

# Indecent Assault

s 323 Criminal Code

**Transitional Sentencing Provisions:** This table is divided into thirds based on the three relevant periods of Sentencing Provisions:

- Post-transitional provisions period
- Transitional provisions period
- Pre-transitional provisions period

These periods are separated by a row which shows when the transitional provisions were enacted, and another showing when they were repealed.

## Glossary:

imp	imprisonment
susp	suspended
PG	plead guilty
PNG	plead not guilty
agg	aggravated
burg	burglary
sex pen	sexual penetration without consent
AOBH	assault occasioning bodily harm
GBH	grievous bodily harm
dep lib	deprivation of liberty
att	attempted
ct	count
TES	total effective sentence
ISO	intensive supervision order
TIC	time in custody
VRO	violence restraining order

No.	Case	Antecedents	Summary/Facts	Sentence	Appeal
6.	<p><i>Pool v The State of Western Australia</i></p> <p>[2013] WASCA 274</p> <p>Delivered 02/12/2013</p>	<p>34-41 yrs at time offending. 42 yrs at time sentencing.</p> <p>Convicted after PG (following negotiations) - Cts 1, 3-4 discontinued.</p> <p>Criminal record; none of which had attracted a term of imp; offences include trespass &amp; unlawful use of optical surveillance device.</p> <p>Left school at 17 yrs; worked in various occupations.</p> <p>In early 30's commenced using cannabis &amp; methyl.</p> <p>Suffered significant depression at various times; including when offending.</p> <p>Married since 2005; two sons; youngest suffers from mild cerebral palsy &amp; frequent seizures.</p> <p>Psychiatric, Psychological &amp; PSR Reports indicate the offences were committed in the context of marked amphetamine abuse &amp;</p>	<p>Indecent deal child u13 yrs s320(4) <i>Criminal Code</i> x 1.</p> <p>Att indecent record child 13-16 yrs s552, 321(6), 321(8)(a) <i>Criminal Code</i> x 1.</p> <p>Indecent deal child 13-16 yrs s321(4), 321(8)(b) <i>Criminal Code</i> x 4.</p> <p>Agg burg in dwelling 401(2) <i>Criminal Code</i> x 2.</p> <p>Agg indecent record child 13-16 yrs s321(6), 321(8)(b) <i>Criminal Code</i> x 1.</p> <p>Indecent ass s323 <i>Criminal Code</i> x 3.</p> <p>Indecent record child s321(6), 321(8)(a) <i>Criminal Code</i> x 1.</p> <p>Dep lib s333 <i>Criminal Code</i> x 1.</p> <p>Agg sex pen s326 <i>Criminal Code</i> x 1.</p> <p>Sex pen s325 <i>Criminal Code</i> x 1.</p> <p>The offending occurred over a period of about 7 yrs and involved numerous acts of sexual violation against 5 victims.</p> <p><u>Ct 2:</u> The appellant and his wife were friends of the victim's mother and regularly babysat the victim. When the victim was 7 yrs old, she stayed at the appellant's home. Whist his wife was asleep in the same room the appellant rubbed the victim's breasts and vagina.</p> <p><u>Ct 3:</u> The victim was aged 13 yrs. She was a neighbour of the appellant. One evening the victim stayed at the appellant's home and went to have a shower. The appellant attempted to record the victim showering from outside. The victim undressed and started to</p>	<p>TES 11 yrs 9 mths imp.</p> <p>EFP.</p> <p>High risk of sexual re-offending.</p> <p>Expressed some regret but has attempted to justify &amp; minimise its severity.</p> <p>Each victim suffered significant &amp; ongoing psychological trauma.</p> <p>Sentencing judge described appellant's attitude as 'predatory'.</p> <p>High risk of future sexual offending.</p>	<p>Dismissed.</p> <p>McLure dissenting.</p> <p>At [71] ... The humiliation and degradation ... was made worse by the appellant's use of a mobile telephone to record visual images of his assaults upon them.</p> <p>At [72] I accept, however that the appellant's individual offences against CLT and TJC were at the lower end of the scale of seriousness in child sex cases and that his individual offences against MJR and MT were not in the worst category of home invasion cases involving sexual violence.</p> <p>At [77] The number of victims, the duration of the offending, the planning, premeditation and persistence, the escalation in the seriousness of the criminal conduct, the appellant's lack of insight and his high risk of</p>

		<p>considerable psychological instability.</p>	<p>shower before noticing the appellant's phone.</p> <p><u>Cts 6-10:</u>  The victim was aged 13 yrs and was the same victim as in Ct 3. The victim slept the night at the appellant's home. Whilst she slept the appellant touched her breast. The appellant then masturbated with his penis close to the victim's face, ejaculated and wiped the fluid on her lips. He then held his erect penis against her lips for a few seconds and again touched her breast. The appellant used a video camera to record his actions.</p> <p><u>Cts 11-13:</u>  The 17 yr old victim was at her boyfriend's house; asleep and fully clothed. The appellant entered the house through an unlocked carport/ kitchen door. The appellant cut the victims outer clothing as she slept with scissors; exposing various parts of her body. He then rubbed her exposed vagina. The victim awoke after hearing a loud bang and the appellant ran from the house. Some months after the incident the victim noticed some videos on her mobile. The videos had been taken by the appellant during the burglary and included a depiction of his hand rubbing the victim's vagina. The victim and appellant were unknown to each other.</p> <p><u>Ct 14:</u>  The victim was aged 14 yrs and unknown to the appellant. The appellant used a video camera to film the victim through her bedroom window. The victim noticed the appellant looking at her through the window. When the appellant was arrested about 14 months later; police found 3 cassettes hidden in</p>		<p>recidivism required the imposition of a very lengthy term of imprisonment.</p>
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			<p>the bodywork of his motor vehicle. The cassettes contained footage of the victim.</p> <p><u>Cts 15-19:</u> The victim was a 37 yr old woman. The victim and appellant were unknown to each other. The appellant entered the victim's house through an unsecured rear sliding door. After scrimmaging through the house he went to the victim's bedroom, placed his hand over her mouth, wrapped his hand around her throat, and tied her hands together and to the bed. He sexually assaulted and digitally penetrated her with his fingers and vibrator. At the same time he used his mobile to record and take photographs of the victim.</p>		
5.	<p><b><i>Hussani v Szolnoski</i></b></p> <p><b>[2013] WASC 64</b></p> <p>Delivered 05/03/2013</p>	<p>25 yrs at time of offence. 26 yrs at time of sentence.</p> <p>Convicted after trial.</p> <p>No criminal record in Australia and claimed by Appellant's counsel that he had no other prior criminal history but this could not be contested.</p> <p>Originally from Afghanistan. Lived as an adult in Pakistan before coming to Australia as a refugee. Detainee at an Immigration Centre.</p> <p>Unemployed through no</p>	<p>Indecent assault s 323 <i>Criminal Code</i>.</p> <p>The appellant was a detainee at an Immigration Centre. The victim was working at the Centre.</p> <p>The appellant, with his right hand, grabbed the victim's left breast, squeezing it twice.</p> <p>Claimed he accidentally brushed the victim's breast.</p> <p>Initially admitted the offence and dictated a letter of apology; Denied the offence when interviewed by Police.</p> <p>Treated as a person of previous good character.</p>	<p>Fined \$5000.</p>	<p>Allowed – Grounds (1) and (2) Refused – remaining grounds.</p> <p>Fine reduced to \$2000.</p> <p>No spent conviction order.</p> <p>At [19] As to the standards of sentencing observed in relation to indecent assault, no range is apparent in respect of sexual offences of this nature.</p>

		<p>fault of his own; had no income.</p> <p>Accepted as a refugee however a decision as to a permanent visa had yet to be made; At time of sentencing had been in detention for 13 months.</p>			
4.	<p><b><i>Victor v The State of Western Australia</i></b></p> <p><b>[2011] WASCA 94</b></p> <p>Delivered 13/04/2011</p>	<p>42 yrs at time of sentence.</p> <p>Convicted after PG. The timing of the plea was clearly affected by the need for the court to resolve the challenge to the admissibility of the confessional evidence.</p> <p>Was in a de facto relationship; had three young children.</p> <p>Employed at the time of the offence.</p> <p>Offence was out of character and despite his record of prior offending, he was of relatively good character.</p> <p>His prior offending was also alcohol related.</p>	<p>Indecent assault s 323 <i>Criminal Code</i>.</p> <p>The victim was 18 yrs at the time of the offence and was a slightly built aboriginal woman who weighed 49.5kg. The appellant was a solid built Aboriginal man and a distant relative of the victim. She referred to him as ‘uncle’ and known him since she was a little girl.</p> <p>The victim had been drinking and became very intoxicated. The appellant was also intoxicated at the time of the offence.</p> <p>The appellant took the victim into a bedroom and laid her on mattress on the floor. The appellant touched the victim’s body and breasts while she was naked.</p> <p>The sentencing judge listed what she described as the circumstances of aggravation; being the victim’s youth, her very small stature, the age disparity between the appellant and the victim and the breach of the relationship of trust within the extended family.</p>	<p>18 mths imp.</p> <p>Genuine remorse.</p>	<p>Allowed.</p> <p>New sentence 7 mths imp susp 3 mths, taking into account the 7 mths the appellant has already served in custody.</p> <p>At [16] The facts do not establish a relationship of such a nature as to give rise to a presumption of trust ... and at [18] and does not establish there was in fact a relationship of trust.</p> <p>At [19] Discusses the Dempsey factors and their relevance to sexual offences committed without consent.</p> <p>At [34] the categories of</p>

					presumptive relationships and positions of trust are not closed. Further, there will be cases which do not come within a category, but which are, in fact, relationships of trust.
3.	<p><b><i>Knott v Moriarty</i></b></p> <p><b>[2010] WASC 36</b></p> <p>Delivered 24/02/2010</p>	<p>23 yrs at time of offence.</p> <p>Convicted after PG.</p> <p>Prior criminal record – wilful exposure, indecent assault, indecent act in public, stalking and breach of VRO.</p> <p>Suffered from autism and mild intellectual disability.</p> <p>Sexually assaulted in custody which had been a traumatic experience and from which he had not fully recovered.</p> <p>Enrolled in the Intellectual Disability Diversion Program (IDDP) of the Perth Magistrates Court.</p> <p>Appellant’s criminal history - at [46] ‘.... it</p>	<p>1 x Breach of susp sentence (Breach of VRO). 1 x Breach of susp sentence (Breach of VRO). 1 x Indecent Assault s323 <i>Criminal Code</i>.</p> <p>The victim was a 17 year old female. The victim and appellant had no prior acquaintance.</p> <p>The appellant followed the victim from her work location in a city arcade to an upstairs storeroom via a shopping centre elevator. As the elevator doors had been about to close, the appellant had run towards the doors, thrusting his hands through the gap, stopping them from closing.</p> <p>The appellant had engaged the victim in conversation, saying ‘You are too glamorous to work in this area’ and ‘Do you have a boyfriend?’ The appellant’s manner had caused the victim to be concerned for her safety. By this stage the elevator had stopped at the second floor. The appellant then stated he was going to walk away for a while. Turning to his right he walked away.</p> <p>Shortly afterward, the appellant had followed the victim through to the staff only area. He walked up behind her and ran his hands up her bare left arm,</p>	<p>6 mths 1 day imp. 6 mths 1 day imp. Conc with each other and indecent assault. 18 mths imp.</p> <p>TES 18 mths imp.</p>	<p>Allowed.</p> <p>7 mths imp (cum) on Breach of VRO.</p> <p>TES 13 mths &amp; 1 day imp.</p> <p>At [50] I consider that it has thus been shown his Honour failed to adequately take into account as a relevant consideration in the sentencing the appellant’s mental impairment.</p>

		<p><i>showed a dangerous propensity' and a need for 'condign punishment to deter the offender'.</i></p> <p>Expressions of Remorse.</p> <p>On a suspended term of imprisonment at 6 mths and 1 day when he committed this offence for the two Breach of VRO offences.</p>	<p>moving it across to her left shoulder and stroking her lower back and buttocks up and down. The victim then walked into the storeroom and locked the door. She was shaking with fear.</p> <p>The victim attempted to gain entry by rattling the door handle several times, calling out to the victim, 'Can you show me something? I need you to show me something.' The appellant then left the area.</p>		
2.	<p><b>SA v McKinnon</b></p> <p><b>[2009] WASC 7</b></p> <p>Delivered 19/01/2009</p>	<p>25 yrs at time of offence.</p> <p>Convicted after PG.</p> <p>Two previous convictions, for traffic matters only.</p> <p>Mild intellectual disability. At time of sentencing was enrolled in the Intellectual Disability Diversion Program (IDDP) of the Magistrates Court.</p>	<p>Indecent assault s 323 <i>Criminal Code</i>.</p> <p>The appellant touched the victim, a young woman, over her clothing from behind when she was bending over to look at some clothing on a rack in a shop.</p> <p>He had apologised to the victim immediately when he was confronted and he had co-operated with the police, making admissions in relation to the offence.</p>	<p>12 mths CBO. Programme and supervision requirements.</p> <p>Spent conviction order not made.</p>	<p>Allowed.</p> <p>Spent conviction order made.</p> <p>Appeal only in respect of failure to grant spent conviction order.</p>
1.	<p><b>Narkle v Hamilton</b></p> <p><b>[2008] WASCA 31</b></p> <p>Delivered 15/02/2008</p> <p>On Appeal from</p>	<p>50 yrs.</p> <p>Convicted after PG.</p> <p>Extensive history of sexual offending that encompasses a number of very serious sexual offences.</p>	<p>Indecent assault s 323 <i>Criminal Code</i></p> <p>The appellant and the victim had known each other for six months. At about 9pm the victim went to a delicatessen. The appellant approached her outside the front of the delicatessen and asked her if she wanted to have sex with him. She declined.</p> <p>The victim went into the delicatessen and the appellant followed her. He continually tried to put</p>	<p>6 mths 2 wks imp.</p> <p>No remorse.</p> <p>Magistrate said that the appellant was a sexual predator who made sexual offending a 'way of life' and that society was entitled to some</p>	<p>Allowed.</p> <p>Re-sentenced to 6 mths 2 wks imp susp 4 mths.</p> <p>Discussion concerning s 87 Sentencing Act.</p> <p>At [40] The court always has a discretion, when</p>

	<p><b>Narkle v Hamilton</b></p> <p><b>[2007] WASC 236</b></p>		<p>his arm around her shoulders and waist. Each time, she moved away from him. The appellant repeatedly asked the victim to return to his house. She declined. The appellant then squeezed her firmly on the buttocks. She moved away from him. He then ran his right hand down the front of her left hip and touched her to the side of her groin area. The victim pushed his hand away and told him not to touch her again.</p>	<p>form of protection from him.</p> <p>Appellant served 443 days in custody for other sexual offences before he was acquitted and 5 months imposed by Magistrate for sentence. On appeal to McKechnie J sentence of 8 months imposed by Magistrate was reduced to 6 months 2 weeks imprisonment to take into account PG.</p>	<p>considering time spent in custody, whether it will make an allowance for that time and if so, how much of an allowance it will make. Even in a case in which the time was spent in custody in respect of the offence in question and for no other reason, the court does not have to give credit for the whole of the time spent in custody.</p> <p>AT [41] Of course, it would be a mistake to assume that time wrongly spent in prison will inevitably be taken into account in sentencing for a later offence.</p>
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