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From: Forrest Gavin 3284 GJRF
Sent: Friday, 18 November 2005 12:49 PM
To: 'ChrisS@ggscorio.vic.edu.au'
Subject: Children and Young Persons Act and Crimes Act

BLAKE DAWSON WALDRON

Lawyers

Private Confidential and Privileged (see notice below)

Dear Stephen,

The issues which you raised with me yesterday were as follows:

- 1) Whether an 18 year old male/student who receives oral sex from a girl of 15 years (and performs oral sex on the same girl) has committed a crime under the *Crimes Act 1958*; and
- 2) Whether it would be mandatory for the School to report such an offence to either the police or other relevant authority.

Crimes Act 1958 - Sexual penetration of a child

It appears that the young man would have committed an offence under the Crimes Act 1958. Section 45 of the Crimes Act provides:

45 (1) A person who takes part in an act of sexual penetration with a child **under the age of 16** is guilty of an indictable offence.

The offence committed by the young man is punishable by up to 10 years' imprisonment.

For clarification, "sexual penetration" is defined by section 35(1). It means, *inter alia*, "the introduction (to any extent) by a person of his penis into the vagina, anus **or mouth** of another person, whether or not there is emission of semen". Further, sub-section (2) of s.35 provides that "For the purposes of ... [s.45] both the person who sexually penetrates another person and the other person are taking part in an act of sexual penetration."

Section 45(4) provides that consent is not a defence to a charge under s.45(1), unless the child was aged over 10 years; and -

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- (a) the accused believed on reasonable grounds that the child was aged 16 or older; or
- (b) the accused was **not more than 2 years older** than the child; or
- (c) the accused believed on reasonable grounds that he or she was married to the child.

None of these defences would appear to be available to the young man in the circumstances.

Crimes Act 1958 - Other offences

It would seem that a young man would also be liable in the circumstances you described, for offences under s 47 (Indecent act with a child under the age of 16), and s 47A (Sexual relationship with a child under the age of 16).

The first of these sections provides that person must not wilfully commit an indecent act with a child under the age of 16 years to whom he or she is not married. The defences outlined above (under section 45(4)) also apply to this offence, although again they do not apply to the young man.

The offence under s.47A will be proved where the accused is shown to be guilty of an offence under s.45, and the jury is satisfied that acts constituting that offence took place on at least two more occasions.

Crimes Act 1958 - Reporting of Offences

Section 325(1) of the *Crimes Act* 1958 provides that:

Where a person (in this section called "the principal offender") has committed a serious indictable offence (in this section called "the principal offence"), any other person who, knowing or believing the principal offender to be guilty of the principal offence or some other serious indictable offence, without lawful authority or reasonable excuse does any act with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender shall be guilty of an indictable offence.

Section 325(6) defines "serious indictable offence" as an offence punishable "on first conviction with imprisonment for life or for a term of five years or more". Thus section 325(1) would apply to a person who impeded the apprehension of the 18 year boy guilty of a crime under s.45 (which is punishable by up to 10 years' imprisonment). A person guilty of an offence under s325(1) would be liable to a maximum of five years' imprisonment where the principal offender was guilty of a crime under s.45.

Nonetheless, it seems unlikely that this section would require the School to report an incident of the sort

you described to the police. The phrase "does any act" would suggest that the section is aimed towards positive actions (for example, providing false information, in response to questions from the police) rather than omissions.

Children and Young Persons Act 1989 - Reporting of Offences

As you know, Section 64 of the *Children and Young Persons Act 1989* provides that a teacher, head teacher or principal (amongst others), must notify the Secretary to the Department of Human Services where he or she forms a belief on reasonable grounds (in the carrying out of his or her profession), that a child is in need of protection.

Section 63 provides that a child is in need of protection, *inter alia*, where "the child has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type".

There are a number of elements of this definition which would appear not be satisfied in the circumstances which you put to us:

- (a) the girl may not have suffered "significant harm", as it seems she was a willing participant and is only very slightly below the age of consent; and
- (b) it is unlikely that it could be said that the child's parents "have not protected, or are unlikely to protect" the child from harm of that type.

I shall be pleased to discuss the above with you.

Kind regards,

Gavin Forrest