



Justice

Discussion Paper

Child Sexual Offences Review



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1. Introduction and purpose of this paper

- 1.1 The NSW Government is committed to the prevention of child sexual assault and appropriate punishments for those who commit these types of offences.
- 1.2 Consequently, the Department of Justice is conducting a review of NSW legislation relating to child sexual abuse offences. This Child Sexual Offences Review (Review) is being undertaken in response to recommendations 1-3 of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders.
- 1.3 This paper identifies and discusses some of the potential problems or concerns with child sexual abuse laws. It presents arguments for and against change and provides possible options for reform.
- 1.4 The Department welcomes submissions from stakeholders and the community concerning issues raised in this paper.
- 1.5 Victims of child sexual abuse can access information, services and support through the Victims Access Line on 1800 633 063.¹

Recommendations of the Joint Select Committee

- 1.6 The Joint Select Committee on Sentencing of Child Sexual Assault Offenders ('the Committee') was appointed by Parliament in August 2013 to report on whether current sentencing options for perpetrators of child sexual assault offences remain effective and whether greater consistency in sentencing and improved public confidence in the judicial system could be achieved through alternative sentencing options.
- 1.7 The Committee published its report, 'Every Sentence Tells a Story – Report on Sentencing of Child Sexual Assault Offenders' on 14 October 2014 and made 29 recommendations relating to child sexual assault offences and sentencing. The Government Response to the Committee's report tabled on 13 May 2015 confirmed that the Government fully endorses the underlying objective of the Committee's recommendations.
- 1.8 Many recommendations of the Committee have already been adopted. For example, in 2015 the Government passed the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* which established the Child Sexual Offence Evidence Pilot ('the Pilot'). The Pilot aims to reduce traumatisation of child sexual assault victims and the stress of giving evidence and has two major components. Firstly, eligible child victims are able to have their evidence pre-recorded in advance of trial and in the absence of a jury. Secondly, children can be supported by a witness intermediary to assist them communicate with the parties and the court when giving evidence. Further, in August 2015, the Government appointed two new District Court judges, who will specialise in hearing child sexual assault cases across NSW.
- 1.9 Relevant to this review, the Committee made the following three recommendations that have not yet been implemented:
 - (1) The Committee recommends that the NSW Government reviews all offences and other provisions in NSW which are particularly relevant to child sexual assault offences and offenders with a view to:

1. Information and contact details for other victim support services and sexual assault services can be found here: <http://www.victimsservices.justice.nsw.gov.au/sexualassault>.

- Consolidating and simplifying the current framework, where possible, so that it is more user-friendly for the legal community and victims.
 - Identifying areas where current offences could be consolidated or revised.
 - Identifying whether any new offences should be created, to fill any gaps in the existing framework.
- (2) The Committee recommends that, as part of the review, the NSW Government consults with relevant stakeholders including but not limited to: the NSW Police Force; the Department of Police and Justice; NSW Courts; the Department of Family and Community Services; the Director of Public Prosecutions; and NSW Health.
- (3) The Committee recommends that the review be carried out and finalised as a matter of high priority, taking into account similar legislative provisions relating to child sexual assault in other States and Territories within Australia and in overseas jurisdictions.²

Scope of the review

- 1.10 The Department of Justice is reviewing child sexual assault offences in the *Crimes Act 1900* and will report to the Attorney General. The aim of the Review is to implement the Joint Select Committee's recommendations by identifying appropriate changes which would consolidate the current legislative framework, revise current offences and create any new offences.
- 1.11 The Department of Justice will consult with stakeholders during the Review, and will also consider:
- Similar legislation in other States and Territories and overseas.
 - Recommendations of the NSW Sentencing Council in Volume 1 of its Report on *Penalties Relating to Sexual Assault Offences in NSW* (2008).
 - NSW Sentencing Council report *Sentencing for Child Sexual Assault* (2015).
 - Findings of and research conducted by the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission).
 - Any other relevant research and reports.
- 1.12 The timetable for the Review has been designed to allow the Review to consider the Royal Commission's recommendations, where relevant, and seek NSW stakeholders' views on these issues, before finalising the Review's recommendations.

2. Joint Select Committee on Sentencing of Child Sexual Assault Offenders, *Every Sentence Tells a Story – Report on Sentencing of Child Sexual Assault Offenders*, Report 1/55, October 2014.

How to make a submission

- 1.13 If you wish to comment on matters contained in this paper, you can make a written submission.

Please email or post your submission to:

Child Sexual Offences Review – Submissions
Justice Strategy and Policy
Department of Justice
GPO Box 31
Sydney NSW 2001

Email: policy@justice.nsw.gov.au (with the subject 'Child Sexual Offences Review')

- 1.14 Alternatively you can make a submission through the NSW Government 'Have Your Say' online portal at <https://www.nsw.gov.au/improving-nsw/have-your-say/>
- 1.15 Submissions need to be received by close of business on **28 July 2017**.
- 1.16 Please note that all submissions and comments will be treated as public, and may be published, unless the author indicates that it is to be treated as confidential.

Questions

The following questions are raised in relation to child sexual abuse offences in this paper:

- Q1. Should the legislative framework for child sexual abuse offences be consolidated and simplified? If yes, what is the best option for reform?
- Q2. Should the number of age categories be reduced? If yes, what age categories should be used?
- Q3. Should any new offences be created?
- Q4. Should any offences be repealed?
- Q5. Should the separate offences of *aggravated sexual assault of child under 16 years* (section 61J(2)(d)) and *sexual intercourse with child between 10 and 16 years* (section 66C) remain? If yes, can their description be improved?
- Q6. Should the offence of *sexual intercourse with child under 10 years* (section 66A) be increased to include children under 12 years?
- Q7. Should the description of the offences of *indecent assault* and *act of indecency* committed against children under 16 years be improved? If yes, what option(s) is preferable?
- Q8. Should the term 'indecent' and the common law definition remain?
- Q9. Should aggravating factors be removed as elements of child sexual assault offences? If yes, what is the best option for reform?
- Q10. Should a provision be introduced to permit the prosecution to rely on the offence with the lesser maximum penalty where the alleged date range includes more than one offence?
- Q11. Should an offender be sentenced by applying current sentencing principles but in accordance with the historic maximum penalty?
- Q12. Should the repeal of the limitation period for certain child sexual assault offences committed against females aged 14 and 15 years, previously contained in section 78, be made retrospective?
- Q13. Should the NSW offence of *persistent child sexual abuse* be modelled on the Queensland offence of maintain an unlawful sexual relationship with a child?
- Q14. Should the offence of *persistent child sexual abuse* be retrospective?
- Q15. Should an offender being sentenced for an offence of *persistent child sexual abuse* receive a higher penalty than isolated offences to reflect the ongoing nature of the abuse?
- Q16. Should a course of conduct charge, as introduced in Victoria, be enacted?
- Q17. Should a course of conduct charge be available for historic offences?

- Q18. Should the law be amended to reflect the broader variety of conduct that is involved in grooming? If yes, should the amendments be modelled on the law in Queensland or Victoria?
- Q19. Should an offence of grooming parents and carers with intent to obtain access to their children be introduced?
- Q20. Should other specific relationships be included in the definition of 'special care'?
- Q21. Should 'special care' offences apply to all forms of sexual offences including indecent conduct?
- Q22. How can appropriate reporting of child sexual abuse be encouraged?
- Q23. Should there be a specific offence for concealing a child sexual abuse offence?
- Q24. Should protection be afforded to those that make such disclosures?
- Q25. Should an offence be introduced of failing to protect a child from sexual abuse?
- Q26. Should a specific offence be introduced to prosecute organisations who fail to protect children from institutional child sexual abuse?
- Q27. Should a defence of honest and reasonable mistake as to age be enacted? If yes, should it apply only where the complainant is 14 or 15 years of age and should the onus be on the accused?
- Q28. Should a statutory defence of similar age be enacted in NSW? If yes, how should it be framed?
- Q29. Should NSW introduce a defence to decriminalise consensual 'sexting' involving persons under 16 years? If yes, how should the defence work?
- Q30. Should the recommendation of the NSW Sentencing Council be adopted to increase the maximum penalty to 12 years and reduce the standard non-parole period to 6 years for the offence of *indecent assault of child under 16 years*?

2. Simplifying the legislative framework in NSW

In brief

Child sexual abuse offences in NSW are criticised as being unnecessarily complex and difficult to understand. They are interspersed with adult offences and contain four age categories. The Joint Select Committee has recommended a review of all child sexual assault offences, with a particular emphasis on improving the usability of the provisions, consolidating or revising provisions and identifying the need for any new offences.

- 2.1 There is a multitude of legislation in NSW dealing with sexual abuse and protection of children. Child sexual abuse offences are primarily contained in the *Crimes Act 1900*. The key child sexual assault offences are listed in the table in Appendix A. Child sexual assault offences can be distinguished from adult sexual assault offences as they contain age categories and do not require the prosecution to establish an absence of consent.
- 2.2 The general age of consent in NSW is 16 years of age and children below the age of 16 years are presumed to be unable to consent to sexual activity. Sections 77 and 78C(2) of the *Crimes Act 1900* provide that consent is not a defence to most child sexual abuse offences.
- 2.3 Consent of the child is a defence only for an offence under section 61J of *aggravated sexual assault*. Section 61J is a sexual assault offence of general application, meaning that it applies to both adult and children. This offence includes as one of the factors of aggravation that the victim was under 16 years. It is the only sexual assault offence where the Crown must establish a lack of consent by the juvenile complainant beyond a reasonable doubt. The concept of consent as it relates to sexual assault has been codified in section 61HA of the *Crimes Act 1900*.

Age categories

- 2.4 Child sexual assault offences refer to the age of the victim as an element of the offence. There are four age categories that are commonly referred to in the legislation:
 - child under 10 years.
 - child 10 or over but under 14 years (i.e. 10-13).
 - child 14 or over but under 16 years (i.e. 14-15).
 - child 16 or over but under 18 years (i.e. 16-17).

Four age categories are used inconsistently

- 2.5 The legislation uses these age categories differently. Not all offences refer to the same age categories and they are often merged. For example, the offence of *indecent assault* refers only to one age category (under 16 years), while *child prostitution* offences refer to two age categories (under 14 and 14-17 years). The offences relating to sexual intercourse with a child refer to three age categories, although they are not contained in the same section.
- 2.6 Where there are age categories for an offence, there are also differences in penalties. As the age of the child decreases, the maximum penalty increases. This is based on the policy

that the younger and more vulnerable the victim, the more serious the offence, and the wider the sentencing scope required.

- 2.7 Reducing the number of age categories and applying them uniformly to all child sexual abuse offences may improve consistency, simplify offences and enhance the community's understanding of the offences. However, collapsing the age categories would limit the use of existing sentencing case law.

Age categories in other jurisdictions are defined differently

- 2.8 In Victoria, there are two main age categories in the legislation, namely, child under 12 years and child 12 years or over but under 16 years. There is also a special category for under care or authority offences of children aged 16 or 17 years.
- 2.9 Queensland legislation contains three age categories, namely, under 12, 13-15 and 16-17 years. The age categories are not consistently applied to each offence. Similarly, legislation in South Australia, Western Australia, Northern Territory and Australian Capital Territory contains three main age categories.³
- 2.10 Legislation in Tasmania only has one age category, namely under 17 years.

Definition of 'child' varies

- 2.11 The reference to 'child' is defined in various NSW offences differently. For example, in sections 66EB (*grooming for unlawful sexual activity*), 80A (*sexual assault by forced self-manipulation*) and 91FA (*child abuse material*) 'child' is defined as a person under the age of 16 years, however, in sections 66EA (*persistent child sexual abuse*) and 80C (*sexual servitude*) 'child' is defined as a person under the age of 18 years.
- 2.12 The *Children and Young Persons (Care and Protection) Act 1998* defines a 'child' as a person under 16 years and a 'young person' as a person aged 16 years or older and under 18 years.⁴ However, it is common practice in the criminal justice system to refer to a defendant who is less than 18 years as a 'young person'. Referring to victims aged 16 and 17 years as 'young persons' in the *Crimes Act 1900* may cause confusion.

Structure of child sexual assault legislation

- 2.13 This part examines the structure of child sexual assault offences contained in the *Crimes Act 1900*. This includes the location of child specific sections compared to offences that refer to both adults and children. It also examines the inconsistencies in the definition of child and the location of provisions relating to attempts and alternative verdicts.

Child and adult sexual offences are mixed together

- 2.14 Child sexual assault offences are not contained in a separate division and are generally merged, to varying degrees, with adult sexual offences.

3. South Australia: under 14, 14-16 and 17 years. Western Australia: under 13, 13-15, 16-17 years. Northern Territory and Australian Capital Territory: under 10, 10-15 and 16-17 years.

4. *Children and Young Persons (Care and Protection) Act 1998* (NSW) section 3.

- 2.15 When it comes to child sexual assault provisions, there are three different structures within the legislation:
- Some sections deal exclusively with sexual offences committed against children. For example, section 66C is concerned solely with sexual intercourse with child aged between 10 and 16 years. Section 66A is concerned solely with sexual intercourse with a child under 10 years of age.
 - Other sections refer to both adult and child victims depending on the subsection. For example, the offence of *act of indecency* contained in section 61N(1) relates to victims under the age of 16 years while section 61N(2) relates to adult victims.
 - The third form is where the child's age is a circumstance of aggravation that attracts a higher maximum penalty. For example, section 61J (*aggravated sexual assault*) includes a circumstance of aggravation where the victim is under 16 years.
- 2.16 This approach can make it difficult for victims and members of the legal profession and the community to navigate through the provisions. The DPP submitted to the Joint Select Committee that the legislative framework for sexual offences and their penalties is complicated and premised on concepts that are out of step with contemporary life.⁵
- 2.17 The NSW Sentencing Council recommended that child sexual abuse offences be separated as follows: Division 10 – Sexual assault adult; Division 10A – Sexual assault child; Division 10B – Sexual servitude.⁶

Attempts and alternative verdicts are dealt with inconsistently

- 2.18 The legislation provides specific provisions for an attempt to commit some child sexual abuse offences. These are usually contained in a subsection or in a separate section entirely. The maximum penalties that apply to attempts compared to completed offences are not always the same. For example, under section 73 a person who has, or attempts to have, sexual intercourse with a child aged 16 or 17 years who is under special care is liable to the same maximum penalty. In contrast, section 66B provides a specific offence of *attempt to have sexual intercourse with a child under 10 years* which carries a maximum penalty of 25 years imprisonment, while the offence of *sexual intercourse with a child under 10 years* is contained in section 66A and carries a maximum penalty of life imprisonment.
- 2.19 It should be noted that section 344A of the *Crimes Act 1900* provides that an offence of attempt to commit an offence contained in the Act attracts the same maximum penalty as a completed offence, unless an alternative maximum penalty is prescribed.
- 2.20 The legislation also contains provisions for alternative verdicts. These are contained in both subsections and separate sections.

Structure in other jurisdictions

Victorian offences

- 2.21 Victoria introduced major legislative reform to the adult and child sexual assault provisions contained in the *Crimes Act 1958* (Vic). The changes came into effect on 1 July 2015 and involved a significant restructuring of the provisions.

5. Joint Select Committee on Sentencing of Child Sexual Assault Offenders, *Every Sentence Tells a Story – Report on Sentencing of Child Sexual Assault Offenders*, Report 1/55, October 2014.

6. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Volume 1, August 2008.

- 2.22 The general structure of the sexual assault provisions is clear and codified with the definitions, objectives and guiding principle contained at the beginning. Sexual penetration and touching are defined. Each section is clearly drafted in language that can be understood not only by the legal profession but also by complainants and the community. There is consistency of expression between the sections. Each element to be proved is distinctly identified.
- 2.23 There are separate subdivisions that relate to specific categories of offences, including rape and sexual assault, incest and sexual offences against children. Where a particular offence has defences or alternative verdicts available or the approval of the Director of Public Prosecutions is required, this is all contained within the same section as the offence. This avoids the need to read through all of the sexual assault provisions to determine if other relevant matters apply to a particular offence.

Other jurisdictions' offence structures vary

- 2.24 The legislation in Western Australia, and recently in Queensland prior to amendments, uses some archaic terminology, such as 'sodomise', 'carnal knowledge' and 'common prostitute or of known immoral character'. It is likely that such expressions do not represent the current views and practices of the community. Many sections are lengthy and combine multiple offences, making it difficult to understand the elements of each offence.
- 2.25 In the United Kingdom sexual assault offences are contained in a separate act.⁷ The legislation is clearly drafted to allow members of the legal profession and the community to easily navigate through the various provisions. Sections set out the elements of each offence in plain English and avoid any ambiguity.

Options for reform

- 2.26 The Joint Select Committee has recommended that the Review identify the areas where current offences can be consolidated or revised.⁸
- 2.27 Consolidation of offences may permit broader offences that capture a greater variety of conduct. It may eliminate offences that are infrequently charged or those that are outdated or no longer reflect community expectations. A reduction in the number of age categories may also streamline some offences.
- 2.28 On the other hand, an extensive range of offences allows for a charge to better reflect the criminality of the conduct. His Honour Judge Graeme Henson, Chief Magistrate, Local Court of NSW, submitted to the Joint Select Committee that separate offences can assist in charge negotiation which can see more matters move from being defended to a plea of guilty.⁹
- 2.29 The following options can be considered concerning the structure of the child sexual assault offences in NSW:
1. To leave the child sexual abuse provisions in the current form as members of the legal profession and judiciary are familiar with them.

7. *Sexual Offences Act 2013* (UK).

8. Joint Select Committee on Sentencing of Child Sexual Assault Offenders, *Every Sentence Tells a Story – Report on Sentencing of Child Sexual Assault Offenders*, Report 1/55, October 2014.

9. Joint Select Committee on Sentencing of Child Sexual Assault Offenders, *Every Sentence Tells a Story – Report on Sentencing of Child Sexual Assault Offenders*, Report 1/55, October 2014.

2. To move the current child sexual abuse offences into a separate part. This would require the sections that relate to both adult and child sexual offences to be redrafted and separated.
3. To simplify and consolidate all child sexual abuse offences, including reducing the number of age categories, similar to the reform in Victoria.

Questions

Q1. Should the legislative framework for child sexual abuse offences be consolidated and simplified? If yes, what is the best option for reform?

Q2. Should the number of age categories be reduced? If yes, what age categories should be used?

Q3. Should any new offences be created?

Q4. Should any offences be repealed?

3. Clarifying offences of sexual assault and sexual intercourse with a child

In brief

A charge of *aggravated sexual assault* (section 61J) can apply to both adult and child victims. Where the offence relates to a child below the age of consent, namely below 16 years, the offence nevertheless requires this child to give evidence about a lack of consent. An alternative charge of *sexual intercourse with child between 10 and 16 years* (section 66C) is available and does not require the prosecution to establish the absence of consent. However, where the age of the victim is 14 or 15 years, it carries a significantly lower maximum penalty.

- 3.1 Sexual intercourse with a child under 16 years may be in contravention of a number of provisions. Where the complainant is 14 or 15 years of age, the prosecution often has to decide between pursuing a higher maximum penalty and avoiding the trauma of a young child having to give evidence about a lack of consent.

Details of applicable adult and child offences

Aggravated sexual assault of child under 16 years: section 61J(2)(d)

- 3.2 Section 61J (*aggravated sexual assault*) prohibits sexual intercourse with any person without their consent in circumstances of aggravation. The circumstances of aggravation include where the victim is under 16 years.¹⁰ Lack of consent of a child under 16 years is an element of this offence. The maximum penalty for this offence is 20 years imprisonment.
- 3.3 This offence requires the prosecution to prove beyond reasonable doubt the absence of consent and knowledge of that absence of consent by the accused. In *McGrath v R*¹¹ it was held that the provision:
- specifically makes the absence of consent and knowledge of that absence of consent elements of the offence. As a result, those matters must, irrespective of the victim's age, be proved beyond reasonable doubt for a person to be convicted of an offence against [section] 61J.¹²
- 3.4 This means that where an accused is prosecuted under section 61J, a child complainant will be questioned and cross-examined as to whether they consented to the sexual intercourse.

Sexual intercourse with child above 10 years and under 16 years: section 66C

- 3.5 Section 66C is a child specific offence of *sexual intercourse with child between 10 and 16 years*. The section has different age categories and provides for an aggravated version of the offence. Where a child is aged 10-13 years the maximum penalty is 16 years and where the child is aged 14-15 years the maximum penalty is 10 years imprisonment. Where the

10. *Crimes Act 1900* (NSW) section 61J(2)(d).

11. [2010] NSWCCA 48.

12. *McGrath v R* [2010] NSWCCA 48 at [11].

offence is committed in circumstances of aggravation, the maximum penalty is 20 years and 12 years, respectively (see Table 3.1 below).

- 3.6 Consent is not a defence to this offence.¹³ Furthermore, the mere lack of opposition is irrelevant and should not be treated as a mitigating factor.¹⁴
- 3.7 Conversely, a lack of consent cannot be taken into account in determining the appropriate sentence. This is because a court must disregard a matter if taking it into account leads to punishing an offender for a more serious offence than the one before the court.¹⁵ This is the *De Simoni* principle.
- 3.8 Where an accused is charged with *aggravated sexual assault of child under 16 years* (section 61J), it is not uncommon for a plea of guilty to be accepted to a charge of *sexual intercourse with child under 16 years* (section 66C). While it precludes the sentencing court from taking into account a lack of consent by the victim, such a plea also avoids the need for the victim to give evidence. The availability of a range of charges can assist in successfully resolving child sexual abuse matters without proceedings to trial.

Table 3.1: Provisions of section 66C(1) – (4)

Section	Provision	Maximum Penalty
66C(1)	Sexual intercourse with child aged 10-13	16 years
66C(2)	Sexual intercourse with child aged 10-13 in circumstances of aggravation	20 years
66C(3)	Sexual intercourse with child aged 14-15	10 years
66C(4)	Sexual intercourse with child aged 14-15 in circumstances of aggravation	12 years

Sexual intercourse with child under 10 years: section 66A

- 3.9 Section 66A makes it an offence to have sexual intercourse with a child less than 10 years of age. The offence carries a maximum penalty of life imprisonment. Consent is not a defence to this offence so it is not necessary for the prosecution to prove an absence of consent.¹⁶
- 3.10 In sentencing an offender, the court cannot take into account that the victim co-operated with the offender and did not struggle as a mitigating factor.¹⁷ Evidence of a victim's resistance or efforts by the offender to restrain the victim is relevant to the assessment of objective seriousness of the offence and would be an aggravating factor.¹⁸ In contrast to section 66C, a lack of consent by the victim does not increase the maximum penalty for the offence and can be taken into account on sentence without breaching the *De Simoni* principle.

Difficulties with the current offences

- 3.11 Where the victim was aged 14 or 15 years at the time of the offence, there is a drastic difference in the maximum penalty between an offence under section 66C compared to section 61J. This may reflect the differences in criminality between sexual intercourse with

13. *Crimes Act 1900* (NSW) section 77.

14. *R v Nelson* [2016] NSWCCA 130.

15. *The Queen v De Simoni* (1981) 147 CLR 383.

16. *Crimes Act 1900* (NSW) section 77.

17. *R v Woods* [2009] NSWCCA 55.

18. *R v Woods* [2009] NSWCCA 55.

a child under 16 years with their agreement, albeit still unlawful, and sexual intercourse which is without the consent of the child.

- 3.12 In pursuit of a higher maximum penalty (20 years), the prosecution may choose the *aggravated sexual assault* offence under section 61J(2)(d) and thus require a complainant to give evidence, and be cross-examined, about a lack of consent. This is despite the statutory provision that the consent of a child under 16 years is not a defence to all other child sexual assault offences.¹⁹ Questions about consent can be distressing to a young complainant and add another complex element that the prosecution must prove beyond reasonable doubt. This is inconsistent with the intention of Parliament to avoid inflicting trauma on vulnerable complainants and to make it easier for children to give evidence.²⁰

Options for reform

Sentencing Council proposal to change section 66C

- 3.13 In response to a number of submissions in relation to this issue, the NSW Sentencing Council suggested that section 66C be amended to provide as follows:
- (i) Any person who has sexual intercourse, attempts to have sexual intercourse or incites a third person to have sexual intercourse with another person who is of or above the age of 10 years but under the age of 16 years is liable to imprisonment for 14 years.
 - (ii) Any person who has sexual intercourse, attempts to have sexual intercourse or incites a third person to have sexual intercourse with another person under the age of 16 years in circumstances of aggravation is liable to imprisonment for 25 years.
 - (iii) In this section circumstances of aggravation mean circumstances in which:
 - a) sexual intercourse by the alleged offender was secured by force or by putting the alleged victim in fear;
 - b) at the time of immediately before or after the commissions of the offence the alleged offender intentionally or recklessly inflicted actual bodily harm;
 - c) the alleged offender was in the company of another person or persons;
 - d) the alleged offender was in position of authority of the alleged victim;
 - e) the alleged victim has a serious intellectual disability;
 - f) the alleged offender took advantage of the alleged victim being under the influence of alcohol or a drug in order to commit the offence; and
 - g) the presence of the alleged victim being secured by kidnapping.²¹
- 3.14 The aim of this proposal was to include consensual and non-consensual sexual intercourse without the need for different age categories as the age of the victim and the disparity between the age of the victim and offender is to be taken into consideration on sentence.²² Opposition by the victim is also a matter to be taken into account on sentence.²³

19. Crimes Act 1900 (NSW) sections 77, 78C(2).

20. Upton G, NSW Attorney General, Second Reading Speech, NSW Legislative Council, *Criminal Procedure Amendment (Child Sexual Offences Evidence Pilot) Bill 2015*, 22 October 2015.

21. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Volume 1, August 2008.

22. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Volume 1, August 2008.

23. *R v Nelson* [2016] NSWCCA 130.

- 3.15 One of the potential difficulties with implementing the above proposal is that it contains circumstances of aggravation different to those contained in section 61J(2) (*aggravated sexual assault*) and section 61M(3) (*aggravated indecent assault*). This may create confusion and further inconsistencies in aggravating factors. This is contrary to the recommendations of the Joint Select Committee to simplify the current offences.

Other options to amend the current offences

- 3.16 The changes to the current age categories, as discussed in Chapter 2, may alleviate some of the current difficulties if this involved amending the offence of *sexual intercourse with child under 10 years* (section 66A) to also apply to children aged 10 and 11 years. This would avoid the need for children under 12 years of age being required to give evidence about consent, as the prosecution would not need to charge the section 61J offence in order to make available the higher maximum penalty.
- 3.17 One further option is to increase the available maximum penalties for the offence of *sexual intercourse with child between 10 and 16 years* (section 66C). Consequently the offence of *aggravated sexual assault* (section 61J(2)(d)) could be amended to remove the age of the victim as a circumstance of aggravation. The prosecution would then rely on the child specific offence, where a lack of consent is not an element of the offence. This would avoid young victims giving evidence and being cross-examined about consent.
- 3.18 Overall, the four available options that can be considered in relation to these provisions are:
1. Maintain the offences in their current form in order to reflect the differences in criminality.
 2. Remove the circumstance of aggravation of victim under 16 years from the *aggravated sexual assault* offence (section 61J(2)(d)) and increase the maximum penalties for *sexual intercourse with child between 10 and 16 years* offences (section 66C).
 3. Amend the offences of *sexual intercourse with child between 10 and 16 years* (section 66C), for example, as suggested by the NSW Sentencing Council.
 4. Amend the offence of *sexual intercourse with child under 10 years* (section 66A) to apply to children under 12 years.

Question

Q5. Should the separate offences of *aggravated sexual assault* of child under 16 years (section 61J(2)(d)) and *sexual intercourse with child between 10 and 16 years* (section 66C) remain? If yes, can their description be improved?

Q6. Should the offence of *sexual intercourse with child under 10 years* (section 66A) be increased to include children under 12 years?

4. Clarifying offences of indecent assault and act of indecency

In brief

The legislation currently draws a distinction between non-penetrative sexual offences that involve unlawful touching and those that do not involve any contact. These are described as 'indecent assault' and 'acts of indecency'. These categories apply to offences committed against adult and child victims. This distinction can lead to complex legal arguments.

Distinction between indecent assault and acts of indecency

- 4.1 Sexual conduct with a child under the age of 16 years that does not involve penetration may involve the commission of offences of *indecent assault* or *act of indecency*. The former offence requires unlawful touching by the offender of the victim whereas this element is not required for the latter offence. Both offences require that the conduct be 'indecent'.

Indecent assault of child under 16 years

- 4.2 Offences involving physical sexual contact between the offender and a child without penetration are commonly referred to as an 'indecent assault'.
- 4.3 Section 61M(2) of the *Crimes Act 1900* refers to the commission of an assault upon a child under 16 years where at the time or immediately before or after the assault, an act of indecency is committed in the presence of the child. The prosecution can rely upon the same act to establish both the assault and the act of indecency. The maximum penalty is 10 years imprisonment and there are no circumstances of aggravation. There is only one age category (under 16 years) and hence there are no distinctions in the provision or maximum penalty depending on the age of the child.

Act of indecency with child under 16 years

- 4.4 Offences involving indecent acts without unlawful physical contact with a child are generally termed 'acts of indecency'. These offences are contained in sections 61N and 61O and relate to both adult and child victims. The maximum penalty ranges from imprisonment for 2 years to 10 years, depending on the age of the child and any aggravating factors.

Table 4.1: Indecent assaults and acts of indecency

Section	Provision	Maximum Penalty
61L	Indecent assault	5 years
61M(1)	Aggravated indecent assault (in company, under authority, physical disability, cognitive impairment)	7 years
61M(2)	Aggravated indecent assault toward victim under 16 years	10 years
61N(1)	Act of indecency with or toward victim under 16 years	2 years
61N(2)	Act of indecency with or towards victim over 16 years	18 months

61O(1)	Aggravated act of indecency with or towards victim under 16 years (in company, under authority, physical disability, cognitive impairment)	5 years
61O(1A)	Aggravated act of indecency with or towards victim under 16 years	3 years
61O(2)	Aggravated act of indecency with or towards victim under 10 years	7 years
61O(2A)	Aggravated act of indecency with or towards victim under 16 years and being filmed for production of child abuse material	10 years

The difficulty in distinguishing between indecent assault and act of indecency

- 4.5 It is sometimes not easy to work out the difference between an offence of *indecent assault* and *act of indecency* when the touching is encouraged. Consider this example: An 18 year old male convinces his 10 year old sister to come to his room, where he undresses and exposes his penis. He then asks the young child if she would touch his penis. The girl complies.
- 4.6 What offence has been committed? An *act of indecency* is committed by exposing the penis. However, the touching of the penis is less obvious. As there was no penetration, a charge of *aggravated sexual assault* is not available. While there was physical contact between the accused and the child, it is arguable that there was no unlawful touching by the accused of the child as required for the charge of *indecent assault*. It was the child that touched the accused, albeit upon his request, and the correct charge may be *incite an act of indecency*, which carries a significantly lesser penalty of 2 years imprisonment.
- 4.7 It can be a complex exercise to determine the appropriate charge which appropriately reflects the criminality of the offence. The above example involves serious criminal conduct which may not be sufficiently reflected in a charge of *incite act of indecency*.

The term 'indecent' is not defined

- 4.8 The term 'indecent' is not defined in the legislation. The common law defines 'indecent' as contrary to the ordinary standards of respectable people in the community and it must have a sexual connotation or overtone. It is a matter for the fact finder to determine the standards prevailing in the community.
- 4.9 The Model Criminal Code Officers Committee of the (then) Standing Committee of Attorneys-General recommended that 'indecent' be defined in similar terms, namely, that it is to be determined by the trier of fact according to the standards of ordinary people.²⁴
- 4.10 The NSW Sentencing Council recommended that 'act of indecency' be defined as follows:
- An act of indecency means an act that:
- (a) is of a sexual nature; and
 - (b) involved the human body, or bodily actions or functions; and
 - (c) is so unbecoming or offensive that it amounts to a gross breach of ordinary contemporary standards of decency and propriety in the Australian Community.²⁵

24. Model Criminal Code Officers Committee of the Standing Committee of Attorney-Generals, *Model Criminal Code – Chapter 5: Sexual Offences Against the Person Report*, May 1999.

25. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Volume 1, August 2008.

- 4.11 This definition was previously contained in section 50AB of the *Crimes Act 1914* (Cth) and was repealed in April 2010 when the *child sex offences outside Australia* were strengthened.²⁶ The term ‘indecent’ is not currently used in the *Crimes Act 1914* (Cth).
- 4.12 In contrast, the term ‘indecent’ has been removed from the adult version of the Victorian offence on the grounds that it is an anachronistic description. The term ‘sexual touching’ is now used instead.²⁷ The introduction of a new modern term may more accurately reflect the current standards, however, it would also require fresh interpretation and development of common law. A narrow definition may stop the law from adapting with changing community standards.

Legislation in other jurisdictions varies

- 4.13 In Victoria and Australian Capital Territory, it is an offence to commit an indecent act with, or in the presence of, a child.²⁸ These provisions do not distinguish between touching and non-touching offences.
- 4.14 Legislation in Northern Territory refers to having sexual intercourse or committing an act of gross indecency upon a child.²⁹ Queensland and Western Australia refer to “indecently deal” with a child.³⁰ Tasmanian legislation refers to an indecent act with, or directed at, a child.³¹ In South Australia it is an offence to indecently assault a child under 14 years.³² The legislation also provides that it is an offence to commit an act of gross indecency with, or in the presence of, a child under 16 years.³³
- 4.15 New Zealand legislation refers to having a “sexual connection” and doing an indecent act with a child.³⁴
- 4.16 In Canada it is an offence to touch any part of the body of a child for a sexual purpose.³⁵ ‘Sexual purpose’ is not defined and it appears that indecently touching a child for the purposes of intimidation or control would not be prohibited by this section. It is also an offence to expose genital organs to a child.³⁶
- 4.17 The legislation in the United Kingdom refers to sexual touching of a child.³⁷ It is also an offence to engage in a sexual activity in the presence of a child for the purposes of sexual gratification.³⁸

26. *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth).

27. Criminal Law Review, Victoria’s New Sexual Offence Laws: An Introduction, June 2015, Part 5.2.

28. *Crimes Act 1958* (Vic) section 47; *Crimes Act 1900* (ACT) sections 61, 61A.

29. *Criminal Code Act 1983* (NT) sections 127, 128.

30. *Criminal Code Act 1899* (Qld) section 210(1)(a); *Criminal Code Act Compilation Act 1913* (WA) section 320(4).

31. *Criminal Code Act 1924* (Tas) sections 124(3), 125B.

32. *Criminal Law Consolidated Act 1935* (SA) section 56.

33. *Criminal Law Consolidated Act 1935* (SA) section 58.

34. *Crimes Act 1961* (NZ) sections 132, 134.

35. *Criminal Code 1985* (Canada) sections 151, 153.

36. *Criminal Code 1985* (Canada) section 173.

37. *Sexual Offences Act 2003* (UK) sections 7, 9.

38. *Sexual Offences Act 2003* (UK) section 11.

Options for reform

- 4.18 The following options for reform (or combination of options) are possible for the offences of indecent assault and acts of indecency involving children under 16 years:
1. Merge the offences of *indecent assault* and *act of indecency*.
 2. Amend the offence of *indecent assault* to include any sexual touching between the victim and the offender.
 3. Replace the term 'indecent' with a more modern term such as 'sexually deal' and/or introduce a statutory definition.

Question

Q7. Should the description of the offences of *indecent assault* and *act of indecency* committed against children under 16 years be improved? If yes, what option(s) is preferable?

Q8. Should the term 'indecent' and the common law definition remain?

5. Simplifying aggravating factors

In brief

In NSW some child sexual assault offences provide aggravating factors. Sometimes it is the age of the child that aggravates an offence. Aggravating factors do not apply to all child sexual abuse offences and where they do apply, the aggravating factors vary between offences. This can be confusing and may result in additional cross-examination of a child. It can also create appealable error.

Inconsistencies in aggravating factors

- 5.1 A number of child sexual abuse offences provide a list of aggravating factors. Where these apply, the applicable maximum penalty is increased as the offence is deemed to be objectively more serious than the non-aggravated offence. The table below summarises the aggravating factors that apply to some child sexual abuse offences.

Table 5.1: Aggravating factors in child sexual abuse offences

Section	Provision	Aggravating factors
61O	Aggravated act of indecency	<ul style="list-style-type: none"> • In company • Under authority • Victim has a serious physical disability • Victim has a cognitive impairment
66C	Sexual intercourse with child between 10 and 16 years	<ul style="list-style-type: none"> • Inflict actual bodily harm • Threaten to inflict actual bodily harm • In company • Under authority • Victim has a serious physical disability • Victim has a cognitive impairment • Took advantage of the victim being under the influence of alcohol or drug • Deprived victim of their liberty • Offender breaks and enters into building with intent to commit an offence

- 5.2 The legislation also provides for adult sexual assault offences that are aggravated if the victim is a child. Similarly, these offences attract a higher maximum penalty to reflect the increase in objective seriousness. The table below summarises the sexual assault offences where at least one of the circumstances of aggravation is that the victim is a child or young person.

Table 5.2: Sexual assault offences where victim is a child is a circumstance of aggravation

Section	Provision	Aggravating factor
61J(2)(d)	Aggravated sexual assault	Victim under 16 years
61M(2)	Aggravated indecent assault	Victim under 16 years
61N(1)	Act of indecency	Victim under 16 years
80A(1)(d)	Sexual assault by forced self-manipulation	Victim under 16 years
80C(a)	Sexual servitude	Victim under 18 years
91J(4)(a)	Voyeurism	Victim under 16 years
91K(4)(a)	Filming a person engaged in private act	Victim under 16 years
91L(4)(a)	Filming a person's private parts	Victim under 16 years

- 5.3 On 29 June 2015, aggravating factors were removed from section 66A of the *Crimes Act 1900* of sexual intercourse with child under 10 years to implement recommendation 5 of the report of the Joint Select Committee on Sentencing of Child Sexual Assault Offenders. The maximum penalty of the redrafted offence is now the same as the aggravated form of the repealed provision to give the court a wider sentencing scope. This does not preclude a sentencing judge from taking into account former aggravating factors as features that increase the objective seriousness of an offence.
- 5.4 In Victoria the age of the child and being under care or authority are the only circumstances that aggravate a sexual offence. These factors increase the maximum penalty that is available. Section 60A of the *Crimes Act 1958* (Vic) provides that where a sexual offence against a child or adult is committed while the offender is carrying an offensive weapon, the offender is liable to a further 2 years imprisonment. The sentence must be cumulative on any other sentence and cannot be suspended.
- 5.5 The removal of aggravating factors would require the maximum penalty for the non-aggravated version of the offence to be increased to the same penalty as the aggravated offence. This may have a negative impact on pleas of guilty and limit the scope for charge negotiations.

Options for reform

- 5.6 The following options are possible in relation to aggravating factors in child sexual assault offences:
1. Leave the current aggravating factors where they apply to child sexual abuse offences.
 2. Prescribe the same aggravating factors to apply to all aggravated child sexual abuse offences. This can either be contained within each section or in a separate provision.
 3. Remove aggravating factors from child sexual abuse offences and increase the maximum penalty of the non-aggravated offence to the same penalty as the aggravated form of the offence. Aggravating factors would then either:
 - a. be generally considered at sentence as part of the court's determination of the seriousness of each offence; or

- b. be contained in a separate section, which must be considered by the court, where applicable, in determining the appropriate sentence.
4. Remove aggravating factors from child sexual abuse offences into a separate section and where they apply it would increase the available maximum penalty, similar to the provision in Victoria.

Question

Q9. Should aggravating factors be removed as elements of child sexual assault offences? If yes, what is the best option for reform?

6. Addressing difficulties arising from historic child sexual offending

In brief

The prosecution of historic child sexual abuse offences frequently raises complex legal and evidentiary issues. There is often a delay in disclosure, lack of physical or forensic evidence and diminished memory. Determining the appropriate charges can be challenging for the prosecution, particularly where the date of the offence cannot be specified. If convicted, sentencing an offender in accordance with historic sentencing principles is often a difficult task for the court.

- 6.1 It is common for survivors of child sexual abuse not to disclose the offences until decades later and delay is more common in this area of law than in any other. Complainants may not feel comfortable reporting the matter to police until they are more mature or may be fearful of the accused. Survivors may be embarrassed or think that they will not be believed. It is not unusual for there to be a period of 15 or 20 years between the commission of the offence and any court proceedings. Longer delays are more prevalent where the abuse occurs in an institutional setting.³⁹
- 6.2 Disclosure to police does not necessarily equate to the commencement of legal proceedings. In 2014, only 19% of reported child sexual assault incidents resulted in the commencement of legal proceedings, with a greater likelihood of charges being laid where there had been delay in reporting.⁴⁰

Prosecuting and defending historic child sexual assault offences

Need for particulars creates difficulties for the prosecution

- 6.3 Delays in reporting of child sexual abuse matters can create a number of challenges for the prosecution. Complainants of historic child sexual abuse frequently have difficulties recalling the particulars of individual offences perpetrated upon them. This is for a number of reasons. Often the victims are young and the passage of time hinders their recall of mundane details. These difficulties do not mean that the allegations of child sexual abuse are untrue. While a complainant may remember exactly what the accused did to them, they may not recall the layout of the room or what pyjamas they were wearing at the time. Defence counsel commonly ask such questions when cross-examining complainants of child sexual abuse with the aim of testing their credibility and reliability.
- 6.4 A complainant who was the subject of one or two offences may be able to recount each event with the required specificity. However, a victim that was subject to a long period of offending may only be able to describe the offences in a general manner, without being able to identify unique incidents and specify a timeframe.⁴¹ The current law requires a

39. Freiberg A, Donnelly H & Gelb K, *Sentencing for Child Sexual Abuse in Institutional Context*, Report for the Royal Commission into Institutional Response to Child Sexual Abuse, July 2015.

40. Cashmore J, Taylor A, Shackel R & Parkinson P, *The Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases*, Report for the Royal Commission into Institutional Response to Child Sexual Abuse, August 2016.

41. Shead K, *Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions*, Current Issues in Criminal Justice, Volume 26, Number 1, July 2014.

charge to have sufficient particularity. Consequently, where the now adult complainants cannot recall a distinct sexual act, the prosecution cannot establish an offence. The only exception to this is a charge of *persistent child sexual abuse* under section 66EA of the *Crimes Act 1900*. This offence is not without its difficulties and is discussed in the following chapter.

- 6.5 The requirement for specificity also requires the prosecution to establish all of the elements of each offence beyond a reasonable doubt. Complainants are frequently asked if they can recall if penetration occurred. This is a difficult question for a complainant to answer about painful and traumatising abuse that occurred many years before.⁴² Penetration can be a difficult concept for a child to grasp. Yet the answer to this question will determine if a charge involving penetration will be preferred or if the allegation is one of indecent assault, with a significant difference in maximum penalties.

Delay also creates issues for the defence

- 6.6 Delay in reporting can also hamper an accused's ability to defend the charge against them. For example, the accused may not be able to present alibi evidence because relevant records are no longer available or the accused and potential alibi witnesses cannot recall where they were at a particular time.
- 6.7 Where there has been long delay the accused can make an application for a permanent stay. This will only be granted where the circumstances are exceptional and generally delay by itself is not sufficient.⁴³

Date of offence can be difficult to pinpoint

- 6.8 Even when a survivor of historic child sexual abuse can recall a particular offence, they must be able to say with some accuracy when the offence occurred. It is common for the prosecution to phrase the indictment in terms of a date range, rather than refer to a particular date. For example, the complainant may recall that the offence occurred when she was in a particular grade at school and hence the indictment will refer to the offence occurring between the start and finish of the school year. Such a range can create a number of issues. Firstly, it may result in the offence falling across two offences depending on when during that date range it was committed. For example, if the allegation is of sexual penetration and the complainant turned 10 years during the period of time particularised in the indictment, the offence is either have *sexual intercourse with child under 10 years* (section 66A) or the offence of *sexual intercourse with child 10 years or older and under 14 years* (section 66C(1)).
- 6.9 When looking at historic offences, the date range can coincide with a change of legislation and the same elements may constitute different offences. For example, fellatio was previously considered to be an indecent act but since legislative change in 1991 it is now considered to be sexual intercourse. There are no legislative provisions as to how the prosecution should proceed in these matters.
- 6.10 Case law provides some guidance on this issue, however, it has not been satisfactorily resolved. In *NW v R*⁴⁴ it was held that a conviction cannot stand where there was significant statutory change, including to the definition and elements, of a charge during the period covered by the indictment. However there is no unfairness where the change in legislation during the time particularised in the indictment and the essential elements of both offences

42. Shead K, *Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions*, Current Issues in Criminal Justice, Volume 26, Number 1, July 2014.

43. *Walton v Gardiner* (1993) 177 CLR 378; *Jargo v District Court of New South Wales* (1989) 168 CLR 23; *Glennon* (1992) 172 CLR 592; *Dupas* (2010) 241 CLR 237; *TS* [2014] NSWCCA 174.

44. [2014] NSWCCA 217.

are the same.⁴⁵ In *Gilson v The Queen*⁴⁶ the offender was charged with one count of *shoplifting and larceny* and one count of *receiving* where the prosecution evidence relied on the doctrine of recent possession. It was held that:

If the jury conclude beyond a reasonable doubt that the accused committed one or other of the offences changed... The trial judge, rather than directing the jury to return a verdict of guilty of the offence which they consider to have been more probable, should direct them that, if they are satisfied beyond a reasonable doubt that the accused either stole the property or received it knowing it to have been stolen, but they are unable to say which, then they should return a verdict of guilty to the less serious offence.

The trial judge should also direct the jury which of the offences they should regard as the less serious.⁴⁷

- 6.11 It is common that during a trial the dates of the alleged offence will be refined or significantly changed.⁴⁸ A complainant may recall more details about the time of the offence or it may become apparent that they were mistaken about the time. For example, the complainant may have thought the offence occurred when she was in grade 8 and had just become friends with Sally, however, school records later establish that Sally did not attend the school until grade 9 and thus the offence must have occurred outside of the date range contained in the indictment. The prosecution can make an application to amend the indictment, however, this requires either leave of the court or consent of the defence. Where there is no consent and the application is refused, the accused must be acquitted.

Options for reform

- 6.12 A legislative provision could be introduced to allow the prosecution to rely on the offence with the lowest maximum penalty where there is uncertainty about the age of the victim at the time of the offence and the date range falls into more than one offence. This would be consistent with the decision of *Gilson v The Queen*⁴⁹ as discussed above.

Question

Q10. Should a provision be introduced to permit the prosecution to rely on the offence with the lesser maximum penalty where the alleged date range includes more than one offence?

Sentencing historic child sexual assault offenders

- 6.13 The purposes of sentencing are punishment, deterrence, community protection, rehabilitation, denunciation and acknowledgement of harm.⁵⁰ Balancing these objectives, while maintaining an instinctive synthesis approach to sentencing, is a complex task. It is made all the more difficult in historic child sexual assault matters. The court must sentence the offender in accordance with the sentencing trends and principles that existed at the time

45. *MJ v R* [2013] NSWCCA 250.

46. [1991] HCA 24.

47. *Gilson v The Queen* [1991] HCA 24.

48. Sheard K, *Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions*, Current Issues in Criminal Justice, Volume 26, Number 1, July 2014.

49. [1991] HCA 24.

50. *Crimes (Sentencing Procedure) Act 1999* (NSW) section 3A.

of the offence.⁵¹ This is based on the principle that an offender should not be exposed to a harsher penalty than which existed at the time of the offence. However, where the change in law has been to the benefit of the offender, such as the introduction of a discount for a plea of guilty, the offender is entitled to the benefit of that change.⁵²

- 6.14 The legislation provides that where there has been an increase in the maximum penalty for an offence, that increase only applies to offences committed after the amendment, however, where there has been a reduction in the maximum penalty after the commission of an offence the offender is entitled to the benefit of that change.⁵³

Historic sentencing principles may not reflect current standards

- 6.15 Where there is lengthy delay between the offence and conviction for a historical child sexual abuse matter, it is a daunting task for the court to apply historic sentencing trends principles and tariffs with few written judgements and little statistical analysis from earlier periods. The general approach appears to be to accord the offender a discount on the basis that a couple of decades ago sentences for child sexual abuse offences were generally more lenient. Very lenient sentences are generally imposed when a court follows sentencing practices that existed at the time of the offence.⁵⁴
- 6.16 The current approach has been the subject of criticism for being unjust as it fails to reflect community standards. For example, His Honour Judge Berman SC of the District Court stated:

Authority which binds me says that the offender is to be sentenced by me for an offence committed in 1987 according to the tariff which existed at the time he would have faced sentence for such misconduct. Cleverer people than me have commented on the inappropriateness of that rule of sentencing. It is undeniable that the last thirty years has seen an increase in awareness on the part of the Courts of the harm that sexual offences, particularly against children, can cause. ...

The Courts have only belatedly understood the seriousness of conduct such as that for which the offender must now be sentenced. Thus to sentence the offender according to standards which existed in the late 1980s is to perpetuate the errors that were made by sentencing Courts at that time. Offenders such as Ms Gaven benefit from earlier mistakes made by sentencing Courts even when we now know that these earlier decisions were wrong.⁵⁵

- 6.17 Similar views were expressed in *R v Pemble*⁵⁶.
- 6.18 In *MPB*⁵⁷ it was highlighted that sentencing patterns can be difficult to obtain, published cases may not represent the sentencing practices of that time, any statistics should be approached cautiously and judicial memory may be unreliable.

United Kingdom approach uses current sentencing principles

- 6.19 In England and Wales, according to a Sentencing Guideline issued by the Sentencing Council, an offender must be sentenced for a sexual offence according to the sentencing

51. *MJR* (2002) 54 NSWLR 368; *Moon* (2000) 117 A Crim R 497.

52. *MJR* (2002) 54 NSWLR 368.

53. *Crimes (Sentencing Procedure) Act 1999* (NSW) section 19.

54. Freiberg A, Donnelly H & Gelb K, *Sentencing for Child Sexual Abuse in Institutional Context*, Report for the Royal Commission into Institutional Response to Child Sexual Abuse, July 2015.

55. *Gaven* [2014] NSWDC 189 at 11-12.

56. [2015] NSWDC 168.

57. [2013] NSWCCA 213.

regime applicable at the date of the sentence, not the offence.⁵⁸ However, the maximum penalty that is applicable is the lower of the current penalty or the maximum applicable at the time of the offence.⁵⁹ The seriousness of the offences, determined by the offender's culpability and the harm caused or intended, is the main consideration for the court.⁶⁰ The Guideline expressly states that the court should not attempt to establish the likely sentence the offender would have received had they been convicted soon after the offence.⁶¹ It further provides that the court must consider the passage of time carefully as it has the potential to mitigate or aggravate the offence, for example, where the offender has continued to offend against the victim or others.⁶²

Considerations for NSW

- 6.20 In July 2015 Mr David Shoebridge MLC, Greens member of NSW Parliament, gave notice to introduce the *Crimes (Sentencing Procedure) Amendment (Child Sexual Offences) Bill 2015*. The purpose was to provide that, in determining the appropriate sentence and non-parole period for a child sexual offence, the court is to have regard to the sentencing practices applicable at the time of sentencing rather than at the time of the commission of the offence.⁶³ The Bill has not yet been considered by Parliament.
- 6.21 This issue is also being considered by the Royal Commission. It noted that in contemplating whether to adopt the approach of England and Wales, it is necessary to consider whether it would reduce guilty pleas.⁶⁴ If accused persons fear that they may be subject to greater penalties, they may be more reluctant to enter pleas of guilty, which may increase the length of the court process and the trauma to victims.

Question

Q11. Should an offender be sentenced by applying current sentencing principles but in accordance with the historic maximum penalty?

Limitation period for prosecution of some offences

- 6.22 Section 78 of the *Crimes Act 1900* (repealed) provided for a limitation period of 12 months for the prosecution of certain sexual assault offences if they are alleged to have been committed against a female child aged 14 or 15 years. This limitation period applied to selected child sexual offences, which changed over time. Originally it related to offences of *carnal knowledge* (section 71), *attempted carnal knowledge* (section 72) and *indecent assault with a girl* (section 76). These offences existed at a time when sexual offending against male children was dealt with under now repealed homosexual offences. On 14 July

58. Sentencing Council of England and Wales, *Sexual Offences – Definitive Guideline*, 12 December 2013, Annex B, Clause 1.

59. Sentencing Council of England and Wales, *Sexual Offences – Definitive Guideline*, 12 December 2013, Annex B, Clause 2.

60. Sentencing Council of England and Wales, *Sexual Offences – Definitive Guideline*, 12 December 2013, Annex B, Clause 4.

61. Sentencing Council of England and Wales, *Sexual Offences – Definitive Guideline*, 12 December 2013, Annex B, Clause 4.

62. Sentencing Council of England and Wales, *Sexual Offences – Definitive Guideline*, 12 December 2013, Annex B, Clause 7.

63. Parliament of NSW, Bills, <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=2930>.

64. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

1981 the provision was amended and the offence of *act of indecency* was added (section 61E). On 23 March 1986 the section was further amended with the addition of offences of *sexual intercourse with child* (section 66C(1)) and *attempt to have sexual intercourse with child* (section 66D).

Repeal of the limitation period was not retrospective

- 6.23 The section was eventually repealed effective from 3 May 1992. The repeal was not retrospective. This means that certain serious child sexual assault offences that occurred prior to 3 May 1992, where the victim was a girl aged 14 or 15 years at the time of the offence, are now statute barred. Historical offences against male children under the homosexual offences are not statute barred.

Statute of limitations has been removed in civil actions

- 6.24 The statute of limitations for civil actions for damages that relates to death or personal injury resulting from child abuse was abolished in NSW by the *Limitation Amendment (Child Abuse) Act 2016*. The Act commenced on 17 March 2016. Child abuse is broadly defined to include abuse perpetrated against a person under the age of 18 that is sexual abuse or serious physical abuse. The removal of the limitation period for commencing civil proceedings is retrospective and so an action can be commenced even where the previous limitation period has expired. This legislation gives effect to the recommendation made by the Royal Commission⁶⁵ and aims to remove one of the barriers to justice for survivors of child abuse.⁶⁶
- 6.25 Similar legislation has been passed in Victoria to remove the limitation period for civil action by survivors of child abuse.⁶⁷ The amendments are also retrospective.

Option to retrospectively repeal the limitation period

- 6.26 The Royal Commission has expressed the view that any limitation period should be removed with retrospective effect.⁶⁸ However, the Commission is of the view that it should not revive any offences that are no longer criminalised, such as consensual homosexual sexual acts.⁶⁹
- 6.27 In South Australia, Victoria and Australian Capital Territory the repeals of limitation periods were retrospective.⁷⁰
- 6.28 A retrospective repeal of the limitation period may create uncertainty in the mind of perpetrators who may be exposed to prosecutions for offences that were previously statute barred. However, where such offenders have preyed on vulnerable victims, who lack the understanding of the wrongdoing done to them or fear reporting the matter, it does not accord with principles of justice that they should now be able to rely on delay in disclosure to avoid prosecution.

65. Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, 14 September 2015.

66. Second Reading Speech, Legislative Assembly, *Limitation Amendment (Child Abuse) Bill 2016*, 16 February 2016.

67. *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic).

68. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

69. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

70. *Criminal Law Consolidated Act 1935* (SA) section 72A; *Criminal Procedure Act 2009* (Vic) section 7A; *Crimes Act 1900* (ACT) section 441.

- 6.29 The repeal of the limitation period for criminal proceedings in certain child sexual assault matters contained in section 78 would recognise that survivors of sexual abuse often take many years to gain the strength to report the matter to police. Section 78 represents the out-dated notion that complainants of sexual abuse should not be believed unless their complaint was made immediately or shortly after the abuse.
- 6.30 A retrospective repeal of section 78 would permit cases that occurred prior to 1992 to be prosecuted although, as with all cases of historic child sexual abuse, there may be difficulties in achieving many successful prosecutions due to the passage of time.
- 6.31 Apart from the limited application of section 78, there are no other limitation periods that apply to child sexual assault prosecutions as there is no time limitation on the prosecution of indictable offences. This is consistent with the common law principle of *nullum tempus occurrit regi* (time does not run against the King). The retrospective removal of the limitation period contained in the now repealed section 78 would bring it into line with the current approach in NSW that justice for serious offences can be done regardless of the amount of time that has passed.

Question

Q12. Should the repeal of the limitation period for certain child sexual assault offences committed against females aged 14 and 15 years, previously contained in section 78, be made retrospective?

7. Improving the offence of persistent child sexual abuse

In brief

Diminished recall of particulars by victims of child sexual abuse is common and understandable particularly where the abuse stretched over an extended period of time. This problem led to the introduction of the offence of *persistent child sexual abuse* (section 66EA) in 1999. However, this provision is rarely used by the prosecution. Complainants continue to be required to provide particulars in relation to each isolated offence, without which an accused cannot be prosecuted.

- 7.1 Survivors of child sexual abuse, particularly those subjected to ongoing abuse, may have difficulties recalling particular dates and details of individual incidents. This can be for numerous reasons, including that the offences happened a long time ago and it is now difficult to remember, the abuse was persistent and it is hard to distinguish between the various occasions, and the victim was very young when the abuse happened.⁷¹
- 7.2 This can often be fatal to a successful prosecution, where the prosecution is required to particularise each offence and the complainant must be able to identify and give evidence about each particular incident. The most extensive cases of child sexual abuse can often be the most challenging to prosecute. In an attempt to overcome these difficulties and in line with the recommendations of the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, the offence of *persistent child sexual abuse* was introduced effective from 15 January 1999.⁷²

Current form of the offence in NSW

- 7.3 The offence of *persistent child sexual abuse* is contained in section 66EA of the *Crimes Act 1900*. It requires the prosecution to establish that a person, on three or more separate occasions occurring on separate days during any period, engaged in conduct in relation to a particular child that constitutes a sexual offence. The maximum penalty is imprisonment for 25 years. The section provides a list of offences that are sexual offences and defines child as a person under the age of 18 years.⁷³ It does not need to be the same sexual offence on each occasion.⁷⁴ It further provides that it is not necessary to specify or prove the dates or exact circumstances of the alleged occasions on which the conduct constituting the offence occurred.⁷⁵ The section requires that the period during which the offences occurred be specified with reasonable particularity and the nature of the separate alleged offences must be described.⁷⁶ Where there are more than three occasions of sexual abuse towards a child, the jury must be satisfied about the same three occasions.⁷⁷

71. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Roundtables*, 9-11 February 2016.

72. *Crimes Legislation Amendment (Child Sexual Offences) Bill 1998* (NSW), Explanatory Notes.

73. *Crimes Act 1900* (NSW) section 66EA(12).

74. *Crimes Act 1900* (NSW) section 66EA(2).

75. *Crimes Act 1900* (NSW) section 66EA(4).

76. *Crimes Act 1900* (NSW) section 66EA(5).

77. *Crimes Act 1900* (NSW) section 66EA(6)(c).

- 7.4 If at least one of the occasions occurred in NSW, it is immaterial that the conduct of any of the other occasions occurred outside of NSW.⁷⁸ Where child sexual abuse offences are committed in NSW and in other jurisdictions, the accused can be prosecuted for all of those offences together and a vulnerable complainant is spared from giving evidence on multiple occasions.
- 7.5 It is immaterial that the conduct on any of those occasions occurred outside NSW, so long as the conduct on at least one of those occasions occurred in NSW.
- 7.6 The offence of *persistent child sexual abuse* is rarely used in NSW. In the 10 year period between April 2006 and March 2016, the offence was charged on a total of 42 occasions.⁷⁹

Problems with the current offence

- 7.7 The limited use of this section may be due to a number of reasons. The charge is complex and thus it may offer little advantage to the prosecution while complicating the case. If the jury cannot agree on the same three sexual offences, the Crown must rely on alternative verdicts, which will still require specific events to be identified with sufficient particularity. Where there are more than three sexual offences alleged, it is not clear how a sentencing judge is to determine which three occasions were settled upon by the jury.
- 7.8 Despite the original legislative intention of Parliament, case law has pared back the effectiveness of the provision. The prosecution is still required to establish at least three occasions and the circumstances of each act with some degree of specificity. In *KRM v The Queen*⁸⁰, the High Court held that the provision “relieves the complainant of the need, or the prosecution of the requirement, to prove the ‘dates or the exact circumstances of the alleged occasions’”. But ‘occasions’ there must still be.⁸¹
- 7.9 Proceedings for *persistent child sexual abuse* can only be instituted with the sanction of the Director of Public Prosecutions.⁸² Such a requirement may be unnecessarily burdensome and hence prohibitive to the proper application of the offence.⁸³

Using the offence does not result in a higher sentence

- 7.10 Even where such a charge is successful, it does not result in a higher penalty being imposed. In *R v Fitzgerald*⁸⁴ it was held that there is nothing in section 66EA:
to suggest that Parliament intended that the sentence for a course of conduct which has crystallised into a section 66EA conviction, should be more harsh in outcome than sentencing for the same course of conduct had it crystallised into convictions for a number of representative offences.⁸⁵
- 7.11 It has been argued that this overlooks the aggravating factor that the offender engaged in a persistent pattern of abuse of a child and this should merit additional sanction.⁸⁶

78. *Crimes Act 1900* (NSW) section 66EA(3).

79. Source: NSW Bureau of Crime Statistics and Research, reference: sr16-14318.

80. [2001] HCA 11.

81. [2001] HCA 11 at [92].

82. *Crimes Act 1900* (NSW) section 66EA(11).

83. NSW Law Reform Commission, *Family Violence – A National Legal Response*, NSWLRC Report 123, Volume 1, October 2010.

84. [2004] NSWCCA 5.

85. *R v Fitzgerald* [2004] NSWCCA 5.

86. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Volume 1, August 2008.

- 7.12 The section is not retrospective and only applies to offences committed after its commencement in 1999.⁸⁷ It does not assist many of the alleged offences that are now being prosecuted that pre-date this provision.⁸⁸

The offence may make it difficult to ensure a fair trial

- 7.13 *Persistent child sexual abuse* offences have received criticism from the judiciary as they create:

an offence which may offend the sensibilities of an experienced criminal lawyer. Lack of particularity in a presentment and in proof can result in unfairness, for it largely deprives the defence of the ability to test the complainant's evidence against a context of surrounding circumstances.⁸⁹

- 7.14 In *KBT v R*,⁹⁰ Justice Kirby stated that the Queensland offence ongoing sexual abuse:

provides that the prosecution must prove that the offender has done an act constituting an offence of a sexual nature on three or more occasions. This statutory prerequisite must be given full effect. This is because it amounts to a parliamentary recognition of the risks involved in the offence. Those risks include the exposure of a person to conviction upon generalised evidence which it may be difficult or impossible to disprove, which need not be confirmed by testimony other than that of the complainant and which may result in a trial involving little more than accusation and denial. These risks provide reasons, quite apart from the general rule of construction ordinarily applied to a criminal statute, for adopting an approach to the preconditions laid down by parliament which is rigorous and defensive of the fair trial of the accused.⁹¹

- 7.15 The concern is that to ensure a fair trial, an accused person should be entitled to the highest degree of particularity, without which the accused maybe at a forensic disadvantage.⁹²

Options for reform

- 7.16 All Australian jurisdictions have offences relating to ongoing sexual abuse of a child, however, the maximum penalties for this offence vary markedly from 7 years (for example, where the individual acts are indecent assaults) to life imprisonment (for example, where one of the offences carries a penalty of more than 20 years imprisonment). In all jurisdictions the approval of the Director of Public Prosecutions, the Attorney-General or equivalent is required before a prosecution can be commenced. The provisions apply retrospectively only in South Australian and Tasmania.⁹³
- 7.17 The offence is commonly used in Queensland and Tasmania and to a lesser extent in South Australia.⁹⁴ Tasmanian legislation requires the prosecution to establish that the defendant maintained a sexual relationship with a young person who is under the age of 17 years involving the commission of unlawful sexual acts on at least three occasions.⁹⁵ The

87. *Crimes Act 1900* (NSW) section 66EA(6)(d).

88. Shead K, *Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions*, Current Issues in Criminal Justice, Volume 26, Number 1, July 2014.

89. *The Queen v KRM* [1999] VSCA 91 at [18].

90. [1997] HCA 54; (1997) 149 ALR 693.

91. *KBT v R* [1997] HCA 54; (1997) 149 ALR 693 at [704].

92. *KRM* [2001] HCA 11.

93. *Criminal Law Consolidated Act 1935* (SA) section 50(6); *Criminal Code Act 1924* (Tas) section 125A(1).

94. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

95. *Criminal Code Act 1924* (Tas) section 125A.

offence has been used to prosecute ‘consensual’ child sexual assault offences.⁹⁶ The charge is rarely prosecuted in the other jurisdictions, which contain similar provisions to those in NSW.⁹⁷

Adopting the Victorian approach

- 7.18 Victoria provides for an offence of persistent sexual abuse of a child under 16 years which carries a maximum penalty of 25 years imprisonment.⁹⁸ To establish the offence the prosecution needs to prove that over a particular period, when the victim was under 16 years, an act constituting a sexual offence took place on at least three occasions.⁹⁹ The acts do not need to be of similar nature and it is not necessary to prove the acts with the same degree of specificity as to date, time, place and circumstances or occasion as would be required to establish a charge for each act.¹⁰⁰ This provision “has not been very effective in practice”¹⁰¹ in Victoria as it still requires a high degree of specificity about each occasion.
- 7.19 To address this issue, a ‘course of conduct charge’ was introduced in 2014.¹⁰² The prosecution is required to prove beyond a reasonable doubt that the incidents of an offence, taken together, amount to a course of conduct having regard to their time, place or purpose and any other relevant matter.¹⁰³ However, there is no requirement to prove each incident with the same degree of specificity as to date, time, place, circumstances or occasion as would be required if charged for an isolated incident.¹⁰⁴ The legislation explicitly provides that it is not necessary to provide any particular number of incidents, distinctive features differentiating any of the incidents or general circumstances of any particular incident.¹⁰⁵
- 7.20 The course of conduct charge is not specific to child sexual assault and can relate to two broad categories of offences, namely, sexual assault and fraud.¹⁰⁶ To establish a course of conduct charge the legislation requires the following elements:
- More than one incident on more than one occasion over a specific period of time.
 - Each incident constitutes an offence under the same provision, however, it can be more than one type of act.
 - Each incident relates to the same victim.
 - The incidents taken together amount to a course of conduct having regard to their time, place or purpose of commission and any other relevant matter.¹⁰⁷
- 7.21 A course of conduct charge is more likely to be established when there are systematic and repeated acts of abuse, where it is more difficult for victims to provide particulars and specifics of each incident.¹⁰⁸
- 7.22 A course of conduct charge is a single offence and an application for a separate trial is not possible.¹⁰⁹ A course of conduct charge is a procedural mechanism to prosecute repeated

96. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

97. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

98. *Crimes Act 1958* (Vic) section 47A.

99. *Crimes Act 1958* (Vic) section 47A(2).

100. *Crimes Act 1958* (Vic) section 47A(2A)-(3).

101. Criminal Law Review, *Victoria’s New Sexual Offence Laws: An Introduction*, June 2015, 23.

102. *Criminal Procedure Act 2009* (Vic) Schedule 1, clause 4A as introduced by *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic).

103. *Criminal Procedure Act 2009* (Vic) Schedule 1, clause 4A(8).

104. *Criminal Procedure Act 2009* (Vic) Schedule 1, clause 4A(9).

105. *Criminal Procedure Act 2009* (Vic) Schedule 1, clause 4A(10).

106. *Criminal Procedure Act 2009* (Vic) Schedule 1, clause 4A(1).

107. *Criminal Procedure Act 2009* (Vic) Schedule 1, clause 4A(1)-(3).

108. Criminal Law Review, *Victoria’s New Sexual Offence Laws: An Introduction*, June 2015, Part 11.

criminal acts. It is available irrespective of when the incidents took place.¹¹⁰ As the conduct subject to a course of conduct charge must have been an offence at the time of commission, the accused is not prejudiced by the application of the charge to historic offences.

- 7.23 In sentencing an offender for a course of conduct charge the court must impose a sentence that reflects the totality of the offending that constitutes the course of conduct and must not impose a sentence that exceeds the maximum penalty prescribed for the offence if charged as a single offence.¹¹¹
- 7.24 The consent of the Director of Public Prosecutions is required for a course of conduct or persistent child sexual abuse charge.¹¹² The Director's Policy also provides a list of criteria that should be taken into account in determining whether to use a course of conduct charge including that substantive charges are preferable, whether the charge adequately reflects the criminality of the offending and there should be a reasonable explanation as to why the evidence or allegation of the victim lacks detail as to dates and circumstances.¹¹³ A "course of conduct charge is not to be used simply to overcome the evidentiary deficiencies of a superficial investigation", however, it can be utilised to overcome an otherwise overloaded indictment.¹¹⁴
- 7.25 The Victorian course of conduct charge has not been tested in the High Court.
- 7.26 A similar charge exists in the United Kingdom and New Zealand.¹¹⁵

Adopting the Queensland approach

- 7.27 Legislation in Queensland provides that it is an offence to maintain an unlawful sexual relationship, involving more than one unlawful sexual act, with a child.¹¹⁶ The jury must be unanimously satisfied beyond reasonable doubt of an unlawful sexual relationship with a child.¹¹⁷ However, the prosecution is not required to allege the particulars of any sexual act that would be necessary if it was charged as a separate offence and all members of the jury are not required to be satisfied about the same acts.¹¹⁸ The maximum penalty is life imprisonment.¹¹⁹
- 7.28 This offence was introduced in 2003 with a "focus on the unlawful relationship or course of conduct, rather than on the separate sexual acts comprising the relationship".¹²⁰ The intention of parliament was to remove:

the requirement to provide three particular acts of a sexual nature. Instead the offence is established by proof of the relationship. For a person to be convicted on the offence, the jury must be satisfied beyond a reasonable doubt that the evidence establishes that an

109. *Criminal Procedure Act 2009* (Vic) Schedule 1, clause 4A(6).

110. *Criminal Procedure Act 2009* (Vic) section 445.

111. *Sentencing Act 1991* (Vic) section 5(2F).

112. *Criminal Procedure Act 2009* (Vic) Schedule 1, clause 4A(12), *Crimes Act 1958* (Vic) section 47A(7).

113. Office of the Director of Public Prosecutions Victoria, *Director's Policy: Course of Conduct Charges*, 4 June 2015.

114. Office of the Director of Public Prosecutions Victoria, *Director's Policy: Course of Conduct Charges*, 4 June 2015.

115. *Criminal Procedure Rules 2010* (UK) Rule 14.2, *Criminal Procedure Act 2011* (NZ) sections 17, 20.

116. *Criminal Code Act 1899* (Qld) section 229B.

117. *Criminal Code Act 1899* (Qld) section 229B(3).

118. *Criminal Code Act 1899* (Qld) section 229B(4).

119. *Criminal Code Act 1899* (Qld) section 229B(1).

120. Hon R J Welford, Attorney-General, *Sexual Offences (Protection of Children) Amendment Bill 2002* (Qld), Second Reading Speech, Legislative Assembly, Queensland, 6 November 2002.

unlawful sexual relationship exists, but they do not have to agree unanimously on particular acts comprising it.¹²¹

- 7.29 The key element of the offence is the unlawful relationship.¹²² It includes a consideration of the duration of the relationship, the number of acts and the nature of the acts. In *R v DAT*¹²³ it was held that seven instances of sexual touching over a period of five years did not amount to maintaining a relationship.
- 7.30 The offence is not retrospective and so cannot be used in relation to historic sexual assault where victims struggle to recall particulars.¹²⁴
- 7.31 The Victorian offence of persistent sexual abuse was modelled on this provision and the previous provision. However, in 2004 the Victorian Law Reform Commission expressed the view that “it is inappropriate to describe child sexual abuse as a ‘sexual relationship’” and recommended that the offence be renamed to ‘persistent sexual abuse of a child’.¹²⁵

Royal Commission’s views on reform options

- 7.32 The Royal Commission in its Consultation Paper on Criminal Justice stated that:
- there needs to be an offence in each jurisdiction that will enable repeated but largely indistinguishable occasions of child sexual abuse to be charged effectively.
- The question then is what form of offence would be most effective.¹²⁶
- 7.33 The Royal Commission stated that the Queensland offence appears to be the most effective as it identifies that the core of the offence is the maintaining of the sexual relationship with a child.¹²⁷
- 7.34 However, it still requires the identification of two or more individual unlawful acts and would not assist in circumstances where a complainant is unable to distinguish particular instances of abuse.
- 7.35 The Royal Commission noted that where the repeated sexual acts against a child are indistinguishable and constitute the same offence, a course of conduct charge, such as in Victoria, may be appropriate.¹²⁸
- 7.36 The Royal Commission noted that there may be:
- significant benefits in enabling persistent child sexual abuse offences to operate retrospectively so that they can apply to conduct that occurred before the commencement of the offence.¹²⁹
- 7.37 While it would be unjust to later punish conduct that was not unlawful at the time it was committed, a *persistent child sexual abuse* offence would only apply to conduct that was

121. Hon R J Welford, Attorney-General, *Sexual Offences (Protection of Children) Amendment Bill 2002* (Qld), Second Reading Speech, Legislative Assembly, Queensland, 6 November 2002.

122. *R v LAF* [2015] QCA 130.

123. [2009] QCA 181.

124. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Roundtables*, 9-11 February 2016.

125. Victorian Law Reform Commission, *Sexual Offences: Final Report*, August 2004.

126. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016 at [192].

127. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

128. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

129. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016 at p 194.

unlawful at the time it was committed.¹³⁰ The Royal Commission was not aware of any arguments that the retrospective operation of the offences in South Australia or Tasmania had resulted in unfairness to an accused.¹³¹

Sentencing Council's proposal for reform

7.38 The NSW Sentencing Council recommended that the offence of *persistent child sexual abuse* (section 66EA) be amended:

in order that it be made clear that a separate offence has been created by this section, the gravamen of which is the fact that the accused has engaged in a course of persistent sexual abuse of a child, and that the appropriate sentence to be imposed is one that is proportionate to the seriousness of the offence.¹³²

This proposal would address the issue in relation to sentencing for persistent child sexual abuse and may create an advantage for the prosecution to charge this offence. However, it would not address the remainder of the issues previously discussed.

Question

Q13. Should the NSW offence of *persistent child sexual abuse* be modelled on the Queensland offence of maintain an unlawful sexual relationship with a child?

Q14. Should the offence of *persistent child sexual abuse* be retrospective?

Q15. Should an offender being sentenced for an offence of *persistent child sexual abuse* receive a higher penalty than isolated offences to reflect the ongoing nature of the abuse?

Q16. Should a course of conduct charge, as introduced in Victoria, be enacted?

Q17. Should a course of conduct charge be available for historic offences?

130. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

131. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

132. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Volume 1, August 2008, Recommendation 4.

8. Improving the offence of grooming

In brief

A variety of behaviours can be involved in grooming children to engage in sexual acts. Technological development now permits grooming to occur via the internet, social media or mobile phones. While some conduct is benign, other conduct only becomes apparent as grooming after a more serious sexual offence has occurred.

Offences that apply to grooming in NSW

- 8.1 'Grooming' occurs where an adult gains the trust of a child, and perhaps other people such as the child's parents, in order to engage in sexual activity with the child or take sexual advantage of the child.¹³³ This is a predatory stage of child sexual abuse and it can be a long and complex process. Some instances of grooming involve overt behaviour, for example showing pornography to a child. However, often the behaviour of a perpetrator is only identified as grooming with the benefit of hindsight after there is actual sexual offending against a child.¹³⁴
- 8.2 Grooming behaviour is a common practice of child sexual abuse predators, particularly those in institutional settings.¹³⁵ Despite this, the offence of *grooming* is rarely prosecuted as proof normally relies on the commission of substantive offences. In those circumstances it is the substantive offences that are prosecuted.

NSW legislation

- 8.3 Section 66EB of the *Crimes Act 1900* provides a number of offenses involving the grooming of a child under 16 years for the purposes of unlawful sexual activity. These are summarised in the table below.

Table 8.1: Grooming offences

Section	Provision	Maximum Penalty
66EB(2)	Intentionally procure a child for unlawful sexual activity – victim under 14 years	15 years
66EB(2)	Intentionally procure a child for unlawful sexual activity – victim aged 14 or 15 years	12 years
66 EB(2A)	Meeting or travelling to meet a child who has been groomed with the intention or procuring the child for unlawful sexual activity – victim under 14 years	15 years
66 EB(2A)	Meeting or travelling to meet a child who has been groomed with the intention or procuring the child for unlawful sexual activity – victim aged 14 or 15 years	12 years

133. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Roundtables*, 9-11 February 2016.

134. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Roundtables*, 9-11 February 2016.

135. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Roundtables*, 9-11 February 2016.

66EB(3)	Expose a child to indecent material or provide a child with an intoxicating substance with the intention of making it easier to procure the child for unlawful sexual activity – victim under 14 years	12 years
66EB(3)	Expose a child to indecent material or provide a child with an intoxicating substance with the intention of making it easier to procure the child for unlawful sexual activity – victim aged 14 or 15 years	10 years

- 8.4 A ‘child’ in this section is defined as a person under the age of 16 years.¹³⁶ For the purposes of section 66EB(2A), a child is groomed if they were exposed to indecent material.¹³⁷ The section also provides that a reference to a child includes a person pretending to be a child if the accused believed that person to be a child.¹³⁸ This enables police to charge predators after under-cover operations.¹³⁹
- 8.5 It is a defence to a charge under section 66EB if the accused reasonably believed that the other person was not a child.¹⁴⁰ Consent is not a defence to this offence.¹⁴¹

Commonwealth legislation overlaps with NSW offences

- 8.6 Commonwealth legislation provides offences in relating to using carriage or postal services to procure or groom a child under 16 years.¹⁴² The legislation refers to “transmitting a communication” to a child under 16 years with the intention of procuring, or making it easier to procure, that child to engage in a sexual activity. The same provisions are in place for causing an article to be carried by a postal or similar service.

Convictions for grooming are rare

- 8.7 *Grooming* convictions are rare and the offence is generally charged where the accused is also facing substantive child sexual abuse offences.
- 8.8 NSW Bureau of Crime Statistics and Research data indicates that *grooming* was charged on 129 occasions between April 2006 and March 2016, with an increased use of the charge over the last 5 years.¹⁴³ The data also shows that in the last 5 years the accused was charged with another sexual offence under a different section in over 80% of matters.¹⁴⁴
- 8.9 The majority of prosecutions for *grooming* in other Australian jurisdictions involve police undercover operations.¹⁴⁵

Broad versus narrow grooming offence

- 8.10 The NSW *grooming* offences commenced on 18 January 2008 to target the increase in predatory sexual behaviour towards children as a consequence of technological

136. *Crimes Act 1900* (NSW) section 66EB(1).

137. *Crimes Act 1900* (NSW) section 66EA(2B).

138. *Crimes Act 1900* (NSW) section 66EB(5).

139. Second Reading Speech, *Crimes Amendment (Sexual Procurement or Grooming of Children) Bill 2007*, 28 November 2017.

140. *Crimes Act 1900* (NSW) section 66EB(7).

141. *Crimes Act 1900* (NSW) section 77.

142. *Criminal Code Act 1996* (Cth) sections section 471.24-471.26, 474.26-474.27A.

143. Source: NSW Bureau of Crime Statistics and Research, reference: sr16-14318.

144. Source: NSW Bureau of Crime Statistics and Research, reference: sr16-14318.

145. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Roundtables*, 9-11 February 2016.

developments, although it is not limited to electronic communication.¹⁴⁶ The provisions have broader application than the Commonwealth legislation, covering various forms of grooming and not only those occurring online.

- 8.11 The purpose of the legislation was “to capture the kinds of grooming activities commonly engaged in by paedophiles, whether online, through electronic communications or through any other means or activities”.¹⁴⁷
- 8.12 The current *grooming* offence is only available where the accused either exposed a child to indecent material or provided a child with an intoxicating substance. This narrow approach refers to very specific conduct and may not capture the variety of conduct that can be used by predators. For example, providing gifts or money, obtaining the trust of the child and/or their parents may not be covered by the current offences.
- 8.13 A narrow approach has some benefits. It covers conduct that is overtly sexual or improper and is unlikely to have an innocent explanation. This makes it easier to establish the intent of the accused, as required for a successful prosecution. It also prevents discouraging adults from forming healthy adult-child relationships for fear of prosecution.¹⁴⁸ For example, a teacher may be reluctant to provide additional assistance to a student falling behind in class for fear of being falsely accused of grooming.
- 8.14 A broader offence relying solely on the intent of the accused would require greater prosecutorial discretion to ensure that benign conduct by adults towards children is not prosecuted. As grooming is an inchoate offence, an expansion of the definition may make it difficult to discern the motivation of an accused.
- 8.15 The Royal Commission commented that while broad *grooming* offences are likely to be very difficult to prove, they may have educative benefits.¹⁴⁹

Other jurisdictions

- 8.16 The majority of other jurisdictions in Australia have offences that target grooming.

Australian Capital Territory

- 8.17 In the Australian Capital Territory it is an offence to use electronic means to suggest to a child that they take part in, or watch, a sexual act.¹⁵⁰ It also prohibits using electronic means to send or make available pornographic material to a young person. These offences specifically target grooming conduct that occurs on line or via electronic means.

146. Hatzistergos J, NSW Attorney General and Minister for Justice, Second Reading Speech, NSW Legislative Council, *Crimes Amendment (Sexual Procurement or Grooming of Children) Bill 2007*, 7 November 2017.

147. Hatzistergos J, NSW Attorney General and Minister for Justice, Second Reading Speech, NSW Legislative Council, *Crimes Amendment (Sexual Procurement or Grooming of Children) Bill 2007*, 7 November 2017.

148. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

149. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

150. *Crimes Act 1900* (ACT) section 66.

Northern Territory

- 8.18 The Northern Territory does not have a specific offence relating to grooming. Section 131 of the *Criminal Code Act 1983* (NT) creates an offence of attempting to procure a child to engage in a sexual act. This may catch some grooming behaviours.

Queensland

- 8.19 Queensland has grooming offences that relate to conduct and electronic communication. Section 218B of the *Criminal Code Act 1899* (Qld) prohibits “any conduct” in relation to a child under 16 years with intent to facilitate the procurement of the child to engage in a sexual act or to expose the child to indecent matter. Section 218A relates to using electronic communication with intent to procure a child under 16 years to engage in a sexual act.

South Australia

- 8.20 In South Australia the grooming offence is contained in section 63B(3) of the *Criminal Law Consolidation Act 1936* (SA). It is an offence to make a communication with the intention of procuring a child to engage in sexual activity or “for a prurient purpose” with the intention of making the child amenable to sexual activity.

Tasmania

- 8.21 In Tasmania it is an offence to make a communication by any means with the intention of procuring a child to engage in an unlawful sexual act.¹⁵¹ It also provides for an offence of making a communication by any means with the intention of exposing a child to any indecent material.¹⁵² It does not require that the exposure of indecent material to a child be done with intent to commit a child sexual abuse offence.

Victoria

- 8.22 The grooming offence in Victoria applies to communications, by words or conduct, with a child under 16 years with the intention of facilitating the child’s involvement in a sexual offence.¹⁵³ It includes electronic communication to reflect the development of technology and that the majority of grooming happens via the internet.¹⁵⁴ The legislation also provides offences covering soliciting or procuring a child under 16 years.¹⁵⁵
- 8.23 This broad offence was introduced in 2014 and is intended to cover variety of predatory behaviours. It includes the grooming of a person who has care, supervision or authority of the child. The Royal Commission “heard evidence of parents being groomed in order to facilitate the perpetrators’ access to their children”.¹⁵⁶ While the Victorian offence prohibits the grooming of parents, proving the unlawful intentions of the perpetrator may be difficult without evidence of a completed child sexual abuse offence or other overt attempts to commit such an offence.

151. *Criminal Code Act 1924* (Tas) section 125D(1).

152. *Criminal Code Act 1924* (Tas) section 125D(3).

153. *Crimes Act 1958* (Vic) section 49B.

154. Victoria Criminal Law Review, *Review of Sexual Offences: Consultation Paper*, September 2013.

155. *Crimes Act 1958* (Vic) section 58.

156. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016 at p 195.

Western Australia

- 8.24 In Western Australia, section 204B of the *Criminal Code Act Compilation Act 1913* (WA) provides for an offence of using electronic communication to procure a child to engage in sexual activity or to expose a child to indecent matter. This provision is based on the Queensland legislation and commenced in 2006.¹⁵⁷

Canada

- 8.25 Canadian law contains separate provisions for grooming conduct over the telephone and online. It is an offence to transmit, make available, distribute or sell sexually explicit material to a child for the purpose of facilitating the commission of a child sexual abuse offence.¹⁵⁸ It prohibits communication or the making of an agreement or arrangement, by any means of telecommunication, with a child for the purpose of facilitating the commission of a child sexual abuse offence.¹⁵⁹

New Zealand

- 8.26 In New Zealand it is an offence to expose a child to indecent material.¹⁶⁰ It is also an offence to meet, intend to meet or arrange to meet a child, having previously met or communicated with that child, with the intention of committing a child sexual abuse offence.¹⁶¹

United Kingdom

- 8.27 In the United Kingdom it is an offence if a person who, for their own sexual gratification, causes a child to watch a sexual act or a pornographic film.¹⁶² Section 15 of the *Sexual Offences Act 2003* (UK) makes it an offence to meet, or travel with intent to meet, a child, having communicated with that child on at least two prior occasions, and with the intention of committing a child sexual abuse offence. The prior meetings or communications need not have an explicit sexual content.¹⁶³ Under section 61 it is an offence to administer a substance without a person's consent with the intent of enabling a sexual act with that person. This provision is not specific to children. The legislation provides offences of causing, inciting or facilitating the commission of a child sexual assault offence.¹⁶⁴

Options for reform

- 8.28 The following options for reform of the offence of *grooming* are available:
1. Maintain the current definition of grooming as it involves conduct that has a sexual connotation, making it easier to establish the motivations of the perpetrator.
 2. Broaden the current offence to prohibit other specific conduct when committed with the intention of making it easier to procure the child for unlawful sexual activity.

157. Western Australia Legislative Assembly, *Parliamentary Debates*, 20 October 2005, p 6725b-6726a.

158. *Criminal Code 1985* (Canada) section 171.1.

159. *Criminal Code 1985* (Canada) sections 172.1, 172.2.

160. *Crimes Act 1961* (NZ) section 124A.

161. *Crimes Act 1961* (NZ) section 131B.

162. *Sexual Offences Act 2003* (UK) section 12.

163. United Kingdom Home Office, *Explanatory Notes: Sexual Offences Act 2003*.

164. *Sexual Offences Act 2003* (UK) sections 10, 14.

3. Amend the offence to provide a broad *grooming* offence, based solely on the accused's intent to procure a child for an unlawful sexual activity.
4. Introduce an offence to criminalise those that groom parents with intent to facilitate access to their child.
5. Remove or amend the age categories to simplify the offence.

Question

Q18. Should the law be amended to reflect the broader variety of conduct that is involved in grooming? If yes, should the amendments be modelled on the law in Queensland or Victoria?

Q19. Should an offence of grooming parents with intent to obtain access to their children be introduced?

9. Strengthening offences against young people under care

In brief

It is an offence for a person to have sexual intercourse with another person aged 16 or 17 years and who is under their special care. Consent is not a defence to this offence. The legislation provides an exhaustive and narrow list of circumstances where the victim is considered to be under the special care of the accused. It does not cover all circumstances where there might be a power imbalance.

- 9.1 Section 73 of the *Crimes Act 1900* provides for offences of having sexual intercourse with a person aged 16 or 17 years who is under their special care. Where the victim is 16 years the maximum penalty is 8 years and where the victim is 17 years the maximum penalty is 4 years. Effectively this provision increases the age of consent to 18 years in circumstances where one person is in a position of dominance or authority over another and may exploit their position.
- 9.2 Special care is defined in the legislation and provides the following exhaustive list of relationships:
- (a) the offender is the step-parent, guardian or foster parent of the victim or the de facto partner of a parent, guardian or foster parent of the victim
 - (b) the offender is a school teacher and the victim is a pupil of the offender
 - (c) the offender has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim
 - (d) the offender is a custodial officer of an institution where the victim is an inmate
 - (e) the offender is a health professional and the victim is a patient of the health professional.¹⁶⁵
- 9.3 Section 73(4) provides that where a person attempts to commit an offence under this section, they are liable to the same maximum penalty. Consent is not a defence to this offence.¹⁶⁶ Marriage is the only defence.¹⁶⁷
- 9.4 The purpose of this section is to protect children aged 16 and 17 years against misuse of authority in particular relationships where there is an apparent power imbalance between the parties.¹⁶⁸

165. *Crimes Act 1900* (NSW) section 73(3).

166. *Crimes Act 1900* (NSW) section 77.

167. *Crimes Act 1900* (NSW) section 73(5).

168. Model Criminal Code Officers Committee of the Standing Committee of Attorney-Generals, *Model Criminal Code – Chapter 5: Sexual Offences Against the Person Report*, May 1999.

Problems with the under special care offence

Special care offences are rarely prosecuted

- 9.5 The offence of *sexual intercourse with person aged 16 or 17 years under special care* is rarely prosecuted in NSW. In the 10 year period from July 2006 to June 2016 a total of 24 people were charged with this offence in relation to a complainant aged 16 years and 8 people were charged in relation to a complainant aged 17 years.¹⁶⁹ During the same period only 14 offenders were sentenced for this offence as the principal offence.¹⁷⁰

Overlap with aggravating factors for other offences

- 9.6 Special care offences should be distinguished from child sexual abuse offences where the offence is aggravated if the offender is in a position of authority over the victim. For example, it is a circumstance of aggravation where the victim is under the authority of the offender for some child sexual abuse offences, including *act of indecency* and *sexual intercourse with child between 10 and 16 years*.¹⁷¹
- 9.7 A person is under authority of another person if the person is in the care, or under the supervision or authority, of the other person.¹⁷² The provision is concerned with whether a particular relationship existed and not whether the offender exploited his or her position of advantage.¹⁷³
- 9.8 Section 21A of the *Crimes (Sentencing Procedure) Act 1999* provides aggravating and mitigating factors that the court is to take into account, where relevant, in determining the appropriate sentence for any criminal offence. Section 21A(2)(k) provides that where an offender abused their position of trust or authority in relation to the victim, this is an aggravating factor that is to be taken into account in determining the appropriate sentence.

Other jurisdictions

- 9.9 All jurisdictions in Australia, except for Queensland and Tasmania, have specific offences in relation to positions of trust or authority.
- 9.10 In Queensland consent is not freely given if it is obtained by the offender exercising their authority over the victim.¹⁷⁴ Similarly, in Tasmania consent is not freely obtained where the victim is overborne by the nature and position of another person.¹⁷⁵ While these are not specific offences that apply to young people that are above the age of consent, they may nevertheless apply to negate consent where the accused abuses their position of trust or authority.

169. Source: NSW Bureau of Crime Statistics and Research, reference: sr16-14707.

170. Source: NSW Bureau of Crime Statistics and Research, reference: sr16-14707. Where an offender is found guilty of more than one offence, the offence which received the most serious penalty is the principal offence.

171. *Crimes Act 1900* (NSW) sections 61O(1), 66C(2), 66C(4).

172. *Crimes Act 1900* (NSW) section 61H(2).

173. *R v Howes* [2000] VSCA 159.

174. *Criminal Code Act 1899* (Qld) section 348(2)(d).

175. *Criminal Code Act 1924* (Tas) section 2A(2)(e).

Victoria

- 9.11 In Victoria it is an offence to take part in an act of sexual penetration with, or commit an act of indecency with or in the presence of, a child aged 16 or 17 years who is under their care, supervision or authority.¹⁷⁶ Consent is a defence to this offence if the accused reasonably believed that the child was 18 years or over or that they were married to the child.¹⁷⁷ The legislation provides a non-exhaustive list of circumstances where a child is under the care, supervision or authority of a person. It includes persons who are the child's teacher, foster parent, legal guardian, minister of religion, employer, youth worker, sports coach, counsellor, health professional, police officer or employee at a remand centre or similar.
- 9.12 The category of religious minister was broadened in the amendments introduced in 2006. The Victorian Criminal Law Review stated that the intention was to:
- include any religious official or spiritual leader who provides religious care or religious instruction to the child...
- This expansion is intended to include lay people who are involved in a religious organisation and who provide religious instruction or care other than pastoral care to a child. An example would be the leader of a church youth group.¹⁷⁸
- 9.13 The legislation provides a maximum penalty of 10, 15 or 25 years depending on the seriousness of the offence, with an offence involving a victim under 12 years attracting the highest penalty.¹⁷⁹

South Australia

- 9.14 It is an offence in South Australia to have sexual intercourse with a person under the age of 18 years while being in a position of authority.¹⁸⁰ The following people are in a position of authority:
- (a) teacher engaged in the education of the child
 - (b) foster parent, step-parent or guardian of the child
 - (c) religious official or spiritual leader (however described and including lay members and whether paid or unpaid) providing pastoral care or religious instruction to the child
 - (d) medical practitioner, psychologist or social worker providing professional services to the child
 - (e) correctional institution employee
 - (f) employer of the child.¹⁸¹
- 9.15 Consent is not a defence to this offence.¹⁸² The offence does not apply to persons who are married.¹⁸³

176. *Crimes Act 1958* (Vic) sections 48, 49.

177. *Crimes Act 1958* (Vic) sections 48(2), 49(2).

178. Victoria Criminal Law Review, *Review of Sexual Offences: Consultation Paper*, September 2013.

179. *Crimes Act 1900* (Vic) section 45(2)(b).

180. *Criminal Law Consolidated Act 1935* (SA) section 49(5).

181. *Criminal Law Consolidated Act 1935* (SA) section 49(5a).

182. *Criminal Law Consolidated Act 1935* (SA) section 49(7).

183. *Criminal Law Consolidated Act 1935* (SA) section 49(8).

Western Australia

- 9.16 In Western Australia it is an offence to engage in sexual conduct with a child aged 16 or 17 years who is under their care, supervision or authority.¹⁸⁴ The legislation does not define the relationships covered by the term 'care, supervision or authority'.

Northern Territory

- 9.17 Northern Territory provides an offence of sexual intercourse or act of gross indecency with a child aged 16 or 17 years and under the person's special care.¹⁸⁵ The victim is under special care in the following situations:
- (a) step-parent, guardian or foster parent of the victim
 - (b) school teacher and the victim is a pupil of the offender
 - (c) established personal relationship with the victim in connection with the care, instructions (for example, religious, sporting or musical) or supervision (for example, in the course of employment) of the victim
 - (d) officer at a correctional institution where victim is detained
 - (e) health professional or provider where victim is a client.¹⁸⁶
- 9.18 Marriage is a defence to this offence.¹⁸⁷

Australian Capital Territory

- 9.19 In the Australian Capital Territory it is an offence to engage in sexual intercourse with, or commit an act of indecency on, or in the presence of, a young person aged 16 or 17 years and who is under their special care.¹⁸⁸ The legislation provides a list of circumstances where a young person is under special care of another, however, it is not exhaustive. It includes teachers, step-parents, legal guardians, persons who provide religious instruction, employers, sports coaches, counsellors, health service providers and custodial officers of or to the young person.¹⁸⁹
- 9.20 There are defences of marriage, similar age and reasonable belief that the victim was 18 years or over available.¹⁹⁰

Options for reform

Broadening the relationships covered by the offence

- 9.21 The list of relationships contained in the NSW offence (see 9.2) does not cover all forms of relationships where the accused can be in a position of authority or power over the victim. For example, where the perpetrator is a teacher but does not teach the child who attends the same school, it may be considered that there is a power imbalance, however, sexual intercourse in those circumstances would be lawful provided the child was 16 years or older and it was consensual.

184. *Criminal Code Act Compilation Act 1913* (WA) section 322.

185. *Criminal Code Act 1983* (NT) section 128.

186. *Criminal Code Act 1983* (NT) section 128(3).

187. *Criminal Code Act 1983* (NT) section 128(4).

188. *Crimes Act 1900* (ACT) sections 55A, 61A.

189. *Crimes Act 1900* (ACT) sections 55A(2), 61A(2).

190. *Crimes Act 1900* (ACT) sections 55A(3)-(4), 61A(3)-(4).

- 9.22 The definition of ‘special care’ does not cover biological or adoptive parents. Biological parents are covered under the *incest* offence.¹⁹¹ Adoptive parents are not specifically referred to in the definition but it can be argued that they fall within the scope of the provision.¹⁹² Although such arguments can prove difficult and unnecessarily complicate the matter.¹⁹³
- 9.23 This issue has been raised by the Royal Commission, including whether there are any gaps in the recognition of relationships of authority.¹⁹⁴
- 9.24 The broadening of relationships where it is considered that there is a power imbalance may afford greater protection to persons aged 16 and 17 years. However, if the circumstances where the offence applies are not clearly defined it can result in uncertainty. The categories should not be so broad as to criminalise ordinary peer-to-peer consensual sexual activities. The Model Criminal Code Officers Committee of the Standing Committee of Attorney-General recommended that the offence should be limited to a discrete set of relationships, similar to those implemented in the NSW legislation.

Broadening the types of sexual conduct covered by the offence

- 9.25 The current offence only applies to sexual intercourse and does not cover non-penetrative sexual acts with persons aged 16 and 17 years. This may fail to protect some young people who are in a relationship where there is a power imbalance. For example, a teacher who engages in indecent touching or fondling with their student does not commit an offence under this provision, provided the conduct is consensual and the student is 16 years or older.
- 9.26 The Model Criminal Code Officers Committee of the Standing Committee of Attorney-General recommended that any such offence apply to acts of indecency and indecent assault.¹⁹⁵

Question

Q20. Should other specific relationships be included in the definition of ‘special care’?

Q21. Should ‘special care’ offences apply to all forms of sexual offences including indecent conduct?

191. *Crimes Act 1900* (NSW) section 78.

192. For example, *Lab v R* [2006] NSWCCA 202.

193. For example, *R v Miller* [2001] NSWCCA 209.

194. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

195. Model Criminal Code Officers Committee of the Standing Committee of Attorney-Generals, *Model Criminal Code – Chapter 5: Sexual Offences Against the Person Report*, May 1999.

10. Introducing specific offences of failing to protect and failing to report

In brief

In NSW there is a broad offence of *concealing a serious indictable offence* (section 316) which is not specific to sexual offences against children and does not always reflect the complexities in such matters. There is also legislation in relation to mandatory reporting by certain professional groups. The legislation does not provide an offence of failing to protect a child from sexual abuse.

- 10.1 Although the criminal law generally requires a person to refrain from doing a particular act, it rarely imposes a duty on a person to act, particularly where that person has not themselves committed an offence.¹⁹⁶ The Royal Commission noted that there may be good reasons for the criminal law to require a third party to act in relation to child sexual abuse, including:
- victims often take a long time to disclose the abuse and it can result in the perpetrator going undetected for many years
 - children are less able to report the abuse to police or protect themselves
 - other children may be exposed to potential abuse, and
 - to deter others due to a fear of detection.¹⁹⁷

Failure to report

- 10.2 Only NSW and Victoria have offences that apply to failures to report child sexual abuse, and the NSW offence is a more general offence of concealing a serious indictable offence.¹⁹⁸
- 10.3 All Australian jurisdictions have mandatory reporting laws which require the reporting of child sexual abuse allegations by certain professionals to child protection agencies, such as the Secretary of the Department of Family and Community Services.¹⁹⁹

NSW offence of conceal serious indictable offence

- 10.4 Section 316(1) of the *Crimes Act 1900* provides the following offence:

If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the

196. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

197. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

198. *Crimes Act 1900* (NSW) section 316; *Crimes Act 1958* (Vic) section 327.

199. For example, *Children and Young Persons (Care and Protection) Act 1998* (NSW) section 27; *Children, Youth and Families Act 2005* (Vic) section 184.

prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.

- 10.5 Section 316(2) provides a maximum penalty of 5 years imprisonment if an offence under section 316(1) is committed by a person who accepts any benefit for themselves or another person. A serious indictable offence is an indictable offence that carries a maximum penalty of 5 years imprisonment or more.²⁰⁰
- 10.6 The Attorney General must approve the prosecution of an offence against section 316(1) if the knowledge or belief that an offence has been committed was formed or the information was obtained in the course of practising a profession, calling or vocation.²⁰¹ This function has been delegated to the Director of Public Prosecutions. The occupations covered by this provision are legal practitioner, medical practitioner, psychologist, nurse, social worker including support worker and counsellor, member of the clergy, researcher, school teacher, arbitrator and mediator.²⁰²
- 10.7 Section 316 replaced the common law offence of misprision of felony, which was extinguished on 25 November 1990.
- 10.8 In 1999 the NSW Law Reform Commission recommended that section 316(1) be repealed and amendments made to section 316(2).²⁰³
- 10.9 This paper focuses on the effectiveness of this offence when applied to the disclosure of sexual abuse against children. The general operation of section 316(1) is beyond the scope of this paper.

Difficulties applying the NSW offence to child sexual abuse reporting

- 10.10 The offence in section 316 can be used to prosecute concealing most serious crimes but it is rarely used in relation to concealing child sexual abuse.²⁰⁴ It only applies when a person knows or believes an offence to have been committed, not when they merely suspect that there might have been an offence. It also only applies when the offence in question is a serious indictable offence (and was a serious indictable offence at the time it was committed).
- 10.11 A person's conduct will only be an offence under section 316 if they do not have a 'reasonable excuse'. The Royal Commission discussed the fact that it may be difficult to determine what amounts to a 'reasonable excuse' in different situations.²⁰⁵ It may be that, when the victim has indicated that they do not want the matter to be reported to Police, this would be a reasonable excuse for a third person not to report the offence. This may be appropriate in some situations (for example, when the victim is now an adult and has made an informed decision free from coercion) but not others (when the victim may be subject to direct or indirect pressure from members of the institution to conceal the offence).
- 10.12 As the offence in section 316 has general application, it does not cater to the nuances that may arise in circumstances of child sexual abuse. The offence may also discourage victims from disclosing the abuse to their friends and family due to a concern that they will have to report the matter to police. Furthermore, the obligation to report suspected abuse to the

200. *Crimes Act 1900* (NSW) section 4.

201. *Crimes Act 1900* (NSW) section 316(4).

202. *Crimes Regulation 2015* (NSW) cl 4.

203. NSW Law Reform Commission, *Review of section 316 of the Crimes Act 1900 (NSW)*, Report 93, December 1999.

204. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

205. *Crimes Regulation 2015* (NSW) cl 4.

police under section 316 applies to children, who may themselves be survivors of sexual abuse.

Victoria uses a more specific offence

- 10.13 Victorian legislation contains a specific offence relating to a failure to disclose a sexual offence committed against a child under 16 years (see Appendix B).²⁰⁶ It is an offence for an adult who forms a reasonable belief that a sexual offence has been committed against a child under 16 years by another adult to fail to disclose that information to a police officer, unless there is a reasonable excuse for not doing so.²⁰⁷
- 10.14 There are a number of exceptions to this requirement. It is not an offence if the information came directly or indirectly from the victim, the victim was 16 years or older at the time of providing the information and the victim requested that the information not be disclosed.²⁰⁸ It does not apply in circumstances where a person was a child at the time they came into possession of the relevant information.²⁰⁹ It provides exemptions for communications that are privileged or confidential.²¹⁰ It prevents the interests of the offender or the reputation of the institution being placed before the interests of the child and the community.
- 10.15 This offence is relatively new, having commenced on 27 October 2014, and with few prosecutions, it is too early to determine the effectiveness of the provision.²¹¹

Option of offence targeting disclosure of institutional child sexual abuse

- 10.16 The Royal Commission and submissions to the Commission identified a number of benefits to having a specific offence targeting disclosure of child sexual abuse in institutions. A specific offence would allow for a lower standard of knowledge or belief than would be reasonable to apply to the community generally, and thus it would cover a broader range of circumstances. It could have a separate maximum penalty that reflected the seriousness of the offence of concealing child sexual abuse and the importance of deterring concealment to protect possible future victims of abuse. It could also apply to concealing any sexual offence against a child, not just a serious indictable offence.
- 10.17 The scope of a specific offence could be carefully limited so it does not apply to children who conceal information, and deals sensitively with situations where the victim who is now an adult does not want the offence reported to police.²¹² Overall, a specific offence may be an important tool to provide police with important information to investigate and prosecute such offences and prevent the continued abuse of a particular child or sexual abuse of other children.
- 10.18 If a specific offence was developed, consideration would need to be given to a range of issues, including:
- whether the offence would apply solely to members of institutions or to all members of the community
 - the fault element (such as knowledge, belief or reasonable suspicion) and the extent to which a lower fault element might encourage overly cautious reporting

206. *Crimes Act 1958* (Vic) section 327.

207. *Crimes Act 1958* (Vic) section 327(2).

208. *Crimes Act 1958* (Vic) section 327(5).

209. *Crimes Act 1958* (Vic) section 327(7)(a).

210. *Crimes Act 1958* (Vic) section 327(7)(b)-(c).

211. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

212. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

- the appropriate maximum penalty
 - whether a new offence should apply retrospectively, to offences and failures to report that happened before the new offence was introduced
 - how a new offence should deal with victims' wishes, particularly a victim's express wish that an offence not be reported to police
 - what amendments, if any, should be made to section 316.
- 10.19 An alternative approach to introducing a new specific offence would be to broaden the current mandatory reporting requirement for certain professionals, individuals or organisations. The amendment could expand the categories of persons that have a duty to disclose if they suspect a child is at risk of harm to include, for example, volunteers and ministers of religion. By capturing a wider group of individuals who are required to disclose, at risk children may be more readily identified. However, there are currently no criminal penalties for failure to comply with mandatory reporting obligations. Criminal penalties for failure to report were removed from child protection legislation in response to recommendations of the 2008 Special Commission of Inquiry into Child Protection Services of NSW, which found the power to prosecute for failing to report had not been exercised and may result in overly cautious reporting.²¹³

Protection of those that disclose child sexual abuse

- 10.20 The Royal Commission acknowledged that protection of whistleblowers who disclose child sexual abuse, particularly in institutional settings, may encourage reporting.²¹⁴
- 10.21 In NSW the *Public Interest Disclosures Act 1994* provides some protection for those that make disclosures that are in the public interest. It is an offence for a person to take detrimental action against another that is substantially in reprisal for making a public interest disclosure.²¹⁵ However, this legislation is mainly concerned with the public sector and the protection does not specifically apply to those who disclose child sexual abuse.
- 10.22 Victoria provides protection to those who disclose child sexual abuse, providing that disclosures made in good faith do not constitute unprofessional conduct, breach of professional ethics and do not contravene medical confidentiality legislation.²¹⁶

Question

Q22. How can appropriate reporting of child sexual abuse be encouraged?

Q23. Should there be a specific offence for concealing a child sexual abuse offence?

Q24. Should protection be afforded to those that make such disclosures?

213. The Hon James Wood AO QC, *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, November 2008, recommendation 6.2.

214. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016. Submissions to the Royal Commission on these issues are published and available here: <http://www.childabuseroyalcommission.gov.au/policy-and-research/our-policy-work/criminal-justice/submissions-on-criminal-justice-consultation-paper>.

215. *Public Interest Disclosures Act 1994* (NSW) section 20(1).

216. *Crimes Act 1958* (Vic) section 328.

Failure to protect

- 10.23 A duty to protect, and any consequent offence of failing to comply with that obligation, is aimed at preventing child sexual abuse. This is different to the offence of failing to report, where the sexual harm to the child has already occurred. The Royal Commission has heard many examples where persons were either allowed to work with a particular child or were allowed to work with other children after concerns were raised and they continued to abuse that particular child and/or other children.²¹⁷
- 10.24 The Royal Commission recommended that any offence of failure to protect should not be unfairly onerous so as not to prevent institutions from continuing to provide services to children.²¹⁸
- 10.25 There is no offence of failing to protect in NSW. Such an offence was recently introduced in Victoria and there is a similar offence in South Australia.

Victorian offence of failure to protect

- 10.26 Victoria introduced a new offence, which commenced on 1 July 2015 of failing to protect a child from risk of sexual abuse.²¹⁹ The offence provides that a person who:
- (a) by reason of the position he or she occupies within a relevant organisation, has the power or responsibility to reduce or remove a substantial risk that a relevant child will become a victim of a sexual offence committed by a person of or over the age of 18 years who is associated with the relevant organisation; and
 - (b) knows that there is a substantial risk that that person will commit a sexual offence against a relevant child
- must not negligently fail to reduce or remove that risk.²²⁰
- 10.27 The offence carries a maximum penalty of 5 years imprisonment.²²¹ The standard of care is that which a reasonable person would exercise in the circumstances.²²² It also requires knowledge that there is a substantial risk to the child, mere suspicion will not be enough.
- 10.28 The offence applies to organisations that exercise care, supervision or authority over children and include, but are not limited to a church, religious body, school, hospital, government department, sporting group, youth organisation or charity.²²³

Offences of criminal neglect or harm may apply

- 10.29 In NSW it is an offence to intentionally take action that results, or appears likely to result, in the child suffering significant harm, as a result of physical injury or sexual abuse, or emotional or psychological harm.²²⁴ While the offence can apply to instances of child sexual

217. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

218. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

219. *Crimes Act 1958* (Vic) section 49C.

220. *Crimes Act 1958* (Vic) section 49C(2)

221. *Crimes Act 1958* (Vic) section 49C(2)

222. *Crimes Act 1958* (Vic) section 49C(3)

223. *Crimes Act 1958* (Vic) section 49C(1)

224. *Children and Young Persons (Care and Protection) Act* (NSW) section 227

abuse, it does not cover circumstances where individuals or organisations fail to take action to protect children. Other jurisdictions also have similar provisions.²²⁵

10.30 In South Australia a person is guilty of an offence if:

- (a) a child or vulnerable adult (the victim) dies or suffers serious harm as a result of an unlawful act; and
- (b) the defendant had, at the time of the act, a duty of care to the victim; and
- (c) the defendant was, or ought to have been, aware that there was an appreciable risk that serious harm would be caused to the victim by the unlawful act; and
- (d) the defendant failed to take steps that he or she could reasonably be expected to have taken in the circumstances to protect the victim from harm and the defendant's failure to do so was, in the circumstances, so serious that a criminal penalty is warranted.²²⁶

10.31 A person had a duty of care to the victim if they are the victim's parent or guardian or have assumed responsibility for the victim's care.²²⁷ This offence is generally not charged in relation to child sexual abuse.²²⁸

Considerations for a failure to protect offence in NSW

10.32 If an offence of failure to protect is to be introduced in NSW, it is necessary to consider the following issues:

- Whether the offence should apply solely to people in authority within certain organisations (such as in Victoria) or also to persons who have a duty of care towards the child (such as in South Australia).
- Whether the standard of care would be knowledge, belief, reasonable suspicion or something else.
- What actions would be required to discharge this obligation, including whether making a report of the abuse to a senior colleague or police would be sufficient.

Question

Q25. Should an offence be introduced for failing to protect a child from sexual abuse?

Offences by institutions

10.33 The Royal Commission has considered the introduction of offences to make organisations criminally liable in cases of institutional child sexual abuse.²²⁹ Such an offence may improve compliance with reporting and protection obligations. It could apply in circumstances where

225. For example, *Children, Youth and Families Act 2005* (Vic) section 493; *Children and Community Services Act 2004* (WA) section 101(1); *Children, Young Persons and Their Families Act 1997* (Tas) section 91

226. *Criminal Law Consolidated Act 1935* (SA) section 14(1)

227. *Criminal Law Consolidated Act 1935* (SA) section 14(3)

228. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016

229. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016; A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, July 2015.

the failure to protect a child from sexual abuse fell far short of the standard of care expected of a reasonable institution.

10.34 However, the Royal Commission also noted the following difficulties with the introduction of such an offence:

- The criminal law is primarily focused on the acts of individuals.
- Organisations can take on various structures and it can be difficult to determine hierarchy.
- It is difficult to enforce and penalise.
- Child sexual abuse may not be disclosed until many years later, where the person(s) that allowed the abuse to occur are no longer employed by the organisation.
- It is difficult to prosecute where there is a division within the organisation between whistleblowers and those who do not act.²³⁰

10.35 The Royal Commission has recommended the introduction of legislation to impose a civil liability on institutions for institutional child sexual abuse.²³¹ If such a scheme is implemented, it would be necessary to consider if it is sufficient to ensure organisations protect children from sexual abuse, or whether criminal liability is also required.²³²

Question

Q26. Should a specific offence be introduced to prosecute organisations who fail to protect children from institutional child sexual abuse?

230. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016; A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, July 2015.

231. Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report*, 2015.

232. Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, September 2016.

11. Introducing statutory defences

In brief

In NSW the defence of honest and reasonable mistake as to the age of the child is available at common law. There is no similar age defence. As a result, NSW legislation is not consistent with other jurisdictions.

- 11.1 NSW currently does not have any statutory defences to the offences of sexual intercourse, indecent assault and act of indecency with a child under 16 years. This is contrary to all other Australian jurisdictions as well as Canada, New Zealand and United Kingdom, which all have a statutory defence of honest and reasonable mistake of age, or a similar age defence, or both.

Defence of honest and reasonable mistake of age

- 11.2 Honest and reasonable mistake as to fact is a basic principle of criminal responsibility rather than a defence. The principle is that a person is not criminally liable for an act or omission if he or she holds an honest and reasonable belief in a state of facts, which, if true, would make the act or omission innocent.²³³

Common law applies in NSW

- 11.3 There is no statutory defence of honest and reasonable mistake in NSW for offences of sexual intercourse, indecent assault and act of indecency with a child below the age of consent. However, the defence is available at common law. Where raised by defence at an evidentiary level, it is for the Crown to disprove the defence beyond a reasonable doubt.²³⁴
- 11.4 A limited statutory defence of honest and reasonable mistake as to age was previously available in NSW under section 77(2) of the *Crimes Act 1900*. The defence was only available where the sexual act was consensual, the victim was aged 14 or 15 years and the accused reasonably believed that the victim was 16 years or older. It also required the sexual activity be heterosexual. The burden of proof was on the accused to establish the defence on the balance of probabilities. That section was repealed in 2003 when the age of consent for all sexual intercourse was changed to 16 years.
- 11.5 In *CTM v R*²³⁵ it was held that following the repeal of section 77(2) the common law defence of honest and reasonable mistake as to age applied to a charge of child sexual abuse. It was held that the defence required an honest and reasonable belief is a state of affairs which, had it existed, would be such that the accused's conduct was innocent. Thus it would be a defence to a charge of sexual intercourse with a child aged 14 or 15 years if the accused honestly and reasonably believed that the complainant was 16 years or over. However, it would not be a defence to a charge of sexual intercourse with child under 14 years if the accused believed that the victim was 15 years of age, for if the child was that

233. For example see, *R v Tolson* (1889) 23 QBD 168; *Proudman v Dayman* [1941] HCA 28; *He Kaw Teh v The Queen* [1985] HCA 43; *Jiminez v The Queen* [1992] HCA 14; *Macleod v The Queen* [2003] HCA 24; *CTM v The Queen* [2008] HCA 25.

234. *CTM v The Queen* [2008] HCA 25.

235. [2008] HCA 25.

age, the conduct would still be an offence. Of course, if the sexual intercourse was not consensual, the accused can be still charged with a general sexual assault offence.

- 11.6 The prosecution does not need to prove that the accused knew or believed that the victim was under the age of 16 years to establish a child sexual abuse offence. However, if there is sufficient evidence adduced at trial on the issue of honest and reasonable mistake of fact in relation to the victim's age, the prosecution must prove beyond a reasonable doubt that the accused did not reasonably and honestly hold that belief.²³⁶ This can be contrasted with the position under the repealed statutory defence which places the onus on the accused to establish the defence on the balance of probabilities and limited the defence to charges that relate to complainants who are aged between 14 and 16 years.²³⁷ Below the age of 14 years, the statutory defence of honest and reasonable mistake was unavailable.

The defence varies across other jurisdictions

- 11.7 The defence of honest and reasonable mistake is available in other jurisdictions in Australia and overseas. The particulars of the offence and the minimum age of the child where the defence is available varies between the jurisdictions.
- 11.8 In the Australian Capital Territory, a defence of reasonable mistake as to age is available for certain offences.²³⁸ For example, consent is a defence to a charge of sexual intercourse or act of indecency with a child if the accused believed that at the time of the offence the child was 16 years or older.²³⁹
- 11.9 Legislation in the Northern Territory provides a defence of reasonable mistake as to age for certain offences.²⁴⁰ For example, it is a defence to a charge of sexual intercourse or act of gross indecency with a child if at the time of the offence the child was 14 years or over and the accused believed that the child was 16 years of over.²⁴¹ However, unless it is expressly stated, the fact that an accused did not know that the child was under a particular age or believed that the child was over a particular age is not a defence.²⁴²
- 11.10 In Queensland there is a defence of reasonable mistake as to the victim's age for particular offences.²⁴³ For example, it is a defence to an offence of sodomise with child aged 12 or old and under 18 years if the accused believed that the victim was over 18 years of age. However, unless specified, it is immaterial that the accused did not know that the victim was under a particular age or believed that the person was not under a particular age.²⁴⁴
- 11.11 South Australian legislation provides for a limited defence of reasonable mistake as to victim's age.²⁴⁵ For example, it is a defence for an offence of sexual intercourse with child between 14 to 16 years, if the child was 16 years at the time of the offence and the accused reasonably believed that the child was 17 years or older.²⁴⁶ This is in contrast to the offence of indecent assault of child under 14 years where the prosecution does not need to establish that the accused knew or was reckless as to the age of the child.²⁴⁷
- 11.12 A limited defence of mistake as to age is contained in the Victorian law.²⁴⁸ For example, consent is a defence to an offence of sexual intercourse with child under 16 years if at the

236. *CTM v R* [2008] HCA 25; *He Kaw Teh v R* [1985] HCA 43.

237. *CTM v R* [2008] HCA 25; *Crimes Act 1900* (NSW) section 77(2).

238. *Crimes Act 1900* (ACT) sections 55(3)(a), 55A(4), 61(3)(a), 61A(4).

239. *Crimes Act 1900* (ACT) sections 55(3)(a), 61(3)(a).

240. *Criminal Code Act 1983* (NT) sections 127(4), 131(3), 131A(6), 132(5).

241. *Criminal Code Act 1983* (NT) section 127(4).

242. *Criminal Code Act 1983* (NT) sections 139, 202E.

243. *Criminal Code Act 1899* (Qld) sections 208(3), 210(5), 215(5).

244. *Criminal Code Act 1899* (Qld) section 229.

245. *Criminal Law Consolidation Act 1935* (SA) section 49(4).

246. *Criminal Law Consolidated Act 1935* (SA) section 49(4).

247. *Criminal Law Consolidated Act 1935* (SA) section 56(2).

248. *Crimes Act 1958* (Vic) sections 45(4)(a), 47(2)(a).

time of the offence the child was aged 12 years or older and the accused believed that the child was aged 16 years or older.²⁴⁹ Consent is also a defence to an offence of indecent act with or in the presence of a child under 16 years if the accused believed that the child was aged 16 years or older.²⁵⁰

- 11.13 In Western Australia the defence of reasonable mistake as to the victim's age is available in limited circumstances.²⁵¹ For example, it is a defence to an offence of show offensive material to child under 16 years or persistent sexual conduct with child under 16 years if the accused reasonably believed that the child was 16 years or older and the accused was not more than three years older than the child.²⁵² In contrast, a reasonable mistake about the age of the victim in child exploitation material is not a defence to any of the child exploitation offences.²⁵³
- 11.14 In New Zealand the defence of reasonable mistake as to age is available for some offences, such as expose child under 16 years to indecent material and sexual conduct with child aged 12 to 15 years. However it requires the accused to have taken reasonable steps to find out that the child was 16 years or older and must have had a reasonable belief that the child was 16 years or over.²⁵⁴ The defence is not available for the offence of having a sexual connection or doing an indecent act with a child under 12 years.²⁵⁵
- 11.15 In Canada it is a defence to some offences that the accused believed the victim was 16 years or over (or 18 years or over as the case may be) at the time of the offence only if the accused took all reasonable steps to ascertain the age of the complainant.²⁵⁶
- 11.16 Legislation in the United Kingdom does not contain a specific defence of reasonable mistake about the age of the child. Rather, it is an element of some offences that the accused did not reasonably believe that the child was at least 16 years (or 18 years where applicable).²⁵⁷ The onus is generally on the prosecution. However, for matters involving a position of trust or family connection, the accused is presumed to not have reasonably believed that the child was 18 years or older unless sufficient evidence is adduced to raise this issue.²⁵⁸

The case put for a statutory defence of honest and reasonable mistake

- 11.17 The common law defence of honest and reasonable mistake as to age is not limited to an age range and may lead to unjust results. For example, consent would be a defence to sexual intercourse with a 10 year old child if the accused honestly and reasonably believed that the child was 16 years or older. While in most instances it is unreasonable to believe that such a young child is above the age of consent, there may be circumstances where such a defence is raised and cannot be negated by the Crown beyond a reasonable doubt.
- 11.18 The introduction of a limited statutory defence could place parameters on this defence depending on the age of the child. This defence would not negate the need to obtain the consent of the child prior to engaging in sexual activity. This would also be consistent with other jurisdictions. Such a defence was also recommended by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General.²⁵⁹

249. *Crimes Act 1958* (Vic) section 45(4).

250. *Crimes Act 1958* (Vic) section 47(2).

251. *Criminal Code Act Compilation Act 1913* (WA) sections 321(9), 321A(9), 322(7).

252. *Criminal Code Act Compilation Act 1913* (WA) sections 204A(4), 321A(9).

253. *Criminal Code Act Compilation Act 1913* (WA) section 221A(1A).

254. *Crimes Act 1961* (NZ) sections 124A(3), 134A.

255. *Crimes Act 1961* (NZ) section 132(4).

256. *Criminal Code 1985* (Canada) sections 150.1(4)-(6), 163.1(5).

257. *Sexual Offences Act 2003* (UK) sections 9(1)(c)(i), 10(1)(c)(i), 15(1)(d).

258. *Sexual Offences Act 2003* (UK) sections 16(4), 17(3), 18(3), 19(3), 25(2), 26(2).

259. Model Criminal Code Officers Committee of the Standing Committee of Attorney-Generals, *Model Criminal Code – Chapter 5: Sexual Offences Against the Person Report*, May 1999.

- 11.19 One option would be a two-stage test to ensure fairness and justice for the accused and the child. First, the jury would consider whether the accused genuinely believed that the complainant was 16 years or over. If a positive finding is made, the jury would then consider whether this belief was reasonable. Only if both elements are established will the defence be made out.
- 11.20 If the defence similar to that contained in the repealed section 77(2) is reintroduced, the burden of proof could be on the accused to establish the defence on the balance of probabilities. Alternatively, it could require that the defence be reasonably raised by the accused, upon which it must be negated by the Crown beyond a reasonable doubt.
- 11.21 The defence could also require that reasonable steps be taken to ascertain the age of the child. This would emphasise the need to make appropriate enquiries about the child's age. Assumptions or carelessness would not be sufficient.

Options for reform

- 11.22 The following options for reform of the defence of honest and reasonable mistake are available:
1. Leave the current common law defence of honest and reasonable mistake as it applies to child sexual abuse matters. This would mean that were an accused honestly and reasonably believed that the complainant was above the age of 16 years and the conduct was consensual, they would not be guilty of a child sexual assault offence. The onus will remain on the Crown to disprove the defence if raised on an evidentiary level by the accused.
 2. Introduce a defence of honest and reasonable mistake as to age that is only available where the complainant was 14 or 15 years of age at the time of the offence. The statutory defence would be narrower than the current common law defence as it would not be available where the complainant was 13 years or younger at the time of the offence. The onus is on the accused to establish the defence on the balance of probabilities. The jury would need to be satisfied that the accused genuinely believed the complainant was 16 years or above and the belief was reasonable in the circumstances. The defence could be made to apply from the date of commencement or from the date section 77(2) was repealed.
 3. Abolish the common law defence and make the age of the complainant in a child sexual assault matter an element of absolute liability. This may encourage people to take more care to determine the age of another person before engaging in sexual activity. However, it may result in an accused person being convicted of child sexual assault offence in circumstances where they truly and reasonably believed that the complainant was at least 16 years old and the conduct was consensual.

Question

Q27. Should a defence of honest and reasonable mistake as to age be enacted? If yes, should it apply only where the complainant is 14 or 15 years of age and should the onus be on the accused?

Defence of similar age

- 11.23 In child sexual assault matters, the defence of similar age refers to circumstances where the victim and the accused engaged in consensual sexual conduct and are of a similar age. This defence is often termed the ‘young love defence’. It provides the minimum age of the child and the maximum age difference between the child and the accused. There is generally a ‘no defence age’, where consent of the child to a child sexual abuse offence will not be a defence regardless of the age of the accused.
- 11.24 There is no statutory or common law defence in NSW for child sexual assault offences involving parties of a similar age.
- 11.25 The NSW Police Force has internal guidelines in relation to voluntary sexual activity between two children, both who are under 16 years and within two years of each other.²⁶⁰ In determining whether charges should be laid, police must consider the ages of the children and their maturity, any imbalance in age or power, whether consent was freely given, and the impact of any substance misuse. These guidelines do not provide a defence. Instead, they afford police discretion not to charge in matters involving voluntary sexual activity between peers of similar age.

The defence in other jurisdictions

- 11.26 The defence of similar age is available in Australian Capital Territory,²⁶¹ Victoria,²⁶² South Australia,²⁶³ Tasmania²⁶⁴ and Canada²⁶⁵ for child sexual abuse offences. The particulars of the offence and the minimum age of the child and age difference where the defence is available varies between the jurisdictions and is summarised in the table below.

Table 11.1: Particulars of similar age defence in other jurisdictions

Jurisdictions	Minimum age of the child	Age difference
Australian Capital Territory	10 years	2 years
South Australia	16 years	1 year
Victoria	12 years	2 years
Tasmania	12 years 15 years	3 years 5 years
Canada	12 years 14 years	2 years 5 years

The case put for a statutory defence of similar age

- 11.27 A defence of similar age was recommended by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General.²⁶⁶ In 2013 the Department of Attorney General and Justice recommended that it consult stakeholders on whether a

260. Guidelines to the investigation of Adolescent Peer Sex, provided by NSW Police.

261. *Crimes Act 1900* (ACT) sections 55(3)(b), 55A(3), 61(3)(b), 61A(3).

262. *Crimes Act 1958* (Vic) sections 45(4)(b), 47(2)(b).

263. *Criminal Law Consolidation Act 1935* (SA) sections 49(4).

264. *Criminal Code Act 1924* (Tas) sections 124(3), 125B(3), 127(2).

265. *Criminal Code 1985* (Canada) sections 150.1(2)-(3).

266. Model Criminal Code Officers Committee of the Standing Committee of Attorney-Generals, *Model Criminal Code – Chapter 5: Sexual Offences Against the Person Report*, May 1999.

similar age defence for young people close in age engaging in consensual sexual activity should be introduced in NSW.²⁶⁷

- 11.28 Current legislation prohibiting children under 16 years from engaging in sexual acts recognises that children are vulnerable and may not understand the consequences of their actions, such as pregnancy and sexual transmitted infections. They may find it difficult to say ‘no’ when pressured or give into the ‘everyone else is doing it’ attitude. It protects children who, despite being of similar age, were influenced or subject to predatory behaviour to engage in sexual acts.
- 11.29 An argument in favour of the defence is that the criminal law should recognise that young people engage in voluntary sexual activity. It may not be in the best interests of children if two 15 year old children who engage in consensual sexual activity are both charged with a criminal offence.²⁶⁸ A conviction might have long-term consequences on their future careers, travel and employment opportunities. Prosecutorial discretion may not be sufficient.
- 11.30 If the defence was to be adopted, it would apply to all child sexual assault offences and be limited by the minimum age of the children and the maximum age difference between them. Consent of the child is required to establish this defence and it does not permit non-consensual sexual conduct between young people.
- 11.31 Child sexual assault offences, with the exception of *aggravated sexual assault* where the complainant is under 16 years, do not require the prosecution to prove a lack of consent (see paragraphs 2.1-2.3). This avoids young complainants giving evidence and being cross-examined about consent. The introduction of the similar age defence may introduce the issue of consent into these offences. Where the accused relies on a similar age defence, complainants will be required to give evidence about consent. Where there is no dispute that the sexual conduct was consensual and the parties were of a similar age, a prosecution would not be commenced.
- 11.32 If a similar age defence is to be introduced in NSW, consideration as to the onus of proof is required. At common law, the accused generally bears the evidentiary onus of establishing the basis of a defence and the prosecution bears the onus of negating the defence beyond reasonable doubt. A similar age defence could operate analogously by placing the onus on the prosecution to rebut the defence, when raised, beyond a reasonable doubt. Another option is to legislatively reverse the onus, as was previously the case for the honest and reasonable mistake of age defence discussed earlier in this chapter (repealed section 77(2)). This would place the onus on the accused to establish the defence on the balance of probabilities.

Question

Q28. Should a statutory defence of similar age be enacted in NSW? If yes, how should it be framed?

267. Department of Attorney General and Justice, *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900*, October 2013.

268. Model Criminal Code Officers Committee of the Standing Committee of Attorney-Generals, *Model Criminal Code – Chapter 5: Sexual Offences Against the Person Report*, May 1999.

12. Decriminalising consensual ‘sexting’

In brief

The sharing of nude or sexually explicit messages and images is a common practice among young people. Although ‘sexting’ amongst young people is generally consensual and does not result in negative repercussions, it falls within the definition of ‘child abuse material’ and can result in children being charged, with long term ramifications.

‘Sexting’ in the current legal framework

- 12.1 Over the last few years there has been an integration of technology and social media by young people into their lives, including their personal and sexual relationships. The sharing of sexually explicit messages and images among young people has received much attention and has raised concerns that minors and young adults engaging in this behaviour may be charged with child pornography offences.
- 12.2 ‘Sexting’ is generally defined as the digital recording of nude or sexually suggestive or explicit images and their distribution by mobile phone messaging or through social media platforms such as Facebook, Instagram and Snapchat.²⁶⁹ The definition can sometimes extend to sexually explicit texts. It is an evolving term that encompasses a wide range of behaviours and practices.²⁷⁰

‘Sexting’ may fall within the scope of child abuse material

- 12.3 There are currently no legislative provisions specifically referring to ‘sexting’ in NSW. Under the current law the practice of ‘sexting’ may constitute an offence under sections 91G-91H if the sexually explicit image or text relates to a child under 16 years. For example, it is an offence for a child under 16 years to take or send a sexual explicit image of themselves. It is also an offence for another person to be in possession of such an image. While ‘sexting’ between persons aged 16 years and above is not criminalised by NSW child pornography provisions, such behaviour involving persons under 16 years, even if consensual, may constitute an offence relating to child abuse material.

Definition of child abuse material

- 12.4 The definition of child abuse material is contained in section 91FB of the *Crimes Act 1900* and is as follows:
- (1) In this Division:
- Child abuse material means material that depicts or describes, in a way that reasonable persons would regard as being, in all circumstances, offensive:
- (a) a person who is, appears to be or is implied to be, a child as a victim of torture, cruelty or physical abuse, or

269. Australian Institute of Criminology, *Sexting amount young people: Perceptions and practices*, Lee M, Crofts T, McGovern A, Milivojevic S, November 2015.

270. Law Reform Committee of Victoria 2013, *Inquiry into sexting*, Parliament of Victoria.

- (b) a person who is, appears to be or is implied to be, a child engaged in or apparently engaged in a sexual pose or sexual activity (whether or not in the presence of other persons), or
 - (c) a person who is, appears to be or is implied to be, a child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity, or
 - (d) the private parts of a person who is, appears to be or is implied to be, a child.
- (2) The matters to be taken into account in decision whether reasonable persons would regards particular material as being, in all circumstances, offensive, include:
- (a) the standards of morality, decency and propriety generally accepted by reasonable adults, and
 - (b) the literary, artistic or educational merit (if any) of the material, and
 - (c) the journalistic merit (if any) of the material, being the merit of the material as a record or report of a matter of public interest, and
 - (d) the general character of the material (including whether it is of a medical, legal or scientific character).
- (3) Material that depicts a person or the private parts of a person include material that depicts a representation of a person or the private parts of a person (including material that has been altered or manipulated to make a person appear to be a child or to otherwise create a depiction referred to in subsection (1)).
- (4) The private parts of a person are:
- (a) the person's genital area or anal area, or
 - (b) the breasts of a female person.
- 12.5 The legislation provides for offences relating to the production, dissemination and possession of such child abuse material.²⁷¹
- 12.6 For the purposes of these provisions, a child is defined as a person under the age of 16 years.²⁷²
- 12.7 There are two defences that could apply to the practice of 'sexting'. The first is if the accused could not have reasonably be expected to have known that they had produced, disseminated or possessed child abuse material, for example, because they believed that the child was 16 years or older.²⁷³ The second defence is if the material came into the accused's possession unsolicited and reasonable steps were taken to get rid of it.²⁷⁴

'Sexting' may involve the commission of other offences

- 12.8 'Commonwealth law provides for offences that would apply to 'sexting' behaviour by young people. In particular it is an offence to possess, control, produce, supply or obtain child pornography material or child abuse material by using a carriage or postal service.²⁷⁵ A child is defined as a person under 18 years. This would mean that it is lawful for two people aged 16 years to have consensual sexual intercourse, yet they would both be committing an offence if one sent the other a sexual image of themselves.

271. *Crimes Act 1900* (NSW) sections 91G-91H.

272. *Crimes Act 1900* (NSW) section 91FA.

273. *Crimes Act 1900* (NSW) section 91HA(1).

274. *Crimes Act 1900* (NSW) section 91HA(2).

275. *Criminal Code Act 1996* (Cth) sections 471.17-471.22, 474.19-474.24C.

- 12.9 'Sexting' may also constitute the offence of committing an act of indecency with or towards another person, or inciting someone else to engage in an indecent act.²⁷⁶ This offence applies where the victim is an adult or a child. There is a higher maximum penalty where the victim is below the age of 16 years. Sending a sexual explicit image may also constitute an offence of *grooming*.²⁷⁷ 'Sexting' behaviour was prosecuted under section 61N (*incite act of indecency*) of the *Crimes Act 1900* in the case of *DPP v Eades*.²⁷⁸ The matter involved a 13 year old complainant sending an image of her standing naked to the offender, who was aged 18 years at the time and had requested such an image.

Child Protection Register

- 12.10 Consensual 'sexting' by minors may result not only in a conviction for producing, disseminating or possessing child abuse material but also the possibility of registration on the Child Protection Register.²⁷⁹ However, if the accused is under 18 years, they will not be registered if they only committed a single offence under section 91H of *produce, disseminate or possess child abuse material* as a result of 'sexting' behaviour.²⁸⁰ The Parliamentary Committee on Children and Young People recently recommended the introduction of legislation to make appropriate exceptions to registration.²⁸¹

'Sexting' practices of young people and potential consequences

Prevalence of 'sexting' practices

- 12.11 Research indicates that 'sexting' is a common behaviour amongst young people. It is mostly done voluntarily and consensually.
- 12.12 The Australian Institute of Criminology conducted a study into the prevalence of 'sexting' amongst young people.²⁸² For the purposes of the survey, 'sexting' was defined as the sending and receiving of sexual images. The study found that 38% of respondents aged 13-15 years and 50% of respondents aged 16-18 years reporting having sent a sexual picture or video of themselves to another person. 62% of respondents aged 13-15 years and 70% of respondents aged 16-18 years had received a sexual image. The participants were asked about their motivations for sending an image of themselves. The most common answers were "to be fun/flirty", "because I received one", "as a sexy present" and "to keep them interested". The least common answers were "to fit in" and "pressure from friends". The data also indicated that 'sexting' was generally done with few 'sexting' partners and within a relationship.
- 12.13 A recent study examined the 'sexting' practices of students in years 10, 11 and 12.²⁸³ The study found that 54% of students had received, and 43% of students had sent, a sexually explicit text message. A sexually explicit image had been received by 42% of students and sent by 26% of students. 9% of students had sent a sexually explicit image of someone else and 22% had used social media for sexual reasons. Year 11 and 12 students were

276. *Crimes Act 1900* (NSW) section 61N.

277. *Crimes Act 1900* (NSW) section 66EB.

278. [2009] NSWSC 1352.

279. *Child Protection (Offenders Registration) Act 2000* (NSW) sections 3, 3A, 3D, 3E.

280. *Child Protection (Offenders Registration) Act 2000* (NSW) sections 3A(2)(c).

281. Committee on Children and Young People, *Sexualisation of Children and Young People*, Report 2/56, November 2016, recommendation 5.

282. Australian Institute of Criminology, *Sexting amount young people: Perceptions and practices*, Lee M, Crofts T, McGovern A, Milivojevic S, November 2015.

283. Patrick K, Heywood W, Pitts M, Mitchell A. Demographic and behavioural correlates of six sexting behaviours among Australian secondary school students. *Sexual Health* 2015; 12: 480-487.

significantly more likely to engage in 'sexting' than year 10 students. The study also found that 'sexting' was significantly associated with sexual behaviour and recreational substance use among both male and female students.

Harmful consequences of 'sexting'

- 12.14 While the majority of 'sexting' behaviour is voluntary and not detrimental to the parties involved, there can be instances that result in harm.
- 12.15 An image may be distributed beyond the initial intended recipient without consent of the person depicted in the image. This can lead to significant and ongoing harm including embarrassment, harassment and bullying. Young women are more likely than young men to suffer negative social consequences from redistribution of sexual images.²⁸⁴ It can also be used to propagate gender stereotypes and can amount to violence against women.
- 12.16 A young person may later regret sharing a sexually explicit image of themselves, even when this was initially done consensually. Unlike physical photographs, it is almost impossible to retrieve or destroy a digital image that has been shared. Such an image can be duplicated without any limitations and its onward distribution cannot be stopped. It can sexualise children and place undue pressure on them to engage in 'sexting'.²⁸⁵
- 12.17 Furthermore, images can be used or manipulated for the purposes of producing child pornography. In 2015 the Internet Watch Foundation conducted a study into the trends of online sexual content.²⁸⁶ The study examined 3,803 images and videos of nude or semi-nude young people aged 20 years or younger. It found that 89.9% of the images and videos assessed had been harvested from the original upload location and were redistributed by third party websites. All of the content assessed as depicting children aged 15 years or younger had apparently been harvested from its original upload location and collected on third party websites. In the majority of images young people took no steps to conceal their identity or location.
- 12.18 'Sexting' behaviour may involve the commission of a criminal offence. Although police discretion is generally being exercised in matters involving consensual 'sexting', there is a real risk of being prosecuted. A child under 16 years who takes an image or a video of themselves would have committed the offence of producing child abuse material. Sending that image would involve dissemination of child abuse material and the saving of the image by the recipient would be possession of child abuse material. These offences carry a maximum penalty of 10 years imprisonment.²⁸⁷ A conviction for such an offence may have long term consequences. It may involve a child being placed on the Child Protection Register, as discussed above. It can also deter children from reporting non-consensual dissemination of images that they voluntarily provided for fear of being prosecuted themselves.

'Revenge porn'

- 12.19 The Government has introduced legislation to criminalise the non-consensual distribution of intimate images, commonly known as 'revenge porn' or image based abuse. The Crimes Amendment (Intimate Images) Bill 2017 will make it an offence to intentionally record or distribute an intimate image of another person without their consent. It will also make it an offence to threaten to record an intimate image without consent. These offences will be

284. Law Reform Committee of Victoria 2013, *Inquiry into sexting*, Parliament of Victoria.

285. Law Reform Committee of Victoria 2013, *Inquiry into sexting*, Parliament of Victoria.

286. Internet Watch Foundation, *Emerging Patterns and Trends Report #1: Online-Produced Sexual Content*, 10 March 2015.

287. *Crimes Act 1900* (NSW) section 91H(2).

punishable by maximum penalties of imprisonment for three years, or a fine of 100 penalty units, or both.

- 12.20 The legislation specifies that a child under 16 years cannot consent to the recording or distribution of an intimate image. This approach was taken in the Bill for consistency with the current law in NSW for other child sexual offences.
- 12.21 The offences will not apply to a child under 16 years who takes and sends an intimate image of themselves to another person. However, the offences will apply to a person who records an intimate of a child under 16 years, or who distributes an image they have been sent by a child under 16 years. To prevent the new offences over-criminalising activity between children, the Director of Public Prosecutions will be required to approve any prosecution of a child under 16 years for one of these offences. The new offences apply in addition to existing State offences and Commonwealth telecommunications offences.

Other jurisdictions

- 12.22 All Australian jurisdictions have laws criminalising the production, dissemination and possession of child pornography material. The definition of a child in relation to child pornography material varies across jurisdictions. In NSW, Queensland and Western Australia the material must relate to a child who is, or who appears to be, under 16 years. In South Australia the material must relate to a child who is, or appears to be, under 17 years. In the Commonwealth, ACT, Northern Territory, Tasmania and Victoria the material must relate to a child who is, or appears to be, under 18 years.
- 12.23 All jurisdictions have defences available for child pornography offences if the conduct was of public benefit and was necessary for purposes such as law enforcement or scientific research.
- 12.24 Only Victoria has introduced specific defences to child pornography offences with the intention of decriminalising certain 'sexting' activities. Tasmania has a defence for child pornography that was not introduced with 'sexting' in mind, but could nevertheless have the effect of decriminalising certain 'sexting' behaviour.

Victoria

- 12.25 In Victoria, under sections 68-70 of the *Crimes Act 1958* (Vic) it is a crime to produce, procure or possess child pornography. A child under the legislation is defined as a person under 18 years.²⁸⁸ In 2014 Victoria introduced the specific exceptions to child pornography offences for 'sexting' by young people under 18 years, which are contained in section 70AAA of the *Crimes Act 1958* (Vic).²⁸⁹ It covers a selection of circumstances involving consensual 'sexting'. It also covers situations where the child is the victim of child pornography offences.
- 12.26 Child pornography offences do not apply to an accused person under 18 years in the following circumstances:
- the pornographic image is of themselves alone or with an adult;
 - the pornographic image is of themselves and another minor where the age difference is less than two years and it does not depict a criminal offence;
 - the pornographic image depicts a criminal offence where they are the victim; or

288. *Crimes Act 1958* (Vic) section 67A.

289. See Appendix B for the full version of the section.

- the pornographic image does not depict a crime and the accused is less than two years older than the youngest minor depicted in the image.

Tasmania

- 12.27 In Tasmania, it is an offence to produce, distribute, possess or access child exploitation material or involve a child under 18 years in the production of child exploitation material.²⁹⁰
- 12.28 A defence to child pornography offences is available where child pornography material depicts sexual activity between the accused and a child under 18 years that is not an unlawful sexual act.²⁹¹ While this defence was not introduced with 'sexting' in mind, it may nevertheless apply to certain 'sexting' behaviour.
- 12.29 Under the *Criminal Code Act 1924* (Tas), there are a number of age-based defences to crimes of unlawful sexual intercourse and indecent act with someone under 17 years. Consent is a defence to these charges where the complainant is 15 years or over and the perpetrator is no more than 5 years older or where the complainant is 12 years or over and the perpetrator is no more than 3 years older.²⁹² Accordingly, a person who is charged with a child pornography offence for a photo that depicts consensual sexual activity within these parameters can raise the defence that the depicted act is not unlawful. However, this defence would only apply to depictions of sexual intercourse and thus may not apply to images depicting 'naked selfies', which is a common form of 'sexting' material.

Options for reform

- 12.30 There is evidence to suggest that the majority of young people who engage in 'sexting' activities do so voluntarily, consensually and with few 'sexting' partners.²⁹³ These findings suggest that the majority of 'sexting' occurs without negative consequences and within existing relationships. However, such behaviour is not without its risks. Children could be subjected to ridicule or peer pressure and the images may be used by unintended recipients to produce child abuse material.
- 12.31 Young people may be prosecuted for engaging in consensual 'sexting' activities. While police may use their discretion not to prosecute in most instances, there is nevertheless a conflict between the law and current practices of young people. There remains the real possibility that a child may be charged and convicted of child abuse material offences or the new intimate images offences, with long lasting consequences. Children and young people may need education about the practice of 'sexting' and the law concerning child abuse material, intimate image offences and indecent acts.²⁹⁴
- 12.32 The law in relation to child abuse material is designed to protect children from sexual exploitation. To prosecute children for creating or sharing consensual sexually explicit images, videos and texts of themselves to prevent such material from being used for child pornography purposes may be akin to victim blaming. It does not protect children but rather makes children who may become victims of child pornography vulnerable to prosecution.

290. *Criminal Code Act 1924* (Tas) sections 130-130D.

291. *Criminal Code Act 1924* (Tas) section 130E(2).

292. *Criminal Code Act 1924* (Tas) sections 124(3), 125B(3).

293. Australian Institute of Criminology, *Sexting amount young people: Perceptions and practices*, Lee M, Crofts T, McGovern A, Milivojevic S, November 2015.

294. National Children's and Youth Law Centre, *New Voices/New Laws*, November 2012.

The Parliamentary Committee on Children and Young People “considers that education provides the best means to prevent such non-consensual sharing of images”.²⁹⁵

- 12.33 There is no doubt that prosecutions and the law should continue to target non-peers and those who create, possess or distribute images of children without their consent. However, there exists a strong argument in favour of the introduction of defences or exceptions to child abuse material offences and potentially the new intimate image offences in the context of ‘sexting’. This would acknowledge that the practice of age appropriate ‘sexting’ is distinct from child pornography offences, which the legislation was originally introduced to target.²⁹⁶

Question

Q29. Should NSW introduce a defence to decriminalise consensual ‘sexting’ involving persons under 16 years? If yes, how should the defence work?

295. Committee on Children and Young People, *Sexualisation of Children and Young People*, Report 2/56, November 2016 at p 54.

296. National Children’s and Youth Law Centre, *New Voices/New Laws*, November 2012.

13. SNPP for indecent assault offences

In brief

A standard non-parole period is prescribed for many child sexual abuse offences. While the majority of these standard non-parole periods represent about half of the maximum penalty, the offence of *indecent assault of child under 16 years* departs from this ratio and has received much criticism.

- 13.1 This chapter outlines the maximum penalties and applicable standard non-parole periods (SNPP) available for child sexual assault offences, with particular emphasis on the SNPP for *indecent assault of child under 16 years*. The chapter focuses on the SNPP for this offence as it has been the subject of extensive criticism. The information on SNPPs for other offences is included for the purposes of completeness. Examination of these SNPPs and sentencing options for child sexual abuse more generally is beyond the scope of this discussion paper.

SNPPs for child sexual assault offences

- 13.2 The legislation requires a court to set a non-parole period when imposing a sentence of imprisonment greater than six months.²⁹⁷ The non-parole period represents the minimum period of time the offender must be kept in custody in relation to the offence.²⁹⁸ The balance of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court find special circumstances.²⁹⁹ This is commonly referred to as the 'statutory ratio' and effectively requires that the non-parole period represent 75% of the total term of imprisonment unless there is a finding of special circumstances.
- 13.3 A SNPP is taken to represent the non-parole period for an offence in the mid-range of objective seriousness.³⁰⁰ It only applies to offenders who are convicted after trial.³⁰¹ It does not apply to offenders being sentenced for offences they committed when they were under the age of 18 years.³⁰² The court may depart from the SNPP if it is appropriate.
- 13.4 The table below lists the maximum penalty and applicable SNPP for child sexual abuse offences. It also includes the ratio of the SNPP to the maximum penalty.

Table 7.1: Maximum penalties and standard non-parole periods (SNPP)

Section	Offence	Maximum Penalty	SNPP	Ratio
61J(2)(d)	Sexual intercourse without consent with child under 16	20 years	10 years	50%
61M(2)	Indecent assault of child under 16	10 years	8 years	80%

297. *Crimes (Sentencing Procedure) Act 1999* (NSW) sections 44, 46.

298. *Crimes (Sentencing Procedure) Act 1999* (NSW) section 44(1).

299. *Crimes (Sentencing Procedure) Act 1999* (NSW) section 44(2).

300. *Crimes (Sentencing Procedure) Act 1999* (NSW) section 54A.

301. *R v Way* (2004) 60 NSWLR 168 at [71].

302. *Crimes (Sentencing Procedure) Act 1999* (NSW) section 54D(3).

66A	Sexual intercourse with child under 10	Life	15 years	15 years / life
66B	Attempt, or assault with intent, to have sexual intercourse with child under 10	25 years	10 years	40%
66C(1)	Sexual intercourse with child aged 10-13	16 years	7 years	44%
66C(2)	Sexual intercourse with child aged 10-13 in circumstances of aggravation	20 years	9 years	45%
66C(4)	Sexual intercourse with child aged 14-15 in circumstances of aggravation	12 years	5 years	42%
66EB(2)(a)	Procuring a child under 14 for unlawful sexual activity	15 years	6 years	40%
66EB(2)(b)	Procuring a child aged 14-15 for unlawful sexual activity	12 years	5 years	42%
66EB(2A)(a)	Meet or travel to meet a child under 14 who has been groomed with the intention to procuring the child for unlawful sexual activity	15 years	6 years	40%
66EB(2A)(b)	Meet or travel to meet a child aged 14-15 who has been groomed with the intention to procuring the child for unlawful sexual activity	12 years	5 years	42%
66EB(3)(a)	Expose child under 14 to indecent material or provide intoxicating substance with the intention of making it easier to procure the child for unlawful sexual activity	12 years	5 years	42%
66EB(3)(b)	Expose child aged 14-15 to indecent material or provide intoxicating substance with the intention of making it easier to procure the child for unlawful sexual activity	10 years	4 years	40%
91D	Cause, or participate as a client with, a child under 14 in an act of child prostitution	14 years	6 years	43%
91E	Obtain benefit from an act of child prostitution where child under 14	14 years	6 years	43%
91G(1)	Use, cause or allow child under 14 to produce child abuse material	14 years	6 years	43%

Problems with SNPP for indecent assault of child under 16 years

- 13.5 It can be seen from the above table that the ratio of SNPP to maximum penalty for the majority of child sexual abuse offences is between 40% and 50%. Only the offence of *indecent assault of child under 16 years* stands out in stark contrast to this, with a ratio of 80%. This offence has a maximum penalty of imprisonment of 10 years, which is reserved for the worst category.
- 13.6 Consider a hypothetical situation where a sentencing court finds that an offence falls within the worst category and imposes a total term of 10 years imprisonment. The starting point for the non-parole period is 7 years and 6 months, which can be reduced if there is a finding of special circumstances.³⁰³ The court can impose a longer non-parole period, however, this would be unusual. Even for an offence failing in the highest range of objective seriousness, it is difficult for a court to impose a non-parole period of 8 years.

303. *Crimes (Sentencing Procedure) Act 1999* (NSW) section 44.

- 13.7 For the court to impose the standard non-parole period of 8 years, the total term would be 10 years and 8 months imprisonment, unless there was a variation to the statutory ratio. Where an offence falls within the mid-range of objective seriousness it is difficult to envisage how a court could impose a non-parole period of 8 years imprisonment.
- 13.8 In the three year period from April 2013 to March 2016, the average prison sentence for the offence of *indecent assault of child under 16 years* has ranged 12.5 months to 17.6 months.³⁰⁴ During the same period no sentence above 7 years imprisonment was imposed and only one person was sentenced to imprisonment for 6-7 years for the offence.³⁰⁵
- 13.9 It should be noted that the offence of *indecent assault* of a child under 16 years carries a higher SNPP than the objectively more serious offences of *sexual intercourse with child between 10 and 13 years* (section 66C(1)) and *aggravated sexual intercourse with child between 14 and 15 years* (section 66C(4)).
- 13.10 The judiciary has been critical of standard non-parole periods that approach the maximum penalty.³⁰⁶
- 13.11 In 2008, the NSW Sentencing Council recommended that the SNPPs for sexual offences be consistently set within a narrow range of 40-60% of the maximum penalty.³⁰⁷ More recently in 2013, the NSW Sentencing Council recommended that SNPPs for each offence be set using a common starting point of 37.5% of the maximum penalty and the figure be moved up or down as appropriate but not exceeding a ratio of 50%.³⁰⁸ It further recommended that for the offence of *indecent assault of child under 16 years* the maximum penalty be increased to 12 years and the SNPP reduced to 5 years (50% ratio).³⁰⁹

Question

Q30. Should the recommendation of the NSW Sentencing Council be adopted to increase the maximum penalty to 12 years and reduce the standard non-parole period to 6 years for the offence of *indecent assault of child under 16 years*?

304. Source: NSW Bureau of Crime Statistics and Research, reference: sr16-14318.

305. Source: NSW Bureau of Crime Statistics and Research, reference: sr16-14318.

306. For example, *R v Dagwell* [2006] NSWCCA 98; *Corby v R* [2010] NSWCCA 146; *R v Stoupe* [2015] NSWCCA 175.

307. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Volume 1, August 2008.

308. NSW Sentencing Council, *Standard Non-Parole Periods*, December 2013, Recommendation 4.1.

309. NSW Sentencing Council, *Standard Non-Parole Periods*, December 2013, Recommendation 4.2.

Appendix A: Table of child sexual offences

Table 1: Child sexual offences under the *Crimes Act 1900 (NSW)*³¹⁰

(The age ranges below are inclusive)

Section	Offence	Maximum Penalty
61J(2)(d)	Sexual intercourse without consent with child under 16	20 years
61M(2)	Indecent assault of child under 16	10 years
61N(1)	Commit or incite act of indecency with child under 16	2 years
61O(1)	Commit or incite act of indecency with child under 16 in circumstances of aggravation	5 years
61O(2)	Commit or incite act of indecency with child under 10	7 years
61O(2A)	Commit or incite act of indecency with child under 16 while knowingly being filmed for the purpose of production of child abuse material	10 years
61P	Attempt to commit an offence under section 61J, 61M, 61N or 61O	Same as substantive offence
66A	Sexual intercourse with child under 10	Life
66B	Attempt, or assault with intent, to have sexual intercourse with child under 10	25 years
66C(1)	Sexual intercourse with child aged 10-13	16 years
66C(2)	Sexual intercourse with child aged 10-13 in circumstances of aggravation	20 years
66C(3)	Sexual intercourse with child aged 14-15	10 years
66C(4)	Sexual intercourse with child aged 14-15 in circumstances of aggravation	12 years
66D	Attempt, or assault with intent, to commit an offence under 66C	Same as substantive offence
66EA	Persistent sexual abuse of child under 18	25 years
66EB(2)(a)	Procuring a child under 14 for unlawful sexual activity	15 years
66EB(2)(b)	Procuring a child aged 14-15 for unlawful sexual activity	12 years
66EB(2A)(a)	Meet or travel to meet a child under 14 who has been groomed with the intention to procuring the child for unlawful sexual activity	15 years
66EB(2A)(b)	Meet or travel to meet a child aged 14-15 who has been groomed with the intention to procuring the child for unlawful sexual activity	12 years
66EB(3)(a)	Expose child under 14 to indecent material or provide intoxicating substance with the intention of making it easier to procure the child for unlawful sexual activity	12 years
66EB(3)(b)	Expose child aged 14-15 to indecent material or provide intoxicating substance with the intention of making it easier to procure the child for unlawful sexual activity	10 years

310. The *Crimes Act 1900* can be found on the NSW Government legislation website: <http://www.legislation.nsw.gov.au/#/view/act/1900/40>.

73(1)	Sexual intercourse with child aged 16 who is under care	8 years
73(2)	Sexual intercourse with child aged 17 who is under care	4 years
73(4)	Attempt to commit an offence under 73	Same as substantive offence
78A	Sexual intercourse with close family member aged 16 or above	8 years
78B	Attempt to commit an offence under 78A	2 years
80A(2A)	Compel child under 16 to engage in self-manipulation by threat	20 years
80D(2)	Cause sexual servitude of a child under 18	20 years
80E(2)	Conduct business involving sexual servitude of child under 18	19 years
80G	Incite a person to commit a sexual assault offence	Same as substantive offence
91D	Cause, or participate as a client with, a child under 14 in an act of child prostitution	14 years
91D	Cause, or participate as a client with, a child aged 14-17 in an act of child prostitution	10 years
91E	Obtain benefit from an act of child prostitution where child under 14	14 years
91E	Obtain benefit from an act of child prostitution where child aged 14-17	10 years
91F	Premises used for child prostitution	7 years
91G(1)	Use, cause or allow child under 14 to produce child abuse material	14 years
91G(2)	Use, cause or allow child aged 14-15 to produce child abuse material	10 years
91H	Produce, disseminate or possess child abuse material	10 years
91J(4)(a)	For sexual arousal or gratification observes child under 16 in private act without their consent	5 years
91J(6)	Attempt to commit an offence under 91J(4)(a)	5 years
91K(4)(a)	For sexual arousal or gratification films child under 16 in private act without their consent	5 years
91K(6)	Attempt to commit an offence under 91K(4)(a)	5 years
91L(4)(a)	For sexual arousal or gratification films private parts of child under 16 without their consent	5 years
91L(6)	Attempt to commit an offence under 91L(4)(a)	5 years

Appendix B: Victorian offence of failing to report child sexual abuse

Crimes Act 1958 (Vic)

Section 327: Failure to disclose sexual offence committed against child under the age of 16 years

(1) In this section—

"interests" includes reputation, legal liability and financial status;

"organisation" includes a body corporate or an unincorporated body or association, whether the body or association—

- (a) is based in or outside Australia; or
- (b) is part of a larger organisation;

"sexual offence "means—

- (a) an offence under Subdivision (8A), (8B), (8C), (8D), (8E) or (8EAA) of Division 1 of Part I or under any corresponding previous enactment; or
- (b) an attempt to commit an offence referred to in paragraph (a); or
- (c) an assault with intent to commit an offence referred to in paragraph (a).

(2) Subject to subsections (5) and (7), a person of or over the age of 18 years (whether in Victoria or elsewhere) who has information that leads the person to form a reasonable belief that a sexual offence has been committed in Victoria against a child under the age of 16 years by another person of or over the age of 18 years must disclose that information to a police officer as soon as it is practicable to do so, unless the person has a reasonable excuse for not doing so.

Penalty: 3 years imprisonment.

(3) For the purposes of subsection (2) and without limiting that subsection, a person has a reasonable excuse for failing to comply with that subsection if—

- (a) the person fears on reasonable grounds for the safety of any person (other than the person reasonably believed to have committed, or to have been involved in, the sexual offence) were the person to disclose the information to police (irrespective of whether the fear arises because of the fact of disclosure or the information disclosed) and the failure to disclose the information to police is a reasonable response in the circumstances; or
- (b) the person believes on reasonable grounds that the information has already been disclosed to police by another person and the first mentioned person has no further information.

Example

A person may believe on reasonable grounds that the information has already been disclosed to police by another person if the person has made a report disclosing all of the information in his or her possession in compliance with mandatory reporting obligations under the *Children, Youth and Families Act 2005*.

- (4) For the purposes of subsection (2) and without limiting that subsection, a person does not have a reasonable excuse for failing to comply with that subsection only because the person is concerned for the perceived interests of—
- (a) the person reasonably believed to have committed, or to have been involved in, the sexual offence; or
 - (b) any organisation.
- (5) A person does not contravene subsection (2) if—
- (a) the information forming the basis of the person's belief that a sexual offence has been committed came from the victim of the alleged offence, whether directly or indirectly; and
 - (b) the victim was of or over the age of 16 years at the time of providing that information to any person; and
 - (c) the victim requested that the information not be disclosed.
- (6) Subsection (5) does not apply if—
- (a) at the time of providing the information, the victim of the alleged sexual offence—
 - (i) has an intellectual disability (within the meaning of the *Disability Act 2006*); and
 - (ii) does not have the capacity to make an informed decision about whether or not the information should be disclosed; and
 - (b) the person to whom the information is provided is aware, or ought reasonably to have been aware, of those facts.
- (7) A person does not contravene subsection (2) if—
- (a) the person comes into possession of the information referred to in subsection (2) when a child; or
 - (b) the information referred to in subsection (2) would be privileged under Part 3.10 of Chapter 3 of the *Evidence Act 2008*; or
 - (c) the information referred to in subsection (2) is a confidential communication within the meaning of section 32B of the *Evidence (Miscellaneous Provisions) Act 1958*; or
 - (d) the person comes into possession of the information referred to in subsection (2) solely through the public domain or forms the belief referred to in subsection (2) solely from information in the public domain; or
 - (e) the person is a police officer acting in the course of his or her duty in respect of the victim of the alleged sexual offence; or
 - (f) the victim of the alleged sexual offence has attained the age of 16 years before the commencement of section 4 of the *Crimes Amendment (Protection of Children) Act 2014*.

Appendix C: Victorian exception to ‘sexting’

Crimes Act 1958 (Vic)

Section 70AAA: Exceptions to certain child pornography offences

- (1) Sections 68, 69 and 70 do not apply to a minor (A) if—
 - (a) the child pornography is an image; and
 - (b) the image depicts A alone or with an adult; and
 - (c) the image is child pornography because of its depiction of A.
- (2) Sections 68, 69 and 70 do not apply to a minor (A) if—
 - (a) the child pornography is an image; and
 - (b) the image depicts A with another minor; and
 - (c) the image is child pornography because of its depiction of A or another minor; and
 - (d) where the image is child pornography because of its depiction of a minor other than A, at the time at which the offence is alleged to have been committed—
 - (i) A is not more than 2 years older than the youngest minor whose depiction in the image makes it child pornography; or
 - (ii) A believes on reasonable grounds that they are not more than 2 years older than the youngest minor whose depiction in the image makes it child pornography; and
 - (e) the image does not depict an act that is a criminal offence punishable by imprisonment.

Example

The image depicts the minor (A) taking part in an act of sexual penetration with another minor who is not more than 2 years younger. Both are consenting to the act. The offences in sections 68, 69 and 70 do not apply to A in respect of the image.

- (3) Sections 68, 69 and 70 do not apply to a minor (A) if—
 - (a) the child pornography is an image; and
 - (b) the image depicts A alone or with another person; and
 - (c) the image depicts an act that is a criminal offence; and
 - (d) A is a victim of that offence.

Example

The image depicts the minor (A) being raped by another person. The offences in sections 68, 69 and 70 do not apply to A in respect of the image.

- (4) Sections 68, 69 and 70 do not apply to a minor (A) if—
 - (a) the child pornography is an image; and
 - (b) the image does not depict A; and
 - (c) the image—
 - (i) does not depict an act that is a criminal offence punishable by imprisonment;
 - or

- (ii) depicts an act that is a criminal offence punishable by imprisonment but A believes on reasonable grounds that it does not; and
- (d) at the time at which the offence is alleged to have been committed—
 - (i) A is not more than 2 years older than the youngest minor whose depiction in the image makes it child pornography; or
 - (ii) A believes on reasonable grounds that they are not more than 2 years older than the youngest minor whose depiction in the image makes it child pornography.

Example

The image depicts a minor being sexually penetrated. A believes on reasonable grounds that they are not more than 2 years older than the minor is at the time at which the image is produced. The offences in sections 68, 69 and 70 do not apply to A in respect of the image.

- (5) In subsection (4)—
 - (a) a reference to the age of the youngest minor whose depiction in the image makes it child pornography is—
 - (i) in relation to an offence against section 68 or 70—a reference to the age of that minor at the time at which the image was made or produced;
 - (ii) in relation to an offence against section 69—a reference to the age of that minor at the time at which the minor was invited, procured, caused or offered to be in any way concerned in the making or production of the image; and
 - (b) a reference to the image, in relation to an offence against section 69, is a reference to the image that A invites, procures, causes or offers the minor to be in any way concerned in its making or production.
- (6) In subsections (2) and (4), a reference to the time at which the offence is alleged to have been committed, in relation to an offence against section 70, is a reference to the time at which A first knowingly possesses the image.
- (7) The accused bears the burden of proving (on the balance of probabilities) the matter referred to in subsection (2)(d)(ii) or (4)(c)(ii) or (d)(ii).

Note

Section 72 of the Criminal Procedure Act 2009 applies to subsections (1), (2) (other than paragraph (d)(ii)), (3) and (4) (other than paragraphs (c)(ii) and (d)(ii)).