

Maintaining a Sexual Relationship with a Child: s 229B¹

Commentary

The offence of maintaining a sexual relationship with a child under 16 was originally inserted by *The Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) and commenced on 3 July 1989.

Until amendments in 2020, the offence of maintaining a sexual relationship with a child applied to different conduct, and attracted different penalties, over the years since its introduction. The offence differed in its application between 3 July 1989 and 1 July 1997; between 1 July 1997 and 1 May 2003; and after 1 May 2003.

The present form of the offence is substantially the same as the form in which it was inserted by the *Sexual Offences (Protection of Children) Amendment Act 2003*.

By amendments in 2020, the application of the offence of maintaining a sexual relationship with a child in s 229B *Criminal Code* has been significantly modified in respect of offences that occurred prior to 1 May 2003.

The *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2020* inserted into the Criminal Code a new Part 9, Chapter 102 – Transitional and declaratory provisions (which commenced on 15 September 2020). Division 1 of that chapter consists of sections 744 – 750.

By s 746(1) *Criminal Code*, s 229B as in force on 15 September 2020 applies, and is taken always to have applied, in relation to acts done before 3 July 1989. The applicable maximum penalties are set out in s 746(2). However, s 746(3) provides that s 746(1) does not apply to an act done before 3 July 1989 if, before 15 September 2020, the act was the subject of a charge of an offence, whether or not the charge was finally dealt with.

By s 747(1) *Criminal Code*, s 229B as in force on 15 September 2020 applies, and is taken always to have applied during the period 3 July 1989 to 30 April 2003. The applicable maximum penalties for the period 3 July 1989 to 30 June 1997 are set out in s 747(2). The applicable maximum penalties for the period 1 July 1997 to 30 April 2003 are set out in s 747(3). However, s 747(5) provides that s 747(1) does not apply if before 15 September 2020

¹ The offence is a prescribed offence under s 161Q *Penalties and Sentences Act 1992* so a serious organised crime circumstance of aggravation is applicable.

the act was the subject of a charge of an offence, whether or not the charge was finally dealt with.

The following model direction reflects the 2020 amendments.

Direction

The prosecution must prove that the defendant maintained an unlawful relationship of a sexual nature with a child under the age of 16 years.

- 1. The prosecution must prove that the defendant was an adult, that is, a person over 18 years of age.**
- 2. The prosecution must prove that the complainant was at the time a child under the age of 16 years.²**
- 3. An unlawful sexual relationship is a relationship that involves more than one unlawful sexual act over any period. “Unlawful sexual act” means an act that constitutes an offence of a sexual nature which is not authorised, justified or excused by law.** [Here identify the offence(s) of a sexual nature upon which the prosecution relies, explaining in respect of each what the jury must find in order to be satisfied that such an offence occurred. ‘Offence of a sexual nature’ means an offence defined in sections 210 (other than section 210 (1) (e) or (f)),³ 215, 222, 349, 350 or 352. In respect of acts prior to 3 July 1989, see s 746(2)(b). In relation to acts during the period 3 July 1989 to 30 June 1997, see s 747(2)(b). In respect of acts during the period 1 July 1997 to 30 April 2003, see s 747(3)(b)].
- 4. Maintained carries its ordinary meaning. That is, carried on, kept up or continued. It must be proved that there was an ongoing relationship of a sexual nature between the defendant and the complainant. There must be some continuity or habituality of sexual conduct, not just isolated incidents.**

² If the child was at least 12 years when the crime was alleged to have been committed, it is a defence to prove the defendant believed on reasonable grounds the child was at least the age of 16 years (s229B(5) *Criminal Code*). See also s 229 of the *Code* which provides that, except as otherwise stated, it is immaterial that the defendant did not know the person was under the specified age or believed that the person was not under that age.

³ An offence defined in s 210(1)(e) or (f) (exposing a child to an indecent object, film etc or taking an indecent photograph or visual image of a child) cannot constitute an offence of a sexual nature for the purpose of establishing any of the three occasions necessary. In *R v Bradfield* [2012] QCA 337, the conviction was quashed because the directions did not distinguish between the counts on the indictment which related to sexual acts and those which did not, leaving open the possibility that a jury member may have convicted on the basis of an offence of the latter kind.

- 5. All of you must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship with the child involving unlawful sex acts existed. It is not necessary that all of you be satisfied about the same unlawful sexual acts.**

Where the prosecution joins a maintaining count with specific counts of sexual offences during the specified period, the prosecution may also rely on evidence of other alleged sexual conduct of the defendant which is not the subject of specific counts. The trial judge should have regard to the decision of the High Court in *HML v R* (2008) 235 CLR 334 and the directions concerning Evidence of other Sexual (or violent) Acts or other “Discreditable Conduct” at No. 66.1.

It may be necessary to give a further direction in terms set out below.

If you are satisfied beyond reasonable doubt of the guilt of the defendant in relation to any of counts [e.g. 2, 3 or 4], the relevant sexual act or acts will then be used in your consideration of the count of maintaining.

In this case, as well as relying on the specific sexual acts identified in counts [e.g. 2, 3 and 4], the prosecution relies upon sexual acts about which the complainant was not specific as to times or circumstances under which the acts occurred. Those sexual acts described by the complainant were [identify those acts].

If you have a doubt about the specific offences in counts [e.g. 2, 3 and 4], then you should only convict the defendant on the basis of the evidence of the other alleged acts if after carefully scrutinising the evidence of the child you are satisfied beyond reasonable doubt that the defendant did these acts during the period alleged in the indictment [specify period].

A reasonable doubt with respect to the complainant’s evidence on any specific count should be taken into account and considered by you in your assessment of the complainant’s credibility generally; however it remains a matter for you as to what evidence you accept and what evidence you reject.⁴

⁴ See *R v Markuleski* (2001) 52 NSWLR 82, *R v M* [2001] QCA 458, *R v S* (2002) 129 A Crim R 339, [2002] QCA 167, and *R v D* [2002] QCA 445. See directions at No 34.