



# resource sheet

NATIONAL CHILD PROTECTION CLEARINGHOUSE

## Age of consent laws

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According to criminal law in Australia, the age of consent refers to the age a person is considered to be capable of legally giving informed consent to sexual acts with another person. When a person engages in sexual behaviour with someone below the age of consent, they are committing a criminal offence (child sexual abuse).

### Why are there age of consent laws?

Age of consent laws are designed to protect children and young people from sexual exploitation and abuse. Such laws effectively determine that children and young people below the age of consent do not have the emotional maturity to consent to sexual activities. In relation to sexual abuse charges in each state and territory, the key difference between child sexual assault and adult sexual assault is that adult sexual assault is based on the absence of sexual consent, whereas in child sexual assault, the issue of consent is superseded by age of consent laws (Eade, 2003). An important distinction should be made between “willingness” and “consent”. A child may be willing to engage in sexual behaviour; however, as they do not have the psychological capacity to give consent according to law, all sexual interactions between an adult and a person under the age of consent are considered abusive (Barbaree & Marshall, 2006).

### What is the legal age of consent in Australian state and territory jurisdictions?

The legal age for consensual sex varies across Australian state and territory jurisdictions (see Table 1). The age of consent is 16 years of age in the Australian Capital Territory, New South Wales,

Northern Territory, Victoria and Western Australia. In Tasmania and South Australia the age of consent is 17 years of age. Queensland is the only state that makes a distinction between different forms of sexual activity and the age of consent. In Queensland, the age of consent for anal sex (referred to as sodomy in legislation) is 18 years of age, while the age of consent for all other sexual behaviour (described as carnal knowledge) is 16 years of age.

### Are there legal defences against sexual interactions with persons under age?

If a person is accused of engaging in sexual behaviour with someone under the legal age, there are various statutory defences available, which are outlined in legislation. While legislation varies in each state and territory, in general two types of defences are available (Cameron, 2007). The first type relates to whether the accused believed on reasonable grounds that the person with whom they engaged in sexual behaviour was above the legal age of consent. All jurisdictions (except New South Wales) have provisions for this defence in legislation; however, several variations exist regarding restrictions on the use of the defence according to the age of the alleged victim. The defence cannot be used if the victim was 10 years or younger at the time of the alleged offence in Victoria and the Australian Capital Territory, 12 years or younger in Queensland, 13 years or younger in Western Australia, and 16 years or younger in South Australia.

The second statutory defence relates to situations in which the two people are close in age. In Victoria and the Australian Capital Territory, engaging in sexual behaviour under the legal age can be defended if the defendant was not more than 2 years older than the person against whom the offence is alleged to have been committed. (Details for other states can be found in Table 1 on pp. 3–4.)

**Table 1: Legal defences of age of consent laws**

State	Legislation	Age of consent
ACT	<i>Crimes Act 1900</i> (Section 55) < <a href="http://www.austlii.edu.au/au/legis/act/consol_act/ca190082/">www.austlii.edu.au/au/legis/act/consol_act/ca190082/</a> >	<p>The age of consent for sexual interactions is 16 years.</p> <p>If a person is charged with engaging in sexual activities with a person under the legal age, a legal defence is outlined in section 55(3). It states that:</p> <p>It is a defence to a prosecution for an offence against subsection (2) if the defendant establishes that—</p> <ul style="list-style-type: none"> <li>(a) he or she believed on reasonable grounds that the person on whom the offence is alleged to have been committed was of or above the age of 16 years; or</li> <li>(b) at the time of the alleged offence— <ul style="list-style-type: none"> <li>(i) the person on whom the offence is alleged to have been committed was of or above the age of 10 years; and</li> <li>(ii) the defendant was not more than 2 years older; and that that person consented to the sexual intercourse.</li> </ul> </li> </ul>
NSW	<i>Crimes Act 1900</i> (Section 66C) < <a href="http://www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/">www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/</a> >	<p>The age of consent for sexual interactions is 16 years.</p> <p>There is no legal defence in legislation when charges are made to a person charged with engaging in sexual activities with a person under the legal age.</p>
NT	<i>Criminal Code Act 1983</i> (Section 127) < <a href="http://www.austlii.edu.au/au/legis/nt/consol_act/cca115/">www.austlii.edu.au/au/legis/nt/consol_act/cca115/</a> >	<p>Age of consent for sexual interactions is 16 years.</p> <p>If a person is charged with engaging in sexual activities with a person under the legal age, a legal defence is outlined in section 127(4). It states that:</p> <p>It is a defence to a charge of a crime defined by this section to prove:</p> <ul style="list-style-type: none"> <li>(a) the child was of or above the age of 14 years; AND</li> <li>(b) the accused person believed on reasonable grounds that the child was of or above the age of 16 years.</li> </ul>
QLD	<i>Criminal Code Act 1899</i> (Sections 208 and 215) < <a href="http://www.austlii.edu.au/au/legis/qld/consol_act/cc189994/">www.austlii.edu.au/au/legis/qld/consol_act/cc189994/</a> >	<p>The age of consent for anal sex (referred to as sodomy in legislation) is 18 years, and for all other sexual acts (referred to as carnal knowledge in legislation) is 16 years.</p> <p>If a person is charged with engaging in sexual activities with a person under the legal age, a legal defence is outlined in section 215(5). It states that:</p> <p>If the offence is alleged to have been committed in respect of a child of or above the age of 12 years, it is a defence to prove that the accused person believed, on reasonable grounds, that the child was of or above the age of 16 years.</p> <p>Note: This defence does not apply to acts of sodomy.</p>
SA	<i>Criminal Law Consolidation Act 1935</i> (Section 49) < <a href="http://www.austlii.edu.au/au/legis/sa/consol_act/clca1935262/">www.austlii.edu.au/au/legis/sa/consol_act/clca1935262/</a> >	<p>The age of consent for sexual interactions is 17 years.</p> <p>If a person is charged with engaging in sexual activities with a person under the legal age, a legal defence is outlined in section 49(4). It states that:</p> <p>It shall be a defence to a charge under subsection (3) to prove that—</p> <ul style="list-style-type: none"> <li>(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 sixteen years; and</li> <li>(b) the accused— <ul style="list-style-type: none"> <li>(i) was, on the date on which the offence is alleged to have been committed, under the age of seventeen years; or</li> <li>(ii) believed on reasonable grounds that the person with whom he is alleged to have had sexual intercourse was of or above the age of seventeen years.</li> </ul> </li> </ul>
TAS	<i>Criminal Code Act 1924</i> (Section 124) < <a href="http://www.austlii.edu.au/au/legis/tas/consol_act/cca1924115/">www.austlii.edu.au/au/legis/tas/consol_act/cca1924115/</a> >	<p>The age of consent for sexual interactions is 17 years.</p> <p>If a person is charged with engaging in sexual activities with a person under the legal age, a legal defence is outlined in section 124(2). It states:</p> <p>It is a defence to a charge under this section to prove that the accused person believed on reasonable grounds that the other person was of or above the age of 17 years.</p> <p>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—</p> <ul style="list-style-type: none"> <li>(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</li> <li>(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.</li> </ul>

State	Legislation	Age of consent
VIC	<i>Crimes Act 1958</i> (Section 45) < <a href="http://www.austlii.edu.au/au/legis/vic/consol_act/ca195882">www.austlii.edu.au/au/legis/vic/consol_act/ca195882</a> >	<p>The age of consent for sexual interactions is 16 years.</p> <p>If a person is charged with engaging in sexual activities with a person under the legal age, a legal defence is outlined in section 45(4). It states that:</p> <p>Consent is not a defence to a charge unless at the time of the alleged offence the child was aged 10 or older and—</p> <ul style="list-style-type: none"> <li>(a) the accused satisfies the court on the balance of probabilities that he or she believed on reasonable grounds that the child was aged 16 or older; or</li> <li>(b) the accused was not more than 2 years older than the child; or</li> <li>(c) the accused satisfies the court on the balance of probabilities that he or she believed on reasonable grounds that he or she was married to the child.</li> </ul>
WA	<i>Criminal Code Act Compilation Act 1913</i> (Section 321) < <a href="http://www.austlii.edu.au/au/legis/wa/consol_act/ccaca1913252">www.austlii.edu.au/au/legis/wa/consol_act/ccaca1913252</a> >	<p>The age of consent for sexual interactions is 16 years.</p> <p>If a person is charged with engaging in sexual activities with a person under the legal age, a legal defence is outlined in section 321(9–10). It states that:</p> <p>It is a defence to a charge under this section to prove the accused person—</p> <ul style="list-style-type: none"> <li>(a) believed on reasonable grounds that the child was of or over the age of 16 years; and</li> <li>(b) was not more than 3 years older than the child.</li> </ul> <p>Note: Under subsection 9(a) it is no defence if the child was under the care or supervision of the accused person. Under subsection 10, it is a defence to a charge to move that the accused was lawfully married to the child.</p>

## Sexual interactions with 16 and 17 year olds under special care

Although the legal age of consent throughout Australia is either 16 or 17 years of age, legislation in New South Wales, Victoria, Western Australia, South Australia and the Northern Territory makes it an offence for a person to engage in sexual interactions with a person aged 16 or 17 years if the young person is under his or her special care or supervision. A person in a supervisory role providing “special care” may include: a teacher, foster parent, religious official or spiritual leader, a medical practitioner, an employer of the child or a custodial official. For further information regarding sexual interaction with 16 and 17 years old under special care please see the relevant state or territory legislation.

## What if both parties are under the age of consent?

### “Normal” sexual exploration

It is a common and normal part of sexual development for young people to explore and experiment in sexual interactions with their peers (Araji, 2004; Barbaree & Marshall, 2006; Eade, 2003). Appropriate sexual exploration is when there is mutual agreement between same- or similar-aged peers, it is non-coercive and all participants have

the control to participate, continue or stop the behaviour. If two young people who are close in age engage in a sexual relationship and there is no evidence of a power imbalance or violence, the sexual interaction is not a legal issue (Barbaree & Marshall, 2006). The state jurisdictions that provide a legal defence when the sexual interaction is between two young people close in age (Western Australia, Tasmania, Victoria and the Australian Capital Territory) are attempting to find a balance that protects children and young people from adult sexual exploitation in a way that does not criminalise them for having sexual relationships with their peers.

### Inappropriate and abusive sexual behaviour

Sexual interaction that is harmful and abusive between two young people under the legal age can be difficult to identify and determine. In situations where there is a clear age difference—for example a teenager and a young child—any sexual interaction is sexual abuse, as there is a definite power imbalance. However, when both parties are close in age, identifying whether the sexual activity is abusive is more complex. Ryan (1997) proposed three factors that must be considered in order to evaluate sexual interactions between two or more children: consent, equality and coercion. Reflecting on these three factors can help to clarify when behaviour is abusive.

## Consent

According to Ryan (1997), the key elements of consent include:

- understanding what is being proposed without confusion (not being tricked or fooled);
- knowing the standard for the behaviour in the family, the peer group and the culture (both parties have similar knowledge);
- having an awareness of possible consequences, such as punishment, pain, pregnancy or disease (both parties similarly aware);
- having respect for agreement or disagreement without repercussion; and
- having the competence to consent (being intellectually able and unaffected by intoxication).

## Equality

Equality relates to the balance of power and control in the relationship. Indicators of inequality include size and weight differences, age differences and differences in intellectual development. Indicators of power differentials are more subtle and they are often established prior to sexual interactions; for example, a strength differential may have been established in earlier wrestling, fighting or play (Ryan, 1997).

## Coercion

In considering the final factor of coercion, Ryan (1997) determined that coercion is the peer pressure put on one child by another to achieve compliance. Such pressure can be placed on a continuum. The lower end may include implied authority, manipulation, trickery or bribery. The top end of the continuum may include physical force, threats of harm and overt violence.

If the relationship between two children or young people under the legal age of consent is unequal, non-consensual or coercive, it is abusive and may require a child protection or judicial response.

## Conclusion

Age of consent laws are important measures for protecting children and young people from sexual exploitation. Whether the sexual interaction between an adult and a person under the age of consent appeared consensual is irrelevant, as the laws determine that children and young people do not possess the maturity to consent to sex with an adult. Adolescence is an important developmental period in which young people are developing autonomy and forming relationships. The challenge for legislation is to find the balance that ensures age of consent laws protect young people from adult sexual exploitation in a manner that does not disempower or criminalise the sexual exploration with peers that is normal for their age and stage in life.

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