

Explanatory Document Exposure Draft Criminal Justice Legislation Amendment (Sexual Offences) Bill 2023

Introduction

The Department of the Attorney-General and Justice (AGD) is working to reform sexual offences in the Criminal Code. The reforms will modernise existing offences, introduce some new offences, adopt recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (RCIRCSA) and bring sexual offences under the operation of the criminal responsibility provisions in Part IIAA of the Criminal Code.

This work builds on previous consultation undertaken on Criminal Code sexual offences in 2014, which included targeted legal stakeholder consultation.

Additionally, since 2014 there have been significant social and legal developments including from the Criminal Justice Report of the RCIRCSA. Recommendations 21, 22, 25, 26, 27, 29 and 74 of the Report are relevant to the reforms.

An Exposure Draft Bill has now been prepared, titled the 'Criminal Justice Legislation Amendment (Sexual Offences) Bill 2023' (the Exposure Draft Bill). The Exposure Draft Bill incorporates stakeholder feedback from the 2014 consultation. In addition, the Exposure Draft Bill incorporates amendments relating to the RCIRCSA (particularly recommendations 21, 22, 25, 26, 27, 29 and 74), the advocacy work of Grace Tame as Australian of the Year in 2021, as well as some law reform initiatives that have occurred in other jurisdictions (such as explicitly criminalising the practice known as 'stealthing').

AGD is consulting on the Exposure Draft Bill with legal stakeholders, as well as government and community stakeholders involved in victims' rights and advocacy and preventing sexual violence, to assist Government in finalising a Bill for introduction in the Legislative Assembly during 2023.

Further details about the key provisions are outlined in this Explanatory Document.

Explanation of key provisions

Clauses 1 to 6

These clauses provide for amendments that are technical or administrative in nature, for example, updating references for definitions.

Amendments are proposed to current section 72 (Piracy) to reflect the changes to the sexual offence provisions, and to update the language so it is gender neutral.

Clause 7: Sections 125B to 125E replaced

Clause 7 provides for the repeal and redrafting of sections 125B to 125E of the Criminal Code to come under the operation of Part IAA criminal responsibility. There are not significant changes to the provisions or penalties.

These offences include:

- section 125B Production, possession etc. of child abuse material;
- section 125C Publishing indecent articles;
- section 125D Using child for production of child abuse material or pornographic or abusive material; and
- section 125E Criminal liability of executive officer of a body corporate.

Clause 8: Section 125F amended (Court proceedings)

Clause 8 is to update references to new offences.

Clause 9: Part V, Division 2, Subdivision 2 replaced

This clause inserts proposed new section 126 (Interference with or indignity to human remains) to replace the offence under current section 140(b) (Misconduct with regard to corpses).

It is proposed that it is not necessary to retain current section 140(a) 'neglects to perform any duty imposed upon him by law or undertaken by him, whether for reward or otherwise, touching the burial or other disposition of a human body or human remains'. The *Burial and Cremation Act 2022* provides for a number of offences in relation to burials and human remains.

Clause 10: Section 188 amended (Common assault)

This clause repeals the current offences at section 188(2)(k) (assault with circumstance of aggravation that the assault was indecent), and section 188(3) (indecent assault of person under 16 years).

Offences to cover this conduct are included in new Part VIA Sexual Offences, for example section 208HC (Indecent touching or act), and section 208JC (Indecent touching involving child or indecent act directed at child).

Clause 11: Sections 192 to 192B repealed

This clause repeals the following sections:

- section 192 Sexual intercourse and gross indecency without consent;
- section 192A Direction to jury in certain sexual offence trials; and
- section 192B Coerced sexual self-manipulation.

Proposed new Part VIA Sexual Offences contains replacements for these provisions.

Clause 12: Section 208AAB inserted

This clause inserts a new proposed offence, section 208AAB (Recording or capturing intimate image without consent). This provision complements the offence at current section 208AB (Distribution of intimate image without consent).

The proposed new offence at section 208AAB uses the existing definition of 'intimate image' at section 208AA of the Criminal Code:

intimate image means an image that depicts or has been altered to appear to depict:

- (a) a person engaged in a sexual act of a kind not ordinarily seen in public; or
- (b) a person in a manner or context that is sexual; or
- (c) the genital or anal region of a person, whether bare or covered by underwear; or
- (d) a breast, whether bare or covered by underwear, of a female person or of a transgender or intersex person who identifies as female.

The rationale behind this offence is to protect people from unwanted violations of privacy. Examples of when the offence would apply include when a person takes a photograph by 'up skirting' another person on the bus, or photographs someone who is undressed in a swimming pool change room. The offence would also apply to a person filming sexual activity involving other people without their consent.

A person aged under 16 years is taken to be incapable of consenting to the recording of an intimate image, but there is a defence included for taking an image 'in other circumstances that a reasonable person would regard as acceptable'.

When the subject of the image is a child, it is anticipated that the more appropriate charge would generally be either a child abuse material offence such as new section 125B (Production, possession etc. of child abuse material), or an offence pursuant to new section 208JF (Taking or recording indecent image of child).

Clause 13: Part VIA inserted

This clause inserts new Part VIA, which brings together the sexual offences in the Criminal Code.

Division 1 Definitions

Division 1 introduces a number of new standalone definitions for Part VIA. This includes definitions for 'consent', 'indecent', 'indecent acts', 'position of authority', and 'touches'. These definitions are outlined in further detail below.

208GA Consent

Proposed section 208GA (Consent) applies to 'sexual acts' in this Part. It retains the current formulation of 'free and voluntary agreement'.

Proposed new section 208GA(2)(h) is a new inclusion, and provides as an example when a person does not consent to an act 'the person participates in the act because of an intentional misrepresentation by another person about the use of a condom'. This is to cover conduct known as 'stealth' (lying about using a condom, or removing a condom during sexual intercourse). This has recently been criminalised in a number of Australian jurisdictions.

The Attorney-General has requested that the Northern Territory Law Reform Committee (NTLRC) investigate, examine and report on possible law reform in relation to consent in sexual offences in the Northern Territory. It is anticipated that a second stage of reforms may be required to give effect to recommendations for reform, if any, made by the NTLRC in considering the request. Those reforms would occur separately from the current Exposure Draft Bill.

208GB Indecent and indecent acts

Proposed new section 208GB provides a new standalone provision to define ‘indecent’ and ‘indecent act’ which is determined by reference to the standards of ordinary people. Proposed new section 208GB(3) clarifies that whether an act is indecent or grossly indecent is a matter for the trier of fact.

208GC Meaning of position of authority

This provision is proposed to replace the current provision at section 128(3), which provides for when a person is considered to be under the ‘special care’ of another person.

The proposed new provision is broader and includes specific circumstances of authority such as any teacher at a school at which the young person is enrolled as a student, and also a broad catch-all provision where ‘the person has authority over the young person because of the circumstances of the person’s relationship with the young person, regardless of whether the authority is exercised lawfully’.

This broader definition is to implement RCIRCSA recommendation 27.

208GD Meaning of touches

Proposed new section 208GD proposes a new definition for ‘touches’ to including touching another person with any part of the person’s body or with anything manipulated by the person.

Division 2 Sexual acts committed without consent

Division 2 provides for sexual acts committed without consent. These provisions will generally be used to prosecute conduct when the victim is an adult.

208H Sexual intercourse

This provision is proposed to replace part of current section 192 (Sexual intercourse without consent). The conduct of ‘gross indecency without consent’ is covered in a separation provision in the Exposure Draft Bill, at proposed new section 208HB.

The maximum penalty for an attempt to commit an offence under proposed new section 208H would be life imprisonment. The current provisions at section 192(5) – 192(8) sets out different penalties for attempts to commit that offence. It is proposed to remove these provisions so that the default position set out in section 43BF applies. The effect of section 43BF is that the maximum penalty for an attempt matches the penalty for the substantive offence.

208HA Procuring sexual intercourse or penetration

This provision is a new offence and is intended to criminalise conduct where the defendant procures the other person, without their consent, to engage in sexual intercourse with another person; to engage in sexual activity with an animal; or to penetrate the person’s own genitals or anus.

This offence covers the conduct under current section 192B (Coerced sexual self-manipulation).

The proposed penalty for this offence is imprisonment for life. This is consistent with the provision at section 43BG (Complicity and common purpose) which states a person who aides, abets, counsels or procures the commission of an offence by another person is subject to the same maximum punishment of the offence itself.

208HB Gross indecency

Proposed new section 208HB(1) provides for when a person intentionally performs an act on another person without their consent, and the act is grossly indecent. The proposed offence largely replicates the provision at current section 192(4).

Proposed new section 208HB(2) provides for an offence if the person engages in conduct that results in the other person performing a grossly indecent act without consent. For example, the first person may make threats that result in the other person performing a sexual act on the first person against their will.

208HC Indecent touching or act

Proposed new section 208HC is to cover touching that is indecent, but falls short of being grossly indecent. This may include, for example, touching of the breasts or genitals through clothing. The provision will also cover an indecent act that is directed at a person.

It is proposed that absolute liability applies to the question of whether the touching or act is 'indecent'. The relevant consideration for the finder of fact would therefore be whether the touching or act was indecent by the standards of ordinary people. The defendant's subjective judgement as to whether the touching or act was 'indecent' will not be a consideration.

Proposed new section 208HC(2) is to cover circumstances where the defendant engages in conduct that results in another person touching them without that person's consent.

208HD Procuring indecent touching

Proposed new section 208HD makes it an offence to procure indecent touching. Similar to proposed new section 208HA, this offence is intended to criminalise conduct where the defendant procures the other person, without their consent, to engage in indecent touching with another person; to engage in indecent touching with an animal; or to indecent touch the person's own body.

The same penalty as the substantive offence under new section 208HC applies - 5 years imprisonment and 7 years imprisonment for an aggravated offence.

208HE Public masturbation

Section 208HE is a proposed new offence to cover public masturbation that is not directed at any particular person.

The provision applies to a person masturbating in public or a place that is visible to the public. The proposed maximum penalty is imprisonment for two years.

It is proposed that there should be a specific provision because there are recidivists who engage in this conduct, and it will make it easier for people needing to identify relevant criminal history to discern what the conduct involved.

208HF Attempt to commit sexual offence and recklessness

Section 208HF provides that where recklessness is the fault element for an offence, then it is also the fault element for an attempt. This means that the default position in section 43BF(4) does not apply.

Division 3 Sexual acts committed against or with children

Division 3 provides for offences committed against or with children aged under 16 years.

For all provisions in this Division, when the victim is aged under 14 years, the fault element as to the circumstance of the victim's age is absolute liability. This means there is no defence available that the offender thought the victim was older. When the victim is aged between 14 or 15 years, the fault element as to circumstance of the victim's age is strict liability. This means the defendant can raise a defence of reasonable mistake of fact as to the victim's age.

Unlike the provisions in the current Criminal Code, the Exposure Draft Bill does not limit any offence so that it can only be committed by a person over 18 years. This is a difference from other jurisdictions, where generally grooming offences can only be committed by an adult. The rationale behind not limiting the offence to adults is that an older child (e.g. 16 or 17 years of age) could engage in grooming or procuring conduct against a young child that should be criminalised. The proposed new section 208JL outlines the requirement for consent of the Director of Public Prosecutions to commence prosecution against children for certain offences.

Further details about the key provision in this Division are outlined below.

208J Sexual intercourse involving child

Proposed new section 208J is to replace current section 127(1)(a) (Sexual intercourse with child under 16 years).

It is proposed that the maximum penalty for sexual intercourse involving a child under 10 years is increased from 25 years to life imprisonment to align with the penalty for sexual intercourse without consent.

The provision includes a new 'similar age defence' at section 208J(5). The purpose of this is so that consensual sexual activity between young people who are close in age is not criminalised. The age gap must be not more than 24 months for this to apply.

208JA Procuring sexual intercourse or penetration involving child

Proposed new section 208JA provides for an offence that mirrors proposed new section 208HA (Procuring sexual intercourse or penetration), but applies when the victim is under 16 years and does not require proof of lack of consent.

The penalties for this offence match those for proposed new section 208J (Sexual intercourse involving child).

208JB Gross indecency involving child

Proposed new section 208JB is to replace current section 127(1)(b) (Gross indecency with child under 16 years). Section 208JB provides for an offence similar to proposed new section 208HB, but applies when the victim is under 16 years and does not require proof of lack of consent as a child is taken to not be capable of consenting to the gross indecency. Gross indecency is determined by reference to the standards of ordinary people.

208JC Indecent touching or act involving child or indecent act directed at child

Proposed new section 208JC provides for an offence similar to proposed new section 208HC (Indecent touching or act), but applies when the victim is under 16 years and does not require proof of lack of consent

as the child is taken to not be capable of consenting to the indecent touching or act. Indecent touching is defined by reference to the new section 208GB.

The offence criminalises both the indecent touching of a child, and when the offender is indecently touched by the child and intentionally allows the touching to occur. This offence covers some of the conduct of current section 132 (Indecent dealing with child under 16 years).

208JD Procuring child to engage in indecent act or touching

Proposed new section 208JD provides for an offence of procuring a child to engage in an indecent act or indecent touching.

208JE Exposing child to indecent thing or indecent act

Proposed new section 208JE makes it an offence to expose a child to an indecent thing or act. This covers parts of current section 132 (Indecent dealing with child under 16 years), namely section 132(2)(b) (exposing child to indecent act), and section 132(e) (exposing child to indecent object or indecent film, video tape, audio tape, photograph or book).

Proposed new section 208JE(5) provides that it is a defence where the defendant has a reasonable excuse.

208JF Taking or recording indecent image of child

Proposed new section 208JF provides for an offence of taking or recording an indecent image of a child. This is to retain the effect of current section 132(2)(f) ('without legitimate reason, intentionally takes or records, by means of any device, an indecent visual image of a child under the age of 16 years').

As outlined in new section 208GB, indecent is defined by reference to the standards of ordinary people.

208JG Engaging in conduct to procure child to engage in sexual activity

Proposed new section 208JG provides for an offence of engaging in conduct to procure a child to engage in sexual activity. The proposed offence does not require the result that a child was procured to engage in sexual activity.

The proposed offence increases the penalty significantly from current section 131 (Attempt to procure child under 16 years), which is 3 years, or 5 years if the offender is an adult. The proposed maximum penalty for new section 208JG(1) (child under 14 years) is imprisonment for 14 years, or 17 years for an aggravated offence. The maximum penalty for new section 208JG(2) (child aged 14 or 15 years) is imprisonment for 10 years, or 12 years for an aggravated offence. The increase in penalty is to reflect the seriousness of the conduct.

208JH Grooming child to engage in sexual activity

This is a new provision that criminalises preparatory conduct that is done with the intention of making it easier for a person to engage in sexual activity with a child under 16 years. These provisions are to cover conduct like building trust and rapport, asking questions of a sexual nature, normalising sexual conduct between adults and children, and making plans to engage in sexual activity with a child.

Proposed new section 208JH(1) involves engaging with the child, and section 208JH(2) involves engaging with a person who from 'time to time' has the child under their care, supervision or authority. This is intended to cover circumstances where a person engages with someone like a child's parent, grandparent or babysitter to make it easier to engage in sexual activity with the child.

This provision would implement RCIRCSA recommendations 25 and 26.

208JI Repeated sexual abuse of a child

Proposed new section 208JI is to modernise the offence at current section 131A (Sexual relationship with child). The intention of this offence is to make it easier to prosecute sexual abuse that has occurred repeatedly, by removing the need to allege particulars of any sexual act that would be necessary if the act were charged as a separate offence.

The proposed provision uses the term 'repeated sexual abuse', to replace the current term 'sexual relationship'. This results from the advocacy of Grace Tame, who criticises the use of the term 'relationship' in relation to repeated abusive conduct because it suggests that the conduct is consensual.

The proposed new offence reduces the number of incidents required to be involved from three to two. This provision would implement RCIRCSA recommendations 21-22.

The proposed new offence increases the maximum penalty to life imprisonment (from imprisonment for seven years to 20 years dependent on the nature of offending) to reflect the gravity of the offending.

208JJ No defence of consent; 208JK No defence of belief in marriage or de facto relationship

Proposed new sections 208JJ and 208JK relate to consent for this Division. The proposed provision at 208JJ provides for no defence of consent, unless 208J(5)(b) (the similar age defence) applies.

The proposed provision at section 208JK provides for no defence of belief in marriage or de facto relationship.

208JL Proceeding against child

It is anticipated that the child sexual offences will be charged very infrequently against child defendants. As a protection to ensure proper charging, the consent of the Director of Public Prosecutions is required for offences against sections 208JG and 208JH to be charged against a child, or any other offence besides section 208JI alleged to have been committed by a child under 14 years of age.

Proposed new section 208JI (Offence of repeated sexual abuse) requires the consent of the Director of Public Prosecutions for charges to be laid regardless of whether the defendant is a child or an adult.

Division 4 Sexual acts committed against young persons by persons in position of authority

Division 4 provides for offences committed by a person in a position of authority against a young person who is aged 16 or 17 years. The provisions generally mirror those of Division 3, which provide for offences committed by any person against a child aged under 16 years.

The intention behind Division 4 is to provide special protection to young people aged 16 or 17 years who are vulnerable to exploitation by a person in a 'position of authority'. As noted above, proposed new section 208GC (Position of authority) broadens the people who are in a position of authority.

As with the provisions in Division 3, the provisions do not require proof of a lack of consent. However, the defence of marriage or de facto relationship is available.

Absolute liability applies to these offences in regards to the victim's age. This means the defendant's state of mind or belief about the victim's age is not relevant.

Division 5 Sexual acts committed against or with mentally impaired persons by carers

Division 5 provides for offences committed against mentally impaired persons by carers. These offences include sexual intercourse, gross indecency, and indecent touching or act. The intention behind Division 5 is to provide special protection to mentally impaired persons, of all ages, who are vulnerable to exploitation by a person who has caring responsibilities for them in relation to their mental impairment.

'Mental impairment' is defined in Division 5 to include 'senility, intellectual disability, mental illness, brain damage and severe personality disorder' (proposed new section 208L). A person responsible for the care of a person with a mental impairment is defined in this Division to mean a person providing medical, nursing, therapeutic or educative services to the mentally impaired person in connection with their mental impairment (proposed new section 208LA).

Proposed new section 208LF provides for a defence of limited consent. It is a defence to an offence against proposed Division 5 if the person with mental impairment consented to the act, and the giving of consent was not unduly influenced by the fact that the person was responsible for the care of the person with a mental impairment. The purpose of this is to balance the sexual autonomy of the mentally impaired person with the objective of providing protection from exploitation.

Division 6 Incest

Proposed new section 208MA provides for an offence of incest, to replace current section 134(1). Incest involves sexual intercourse with another person who is a close family member and the person has knowledge that they are a close family member. A 'close family member' is defined as someone who through birth is related as a grandparent, parent, sibling (including half-brother or half-sister), child or grandchild of the person (proposed new section 208M).

The new proposed offence retains the maximum penalty of imprisonment for 14 years. There is no defence of consent, however, a defence of compulsion exists where the close family member is procured, by force or otherwise, to engage in the conduct.

Current sections 134(2) and 134(3) provide for incest offences against child victims. These are not recreated in Division 6, because they would be prosecuted under Division 3 (Sexual acts committed against or with children).

Division 7 Sexual offence involving animal

Proposed new section 208N (Sexual offence involving animal) is to replace the offence at current section 138 (Bestiality). It is proposed to increase the maximum penalty from imprisonment for 3 years to imprisonment for 7 years to bring the Northern Territory into line with other jurisdictions.

The new offence also covers broader conduct than the current offence as it extends to touching of the animal/person's genitalia with the animal/person's mouth and inserting a thing manipulated by the person into the genitalia or anus of the animal for an indecent purpose.

Division 8 General matters

Division 8 sets out various matters, including the list of circumstances of aggravation (at proposed new section 208PA), and a number of procedural and evidentiary provisions.

Clauses 14 -17

These clauses provide for amendments that are transitional, technical or administrative in nature.

Clauses 18 - 19

Clause 19 amends section 5 of the *Sentencing Act 1995* by inserting proposed new subsection (3A) to make explicit that when an offender's alleged 'good character' was of assistance in committing the offence, it should not be regarded a mitigating factor on sentence. An example of this is an offender who had a long history of volunteering in junior sport, but in the course of that, committed child sex offences. This gives effect to RCIRCSA recommendation 74.

Consultation Process

AGD is seeking feedback and comment in response to the Exposure Draft Bill.

The closing date for submissions is Wednesday 15 February 2023.

Electronic copies of submissions are preferred. Please send submissions or queries to: Policy.AGD@nt.gov.au. Alternatively, submissions may be sent via post to:

Director, Legal Policy
Department of the Attorney-General and Justice
GPO Box 1722
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Submissions may be made publically available, and may be published on the Department's website, unless they are clearly marked as 'confidential'. The Department may draw upon the contents of submissions made, and may publicly quote or refer to submissions unless a submission is clearly marked as 'confidential'.

Should you require further information, please contact Policy.AGD@nt.gov.au.