LAW REFORM COMMISSION

Review Paper

« Criminal Protection of Children’s Rights »

[May 2016]

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About the Commission

THE LAW REFORM COMMISSION OF MAURITIUS consists of –

(a) a Chairperson, appointed by the Attorney-General;
(b) a representative of the Judiciary appointed by the Chief Justice;
(c) the Solicitor-General or his representative;
(d) the Director of Public Prosecutions or his representative;
(e) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
(f) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
(g) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
(h) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
(i) two members of the civil society, appointed by the Attorney-General.

Under the direction of the Chairperson, the Chief Executive Officer is responsible for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

The Secretary to the Commission is responsible for taking the minutes of all the proceedings of the Commission and is also responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission.

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Executive Summary

Review Paper on « Criminal Protection of Children’s Rights »
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With a view to strengthening our legislation, the Commission has reviewed from a comparative perspective the criminal protection of children’s rights in various jurisdictions – such as UK, Australia, New Zealand, Canada, France, and South Africa – in relation to sexual offences, abduction, endangering child’s life and criminal responsibility.
CRIMINAL PROTECTION OF CHILDREN’S RIGHTS

INTRODUCTION

1. According to Article 19 of the UN Convention on the Rights of the Child\(^1\), to which Mauritius has acceded, “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”

2. To that end, the Commission has examined the criminal legislation in force in Mauritius and other jurisdictions, such as the UK, Canada, France, New Zealand, South Africa and Australia. The aim is to generate some reflection on the way forward to reform our criminal legislation so as to better afford criminal protection to children’s rights.

(I) CRIMINAL PROTECTION OF CHILDREN’S RIGHTS IN MAURITIUS

3. Provisions related to child protection are found in various statutes. First and foremost, we have the Child Protection Act. Then, we have the Criminal Code and the Criminal Code (Supplementary Act). Some provisions can also be found in the Employment Rights Act and the Protection from Domestic Violence Act.

(A) Child Protection Act (CPA)

4. A child, according to this Act, means any unmarried person under the age of 18.

5. Any person who ill-treats a child or otherwise exposes a child to harm shall commit an offence. Child trafficking is also an offence under the Act. Moreover, any person who, for pecuniary gain or by gifts, promises, threats or abuse of authority, incites the parents of a child to abandon the child or a child to be born shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 8 years.

6. Child abduction is also provided for in the law. The Act, furthermore, deals with sexual offences against children. Thus, any person who causes, incites or allows any child to be sexually abused by him or by another person, to have access to a brothel or to engage in prostitution shall commit an offence.
7. It is also an offence to take indecent photographs of children. Besides, any person who causes or allows any child under his care to beg shall commit an offence.

(B) Criminal Code (CC)

8. S. 220 of our Criminal Code deals with the murder of a newly born child and infanticide.

9. Also, any person who sells or offers for sale an axe, knife, cutlass, hook of any type, or any instrument or tool with a blade or pointed edge, to any person under the age of 12 shall commit an offence.

10. Any person who has sexual intercourse with a minor under the age of 16 or a mentally handicapped person, even with his consent, shall be liable to penal servitude for a term not exceeding 20 years.

11. Moreover, any person who offends against morality, by habitually exciting, encouraging, or facilitating the debauchery or corruption of youth of either sex under the age of 18 shall be punished by imprisonment for a term not exceeding 10 years.

12. Besides, any person who, having been judicially ordered to pay alimony to his spouse or children, voluntarily fails, for 2 months, to pay the full amount of alimony so ordered to

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7 S. 15 CPA
8 S. 17 CPA
9 S. 233 B CC
10 S. 249 (4) CC
11 S. 251 (1) CC
his spouse or children, shall commit an offence and shall, on conviction, be liable to a fine not exceeding 50,000 rupees and to imprisonment for a term not exceeding 2 years\textsuperscript{12}.

13. Also, any father or mother who, through ill-treatment, pernicious examples of habitual drunkenness or notorious ill conduct, lack of care or direction, seriously endangers the health, security or morality of any of his minor children shall commit an offence\textsuperscript{13}.

14. Finally, any person who takes advantage of the wants, weaknesses, or passions of a minor, for the purpose of making the minor subscribe to his prejudice, any bond, acquittance or discharge for loan of money, movable effects, commercial bill, or other valuable consideration, under whatever form such transaction is made or disguised, shall be punished by imprisonment, and by a fine not exceeding 100,000 rupees\textsuperscript{14}.

(C) Criminal Code (Supplementary Act)

15. According to Section 86 (2) of the Criminal Code (Supplementary Act): “Any person who sells, lends, hires or distributes to a minor or exposes or allows to be exposed to the view of a minor any obscene matter shall commit an offence and, notwithstanding section 152 of the Criminal Procedure Act, shall, on conviction, be liable to imprisonment for a term not exceeding 4 years together with a fine not exceeding 100,000 rupees.”

16. Moreover, according to Section 26 (1) (a): “Every person shall be deemed an idle and disorderly person who being able to work is found wandering abroad or placing himself in any public place to beg or gather alms, or causing any child to do so.”

\textsuperscript{12} S. 261 (1)
\textsuperscript{13} S. 260 (3)
\textsuperscript{14} S. 331
(D) Employment Rights Act

17. According to the Act, a “child” is any person under the age of 16, while “young person” means a person, other than a child, who is under the age of 18.

18. The Act prohibits employing a child for employment or work in any occupation\(^\text{15}\). Furthermore, no person shall employ, or continue to employ, a young person on work which by its nature, or the circumstances in which it is carried out, is likely to jeopardise the health, safety, physical, mental, moral or social development of the young person\(^\text{16}\).

(E) Protection from Domestic Violence Act (PDVA)

19. According to the Act, “domestic violence” includes acts committed by a person against his spouse, a child of his spouse or another person living under the same roof.

20. Moreover, in determining an application for a protection order\(^\text{17}\), the Court shall have regard to the following:

- the welfare of any child affected, or likely to be affected, by the respondent spouse’s conduct;
- the accommodation needs of the aggrieved spouse, his children as well as those of the respondent spouse and his children; and
- any hardship that may be caused to the respondent spouse or to any of his children as a result of the making of the order.

\(^{15}\) S. 12 (1) ERA
\(^{16}\) S. 12 (2) (a) ERA
\(^{17}\) S. 3 (4) PDVA
21. Furthermore, where a protection order is made, the Court may further specify the conditions on which the respondent spouse approach or contact the aggrieved spouse or his child\textsuperscript{18}.

\textsuperscript{18} S. 3 (5) (b) (ii) PDVA
(II) CRIMINAL PROTECTION OF CHILDREN’S RIGHTS IN OTHER JURISDICTIONS

(A) SEXUAL OFFENCES AGAINST CHILDREN

(1) UK

22. There is no single piece of legislation that covers child protection in the UK, but rather a plethora of laws and guidance that are continually being amended, updated and repealed. It must be noted that the Human Rights Act 1998\(^{19}\) incorporates the European Convention on Human Rights into UK law. Whilst it does not specifically mention children’s rights, children are covered by this legislation as they are persons in the eyes of the law, just as adults are. The Act makes it unlawful for public authorities to act in a manner which is incompatible with the rights and freedoms contained in the Act. It also requires the Government and the courts to ensure that court rulings and new Bills are compatible with the Act wherever possible. These rights include the right to respect for private and family life.

23. As to sexual offences against Children, it is dealt with in the Sexual Offences Act 2003.\(^{20}\)

24. The Sexual Offences Act 2003\(^{20}\) was introduced to update the legislation relating to offences against children. It includes the offences of grooming, abuse of position of trust, trafficking, and covers offences committed by UK citizens whilst abroad. It also updates the Sex Offenders Act 1997 by strengthening the monitoring of sex offenders.

\(^{19}\) http://www.legislation.gov.uk/ukpga/1998/42/contents

25. **Sections 5 to 29** of the Act deal with Sexual offences against children. Serious sexual offences include rape, sexual assault, sexual activity with a child aged under 13 and other serious sexual offences defined in the Act. Victims can be female or male, adult or child.

26. Section 5 deals with **rape of a child under 13**. A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life. The offence is constituted when a person intentionally penetrates the vagina, anus or mouth of another person with his penis, and the other person is under 13.

27. Section 8 deals with **causing or inciting a child under 13 to engage in sexual activity**. A person guilty of an offence under this section is liable on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or both. On conviction on indictment, to imprisonment for a term not exceeding 14 years.

28. Section 9 incriminates **sexual activity with a child**. The offence is constituted when a person aged 18 or over intentionally touches another person, the touching is sexual, and either the other person is under 16 and the offender does not reasonably believe he or she is 16 or over, or the victim is under 13.

29. To **engage in sexual activity in the presence of a child** is also an offence according to section 11 of the Act. Similarly, it is an offence to **cause a child to watch a sexual act** (S 12).

30. It is to be noted that a person under 18 commits an offence if he does anything which would be an offence under any of sections 9 to 12 if he were aged 18 (S 13).
31. To combat increasing sexual approaches to children on-line, there exists a new offence of **meeting a child following sexual grooming**. This makes it a crime to befriend a child on the Internet or by other means and meet or intend to meet the child with the intention of abusing them. The maximum sentence is 10 years’ imprisonment (S 15).

32. Child sex offences cover not only assaults by blood relatives but as well foster and adoptive parents and live-in partners. To protect vulnerable 16 and 17 year olds, the offences of “**abuse of a position of trust**” forbids sexual contact between adults and children under 18 in schools, colleges and residential care (Sections 16 to 24).

33. **Sexual activity with a child family member** is also an offence (S 25). Where in proceedings for an offence under this section it is proved that the other person was under 18, the defendant is to be taken not to have reasonably believed that that person was 18 or over unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.

34. The **abuse of children through prostitution and pornography** is also reprimanded (S 47). It is thus an offence for a person to intentionally obtain for himself the sexual services of another person, and before obtaining those services, he has made or promised payment for those services to that person or a third person, or knows that another person has made or promised such a payment, and the person is under 18, and the offender does not reasonably believe that he is 18 or over, or the person is under 13.

35. Those accused of child rape can no longer argue that the child consented. Any sexual intercourse with a child under 13 will be treated as rape. Other non-consensual offences against children under 13 are sexual assault by penetration, sexual assault, and causing or
inciting a child to engage in sexual activity. There are new offences of sexual activity with a child under 16. These cover a range of behaviour, involving both physical and non-physical contact. As children and young persons commit sexual crimes on other children, these offences also apply to individuals under 18.

36. The **Sex Offenders Act 1997**\(^1\) requires sex offenders convicted or cautioned on or after 1\(^{st}\) September 1997 to notify the police of their names and addresses and of any subsequent changes (known colloquially as the sex offenders register).

37. Scotland possesses many statutes which deal with Child Protection. Among them we find the **Children (Scotland) Act 1995**\(^2\), **Adoption and Children (Scotland) Act 2007**, **Protection of Vulnerable Groups (Scotland) Act 2007**\(^3\), **Children's Hearings (Scotland) Act 2011**\(^4\), and **Children and Young People (Scotland) Act 2014**\(^5\).

38. The **Sexual Offences (Amendments) Act 2000**\(^6\) introduced a new offence of abuse of trust applicable to "positions of trust" which involve looking after children and young people who are in full-time education, detained under a court order, looked after in a hospital/children’s home or other establishment providing social care or in foster care.

39. The **Criminal Justice and Immigration Act 2008**\(^7\) allows people who commit sex offences against children abroad to face prosecution in the UK, even if that offence is not illegal in the foreign country in which it was committed.

40. The French Penal Code distinguishes several categories of sexual offences according to their nature and their gravity. When committed on a minor, the law generally provides for firmer penalties. They are as follows:

- **Rape**

41. The penalty is increased from fifteen years’ imprisonment to twenty years in cases where the rape is committed on a minor under the age of fifteen; on a person who is particularly vulnerable due to age, sickness, infirmity, physical or mental deficiency, or pregnancy; or where it is committed by an ascendant relative or by any person having authority over the victim.\(^{28}\)

- **Sexual assault**

42. It consists of any sexual infringement committed with violence, constraint, threat, or surprise. The penalty is increased from five years’ imprisonment and a €75,000 fine to seven years’ imprisonment and a €100,000 fine when committed on a minor less than fifteen years of age or on a person who is particularly vulnerable due to age, sickness, infirmity, physical or mental deficiency, or pregnancy.\(^{29}\) It is further raised to ten years’ imprisonment and a €150,000 fine when it results in an injury or is committed by an ascendant relative or by any person having authority over the victim.\(^{30}\)

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\(^{28}\) Art. 222-24 Fr. Pen. Code  
\(^{29}\) Art. 222-29 Fr. Pen. Code  
\(^{30}\) Art. 222-30 Fr. Pen. Code
➢ **Indecent assault**

43. Performing without violence, constraint, threat, or surprise, a sexual assault on the person of a minor less than fifteen years old is punishable by five years’ imprisonment and a fine of €75,000\(^{31}\). This offence is punishable by ten years’ imprisonment and a €150,000 fine when committed by an ascendant relative, by any person having authority over the victim, or when the minor has been put in contact with the perpetrators of the act by the use of a telecommunication network for the dissemination of messages intended for the general public. Indecent assault performed on a minor over fifteen years old is punishable by two years’ imprisonment and a €300,000 fine when committed by an ascendant relative or by any person having authority over the victim.

➢ **Corruption of a minor**

44. Encouraging or attempting to encourage the corruption of a minor is punishable by five years of imprisonment and a €75,000 fine\(^{32}\). These penalties are raised to seven years’ imprisonment and a fine of €100,000 when the minor is less than fifteen years old; when the minor has been put in contact with the perpetrators of the act by the use of a telecommunication network for the dissemination of messages intended for the general public, or when the conduct occurs inside a scholastic or educational establishment or, at a time when students are entering or leaving, in the vicinity of such an establishment. The same penalties are applicable to the conduct of an adult who organises meetings involving sexual exhibitions or relations in which a minor assists or participate.

\(^{31}\) Art. 227-25 Fr. Pen. Code

\(^{32}\) Art. 227-22 Fr. Pen. Code
Sex tourism

45. A French national or a person habitually residing in France who while abroad commits one of the following offences may be prosecuted in France: sexual assault, indecent assault, child pornography, corruption of a minor, or sex with a minor against remuneration. French law, similarly to British law as we have seen above\(^{33}\), applies even if the offence committed is not punishable under the legislation of the country where the offence took place, and prosecution is not conditioned on a complaint from the victim, next of kin, or official report from the authorities of the country where the offence was committed\(^{34}\). The offence needs only be brought to the attention of the French judicial authorities. These provisions apply even though the defendant acquired French nationality subsequent to the conduct imputed to him or her.

Sale, Trafficking, and Kidnapping of Children

46. The French Penal Code contains provisions on trafficking of person, kidnapping, concealment and confinement of children, and the substitution of one child for another. Trafficking is defined as the recruitment, transport, accommodation, or reception of a person in exchange for remuneration or any other consideration, or for the promise of remuneration or other consideration, in order to place that person at the disposal of an identified or unidentified third party so as to allow the commission against that person of the offence of procuring, sexual assault, the exploitation of begging, or living or working conditions inconsistent with human dignity, or to compel that person to commit any such

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33 See paragraph 39.
34 Art 222-22 (alinéa 2), 225-12-3 and 227-27-1 Fr. Pen. Code
offence. Trafficking is punished by ten years' imprisonment and a €1,500,000 fine when committed against a minor\(^{35}\).

47. The French Penal Code also punishes anyone who encourages parents to abandon their children or who serves as an intermediary in the placement or adoption of children. When this conduct is committed habitually or for profit, the penalties are doubled.

\begin{itemize}
\item \textbf{Procuring and Child Prostitution}
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48. Procuring is punished with seven years’ imprisonment and a fine of €1,500,000 where it is committed with respect to a minor. If the minor is under fifteen, the penalty is increased to fifteen years’ imprisonment and a €3,000,000 fine. The prostitution of minors is prohibited. \textbf{Any minor who prostitutes him/herself is considered in danger and falls under the protection of the competent juvenile justice judge.}

49. In addition, soliciting, accepting, or obtaining, in exchange for remuneration or a promise of remuneration, relations of a sexual nature with a minor who engages in prostitution, even if not habitually, is punished by three years’ imprisonment and a fine of €45,000. The penalty is increased to five years’ imprisonment and a €75,000 fine\(^{36}\) where the offence is committed habitually or against more than one person, the person was put in contact with the offender by the use of a public communications network, the offence was committed by a person abusing the authority conferred upon him by his position, or the offender involuntarily put the life of the person in danger or committed violence

\footnotesize{\(^{35}\) Art. 225-4-2 Fr. Pen. Code

\(^{36}\) Art. 225-12-2 Fr. Pen. Code}
against this person. The penalty is increased to seven years’ imprisonment and a fine of €100,000 where the offence was committed against a minor under the age of fifteen.

➢ **Child Pornography**

50. Taking, recording, or transmitting a picture or representation of a minor with a view to circulating it, where that image or representation has a pornographic character, is punished by five years’ imprisonment and a fine of €75,000. The same penalty applies to offering or distributing such a picture or representation by any means, and to importing or exporting it, or causing it to be imported or exported. The penalties are increased to seven years’ imprisonment and a fine of €100,000 where use was made of a public communications network in order to circulate the image or representation of a minor. **Possessing such an image or representation** is punished by two years’ imprisonment and a fine of €30,000.

51. The offences described above are punished with ten years’ imprisonment and a fine of €500,000 where they are committed by an organised gang. **These provisions also apply to the pornographic images of a person whose physical appearance is that of a minor**, unless it is proved that the person was over eighteen on the day his picture was taken or recorded.

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37 Art. 227-23 Fr. Pen. Code
52. The Canadian Criminal Code\textsuperscript{38} deals with the matter of the protection of children with respect to physical abuse and neglect, sexual exploitation, child prostitution and child pornography. These include both substantive offences and procedural protections.

53. According to Section 151, every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year, or is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

54. Moreover, every person who, for a sexual purpose, invites, counsels or incites a person under the age of 16 years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of 16 years is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year or is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

\textsuperscript{38} \url{http://laws-lois.justice.gc.ca/eng/acts/C-46/}
55. **Section 153** deals with those situations where there is a position of trust or authority towards a young person or where there is a young person in a position of dependency.

56. A person commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person and is liable to imprisonment for a term of not more than 14 years and, if the other person is under the age of 16 years, to a minimum punishment of imprisonment for a term of five years.

57. **Section 159** prohibits anal intercourse where the parties are under 18 years. The changes that have been made apply only to permit adults to engage in this form of activity.

58. According to **Section 170**, every parent or guardian of a person under the age of 18 years who procures the person for the purpose of engaging in any sexual activity which is prohibited with a person other than the parent or guardian is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.

59. **Section 171** prohibits householders from permitting sexual activities in the house where there is a person under 18 years.

60. **Section 172** deals with corrupting children by parents or others by their conduct of adultery, immorality, drunkenness, etc.

61. **Section 173** prohibits anyone from committing an indecent act in a public place and more particularly for a sexual purpose, to expose one’s genital organs to a child under 16 years of age.
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62. Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year (Section 163.1 (2)).
63. The rights of children in New Zealand are protected through various pieces of legislation. These include the Children’s Commissioner Act 2003\textsuperscript{39} (CCA), and the Children, Young Persons, and Their Families Act 1989\textsuperscript{40} (CYPFA), the Care of Children Act 2004\textsuperscript{41}, the Education Act 1989\textsuperscript{42}, the New Zealand Bill of Rights Act 1990\textsuperscript{43} (NZBORA), the Crimes Act 1961\textsuperscript{44}, the Human Rights Act 1993\textsuperscript{45}, the Privacy Act 1993\textsuperscript{46}, and the Official Information Act 1982\textsuperscript{47} (OIA). The laws and policies comply with the United Nations Convention on the Rights of the Child (UNCRC), which New Zealand ratified on 6 April 1993.

64. In New Zealand a person is considered a child or “minor” until the age of 20\textsuperscript{48}. On reaching this “age of majority” the person is no longer a child in the eyes of the law, and has all the rights and obligations of an adult. There are laws to protect young people from harm they may be subject to due to their lack of maturity. Some legal age restrictions are lifted below the age of majority, trusting that a child of a certain age is equipped to deal with the potential harm.

65. Under the Crimes Act, everyone who has sexual connection with a child under 12 is liable to imprisonment for a term not exceeding 14 years. Everyone who attempts to have

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\item \textsuperscript{39} http://www.legislation.govt.nz/act/public/2003/0121/latest/whole.html
\item \textsuperscript{40} http://www.legislation.govt.nz/act/public/1989/0024/latest/DLM147088.html
\item \textsuperscript{41} http://www.legislation.govt.nz/act/public/2004/0090/latest/DLM317233.html
\item \textsuperscript{42} http://www.legislation.govt.nz/act/public/1989/0080/latest/DLM175959.html
\item \textsuperscript{43} http://legislation.govt.nz/act/public/1990/0109/latest/whole.html
\item \textsuperscript{44} http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html
\item \textsuperscript{45} http://www.legislation.govt.nz/act/public/1993/0082/latest/DLM304212.html
\item \textsuperscript{46} http://www.legislation.govt.nz/act/public/1993/0028/latest/DLM296639.html
\item \textsuperscript{47} http://www.legislation.govt.nz/act/public/1982/0156/latest/DLM65363.html
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sexual connection with a child is liable to imprisonment for a term not exceeding 10 years. Everyone who does an indecent act on a child is liable to imprisonment for a term not exceeding 10 years. It is not a defence to a charge under this section that the person charged believed that the child was of or over the age of 12 years (Section 132).

66. Moreover, everyone who has sexual connection with a young person under 16 is liable to imprisonment for a term not exceeding 10 years. Everyone who attempts to have sexual connection with a young person is liable to imprisonment for a term not exceeding 10 years. Everyone who does an indecent act on a young person is liable to imprisonment for a term not exceeding 7 years. No person can be convicted of a charge if he or she was married to the young person concerned at the time of the sexual connection or indecent act concerned (Section 134).

67. Also, everyone commits an offence who, being a New Zealand citizen or ordinarily resident in New Zealand has sexual connection outside New Zealand, with or on a child under the age of 12 years or under the age of 16 years (Section 144A).

68. It is likewise an offence to organise or promote child sex tours (Section 144C).
(5) SOUTH AFRICA

69. Concerning sexual offences against children, they are dealt with in the **Criminal Law (sexual offences and related matters) amendment Act**\(^{49}\) of 2007\(^{50}\).

70. Child pornography is defined in the Act “as any image, however created, or any description or presentation of a person, real or simulated, who is, or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such image or description or presentation is intended to stimulate erotic or aesthetic feelings or not (…)”.

71. Part 1 of Chapter 3 deals with **consensual sexual acts with certain children**, while Part 2 is concerned with **sexual exploitation and sexual grooming of children, exposure or display of or causing exposure or display of child pornography or pornography to children and using children for pornographic purposes** or benefiting from child pornography, and part 3 is in relation to compelling or causing children to witness sexual offences, sexual acts or self-masturbation and exposure or display of or causing exposure or display of genital organs, anus or female breasts ('flashing') to children.

72. The Act differentiates between sexual “penetration” and sexual “violation”\(^{51}\).

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\(^{49}\) ss 15- 22


\(^{51}\) “sexual violation” includes any act which causes—

(a) direct or indirect contact between the—

(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;

(ii) mouth of one person and—

(aa) the genital organs or anus of another person or, in the case of a female, her breasts;

(bb) the mouth of another person;
According to the above Act, a person ('A') who commits an act of sexual penetration with a child ('B') is, **despite the consent of B to the commission of such an act**, guilty of the offence of having committed an act of consensual sexual penetration with a child\(^{52}\). In the Act, a child means a person under the age of 18 years or, with reference to Sections 15 and 16, a person 12 years or older but under the age of 16 years.

Section 16 reads as follows: "A person ("A") who commits an act of sexual violation with a child ("B") who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child, unless A, at the time of the alleged commission of such an act, was— (a) 12 years of age or older but under the age of 16 years; or (b) either 16 or 17 years of age and the age difference between A and B was not more than two years.”

Sexual exploitation of children is also covered in the Act: A person ("A") who unlawfully and intentionally engages the services of a child complainant ("B"), with or without the consent of B, for financial or other reward, favour or compensation to B or to a third person ("C") - (a) for the purpose of engaging in a sexual act with B, irrespective

\(^{52}\) S. 15 (1)
of whether the sexual act is committed or not; or (b) by committing a sexual act with B, is, in addition to any other offence which he or she may be convicted of, guilty of the offence of sexual exploitation of a child.

76. Sexual grooming of children is also a crime under the Act. Thus, a person (“A”) who- (a) manufactures, produces, possesses, distributes or facilitates the manufacture, production or distribution of an article, which is exclusively intended to facilitate the commission of a sexual act with or by a child (“B”); (b) manufactures, produces, possesses, distributes or facilitates the manufacture, production or distribution of a publication or film that promotes or is intended to be used in the commission of a sexual act with or by B; (c) supplies, exposes or displays to a third person (“C”) — (i) an article which is intended to be used in the performance of a sexual act; (ii) child pornography or pornography; or (iii) a publication or film, with the intention to encourage, enable, instruct or persuade C to perform a sexual act with B; or (d) arranges or facilitates a meeting or communication between C and B by any means from, to or in any part of the world, with the intention that C will perform a sexual act with B, is guilty of the offence of promoting the sexual grooming of a child.

77. Exposure or display of or causing exposure or display of child pornography or pornography to children is sanctioned under the Act.

78. It is also an offence to use children for or benefit from child pornography.

53 S. 17 (1)
54 Child grooming is befriending and establishing an emotional connection with a child, and sometimes the family, to lower the child’s inhibitions for child sexual abuse.
55 S. 18 (1)
56 S. 19
57 S. 20
79. A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a child complainant (“B”), without the consent of B, to be in the presence of or watch A or C while he, she or they commit a sexual offence, is guilty of the offence of compelling or causing a child to witness a sexual offence\(^{58}\).

80. Finally, a person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, exposes or displays or causes the exposure or display of the genital organs, anus or female breasts of A or C to a child complainant (“B”), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of genital organs, anus or female breasts to a child\(^{59}\).

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\(^{58}\) S. 21 (1)  
\(^{59}\) S. 22
81. Each jurisdiction provides a range of offences concerning sexual conduct with children. These include, for example: sexual intercourse, attempts to have sexual intercourse, acts of indecency, procuring or grooming a child for ‘unlawful sexual activity’, and abducting a child with the intention of engaging in unlawful sexual activity.

82. **Offences against children are commonly expressed in terms of the age of the victim.** For example, there are offences against young children (under the age of 10, 12 or 13 years of age, depending on the jurisdiction) and offences against older children (generally under the age of 16, but in some cases 17, or 18 years of age). This gradation generally reflects the seriousness of offences against very young children. Accordingly, the sentences attached to those offences are higher than for those against older children. For example, in NSW, different penalties are provided where the child is under the age of 10 years (25 years’ imprisonment); between the ages of 10 and 14 years (16 years’ imprisonment); and between the ages of 14 and 16 years (10 years’ imprisonment). As for offences against adults, aggravating factors are also applicable to offences against children.

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60 NSW: Crimes Act 1900 (NSW) s 66A—under the age of 10 years; s 66C—aged between 10 and 16 years. Victoria: Crimes Act 1958 (Vic) s 45 — under the age of 16 years. Queensland: Criminal Code (Qld) s 215—offences of ‘carnal knowledge of a child’ relating to children under 16 years of age; s 208(1)—sodomy relating to children under the age of 18 years. Western Australia: Criminal Code (WA) s 320(2)—children under the age of 13 years; s 321(2)—children aged between 13 and 16 years. South Australia: Criminal Law Consolidation Act 1935 (SA) s 49(1)—under the age of 14 years; s 49(3)—under the age of 17 years. Tasmania: Criminal Code (Tas) s 124—under the age of 17 years. ACT: Crimes Act 1900 (ACT) s 55(1)—under the age of 10 years; s 55(2)—under the age of 16 years. Northern Territory: Criminal Code (NT) s 127 under the age of 16 years.

61 Crimes Act 1958 (Vic) s 56; Criminal Code (NT) s 201. See also Queensland which has an offence of ‘taking a child for immoral purposes’: Criminal Code (Qld) s 219.
83. In some jurisdictions, consent by a person who is under the age of consent to sexual activity is excluded from operating as a defence to sexual offence charges, regardless of any similarity in age between the victim and the accused\textsuperscript{62}. However, many jurisdictions recognise that consent may play a role in such situations, and consequently there are a range of statutory formulations involving consensual sexual activity between young people under the age of consent but similar in age. For example, in Victoria, consent may be a defence to the offence of sexual penetration or an indecent act where the victim is aged 12 years and over and the accused is not more than two years older than the victim. In South Australia similarity in age is recognised as a defence where the victim is over the age of 16 years and the accused is under the age of 17 years. In Tasmania, consent is a defence, except in relation to anal sexual intercourse, where the victim is aged 15 years and over and the defendant is not more than five years older, or where the victim is aged 12 years or over and the defendant is not more than three years older.

84. A related issue, of particular relevance in cases involving older children, is that of the age of consent. Historically, there were significant inconsistencies within and across jurisdictions with respect to the age of consent based on gender, sexuality and other factors. Despite significant reforms, some inconsistency remains. For example, Commonwealth legislation sets the age of consent at 16 years of age, which is consistent with legislation in NSW, Victoria, Western Australia, ACT and the NT. However, the age of consent is 17 years of age in South Australia and Tasmania, and legislation in Queensland distinguishes between vaginal sex and sodomy, in relation to which the age of consent is 16 and 18 years of age respectively.

\textsuperscript{62} Crimes Act 1900 (NSW) ss 77, 78C
85. State and territory criminal law provides for a range of incest offences\(^{63}\), where the victim and the accused are closely related. Similarly, in most other jurisdictions sexual activity occurring in the context of biological and adoptive relationships or involving half-sisters and brothers or step-sisters and brothers is covered by the incest provisions. However, legislation across jurisdictions is inconsistent with respect to whether incest offences also cover conduct arising in the context of de facto relationships or those arising from fostering and other legal arrangements. Overall, incest type offences do not tend to make provision for offences arising in communities which may have extended family and kinship definitions and structures.

86. A number of jurisdictions have introduced offences that apply to a defendant who has a special relationship with the victim as a result of the defendant’s position or authority, or the care that he or she provides to the child, for example, as a teacher, religious guide, doctor, employer or sports coach\(^ {64}\).

\(^{63}\) In Western Australia, this offence is referred to as sexual offences by a “relative and the like”: Criminal Code (WA) s 329.

\(^{64}\) Crimes Act (NSW) s 73(3); Crimes Act 1958 (Vic) s 49(4); Criminal Law Consolidation Act 1935 (SA) s 49(5a); Criminal Code (NT) s 128(3).
(B) ABDUCTION

(1) UK

87. The current child protection system is based on the Children Act 1989, which was introduced in an effort to reform and shed light on the existing overabundance of laws affecting children.

88. The Children Act 1989\(^\text{65}\) revolves around the idea that children are best cared for within their own families; however, it also makes provisions for instances when parents and families do not co-operate with statutory bodies. This legislation allocates duties to local authorities, courts, parents and other agencies in the United Kingdom, to ensure children are safeguarded and their welfare is promoted.

89. It is an offence to knowingly take a child, who is in care, away from the responsible person as ordered by the court. It is also an offence to encourage or assist a child to run away from the responsible person this can be punishable by imprisonment up to 6 months or a fine\(^\text{66}\).


\(^{66}\) Children Act 1989 S. 49
(2) FRANCE

90. According to article 227-7 of the French Penal Code, the abduction of a minor from the care of persons who exercise parental authority over him or from persons to whom he was entrusted, or with whom the child habitually resides, when committed by any ascendant, is punished by one year's imprisonment and a fine of €15,000.

91. Moreover, the abduction without fraud or violence of a minor from the care of persons who exercise parental authority over him or from persons to whom he was entrusted or with whom he habitually resides, when committed by a person other than those referred to in article 227-7, is punished by five years’ imprisonment and a fine of €75,000 (article 227-8).
(3) NEW ZEALAND

92. According to Section 208 of the Crimes Act, everyone is liable to imprisonment for a term not exceeding 14 years who unlawfully takes away or detains a person without his or her consent or with his or her consent obtained by fraud or duress, —
(a) with intent to marry him or her; or
(b) with intent to have sexual connection with him or her; or
(c) with intent to cause him or her to be married to or to have sexual connection with some other person.

93. Moreover, everyone is liable to imprisonment for a term not exceeding 14 years who unlawfully takes away or detains a person without his or her consent or with his or her consent obtained by fraud or duress, —
(a) with intent to hold him or her for ransom or to service; or
(b) with intent to cause him or her to be confined or imprisoned; or
(c) with intent to cause him or her to be sent or taken out of New Zealand (S 208 Crimes Act).

94. It is to be noted that young person under 16 cannot consent to being taken away or detained (S 209A Crimes Act).

95. Also, everyone is liable to imprisonment for a term not exceeding 7 years who, with intent to deprive a parent or guardian or other person having lawful care or charge of a young person of the possession of the young person, unlawfully takes or entices away or detains the young person. Furthermore, everyone is liable to imprisonment for a term not exceeding 7 years who receives a young person, knowing that he or she has been unlawfully taken or enticed away or detained with intent to deprive a parent or guardian
or other person having the lawful care or charge of him or her of the possession of him or her. It is immaterial whether the young person consents, or is taken or goes or is received at his or her own suggestion and it is immaterial whether the offender believes the young person to be of or over the age of 16 (S 210 Crimes Act).
(4) SOUTH AFRICA

96. The Children's Act 2005\(^67\) consolidates and reforms the law on matters related to children. It deals with topics including the age of majority, paternity, custody, child support, guardianship, parenting plans, children's courts, circumcision, day care, child protection, foster care, group homes, adoption, surrogacy, child abduction, and trafficking of children.

97. The Act also deals with child abduction\(^68\) and trafficking in children\(^69\). A child who is a victim of trafficking must be referred to a designated social worker for investigation and may, pending such investigation, be placed in temporary safe care\(^70\).

98. Section 278 of the Act gives the court certain powers to deal with child-abductions. When a child is abducted the Act states that the High Court can make an order demanding the return of the child. The High Court will first ask the family advocate for a report on the home life of the child before the child was abducted. The High Court may also ask the child what happened when he or she was abducted and what the child wants the court to do. The High Court will then make an order for the child to be returned to its original home depending on what information the court finds out.

\(^{68}\) Ch. 17 CA
\(^{69}\) Ch. 18 CA
\(^{70}\) S. 289 CA
99. Section 282 of the Canadian Criminal Code prohibits parental child abductions in situations where there is a custody order made by a Canadian court. Section 283 applies to situations where parents continue to have joint custody of their child by operation of law, where there is a written agreement, where there is a foreign custody order, or where the abducting parent did not believe or know there was a valid custody order. The essential element of the criminal charge of abduction is the intent to withdraw from the other parent possession of the child. An abduction has ensued when an offender could foresee that his or her act would certainly deprive the other parent of the possession of or the ability to exercise control over the child. The child’s consent or lack of consent is not germane to the criminal charge of abduction. An abduction occurs when a child is taken against the will of the child's parent or guardian, even if the child takes an active or leading role.

100. The criminal offence of abduction does not automatically dismiss an offender's existing right to custody of his or her child under the Children's Law Reform Act. Nevertheless, because custody rights are granted in accordance with the child's best interests, the criminal conduct of abduction will be relevant to the court in considering an offender's custody rights.

101. The Ontario Court of Appeal in \textit{R v McDougall} (1990) 62 CCC (3d) 174 at 189 warned that: "The offence created by s. 282 is a grave one and is intended to strike at conduct in the nature of child abduction. Care must be taken before a prosecution is launched under s. 282 to ensure that the events complained of truly amount to criminal conduct. This care is evidenced by the requirement in s. 283 (a companion section to s. 282) that the Attorney General or counsel instructed by him consent to proceedings under that section."
It is very common in custody and access disputes that each parent feels terribly wronged and makes the most serious allegation against the other (...) Criminal prosecutions cannot become a weapon in the arsenal of parties to acrimonious family disputes.71

102. Ontario Children's Law Reform Act72 provides some measures, which help to prevent the abduction of children by their parents. Courts may restrict the issuing of passports, for example, or set limitations on access to the children. A court can also order the provincial health plan, registrar of motor vehicles and other departments to provide the address of a suspected abducting parent to an applicant. Even lawyers can be directed to breach their solicitor-client privilege and provide an address on the basis that privilege cannot be used to commit a civil wrong.

72 https://www.ontario.ca/laws/statute/90c12
(6) AUSTRALIA

103. Under the Family Law Act 1975 a party to proceedings or a person acting on their behalf or at their request is liable to be imprisoned for up to 3 years if that person takes or sends a child, or attempts to do so, outside Australia in breach of a residence, contact or care order of the court. A similar penalty can be imposed where the removal occurs when proceedings for a residence, contact or care order are pending before the court.

104. Concerning internal abductions, in a majority of cases the parent from whom the child is taken has no order of the court and the abducting parent has not committed a criminal offence in removing the child. As a result, the other parent needs to pursue orders from a court exercising jurisdiction under the Family Law Act to locate and recover the child.

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(C) ENDANGERING CHILD’S LIFE

(1) UK

105. The Children Act provides for the powers of the individual local Police forces to intervene to safeguard children\(^{75}\). Under this law, the police have the power to remove children to a safe location for up to 72 hours to protect them from "significant harm". Police do not require a court order to take such a step. During the 72 hours, the police officer responsible for executing their powers should inform the “designated officer”. A designated officer should be allocated to each police force to deal with these emergency child safeguarding cases and to liaise with local authorities. The police should also inform the child’s parents of the situation and help the child to understand what is happening and ascertain their wishes and views.

106. According to Section 47, a local authority must investigate if they are informed that a child in their area is subject of an emergency protection order, is in police protection or is suffering or likely to be suffering significant harm. They must then take any steps, as reasonably feasible, to ensure that the child is secured. If any concerns arise regarding a child’s education, the relevant local education authority should be consulted. If as part of the enquiries they are unable to gain access to the child, and they still have significant concerns, the local authority can apply for an emergency protection order, a child assessment order, a care order or a supervision order. If it is deemed an order is not required they may establish a date to review the case.

\(^{75}\) Children Act 1989 S. 46
107. The Children Act 1989 defines “harm” as ill-treatment (including sexual abuse and non-physical forms of ill-treatment) or the impairment of health (physical or mental) or development (physical, intellectual, emotional, social or behavioural)\(^76\). “Significant” is not defined in the Act, although it does say that the court should compare the health and development of the child “with that which could be reasonably expected of a similar child”. So **the courts have to decide for themselves what constitutes “significant harm” by looking at the facts of each individual case.** Section 120 of the **Adoption and Children Act 2002\(^77\)** amends the Children Act 1989 by expanding the definition of “harm” to include witnessing domestic violence.

108. It is to be observed that the **United Nations Convention on the Rights of the Child 1989** (UN, 1989) was ratified by the UK on 16 December 1991. It includes the right to protection from abuse, the right to express their views and have them listened to and the right to care and services for disabled children or children living away from home. Although the Government has said it regards itself bound by the Convention and refers to it in child protection guidance, it has not become part of UK-wide law.

109. Section 58\(^78\) of the Children Act 2004 updates the legislation on physical punishment. It **limits the use of the defence of reasonable punishment so that it can no longer be**

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\(^76\) Children Act 1989 S. 31
\(^77\) http://www.legislation.gov.uk/ukpga/2002/38/contents
\(^78\) 58 Reasonable punishment

(1) In relation to any offence specified in subsection (2), battery of a child cannot be justified on the ground that it constituted reasonable punishment.

(2) The offences referred to in subsection (1) are—

(a) an offence under section 18 or 20 of the Offences against the Person Act 1861 (c. 100) (wounding and causing grievous bodily harm);

(b) an offence under section 47 of that Act (assault occasioning actual bodily harm);

(c) an offence under section 1 of the Children and Young Persons Act 1933 (c. 12) (cruelty to persons under 16).

(3) Battery of a child causing actual bodily harm to the child cannot be justified in any civil proceedings on the ground that it constituted reasonable punishment.
used when people are charged with the offences against a child of wounding, actual or grievous bodily harm or cruelty. Therefore any injury sustained by a child which is serious enough to warrant a charge of assault occasioning actual bodily harm cannot be considered to be as the result of reasonable punishment.

110. The **Domestic Violence, Crime and Victims Act 2004**\(^79\) closes a legal loophole (whereby defendants in murder and manslaughter cases could escape conviction by claiming each other had killed the child), by creating a new offence of causing or allowing the death of a child or vulnerable adult. The offence establishes a new criminal responsibility for members of a household where they know that a child or vulnerable adult is at significant risk of serious harm. The **Domestic Violence, Crime and Victims (Amendment) Act 2012** extends the 2004 offence to include “causing or allowing child or vulnerable adult to suffer serious physical harm”.

111. The **Forced Marriage Act (Civil Protection) 2007**\(^80\) gives courts the power to make orders to protect the victim or potential victim of a forced marriage and help remove them from that situation. Although this Act does not make forcing someone into marriage a crime, anyone found to be contravening a Forced Marriage Protection Order can be charged with a criminal offence.

112. The **Female Genital Mutilation Act 2003**\(^81\) spreads the existing legislation criminalising female genital mutilation in the UK, by making it an offence for UK nationals or permanent UK residents to take a girl abroad, or to help others to take

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(4) For the purposes of subsection (3) “actual bodily harm” has the same meaning as it has for the purposes of section 47 of the Offences against the Person Act 1861.
(5) In section 1 of the Children and Young Persons Act 1933, omit subsection (7).
a girl abroad, to carry out female genital mutilation, even in countries where the practice is legal.

113. The **Serious Organised Crime and Police Act 2005**\(^{82}\) set up the framework for the UK-wide Child Exploitation and Online Protection (CEOP) Centre to be created. It also comprises provisions for improving the vetting system to stop adults who pose a risk from working with children\(^{83}\).

114. The **Children’s Hearings (Scotland) Act** 2011 sets out the structure for the care and protection of children by the imposition of Compulsory Measure of Supervision. The Act sets out when referrals must be made to the Children’s Reporter, the mechanisms for the provision of Compulsory Measures of Supervision and the forms such measures may take. This Act also sets out the legislation governing emergency measures for the protection of children, including child protection and child assessment orders, emergency applications to justices of the peace and the powers of a constable to remove a child to a place of safety.

115. Schedule 1 to the **Criminal Procedure (Scotland) Act** 1995\(^{84}\) covers a list of offences against children, e.g. abandonment or wilful neglect. Someone who has committed an offence which is enumerated in this Schedule is often referred to by professionals as a “Schedule 1 offender”.


\(^{83}\) [Section 163](http://www.legislation.gov.uk/ukpga/2005/15/contents)

116. According to article 227-15 of the French Penal Code, deprivation of food or care to the point of endangering the health of a minor under fifteen years of age, inflicted by an ascendant or by any other person exercising parental authority or having authority over the minor, is punished by seven years’ imprisonment and a fine of €100,000.

117. Keeping a child under six years of age on a public highway or in a place used for the purposes of public transport with the aim of soliciting the generosity of passers-by also constitutes deprivation of care.

118. According to article 227-17, failure by the father or mother, without a legitimate reason, to comply with their legal obligations to the point of endangering the health, safety, morals or education of their minor child is punished by two years’ imprisonment and a fine of €30,000.

119. The direct provocation of a minor to make unlawful use of drugs is punished by five years’ imprisonment and a fine of €100,000. Where it concerns a minor under fifteen years of age, or where the offence is committed inside a learning or educational institution or, when the pupils are entering or leaving, outside such an institution, the offence is punished by seven years’ imprisonment and a fine €150,000 (article 227-18).

120. Also, the abandonment of a minor under fifteen years of age in any given place is punished by seven years’ imprisonment and a fine of €100,000 except where the circumstances of the abandonment enabled the health and the safety of the minor to be assured.
(3) CANADA

121. **Section 215** imposes a legal duty on parents and guardians to provide the necessaries of life to children under the age of 16 years of age. In the absence of a lawful excuse, the parent will be liable to a maximum penalty of five years’ imprisonment.

122. **Section 218** of the Criminal Code makes it a crime to unlawfully abandon or expose a child under the age of ten years to risk without protection, so that its life is endangered or its health could be permanently injured. A further requirement regarding the duty of a parent or guardian is to be found in **Section 219** which makes it a crime to do anything or omit to do anything that it is their duty to do, to show wanton or reckless disregard for the lives or safety of their children. This involves the failure of one parent to protect the child from an abusive parent or other person or to fail to seek medical assistance for a child. These are all subject to the test of reasonableness as with other forms of criminal negligence. A final protection is found in **Section 223** which prohibits injury to a child before or during its birth as a result of which the child dies.
(4) NEW ZEALAND

123. According to Section 154 of the Crimes Act 1961, everyone is liable to imprisonment for a term not exceeding 7 years who unlawfully abandons or exposes any child under the age of 6 years.

124. Everyone is liable to imprisonment for a term not exceeding 14 years who causes the death of any child that has not become a human being in such a manner that he or she would have been guilty of murder if the child had become a human being (Section 182 (1))

125. Everyone is liable to imprisonment for a term not exceeding 2 years who assaults any child under the age of 14 years (Section 194).

126. According to Section 195, everyone is liable to imprisonment for a term not exceeding 10 years who, being a person who has actual care or charge of the victim, intentionally engages in conduct that, or omits to discharge or perform any legal duty the omission of which, is likely to cause suffering, injury, adverse effects to health, or any mental disorder or disability to a child.

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85 No one is guilty of any offence who before or during the birth of any child causes its death by means employed in good faith for the preservation of the life of the mother.
(5) AUSTRALIA

(i) Child Protection legislation

127. In four jurisdictions (Western Australia, Victoria, Tasmania and New South Wales), there are child abuse and neglect offences in child protection legislation. In Western Australia, a person with the care and control of a child must not do an act, or fail to do an act, knowing (or recklessly disregarding) that the conduct may cause significant harm to a child from abuse (physical, sexual, emotional or psychological) or neglect. The relevant legislation defines “neglect” to include the failure by the child’s parents to provide adequate care or effective medical, therapeutic or remedial treatment for the child. The penalty is imprisonment for up to 10 years.

128. In Victoria and Tasmania, it is an offence for a person who has a duty of care to a child to take, or fail to take, action that has either resulted in harm to the child, or has the potential to cause harm. The maximum penalty ranges, respectively, from 12 months’ imprisonment to two years.

129. New South Wales (NSW) child protection law makes it an offence for any person (not just one who has care of a child) to do an act intentionally that causes or appears likely to cause injury or harm to a child or young person. It is also an offence for a person who has care of a child or young person to fail to provide the child or young person with adequate and proper food, nursing, clothing, medical aid or accommodation. Both these

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86 S 101 Children and Community Services Act 2004 (WA)
87 S 493 Children, Youth and Families Act 2005 (Vic); Children, S 91(1) Young Persons and Their Families Act 1997 (Tas).
88 S 227 Children and Young Persons (Care and Protection) Act 1998 (NSW)
offences attract a maximum monetary penalty of 200 penalty units, the value of which is currently $22,000\(^{89}\).

130. A number of child protection laws also make it an offence for a person who has care and control of a child to leave a child unattended and unsupervised either in a motor vehicle\(^{90}\), or more generally. In NSW, the offence is framed more broadly to apply to any person, not only one who has care and control of a child. Again, the penalties for these offences vary substantially across the jurisdictions - from a monetary penalty in NSW to a term of up to five years’ imprisonment in Western Australia\(^{91}\).

131. Other offences contained in child protection legislation include removing a child or young person from the care of a person who has protection and care responsibility under the relevant Act, and offences concerning tattooing, branding and body piercing\(^{92}\).

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\(^{89}\) S 17 Crimes (Sentencing Procedure) Act 1999 (NSW)

\(^{90}\) S 231 Children and Young Persons (Care and Protection) Act 1998 (NSW)

\(^{91}\) S 102 Children and Community Services Act 2004 (WA)

\(^{92}\) Ss 230–230A Children and Young Persons (Care and Protection) Act 1998 (NSW); S 103 Children and Community Services Act 2004 (WA)
132. In four jurisdictions: Queensland, South Australia, the ACT and the Northern Territory, offences relating to child abuse and neglect are contained in general criminal laws. The criminal statutes of NSW and Tasmania also contain more serious offences relating to the abuse and neglect of children.

133. Under the criminal legislation of NSW, Queensland (Qld), Western Australia, South Australia, Tasmania, Australian Capital Territory (ACT) and the Northern Territory, it is an offence for a person with parental responsibility to fail to provide a child (generally defined as a child under the age of 16 years) under his or her care with the “necessities of life” (generally defined as the provision of accommodation, food, clothing and access to healthcare, and education). In NSW, the maximum penalty is imprisonment for five years; in the ACT, it is two years. In Queensland, South Australia and Tasmania, maximum penalties of three years’ imprisonment apply where the neglect endangers the child’s health.

134. In Queensland, it is an offence for any person who has the care and control of a child to cause harm to a child aged below 16 years by reason of failing to provide for the child, deserting the child or leaving the child without means of support. In a number of jurisdictions, it is also a crime to abandon or expose a child where that act endangers the life of the child or may cause serious injury, although the provisions vary in terms of the age of the child. In the Northern Territory, for instance, the offence relates to a child aged under two years, while in NSW and Queensland, the offence applies to a child aged under

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93 S 43A Crimes Act 1900 (NSW); Ss 177, 286 Criminal Code Act 1899 (Qld); S 30 Criminal Law Consolidation Act 1935 (SA); Criminal Code (WA) s 263; Ss 144–152 Criminal Code (Tas); S 39 Crimes Act 1900 (ACT); Ss 149, 183 Criminal Code (NT).
94 S 364 Criminal Code Act 1899 (Qld)
seven years. These offences attract maximum penalties ranging from five to seven years imprisonment, some depending on the age of the child.

135. There is some discrepancy among the elements of the offence provisions in the criminal laws of the states and territories. Most require the prosecution to prove either an intentional or reckless act or omission and that the child has suffered, or was placed at risk of suffering, a high degree of harm such as serious injury or danger of death. Section 43A of the Crimes Act 1900 (NSW), for instance, provides that a person with parental responsibility for a child who intentionally or recklessly fails to provide the child with the “necessities of life” is guilty of an offence if the failure causes a danger of death or serious injury to the child. By contrast, under s 30 of the Criminal Law Consolidation Act 1935 (SA), which applies not only to children but to vulnerable adults, the prosecution must show failure to provide food, clothing or accommodation, but it does not require the prosecution to prove risk of harm.

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95 S 43A Crimes Act 1900 (NSW) inserted by Crimes Amendment (Child Neglect) Act 2004 (NSW)
96 S 30 Criminal Law Consolidation Act 1935 (SA)
136. According to Section 150 of the Children’s Act, a child is in need of care and protection if, the child has been abandoned or orphaned and is without any visible means of support, displays behaviour which cannot be controlled by the parent or care-giver, lives or works on the streets or begs for a living, is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency, has been exploited or lives in circumstances that expose the child to exploitation, lives in or is exposed to circumstances which may seriously harm that child’s physical, mental or social well-being; may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child; is in a state of physical or mental neglect; or is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.

137. If, on evidence given by any person on oath or affirmation before a presiding officer it appears that a child who resides in the area of the children's court concerned is in need of care and protection, the presiding officer must order that the question of whether the child is in need of care and protection be referred to a designated social worker for an investigation.

138. Moreover, according to Section 305 (3) of the same Act, a parent, guardian, other person who has parental responsibilities and rights in respect of a child, care-giver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an
offence if that parent or care-giver or other person abuses or deliberately neglects the child or abandons the child.

139. Also, a person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance (S 305 (4) Children’s Act).
(D) CRIMINAL RESPONSIBILITY

(1) UK

140. According to Section 34 of the Crime and Disorder Act 1998, the age of criminal responsibility in England and Wales is 10 years old\(^97\). This means that children under 10 can’t be arrested or charged with a crime. There are other punishments that can be given to children under 10 who contravenes the law. Children under 10 who break the law are treated in a different way to adults or youths under 18 who commit a criminal offence. Children under 10 who break the law regularly can sometimes be taken into care, or their parents could be held liable.

141. Children between 10 and 17 can be arrested and taken to court if they commit a crime. Young people aged 18 are handled as an adult by the law. If they are sent to prison, they will be sent to a place that holds 18 to 25-year-olds, not a full adult prison.

142. In Scotland the age of criminal responsibility is 8 years old but the age at which a child can be prosecuted is 12 years (Sec. 52 of the Criminal Justice and Licensing (Scotland) Act 2010)\(^98\). Children under 12 may be referred to a social worker and a children’s hearing. A children’s hearing is a legal meeting and decisions made can become part of a criminal record. Moreover, no child under the age of 16 years shall be prosecuted for any offence except on the instructions of the Lord Advocate, or at his instance; and no court other than the High Court and the sheriff court shall have jurisdiction over a child under the age of 16 years for an offence. Where a child is charged with any offence, his parent or guardian may in any case, and shall, if he can be

found and resides within a reasonable distance, be required to attend the court before which the case is heard or determined during all the stages of the proceedings, unless the court is satisfied that it would be unreasonable to require his attendance (Sec 42 of the Criminal Procedure (Scotland) Act 1995).  

(2) FRANCE

143. There is no specific legal age under which a juvenile cannot be prosecuted. The sole criterion is that of moral discernment, which may vary depending upon the maturity of the child and the nature of the offence committed. The Penal Code provides that minors capable of discernment are criminally responsible for the crimes, misdemeanours and contraventions of which they have been found guilty, and are subject to measures of protection, assistance, supervision and education according to the conditions laid down by specific legislation\(^{100}\).

144. This legislation also determines the educational measures that may be imposed upon minors aged between ten and eighteen years of age, as well as the penalties which may be imposed upon minors aged between thirteen and eighteen years old, taking into account the attenuation in responsibility resulting from their age.

145. Penalties, however, are adapted to the age of the child. The Penal Code distinguishes five categories:

- Children without discernment: there is no criminal liability. The juvenile justice judge may, however, consider that the child is in danger or that the conditions of his education are gravely compromised and order an educational or assistance measure;

- Children under ten with discernment: the child may be found criminally responsible before a juvenile justice court. He/she cannot receive either a criminal penalty or an educational sanction. Educational sanctions are a new tool introduced in 2002. They fall between educational measures and criminal sanctions. The judge may only order an educational, protection, or assistance measure;

\(^{100}\) Art. 122-8 Fr. Pen. Code
- Children from ten to thirteen: the judge may order the following educational sanctions: confiscation of the object used in the commission of the offence, ban on associating with the victim or the accomplices, ban on going to the place where the offence took place, compensation of the victim, and mandatory civic education. In the event of non-compliance with these sanctions, the judge may order placement in an institution. The sanctions will appear on the child’s criminal record;

- Children from thirteen to sixteen: the criminal penalties incurred are half the ones stipulated for adult offenders. The juvenile justice court may combine criminal penalties with educational measures; and

- Children from sixteen to eighteen: they may benefit from the same penalty reduction than children from thirteen to sixteen receive, but in their case, this reduction is optional.

146. When an offence committed by a minor is brought to the attention of the public prosecutor, he/she may decide to instigate criminal proceedings or use alternative procedures, in particular where the offence has limited consequences for both the victim and the society. They include admonition with compensation of the victim, conditional closure of the case with the obligation to compensate the victim, or instruction to undergo treatment or punitive mediation.
(3) NEW ZEALAND

147. **A child under the age of ten cannot be convicted of an offence**\(^{101}\). If the child is aged 10 or 11, they can be prosecuted for murder or manslaughter. If the offender is aged 12 or 13, they can only be prosecuted for an offence if the maximum penalty is 14 years’ imprisonment or more, or if the maximum penalty is 10 years’ imprisonment or more if they are a repeat offender and the previous offence had a maximum penalty of 14 years’ imprisonment or more. All children aged between 10 and 13 have a rebuttable presumption of incapacity to commit a crime. Young persons aged 14 to 16 may be prosecuted for any crime, unless a higher age limit is stated in the specific legislation (e.g. people under 16 cannot be convicted of incest).

148. If the child is brought within the court system, the judge has discretion not to use the criminal process and direct them towards social welfare. When the child offender does not fall into these categories, they are dealt with under the care and protection provisions of Children, Young Persons, and Their Families Act (CYPTFA)\(^{102}\), or by the police, which are governed by youth justice principles.

149. If between 14 and 17, the court will have regard to the age of the offender. If the crime is dealt with in the Youth Court, then the Youth Justice Act and youth principles will apply. However, the offender can be sent to the District Court or High Court for sentencing or trial, where the Sentencing Act 2002\(^{103}\) applies. Under the Sentencing Act 2002, a child or young person under 17 cannot be sentenced to prison or home detention.

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\(^{101}\) Crimes Act 1961, s. 21.
150. While minors require protection in the law, New Zealand recognises that at certain ages specified in law, minors have the maturity to understand and be responsible for their acts. People who are below the general age of majority but have reached a specific age are deemed to have the same liability for crime they commit as adults. For example, a child of at least 14 may be charged with any crime within New Zealand. However, criminal cases involving minors under 18 are tried in the Youth Courts.

151. The Youth Court\textsuperscript{104} is less formal than other courts, and the judge is more active in explaining the procedure as well as gathering data. The punishments are less severe, and are grouped depending on their restrictiveness into seven categories. The court has a stronger focus on restorative justice, reflected in the involvement of the victims, the young person's understanding and co-operation in the proceedings, acknowledgement of the power imbalanced by proving all young people with a lawyer, and the restorative justice outcomes promoted.

\textsuperscript{104} The Youth Court is a subdivision of the District Court and has the same general status and powers. Youth Court decisions are appealed to the High Court.
(4) CANADA

152. In Canada, according to Section 13 of the Criminal Code, the age of responsibility is twelve years\textsuperscript{105}. Traditionally, Canada followed the common law rule under which a child could be held responsible for criminal actions starting at the age of seven, though only if the Crown could establish that the child knew that his or her acts were wrong. In 1983, the minimum age for criminal responsibility was raised to twelve. While the change in the law was controversial, twelve was chosen because it is commonly the age of leaving elementary school, and it was considered that younger children could not understand and engage in the youth court process.

153. In 2006, then-justice Minister Vic Toews recommended lowering the age of youth court jurisdiction from 12 to 10 years\textsuperscript{106}, but this proposal did not succeed.

\textsuperscript{105} \url{http://laws-lois.justice.gc.ca/eng/acts/C-46/page-3.html#docCont}
\textsuperscript{106} \url{http://www.theglobeandmail.com/opinion/dont-make-criminals-of-children-under-12/article731396/}
154. According to Section 4M of the Crimes Act 1914, a child under 10 years old cannot be liable for an offence against a law of the Commonwealth\(^{107}\).

155. Between the ages of 10 and 14 years, a further rebuttable presumption operates to deem a child between the ages of 10 and 14 incapable of committing a criminal act (i.e. \textit{doli incapax})\(^{108}\). Only if the prosecution can rebut this presumption, by showing that the accused child was able at the relevant time adequately to distinguish between right and wrong, can a contested trial result in conviction. From 14 to either 17 or 18 years (depending on jurisdiction), young offenders may be held fully accountable for their criminal acts but are subject to a different range of criminal sanctions than adults committing the same offences.

\(^{107}\) http://www.austlii.edu.au/au/legis/cth/consol_act/ca191482/s4m.html

156. According to the Child Justice Act\textsuperscript{109} a child is someone who is under the age of 18. The CJA\textsuperscript{110} is specifically intended for children between the ages 10 and 18. The CJA states that a child under the age of 10 years cannot be arrested. This means that a child under 10 years does not have criminal responsibility and cannot be charged or arrested for an offence. In such a case, the child will be referred to the Children’s Court. Moreover, a child older than 10 years is presumed to lack criminal capacity unless the state proves that he/she has criminal capacity. Such a child can be arrested. A child above 14, but under 18 years of age, is said to have criminal capacity and can be arrested.

157. The CJA admits the child’s background or upbringing to be taken into consideration\textsuperscript{111}. It guarantees that the individual needs and circumstances of certain children in conflict with the law are assessed when a decision is made about the child.

\textsuperscript{109} The Child Justice Act 2008 aims to establish a criminal justice system for children, who are in conflict with the law, in accordance with the values underpinning the South African Constitution and the country’s international obligations, by, among others, creating, as a central feature of a new criminal justice system for children, the possibility of diverting matters involving children who have committed offences away from the criminal justice system, in appropriate circumstances, while children whose matters are not diverted, are to be dealt with in the criminal justice system in child justice courts. The Act also expands and entrenches the principles of restorative justice in the criminal justice system for children who are in conflict with the law, while ensuring their responsibility and accountability for crimes committed.


\textsuperscript{111} S. 54 CJA
158. The Law Reform Commission has also proposed in the Interim Report on Reform of Criminal Code (May 2016) changes aimed at better protecting the rights of the child.

They are, _inter alia_, as follows:

- Deprivation of food or care to the point of endangering the health of a minor under sixteen years of age, inflicted by an ascendand or by any other person exercising parental authority or having authority over the minor, shall be punished by imprisonment for a term not exceeding seven years and a fine not exceeding 200,000 Rupees (new Section 260 (1));
- It is an offence to keep a child under six years of age on a public road or in a place used for the purposes of public transport with the aim of soliciting the generosity of passers-by (new Section 260 (1));
- Failure by the father or mother, without a legitimate reason, to comply with their legal obligations to the point of endangering the health, safety, morals or education of their minor child shall be punished by imprisonment for a term not exceeding two years and a fine not exceeding 150,000 Rupees (new Section 260 (3));
- It would also be an offence to fraudulently abusing the ignorance or situation of weakness of a minor in order to induce the minor to act or abstain from acting in any way seriously harmful to him (new Section 331(1));
- The sale of fireworks shall be prohibited to minors and those found guilty of such offence shall be liable to a fine not exceeding 3,000 Rupees and imprisonment for a term not exceeding 10 days (new Section 385);
- Any person who, having knowledge of maltreatment, deprivations, or sexual assaults inflicted upon a minor under sixteen years of age omits to report this to the administrative
or judicial authorities shall be punished imprisonment for a term not exceeding three years and a fine not exceeding 50,000 Rupees (new Section 161 (2));

- The manufacture, transport, distribution by whatever means and however supported, of a message bearing a pornographic or violent character or a character seriously violating human dignity, or the trafficking in such a message, shall be punished by imprisonment for a term not exceeding three years and a fine not exceeding 100,000 Rupees, where the message may be seen or perceived by a minor (new Section 260B);

- Where a sexual aggression would be committed abroad against a minor by a Mauritian national or a person habitually resident in Mauritius, Mauritian law would apply (new Section 249 (1));

- The commission without violence, constraint, threat or surprise of a sexual offence by an adult on the person of a minor under sixteen years of age shall be punished by penal servitude for a term not exceeding twenty years. It shall be punished by penal servitude for a term not exceeding thirty years when it was committed by a legitimate, natural or adoptive ascendant or by any other person having authority from law or of fact over the victim or when it was committed by a person abusing the authority conferred by his position (new Section 250 B (1) and (2));

- Sexual acts committed without violence, constraint, threat or surprise on a minor aged over sixteen and not emancipated by marriage shall be punished by penal servitude for a term not exceeding twenty years where they are committed by a legitimate, natural or adoptive ascendant or by any other person having authority from law or of fact over the victim or where they are committed by a person abusing the authority conferred by his functions (new Section 250 B (3));

- Taking, recording or transmitting a picture or representation of a minor with a view to circulating it, where that image or representation has a pornographic character, shall be punished by imprisonment for a term not exceeding five years and a fine not exceeding 75,000 Rupees. When the image or representation involves a minor under sixteen, the
acts would be punishable even if they were not committed in view of the dissemination of this image or representation (new Section 250 C)); and

- When the minor is a victim, it constitutes, in respect of certain offences, an aggravating circumstance: procuring prostitutes (new S. 253), sexual harassment (new S. 254), moral harassment (new Section 255), exploitation of begging (new S. 196), manslaughter (new S. 223(1)), torture and acts of barbarity (new Section 223 A), acts of violence (new S. 228), rape (new Section 250 (2)).

159. Some further changes can be envisaged, and the comparative analysis which has been made can be of some inspiration, such as:

- Making bullying at school an offence, as is provided by Section 89 of the UK Education and Inspections Act 2006;
- Making “hazing” (“bizutage”) a crime, as it is in France (Article 225-16-2 of the French Penal Code);
- Creating a new offence of causing or allowing the death of a child, as is the case under the UK Domestic Violence, Crime and Victims Act 2004;
- Making provision so that persons who commit sex offences against children abroad can face prosecution in Mauritius, even if that offence is not illegal in the foreign country in which it was committed, as it is the case with the UK Criminal Justice and Immigration Act 2008 and Section 144A of the New Zealand Crimes Act 1961;
- Making it a crime, as is provided by Section 219 of the Canadian Criminal Code, to fail to seek medical assistance for a child;
- Making it a crime for someone to cause the death of any child that has not become a human being in such a manner that he would have been guilty of murder if the child had become a human being [Presently, according to French doctrine and jurisprudence (Crim.
25 juin 2002\(^{112}\), there cannot be voluntary or involuntary homicide on a child not yet born. This is not the case in New Zealand (Section 182 (1) of the Crimes Act, regarding the “Killing unborn child”));

- Making sexual grooming an offence, as is the case in South Africa (S. 18 (1) Criminal Law (sexual offences and related matters) amendment Act);
- Making it an offence to compel or cause a child to witness a sexual offence (S. 21 (1) Criminal Law (sexual offences and related matters) amendment Act - South Africa);
- Affording greater protection to children with disabilities, as is required by Article 23 of the UN Convention on the Rights of the Child; and
- Making it an offence for a person who has care and control of a child to leave a child unattended and unsupervised either in a motor vehicle, as is the case in New South Wales (S 231 Children and Young Persons (Care and Protection) Act 1998).

\(^{112}\) https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007069402