - The relationship between the accused person and child.

If a young person’s nudes have been shared, without their consent, they can obtain evidence, report it and block the person.

Obtaining evidence

A young person can save any evidence of photos or videos shared by taking screenshots. If it was uploaded online, they can screenshot the web page address, also known as the URL, or if it was uploaded on a social media service, they can screenshot the account or profile username.

If possible, record the time and date the content was shared including any other important information and record the date and time the evidence was collected.

Be careful when screenshotting evidence as screenshotting the actual nude image or video could be considered as possessing, creating or sharing sexual images of people under the age of 18 which is unlawful.

Reporting

A young person can make a report to the Police and eSafety Commissioner. Any person can make a report to eSafety Commissioner, there are no age restraints.

eSafety may assist with getting images or videos removed and may take action against the person who uploaded the images or videos.

If the image or video was uploaded to a social media account, a report can be made to the social media service. The posting or sharing of nude images or videos without a person’s consent is against the guidelines of most social media services.

If the image or video comes up whilst using a search engine, a request can be submitted to the search engine to ask them to remove the URL links with image or videos from search results.

Block

After evidence has been obtained, the young person can consider blocking the person who uploaded the images or videos.

Technology Safety Tips

Tech Safety by WESNET has great resources for technology safety for both victims and services. Below are some tips from their website:

- If photos and videos are uploaded automatically online to a cloud service, make sure accounts are secure and the password to the account is not shared with others;
- Review privacy settings on social media accounts;
- Put passwords on devices;
- Create a Google Alert with your name to be alerted if anything is posted online with your name.

Dating apps

Dating apps have become a playground for sex offenders. This is detailed in Four Corners episode titled "Tinder: A Predators' Playground" aired on 12 October 2020.

We suggest providing the following tips to any young person that may be using dating apps:

- Take screenshots of matches and conversations before meeting the person as apps, such as Tinder, allows a person to "unmatch" with someone which deletes any trace of prior communication;
- Let another person know where they are going and who they will be meeting;
- Meet in a public place;
- Keep their phone on them; and
- If they have an iPhone, they can hit the lock button 5 times and it will make an alert sound and will automatically call 000.

Additional technology safety tips

Children and young people should:

- Consider whether they should publish their person information online, such as their full name, address, phone number and school;
- Only meet with friends that they know offline;
- Be careful of who they talk to on social media; and
- Stay away from websites that are not meant for children.

Age of consent – medical treatment

A child or young person can consent to health and medical treatment if they have "Gillick competence". This refers to a child or young person having sufficient understanding and intelligence to enable them to fully understand what is proposed.

A child or young person must be able to:

- Understand the purpose and nature of the treatment;
- Understand its benefits, risks and alternatives;
- Understand consequences of the treatment; and
- Is able to retain and process the information.

There is no set age for consent for medical treatment, however in NSW, section 49 of the *Minors (Property & Contracts) Act 1970* allows medical or dental treatment of a minor aged 14 years and over with their consent and the medical practitioner would be protected from any claims for assault or battery in respect to anything done in the course of that treatment.

Fraser Guidelines

The Fraser Guidelines outlines the criteria that need to be met for a medical professional to lawfully provide contraceptive advice and treatment to a minor without informing their parents.

Advice on contraception and treatments can be given if:

- The young person has sufficient maturity or intelligence to understand the nature and implications of proposed treatment;
- The young person cannot be persuaded to inform their parents;
- The young person is likely to be or continue having sexual intercourse with or without contraceptive treatment;
- The young person's physical or mental health is likely to suffer unless they receive the advice or treatment; and
- The advice or treatment is in the young person's best interests.

Confidentiality

If a child has capacity to consent to medical treatment and can understand confidentiality, they have a right to it. The duty of confidentiality owed to a child is the same as it is for adults.

A breach of confidentiality can be broken if:

- Child consents to the disclosure;
- Where the medical practitioner is compelled by law to disclose, including where a child may be at risk of significant harm, the medical practitioner would be required to make a mandatory report;
- It is in the best interests of the child;
- It is in the public's interest; and
- Where disclosure is necessary to treat the child.

Useful resources

- [Women's Legal Service NSW website](#)
 - [Sexual Assault: Your rights and the law](#)
 - [ReCharge: Women's Technology Safety](#)
 - [GP Toolkit](#)
- [Tech Safety by WESNET](#)