Sexual relationship with child

s 321A Criminal Code and sexual offending committed in the context of either a consensual or non consensual relationship

From 1 January 2014

Transitional Sentencing Provisions: This table is divided into thirds based on the three relevant periods of Sentencing Provisions:

- Post-transitional provisions period
- Transitional provisions period
- Pre-transitional provisions period

These periods are separated by a row which shows when the transitional provisions were enacted, and another showing when they were repealed.

Glossary:

impimprisonmentsuspsuspendedconcconcurrentcumcumulativePGplead guilty

sex pen sexual penetration without consent AOBH assault occasioning bodily harm

GBH grievous bodily harm

att attempted

EFP eligible for parole

indec indecent pen penetrate

TES total effective sentence
CRO conditional release order
CBO community based order

'Consensual' relationship

No.			Appeal			
2.	Cairns v The	56 to 57 yrs at time offending.	1 x Persistent sex conduct with child U16	5 yrs imp.	Dismissed – on papers.	
	State of Western					
	Australia	Convicted after PG (25%		EFP.	Appellant challenged length of	
		discount).	Offending occurred over a period of 22 mths.		sentence.	
	[2015] WASCA		The victim, E, was aged 14-15 yrs. E lived	Sentencing judge found a		
	198	No criminal history.	with the appellant on occasion. The	serious breach of trust and	At [27] This case is a	
			appellant was a father-figure and pastoral	appellant's actions were	particularly serious example of	
	Delivered	Favourable antecedents.	carer for E.	persistent and prolonged and	its type by virtue of the	
	25/09/2015			profoundly damaging to E.	frequency of the sexual	
		Appellant's childhood	The appellant and E engaged in frequent		conduct and the length of time	
		described as unremarkable.	sexual behaviour prior to her turning 16 yrs	Sentencing judge found that	over which it occurred; the	
			and for a number of mths after she turned 16	the sexual acts were	large age difference the	
		Consistent record of gainful	yrs.	'consensual', but noted that,	nature of the sexual conduct	
		employment; former police		insofar as E demonstrated	the abuse of trust; and the	
		officer; pastor of an	The sexual relationship included the	sexualised behaviour, it was	harm done to E. This was	
		evangelical church; owned	appellant stimulating intercourse with E's	a reflection of the	not offending at the lower	
		driving school at time	hand to the point of ejaculating into her hand,	relationship and the	end of the scale. The absence	
sentencing.		sentencing.	mutual genital touching, multiple digital pen	conspicuously unequal	of agg factors does not turn	
		of E's vagina, and rubbing of the appellant's position she was in. Married twice; has two, erect penis against E's vagina without		them into mitigating		
					factorsWhile the favourable	
		estranged adult children.			personal circumstances of the	
		of responsibility and co-		1	appellant were relevant, the	
	Later, when E may have been 16 yrs, penile		operation with police.	leniency that could reasonably		
			pen of E's vagina occurred. This was not	T '1 C CC 1'	be afforded to them is limited.	
			relied upon as a fact of offending, but for	Low risk of reoffending.	A ([20] ([22] D;) ; (
			contextual purposes only.		At [29] – [32] Discussion of	
comparative cases.						
			Transitional provisions repealed – 14/01/200	9		
				•		

s 321A Criminal Code changed from 'Sexual relationship with child u 16' to 'Persistent sexual conduct with child u 16' (27/04/2008)

- Removal of the prohibition that no other offences of sexual nature can be charged during the period the sexual relationship is alleged on the same indictment.
- Court cannot order prosecutor to give person charged particulars of the sexual acts alleged to constitute the offence previously provided only that an indictment need not contain particulars.
- Removal of the ability to use an acquittal or conviction of sexual relationship with a child as a defence to an alleged sexual offence against the same child occurring during the period of the alleged relationship.

			10/1				
Transitional provisions enacted – 31/08/2003							

s 321A Criminal Code Sexual relationship with a child amended (21/09/2002)

• Defence of alleged offender being not more than 3 years older than the child added.

'Non-consensual' relationship

No.	Case	Antecedents	Summary/Facts	Sentence	Appeal
1.	AJ v The State of	55 yrs at time sentencing.	Ct 1: Persistently engaging in sexual conduct	Ct 1: 5 yrs imp (cum).	Dismissed.
	Western		with child aged U16 yrs.	Ct 2: 4 yrs imp (cum).	
	Australia	alia Convicted after early PG (25% Ct 2: Persistently engaging in sexual conduct			Appeal concerned totality
		discount).	with child aged U16 yrs.	TES 9 yrs imp.	and length of sentence.
	[2016] WASCA				
	13	No prior criminal history.	<u>Ct 1</u>	Sentencing judge	At [59] Each offence was

Delivered 18/01/2016

Difficult childhood.

Physical difficulties as a result of his service in the Australian Defence Force.

Difficulties with family, employment and accommodation since offending was discovered.

Stable employment and of good character.

The appellant wrote letters of apology to his family.

Offending occurred over 6 years. The victim A was aged 9-15 yrs and was the appellant's lineal daughter.

Offending involved repetitive, generally nonpenetrative touching and rubbing of A's vagina, with some cunnilingus-like features on some of the behaviour; rubbing of the breasts, squeezing of the buttocks, kissing of the vagina. The appellant touched A's breasts and vagina weekly. The appellant bargained with A by agreeing to her requests if he could 'have a feel'.

<u>Ct 2</u>

Offending occurred over 3.5 yrs. The victim M was aged 7-11 yrs and was the appellant's lineal daughter.

The offending with M was the same as with A. The appellant also procured M to touch his penis occasionally, and simulated sexual intercourse by laying on M when both of them were naked. M said that the conduct occurred more than 10 times a month.

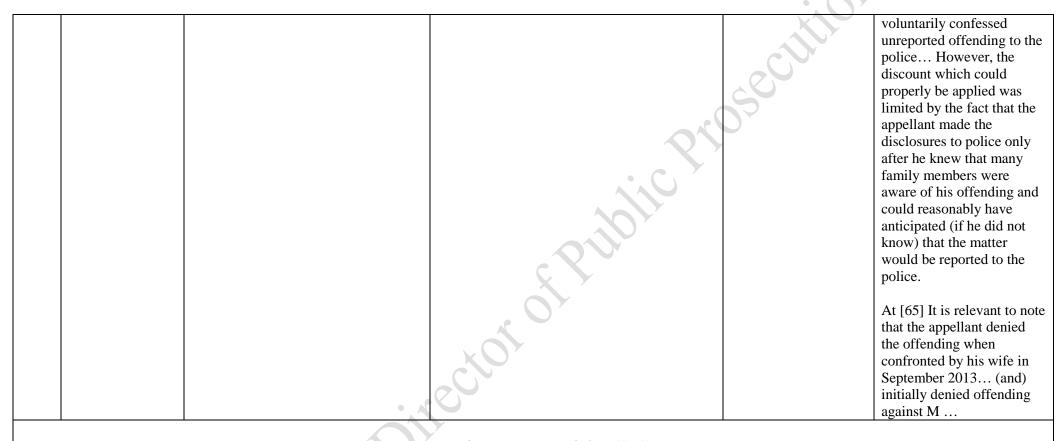
found that the appellant was very remorseful and had a low risk of reoffending.

Sentencing judge gave discount for the appellant's voluntary confession of unreported offending to police. committed over a significant time... The sexual conduct occurred frequently and on regular occasions ... it is clear ... that the appellant's offending involved many individual incidents of sexual conduct.

At [60] The age of the appellant's victims when the offending began ... is also a significant agg feature ... The fact that the appellant was the victim's father... is also an agg factor. The offending involved a gross breach of trust and, in the case of A, involved demands for sex as a condition for allowing her to engage in ordinary childhood activities... (and) threats.

At [61]... it was not in the worst category of offending against that section. The aggravating feature of penetrative sex was not established in the present case.

At [64] ... the appellant



Transitional provisions repealed – 14/01/2009

s 321A Criminal Code changed from 'Sexual relationship with child u 16' to 'Persistent sexual conduct with child u 16' (27/04/2008)

- Removal of the prohibition that no other offences of sexual nature can be charged during the period the sexual relationship is alleged on the same indictment.
- Court cannot order prosecutor to give person charged particulars of the sexual acts alleged to constitute the offence previously provided only that an indictment need not contain particulars.

 Removal of the ability to use an acquittal or conviction of sexual relationship with a child as a defence to an alleged sexual offence against the same child occurring during the period of the alleged relationship. 							
Transitional provisions enacted – 31/08/2003							
s 321A Criminal Code Sexual relationship with a child amended (21/09/2002) • Defence of alleged offender being not more than 3 years older than the child added.							