

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are separated by a row which shows when the transitional provisions were enacted, and another showing when they were repealed.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

imp	imprisonment
susp	suspended
conc	concurrent
cum	cumulative
PG	plead 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.	Case	Antecedents	Summary/Facts	Sentence	Appeal
2.	<p><i>Cairns v The State of Western Australia</i></p> <p>[2015] WASCA 198</p> <p>Delivered 25/09/2015</p>	<p>56 to 57 yrs at time offending.</p> <p>Convicted after PG (25% discount).</p> <p>No criminal history.</p> <p>Favourable antecedents.</p> <p>Appellant’s childhood described as unremarkable.</p> <p>Consistent record of gainful employment; former police officer; pastor of an evangelical church; owned driving school at time sentencing.</p> <p>Married twice; has two, estranged adult children.</p>	<p>1 x Persistent sex conduct with child U16 yrs.</p> <p>Offending occurred over a period of 22 mths. The victim, E, was aged 14-15 yrs. E lived with the appellant on occasion. The appellant was a father-figure and pastoral carer for E.</p> <p>The appellant and E engaged in frequent sexual behaviour prior to her turning 16 yrs and for a number of mths after she turned 16 yrs.</p> <p>The sexual relationship included the appellant stimulating intercourse with E’s hand to the point of ejaculating into her hand, mutual genital touching, multiple digital pen of E’s vagina, and rubbing of the appellant’s erect penis against E’s vagina without penetration.</p> <p>Later, when E may have been 16 yrs, penile pen of E’s vagina occurred. This was not relied upon as a fact of offending, but for contextual purposes only.</p>	<p>5 yrs imp.</p> <p>EFP.</p> <p>Sentencing judge found a serious breach of trust and appellant’s actions were persistent and prolonged and profoundly damaging to E.</p> <p>Sentencing judge found that the sexual acts were ‘consensual’, but noted that, insofar as E demonstrated sexualised behaviour, it was a reflection of the relationship and the conspicuously unequal position she was in.</p> <p>Genuine remorse, acceptance of responsibility and co-operation with police.</p> <p>Low risk of reoffending.</p>	<p>Dismissed – on papers.</p> <p>Appellant challenged length of sentence.</p> <p>At [27] This case is a particularly serious example of its type by virtue of the frequency of the sexual conduct and the length of time over which it occurred; the large age difference... the nature of the sexual conduct... the abuse of trust; and the harm done to E. This was not... offending at the lower end of the scale. The absence of agg factors... does not turn them into mitigating factors... While the favourable personal circumstances of the appellant were relevant, the leniency that could reasonably be afforded to them is limited.</p> <p>At [29] – [32] Discussion of comparative cases.</p>
<i>Transitional provisions repealed – 14/01/2009</i>					

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.

‘Non-consensual’ relationship

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

	<p>Delivered 18/01/2016</p>	<p>Difficult childhood.</p> <p>Physical difficulties as a result of his service in the Australian Defence Force.</p> <p>Difficulties with family, employment and accommodation since offending was discovered.</p> <p>Stable employment and of good character.</p> <p>The appellant wrote letters of apology to his family.</p>	<p>Offending occurred over 6 years. The victim A was aged 9-15 yrs and was the appellant's lineal daughter.</p> <p>Offending involved repetitive, generally non-penetrative 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'.</p> <p><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.</p> <p>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.</p>	<p>found that the appellant was very remorseful and had a low risk of reoffending.</p> <p>Sentencing judge gave discount for the appellant's voluntary confession of unreported offending to police.</p>	<p>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.</p> <p>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.</p> <p>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.</p> <p>At [64] ... the appellant</p>
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Transitional provisions repealed – 14/01/2009

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