A Comparative Analysis of laws and procedures dealing with sexual offences against children in 4 common law countries

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AGE OF CONSENT

An analysis of current laws & reform

Katrina Dade
The age of consent in Australia depends on a number of factors:

a) the state in which the person resides;
b) whether the person is a male or female, and
c) whether the sexual activity is male/female, male/male or female/female.
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The reasons for AOC include its consistency with other areas of law, that is those that go to protect the innocence of the child (e.g. common law presumption of child being that of under 10 years, children's evidence etc).

Inconsistencies between jurisdiction create issues; why not have one uniform standard?

A belief that the innocence of children and their dependency make them less able to give rational thought compared to that of adults.
Age of consent is 16

Main reasoning behind such an age is the cultural and historical importance of families, whanau tribes and communities in development of a child and their future family.

Living together as a whanau means there is a shared social responsibility to support each other and has been a contributing factor to the rate of teenage pregnancies.

In one sense, NZ has culturally accepted the ability for adolescents to carry out sexual activity and should such result in pregnancy they have a cultural and social duty to support it.

One is often looked favourably upon as it is seen as a continuance of family and tradition.
In England, Scotland, Northern Ireland and Wales AOC is 16 for both homosexual or heterosexual sex.

The age being set as this was to ultimately protect children, despite studies indicating that up to one third of teenagers are having sex before this.

This AOC has been enacted with consideration of the high levels of teenage pregnancy, whether such an instrument prevents them however is another question.
How does India Compare?

- Currently stands at 18 years old and 16 years old with marriage
- Reason for having higher AOC at 18 years was as a direct result of anti-rape ordinance following gang-rape Delhi case in 2012
Government believes that those under 18 are not prepared to handle sexual relations.

Reflects other widespread issues of India including child abuse, teenage pregnancies, human trafficking and rape.

Children of India represent a gross amount of world’s population the Government through such as AOC is making sure they are adequately protected (is over protection reducing effectiveness?)

Existence of traditional customs (i.e. caste system, active role of religion) and societal attitudes makes it very difficult to legalise sexual activity younger than the current age of 18.
The difficulties of a set AOC

- The role of criminal law is questioned, is it in place to reserve order not to intervene in the personal decisions of citizens.

- Determining an objective age of consent – there is no scientific method available to determine at what point a person can determine how to properly consent.

- With this idea in mind the ability for changing AOC with societal developments is necessary → something which government and law institutions are reluctant to do.

- It is unrealistic to expect that, by reason of legislation, adolescents will defer sexual activity until some arbitrary age of consent.
To drop the AOC to 15 as it would be a more realistic reflection, fits in with age in which children can leave school, find a job and become a responsible adult.

- Strengthening of defences to AOC nationally as currently only operates by statute in some jurisdictions.
Currently no urgent political agenda to address age of consent instead part of discussion

It is recognised that many New Zealanders are having first sexual experiences around age of 14 and thus through lowering AOC would make access to advice and support much easier

Others argue it is not about changing AOC directly it is about education, children are going to have sex regardless so why not let them make informed decisions
While there is public pressure, government is against lowering age of consent below 16 years old
Lowering AOC will not reduce teenage pregnancy as it is being argued (questionable)
Also argued that lowering the age by a year could "draw a line in the sand" against sex at 14 or younger.
Department for Education to update and modernise sex education in schools which hasn't kept up with the internet age.
Introduction of Defences

* Reasonable Mistake of Age
* Similar Age Defence
* Lawful Marriage
Why is it a good idea?

- Objective standard and blanket approach fails to consider unique differences of adolescents and society which they live in.
- Having an AOC that is different for each persons based on their level of maturity is unworkable and impossible.
- Strikess a balance between affirming the right of young people to control their own bodies, while protecting them from exploitation by people much older.
- Acknowledges the fact that lots of young kids engage in harmless, innocent sexual experimentation with each other.
- Relieves criminalisation and penalties of young people in situations where consent was a factor.
Reasonable Mistake of Age

- Reasonable mistake of fact
- Proudman v Dayman [1941] HCA - defendant must provide evidence which suggested that they had an honest and reasonable belief ‘in a state of affairs such that, if the belief were correct, the conduct of the accused would be innocent.’
- more than mere ‘ignorance of the law’, i.e. can not claim they didn’t know the age of consent laws.
- Operates through legislation all jurisdictions of Australia (except NSW) variations in each
Operation in NZ through *Crimes Act 1961 (NZ)* – only a defence to a charge of sexual conduct with a person under the age of 16 if the accused can prove that he or she ‘had taken reasonable steps to find out whether the young person was of or over the age of 16 years.

Similar approach in UK the onus is on the Crown to prove that the accused did not reasonably believe the child or young person to be 16 or over (*Sexual Offences Act 2003 (UK) c 42, s 9(1)(c)(i)*).
There should be a great emphasis on prosecutorial discretion where conduct is genuinely consensual.

While it can be portrayed as encouragement of sexual activity it does not diminish the protection to vulnerable children from predatory sexual exploitation or abuse.

A relatively liberal similar-age consent defence regime ensures that cases are kept to a minimum.

Case in WA Australia as noted by Western Australian Law Reform Commission in its Discussion Paper on the *Community Protection (Offender Reporting) Act 2004* demonstrates need for such a defence, without it offender would be subject to the CPOR Act for a period of seven-and-a-half years – Community Protection (Offender Reporting) Act 2004; he will be approximately 24 years of age before his reporting obligations cease.

Because the offences involved a child under the age of 13 years the Commissioner of Police has no discretion to suspend his reporting obligations.
Areas of Research

* Does jurisdiction have mandatory reporting legislation
* Who is mandated to report
* Standards for making report
* Helplines’ assistance
* Failure to make mandated report
* Reasons for and against mandatory reporting
* Barriers to reporting generally
Is there Mandatory Reporting?

Australia – YES
India – YES
New Zealand – NO
United Kingdom – NO

* However, even those jurisdictions who do not enforce mandatory reporting laws have procedures for reporting suspected child sexual abuse. So I have researched these countries in relation to reporting child sexual abuse generally, and this will be in my final report.
Who is mandated to report?

- No mandatory reporting laws

- **any person** (adult or child) who believes a sexual offence against a child is likely to occur or who has knowledge it has occurred, with failure to do so attracting imprisonment (s 19 POCSO Act 2012)
* Exists in all jurisdictions. In NSW mandatory reporting exists for **professionals who work with children** who have reasonable grounds to suspect risk of sexual abuse, with suspicion arising through course of professional duty (s 23 and s 27 *Children and Young Persons (Care and Protection Act) 1998* (NSW)).

* Australia Federal jurisdiction – people who work in Family Court of Australia and the Federal Magistrates Court also mandatory reporters (s 67ZA *Family Law Act 1975* (Cth)).
Reasonable grounds to suspect (suspicions do not need to be confirmed/solid proof not necessary before making report) child is at risk of significant harm (circumstances exist to a significant extent which cause concern for safety, welfare and wellbeing of child). ‘Significant’ = (not minor or trivial, may reasonably be expected to have substantially and demonstrably adverse impact on child)

May be one act or omission or accumulation of acts or omissions
Any person (child or adult) who has **apprehension** that an offence covered in the act is likely to occur or has knowledge that has occurred **shall** provide that information to the Special Juvenile Police Unit or the local police (s 19(1) POCSO)
Helplines are available to assist in reporting in all four jurisdictions.
Penalties for failure to make Mandatory Report

- no criminal sanctions (removed in 2010), however, there is still a legal duty to do so

- up to six months imprisonment and a fine
The Pros and Cons of Mandatory Reporting

Understanding of the underlying rationale for the existing mandatory reporting laws, and the rationale for lack of mandatory reporting is an interesting point of distinction between India and Australia (as mandatory reporting jurisdictions), and New Zealand and United Kingdom.
In Support

- Child protection – MR considered to have an important role in protecting children. (ALRC, 1981) because children considered to not have sufficient ability to protect themselves from abuse
- Early intervention – MR allows for early intervention which protects against continuing costs (physically, mentally and economically)
- CSA still underreported, but having MR means many substantiated cases are brought forward (Mathews and Walsh, 2004)
- MR reduces barriers to reporting
- Formal recognition that CSA is unacceptable
Mandating everyone to report may lead to many incorrect reports and overloading the system. Result is slow processing - Not having swift resolution to legitimate reports may discourage people from pursuing the case to a conviction.

- New Zealand – non-implementation of mandatory reporting – fears/risk of increase in unfounded cases
- Risk of damaging doctor-patient relationship, reducing ability for doctor to intervene and provide care to a potential victim
- Focus shifts from provision of support to investigation and assessment of reports
- Removes decision making power from victim-officially reported even if child not party to that decision
Victim may hide/cover up their abuse due to the following factors:

- Socio-cultural influences
- Fear of social **stigma** – fear of victim shaming
- Sex considered **taboo**, a topic that is ‘shrouded in secrecy’
- Many perpetrators are **known to the victim**, neighbourhood, family member, institutions
- **Power imbalances**
- Perceptions of lengthy legal process
- Reliving the pain
- Lack of legal or personal **support**
Other Barriers to Reporting

- Institutions in which the abuse has occurred did not report the matters because of the negative effect it would have on the reputation of the institution.
- This has also been raised by the NSPCC (National Society for the Prevention of Cruelty to Children) at 2014 roundtable discussion on potential for mandatory reporting in the UK.
- Reporters fear of being involved in legal proceedings.
IN TRIAL PROTECTIONS

Child Complainants in Sexual Assault Trials

Caitlin Comensoli
Common Protections

- CCTV/audio-visual
- Ensuring the accused cannot see the complainant.
- Rules forbidding an unrepresented defendant from cross-examine a child
- Allowing a support person
- Familiarisation with the trial process, including visits to the court
- Trials held in camera (closed to the public)
- Protection of a child’s identity.
Pre-Recorded Evidence

- UK, NZ and AUS: allow pre-recorded evidence in chief
- UK and AUS: allow police interview to be submitted as evidence in chief
- AUS, NZ and on trial in UK: allow for the pre-recording of evidence in chief, cross-examination and re-examination
Benefits

- Reduce stress on child
- Accuracy of information
- Possibility of getting guilty plea
- Editing out inadmissible evidence
- Demonstrate non-verbal and emotional effects of abuse
Problems

- Rushed case preparation
- Requirement for multiple interviews
- Possibility of delay
- Quality of interviewer
- Children prone to giving incomplete statements initially
- Reliance on relationship of trust
Confusing questions
Repetition
Leading and tag questions
Do you ever tell lies? Have you ever fibbed?
When child doesn't understand a question or know an answer
Disallowing Certain Questions
Protections for all witnesses

- Improper
- Irrelevant
- Unfair
- Misleading
- Needlessly repetitive
- Too complicated
Protections in POCSO

- Aggressive questioning disallowed
- No character assassinations
- Questions to a child put to the Special Court first
The English System

**R v Wills**
- ‘Necessary and appropriate’ limits

**R v B**
- Restricts questioning child likely to acquiesce to

**R v Edwards**
- Can’t put case to child

**Ground Rules Hearings**
- Who, how, how long
Available to all children not just those with a physical or mental disability (as is the case with Indian ‘special educators’)

UK: Those unable to recognise problematic questions or are unlikely to speak up to authority if they can recognise them
Serve the court *not* the witness

Establish communication style of child

Interfere with inappropriate questions

Ensure child understands the questions put to them and that the court understands the child’s answers

UK: report to court on child’s communication abilities during Ground Rules Hearings
Compensation Schemes

* **POCSO Act s33(8)**
  
  “*In appropriate cases, the Special Court may, in to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child*”

* **POCSO Rules 2012- Rule 7 Compensation**
NSW has the *Victims Rights and Support Act 2013* to address victims compensation.

UK has the *Criminal Injuries Compensation Scheme 2012*

These schemes are much more comprehensive with over 100 sections each.

Both schemes deal with victims of violent crime (in which children can be included), this differs from the *POCSO Act* which deals only with child sexual offences.


NZ on the other hand has a no fault personal injury scheme to compensate victims - the *Accident Compensation Act 2001*. Hence no conviction is required, just require personal injury.
Is the Victim Compensated by the Offender?

- It is unclear in the wording of s33(8) of the POCSO Act to establish whether reparation is to be ordered against offenders.
- Rule 7(4) of the POCSO Rules states that compensation ordered by the Special Court is to be paid from the state government from the Victims Compensation Fund or other like schemes.
- The Parliamentary Committee: Human Resource Development Report 2011 recommended the creation of a survivor support fund with the fine collected as punishment to be added to this fund to compensate victims.
- This report also recognised the philosophy underlying victims compensation expressed in the preamble of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the UNGA in 1985- these included principles of restitution- that offenders should pay for the costs of their crimes and state compensation where such costs are not recoverable from offenders or elsewhere, states should endeavour to provide financial assistance.
- Unsure as to whether this is actually being implemented
* **Section 57** - enables the recognition payments made under the scheme to be recovered from persons found guilty of the crimes giving rise to the payments.

* **Section 59** - the commission has the discretion to make provisional orders for restitution.

* **S94- compensation for injury** - a court that convicts a person of an offence may, by notice given to the offender, direct a sum not exceeding $50,000AUD be paid out of the property of the offender to any aggrieved person.
The court may order reparation if the offender is convicted.

This may include for things like:

- personal injury
- medical expenses
- travel expenses
**S12 Sentencing Act 2002** - Court entitled to impose order for reparation unless they are satisfied that it would result in undue hardship for the offender or dependents of the offender.

- Personal injury is however covered in the *Accident Compensation Act 2001*. 
Yes, state compensation is provided by each of the jurisdictions. Compensation amounts vary, and reasoning behind compensation schemes vary.
* In NSW there is a focus on meeting the immediate needs of victims as well as recognition the wrong done to them.

* The UK scheme was seen as "an expression of public sympathy for innocent victims of violent crime."

* NZ has a focus on rehabilitation- the reason for their no-fault scheme
In all jurisdictions there are stronger punishments for crimes against minors, however this is not translated in higher compensation amounts.

In NSW and UK the compensation amount is dependent on the Crime, more so than the age of victims.

In NSW the limitation period is extended for victims to apply for compensation, whereas other victims are required to lodge an application within 2 years.

NZ scheme is determined on a case by case basis so age could be taken into consideration when deciding the compensation amount.
POCSO Rules r7(3) lists the factors to be considered when determining an awards for compensation.

One consideration was loss of educational opportunity- now this is not considered in other jurisdictions- UK and NSW in their schemes do address loss of income from not being able to work in their compensation amounts. This could be attributed to the schemes not being strictly aimed at children but at ‘victims of crime’.

There is no guideline to determine what compensation will be awarded- seems to be up to discretion of the court.
* This is covered in **Section 23 of the Victims Rights and Support Act 2013**
* A victim of an **Act of Violence** is eligible for support.
* s19(3) recognises **sexual assault and domestic violence** as Acts of Violence.
* Financial assistance for immediate needs capped at $5,000AUD (235135 Rupees as at 18/10/2015)
* Recognition payment $10000AUD (470270 Rupees) for sexual assault involving serious bodily injury, pattern of sexual or indecent assault/attempting sexual assault involving violence.
* There are varying grades of payment amounts depending on severity of case
* There is also a provision for economic loss capped at $30000AUD (1410806 Rupees). This includes ongoing medical expenses and loss of earnings.
You are eligible for support if you sustain a injury because you were a direct victim of a **Crime of Violence**.

Sexual assault covered as a **Crime of Violence**- Annex B 2(d) CICA Scheme.

Payments may be for:
- Injury
- Loss of earnings
- Special expenses
- Bereavement
- Child
- Dependency
- Funeral
- Maximum award- 500,000 pounds (49,948,600 Rupees as at 18/10/2015)
- Sexual assault victim- has the opportunity to get an award for either sexual assault injury or for mental injury depending on which one offers the higher compensation.
Sexual assault:

* greater payment if it is a repeated series of acts as opposed to one isolated incident. I.e. 3330 pounds for isolated incident - if repeated over a period up to 3 years then payment doubles. Max for bodily injuries is 22000 pounds. Mental illness payment ranges from 22000-27000 pounds.

* Many categories to consider which have established compensation amounts.
The Accident Compensation Act 2001 provides cover for mental illness caused by certain criminal acts in s21. These cover offences listed in Schedule 3 of the Act.

- Schedule 3 covers many aspects relating to sexual offences.
- Compensation also available if you have suffered personal injury as a result of crime, however to claim for mental trauma it is necessary to fall under the schedule 3 qualifier.
- Physical injuries dealt with on a case-by-case basis
- Claims and lump sum payments are determined based on impairment caused- for example loss of a leg may result in 40% impairment- this would have seen a lump sum payment close to $30000 NZD (1326085 Rupees as at 18/10/2015)
- With that said there is no maximum compensation amount in NZ
The scheme was amended due to long waiting periods to obtain funds when individuals needed them. For example the payments were being received long after bills for medical expenses and funeral payments were due. Hence the scheme was amended to meet these immediate needs more effectively - it was felt the old scheme undermined the objectives the scheme was trying to attain in enabling the rehabilitation of and recovery of victims. There has been complaints however as the amounts received are less for the recognition payment, and there have been complaints regarding the retrospective nature of the scheme, however the overall effectiveness of this will be able to be determined as the scheme is allowed to mature.
Counselling does not appear to be explicitly part of the POSCO act, I am not sure if it can fall into the physical or mental trauma aspects of the Act.

The Parliamentary Committee HRC called for free and confidential counselling and support services for victims by professionally trained counsellors.

I guess it may be implicit in the act as there is a criteria to be eligible to be a counsellor in the POCSO model guidelines.

Also the guidelines say the counsellors are payed a salary and receive from a fund constituted by the state government under s 61 of the Juvenile Justice (Care and Protection of Children) Act 2000.

S7 of the POCSO rules can pass orders for interim compensation to meet immediate needs of child for relief or rehabilitation- I guess this could include counselling.

So it does appear that counselling is free, however it is not clear on how much counselling is available to the child.
22 hours of free counselling available, however reading a second reading speech of parliament, it says this number can be extended where appropriate.

Section 23 as mentioned above also includes parents, or guardians being eligible for support, so following this it would be assumed that counselling services also exist for these related parties.
* Not covered in the legislation, or the Criminal Injuries Compensation Scheme
* Have to rely on other organisations
* Victims Support Organisation - that provides emotional support which is similar to counselling. More of a volunteer service assigned to listen to victims - free service so would be open to children and their parents, however there is a lack of having a professional listen to your issues.
* Counselling available for adult or child sexually abused and suffers mental injury due to the abuse.
* The ACC will cover the full cost as long as the guidelines regarding the choice of counsellor are met.
* Also ACC has to be satisfied that mental injury caused by sexual abuse to be eligible to be covered.
* 16 counselling sessions entitled with ACC registered counsellor.
* More may be available on assessment
* Does not appear to be free for family members.