



# Maximum Penalties for Sexual Penetration with a Child under 16 Report

Published by the Sentencing Advisory Council  
Melbourne Victoria Australia.

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ISBN 978-1-921100-45-1 (Print)  
978-1-921100-46-8 (Online)

Also published on [www.sentencingcouncil.vic.gov.au](http://www.sentencingcouncil.vic.gov.au)

Authorised by the Sentencing Advisory Council  
4/436 Lonsdale Street, Melbourne

Printed by BigPrint, 50 Lonsdale Street, Melbourne

The publications of the Sentencing Advisory Council follow the Melbourne University Law Review Association Inc *Australian Guide to Legal Citation* (2nd ed, 2002).

Printed on recycled paper  
ISO 14001 environmental management system in place.

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The Council would like to thank all of those who made submissions and attended meetings in relation to this reference. The Council would also like to thank the following people for their assistance in the preparation of this report: Julie Bransden, Prue Boughey, Jenni Coady, Karen Gelb, Catherine Jeffreys, the staff of the Department of Justice Library, Karen Hogan, Nina Hudson and Stuart Ross.



# Executive Summary

## Terms of reference

On 17 December 2008 the Attorney-General wrote to the Sentencing Advisory Council ('the Council') seeking its advice on the adequacy of the maximum penalties that currently apply to the offence of sexual penetration with a child under the age of 16.<sup>1</sup> The Attorney-General requested that the Council have regard to the three circumstances in which this offence can be committed and advise on the adequacy of each currently applicable maximum penalty.

The Attorney-General noted that this reference may require a consideration of current sentencing practices and the surrounding legislative framework of offences and penalties for relevant sexual offences against children.

## The offence of sexual penetration with a child under the age of 16

The offence of taking part in an act of sexual penetration with a child under the age of 16 is found in section 45 of the *Crimes Act 1958* (Vic) which states:

- (1) A person who takes part in an act of sexual penetration with a child under the age of 16 is guilty of an indictable offence.
- (2) A person who is guilty of an offence against subsection (1) is liable –
  - (a) if the court is satisfied beyond reasonable doubt that the child was, at the time of the offence, under the age of 10, to level 2 imprisonment (25 years maximum); or
  - (b) if the court is satisfied beyond reasonable doubt that the child was, at the time of the offence, aged between 10 and 16 and under the care, supervision or authority of the accused, to level 4 imprisonment (15 years maximum); or
  - (c) in any other case, to level 5 imprisonment (10 years maximum).

This penalty structure means that in circumstances where the prosecution proves beyond a reasonable doubt that a child victim was under the age of 10 or was under the care, supervision or authority (CSA) of the offender at the time of the offence,<sup>2</sup> the applicable maximum penalty increases from 10 years to 25 or 15 years respectively. These circumstances are known as 'statutory aggravating factors' and indicate that Parliament considers the seriousness of offences committed in these circumstances to be higher than in the absence of such aggravating factors.

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1 Letter from the Attorney-General, the Hon. Rob Hulls, MP, to Professor Arie Freiberg, 17 December 2008.

2 Or, in the case where an offender pleads guilty, where he or she accepts that the child was relevantly aged under 10 or under the care, supervision or authority of the offender.

## Context of the reference

The adequacy of the maximum penalties for this offence was the subject of media comment in the context of a County Court case involving the sexual penetration of a child who had turned 10 years of age two weeks prior to the commission of the offence.<sup>3</sup> In *R v Maurice*,<sup>4</sup> the fact that the child was over the age of 10 meant that the available maximum penalty was 10 years imprisonment. If the offence had been committed two weeks earlier, when the child was under 10 years of age, the applicable maximum penalty would have been 25 years imprisonment. This case attracted attention because of the 15 year difference between the maximum penalties applying to offences committed against children under 10, and those where the victim is between 10 and 16.<sup>5</sup>

## Current sentencing practices

In his terms of reference, the Attorney-General noted that the Council may need to have regard to current sentencing practices for the offence of sexual penetration with a child under 16 in order to assess the adequacy of the current maximum penalties for this offence. Though it is not the primary purpose of this report to comment on the adequacy of current sentencing practices, the Council's consultations revealed that, while some people did not consider that the maximum penalties for this offence were inadequate, an overwhelming majority thought that sentences imposed for offences involving the sexual penetration of children were low, or even inadequate, in relation to the existing maximum penalties. The Victorian Court of Appeal has recently commented that 'a real question arises as to the adequacy of current sentencing for [these] offence[s] ... [and] that is a matter of first importance to the administration of criminal justice in this State'.<sup>6</sup>

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- 3 *R v Maurice* [2009] VCC (Unreported, Lacava J, 14 October 2008). The offender in this case also pleaded guilty to aggravated burglary, which carries a maximum penalty of 25 years imprisonment: *Crimes Act 1958* (Vic) s 77. He was sentenced to a total effective term of imprisonment of 9 years with a non-parole period of 7 years.
  - 4 *R v Maurice* [2009] VCC (Unreported, Lacava J, 14 October 2008).
  - 5 See for example, Kellie Cameron, 'Sex attack law under review after court case', *Herald Sun* (Melbourne), 15 October 2008; Norrie Ross, 'Sex fiend rethink by Rob Hulls and Sentencing Advisory Council', *Herald Sun* (Melbourne), 16 October 2008.
  - 6 *DPP v DDJ* [2009] VSCA 115 (Unreported, Maxwell P, Vincent and Neave JJA, 28 May 2009) [72]. This case related to the offence of maintaining a sexual relationship with a child under the age of 16 (now renamed 'persistent sexual abuse of a child under the age of 16': see *Crimes Act 1958* (Vic) s 47A). In a judgment handed down on the same day, the Court made similar comments in relation to sentencing practices for the offence of sexual penetration with a child under 10: *DPP v CPD* [2009] VSCA 114 (Unreported, Maxwell P, Redlich JA and Robson AJA, 28 May 2009) [68].

The Council's analysis of statistics relevant to the sentencing of people convicted of the offence of sexual penetration with a child under 16 shows that over the period 2006–07 to 2007–08, the average term of imprisonment for:

- an individual charge of sexual penetration (child under 10) was 3.3 years (maximum penalty is 25 years);
- an individual charge of sexual penetration (care, supervision or authority) was 3.6 years (maximum penalty is 15 years); and
- an individual charge of sexual penetration (aged between 10–16) was 2.3 years (maximum penalty is 10 years).<sup>7</sup>

The average total effective imprisonment sentence for each of these offences was higher, with average terms of imprisonment of 6.7 years, 8.8 years and 4.2 years respectively being imposed.

A number of those consulted by the Council argued that sentences imposed for offences involving the sexual penetration of children, both in terms of sentences given for individual charges and for the total imprisonment sentences, were too low when considered in the context of the inherent seriousness of child sex offences and the relevant maximum penalties. These views were expressed by victims of crime, victim support organisations and police,<sup>8</sup> and were informed by first-hand knowledge and experience and by reference to the sentencing statistics produced by the Council.<sup>9</sup>

Although recognising that an increase in a statutory maximum penalty is generally considered to be an indication by Parliament that longer sentences should be imposed,<sup>10</sup> the Council does not believe that increasing the statutory maximum penalties would have a significant effect on current sentencing practices for the offence of sexual penetration with a child under 16. Raising the maximum penalties may only marginally, if at all, increase sentences imposed for the offence. The current maximum penalties were not considered to be inadequate by many people consulted for this reference.

7 Sentencing Advisory Council, *Sentencing for Sexual Penetration Offences: A Statistical Report* (2009) 14.

8 Submission 3 (R. Marks); Submission 12 (Bravehearts); Submission 18 (South Western Centre Against Sexual Assault); Submission 21 (Women's Legal Service Victoria); Submission 22 (B. Bull); Victim Issues Roundtable (6 April 2009); Meeting with parents of a child victim of sexual assault (9 April 2009); Meeting with Frankston SOCIT (6 May 2009); Meeting with West CASA (22 April 2009); Meeting with Ballarat CASA (21 May 2009).

9 The potential limitations of sentencing data are discussed further at Chapter 5 of this report.

10 Meeting with County Court judges (14 May 2009). See also *R v AB* (No. 2) (2008) 18 VR 391, 406; *DPP v Aydin & Kirsch* [2005] VSCA 86 (Unreported, Callaway, Buchanan and Eames JJA, 3 May 2005) [10]–[12] (Callaway JA) as to the different factors relevant to the significance of an increased maximum.

The Council is of the view that recent judgments by the Court of Appeal in relation to current sentencing practices for the offence of sexual penetration with a child under 16 may be more effective in changing sentencing practices than changes in statutory maximum penalties.<sup>11</sup> The *Sentencing Act 1991* (Vic) contains provisions relating to guideline judgments that have not been used to date, and the Council considers that the development of a guideline judgment in relation to the offence of sexual penetration with a child under 16 could also be a more effective method of addressing the issue of low sentencing practices in relation to this offence.

The Council does, however, recommend that the 'lower' age for this offence be raised from 'under 10' to 'under 12'. Although any aged-based legal definition is problematic and to some extent arbitrary, the majority of people consulted considered that limiting the application of the higher maximum penalty of 25 years imprisonment to children aged under 10 did not reflect the inherent vulnerability of pre-teen children. The Council agrees with this view, and has recommended that the lower age limits applying to the offence of sexual penetration with a child under 16 be raised to include children aged 10 and 11. This recommendation is discussed further at Chapter 7 of this report.

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11 *DPP v DDJ* [2009] VSCA 115 (Unreported, Maxwell P, Vincent and Neave JJA, 28 May 2009) [71]–[72]; *DPP v CPD* [2009] VSCA 114 (Unreported, Maxwell P, Redlich JA and Robson AJA, 28 May 2009) [68].

## Recommendations

The Council makes the following recommendations.

The Council considers that the current maximum penalties for the offence of sexual penetration with a child under 16 are adequate and do not require amendment (**Recommendation 1**).

However, the Council recommends that:

- the statutory aggravating factor of 'sexual penetration with a child under 10' should be changed to '*sexual penetration with a child under 12*'.
- the statutory aggravating factor of 'sexual penetration with a child aged between 10 and 16 and under the care, supervision or authority of the offender' should be changed to '*sexual penetration with a child aged between 12 and 16 and under the care, supervision or authority of the offender*'.
- the non-aggravated form of the offence of 'sexual penetration with a child aged between 10 and 16' should be changed to '*sexual penetration with a child aged between 12 and 16*' (**Recommendation 2**).

This would result in the following offence structure:

Offence	Maximum Penalty
Sexual penetration with a child under 12	25 years imprisonment
Sexual penetration with a child aged between 12 and 16 and under the care, supervision or authority of the offender	15 years imprisonment
Sexual penetration with a child aged between 12 and 16	10 years imprisonment



# Chapter 1: Introduction





## Scope of the reference

- I.5 This reference is confined to an examination of the maximum penalties for the offence of sexual penetration with a child under 16. However, it is acknowledged that sexual offences in general raise a number of complex issues. Many of the people consulted for this reference noted the significant difficulties in the identification, investigation and prosecution of these offences. Rates of reporting are low, and there is a relatively low rate of prosecution.<sup>12</sup> For those cases that do come before a court, both plea and conviction rates are lower than for other criminal offences.<sup>13</sup> Further, the experiences of sexual assault victims involved in the criminal justice process have often been very negative.<sup>14</sup> These experiences are particularly compounded where the victim is a child.
- I.6 Many of these issues have been discussed in previous policy reviews, most notably in the Victorian Law Reform Commission's 2004 *Sexual Offences: Law and Procedure Final Report* ('VLRC Final Report'). This report highlighted many of the difficulties faced in the policing and prosecution of sexual offences.<sup>15</sup>
- I.7 A number of legislative changes were implemented following the VLRC Final Report including, but not limited to, changes to directions given to juries in sexual offence cases,<sup>16</sup> protection of therapeutic communications made to counsellors and other health care professionals,<sup>17</sup> and the creation of a number of new sexual offences.<sup>18</sup> Of particular relevance to sexual offences against children were the changes made to arrangements for the giving of evidence by child complainants.<sup>19</sup>
- I.8 In addition, some procedural and operational reforms were introduced, including the establishment of specialist sex offence lists in Victorian courts, a specialist sex offences prosecution unit at the Office of Public Prosecutions and training in issues surrounding sexual assault for judges and other legal professionals. Again of particular relevance to children was the establishment of a Child Witness Service to assist child witnesses during the court process.<sup>20</sup>
- I.9 The VLRC Final Report extensively discussed both procedural and substantive issues relating to the prosecution of sex offences, leading to significant changes in the law. However, this report is limited to a consideration of the adequacy of the maximum penalties that currently apply to the

12 Sentencing Advisory Council (2009), above n 7, 3.

13 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure Final Report* (2004) 80.

14 Meeting with West CASA (22 April 2009); Meeting with Ballarat CASA (21 May 2009); Meeting with Gatehouse Centre, Royal Children's Hospital (22 June 2009); Telephone communication with mother of a child victim of sexual assault (6 July 2009).

15 Sexual offences that result in a sentence being imposed by a court represent a very small percentage of sexual offences that are reported by victims in surveys. A discussion of the attrition of sexual offences within the criminal justice system can be found in Victorian Law Reform Commission, *Sexual Offences: Law and Procedure Discussion Paper* (2001) ch 3.

16 *Crimes Act 1958* (Vic) s 37–37AA.

17 *Evidence Act 1958* (Vic) s 32C.

18 For example, the offences of compelling sexual penetration and sexual offences against persons with a cognitive impairment by providers of special programs: see *Crimes Act 1958* ss 38A, 52.

19 *Evidence Act 1958* (Vic) ss 37CAA, 41E.

20 See Department of Justice, *Annual Report 2007–2008* (2008) 26.

offence of sexual penetration with a child under 16. There were a number of related concerns raised in consultations, and while the Council acknowledges the importance of these issues they will not be discussed as they are outside the scope of the reference. These issues included:

- the application of the *Sex Offenders Registration Act 2004* (Vic);<sup>21</sup>
- the availability and efficacy of treatment and support services for sexual offenders;<sup>22</sup>
- consideration of the maximum penalties applicable to other sexual offences that are capable of being committed against children, such as rape, incest, persistent sexual abuse of a child under 16, and indecent act with a child under 16;<sup>23</sup>
- sexual offenders falling within the jurisdiction of the Children's Court;<sup>24</sup>
- the involvement of the victim in the court process;<sup>25</sup>
- intellectually disabled offenders or victims;<sup>26</sup> and
- the need for education for the wider community around the graduated age structure and other issues relevant to this offence.<sup>27</sup>

1.10 A further issue raised in consultation was whether or not 16 was the appropriate age for the upper limit for the offence of sexual penetration. An adolescent health professional consulted by the Council suggested that there was some inconsistency in fixing 16 as the legal age at which young people can consent to sexual penetration<sup>28</sup> when other markers of reaching adulthood are not reached until later, such as the voting or drinking age.<sup>29</sup> This report discusses the relevance of age to the offence of sexual penetration, but only in relation to the lower age limit – the 'no defence' age. Specific discussion of the upper age limit was considered outside the scope of this report because it does not directly affect the adequacy of the maximum penalties for the offence of sexual penetration.

21 Victorian courts are prohibited from taking into account any consequences that may arise under the *Sex Offenders Registration Act 2004* (Vic) when sentencing an offender: *Sentencing Act 1991* (Vic) s 5(2BC). This issue was raised at a meeting with Victoria Police SOCAU (12 March 2009) as well as in Submission 5 (Anonymous).

22 This was raised by a convicted child sex offender who stressed the importance of providing treatment and support to offenders both while in custody and in the community as well as Submission 15 (Victorian Aboriginal Legal Service) and Submission 20 (Springvale Monash Legal Centre). The Council discussed some of these issues in its *High-Risk Offenders: Post-Sentence Supervision and Detention: Discussion and Options Paper* (2007) and *High-Risk Offenders: Post-Sentence Supervision and Detention: Final Report* (2007).

23 Submission 14 (South Eastern Centre Against Sexual Assault) and Submission 19 (Office of the Child Safety Commissioner) suggested changes to the maximum penalties for other sexual offences and the creation of a sexual offence of indecent act with a child under 16 where the victim is under the care, supervision or authority of the offender.

24 Sentencing data from the Children's Court were not available at the time of this reference. Sentencing principles and the range of sentencing dispositions available also significantly differ from dispositions available when charges are heard on indictment in the higher courts. See generally *Children, Youth and Families Act 2005* (Vic) pt 5.3.

25 Meeting with parents of a child victim of sexual assault (9 April 2009); Telephone communication with mother of a child victim of sexual assault (6 July 2009).

26 Meeting with Victoria Police SOCAU (12 March 2009); Victim Issues Roundtable (6 April 2009); Legal Issues Roundtable (6 April 2009); Telephone communication with Dr Patricia Brown, Director, Children's Court Clinic (2 June 2009).

27 Telephone communication with adolescent health professional (3 July 2009); Submission 5 (Anonymous); Submission 22 (B. Bull).

28 Except when the child is under the care, supervision or authority of the offender, in which case the age of consent is 18 years: *Crimes Act 1958* (Vic) s 48.

29 Telephone communication with adolescent health professional (3 July 2009); Submission 5 (Anonymous); Submission 17 (B. Marshall).

## Young people and the law in Victoria: A policy and legislative background

- 1.11 There are many examples in law where age is used to distinguish between legal and illegal behaviour. For example, laws in Victoria currently define the age at which a person may legally drink alcohol, sign contracts, drive a vehicle, get married, initiate legal proceedings in their own name and consent to medical procedures.<sup>30</sup> Age limitations also apply to some rights of citizenship, such as the age at which a person may vote in Federal, State and local government elections.<sup>31</sup>
- 1.12 The use of age as a barrier to certain activities within legislation is generally considered protective in nature, and is underpinned by an assumption that people of a young age often lack the capacity or experience to make informed choices about decisions that could have a significant impact on their lives.<sup>32</sup> The law therefore seeks to prevent harm to children by offering them legal protection during their formative years of development, and granting them specific rights and protections in law. This protection is usually achieved through the regulation of behaviour children may engage in,<sup>33</sup> or by the regulation of the activities of adults in relation to children.<sup>34</sup>
- 1.13 The protection of children within legal systems is not limited to delineating lawful and unlawful conduct by reference only to age. Legislation is often specifically directed to promoting and protecting the rights of children due to their status in society as a vulnerable class of people who do not necessarily have the ability or capacity to make decisions about their own welfare. Responsibility for the welfare of children, such as the provision of food, shelter, safety and medical care, is typically delegated to those in positions of authority, such as parents, teachers and other relatives. When these people abuse their positions, it can be difficult for children to assert their rights against the dominant adult and remain safe in their own environment. In *R v Van Roosmalen*,<sup>35</sup> Cummins J set out the sentencing policy to be applied in cases of sexual assault on children:

The courts have a special and precious duty to protect children. Children are vulnerable. They are especially vulnerable to abuse of trust within the home. They usually cannot protect themselves. Courts should mark by substantial custodial punishment criminal abuse of trust within the home in order to signify condemnation of that behaviour, in order to punish the offender and, particularly, in order to protect children from abusers actual and potential.<sup>36</sup>

30 *Liquor Control Reform Act 1998* (Vic) s 119; *Road Safety Act 1986* (Vic) s 19; *Marriage Act 1961* (Cth) s 11; *Age of Majority Act 1977* (Vic) s 3.

31 *Electoral Act 2002* (Vic) s 87; *Commonwealth Electoral Act 1918* (Cth) s 93.

32 See for example, *R v Nguyen* (2001) 124 A Crim R 477, 481. Some commentators have argued that legal interventions in relation to children represent a desire to control rather than to protect, as they are based on the assumption that children are incapable of exercising free and considered thought processes: Lauren Eade, 'Legal Incapacity, Autonomy, and Children's Rights' (2001–2003) 5(2) *Newcastle Law Review* 157, 157–162.

33 For example, children are prohibited from consuming alcohol or cigarettes.

34 For example, by making it illegal for an adult to take part in an act of sexual penetration with a child.

35 (1989) 43 A Crim R 358.

36 *Ibid* 361 (Cummins J).

1.14 In these situations, such as where a parent physically abuses his or her child, or where an adult exploits the sexual vulnerability of a child, the law recognises a responsibility to intervene and protect the interests of children. Some examples<sup>37</sup> of where the Parliament of Victoria has legislated to protect the rights and safety of children include:

- *Crimes Act 1958* (Vic): Part 8A to 8G of this Act governs sexual offences within Victoria, and an objective of this provision is to 'protect children ... from sexual exploitation'.<sup>38</sup>
- *Children, Youth and Families Act 2005* (Vic): this Act governs the provision of community services to support children, to protect children, to provide for children who have been charged with criminal offences, and to continue the Children's Court as a specialist court dealing with matters relating to children.<sup>39</sup>
- *Child Wellbeing and Safety Act 2005* (Vic): this Act lists a set of principles considered fundamental for the development of, and provision of services to children, including that 'all children should be given the opportunity to reach their full potential and participate in society irrespective of their family circumstances and background'.<sup>40</sup>
- *Charter of Human Rights and Responsibilities Act 2006* (Vic): this Act provides that 'every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child'.<sup>41</sup>
- *Working with Children Act 2005* (Vic): the purpose of this Act is to 'assist in protecting children from sexual or physical harm by ensuring that people who work with, or care for, them have their suitability to do so checked by a government body'.<sup>42</sup>

1.15 Legislation such as the above represents a policy statement that society and government share the responsibility of protecting children due to their vulnerability to exploitation, particularly by those who occupy positions of trust or authority. All States and Territories of Australia have also recently endorsed a national framework for the protection of children entitled *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009–2020*.<sup>43</sup> This framework has as one of its objectives the prevention of child sexual abuse and exploitation and represents a national commitment to raising awareness of child exploitation, enhancing prevention strategies for child sexual abuse, ensuring survivors of sexual abuse have access to treatment and support, and strengthening law enforcement and judicial processes in response to child sexual abuse and exploitation.<sup>44</sup>

37 Some of these examples are drawn from the discussion in Submission 19 (Office of the Child Safety Commissioner).

38 *Crimes Act 1958* (Vic) s 37A(b).

39 *Children, Youth and Families Act 2005* (Vic) s 1.

40 *Child Wellbeing and Safety Act 2005* (Vic) s 5(1)(b).

41 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2). Australia is also signatory to the United Nations Convention on the Rights of the Child, which includes the provision that 'parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child' and that 'parties undertake to protect the child from all forms of sexual exploitation and sexual abuse': *Convention on the Rights of the Child*, 44/25, UN GAOR, 44<sup>th</sup> session, UN Doc A/Res/44/25 (1989), arts 19 and 34.

42 *Working with Children Act 2005* (Vic) s 1(1).

43 Council of Australian Governments, *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009–2020* (2009).

44 *Ibid* 31.

## Sexual offences and the law: Policy objectives

- I.16 Laws that seek to criminalise sexual conduct have several policy bases ranging from the protection of individual autonomy to the protection of the vulnerable. Generally speaking, the legal objectives of these laws can be described as follows:
- laws that protect sexual autonomy;
  - laws that protect people who are vulnerable to sexual exploitation; and
  - laws that protect public morality by prohibiting certain conduct that is perceived as immoral or offensive.<sup>45</sup>

### Adults and the principle of sexual autonomy

- I.17 Fundamental to the legal regulation of sexual conduct is the principle that the law should respect the sexual autonomy of individuals. In practical terms, this means that people who freely engage in sexual activity should not be subject to criminal sanction, even if the acts or practices engaged in might be considered unusual or immoral by some parts of society. The rationale behind this principle is that the law should respect the bodily integrity of individuals, and should not intervene in their private affairs except in exceptional circumstances. In other words, adults who are under no impediment regarding their ability to understand the consequences of their actions must be free to make choices about their private lives, and the law should not intervene unless their behaviour is harmful to others.<sup>46</sup>
- I.18 However, the principle of sexual autonomy also operates to protect individuals in circumstances where they do not freely participate in sexual activity. For example, sexual intercourse without the consent of one party is a criminal offence because the sexual autonomy of the non-consenting party has been infringed. The law thus recognises a harm arising from the breach of that person's sexual autonomy and provides a sanction, in this case by establishing the offence of rape.<sup>47</sup>
- I.19 The principle of sexual autonomy is thus based on the premise that individuals who are capable of consenting to sexual activity should not be subject to public scrutiny by the legislature. In this context, the line of demarcation between criminal and non-criminal sexual conduct is drawn around the issue of consent, with any legally relevant behaviour that is engaged in without the consent of one party considered criminal.

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45 An example of this category could be bestiality: *Crimes Act 1958* (Vic) s 59.

46 This concept of individual liberty is based on John Stuart Mill's 'harm principle.' John Stuart Mill, *On Liberty* (1956), cited in Bruce Hafen and Jonathan Hafen, 'Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child' (1996) 37 *Harvard International Law Journal* 449, 452. Mill did not consider the 'harm principle' to be applicable to children. It applied only to 'human beings in the maturity of their faculties ... not of children [who] must be protected against their own actions as well as against external injury'.

47 In Victoria, the offence of rape is defined as the intentional sexual penetration of a person of any age without that person's consent. The absence of consent is a necessary element of the offence and the prosecution must prove beyond a reasonable doubt that the accused either knew the person was not consenting or might not be consenting, did not give any thought as to whether the person was or might not be consenting, or became aware after penetration that the person was not or might not be consenting: *Crimes Act 1958* (Vic) s 38.

- 1.20 Absence of consent is not, however, the only basis on which criminal sexual conduct is defined. If this were so, people who are incapable of giving consent and people who are capable of giving consent, but are vulnerable to exploitation, may be excluded from the protection of the law. Moreover, limiting a definition of sexual criminality to the issue of consent fails to identify the separate and specific wrong that is done when a sexual offence is committed against a child. Laws governing sexual assault therefore generally expand beyond the issue of consent alone, and recognise and protect categories of people for whom consent is a problematic or contested issue.

## Protective principle and child sex offence laws

- 1.21 Child sex offence laws are founded on the view that the ability to consent cannot always be presumed and that the law should safeguard children from the predatory conduct of older people. The law aims to protect the sexual safety of children and other vulnerable groups (such as people with cognitive impairments), and there are a number of offences that prohibit the sexual exploitation of such individuals.<sup>48</sup>
- 1.22 In its *2007 Report on Rape and Other Sexual Offences*, the Scottish Law Commission used the term ‘protective principle’ to identify laws that seek to protect people for whom the concept of consent is problematic.<sup>49</sup> Laws informed by the protective principle are laws that protect people who cannot consent to sexual activity, or alternatively, people whose ‘consent’ is compromised by their particular vulnerability to exploitation. Persons in the former category include young children who lack the intellectual capacity to understand the meaning of consent, while those in the latter category could include older children, people with cognitive impairments, people who are under the authority or supervision of the offender, and people who are otherwise vulnerable to sexual exploitation.
- 1.23 The report noted that separate sexual offences relating to children performed the important symbolic function of communicating the view that ‘vulnerable persons are protected and are seen to be protected by the criminal law’.<sup>50</sup> In this context, subsuming child sex offences into offences that identify criminality by reference to the concept of consent does not sufficiently address the inherent wrongness of those offences because it assumes the victim is capable of exercising free and informed choice. It is therefore an additional wrong to sexually penetrate a person who lacks capacity, and should be differentiated from cases where consent is possible, but is not given.<sup>51</sup>
- 1.24 The offence of sexual penetration with a child under 16 is a clear example of a law with a protective intent, as it provides for criminal sanction against those who participate in sexual acts with children regardless of whether or not the child has ‘consented’. It also establishes degrees of severity of harm by incorporating statutory aggravating factors that increase the applicable maximum penalties.

48 For example, sexual penetration with a child under 16, indecent act with a child under 16, rape, incest and persistent sexual abuse of a child under the age of 16. See generally *Crimes Act 1958* (Vic) pt 8A–8G. Victoria also has laws in relation to sexual offences against people with cognitive impairments: see *Crimes Act 1958* (Vic) pt 8E.

49 Scottish Law Commission, *Report on Rape and Other Sexual Offences* (2007) 58–97.

50 *Ibid* 59.

51 *Ibid* 59–60.

## The Council's approach

### Consultation

- 1.25 On 20 March 2009, the Council released a Consultation Paper which described the context of the reference and provided information about the offence of sexual penetration with a child under 16 and related offences in Victoria.<sup>52</sup> The Consultation Paper outlined the current maximum penalties for this offence, as well as considering the functions of maximum penalties more generally. The Council sought written submissions on four questions relating to the structure of the offence and conducted a series of meetings with relevant stakeholders throughout March, April, May and June 2009. Some of the individuals and organisations consulted by the Council included victims and families of victims, offenders, legal practitioners, psychologists, workers from Centres Against Sexual Assault, the Victorian Association for the Care and Resettlement of Offenders, County Court judges, the Child Witness Service and the Witness Assistance Service at the Office of Public Prosecutions and members of Victoria Police.<sup>53</sup>
- 1.26 The broader community was invited to comment through advertisements placed in *The Age* and the *Herald Sun*, and the Council received 24 written submissions from a range of stakeholders and members of the public.<sup>54</sup>

### Statistical analysis

- 1.27 The Council also released a statistical report entitled *Sentencing for Sexual Penetration Offences: A Statistical Report* on 20 March 2009.<sup>55</sup> The statistical report analysed sentencing practices in Victoria for offences involving the sexual penetration of children, and considered the relationship between various offence, offender and victim characteristics and sentencing outcomes. It also considered factors such as the age of the victim, the age of the defendant, and the age difference between the victim and the defendant. Much of the data from that report are referred to throughout this report, particularly in Chapter 5. Subsequent to the release of the statistical report, further statistical analyses were undertaken to address some specific questions raised by this reference. Linear and logistic regression analyses were performed in order to quantify first the extent to which certain factors influence sentencing outcomes, and second the effect of different victim ages on sentencing practices. These analyses are discussed in Chapter 7 and Appendices 5 and 6 of this report. Also, results from an investigation into the relationship between offender and victim in child sexual offence cases are reported in Chapters 5 and 7.

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52 Sentencing Advisory Council, *Maximum Penalties for Sexual Penetration with a Child under 16: Consultation Paper* (2009).

53 For a list of meetings and telephone communications see Appendix I.

54 For a list of submissions received see Appendix I.

55 Sentencing Advisory Council (2009), above n 7.

## Structure of the report

- I.28 Chapter 2 outlines the structure of the offence of sexual penetration with a child under 16 and briefly discusses the concept of statutory aggravating factors.
- I.29 Chapter 3 discusses sexual offences that are related to the offence of sexual penetration with a child under 16, and in some cases may be charged either as an alternative, or in preference to the offence of sexual penetration with a child. This chapter also outlines the various decision-making processes which can result in an offender being convicted of a particular offence.
- I.30 Chapter 4 considers the functions of statutory maximum penalties generally.
- I.31 Chapter 5 analyses current sentencing practices and the relative seriousness of the different forms of sexual penetration with a child under 16. This chapter concludes that current sentences are not 'pushing up' against the maximum penalties, which would suggest that the maximums are sufficient to deal with the types of cases coming before the courts. Further, the current maximum penalties adequately reflect the harm and culpability inherent in this offence.
- I.32 Chapter 6 discusses the perceived inadequacy of current sentencing practices raised in the Council's consultations and the impact this perception can have on confidence in the courts, and considers the possibility of the Court of Appeal developing some sentencing guidance for this offence.
- I.33 Chapter 7 is a review of the age ranges that currently apply to this offence, including the historical context against which the 'lower age' for protecting children under the age of 10 was set. This chapter examines whether the 'lower age' should be raised so as to include a wider group of young children within the higher penalty category for the offence of sexual penetration with a child under 16.



## Chapter 2: The offence of sexual penetration with a child under 16



## The current law in Victoria

- 2.1 Section 45 of the *Crimes Act 1958* (Vic) creates three different forms of the offence of sexual penetration with a child under 16. Each form of the offence carries a different applicable maximum penalty depending on whether or not a statutory aggravating factor is present.
- 2.2 The currently applicable maximum penalties are:
- Sexual penetration (child under 10) 25 years imprisonment<sup>56</sup>
  - Sexual penetration (CSA) 15 years imprisonment<sup>57</sup>
  - Sexual penetration (10–16) 10 years imprisonment<sup>58</sup>

### Elements of the offence

- 2.3 To establish the offence of sexual penetration with a child under 16, the prosecution must prove beyond a reasonable doubt that:
- the offender took part in an act of sexual penetration with the victim of the offence; and
  - the victim was under the age of 16 years at the time of the offence (or under the age of 10, if relevant); and
  - the victim was under the care, supervision or authority of the offender (if relevant).
- 2.4 An 'act of sexual penetration' is broadly defined to include:
- (a) the introduction (to any extent) by a person of his penis into the vagina, anus or mouth of another person whether or not there is emission of semen; or
  - (b) the introduction (to any extent) by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes.<sup>59</sup>
- 2.5 The offence of sexual penetration with a child is gender neutral and criminalises all acts of sexual penetration between adults and children. Moreover, the concept of 'sexual penetration' includes both parties to the act, so as to avoid an inference that the act must be committed on the younger person by the older person. As the offence is defined by reference to the age of the child rather than by the relative roles, intentions or actions of the participants, the adult is guilty of the offence even if the child sexually penetrated the adult. The consent of the child to the sexual penetration, if present, is irrelevant to determining the guilt of the older person, although it may be relevant to the sentence that is subsequently imposed.

<sup>56</sup> *Crimes Act 1958* (Vic) s 45(2)(a).

<sup>57</sup> *Crimes Act 1958* (Vic) s 45(2)(b).

<sup>58</sup> *Crimes Act 1958* (Vic) s 45(2)(c).

<sup>59</sup> *Crimes Act 1958* (Vic) s 35.

## The issue of consent

- 2.6 In contrast to some other sexual offences, except in very limited circumstances it is not a defence to argue that the victim in fact consented to the act of sexual penetration.<sup>60</sup> The offence is complete upon the establishment beyond a reasonable doubt that the child was sexually penetrated and was under the relevant age at the time the act of penetration occurred. The consent of the child, if present, is irrelevant to determining a person's guilt in relation to this offence and reflects the premise that children are not sufficiently mature to consent meaningfully to sexual penetration. The aim of the law in this regard is to 'protect children and young adolescents who are generally vulnerable to persuasive conduct of older or more mature persons from being sexually abused by them'.<sup>61</sup>
- 2.7 In reality, however, some young people under the age of 16 can and do consent to sexual intercourse, and the consent of the victim may therefore be relevant when assessing the relative culpability of the offender at sentence. Caution should be exercised in referring to consent given by adolescents under 16 as their youth and vulnerability mean that they may not necessarily be able to consent freely to participation in sexual activity.<sup>62</sup>
- 2.8 However, courts have recognised that the level of culpability involved where the victim and offender are close in age and engaging in a consensual sexual relationship is significantly different to a situation where an older adult exploits the vulnerability of a much younger victim.<sup>63</sup> Public policy considerations and prosecutorial discretion may also influence whether cases in the former category proceed to court at all because of the particular context to the offending.<sup>64</sup>

## The concept of 'statutory aggravating factors'

- 2.9 For most criminal offences, one maximum penalty applies to the entire range of criminal conduct falling within the offence category. Although a sentencing court can take aggravating elements of the offending into account when considering the length of sentence to impose,<sup>65</sup> the presence of an aggravating factor does not change the maximum penalty applicable to the particular offence.
- 2.10 For some criminal offences, however, specific aggravating factors are included in the legislative description of the offence and are intended to reflect the fact that the relative seriousness of the offending conduct is higher if a relevant 'statutory aggravating factor' is present. The maximum penalties that apply to the aggravated forms of the offence are generally higher than the penalty for the 'base' offence.

60 *Crimes Act 1958* (Vic) s 45(4).

61 *R v Nguyen* (2001) 124 A Crim R 477, 481.

62 For a discussion of some of the issues around consent and agreement for young people engaging in sexual intercourse, see Anastasia Powell, 'Youth "at risk"? Young people, sexual health and consent' (2007) 26(4) *Youth Studies Australia* 21. See also Michelle Oberman, 'Turning Girls into Women: Re-evaluating Modern Statutory Rape Law' (1994) 85 *Journal of Criminal Law & Criminology* 15, 27–28 and Michelle Oberman, 'Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape' (2000) 48 *Buffalo Law Review* 703, 754–755.

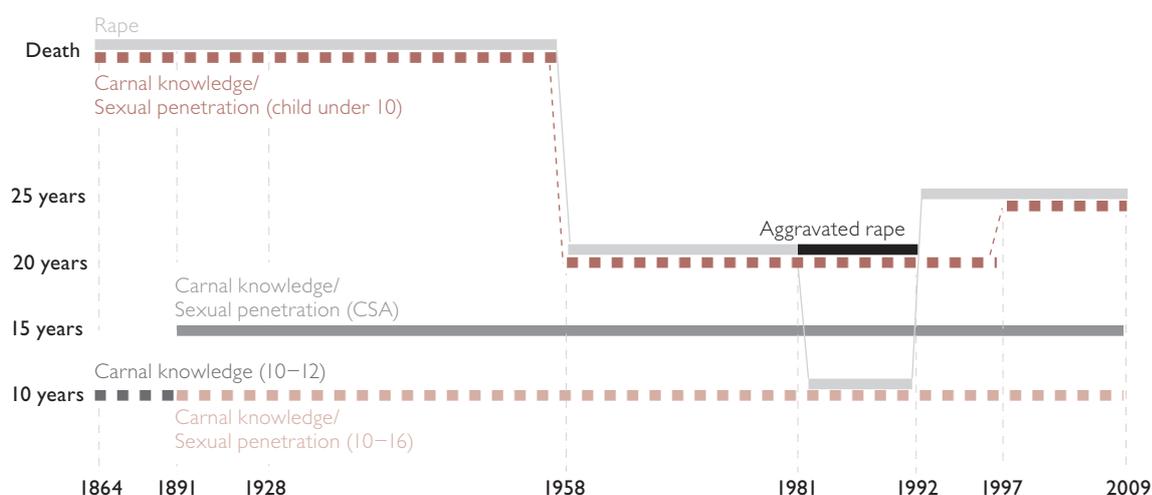
63 See Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999) 938.

64 Office of Public Prosecutions (Victoria), *The Prosecutorial Discretion: Policy 2* (2008) [2.9] <[www.opp.vic.gov/wps/wcm/connect/Office+Of+Public+Prosecutions/resources/file/eba54e0a1085c69/2\\_The\\_Prosecutorial\\_Discretion.pdf](http://www.opp.vic.gov/wps/wcm/connect/Office+Of+Public+Prosecutions/resources/file/eba54e0a1085c69/2_The_Prosecutorial_Discretion.pdf)> at 1 June 2009.

65 *Sentencing Act 1991* (Vic) s 5(2)(g).

- 2.11 Sexual penetration with a child under 16 is an offence that includes statutory aggravating factors, meaning that there are three different forms (with different maximum penalties) that the offence can take.
- 2.12 The relevant maximum penalties are:
- **Sexual penetration with a child under the age of 10**  
Maximum penalty: 25 years imprisonment<sup>66</sup>  
Statutory aggravating factor: child under the age of 10.
  - **Sexual penetration with a child aged between 10 and 16 and under the care, supervision or authority of the offender**  
Maximum penalty: 15 years imprisonment<sup>67</sup>  
Statutory aggravating factor: child under care, supervision or authority.
  - **Sexual penetration with a child aged between 10 and 16 and not under the care, supervision or authority of the offender**  
Maximum penalty: 10 years imprisonment<sup>68</sup>  
Statutory aggravating factor: none – this is the 'base' form of the offence.
- 2.13 Victorian law has consistently recognised that offences involving sexual penetration with children under the age of 16 should attract significant maximum penalties. The increased seriousness of offences committed against children under the age of 10 or in the care of the offender has also been reflected by the fact that higher maximum penalties have always applied to such offences.
- 2.14 Figure 1 shows the history of maximum penalties for the offence of sexual penetration with a child under 16 in Victoria.

**Figure 1:** Maximum penalties for offences involving sexual penetration with children 1864–2009 (see also Appendix 3)



66 *Crimes Act 1958* (Vic) s 45(2)(a).

67 *Crimes Act 1958* (Vic) s 45(2)(b).

68 *Crimes Act 1958* (Vic) s 45(2)(c).

### *Sexual penetration with a child under the age of 10*

2.15 In Victoria, offending involving sexual penetration with a child under the age of 10 has historically attracted a higher statutory maximum penalty than other forms of the offence of sexual penetration with a child (see Appendix 3). Children under this age are considered by the law to be incapable of consenting to sexual activity but, as various law reform bodies have noted, the setting of a 'lower age' at which higher penalties apply also reflects contemporary community expectations regarding the protection of children. For example, the Scottish Law Commission argued that:

these [lower age] provisions serve an important symbolic function of giving direct expression to the principle that vulnerable persons are protected, and are seen to be protected by the criminal law. Sexual activity with young children ... is wrong and the law should say so explicitly rather than subsuming such cases in a more general principle of consent.<sup>69</sup>

2.16 Prior to 1997, the maximum penalty for the offence of sexual penetration (child under 10) in Victoria was 20 years imprisonment. In 1997, this was increased to 25 years imprisonment<sup>70</sup> with the aim of putting it 'on the same footing as rape'.<sup>71</sup> Therefore, while this offence can be charged as an alternative to rape, an offender would be liable to the same maximum penalty regardless of which substantive offence was charged. As the Law Reform Commission of Victoria commented: '[r]ape is not commonly charged in relation to young children. The child-specific sexual penetration offences are easier to prosecute, because lack of consent does not have to be shown unless specific offences are involved'.<sup>72</sup> Confining such offending to a consent model such as that required by the offence of rape may also not sufficiently reflect the separate and additional wrong that is done when a person not only does not consent to sexual penetration, but in fact lacks the capacity to do so.<sup>73</sup>

### *Sexual penetration with a child aged between 10 and 16 and under the care, supervision or authority of the offender*

2.17 A higher statutory maximum penalty has also consistently applied to offences of sexual penetration with a child older than 10 where the offender is in a position of authority or responsibility in relation to the victim (see Figure 1, above). The first legislative manifestation of this principle in Victoria was the *Crimes Act 1891* (Vic), which made school teachers liable to a higher penalty for offences of sexual penetration with their students.<sup>74</sup> Subsequent legislation continued to reflect the view that offending of this nature by persons in positions of authority was considered to aggravate the offending (see Appendix 3).

<sup>69</sup> Scottish Law Commission (2007), above n 49, 59.

<sup>70</sup> *Sentencing and Other Acts (Amendment) Act 1997* (Vic) s 60(1) (see sch 1, item 22).

<sup>71</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 24 April 1997, 872 (Jan Wade, Attorney General).

<sup>72</sup> Law Reform Commission of Victoria, *Sexual Offences Against Children*, Report No. 18 (1988) 23.

<sup>73</sup> Scottish Law Commission (2007), above n 49, 59–60.

<sup>74</sup> *Crimes Act 1891* (Vic) s 5(1).

- 2.18 The current terminology of 'care, supervision or authority' was introduced by the *Crimes (Sexual Offences) Act 1980* (Vic) which made it an offence punishable by 15 years imprisonment for an offender to take part in an act of sexual penetration with a child aged between 10 and under 16 and under their care, supervision or authority. In contrast, acts of sexual penetration with a child aged between 10 and not under the care, supervision or authority of the offender carry a maximum penalty of 10 years imprisonment.
- 2.19 'Care, supervision or authority' is not defined in section 45 of the *Crimes Act 1958* (Vic), however, the concept has been extensively considered by Victorian courts. The requisite relationship depends 'upon whether, looking at the evidence as a whole, it demonstrates that the relationship was one where, as a matter of fact, the complainant was under the care, supervision or authority of the applicant during the period alleged'.<sup>75</sup> This category includes, but is not limited to, relationships involving teachers, family friends, foster parents, employers, health professionals, counsellors and youth workers.<sup>76</sup>

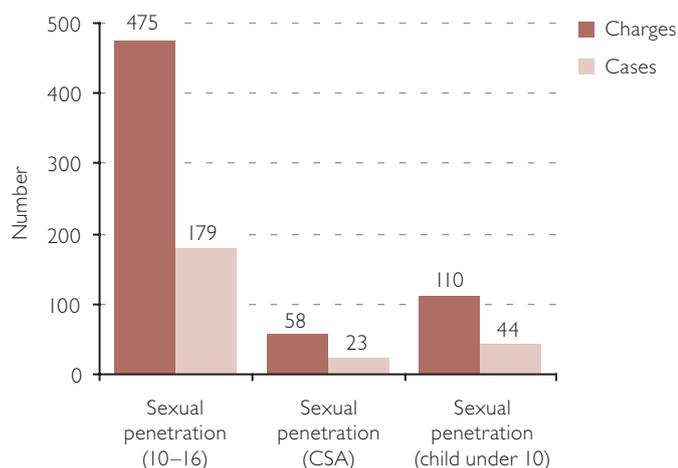
#### *Sexual penetration with a child aged between 10 and 16 and not under the care, supervision or authority of the offender*

- 2.20 The maximum penalty for taking part in an act of sexual penetration with a child under the age of 16 in the absence of any statutory aggravating factor has historically remained constant at 10 years imprisonment (see Figure 1 above and Appendix 3).
- 2.21 This form of the offence covers a wide range of criminal behaviour ranging from situations where two adolescents who are close in age engage in a 'consensual' sexual relationship to situations where an adult preys upon a child and coerces the child to participate in acts of sexual penetration. Although there will always be exceptions to any generalisations made, there are two situations in which the offence of sexual penetration (10–16) would most commonly be charged.
- 2.22 The first is where the victim is ostensibly consenting to the sexual penetration, even though this consent is not relevant to whether the defendant is guilty of the offence.
- 2.23 The second situation in which a charge of sexual penetration (10–16) may also be filed is where sexual penetration has taken place and there is unclear evidence that at the time when the alleged offence took place the victim was not consenting, or that the offender was aware or should have been aware that the victim was not consenting.

<sup>75</sup> *R v Macfie* [2000] VSCA 173 (Unreported, Winneke P, Brooking and Chernov JJA, 31 October 2000) [22].

<sup>76</sup> Section 48(4) of the *Crimes Act 1958* (Vic) lists relationships that are capable of constituting a relationship of care, supervision or authority. This section relates to children aged 16–17 and under the care, supervision or authority of the offender, but may be of assistance when considering the requisite relationship for children under the age of 16. This list is not exhaustive. Submission 13 (Koorie Women Mean Business Incorporated) noted the importance of ensuring the expanded understandings of family relationships in Indigenous communities are recognised as being relationships which could fall into the category of 'care, supervision or authority'.

Figure 2: Number of charges and cases by form of offence of sexual penetration with a child under 16, 2006–07 to 2007–08



2.24 Figure 2 shows the number of charges heard by Victorian courts for each form of the offence of sexual penetration with a child under 16 for the period 2006–07 to 2007–08.

2.25 As Figure 2 demonstrates, for the period July 2006 to June 2008, the most common form of the offence of sexual penetration with a child under 16 was sexual penetration (10–16) with 475 charges in 179 cases. Sexual penetration (child under 10) was the second most common with 110 charges in 44 cases. There were only 23 cases of sexual penetration (CSA), which included 58 charges.<sup>77</sup>

## Defences

2.26 The defences to the offence of sexual penetration with a child arise when the victim is over the age of 10, where the victim consented to the sexual penetration, and where the accused:

- can establish on the balance of probabilities that he or she believed on reasonable grounds that the child was aged 16 or over; or
- can establish on the balance of probabilities that he or she believed on reasonable grounds that he or she was married to the child (for example, a marriage valid under the laws of another country); or
- was not more than two years older than the child.<sup>78</sup>

2.27 These defences are not applicable in circumstances where the victim is aged under 10, even if the victim ‘consented’ to the sexual penetration.<sup>79</sup> People consulted by the Council were generally of the view that children under the age of 10 were not capable of forming meaningful

<sup>77</sup> Sentencing Advisory Council (2009), above n 7, 11.

<sup>78</sup> *Crimes Act 1958* (Vic) s 45(4).

<sup>79</sup> *Crimes Act 1958* (Vic) s 45(4).

consent to sexual penetration,<sup>80</sup> and the Australian Medical Association considered that a child aged 10 could begin to understand the physiological aspects of sexual intercourse, but that this did not necessarily mean they were intellectually capable of consenting.<sup>81</sup> In its 1999 report, the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General considered that for all these reasons, the rationale underpinning the 'no defence' age was that sexual conduct with younger children was considered to be an even more serious offence than sexual conduct with older children.<sup>82</sup> This opinion was also reflected in a recent review of sexual offences by the Scottish Law Commission, which commented that:

Many legal systems draw a key distinction between the age of the child at which sexual activity is absolutely wrong and a higher age at which sexual activity is still wrong but for which a limited number of defences are available ... young children below a certain age cannot, as a matter of law, consent.<sup>83</sup>

- 2.28 Although the maximum penalties for sexual penetration with a child under 16 have varied over time, the structure of the offence, specifically in relation to the age ranges that delineate the penalties between the different categories of offending conduct, has not changed since English law was received into the Australian colonies. It is perhaps notable that despite the many reforms to laws prohibiting sexual conduct with children,<sup>84</sup> the structure of the offence of sexual penetration with a child has not undergone significant scrutiny since its incorporation into the law of Victoria (see Appendix 3).
- 2.29 Moreover, societal attitudes towards children have undergone significant change over the past 200 years, with a more protective emphasis moving attitudes away from a perception that children are 'small adults' destined to join the workforce at an early age and to marry and bear children during their adolescence.<sup>85</sup> Contemporary attitudes situate children as vulnerable and inexperienced members of society who are to be protected and taught sound judgment prior to engaging in behaviour that is potentially physically and psychologically damaging.
- 2.30 The age ranges currently applicable to the offence of sexual penetration with a child under 16 are considered in detail in Chapter 7, where the Council recommends that the lower age range should be increased to include children aged 10 and 11. However, in order to provide a context and rationale for this recommendation, the following chapters review related offences and charging practices in relation to sexual offences, the functions of maximum penalties generally, sentencing practices and the particular types of harm contemplated by the statutory aggravating features of this offence.

80 Victim Issues Roundtable (6 April 2009); Legal Issues Roundtable (6 April 2009); Submission 11 (Law Institute of Victoria); Submission 23 (Victoria Legal Aid).

81 Meeting with Australian Medical Association (Victoria) (12 May 2009).

82 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Sexual Offences Against the Person Report* (1999) 125.

83 Scottish Law Commission (2007), above n 49, 63, 66.

84 See for example Victorian Law Reform Commission (2004), above n 13.

85 Juliette Goldman and Carol Ronken, 'The Concept of Childhood' in Queensland Crime Commission (ed), *Child Sexual Abuse in Queensland: Selected Research Papers* (Project AXIS) (2000) 31, 31–2.



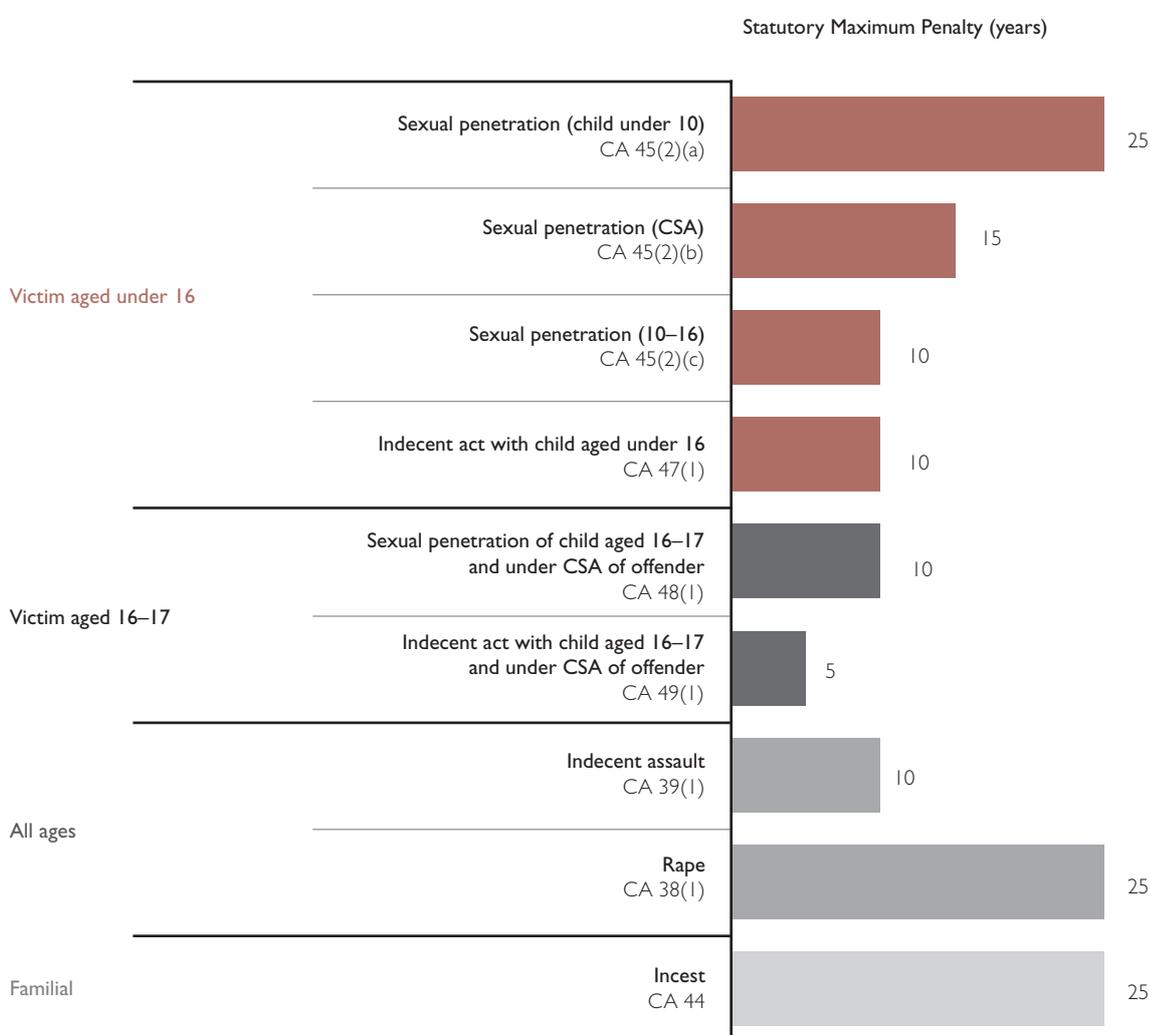
## Chapter 3: Related Offences



## Related sexual offences against children

3.1 The *Crimes Act 1958* (Vic) contains many other sexual offences that are related to the offence of sexual penetration with a child under the age of 16. These include, but are not limited to, rape, indecent assault, incest and indecent act with or in the presence of a child under 16.<sup>86</sup> The elements of these offences are detailed in Appendix 2 and the varying maximum penalties, including the penalties for sexual penetration with a child, are set out in Figure 3.

Figure 3: Maximum penalties for selected sexual offences in the *Crimes Act 1958* (Vic)



86 *Crimes Act 1958* (Vic) ss 38, 39, 44, 47.

- 3.2 Although not all of these offences are confined in application to children under the age of 16, they have in common an element of indecent touching or an act of sexual penetration. It is therefore possible for them to 'overlap' with the offence of sexual penetration with a child under 16 in that a particular offence may be charged either in preference to, or as an alternative to that offence.
- 3.3 For example:
- Where there has been an act of sexual penetration with a child and the accused person is a family member of the complainant, incest may be the more appropriate charge.
  - Where it is unclear whether an act of sexual penetration has occurred, the offence of indecent act with a child under 16 may be charged instead of, or as an alternative to, the offence of sexual penetration with a child under 16.
  - Where an act of sexual penetration with a child has taken place in circumstances where there is an absence of consent the offending may be charged as rape.
- 3.4 In considering the maximum penalty for the offence of sexual penetration with a child under the age of 16 (other than where the child is under the age of 10), it is therefore possible that some of the 'worst' examples of offending could be charged as either rape or incest, both of which carry a significantly higher maximum penalty. Other factors, such as the use of violence, threats or unlawful detention could constitute separate offences which could be charged alongside the sexual offence and could result in a higher total effective sentence. For example, in the case of *R v Maurice*,<sup>87</sup> the offender also pleaded guilty to aggravated burglary, which carries a maximum penalty of 25 years imprisonment.<sup>88</sup>

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87 [2009] VCC (Unreported, Lacava J, 14 October 2008).

88 *Crimes Act 1958* (Vic) s 77.

## Appropriate charges

- 3.5 The existence of a number of sexual offences within the *Crimes Act 1958* (Vic), the practice of plea negotiation and the various stages at which the police, the prosecution, a court or a jury can decide that there is, or is not, sufficient evidence to convict a person of the offence mean that not all offences that involve an allegation of an act of sexual penetration with a young person will be charged as sexual penetration with a child under 16.
- 3.6 Some people consulted for this reference were of the view that longer sentences for sexual offending against children would be imposed if the prosecution consistently proceeded with the charge of rape, which carries a maximum penalty of 25 years imprisonment, in preference to the offence of sexual penetration with a child (10–16).<sup>89</sup> These people were critical of the fact that rape is not often charged in relation to children.<sup>90</sup> It was suggested that the 15 year discrepancy between the penalty for rape and sexual penetration (10–16) was considered anomalous with the intent of the legislation because it devalued the experience of the child and implied that the harm caused by the offence of sexual penetration (10–16) was less than where a person is convicted of rape.<sup>91</sup>
- 3.7 The Council strongly agrees that rape is the appropriate charge in cases where there is evidence that the complainant was not consenting. However, there are a number of factors that can affect the charge a person is ultimately presented on and/or convicted of, and not all of these are controlled by the prosecuting authorities. There are many other stages in the legal process where a decision can be made to proceed on a charge of sexual penetration with a child in preference to rape. One sound policy reason for preferring a charge of sexual penetration (child under 10) to rape is that the maximum penalty for this offence is the same as rape, 25 years imprisonment, but unlike the charge of rape, the prosecution is not required to prove lack of consent, thus avoiding the possibility that a child under 10 may be cross-examined as to whether he or she ‘consented’ to sexual intercourse.
- 3.8 The more difficult cases are those where the complainant is aged over 10 and the evidence is not clear as to whether or not there was a lack of consent. While as a matter of principle, it may be argued that these cases should proceed to trial on a charge of rape, there are a number of stages in the process when a decision may be made to proceed with sexual penetration (10–16) instead. These stages are detailed below.

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89 Legal Issues Roundtable (6 April 2009).

90 Legal Issues Roundtable (6 April 2009); Submission 6 (Anonymous).

91 Submission 6 (Anonymous).

## Police charges

- 3.9 The proceedings for most criminal offences begin with the filing of charges by Victoria Police. The police may charge an offender with rape or sexual penetration (10–16), or another relevant sexual offence depending on the results of their investigation. A person may also be charged with rape and sexual penetration (10–16) regarding the one instance of sexual penetration if the evidence is not clear as to the appropriate charge. These offences would be charged in the alternative because a person can only be convicted of one offence in relation to a particular action.

## Committal hearing

- 3.10 At a committal hearing, the defendant has the opportunity to test the evidence against him or her by cross-examining prosecution witnesses before a magistrate. At the close of the hearing, the magistrate must make a determination as to whether or not ‘the evidence is of sufficient weight to support a conviction for the offence with which the defendant is charged’.<sup>92</sup> At this stage a magistrate may decide that there is insufficient evidence to proceed with the rape charge, but enough to continue with the sexual penetration charge (10–16).<sup>93</sup>

## Prosecution discretion

- 3.11 Prior to the trial, the Office of Public Prosecutions (OPP) could make the decision not to proceed on the charge of rape. This may be because the prosecution has determined that there are no ‘reasonable prospects for conviction’ in the case.<sup>94</sup>

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92 *Magistrates’ Court Act 1989* (Vic) sch 5, item 23(2)(b).

93 Although also note that the Director of Public Prosecutions retains the power to directly present a person for trial in a higher court even if a magistrate has found there is insufficient evidence upon which to commit a person for trial: *Magistrates’ Court Act 1989* (Vic) s 56B(a).

94 Office of Public Prosecutions (Victoria) (2008), above n 64, [2.1].

## Plea negotiation

- 3.12 Alternatively, the OPP may choose to accept an offer from the accused person to plead guilty to the lesser charge of sexual penetration with a child under 16.<sup>95</sup> OPP policy states that:
- No plea will be accepted by the Crown unless it reasonably reflects the nature of the criminal conduct of the accused and provides an adequate basis upon which the Court can impose an appropriate sentence. In exercising this discretion it has to be borne in mind that in a particular case the public interest may be better served by the certainty of a conviction secured by the acceptance of a lesser plea than by the unpredictability inherent in a contested trial.<sup>96</sup>
- 3.13 Decisions to accept a plea of guilty are made on an individual case basis, and reasons for taking such a course may include weaknesses in the prosecution case, a desire to prevent a traumatised victim from having to give evidence in court and whether it is in the public interest to accept a plea of guilty in the circumstances of a particular case.<sup>97</sup>

## Jury verdict

- 3.14 If the prosecution proceeds to trial on the count of rape and presents the case to the jury on the basis that there was no consent and that the accused knew that there was a lack of consent, it would be open to the jury to return a verdict of sexual penetration with a child under 16 if it did not find that the absence of consent had been established beyond reasonable doubt.<sup>98</sup> A judge may also direct a jury to acquit on the charge of rape on the basis that there is no evidence that could support the conviction.<sup>99</sup> It may, however, still be open to the jury to convict on the alternative charge of sexual penetration with a child under 16.

95 Plea negotiation can occur at any stage of the criminal proceeding, including prior to a committal hearing. See discussion in Sentencing Advisory Council, *Sentence Indication and Specified Sentence Discounts: Final Report* (2007) 67–72.

96 Office of Public Prosecutions (Victoria) (2008), above n 64, [2.6.5].

97 Ibid [2.9]. See also Office of Public Prosecutions (Victoria), *Early Resolution of Cases: Policy 22* (2008) [22.3.5] <[www.opp.vic.gov.au/wps/wcm/connect/Office+Of+Public+Prosecutions/resources/file/eba5620a1085d2c/22\\_Early\\_Resolution\\_Of\\_Cases.pdf](http://www.opp.vic.gov.au/wps/wcm/connect/Office+Of+Public+Prosecutions/resources/file/eba5620a1085d2c/22_Early_Resolution_Of_Cases.pdf)> at 1 June 2009.

98 *Crimes Act 1958* (Vic) s 425(1).

99 Christopher Corns and Steven Tudor, *Criminal Investigation and Procedure: The Law in Victoria* (2009) [10.590].



## Chapter 4: Functions of the statutory maximum penalty



## The functions of a statutory maximum penalty

- 4.1 In considering or reviewing the adequacy of a statutory maximum penalty, it is necessary to consider the purpose it serves in the context of the criminal law. A statutory maximum penalty should:
- place a legislatively defined 'ceiling' on the action the State may lawfully take against an individual (known as the 'principle of legality');
  - reflect the seriousness of the offence in relation to other criminal offences, and community perceptions regarding the seriousness of the offence; and
  - serve as a general deterrent to potential offenders by indicating the highest punishment they will face if they commit that particular offence.<sup>100</sup>
- 4.2 There are other mechanisms in addition to the sentence imposed which can have a further significant impact on an offender. Offenders may be subject to orders confiscating property which has been used in the commission of an offence<sup>101</sup> or restraining them from dealing with property to satisfy claims for compensation made by the victim.<sup>102</sup> Further, sexual offenders may also be placed on a register of sex offenders. This requires offenders to keep police notified of their whereabouts and inform them of their personal details and is aimed to reduce the likelihood of re-offending.<sup>103</sup> Registered offenders must report annually<sup>104</sup> and report any changes to relevant personal details.<sup>105</sup> The length of the reporting period differs according to the seriousness of the offence committed, ranging from eight years to life,<sup>106</sup> and it is an offence to fail to comply with reporting obligations without a reasonable excuse.<sup>107</sup>

<sup>100</sup> Fox and Freiberg (1999), above n 63, 233–4.

<sup>101</sup> For example, a houseboat used to lure children for the purpose of offending against them.

<sup>102</sup> For further discussion of the operation of the confiscations scheme in Victoria, see Sentencing Advisory Council, *Sentencing, Parole Revocation and Confiscation Orders: Discussion and Options Paper* (2009) 35–59.

<sup>103</sup> *Sex Offenders Registration Act 2004* (Vic) s 1.

<sup>104</sup> *Sex Offenders Registration Act 2004* (Vic) s 16.

<sup>105</sup> *Sex Offenders Registration Act 2004* (Vic) s 17.

<sup>106</sup> *Sex Offenders Registration Act 2004* (Vic) s 34.

<sup>107</sup> *Sex Offenders Registration Act 2004* (Vic) s 46.

## The principle of legality

- 4.3 The maximum penalty prescribed by the law 'is there to place a known and legally defined limit on judicial discretion in imposing punishment for that offence'.<sup>108</sup> It provides a legislatively defined 'ceiling' on the lawful action permitted by the State against an individual who commits an offence, and is also a symbolic recognition that the power of the State to deal with offenders must be subject to lawful restraint.<sup>109</sup>
- 4.4 The maximum penalty should be high enough to provide for the worst examples of the offence, but not so high as to be disproportionate to the seriousness of the relevant offence.<sup>110</sup>

## Offence seriousness

- 4.5 The maximum penalty should serve as an expression of the gravity with which the community views the offence and should provide guidance to the judiciary about the seriousness of the offence relative to other offences.<sup>111</sup>
- 4.6 Developing a consistent framework of maximum penalties by ranking the relative seriousness of criminal conduct is inherently difficult as '[s]ocial problems do not lend themselves to simple or elegant mathematical solutions. There is no strict denominator of social problems and no scale for comparing different problems'.<sup>112</sup> The concept of offence seriousness will mean different things to different people, depending on the emphasis placed on particular elements of the offences.<sup>113</sup>
- 4.7 One way to determine the seriousness of criminal conduct is by reference to the degree of harm caused or risked by the offender's actions, and the culpability of the offender for the ensuing harm.
- 4.8 An assessment of culpability involves gauging the extent to which an offender should be held accountable for his or her actions by assessing the offender's awareness, motivation and state of mind in committing the offence. For example, an offence requiring that the offender had the intention to cause a certain form of harm, such as *intentionally* causing serious injury, reflects a higher level of culpability than *negligently* causing serious injury.<sup>114</sup> However, the legal elements of the offence are of limited use in this task, as many offences simply involve engaging in proscribed conduct, without requiring the causation of any particular harm and without specifying any fault element in relation to the causation of harm. The offence of taking part in an act of sexual penetration with a child under 16 is such an offence. The legal elements of the

<sup>108</sup> Sentencing Task Force, *Review of Statutory Maximum Penalties in Victoria: Report to the Attorney-General* (1989) [45] (written for the Sentencing Task Force by Arie Freiberg and Richard Fox).

<sup>109</sup> It should be noted that there are also circumstances in which societies are prepared to move beyond traditional maximum penalty limits to keep particular types of offenders in custody indefinitely. Provisions such as indefinite sentences (see *Sentencing Act 1991* (Vic) s 18A–18P) and post-sentence supervision and detention schemes (see Sentencing Advisory Council, *Discussion and Options Paper* (2007), above n 22, and Sentencing Advisory Council, *Final Report* (2007), above n 22) can operate to keep potentially dangerous sexual offenders incarcerated for prolonged periods of time.

<sup>110</sup> Sentencing Task Force (1989), above n 108, [45]–[46]. See also *Markarian v The Queen* [2005] 228 CLR 357.

<sup>111</sup> Sentencing Task Force (1989), above n 108, [47].

<sup>112</sup> *Ibid* [102].

<sup>113</sup> *Ibid*.

<sup>114</sup> *Crimes Act 1958* (Vic) ss 16, 24.

offence do not require that any harm has been caused and do not specify any fault element in relation to the causation of harm. The assessment of relative harm and culpability in relation to sexual offences is examined in detail in Chapter 5.

## Deterrence

4.9 The statutory maximum penalty is also intended to serve as a general deterrent by warning potential offenders about the highest penalty that they will face if they commit such an offence. However, it is difficult to quantify whether or not the maximum penalty for an offence has any deterrent effect. There is no evidence as to how many potential offenders are aware of the maximum penalties for particular offences or whether or not they are in a position to draw a distinction between those maximum penalties and the level of sentences being imposed by the courts.<sup>115</sup>

4.10 The Victorian Court of Appeal has recently noted the importance of imposing sentences that serve as a deterrent in relation to sex offenders:

The undoubted fact that in recent times there has been evidence of a rising tide of public indignation that such crimes have been committed and can be seen to be anything but infrequent occurrences. The courts, and particularly this court is, I consider bound to respond to the legitimate community concern with the response placing emphasis on the need in particular to have sentences give effect to both specific and general deterrence.<sup>116</sup>

4.11 In an earlier case, the Court of Appeal noted:

In consequence of an increasing awareness in our society of the incidence of the sexual abuse of children and much greater understanding of the potential destructive impact that it has had and is continuing to have on the lives of so many people in our community, this Court has, on a large number of occasions, emphasised two fundamentally important considerations. First, in the assessment of the appropriate level of just punishment, conduct of the kind encompassed by counts 4 and 5 [sexual penetration] will be viewed as gravely serious. Sentences must involve recognition of the kind of personal damage that is occasioned by such behaviour and of the reality that the rehabilitation of the victim may be far more difficult to accomplish than that of the perpetrator. This leads to the second consideration. Through the sentences that they impose, the courts must, in order to protect future possible victims against such damage, endeavour to deter those who may be so inclined from engaging in such activities.<sup>117</sup>

4.12 Some of the people consulted for this reference questioned the deterrent effect of maximum penalties, particularly in the context of sentences actually imposed for the offence of sexual penetration with a child under 16.<sup>118</sup> One person suggested that those who commit these offences are unlikely to be aware of the penalties they could be liable to, commenting that, 'most people don't have sentencing remarks in their back pocket with a pack of condoms when they go out on Saturday night'.<sup>119</sup>

115 Sentencing Task Force (1989), above n 108, [50].

116 *R v Wayland* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Crockett, Southwell and Hampel JJ, 14 September 1992) [4] cited with approval in *DPP v CPD* [2009] VSCA 114 (Unreported, Maxwell P, Redlich JA and Robson AJA, 28 May 2009) [54].

117 *DPP v DJK* [2003] VSCA 109 (Unreported, Batt, Vincent and Eames JJA, 20 August 2003) [26].

118 Submission 14 (South Eastern Centre Against Sexual Assault); Submission 15 (Victorian Aboriginal Legal Service); Meeting with Paul Higham, criminal defence barrister (17 April 2009); Meeting with Gatehouse Centre, Royal Children's Hospital (22 June 2009).

119 Meeting with Paul Higham, criminal defence barrister (17 April 2009).

- 4.13 However, the maximum penalty may serve as a useful tool for those whose responsibility it is to provide community education programs as it may assist them to communicate more confidently the community's intolerance of such offences.
- 4.14 Awareness of the maximum penalty may have more relevance as a deterrent for people who commit crimes against children under their care, supervision or authority. As such offenders often choose particular professions or situations so that they are in a position to access and groom children, they are potentially more likely to be aware of the legal consequences of their actions.
- 4.15 Similarly, the concept of specific deterrence may have more meaning in the context of sexual offending, as recorded rates of recidivism for sex offenders are generally lower than for other offenders.<sup>120</sup> Whether this can be attributed to the deterrent effect of sentences imposed, rehabilitation or simply lack of opportunity to re-offend is, however, unclear.<sup>121</sup> A participant in the meeting with the Gatehouse Centre who works with sexual offenders suggested that the deterrent may be the threat of imprisonment, rather than the specific quantum of the maximum penalty.<sup>122</sup>

## Maximum penalty framework

- 4.16 Section 109 of the *Sentencing Act 1991* (Vic) contains a scale of statutory maximum penalties of imprisonment beginning at Level 1 (life imprisonment) and then decreasing incrementally from Level 2 (25 years imprisonment) to Level 9 (6 months imprisonment). The penalty scale was intended to provide some consistency by grouping offences according to their relative seriousness at different penalty levels. For example, the most serious offence against the person (murder) attracts the highest maximum penalty of life imprisonment (Level 1). Levels 2 to 6 decrease in five-year increments from 25 years to 5 years imprisonment. Levels 7, 8 and 9 are equal to 2 years, 1 year and 6 months imprisonment respectively.
- 4.17 Since the introduction of the penalty scale, statutory provisions that create an offence ordinarily set the maximum penalty at one of the levels specified in the scale. While the penalty scale provides a clear framework within which to set the maximum penalties, it does not allow for fine distinctions in the relative seriousness of offences. The organisation of the penalty scale into five-year increments means that the maximum penalty can only provide a rough guide to the relative seriousness of the offending conduct. Accordingly, where offences are divided by statutory aggravating factors with different maximum penalties, such as with the offence of sexual penetration with a child under 16, care should be taken to ensure that the distinctions created by those factors warrant a five-year difference in maximum penalty.

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<sup>120</sup> Karen Gelb, *Recidivism of Sex Offenders: Research Paper* (2007) 21.

<sup>121</sup> *Ibid* 21–31.

<sup>122</sup> Meeting with Gatehouse Centre, Royal Children's Hospital (22 June 2009).

## Relevance of maximum penalties

4.18 The maximum penalty is considered to be of primary importance in the sentencing process:

It is because the maximum penalty is important that s. 5(2)(a) of the *Sentencing Act* lists it first among the matters to which a court sentencing an offender must have regard and, if the judge mistakes the maximum, that re-opens the discretion unless the Court of Appeal is satisfied that the mistake could not have materially affected the sentence ... It is sometimes said that a judge, in obedience to s. 5(2)(a) 'steers by the maximum'. It is a helpful metaphor, but two things should be said of it. One is that there is a difference between steering by the maximum and aiming at the maximum. The penalty prescribed for the worst class of case is like a lighthouse or a beacon. The ship is not sailed towards it, but rather it is used as a navigational aid. The other is that the steering by the maximum may decrease the sentence that might otherwise be imposed as well as increase it.<sup>123</sup>

4.19 The Victorian Court of Appeal has recently clarified the relevance of an increase to a statutory maximum penalty, and has indicated that such increases are of relevance to sentencing generally, but have the most application for offending in the 'worst' category of the offence:

Whenever Parliament increases the maximum sentence for any criminal offence, that increase has potential significance for all sentences to which the new maximum applies ... the increase will have very substantial implications for any sentence for an offence that is placed within the worst category of that offence. Even where the offence to which the increase applies is nowhere near the worst category, the increase remains of relevance since, in the usual case, the increase shows that Parliament regarded the previous penalties as inadequate. Even where the new maximum penalty may only be of general assistance, it becomes the 'yardstick' which must be balanced with all other relevant factors.<sup>124</sup>

4.20 In a subsequent case, the Court of Appeal noted that higher sentences were not an inevitable consequence of an increase in maximum penalty.<sup>125</sup> However, in many cases, particularly in circumstances where the Parliament has indicated a specific intent for courts to impose lengthier sentences,<sup>126</sup> this is the likely and expected outcome of such increases in maximum penalties. Some judicial officers consulted for this reference were of the view that an increase in maximum penalty would represent a clear indication from Parliament that lengthier sentences were to be imposed in relation to the particular offence.<sup>127</sup>

<sup>123</sup> *DPP v Aydin & Kirsch* [2005] VSCA 86 (Unreported, Callaway, Buchanan and Eames JJA, 3 May 2005) [10]–[12].

<sup>124</sup> *R v AB (No.2)* (2008) 18 VR 391, 406.

<sup>125</sup> *R v Grossi* (2008) 183 A Crim R 15, 29.

<sup>126</sup> In 1997 the Victorian Government passed legislation that increased the applicable maximum penalties for a range of offences including manslaughter and sexual penetration with a child under 10. The then-Attorney-General stated that it was the intent of Parliament that 'increased maximum penalties which the government expects will lead to higher sentences [would be] passed on individual offenders': Victoria, *Parliamentary Debates*, Legislative Assembly, 24 April 1997, 872 (Jan Wade, Attorney-General).

<sup>127</sup> Meeting with County Court judges (14 May 2009).



## Chapter 5: Adequacy of the maximum penalties



## Introduction

- 5.1 The following analysis begins with the premise that the current maximum penalties for this offence are already set at a high level on the penalty scale. By setting the applicable maximum penalties at 25, 15 and 10 years imprisonment, Parliament has indicated that these offences are among the most serious known to Victorian law. This view has been reinforced by subsequent legislation specifying that a wholly suspended term of imprisonment for the offence of sexual penetration with a child under 16 (with regard to offences committed on or after 1 November 2006) may only be imposed if there are exceptional circumstances for doing so, and if it is in the public interest to do so.<sup>128</sup>
- 5.2 The previous chapter examined the three purposes of a statutory maximum penalty – the principle of legality, offence seriousness and deterrence. This chapter analyses the extent to which the current statutory maximum penalties for sexual penetration with a child under 16 adequately satisfy two of those purposes.
- 5.3 First, it examines current sentencing practices for the offence based on data compiled by the Council. The purpose of this analysis is to ascertain whether or not judicial officers are ‘constrained’ by the upper limit of the relevant penalty when sentencing offenders.
- 5.4 Secondly, it considers the maximum penalties in the context of offence seriousness as set out in the previous chapter. The purpose of this analysis is to determine whether the relative harm caused by each form of the offence is sufficiently represented by the applicable maximum penalty.
- 5.5 The third purpose discussed in Chapter 4, deterrence, does not form part of this analysis as there is little data or research available regarding the deterrent effect of maximum penalties for sexual offences against children.
- 5.6 This analysis concludes that the current maximum penalties for the offence of sexual penetration with a child under 16 are sufficient, both in terms of their ability to address the relative seriousness of each form of the offence, and in relation to the ability of judicial officers to impose appropriate sentences within the applicable penalty range.
- 5.7 There were some people consulted by the Council who suggested that there should be no distinction between maximum penalties for each form of the offence and that all forms of the offence of sexual penetration of a child under 16 should be subject to a maximum penalty of 25 years imprisonment.<sup>129</sup> The Council is, however, cognisant of the practical implications of recommending such a course, particularly in light of submissions received indicating a concern that a significant increase in maximum penalties may result in fewer guilty pleas for the lower penalty category offences of sexual penetration (10–16) and (CSA).<sup>130</sup> Considering the traumatic effect that a trial can have on victims of sexual assault, particularly children, the Council ultimately considers that it may be counter-productive to make changes which may lead to more complainants being subjected to cross-examination.

128 *Sentencing Act 1991* (Vic) ss 3 and 27(2B). The offence of sexual penetration with a child under 16 is included on the list of ‘serious offences’ for which a judge may not wholly suspend a sentence unless there are exceptional circumstances for doing so, and if it is in the public interest to do so. This provision came into operation on 1 November 2006: *Sentencing (Suspended Sentences) Act 2006* (Vic) s 7(1).

129 Submission 3 (R. Marks); Submission 4 (H. Farquhar); Submission 6 (Anonymous); Submission 12 (Bravehearts).

130 Submission 23 (Victoria Legal Aid); Legal Issues Roundtable (6 April 2009).

## Current sentencing practices

- 5.8 In considering the adequacy of the maximum penalties for this offence, a key question is whether or not there is sufficient scope for the courts to deal with all the relevant conduct coming before the courts. This can be determined by examining the average sentences currently being imposed for this offence. Further, some consideration must be given to whether or not the longest sentences being imposed are approaching the maximum. If so, an increase in the maximum penalty may be justified to ensure that the upper range is reserved for the 'worst cases'.
- 5.9 It is therefore necessary to analyse current sentencing practices<sup>131</sup> for the offence of sexual penetration with a child under 16 by considering available sentencing statistics and case law that is comparable on both a factual and legal basis. Sentencing statistics are a valuable resource when ascertaining a broad view of current sentencing practices; however, they should be considered carefully as their use is limited by 'the absence of information about the individual sentencing decisions, as to whether the sentenced person had pleaded guilty or not guilty and whether there were other mitigating or aggravating features which affected the sentence'.<sup>132</sup>
- 5.10 The relevant sentencing statistics need to be considered in the context of the number of offences of sexual penetration with a child under 16 receiving sentences of imprisonment and the number of charges dealt with at any one time. The following is an analysis of sentencing practices in Victorian Courts for the three forms of the offence of sexual penetration with a child under 16 for the period July 2006 to June 2008.<sup>133</sup> These statistics distinguish between charges and cases. A 'charge' is a single count of a proven offence, whereas a 'case' is all proven charges against a defendant in the same proceeding.<sup>134</sup> This distinction may be an important consideration when assessing relative sentence lengths in the context of applicable sentencing principles, such as the principle of totality (see discussion below at 5.31).

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<sup>131</sup> *Sentencing Act 1991* (Vic) s 5 (2)(b) states that a court must have regard to 'current sentencing practices' in sentencing.

<sup>132</sup> *DPP v CPD* [2009] VSCA 114 (Unreported, Maxwell P, Redlich JA and Robson AJA, 28 May 2009) [57]. See also *DPP v Maynard* [2009] VSCA 129 (Unreported, Ashley, Redlich and Kellam JJA, 11 June 2009) [35]: 'care must be taken when making comparisons between individual cases and in using statistics. Statistics do no more than establish minimum and maximum sentences and the average and median sentences imposed during a particular, and necessarily arbitrary period. Indeed, there is a danger that undue reliance upon the average or median sentence imposed during a particular period will distract the sentencing judge from the particular circumstances of the case and has the capacity to distort sentencing in particularly serious cases towards the average or median figure. The statistics cited provide guidance in only a limited way to the sentence that should have been imposed in this case. By themselves, statistics do not establish a sentencing practice'. The limitations of sentencing statistics were also noted in Submission 11 (Law Institute of Victoria).

<sup>133</sup> The offence of sexual penetration with a child under 16 is an indictable offence and must therefore be heard in the higher courts. All cases examined by the Council concerned charges which were heard in the County Court of Victoria.

<sup>134</sup> For a comprehensive explanation of the methodology utilised in counting cases and charges for statistical purposes, see Sentencing Advisory Council (2009), above n 7, 7–9.

## Sentence type

- 5.11 Figure 4 illustrates that the most common sentence for all forms of the offence of sexual penetration with a child under 16 was imprisonment. Offenders convicted of a charge of sexual penetration (child under 10) were the most likely to be sentenced to a term of imprisonment. A majority of charges of sexual penetration (CSA) also received sentences of imprisonment.
- 5.12 A much lower proportion of charges of sexual penetration (10–16) received a term of imprisonment. This form of the offence had a wider distribution of sentence types, with 21.5 per cent of charges receiving a non-custodial sentence.
- 5.13 Figure 5 shows the distribution of total effective sentences for cases in which at least one of the specified sexual offences was sentenced.

Figure 4: Percentage of charges by form of the offence and sentence type, 2006–07 to 2007–08

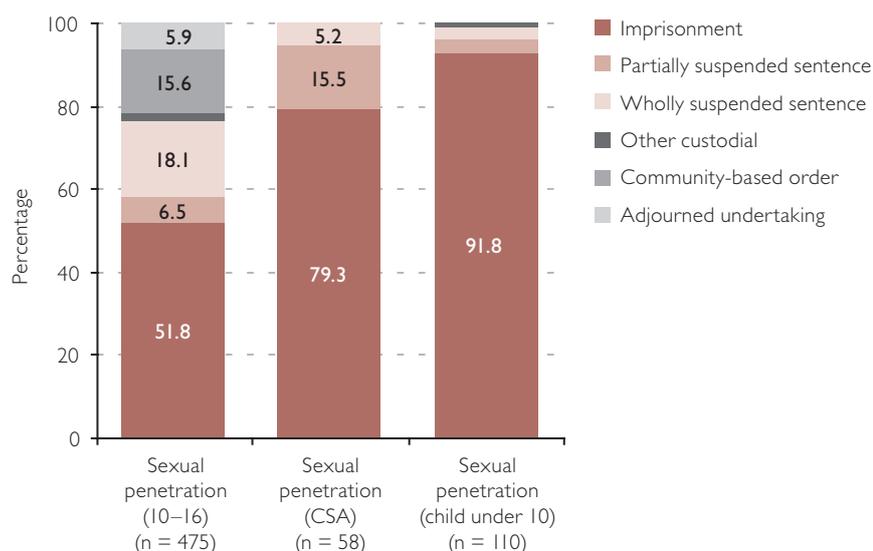
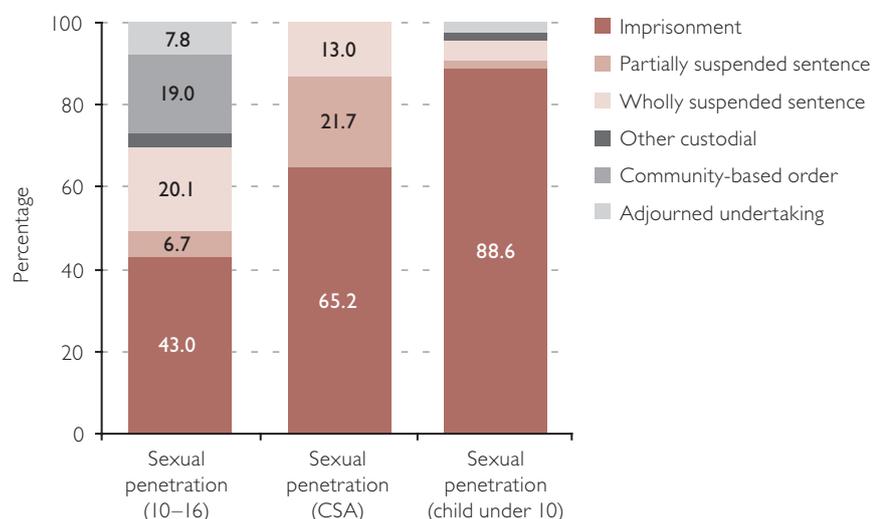


Figure 5: Percentage of cases by offence type and sentence type, 2006–07 to 2007–08



- 5.14 The case-based analysis shows a similar spread of offending; however, in general the sentences were slightly less severe. For example, 43 per cent of cases with sexual penetration (10–16) received a total effective sentence of imprisonment (compared with 51.8% of charges).
- 5.15 Both the charge- and case-based data reflect the relative maximum penalties for the different forms of the offence.

### Imprisonment length

- 5.16 Figure 6 (opposite) shows the average length of sentences of imprisonment for charges and cases according to offence type.
- 5.17 For charges, the longest average sentence length was for sexual penetration (CSA) (3.6 years) and the shortest was for sexual penetration with a child (10–16) (2.3 years).
- 5.18 For cases, the average total effective sentence of imprisonment across all offences was substantially higher than the average for individual charges. This is due to the prevalence of cases with multiple charges for these offence types, as described below.
- 5.19 The data in relation to the average length of imprisonment term per charge are not consistent with the way the maximum penalties are graduated because sexual penetration (child under 10) has a much higher maximum penalty than sexual penetration (CSA). However, the average term of imprisonment for both cases and charges is higher for sexual penetration (CSA) than sexual penetration (child under 10).
- 5.20 Figure 7 (opposite) shows the longest imprisonment sentence for charges and cases by offence.
- 5.21 While the longest imprisonment sentence imposed in a case reflects the graduated penalties, in relation to the longest term of imprisonment imposed for a single charge, sexual penetration (CSA) has had a higher imprisonment term imposed (8 years) than sexual penetration (child under 10) (6.5 years).
- 5.22 While there are limitations on the comparative value of statistics in this form, this is still a noticeable difference in light of the fact that the maximum penalty for sexual penetration (CSA) is 10 years lower than the maximum penalty for sexual penetration (child under 10).
- 5.23 The fact that the average sentences are so far removed from the maximum penalties for each form of the offence would suggest that there is sufficient latitude for courts to deal with the various factual scenarios which may arise. Further, as the longest sentences of imprisonment are also much lower than the maximum penalties, the legislative ‘ceiling’ is high enough to accommodate the worst example of this offence.<sup>135</sup>
- 5.24 Consistent with the data, Victoria Legal Aid, the Law Institute of Victoria and Youthlaw all agreed that the current offence and maximum penalty structure was adequate to deal with all offences currently coming before the courts.<sup>136</sup>

<sup>135</sup> It should be noted that the data examined only covers two years. Longer sentences may have been imposed for these offences in previous years.

<sup>136</sup> Submission 10 (Youthlaw); Submission 11 (Law Institute of Victoria); Submission 23 (Victoria Legal Aid).

- 5.25 There was, however, a view expressed by many consulted by the Council that the data also reveal that current sentencing practices are insufficient to reflect the seriousness of the offence.<sup>137</sup>
- 5.26 When considering the average length of sentences for this offence, it is important to note that charges for sexual penetration with a child under 16 are rarely dealt with in isolation. While courts must sentence offenders separately on each charge before them, where multiple offences are being dealt with at the same time, courts must also be mindful of the principle of totality. The operation of this principle may provide some explanation as to why average sentences for individual charges of sexual penetration with a child under 16 are so far removed from the maximum penalties applicable to each form of the offence (see Figure 6).

**Figure 6:** Average imprisonment sentence length (years) by level of analysis and offence type, 2006–07 to 2007–08



**Figure 7:** Longest imprisonment sentence length (years) by level of analysis and offence type, 2006–07 to 2007–08



<sup>137</sup> Meeting with West CASA (22 April 2009); Meeting with Ballarat CASA (21 May 2009); Submission 3 (R. Marks).

## Sentencing for multiple offences in a case

- 5.27 Figure 8 (opposite) shows that between July 2006 and June 2008 for each form of the offence of sexual penetration with a child under 16, the average number of charges per case was at least two. For sexual penetration (child under 10) and (CSA) the average number of charges was 2.5 and for sexual penetration (10–16), it was 2.7.
- 5.28 The number of charges per case increased for all forms of the offence where other sexual offences were included. This was most striking for sexual penetration (CSA) where the average number of sexual offences per case was 9.8 and sexual penetration (child under 10) where there was an average of 8.9 charges.<sup>138</sup>
- 5.29 The most common sexual offence sentenced alongside all forms of sexual penetration with a child under 16 was indecent act with a child under 16. More than half of the cases of sexual penetration (child under 10) (63.6%) and sexual penetration (CSA) (69.6%) contained at least one count of indecent act with a child under 16. A lower number of cases of sexual penetration (10–16) also had at least one count of indecent act with a child under 16 (29.4%).<sup>139</sup>
- 5.30 The greater the number of sexual offences in any one case, the greater the total effective sentence will be, as shown in Figure 9 (opposite).

## Principle of totality

- 5.31 The total effective sentences shown in Figure 9 are sentences imposed on all the charges in each case. The totality principle aims to ensure that offenders sentenced for multiple offences receive a sentence that overall is just and appropriate for the whole of their offending behaviour.<sup>140</sup> A closely related principle to totality is the tendency to avoid sentences which ‘crush’ any future hope for the offender of ‘any reasonable expectation of usefulness of life after release’.<sup>141</sup> However, the question of whether a sentence is crushing is not the only consideration when applying the totality principle.<sup>142</sup>
- 5.32 The primary justification for the totality principle is to achieve appropriateness in sentencing by ensuring there is proportionality between multiple sentences and the overall offending behaviour.<sup>143</sup> Proportionality requires that the aggregate of the sentences imposed be proportionate to the total criminality involved in the offences for which an offender is being sentenced. However, mercy may also justify the application of totality and permits a court to intervene and adjust a sentence if its aggregate effect will be crushing for the offender.<sup>144</sup>

<sup>138</sup> Sentencing Advisory Council (2009), above n 7, 33.

<sup>139</sup> *Ibid* 34–5.

<sup>140</sup> See *Attorney-General v Tichey* (1982) 30 SASR 84, 92–3; *Johnson v The Queen* (2004) 205 ALR 346.

<sup>141</sup> *Yates v The Queen* [1985] VR 41, 48; *R v Beck* [2005] VSCA 11 (Unreported, Vincent, Nettle JJA and Cummins AJA, 8 February 2005) [19]. See also David Thomas, *Principles of Sentencing* (2nd ed, 1979) 57–8, cited in *Postiglione v The Queen* (1997) 189 CLR 295, 304.

<sup>142</sup> *Johnson v The Queen* (2004) 205 ALR 346, 355.

<sup>143</sup> Fox and Freiberg (1999), above n 63, 724.

<sup>144</sup> *Postiglione v The Queen* (1997) 189 CLR 295, 304.

5.33 In practice, this allows a court to adjust a sentence if the sum of individual sentences imposed would be disproportionate to the offending. This can be done in two ways:

- adjusting the manner in which sentences are structured through orders for cumulation or concurrency; or
- adjusting the total sentence through moderation of individual sentences.

Figure 8: Average number of charges per case by offence and charge types, 2006–07 to 2007–08



Figure 9: Average total effective sentence term of imprisonment for cases by number of sexual offences within the case and offence category, 2006–07 to 2007–08



- 5.34 The first method of cumulation and concurrency is generally accepted as the primary mechanism for giving effect to the totality principle.<sup>145</sup>
- The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'.<sup>146</sup>
- 5.35 For example, if sentencing an offender for multiple offences arising out of the same course of conduct, a court could impose appropriate individual sentences to reflect the gravity of each offence and order that they be served concurrently.
- 5.36 In some cases, it might be more appropriate to use cumulation. For example, when there are separate victims for each offence, the court could impose moderated but still appropriate sentences for each offence and order that they be served cumulatively.<sup>147</sup> Although less favoured, this 'moderating and cumulation technique'<sup>148</sup> has been used to correct sentencing errors where a heavy sentence has been imposed on one count and inappropriate orders for concurrency have been made for sentences on other counts.<sup>149</sup>
- 5.37 The second method of achieving totality involves adjustment of the total sentence through moderation of individual sentences below that which would otherwise be imposed.<sup>150</sup> Generally, this second mechanism is only to be applied where the primary mechanism of cumulation and concurrency cannot be used.<sup>151</sup> For example, this could include circumstances where the offender is already serving a sentence interstate<sup>152</sup> or in Victoria<sup>153</sup> or where the offender is being sentenced after a breach of parole.<sup>154</sup>
- 5.38 While the cumulation and concurrency mechanism is generally accepted as the orthodox mechanism for achieving totality, where appropriate, the second mechanism of moderation remains open to the sentencing judge.<sup>155</sup>
- 5.39 The principle of totality may have some effect on the length of sentences for charges where there are multiple charges dealt with at the same time. However, there is still a significant disparity between the sentences being imposed and the current maximum penalties. This issue is discussed further in Chapter 6.

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145 *Mill v The Queen* (1988) 166 CLR 59, 63; *Johnson v The Queen* (2004) 205 ALR 346.

146 Thomas (1979), above n 141, 56–7; cited in *Mill v The Queen* (1988) 166 CLR 59, 63.

147 *R v Lomax* [1998] 1 VR 551; *DPP v Grabovac* [1998] 1 VR 664.

148 Judicial College of Victoria, 'Moderation and Cumulation', *Victorian Sentencing Manual* (2006–) [6.4.3.3] <[www.justice.vic.gov.au/emanuals/VSM/default/htm](http://www.justice.vic.gov.au/emanuals/VSM/default/htm)> at 21 April 2009.

149 *R v McCriston* [2000] VSCA 200 (Unreported, Winneke P, Callaway and Buchanan JJA, 17 October 2000) [13]. See also *R v Izzard* (2003) 7 VR 480.

150 *Mill v The Queen* (1988) 166 CLR 59, 63.

151 Judicial College of Victoria (2006–), 'Mechanisms of Totality', above n 148, [6.4.3].

152 *Mill v The Queen* (1988) 166 CLR 59.

153 *R v Beck* [2005] VSCA 11 (Unreported, Vincent, Nettle JJA and Cummins AJA, 8 February 2005).

154 *R v Aleksov* [2003] VSCA 44 (Unreported, Callaway, Batt JJA and Cummins AJA, 9 April 2003). See Judicial College of Victoria (2006–), above n 148, [6.4.3].

155 *Johnson v The Queen* (2004) 205 ALR 346, 356. See also *Pearce v The Queen* (1998) 194 CLR 610.

## Relative offence seriousness

- 5.40 Sentencing practices are not the only basis on which an assessment of the adequacy of a maximum penalty can or should be made. Critical issues to be explored when assessing the adequacy of statutory maximum penalties include an assessment of whether the maximum penalty itself sufficiently reflects the inherent seriousness of the particular offence, the harm caused by the offending and the culpability of the offender for the offending conduct.
- 5.41 Although the high maximum penalties applicable to the offence of sexual penetration with a child under 16 are an indication that each form of the offence is considered by Parliament to be serious, the offence structure itself is a relatively unhelpful instrument by which to consider the actual harm contemplated by the offending conduct. Unlike some other offences such as intentionally causing serious injury or culpable driving, the legal elements of the offence of sexual penetration with a child under 16 do not in themselves provide an indication of the relative harm caused by the offending and the culpability of the offender for it. A more holistic approach to offence seriousness and an assessment of the adequacy of the maximum penalties are needed therefore to undertake a consideration of the type and seriousness of harm contemplated by the statutory aggravating factors for the offence of sexual penetration with a child under 16.

### Understanding ‘harm’ and ‘culpability’ in the context of sexual offending

- 5.42 The inclusion of statutory aggravating factors within legislative offence descriptions is generally intended to indicate that the type of harm caused, or potentially caused, by the aggravated form of the offence is more serious than other types of harm. This premise is reflected by the availability of higher statutory maximum penalties for the aggravated forms of the particular offence. In the case of sexual penetration with a child under 16, it is reflected by indicating that offences committed against children under 10, or under the care, supervision or authority of the offender sit higher on the penalty scale than the unaggravated form of the offence. This is because the very young age of the child, or the relationship between the offender and the child, is considered to intensify the harm or damage caused to the victim.
- 5.43 However, the harm caused by sexual offending is inherently difficult to quantify, and is not easily ‘graded’ by reference to offence category. The Ballarat Centre Against Sexual Assault (Ballarat CASA) commented that while sexual trauma at an early age was likely to cause serious and long-term difficulties, ‘the age of the child and the circumstances of the offending are not the most reliable determinants of harm’.<sup>156</sup> This is because unlike some criminal offences where the harm is immediately and readily apparent, such as an assault where the injuries are visible, the true harm caused by sexual offending is often emotional and psychological and can lie dormant for many years.<sup>157</sup> Harm caused by sexual offending may also be physical, and in the case of particularly young children, may impact on long-term sexual and reproductive health.

<sup>156</sup> Meeting with Ballarat CASA (21 May 2009).

<sup>157</sup> This is not to suggest that an assault may not have serious emotional and psychological effects as well, for example by impacting on the victim’s feelings of personal safety.

- 5.44 The harm caused by sexual offending is particularly relevant where the victim is a child because it is well established that sexual abuse can have a significant impact on issues of child development and psychological well-being, and can continue to affect victims of child sexual abuse well into adulthood.<sup>158</sup> Research suggests that '[d]epression, low self-esteem, mistrust of adults, and anger and hostility can persist for years' in cases where a child has been sexually abused.<sup>159</sup> Children of different ages may also react differently to abuse, from 'sleep difficulties, loss of appetite and generalised fearfulness' in younger children, to 'severe depression, suicidal impulses, substance abuse, early sexual activity with more partners, running away and delinquency' in adolescents.<sup>160</sup>
- 5.45 The views of those the Council consulted reflected considerable community concern for the impact that sexual abuse can have on children.<sup>161</sup> The long-term effects of this abuse were also emphasised: 'when a child is sexually assaulted, this stays with them for life'.<sup>162</sup> The parents of a young girl who had been sexually abused told the Council that:
- she has lost something that can never be returned ... at the moment, she is coming to terms with what happened to her physically, but as she gets older and begins to understand the sexual nature of the offence against her that is more for her to deal with.<sup>163</sup>
- 5.46 An adult survivor of child sexual assault commented that, 'the child victims carry their scars for life and their experiences do affect them in many aspects of their lives ... counselling helps and we can go on to enjoy a somewhat normal life, but the memories are always there'.<sup>164</sup>
- 5.47 Several people consulted felt that the courts did not seem to understand the specific meaning of 'harm' in the context of child sexual offences.<sup>165</sup> The Western Region Centre Against Sexual Assault (West CASA) noted:
- Legal understandings of harm in sexual assault cases are limited—how can courts determine seriousness if they do not understand harm? Harm caused goes well beyond whatever physical trauma is caused by the act itself. There are long term harms such as a higher risk of physical and mental illness. Also, women who have been abused are much more likely to be incarcerated. The courts are still in a place where the understanding of the harm caused by sex offending is not well understood. Research has moved on significantly but the courts have been unable to catch up.<sup>166</sup>
- 5.48 However, courts have recognised the particular harm suffered by children in cases of child sexual abuse. In a recent case, the Victorian Court of Appeal commented:
- It is well to bear in mind that the rehabilitation of the victim of sexual abuse may often be more difficult to achieve than that of the perpetrator. Frequently the damage will be profound and a long

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158 Michael Dunne and Margot Legosz, 'The Consequences of Childhood Sexual Abuse' in Queensland Crime Commission (2000), above n 85, 44, 55.

159 Laura Berk, *Child Development* (6th ed, 2003) 588.

160 *Ibid.*

161 Submission 3 (R. Marks); Submission 7 (D. Duthie); Submission 12 (Bravehearts); Victim Issues Roundtable (6 April 2009); Meeting with West CASA (22 April 2009); Meeting with Ballarat CASA (21 May 2009); Meeting with Gatehouse Centre, Royal Children's Hospital (22 June 2009).

162 Submission 4 (H. Farquhar).

163 Meeting with parents of a child victim of sexual assault (9 April 2009).

164 Submission 22 (B. Bull).

165 Submission 3 (R. Marks); Submission 22 (B. Bull).

166 Meeting with West CASA (22 April 2009).

time will pass before it can be addressed at all. In the meantime, childhood will be destroyed, self esteem damaged, educational and career opportunities lost and the capacity to form and maintain relationships seriously impaired.<sup>167</sup>

- 5.49 Courts have also acknowledged that the harm caused by sexual offending may in fact extend beyond the victim.<sup>168</sup> In the County Court case which prompted this review, *R v Maurice*,<sup>169</sup> the offender broke into the victim's home through her bedroom window in the early hours of the morning and digitally penetrated her vagina. The sentencing judge commented that:

[The victim impact] statements show very clearly that your offending has had a catastrophic effect upon [the victim] and her family ... you in fact destroyed the very decent life that this family had loved. Every aspect of life of every member of the family has been affected by your crimes ... [they have been] forced to sell up and move. The parents are wracked with blame, holding themselves responsible for not completely protecting their children. Completely outgoing decent people have reverted to insular souls who now trust no-one.<sup>170</sup>

- 5.50 It is against this framework of 'harm' that the graduated penalties for the offence of sexual penetration with a child under 16 can be contextualised. Although significant and serious harm is assumed by the commission of any sexual offence against a child, the law also acknowledges that there are certain circumstances, namely those identified by the statutory aggravating factors, in which the harm caused or risked may be intensified. The culpability of the offender is higher when the offending conduct is of a type captured by the statutory aggravating factors as the power imbalance between the parties is more significant.<sup>171</sup>

## Age of child – 'younger' children (children under 10)

- 5.51 Many stakeholders considered that the harm caused by sexual offending was greater for younger children.<sup>172</sup> As the submission from the Office of the Child Safety Commissioner observed:

Society also holds very strongly a view that the younger a child is, the more vulnerable they are given their initial complete reliance on the care and protection of the caring adults in their lives. This reliance on the nurturing and protection of others decreases as the child's developmental age increases and he/she becomes more emotionally and physically mature, moving towards full independence.<sup>173</sup>

- 5.52 Although as explained above, it is difficult to draw generalisations about the nature of harm in the context of sexual offending, children under 10 were considered to be 'highly vulnerable'.<sup>174</sup> This is currently indicated by the maximum penalty for this form of the offence, which is 25 years imprisonment, which is the second highest penalty available under Victorian law.<sup>175</sup>

167 *DPP v Toomey* [2006] VSCA 90 (Unreported, Buchanan, Vincent and Nettle JJA, 19 April 2006) [22].

168 The wider impact of the offence was reinforced to us in our discussions with the parents of a child victim of sexual assault (9 April 2009).

169 [2009] VCC (Unreported, Lacava J, 14 October 2008).

170 *Ibid* [13]–[14].

171 Factors other than those specified by statute remain capable of aggravating the offending conduct. Judges are required to have regard to the presence of any aggravating or mitigating factor concerning the offender or any other relevant circumstance when sentencing: *Sentencing Act 1991* (Vic) s 5(2)(g).

172 Submission 14 (South Eastern Centre Against Sexual Assault); Submission 19 (Office of the Child Safety Commissioner); Submission 21 (Women's Legal Service Victoria); Submission 23 (Victoria Legal Aid).

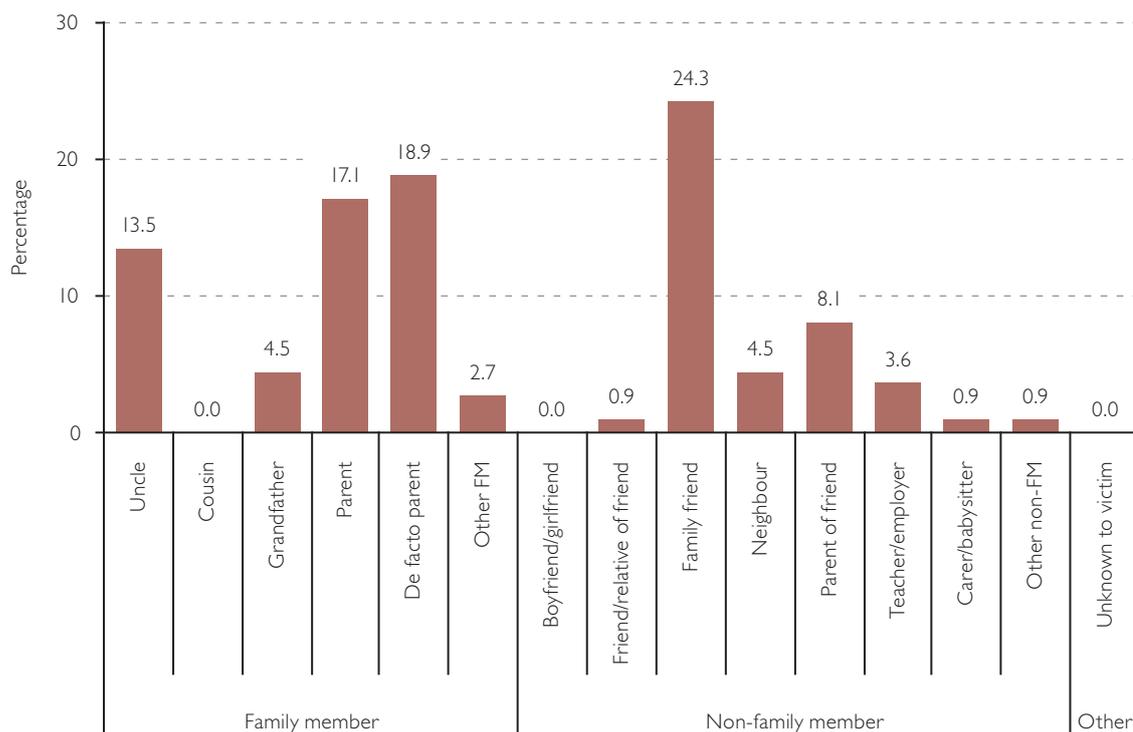
173 Submission 19 (Office of the Child Safety Commissioner).

174 Submission 23 (Victoria Legal Aid).

175 *Sentencing Act 1991* (Vic) s 109.

- 5.53 A number of people commented in consultations that there is no separate category of care, supervision or authority for children under 10 because this effectively describes the relationship between almost all adults and children of this age.<sup>176</sup> This view is supported by an examination of the Council's data, which demonstrates no offences were committed against children under 10 in 2006–07 to 2007–08 by people who were unknown to the victim (see Figure 10 below).<sup>177</sup>
- 5.54 Sexual penetration with a child under 10 thus involves a high level of culpability, because 'younger' children are members of a particularly vulnerable group, and are particularly susceptible to sexual abuse by family members or other trusted adults.<sup>178</sup> The protective principle finds its strongest expression in relation to the offence of sexual penetration (child under 10), as the particular vulnerability of the victim by reference to his or her age means that culpability cannot be mitigated by any suggestion of consent.

**Figure 10:** Percentage of charges by relationship of offender to victim for sexual penetration with a child aged under 10, 2006–07 to 2007–08



<sup>176</sup> Submission 11 (Law Institute of Victoria); Submission 23 (Victoria Legal Aid); Victim Issues Roundtable (6 April 2009); Legal Issues Roundtable (6 April 2009); Meeting with Gatehouse Centre, Royal Children's Hospital (22 June 2009).

<sup>177</sup> This is not to suggest that sexual offences against children are never committed by people unknown to the victim, rather that such cases were not recorded in the Council's data sample as having been sentenced in the relevant time period.

<sup>178</sup> See for example, Martin Wasik, 'Crime Seriousness and Victim/Offender Relations' in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (1998) 104, 115.

- 5.55 Courts have also generally taken the view that ‘the younger, more vulnerable or less mature the victim is, the more heinous is the perpetrator’s behaviour’, and consequently, the higher the culpability of the offender.<sup>179</sup> In *DPP v CPD*,<sup>180</sup> the Court of Appeal considered it to be a ‘significant aggravating feature’ that the victims were ‘extremely young and therefore highly vulnerable’.<sup>181</sup>
- 5.56 Consistent with this view, the Council’s data show that courts are generally more likely to impose a term of imprisonment where a victim is under 10.<sup>182</sup> In the period 2006–07 to 2007–08, all charges of sexual penetration (child under 10) received terms of imprisonment where the victim was under 5. This decreased slightly to 97 per cent where the victim was aged 5 to 6 and further to 87.5 per cent where the child was aged 7 to 9.<sup>183</sup>
- 5.57 Another factor that has been considered to increase the culpability of the offender is the age gap between the victim and the offender. While all cases of adults offending against children will involve an imbalance of power, this may be exacerbated where there is a greater difference in age. The age disparity between a victim and an offender has been taken into account by courts as an aggravating feature, particularly where the court is of the view that the difference in age suggests that ‘the offender has used his or her greater experience to overbear or manipulate the victim’.<sup>184</sup> The age difference between the victim and the offender was most marked for sexual penetration (child under 10), with over two-thirds of charges being committed by offenders who were 20 years or more older than their victims (69.0%) and one-third (33.3%) who were 40 years or more older.<sup>185</sup> Almost all charges of sexual penetration (under 10) received sentences of imprisonment where the age difference was more than 10 years.<sup>186</sup>
- 5.58 A number of submissions provided to the Council did not support the view that the seriousness of the offence could be determined by reference to the age of the victim.<sup>187</sup> It was argued that the age distinction is irrelevant and that all sexual offending against children (under 16) should be treated in the same way. Some people suggested that while physical harm may be greater for younger children it does not necessarily follow that the emotional effect of offending is determined by the victim’s age.<sup>188</sup> For example, Bravehearts was of the view that ‘the impact of the offence on a child is not necessarily mitigated by the victim’s age’.<sup>189</sup> The Victorian Women’s Trust suggested that ‘it is difficult to comprehend that the law in its current

179 *R v Sulemanov* [2007] VSCA 288 (Unreported, Vincent, Redlich and Kellam JJA, 11 December 2007) [20]. A court may also consider that an offence committed against an elderly person increases the gravity of the offence. See Fox and Freiberg (1999), above n 63, 258.

180 [2009] VSCA 114 (Unreported, Maxwell P, Redlich JA and Robson AJA, 28 May 2009).

181 *Ibid* [66].

182 Sentencing Advisory Council (2009), above n 7, 18.

183 *Ibid*.

184 Fox and Freiberg (1999), above n 63, 258.

185 Sentencing Advisory Council (2009), above n 7, 23.

186 *Ibid* 24.

187 Submission 12 (Bravehearts); Submission 13 (Koorie Women Mean Business Incorporated); Submission 15 (Victorian Aboriginal Legal Service); Submission 16 (Victorian Women’s Trust); Submission 20 (Springvale Monash Legal Service); Telephone communication with mother of a child victim of sexual assault (6 July 2009).

188 Telephone communication with adolescent health professional (3 July 2009).

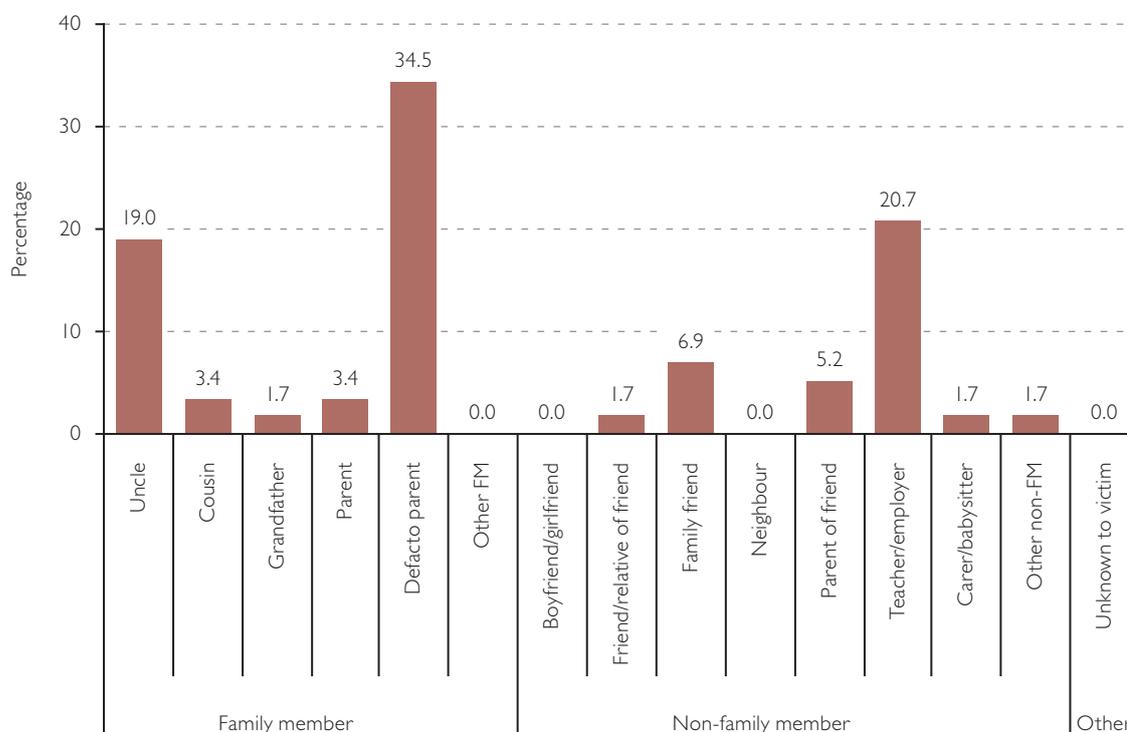
189 Submission 12 (Bravehearts).

form can distinguish the seriousness of offences based on small age differences'.<sup>190</sup> Some of these people thought that there should be one maximum penalty for all three forms of the offence as they could not distinguish between the relative seriousness of the different circumstances of offending.<sup>191</sup>

### Child under care, supervision or authority (10–16)

- 5.59 Sexual penetration (CSA) involves adult offenders who use their positions of power to prey on children. The victims in this form of the offence are older than for sexual penetration (child under 10); therefore the main harm comes from the breach of trust inherent to the offence, rather than by reference to the age of the victim.
- 5.60 Between July 2006 and June 2008, there were 58 charges of sexual penetration (CSA) in 23 cases and there was a generally even distribution of victim ages across these charges.<sup>192</sup> Figure 11 details the types of relationships between the victim and offender for the charges of sexual penetration (CSA) in the period 2006–07 to 2007–08.

**Figure 11:** Percentage of charges by relationship of offender to victim for sexual penetration (CSA), 2006–07 to 2007–08



<sup>190</sup> Submission 16 (Victorian Women's Trust).

<sup>191</sup> Submission 3 (R. Marks); Submission 4 (H. Farquhar); Submission 5 (Anonymous); Submission 12 (Bravehearts); Submission 15 (Victorian Aboriginal Legal Service); Submission 20 (Springvale Monash Legal Service).

<sup>192</sup> See Figure 2 above. See also Sentencing Advisory Council (2009), above n 7, 17.

- 5.61 The most significant harm caused by this form of the offence is the breach of trust caused by the misuse of power and exploitation of the relationship by the adult party.<sup>193</sup> This can have a particularly negative effect on the victim, as research suggests that, in addition to the invasiveness of the sexual act, 'the longer and [more frequent acts] committed by someone close to the child constitute greater severity and related to corresponding increases in a variety of behaviour problems'.<sup>194</sup>
- 5.62 This view was reinforced by many of the people consulted by the Council.<sup>195</sup> For example, the Office of the Child Safety Commissioner submitted that 'crime is even more harmful when committed by a person who has been entrusted with the care of the child, either by virtue of being a family member or as a function of their employment', due to the fact that 'such crimes are a complete breach of trust, with the impact of long-term psychological trauma for the victim/survivor'.<sup>196</sup> Participants in a Victim Issues Roundtable conducted by the Council also noted that victims in a care, supervision or authority relationship may have been so well groomed by the older party that they are unable to perceive themselves as victims.<sup>197</sup>
- 5.63 The courts have also acknowledged the prevalence of the offence of sexual penetration (CSA) and in particular, have reflected the fact that society expects and places responsibility upon people within the CSA role to be protectors of children, not offenders against them:
- Over the last few years this community has been required to face and respond to an appalling incidence of child abuse and the frequently terrible consequences which have followed. Those consequences, even in terms of the behaviour of ordinary decent adults interacting with children in the course of their work or social activities, have been profound. Slowly but surely we have come to recognise that many of the perpetrators are people who have taken advantage of powerful positions of trust and dominance, as parents, teachers, members of the clergy or in activity groups of one kind or another, to engage in such behaviours. On occasions they have done this, as here, for many years. Sometimes, due to the age of the victims and the manipulative ability of those who prey upon them, the commission of offences of this kind may not emerge until much later, and not until great damage has been occasioned.<sup>198</sup>
- 5.64 Some submissions did not support the view that the relationship of care, supervision or authority necessarily increased the harm inherent in the offence.<sup>199</sup> For example, the Victorian Aboriginal Legal Service submitted that 'harm cannot be measured by the status or label given to describe the relationship of one person with another' and that doing so risks 'undermin[ing] the legitimacy or weight of a victim's account or experience of harm'.<sup>200</sup>
- 5.65 However, a convicted child sex offender who spoke to the Council considered that sometimes child sex offenders may deliberately seek out or choose professions where they will have

193 Submission 19 (Office of the Child Safety Commissioner); Submission 21 (Women's Legal Service Victoria); Victim Issues Roundtable (6 April 2009).

194 William Friedrich, Anthony Urquiza and Robert Beilke, 'Behaviour Problems in Sexually Abused Young Children' (1986) 11 *Journal of Pediatric Psychiatry* 47, 55.

195 For example Victim Issues Roundtable (6 April 2009); Legal Issues Roundtable (6 April 2009); Telephone communication with Dr Patricia Brown, Director, Children's Court Clinic (2 June 2009); Telephone communication with adolescent health professional (3 July 2009).

196 Submission 19 (Office of the Child Safety Commissioner).

197 Victim Issues Roundtable (6 April 2009).

198 *DPP v Riddle* [2002] VSCA 153 (Unreported, Phillips, Chernov and Vincent JJA, 11 September 2002) [35] (Vincent JA).

199 Submission 12 (Bravehearts); Submission 20 (Springvale Monash Legal Service); Meeting with Ballarat CASA (21 May 2009).

200 Submission 15 (Victorian Aboriginal Legal Service).

access to young children; other people who made submissions to the Council also thought that child sex offenders are drawn to work in fields whereby their contact and access to children is increased.<sup>201</sup> The penalties for offences committed in these circumstances, according to these submissions, should include recognition of the planned and calculated nature of the behaviour of these offenders, and therefore their increased culpability. As argued in one submission to the Council, 'sexual abuse can be both an opportunistic and premeditated crime, it is no accident that many perpetrators work in close contact with children and the penalties need to include an understanding of the organised and intentional nature of these offences'.<sup>202</sup>

- 5.66 The Council found significant support for retaining the concept of 'care, supervision or authority' as a statutory aggravating factor for this offence.<sup>203</sup> For all the above reasons regarding breach of trust and abuse of position, it was generally accepted that people in a relationship of care, supervision or authority had a higher degree of culpability for offences committed against children in their care, and that penalties for this type of offending should consequently be higher than in the absence of this type of relationship. A number of submissions suggested that the seriousness of this form of the offence justified an increase in the maximum penalty to the next penalty level.<sup>204</sup>

### Non-aggravated form of the offence (10–16)

- 5.67 Sexual penetration (10–16) is sometimes referred to as the 'non-aggravated' form of the offence, as it includes the possibility that children:
- may legally consent to sexual intercourse with a person not more than two years older than themselves (this constitutes a defence to the offence of sexual penetration);<sup>205</sup> or
  - may factually consent to sexual intercourse with a person of any age. While consent is not relevant to determining a person's guilt, it is relevant to sentencing as it may lessen an offender's culpability.
- 5.68 The offence of sexual penetration (10–16) covers a broad range of sexual activity, some of which has been characterised by courts as 'consensual' relationships between people of a similar age.<sup>206</sup> While sexual penetration under these circumstances can still be harmful to victims, it is the capacity to consent to sexual penetration that provides some difference between the level of harm inherent to sexual penetration (10–16) and the other two categories of this offence.<sup>207</sup>

201 Submission 6 (Anonymous).

202 Submission 6 (Anonymous).

203 Submission 11 (Law Institute of Victoria); Submission 23 (Victoria Legal Aid); Victim Issues Roundtable (6 April 2009); Legal Issues Roundtable (6 April 2009); Telephone communication with Dr Patricia Brown, Director, Children's Court Clinic (2 June 2009).

204 Submission 14 (South Eastern Centre Against Sexual Assault); Submission 19 (Office of the Child Safety Commissioner); Submission 8 (Family Voice Australia); Submission 21 (Women's Legal Service Victoria).

205 *Crimes Act 1958* (Vic) s 45(4)(b).

206 These are typically consensual relationships where the parties are of a similar age, but where the older party is more than two years older than the younger party, thereby precluding the defence contained in *Crimes Act 1958* (Vic) s 45(4). In some cases, the Director of Public Prosecutions may choose not to proceed with charges in this category: see Office of Public Prosecutions (Victoria) (2008), above n 64, [2.9].

207 A number of people in consultations raised concerns about the ability to consent for the younger children in this age group (10, 11, 12 and 13 years). This is addressed in Chapter 7.

- 5.69 Some of the people consulted by the Council suggested that there are many young people in their early teens involved in 'consensual' sexual relationships with partners of similar ages.<sup>208</sup> However, there was some concern expressed by others regarding the extent to which the law therefore characterises young people as participating in consensual sexual relationships. Some argued that children of this age may be coerced into sexual relationships due to peer pressure.<sup>209</sup> Participants in the Victim Issues Roundtable argued that 'consent' given at a young age may not be free from coercion or other external pressures, and therefore that the real harm of the activity may not be realised by the victim him or herself until years later.<sup>210</sup> This concern was echoed by the staff at the Gatehouse Centre who questioned the quality of consent given by young people. It was suggested that these offences are often committed against vulnerable adolescents who are not in a position to give consent freely.<sup>211</sup> A recent survey of young people in Years 10 and 12 conducted by the Australian Research Centre on Sex, Health and Society has found that just under one third of the sample reported previously having unwanted sex. The main reasons given for being involved in unwanted sexual activity were being too drunk (17%) or being pressured by their partner (18%). This would suggest that there may often be situations within relationships where young people are not giving free agreement to participating in sexual activity.<sup>212</sup>
- 5.70 The Council's data demonstrate that for the period 2006–07 to 2007–08, the most common form of the offence charged was sexual penetration (10–16).<sup>213</sup> The majority of victims of sexual penetration (10–16) were aged 14 or 15,<sup>214</sup> and 25.7 per cent of charges for this form of the offence arose in situations where the relationship between the victim and the defendant was characterised by the court as a consensual sexual relationship despite the victim's inability to give legal consent (see Figure 12, page 58).
- 5.71 The key issue in discussions of consent or 'agreement' was the age disparity between the victim and the offender. The general consensus was that the harm caused by 'consensual' activity between young people was likely to be less than in a situation where a predatory adult takes advantage of a much younger child.<sup>215</sup> One submission commented that, 'this [sexual activity between young people] whilst not always emotionally and socially beneficial for the young person, is quite different to the sexual penetration of that same young person by someone who is significantly older and/or in the position of care or authority and/or in no way considers themselves to be in a relationship with that young person'.<sup>216</sup>

208 Submission 10 (Youthlaw); Submission 18 (South Western Centre Against Sexual Assault); Submission 24 (Mental Health Legal Centre).

209 Victim Issues Roundtable (6 April 2009).

210 Ibid.

211 Meeting with Gatehouse Centre, Royal Children's Hospital (22 June 2009). Similarly, an adolescent health professional with whom the Council consulted (3 July 2009) had concerns about what 'consent' means when referring to children of this age.

212 Anthony Smith *et al.*, *Secondary Students and Sexual Health 2008: Results of the 4th National Survey of Australian Secondary Students, HIV/AIDS and Sexual Health* (2009) 31.

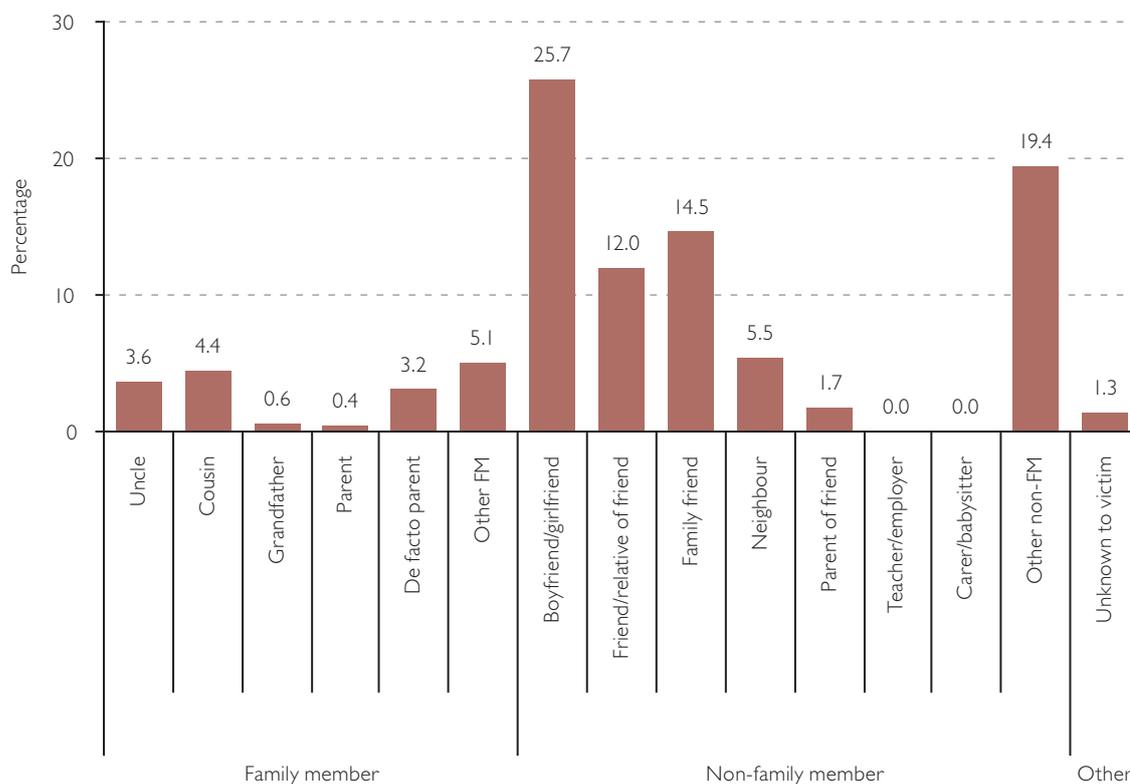
213 Sentencing Advisory Council (2009), above n 7, 11. There were 475 charges in 179 cases.

214 Ibid 17.

215 Submission 10 (Youthlaw); Submission 19 (Office of the Child Safety Commissioner); Victim Issues Roundtable (6 April 2009); Legal Issues Roundtable (6 April 2009).

216 Submission 6 (Anonymous).

Figure 12: Percentage of charges by relationship of offender to victim for sexual penetration (10–16), 2006–07 to 2007–08



5.72 The Council's data also show that offenders convicted of this form of the offence are more likely to be younger and closer to the age of the victim (see Figure 13 opposite). Nearly half of the defendants were aged under 24 (49.3%) and over a quarter were aged between 30 and 44 (25.7%). This is a younger age profile than for the other two forms of the offence,<sup>217</sup> and was also the only form of the offence for which there was a clear pattern in relation to the likelihood of receiving a sentence of imprisonment based on the age of the defendant. Only 24 per cent of charges in relation to offenders under 19 received a term of imprisonment.

5.73 However, the likelihood of imprisonment increased with the relative age disparity between the victim and the offender, with 100 per cent of charges where the offender was aged over 60 receiving terms of imprisonment.<sup>218</sup> In one case involving a 'consensual' relationship, it was considered significant by the court that the offender was 'more than 50% older than the victim and of the two he was clearly the more intelligent and mature'.<sup>219</sup> This can be contrasted with a scenario where the victim and the offender are in a 'consensual' sexual relationship and are also close in age. As noted by Fox and Freiberg, '[s]entences at the lowest end of the range will be appropriate for consensual acts of intercourse between persons whose age difference is not great'.<sup>220</sup>

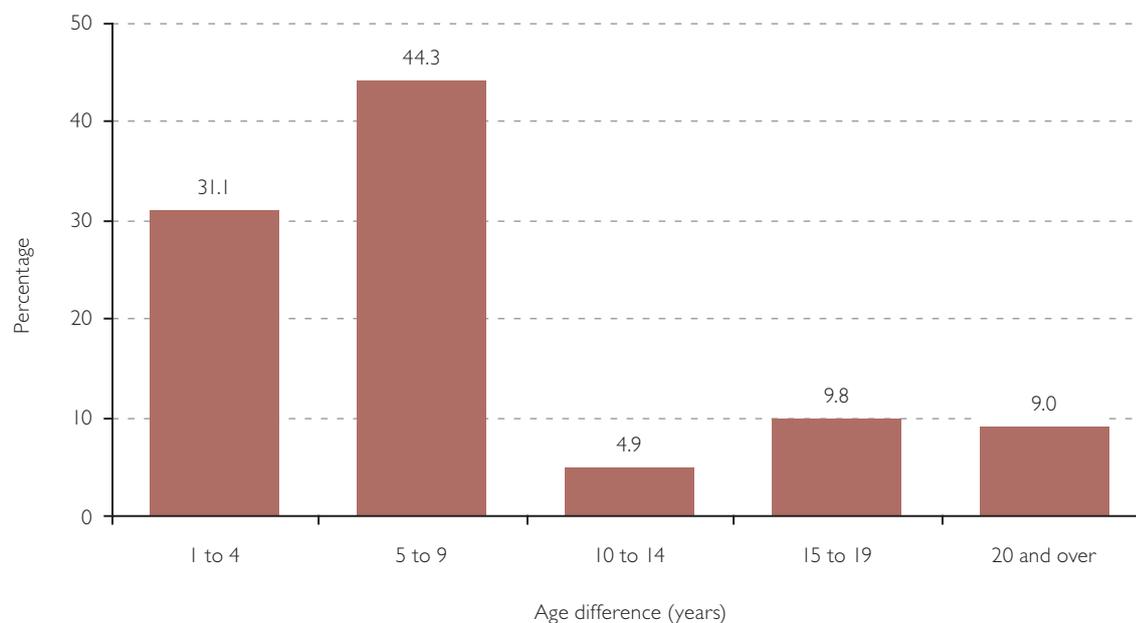
217 Sentencing Advisory Council (2009), above n 7, 20.

218 Ibid 21.

219 *R v Nguyen* (2001) 124 A Crim R 477, 481.

220 Fox and Freiberg (1999), above n 63, 938.

**Figure 13:** Percentage of charges of sexual penetration (10–16) where there was a boyfriend/girlfriend relationship by age difference between offender and victim, 2006–07 to 2007–08



- 5.74 A number of people consulted recognised that there is a difference in the level of culpability between another young person in a ‘consensual’ relationship with the victim and an older person offending against a very young child.<sup>221</sup> For example, one person who made a submission to the Council suggested that ‘a teenager ... should not have to suffer and be treated like a serial predator. They should have the opportunity to grow into responsible, law abiding adults.’<sup>222</sup> Another person, himself a victim of childhood sexual abuse, was also of the view that cases of an adult taking advantage of a child should be treated differently to where two young people of a comparable age engage in consensual sexual intercourse.<sup>223</sup>
- 5.75 This focus on some level of consent is not predicated on the idea that culpability for child sexual offences is mitigated by the conduct of the victim or that responsibility for the offence lies with the victim.<sup>224</sup> Rather the lower level of culpability is based on the absence of aggravating factors – such as where ‘the fact that the offender has deliberately sought out and violated the child or the fact that the offender has abused a position of trust’.<sup>225</sup>

221 Victim Issues Roundtable (6 April 2009); Legal Issues Roundtable (6 April 2009); Meeting with parents of a child victim of sexual assault (9 April 2009).

222 Submission 5 (Anonymous).

223 Submission 22 (B. Bull).

224 Meeting with Gatehouse Centre, Royal Children’s Hospital (22 June 2009).

225 Wasik (1998), above n 178, 122.

- 5.76 It was suggested in consultations that an unintended consequence of increasing the maximum penalty for the non-aggravated form of the offence may be the undue criminalisation of children involved in juvenile sexual experimentation. This could occur in cases where there is more than a two-year age gap between the victim and the offender (so as to preclude the availability of a defence), but where the sexual intercourse was consensual and the parties were close in age. There is a possibility that these cases may not be prosecuted subject to a determination by the Director of Public Prosecutions that doing so would not be in the public interest.<sup>226</sup> Further, as suggested by the Women's Legal Service Victoria, judges would still have the discretion not to impose higher sentences for this particular group.<sup>227</sup> However, others were of the view that where this form of the offence is prosecuted and proceeds to sentence, it may be unjust to expose such offenders to a significantly higher maximum penalty.<sup>228</sup>
- 5.77 Others argued that the seriousness of this form of the offence warranted an increase in the maximum penalty as the 'worst case' could not be dealt with by 10 years imprisonment. Some people argued that the 15 year gap in maximum penalty between sexual penetration of children over 10 and under 10 was too great and was inconsistent with the protective intent of the legislation.<sup>229</sup>
- 5.78 Figure 12 (page 58) shows that there are some charges dealt with under this form of the offence which involve victims and offenders who could not be involved in consensual relationships and are unlikely to be close in age. A total of 17.3 per cent of charges occurred in circumstances where there was some family relationship between the victim and the offender. These charges do not sit easily within the harm and culpability framework for this form of the offence as the harm caused by sexual offending in family relationships is generally considered to be of a greater magnitude than offending in other contexts.<sup>230</sup> Further, the culpability of offenders who prey on those in their own family has been repeatedly reinforced by the courts.<sup>231</sup> The sentencing statistics cannot provide any context as to why this criminal behaviour has been dealt with as sexual penetration with a child under 16 and there are a number of reasons as to why this may have occurred.<sup>232</sup> However, the presence of these charges should not be seen as a justification for increasing the level of harm and culpability for this form of the offence as they fall outside the types of conduct this offence is intended to cover.

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226 Office of Public Prosecutions (Victoria) (2008), above n 64, [2.6.6] and [2.9.2].

227 Submission 21 (Women's Legal Service Victoria).

228 Submission 10 (Youthlaw); Submission 24 (Mental Health Legal Centre); Meeting with County Court judges (14 May 2009) (this view was not held by all judges consulted).

229 Meeting with parents of a child victim of sexual assault (9 April 2009); Submission 8 (Family Voice Australia); Submission 16 (Victorian Women's Trust); Submission 19 (Office of the Child Safety Commissioner); Submission 21 (Women's Legal Service Victoria); Meeting with West CASA (22 April 2009); Meeting with Ballarat CASA (21 May 2009); Meeting with SECASA (6 May 2009).

230 See for example, Joseph Beitchman *et al.*, 'A Review of the Long-Term Effects of Child Sexual Abuse' (1992) 16 *Child Abuse & Neglect* 101.

231 See for example, *R v Wakime* [1997] 1 VR 242, 244; *R v RTG* [2004] VSCA 89 (Unreported, Batt, Chernov and Eames JJA, 6 May 2004), [20].

232 See discussion at Chapter 3, 'Related offences'.

## The Council's view

- 5.79 The Council views all sexual offending against children as intrinsically serious. However, the Council acknowledges that the different circumstances in which sexual penetration with a child under 16 can arise represent differing levels of harm and culpability, which should be reflected in correspondingly different maximum penalties. These different penalties symbolise not only the inherent seriousness of each of the forms of the offence, but also their relative seriousness to each other and to other sexual offences.
- 5.80 The Council is of the view that based on current sentencing practices, it is difficult to draw a conclusion that the current maximum penalties for the offence of sexual penetration with a child under 16 are inadequate. Unlike other maximum penalty references the Council has undertaken,<sup>233</sup> it is clearly not the case that sentencing practices are 'pushing up' against the statutory maximum penalty so as to require an increase in the available maximum in order to accommodate the worst examples of this offence. Current sentencing practices would suggest that the maximum penalties provide sufficient scope for the courts to impose appropriate sentences for all forms of this offence.
- 5.81 The recent County Court case of *R v Maurice* does, however, starkly demonstrate the arbitrariness of the age ranges that govern this offence, though the type of offending present in this case is arguably atypical for the category of sexual penetration (10–16). This view is strengthened by reference to the Council's data, which demonstrate that over a quarter of charges in this category involve consensual relationships between young people who are close in age, and not the predatory conduct of adults in relation to children. While the potential for predatory offending to fall within this category is self-evident, the Council considers that the appropriate charge for non-consensual sexual activity, regardless of the relationship between the victim and the offender, is rape, which carries a maximum penalty of 25 years imprisonment.<sup>234</sup>
- 5.82 Ultimately, the Council does not recommend that the maximum penalties for the offence of sexual penetration with a child under 16 be increased because it is of the view that the current maximum penalties are sufficient to represent the offending conduct contemplated by each category of the offence and also the relative harm caused and the culpability of offenders.

### RECOMMENDATION 1

That the current maximum penalties for the offence of sexual penetration with a child under 16 are adequate and do not require amendment.

233 See for example, Sentencing Advisory Council, *Maximum Penalty for Negligently Causing Serious Injury: Report* (2007).

234 *Crimes Act 1958* (Vic) s 38.



## Chapter 6: Sentencing for sexual penetration with a child under 16



## Introduction

- 6.1 As identified in the previous chapter, current sentencing practices do not support an increase in the maximum penalties for sexual penetration with a child under 16 as there is more than enough scope to cover the types of offences coming before the courts. However, the gap between the maximum penalties and the current sentences being handed down may be indicative of a different issue – the adequacy of current sentencing practices.

## Consultation

- 6.2 Though there was some difference of opinion as to whether the current maximum penalties are adequate, the majority of people consulted for this reference felt that the real issue regarding this reference was not the inadequacy of the currently applicable penalties, but rather the fact that current sentencing practices are low and do not sufficiently represent the harm that is caused by these offences.
- 6.3 Most consultees were of the view that it is artificial to look at the maximum penalties for these offences when the sentences being imposed are so much lower than the maximum penalties prescribed.<sup>235</sup> Some participants asked why maximum penalties even exist if the sentences passed are so far removed from them.<sup>236</sup> Bravehearts submitted that:
- From our perspective, of most concern is that the **actual sentences being imposed** under the current system are grossly inappropriate to the range of offending covered by each offence category ... [a]s an agency that works with survivors of child sexual assault, children, young people and adult survivors, we understand the impact of these offences and find it unacceptable the average and longest imprisonment terms are so out of proportion with the statutory maximum sentences.<sup>237</sup>
- 6.4 Another submission suggested that 'current maximums are purely academic'.<sup>238</sup>

## The Court of Appeal

- 6.5 This disparity between the current penalties being handed down and the maximum penalties has been recognised by the Victorian Court of Appeal. In two recent cases (*DPP v CPD*<sup>239</sup> and *DPP v DDJ*<sup>240</sup>) the Court commented unfavourably on the adequacy of current sentencing practices for sexual penetration offences.

235 Submission 3 (R. Marks); Submission 12 (Bravehearts); Submission 18 (South Western Centre Against Sexual Assault); Submission 21 (Women's Legal Service Victoria); Victim Issues Roundtable (6 April 2009); Meeting with parents of a child victim of sexual assault (9 April 2009); Meeting with West CASA (22 April 2009); Meeting with Frankston SOCIT (6 May 2009); Meeting with Ballarat CASA (21 May 2009).

236 Meeting with parents of a child victim of sexual assault (9 April 2009).

237 Submission 12 (Bravehearts).

238 Submission 3 (R. Marks).

239 [2009] VSCA 114 (Unreported, Maxwell P, Redlich JA and Robson AJA, 28 May 2009).

240 [2009] VSCA 115 (Unreported, Maxwell P, Vincent and Neave JJA, 28 May 2009).

- 6.6 In *DPP v CPD*, the court commented that '[s]elf-evidently, a statistical range with an upper limit of (say) 7 years is difficult to reconcile with the statutory maximum of 25 years'<sup>241</sup> and further, 'current sentencing practices for sexual penetration of a child under 10 appear difficult to reconcile with the high maximum penalty set by Parliament'.<sup>242</sup>
- 6.7 In the same case, the Court held that 'when regard is had to the statutory maximum penalty of 25 years imprisonment, a real question arises as to the adequacy of current sentencing for this offence'.<sup>243</sup> In relation to reviewing the adequacy of sentencing practices, the Court considered that:
- There is nothing in s 5(2) [of the *Sentencing Act 1991*] which suggests that, where current sentencing practices are out of step with the maximum fixed by Parliament, current practices must prevail ... the statutory requirement to have regard to current sentencing practices does not foreclose the possibility of an increase in the level of sentences when due regard is given to the maximum sentence and other considerations.<sup>244</sup>
- 6.8 The Court went on to say that:
- The need for consistency in sentencing – which is in part achieved by the giving of appropriate weight to current sentencing practices – does not deny the discretion to impose a sentence which is higher than current practice, where the maximum penalty or other considerations indicate that such a course is appropriate.<sup>245</sup>
- 6.9 In *DPP v DDJ*, the Court concluded that it had competency to express a view regarding the adequacy of current sentencing practices in an appropriate case, and invited the Director of Public Prosecutions to address the issue in a fully argued case.<sup>246</sup>

## Implications of current sentencing practices

- 6.10 The upper reaches of the maximum penalty are rightly reserved for the 'worst examples of the case for which it is prescribed'.<sup>247</sup> Therefore it would be expected that sentences in the many different examples of particular offences that come before the courts would be varied within the scope provided for the maximum penalties for that offence. However, for the offence of sexual penetration with a child under 16, the average and the longest sentences over the period examined by the Council seem overwhelmingly concentrated towards the lower end of the scale.
- 6.11 There is a danger that when courts impose sentences which are perceived as inconsistent with the seriousness with which particular conduct is viewed, confidence in the criminal justice

241 *DPP v CPD* [2009] VSCA 114 (Unreported, Maxwell P, Redlich JA and Robson AJA, 28 May 2009) [62].

242 *Ibid* [68].

243 *Ibid* [8].

244 *Ibid* [72].

245 *Ibid* [81].

246 *DPP v DDJ* [2009] VSCA 115 (Unreported, Maxwell P, Vincent and Neave JA, 28 May 2009) [71]–[72].

247 Sentencing Task Force (1989), above n 108, [46].

system may erode.<sup>248</sup> This is particularly true where the process of coming forward and being part of a prosecution can be difficult for victims,<sup>249</sup> as recognised by Justice Vincent in *DPP v DJK*:

Indeed, from the victim's perspective, an apparent failure of the system to recognise the real significance of what has occurred in the life of that person as a consequence of the commission of the crime may well aggravate the situation ... [s]entences must involve recognition of the kind of personal damage that is occasioned by such behaviour and of the reality [that] the rehabilitation of the victim may be far more difficult to accomplish than that of the perpetrator.<sup>250</sup>

- 6.12 In addition to the effect on the victim, this disenchantment with the system can infiltrate into the community at large, as also noted in *DPP v DJK*:

If the balancing of values and considerations represented by the sentence which, of course, must include those factors which militate in favour of mitigation of penalty, is capable of being perceived by a reasonably objective member of the community as just, the process of recovery is more likely to be assisted. If not, there will almost certainly be created a sense of injustice in the community generally that damages the respect in which our criminal justice system is held and which may never be removed.<sup>251</sup>

- 6.13 This lack of confidence weakens the ability of the law to deal effectively with sexual offenders if victims are reluctant to come forward, as observed by Justice Vincent in *DPP v Toomey*:<sup>252</sup>

If the system cannot be seen to have recognised the significance of what has occurred and to have responded appropriately, then its operations will discourage victims from coming forward and indirectly contribute to the concealment of offences. In my view, this cannot be permitted to occur.<sup>253</sup>

- 6.14 One counsellor of sexual assault victims told the Council she would make her clients aware of the types of sentences being handed down for like offences so that they could make an informed decision about whether or not they wanted to proceed. It is difficult to see how many would choose to proceed when as another counsellor commented, the sentences imposed are often much shorter than the period of abuse suffered by the victim.<sup>254</sup> Further, it can have a negative effect on those charged with the investigation and prosecution of these offences. As one of the police officers consulted by the Council suggested, police put in a lot of work into the investigation of these offences and it can be demoralising, when even where there is a conviction, as the sentences are so low.<sup>255</sup>

- 6.15 From a broader perspective, the perceived inadequacy of sentences may lead to calls for inflexible measures such as mandatory sentencing. The Council is strongly supportive of retaining judicial discretion as the judge is in the best position to impose the most appropriate sentence taking into account all the relevant factors and weighing up their relative values.<sup>256</sup> However, at present, judges may feel unable to increase the quantum of sentences due to current sentencing practices.

248 Submission 7 (D. Duthie); Submission 18 (South Western Centre Against Sexual Assault); Meeting with West CASA (22 April 2009).

249 Meeting with Ballarat CASA (21 May 2009); Meeting with Gatehouse Centre, Royal Children's Hospital (22 June 2009).

250 *DPP v DJK* [2003] VSCA 109 (Unreported, Batt, Vincent and Eames JJA, 20 August 2003) [16]–[24].

251 *Ibid* [16].

252 [2006] VSCA 90 (Unreported, Buchanan, Vincent and Nettle JJA, 19 April 2006).

253 *Ibid* [24].

254 Meeting with West CASA (22 April 2009).

255 Meeting with Frankston SOCIT (6 May 2009).

256 For a comparison of the structured discretionary sentencing regime in Victoria with mandatory sentencing schemes in other jurisdictions, see Adrian Hoel and Karen Gelb, *Sentencing Matters: Mandatory Sentencing* (2008).

## The Council's view

- 6.16 The Council is of the view that current sentencing practices for sexual penetration with a child under 16 do not reflect the seriousness of this offending behaviour as indicated in the high maximum penalties imposed by Parliament.
- 6.17 Although recognising an increase in a statutory maximum penalty is generally considered to be an indication by Parliament that longer sentences for particular offences should be imposed,<sup>257</sup> it does not necessarily follow that raising the maximum penalties for these offences would have a significant impact on the sentences currently being imposed.
- 6.18 The Council's data show that the average sentence for an individual charge of sexual penetration (child under 10) in the time period examined by the Council was 3.3 years (the maximum penalty is 25 years imprisonment). The longest sentence imposed on a single charge was 6.7 years. This would suggest that increases in the maximum penalty for the other forms of this offence would not necessarily lead to increased sentences which better reflect the seriousness of this offending behaviour.
- 6.19 The Council notes the comments of the Court of Appeal in the recent cases of *DPP v CPD* and *DPP v DDJ*.<sup>258</sup> Consideration of current sentencing practices in an appropriate appeal case may be a more effective way to address the dissonance between current sentencing practices and the maximum penalty than raising the maximum penalty itself.
- 6.20 In order to provide further guidance for sexual penetration with a child under 16, which can encompass such a wide range of offending, the Court of Appeal may consider utilising the guideline provisions in the *Sentencing Act 1991 (Vic)*.<sup>259</sup>
- 6.21 These provisions empower the Court of Appeal to give a guideline judgement in an appeal matter before the Court.<sup>260</sup> A guideline judgement can be given in a case even where it is not necessary for the purposes of determining the appeal.<sup>261</sup> In handing down a guideline judgement, the Court must have regard to:
- the need to promote consistency of approach in sentencing offenders; and
  - the need to promote public confidence in the criminal justice system.<sup>262</sup>

257 *R v AB (No.2)* (2008) 18 VR 391, 406.

258 *DPP v CPD* [2009] VSCA 114 (Unreported, Maxwell P, Redlich JA and Robson AJA, 28 May 2009); *DPP v DDJ* [2009] VSCA 115 (Unreported, Maxwell P, Vincent and Neave JJA, 28 May 2009).

259 *Sentencing Act 1991 (Vic)* pt 2AA.

260 *Sentencing Act 1991 (Vic)* s 6AB(1).

261 *Sentencing Act 1991 (Vic)* s 6AB(3).

262 The Court of Appeal is also required to take into account any views stated by the Sentencing Advisory Council and any submissions made by the Director of Public Prosecutions or a lawyer in relation to the formulation of a guideline judgment: *Sentencing Act 1991 (Vic)* s 6AE.

- 6.22 Under section 6AC of the *Sentencing Act 1991* (Vic) a guideline judgment may set out:
- (a) criteria to be applied in selecting among various sentencing alternatives;
  - (b) the weight to be given to the various purposes specified in section 5(1) for which a sentence may be imposed;
  - (c) the criteria by which a sentencing court is to determine the gravity of an offence;
  - (d) the criteria which a sentencing court may use to reduce the sentence for an offence;
  - (e) the weighting to be given to relevant criteria;
  - (f) any other matter consistent with the principles contained in this Act.
- 6.23 Under this guideline system, however, the Court of Appeal may not set out an appropriate level or range of sentences for a particular offence or class of offence, which is possible in the United Kingdom, New Zealand and similar common law jurisdictions. Aside from the statutory limitations, the Court of Appeal may feel constrained in the use of the section 6AC mechanism because of the views of the High Court expressed in the cases of *Markarian v The Queen*<sup>263</sup> and *Wong v The Queen*.<sup>264</sup>
- 6.24 *Markarian v The Queen* approved the 'instinctive synthesis' approach to sentencing that is followed in Victoria, namely, that a judge must identify all the factors that are relevant to the sentence, discuss their significance and then make a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.<sup>265</sup> In *Wong v The Queen*, a drug importation case heard on appeal from the New South Wales Court of Appeal (exercising Federal jurisdiction), the High Court held that the guideline judgment in question was inconsistent with general sentencing principles set out in Commonwealth sentencing legislation as it placed undue emphasis on the relevant weight of the narcotics and thereby departed from fundamental sentencing principles which the court was required by law to have regard to.<sup>266</sup> Both these cases suggest that there is potential conflict between guideline judgments and established sentencing principles, and that any future guideline judgment may therefore be subject to scrutiny by the High Court.
- 6.25 Nonetheless, although guideline judgments have not yet been used in Victoria, doing so might allow the Court of Appeal to assist sentencing judges in the exercise of their discretion in what is a complex sentencing process and also contribute to the promotion of confidence in the criminal justice system.

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263 (2005) 228 CLR 357.

264 (2001) 207 CLR 584.

265 *Markarian v The Queen* (2005) 228 CLR 357, 378.

266 (2001) 207 CLR 584. See also *R v Ngui & Tiong* (2000) 1 VR 579.



## Chapter 7: Raising the 'no-defence' age



## Introduction

- 7.1 As the preceding chapters of this report indicate, the Council does not consider that the current structure of the offence of sexual penetration with a child under 16 requires amendment, nor that the current maximum penalties for this offence should be raised. However, the Council does recommend that the 'lower age' range at which the higher maximum penalty applies be raised to 'under 12' so as to include children aged 10 and 11.
- 7.2 The reason for this recommendation is based on the view that the lower age at which higher maximum penalties apply, currently 'under 10', does not adequately reflect expectations regarding the seriousness of sexual offences committed against children generally, but in particular those committed against very young children.<sup>267</sup>
- 7.3 It is useful to consider the historical context in which the concept of protecting children under a lower age arose.

## History of the offence of sexual penetration with a child

### The law of England

- 7.4 In 1275 the English Parliament passed the first Statute of Westminster, which prohibited any person from 'ravish[ing], [n]or tak[ing] away by force, any Maiden within Age (neither by her own Consent, nor without)'.<sup>268</sup> This offence was classified as a misdemeanour, and was punishable by 2 years imprisonment and a fine. A 'maiden within age' was considered to be a female under the age of 12, as 12 was the age of consent for marriage.<sup>269</sup> In 1285 this offence was reclassified as a felony punishable by death.<sup>270</sup> In 1576 the age at which sexual conduct was criminalised was lowered to 10, although as 12 remained the age of consent for marriage it was still a misdemeanour to sexually penetrate a female aged between 10 and 12.<sup>271</sup> The penalty for offences against females under 10 remained death until 1841, as Britain gradually abolished the death penalty for all but a few offences.<sup>272</sup>
- 7.5 Early laws prohibiting sexual conduct with children were not exclusively intended to protect children from sexual abuse or exploitation. Although William Blackstone argued that the object of the 1576 law was to 'declare that a girl under the age of ten was incapable of judgement and discretion and thus unable to give legal consent', it has been noted that such laws were less concerned with the protection of children and more about protecting the valuable commodity of

267 Victim Issues Roundtable (6 April 2009).

268 Statute of Westminster I, 1275, 3 Edw. I c 13 (1 Statutes at Large 83).

269 Edward Coke, *The Second Part of the Institutes of the Laws of England 181* (1817), cited in Rita Edison, 'The Constitutionality of Statutory Rape Laws' (1980) 27 *UCLA Law Review* 757, 762 fn 35.

270 Statute of Westminster II, 1285, 13 Edw. I c 34.

271 1576, 18 Eliz. I c 7.

272 In 1841, the penalty for carnal knowledge of a girl under 10 was reduced from death to transportation for life: 4 & 5 Vic. c 56. In 1861 the penalty was reduced again to a minimum of 3 years penal servitude and a maximum of life penal servitude: 24 & 25 Vic. c 100, cited in Jennifer Temkin, *Rape and the Legal Process* (2nd ed, 2002) 137.

female chastity.<sup>273</sup> A female child was considered the property of her father, who would be deprived of her dowry in the event that she was unable to be married due to her prior sexual experience. In this sense, although the law did protect females of a young age, sexual penetration offences against children were initially considered property crimes rather than crimes against the person.<sup>274</sup> 'Chaste' females were protected by the law, but in large part this protection was granted for the benefit of their fathers, perhaps best demonstrated by the fact that the offence was not gender neutral and similar offences against male children did not exist.<sup>275</sup>

## The position in Victoria

- 7.6 British criminal law was received into the colony of New South Wales at the time of English settlement in 1788.<sup>276</sup> In 1828, the Imperial Parliament passed legislation providing that the laws and statutes of England were to be applied to the courts of New South Wales and Van Diemen's Land (later Tasmania),<sup>277</sup> and the subsequently formed colonies, including Victoria, later adopted statutes that absorbed English law into the local conditions.<sup>278</sup>
- 7.7 In 1864, the first consolidation of the law of Victoria thus included the English offence of carnal knowledge and abuse of a girl under 10, for which the maximum penalty was death.<sup>279</sup> The offence of carnal knowledge of a girl aged over 10 and under 12 was punishable by a maximum of 10 years imprisonment.<sup>280</sup> In 1891 a limited form of 'care, supervision or authority' was incorporated into legislation by establishing it as an offence for a schoolmaster to have carnal knowledge of a female pupil between the age of 10 and 16.<sup>281</sup> This offence carried a maximum penalty of 15 years imprisonment.<sup>282</sup>
- 7.8 By 1891 the age of consent had been raised from 12 to 16.<sup>283</sup> Since this time, it has been an offence in the colony and later State of Victoria to:
- have carnal knowledge (later sexual penetration) of a girl under 10;
  - have carnal knowledge (later sexual penetration) of a girl aged between 10 and 16; and
  - have carnal knowledge (later sexual penetration) of a female pupil aged between 10 and 16.

273 William Blackstone, *Commentaries on the Laws on England* (9th ed, 1783); See also Oberman (1994), above n 62; Oberman (2000), above n 62.

274 Susan Brownmiller, *Against Our Will: Men, Women and Rape* (1975), 19–20; Edison (1980), above n 269, 767.

275 The offence of sodomy did exist, however this was not an offence specifically directed at the protection of children nor was it confined to male sexual contact – a male could sodomise a male or a female: *Buggery Act 1533* (25 Hen. VIII c 6).

276 English criminal law was imported into the Australian colony by virtue of Letters Patent issued by the British Crown in 1787. See John Barry et al., *An Introduction to the Criminal Law of Australia* (1948) 2.

277 *Australian Courts Act 1828* (Imp) s 24, 9 Geo. IV c 83 (Imp).

278 The present day State of Victoria was originally part of the colony of New South Wales, and therefore British law was formally adopted in 1828. Victoria became a separate colony in 1851 and formally adopted its own constitution, which incorporated British law in 1855: *Victorian Constitution Act 1855* 18 & 19 Vic. c 55, s 40.

279 *Criminal Law and Practice Statute 1864* (Vic) s 45.

280 *Criminal Law and Practice Statute 1864* (Vic) s 47.

281 *Crimes Act 1891* (Vic) s 5(1).

282 *Crimes Act 1891* (Vic) s 5(1).

283 See *Crimes Act 1891* (Vic). The higher age of consent has its origins in mid-nineteenth century feminism. Victorian feminists were part of a 'social purity' movement which sought to educate the working class on the value of chastity as well as having the more practical purpose of protecting young females from disease and sexual abuse: Oberman (1994), above n 62, 27–28.

## Setting the 'lower age'

- 7.9 The concept of the 'protective principle' or protective function of the law and the harm caused by sexual offending against children has been discussed in detail in Chapters 2 and 5 of this report. While the offence of sexual penetration with a child under 16 is a clear example of a law with a protective function, the 'lower age' for this offence has not changed since English law was received into Australia. Although it is true that any age chosen will be somewhat arbitrary and will exclude people from its ambit,<sup>284</sup> the Council considers that setting the age at its current level of 'under 10' does not sufficiently protect young children.
- 7.10 The issue of an appropriate 'lower age' has most recently been addressed by the New South Wales Sentencing Council, which recognised that:
- the age brackets can operate in an arbitrary way, and ... there is little justification for regarding a sexual assault of a child aged 10 years and 1 month as less serious than one involving a child aged 9 years and 11 months. The artificiality of age distinctions is heightened when it applies to the mid adolescent years given contemporary experience with maturation rates.<sup>285</sup>
- 7.11 Despite this, the New South Wales Council concluded that:
- there is merit in providing some direction for sentencing judges in relation to circumstances of potential aggravation, including the age of the victim.<sup>286</sup>
- 7.12 In a report published in 1999, the Model Criminal Code Officers Committee (MCCOC) considered that there should be a uniform 'lower age' across Australian jurisdictions, but did not comment on what that age should be. The MCCOC noted that the States currently take various approaches to setting the lower age (see Appendix 4), the lowest of which was 10.<sup>287</sup>
- 7.13 In 2000, the United Kingdom Home Office published a report which suggested that 13 was the appropriate lower age:
- The Australian Model Criminal Code Officers Committee (MCCOC) has recently proposed that there should be no possibility of consent below the age of 10. This is the age of criminal responsibility in England and in Wales, but we felt it was too low to offer protection. We wanted to protect children who were clearly pre-pubertal or entering puberty, but recognised that it was impossible to get a perfect match. The age of onset of puberty is very variable, and as a result of better general health and nutrition, has reduced over the past century. Children mature at very different rates. After careful thought we decided that the *thirteenth birthday* provided a benchmark that is already established in law and recognised by society as the entry into teenage years. We adopted that as the age below which no consent should be recognised. We also thought that offences of adult sexual abuse of a child under 13 should be of strict liability and attract no statutory defence such as mistake of age.<sup>288</sup>

284 Legal Issues Roundtable (6 April 2009).

285 New South Wales Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Vol. 1 (2008) 32–3.

286 *Ibid.*

287 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (1999), above n 82, 125–127.

288 Home Office (United Kingdom), *Setting the Boundaries: Reforming the Law on Sex Offences*, Vol. 1 (2000) [3.5.10].

- 7.14 In the same year, however, the United Kingdom Law Commission was of the view that setting the lower age at 13 may be too high:

What age that should be is a matter for those expert in child development and those with a wider policy remit. We note that the Sexual Offences Act 1956 recognises for various purposes, a watershed at the age of 13. We suspect that, given the changes over time in rates of child development, 13 would now be too old. The aim would be for an age at which no or virtually no individual is likely, as a matter of fact, to be able to give an effective consent to sexual intercourse (illustratively, we suggest that it is likely to be something between 9 and 11). We are aware, for instance, of recent notorious cases in which 12 year old girls have given birth to the offspring of child fathers, in or after, what seems to be consensual relationships.<sup>289</sup>

- 7.15 Most people consulted by the Council agreed that 'younger children' should be protected by the law through the availability of a higher maximum penalty for sexual offences committed against them, and that the age should be raised. However, the majority freely acknowledged that they had not previously given considerable thought to what the 'lower age' should be.<sup>290</sup> As one person noted, 'we have been so concerned with reducing rates of attrition and getting people to court that we haven't focused on this aspect of the offence'.<sup>291</sup>

## What the age should be – views from consultation and data analysis

- 7.16 Unlike the non-aggravated form of the offence (sexual penetration (10–16)), a person accused of committing an act of sexual penetration with a child under the 'lower age' may not defend him- or herself based on mistake of age, nor may they raise the 'consent' of the child as a matter relevant to sentence.<sup>292</sup>
- 7.17 For these reasons, matters relevant to setting the appropriate 'lower age' include:
- At what age do children have the ability to consent to sexual penetration?
  - At what age are children beginning to engage in sexual penetration?
  - At what age does the community think that children should be able to engage in, at the very least, experimentation with people close to their own age?
- 7.18 It was suggested by one of the participants in a meeting with the Gatehouse Centre that there is a perception in the community that very young adolescents are sexually active, but this is not reflected in the relevant research. A 2005 report found that the median age of first sexual intercourse is 16 years for men and women.<sup>293</sup>
- 7.19 There was no clear consensus either from people consulted, or from child development literature as to the appropriate lower age in light of the above factors.<sup>294</sup> Most people consulted

289 Law Commission (United Kingdom), *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (2000) 12.

290 Victim Issues Roundtable (6 April 2009).

291 Victim Issues Roundtable (6 April 2009).

292 *Crimes Act 1958* (Vic) s 45(4).

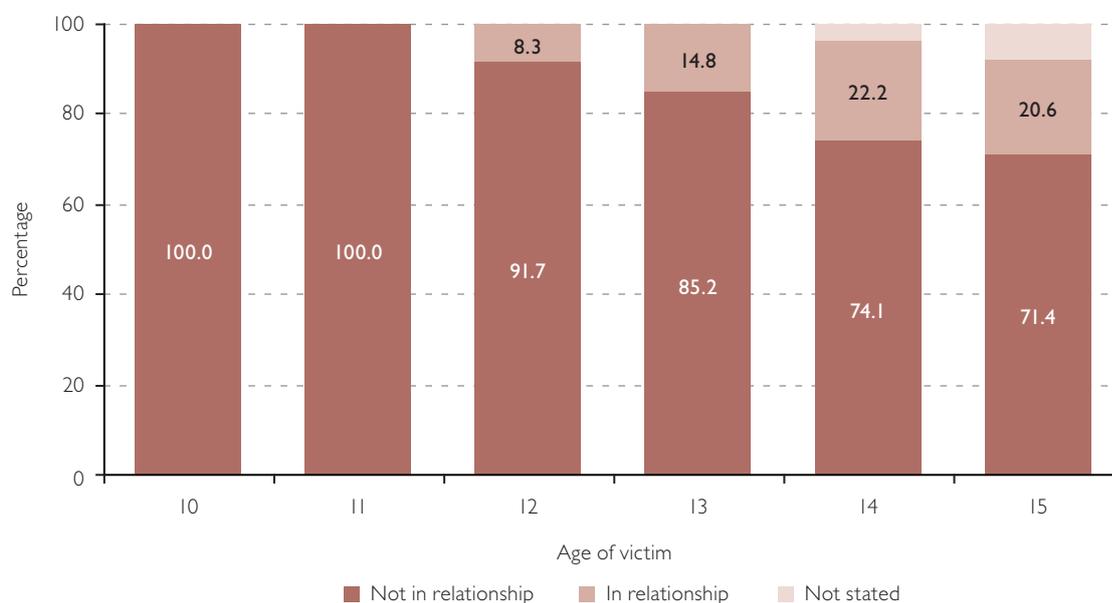
293 Family Planning Victoria, Royal Women's Hospital and Centre for Adolescent Health, *The Sexual and Reproductive Health of Young Victorians* (2005) 12.

294 One of the reasons for this is that children will develop at different rates, particularly in relation to sexual development: 'A child's sexual development is as specific to the individual child as any other kind of development; possibly more so, because it involves a composite of physical, emotional and intellectual development': Eade (2001–2003), above n 32, 161.

considered that 10 was not the appropriate lower age as it did not include vulnerable adolescents aged 10, 11, 12 and in some cases 13 or 14.<sup>295</sup>

- 7.20 Many of those consulted who work with children, including some psychologists, CASA workers and Child Witness Support workers viewed the transition from primary to secondary school as being significant. This is because most children turn 12 in Year 7 and there was a view that children in high school are generally treated as having more independence, the ability to make their own decisions and a better understanding of what is going on around them.<sup>296</sup> However, other people preferred a structure that included 12 year olds (making the penalty structure 'under 13').<sup>297</sup>
- 7.21 The professional experiences of some people consulted indicated that children under 12 generally did not become involved in consensual sexual relationships with other children close to their own age, however as they got older, it became a 'grey area'.<sup>298</sup> This view is supported by the data compiled by the Council. Between July 2006 and June 2008, there were no instances where the court characterised the offending as 'consensual' where the victim was aged under 12. However, the court identified consensual cases where the victim was 12 (8.3%) and 13 (14.8%) (see Figure 14).

**Figure 14:** Percentage of victims of sexual penetration (10–16) by age of victim and relationship between offender and victim, County Court, 2006–07 to 2007–08



295 Submission 19 (Office of the Child Safety Commissioner); Submission 21 (Women's Legal Service Victoria); Victim Issues Roundtable (6 April 2009); Meeting with West CASA (22 April 2009); Meeting with Frankston SOCIT (6 May 2009); Meeting with Ballarat CASA (21 May 2009); Meeting with Gatehouse Centre, Royal Children's Hospital (22 June 2009).

296 Victim Issues Roundtable (6 April 2009).

297 Submission 14 (South Eastern Centre Against Sexual Assault); Submission 19 (Office of the Child Safety Commissioner).

298 Victim Issues Roundtable (6 April 2009); Meeting with West CASA (22 April 2009); Meeting with Frankston SOCIT (6 May 2009); Meeting with Ballarat CASA (21 May 2009).

- 7.22 Moreover, courts are more likely to impose a term of imprisonment on an offender when the victim is aged 10–11 than when the victim is aged 12–13:
- where the victim was aged 10–11, 93.8% of offenders received terms of imprisonment; and
  - where the victim was aged 12–13, 60.7% of offenders received terms of imprisonment.<sup>299</sup>
- 7.23 Regression analyses were also conducted in order to determine the victim age at which sentencing practices change the most (Appendix 5 and 6). These analyses found that, after controlling for factors such as prior convictions, plea type and age discrepancy between offender and victim, the age of the victim influenced sentence outcomes at a statistically significant level. As the age of the victim increased there tended to be a decline in both the likelihood of a charge receiving imprisonment and the length of the imprisonment term itself. Furthermore, the victim age-split that was the most influential in reducing the likelihood of imprisonment was ‘under 12 versus over 12’. There was a 75.3 per cent reduction in the likelihood of imprisonment when the victim was aged 12 years and over compared with victims aged under 12 years.
- 7.24 The statistical analyses suggest that Victorian courts already recognise a difference between children aged under and over 12. If the existence of the different penalties for victims of different ages is based on the idea that over the ‘no defence’ age, children can and do become involved in sexual relationships, the above analysis would suggest that 10 is not the appropriate age because it appears that children aged under 12 generally do not, and perhaps should not, engage in sexual activity.
- 7.25 Theories of child development reveal no consensus as to the age at which children sexually develop and/or are physically, emotionally and intellectually capable of participating in a sexual relationship.<sup>300</sup> Other domestic and comparable overseas jurisdictions do not have a consistent approach to the lower age although many comparable common law jurisdictions have increased the lower age to an age above 10 (see Appendix 4).

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299 Sentencing Advisory Council (2009), above n 7, 18.

300 See for example Berk (2003), above n 159, 16–31. See also Mark Barnett *et al.*, *Age Appropriate Sexual Behaviour in Children and Young People: Information Booklet For Carers and Professionals* (2007); Jennifer Ann Drobac, ‘“Developing Capacity”: Adolescent “Consent” at Work, at Law, and in the Sciences of the Mind’ (2006) 10(1) *UC Davis Journal of Juvenile Policy and Law* 1; John DeLamater and William Friendrich, ‘Human Sexual Development’ (2002) 39(1) *The Journal of Sex Research* 10.

## The Council's view

- 7.26 Given that there is neither consensus nor an authoritative approach to setting the appropriate 'lower age', the Council is cognisant of the fact that any recommendation to increase the lower age will be met by criticism for failing to include certain age groups within its ambit. However, given that the lower age has neither changed nor been reviewed since the reception of English law into Australia and that community views regarding the concept of childhood have progressed significantly since that time, the Council does not consider that this is a sufficient basis for not recommending that the lower age be raised.
- 7.27 The Council has considered carefully the views raised in consultations and the evidence from the data analysed for this reference. Taking these into account, the Council considers that the appropriate level at which to set the lower age is 'under 12', so as to include 10 and 11 year old children within the 25 year maximum penalty category.
- 7.28 The Council has not recommended that the lower age include children aged 12 because of the risk, albeit small, of capturing children in consensual relationships with people of a similar age within the higher penalty category, and therefore exposing young offenders to the second highest criminal penalty known to the law.

### RECOMMENDATION 2

That the following changes be made to the offence of sexual penetration with a child under 16:

- The statutory aggravating factor of 'sexual penetration with a child under 10' should be changed to '*sexual penetration with a child under 12*'.
- The statutory aggravating factor of 'sexual penetration with a child aged between 10 and 16 and under the care, supervision or authority of the offender' should be changed to '*sexual penetration with a child aged between 12 and 16 and under the care, supervision or authority of the offender*'.
- The non-aggravated form of the offence of 'sexual penetration with a child aged between 10 and 16' should be changed to '*sexual penetration with a child aged between 12 and 16*'.



## Appendices



# Appendix 1: Consultation

## Meetings/Telephone communications

Date	Meeting/Telephone Communications
10 February 2009	CASA Forum
13 February 2009	Victorian Association for the Care and Resettlement of Offenders (VACRO)
16 February 2009	Child Witness Service
19 February 2009	South Eastern Centre Against Sexual Assault (SECASA)
11 March 2009	Witness Assistance Service (Office of Public Prosecutions)
12 March 2009	Meeting with Victoria Police, Sexual Offences and Child Abuse Unit (SOCAU)
12 March 2009	Meeting with Gatehouse Centre, Royal Children's Hospital
19 March 2009	Victorian Association for the Care and Resettlement of Offenders
31 March 2009	Office of Public Prosecutions
6 April 2009	Victim Issues Roundtable
6 April 2009	Legal Issues Roundtable
7 April 2009	Meeting with B. Bull
7 April 2009	Meeting with a magistrate and a County Court judge
9 April 2009	Meeting with parents of a child victim of sexual assault
16 April 2009	Meeting with wife of convicted sex offender
17 April 2009	Meeting with Paul Higham, criminal defence barrister
22 April 2009	Meeting with Western Region Centre Against Sexual Assault (West CASA)
24 April 2009	Meeting with Dr Lauren Gradstein, Senior Psychologist, Pre-Sentence Assessment – County Court
28 April 2009	Meeting with convicted child sex offender
29 April 2009	CASA House
6 May 2009	Meeting with Frankston Sexual Offences and Child Abuse Investigation Team (Frankston SOCIT)
6 May 2009	Meeting with South Eastern Centre Against Sexual Assault (SECASA)
12 May 2009	Australian Medical Association (Victoria)
14 May 2009	Meeting with County Court judges
21 May 2009	Meeting with Ballarat Centre Against Sexual Assault (Ballarat CASA)
25 May 2009	Mildura Sexual Offences and Child Abuse Investigation Team and Centre Against Sexual Assault (Mildura SOCIT and CASA)
2 June 2009	Telephone communication with Dr Patricia Brown, Director, Children's Court Clinic
22 June 2009	Meeting with Gatehouse Centre, Royal Children's Hospital
22 June 2009	Meeting with Dr Anne Smith, Medical Director, Victorian Forensic Paediatric Medical Service Royal Children's Hospital
26 June 2009	Witness Assistance Service (Office of Public Prosecutions)
3 July 2009	Telephone communication with adolescent health professional
6 July 2009	Telephone communication with mother of a child victim of sexual assault

## Submissions

Number	Date received	Person/organisation
1	30 March 2009	Anonymous
2	30 March 2009	Confidential
3	1 April 2009	R. Marks
4	1 April 2009	H. Farquhar
5	3 April 2009	Anonymous
6	15 April 2009	Anonymous
7	16 April 2009	D. Duthie
8	19 April 2009	Family Voice Australia
9	19 April 2009	Confidential
10	28 April 2009	Youthlaw
11	30 April 2009	Law Institute of Victoria
12	1 May 2009	Bravehearts
13	1 May 2009	Koorie Women Mean Business Incorporated
14	1 May 2009	South Eastern Centre Against Sexual Assault
15	1 May 2009	Victorian Aboriginal Legal Service
16	4 May 2009	Victorian Women's Trust
17	1 May 2009	B. Marshall
18	6 May 2009	South Western Centre Against Sexual Assault
19	6 May 2009	Office of the Child Safety Commissioner
20	8 May 2009	Springvale Monash Legal Service
21	11 May 2009	Women's Legal Service Victoria
22	11 May 2009	B. Bull
23	8 May 2009	Victoria Legal Aid
24	13 May 2009	Mental Health Legal Centre

## Appendix 2: Related offences

**Table 1:** Other sexual offences capable of being charged in relation to children

Offence	Description
<b>Indecent act with or in the presence of a child under the age of 16</b>	<p>The concept of an 'indecent act' is not defined by legislation but has been judicially considered to be an act which 'right-minded persons would consider to be contrary to community standards of decency'.<sup>301</sup> The offence of indecent act with or in the presence of a child under the age of 16 does not require an act of sexual penetration to have occurred.</p> <p>Consent is not a defence to a charge of this offence unless:</p> <ul style="list-style-type: none"> <li>(a) the accused satisfies the court on the balance of probabilities that he or she believed the child was aged 16 or older; or</li> <li>(b) the accused was not more than 2 years older than the child; or</li> <li>(c) the accused satisfies the court on the balance of probabilities that he or she believed on reasonable grounds that he or she was married to the child.</li> </ul> <p>The maximum penalty for indecent act with or in the presence of a child under the age of 16 is 10 years imprisonment.<sup>302</sup></p>
<b>Rape</b>	<p>Rape is the intentional sexual penetration of a person of any age without that person's consent. The absence of consent is a necessary element of the offence and the prosecution must prove beyond reasonable doubt that the accused either knew the person was not or might not be consenting, did not give any thought to whether the person was or might not be consenting, or became aware after penetration that the person was not or might not be consenting.</p> <p>The maximum penalty for rape is 25 years imprisonment.<sup>303</sup></p>
<b>Incest</b>	<p>Incest is the act of sexual penetration between lineal descendants and some legal or defacto relatives. While incest can involve a range of lineal relationships and is not confined to minors, the <i>Crimes Act 1958 (Vic)</i> provides for a higher maximum penalty where the victim is under the age of 18 years and/or is the natural, step or defacto child of the accused.<sup>304</sup> Consent is not a defence to the offence of incest. The <i>Crimes Act 1958 (Vic)</i> sets out varying maximum terms of imprisonment ranging from 5 to 25 years depending on the lineal relationship and the age of the victim.</p> <p>The maximum penalty for incest where the victim is under the age of 18 and is the natural, step or defacto child of the accused is 25 years imprisonment.<sup>305</sup></p>
<b>Indecent assault</b>	<p>A person commits indecent assault if he or she assaults another person in indecent circumstances while being aware that that person is not consenting, or might not be consenting.</p> <p>The maximum penalty for indecent assault is 10 years imprisonment.<sup>306</sup></p>

301 *DPP v Scott* [2004] VSC 129.

302 *Crimes Act 1958 (Vic)* s 47.

303 *Crimes Act 1958 (Vic)* s 38.

304 *Crimes Act 1958 (Vic)* s 44(1), (2).

305 *Crimes Act 1958 (Vic)* s 44.

306 *Crimes Act 1958 (Vic)* s 39.

## Appendix 3: Legislative history of relevant offences

**Table 2:** Legislative history of offences involving the sexual penetration of children under the age of 10 in Victoria

Year	Offence	Legislation	Section	Penalty	Age	Consent
1864	Carnal knowledge of a girl under 10	<i>Criminal Law and Practice Statute 1864</i>	45	Death	Child under 10	No defence
1891	Carnal knowledge of a girl under 10	<i>Crimes Act 1891</i>	5(1)	Death	Child under 10	No defence
1928	Carnal knowledge of girl under 10	<i>Crimes Act 1928</i>	42	Death	Girl under 10	No defence
1958	Carnal knowledge of girl under 10	<i>Crimes Act 1958</i>	46	20 years	Girl under 10	No defence
1981	Sexual penetration with a child under 10	<i>Crimes (Sexual Offences) Act 1980</i> Effective 1 March 1981	47	20 years	Child under 10	No defence
1991	Sexual penetration of a child under the age of 10	<i>Crimes (Sexual Offences) Act 1991</i> Effective 5 August 1991	45	20 years	Child under 10	No defence
1997	Sexual penetration of a child under 10	<i>Sentencing and Other Acts (Amendment) Act 1997</i> Effective 1 September 1997	60	25 years	Child under 10	No defence
2000	Sexual penetration of a child under the age of 16, where child is under age of 10 <sup>307</sup>	<i>Crimes (Amendment) Act 2000</i> Effective 22 November 2000  Retrospective and applicable to offences committed on or after 5 August 1991	5	25 years	Child under 10	No defence

<sup>307</sup> The *Crimes (Amendment) Act 2000* (Vic) did not alter the maximum penalty for the offence of sexual penetration of a child under 10. However, it merged the two separate offences of sexual penetration of a child under 10 and sexual penetration of a child between 10–16. The change was made so that the one offence could be charged where there was uncertainty about the age of the child at the time of the offending. See Victoria, *Parliamentary Debates*, Legislative Assembly, 5 October 2000, 955 (Rob Hulls, Attorney-General).

**Table 3: Legislative history of offences involving the sexual penetration of children under the age of 16 in Victoria**

Year	Offence	Legislation	Section	Penalty	Age	Consent
1864	Carnal knowledge of a girl 10 and under 12	<i>Criminal Law and Practice Statute 1864</i>	47	10 years	Girl 10–11	No defence
1891	Carnal knowledge of girl of 10 and under 16	<i>Crimes Act 1891</i>	5(1)	10 years; 15 years if teacher/pupil	Girl 10–15	No defence unless complainant older than or same age as defendant
1928	Carnal knowledge of girl of 10 and under 16	<i>Crimes Act 1928</i>	44	10 years; 15 years if teacher/pupil	Girl 10–15	No defence unless complainant older than or same age as defendant
1958	Carnal knowledge of girl of 10 under 16	<i>Crimes Act 1958</i>	48	10 years; 15 years if teacher/pupil	Girl 10–15	No defence unless complainant older than or same age as defendant
1981	Sexual penetration of child of 10 and under 16	<i>Crimes (Sexual Offences) Act 1980</i> Effective 1 March 1981	48	10 years; 15 years if under care, supervision or authority of accused	Child 10–15	No defence unless accused believes on reasonable grounds at the time the offence was committed that he or she was married to the complainant, or that the complainant was of or above the age of 16, or that the accused was not more than 2 years older than the complainant
1991	Sexual penetration of a child of 10 and under 16	<i>Crimes (Sexual Offences) Act 1991</i> Effective 5 August 1991	46	10 years; 15 years if under care, supervision or authority of defendant	Child 10–15	No defence unless accused believed complainant was over 16, accused was not more than 2 years older than child, accused believed on reasonable grounds that he/she was married to the complainant
2000	Sexual penetration of a child of 10 and under 16 <sup>308</sup>	<i>Crimes (Amendment) Act 2000</i> Effective 22 November 2000	45	10 years; 15 years if under care, supervision or authority of accused	Child 10–15	No defence unless accused believed victim was over 16, accused was not more than 2 years older than child, accused believed on reasonable grounds that he/she was married to the complainant

308 See explanation at above n 307.

## Appendix 4: Inter-jurisdictional comparison

### Other Australian jurisdictions

**Table 4:** Comparison of selected offences of sexual penetration with children across Australian jurisdictions

Jurisdiction	Sexual penetration with younger children	Sexual penetration with older children	Rape
Australian Capital Territory	The maximum penalty for a person who penetrates a child under 10 years of age is imprisonment for 17 years. <sup>309</sup>	The maximum penalty for a person who penetrates a child under 16 years of age is imprisonment for 14 years. <sup>310</sup>	The maximum penalty for rape is imprisonment for 12 years or 14 years where the person does so acting in company. <sup>311</sup>
New South Wales	The maximum penalty for a person who penetrates a child under 10 years of age is imprisonment for 25 years. <sup>312</sup>	The maximum penalty for a person who penetrates a child under 14 years of age is imprisonment for 16 years. The maximum for a child under the age of 16 is imprisonment for 10 years. <sup>313</sup>	The maximum penalty for rape is imprisonment for 14 years. <sup>314</sup>
Northern Territory	The maximum penalty for a person who penetrates a child under 10 years of age is imprisonment for 25 years. <sup>315</sup>	The maximum penalty for a person who penetrates a child under 16 years of age is imprisonment for 16 years. <sup>316</sup>	The maximum penalty for rape is life imprisonment. <sup>317</sup>
Queensland	The maximum penalty for a person who penetrates a child under 12 years of age is life imprisonment. <sup>318</sup>	The maximum penalty for a person who penetrates a child under 16 years of age is 14 years imprisonment or, if the offender was the child's guardian or carer, life imprisonment. <sup>319</sup>	The maximum penalty for rape is life imprisonment. <sup>320</sup>

309 *Crimes Act 1900* (ACT) s 55(1).

310 *Crimes Act 1900* (ACT) s 55(2).

311 *Crimes Act 1900* (ACT) s 54(1), (2).

312 *Crimes Act 1900* (NSW) s 66A. The section also sets out higher maximums for aggravated versions of these offences.

313 *Crimes Act 1900* (NSW) s 66C. The section also sets out higher maximums for aggravated versions of these offences.

314 *Crimes Act 1900* (NSW) s 61I. The terminology used by this Act for rape is 'sexual assault'.

315 *Criminal Code Act 1983* (NT) s 127(3). This offence includes sexual penetration and gross indecency.

316 *Criminal Code Act 1983* (NT) s 127(1). This offence includes sexual penetration and gross indecency. Subsection 2 provides for a higher penalty where there are certain types of aggravation.

317 *Criminal Code Act 1983* (NT) s 192(3). The terminology used by this Act for rape is 'sexual intercourse without consent'.

318 *Criminal Code Act 1899* (Qld) s 215(3). The subsection sets out a lower maximum for an attempt. This provision is limited to vaginal penetration. Anal penetration is dealt with under a separate offence under section 208 and has the same maximum penalty.

319 *Criminal Code Act 1899* (Qld) s 215(2), (4). Subsection 4 sets out a lower maximum for an attempt. Anal penetration is dealt with under a separate offence under section 208 and has a maximum penalty of imprisonment for 14 years.

320 *Criminal Code Act 1899* (Qld) s 349(1). Subsection 3 specifies that a child under 12 years of age is incapable of giving consent.

South Australia	The maximum penalty for a person who penetrates a child under 14 years of age is life imprisonment. <sup>321</sup>	The maximum penalty for a person who penetrates a child under 17 years of age is imprisonment for 10 years. <sup>322</sup>	The maximum penalty for rape is life imprisonment. <sup>323</sup>
Tasmania	There is no separate offence specifically relating to younger children.	The maximum penalty for a person who penetrates a child under 17 years of age is imprisonment for 21 years. <sup>324</sup>	The maximum penalty for rape is imprisonment for 21 years. <sup>325</sup>
Victoria	The maximum penalty for a person who penetrates a child under 10 years of age is imprisonment for 25 years. <sup>326</sup>	The maximum penalty for a person who penetrates a child under 16 years of age is imprisonment for 15 years (if the child was in the person's care, supervision or authority) or 10 years (if not). <sup>327</sup>	The maximum penalty for rape is imprisonment for 25 years. <sup>328</sup>
Western Australia	The maximum penalty for a person who penetrates a child under 13 years of age is imprisonment for 20 years. <sup>329</sup>	The maximum penalty for a person who penetrates a child under 16 years of age is imprisonment for 20 years (if the child was in the person's care, supervision or authority) or imprisonment for 14 years (if not). <sup>330</sup>	The maximum penalty for rape is imprisonment for 14 years. <sup>331</sup>

321 *Criminal Law Consolidation Act 1935* (SA) s 49(1).

322 *Criminal Law Consolidation Act 1935* (SA) s 49(3). Subsection 5 also makes it an offence for a person to sexually penetrate a child under 18 years of age where the offender is the child's guardian or teacher. This has a maximum penalty of imprisonment for 10 years.

323 *Criminal Law Consolidation Act 1935* (SA) s 48.

324 *Criminal Code Act 1924* (Tas) s 124(1). The penalty for all serious offences in Tasmania, unless otherwise stated in the provision itself, is 21 years imprisonment; see s 389(3).

325 *Criminal Code Act 1924* (Tas) s 185(1). The penalty for all serious offences in Tasmania, unless otherwise stated in the provision itself, is 21 years imprisonment; see s 389(3).

326 *Crimes Act 1958* (Vic) s 45(2)(a).

327 *Crimes Act 1958* (Vic) s 45(2)(b), (c).

328 *Crimes Act 1958* (Vic) s 38(1).

329 *Criminal Code Compilation Act 1913* (WA) s 320(2).

330 *Criminal Code Compilation Act 1913* (WA) s 321(7).

331 *Criminal Code Compilation Act 1913* (WA) s 325. The terminology used by this Act for rape is 'sexual penetration without consent'.

## International jurisdictions

### England

Sexual offence laws in England underwent significant reform in 2003. The *Sexual Offences Act 2003* (UK) establishes a range of offences relevant to offending against children, including offences for performing sexual acts in the presence of children and facilitating the sexual abuse of children.<sup>332</sup>

**Table 5: Offences under the *Sexual Offences Act 2003* (UK) involving the sexual touching or the sexual penetration of children**

Offence description	Maximum penalty
<b>Younger children</b>	
Rape of a child under 13 <sup>333</sup>	Life imprisonment
Assault of a child under 13 by penetration <sup>334</sup>	Life imprisonment
Sexual assault of a child under 13 <sup>335</sup>	14 years imprisonment
Causing/inciting a child under 13 to engage in sexual activity <sup>336</sup>	Life or 14 years imprisonment
<b>Older children</b>	
Sexual activity with a child under 16 <sup>337</sup>	14 years imprisonment
Causing/inciting a child to engage in sexual activity <sup>338</sup>	14 years imprisonment
<b>Care, supervision or authority</b>	
Sexual activity with a child under 18 – position of trust <sup>339</sup>	5 years imprisonment
Causing/inciting a child to engage in sexual activity – position of trust <sup>340</sup>	5 years imprisonment
<b>Rape</b>	
Intentional penetration of vagina, anus or mouth without consent <sup>341</sup>	Life imprisonment

332 See generally *Sexual Offences Act 2003* (UK) pt 1.

333 Rape is defined as the penile penetration of the vagina, mouth or anus: *Sexual Offences Act 2003* (UK), s 5(1).

334 Assault by penetration is defined as sexual penetration of the vagina or anus by any object or part of the body other than the penis: *Sexual Offences Act 2003* (UK) s 6(1).

335 Sexual assault is defined as the intentional sexual touching of a child under 13: *Sexual Offences Act 2003* (UK) s 7(1)(a)–(c). The maximum penalty for this offence is 6 months if it is prosecuted summarily.

336 Defined as intentionally causing or inciting a child under 13 to engage in sexual activity: *Sexual Offences Act 2003* (UK) s 8(1). The maximum penalty for this offence is life if the sexual activity involves an act of penetration (section 8(2)) and 14 years in all other instances where the offence is prosecuted on indictment. If this offence is prosecuted summarily, the maximum penalty is 6 months (section 8(3)(a)).

337 Sexual activity is defined as the sexual touching of a child under 16: *Sexual Offences Act 2003* (UK) s 9(1). If this offence is prosecuted summarily the maximum penalty is 6 months (section 9(3)(a)).

338 Defined as intentionally causing or inciting a child under 16 to engage in sexual activity: *Sexual Offences Act 2003* (UK) s 10(1). If this offence is prosecuted summarily, the maximum penalty is 6 months (section 10(3)(a)).

339 Defined as the sexual touching of a child under 18 by a person in position of trust: *Sexual Offences Act 2003* (UK) s 16(1). The definition of 'position of trust' is found in section 21 of the Act. If this offence is prosecuted summarily, the maximum penalty is 6 months (section 16(5)(a)).

340 Defined as a person in a position of trust intentionally causing or inciting a child under 18 to engage in sexual activity: *Sexual Offences Act 2003* (UK) s 17(1). If this offence is prosecuted summarily, the maximum penalty is 6 months (section 17(5)(a)).

341 *Sexual Offences Act 2003* (UK) s 1(4).

## Ireland

The law governing sexual offence laws was changed in 2006 after a ruling by the Supreme Court of Ireland that some of the previous laws in this area were unconstitutional.<sup>342</sup> The *Criminal Law (Sexual Offences) Act 2006* (Irl) was passed to replace the unconstitutional sections of the previous legislation.

**Table 6:** Offences involving the penetration of children under the *Criminal Law (Sexual Offences) Act 2006* (Irl)

Offence description	Maximum penalty
<b>Younger children</b>	
Defilement of a child aged under 15 <sup>343</sup>	Life imprisonment
<b>Older children</b>	
Defilement of a child aged under 17 <sup>344</sup>	5 years imprisonment <sup>345</sup>
<b>Care, supervision or authority</b>	
Defilement of a child aged under 17 by person in authority <sup>346</sup>	10 years imprisonment
<b>Rape</b>	
Unlawful sexual intercourse without consent <sup>347</sup>	Life imprisonment

342 *CC v Ireland and ors* [2006] IESC 33.

343 Defined as a sexual act with a child under 15: *Criminal Law (Sexual Offences) Act 2006* (Irl) s 2(1). A 'sexual act' is further defined as an act consisting of sexual intercourse (see *Criminal Law (Rape) Act 1981* (Irl) s 1(2)) or buggery between persons not married to each other: *Criminal Law (Sexual Offences) Act 2006* (Irl) s 1. This definition includes non-penile penetration of the mouth, anus or vagina: see *Criminal Law (Rape) (Amendment) Act 1990* (Irl) ss 3(1), 4(1).

344 *Criminal Law (Sexual Offences) Act 2006* (Irl) ss 3(1)(a), (3)(a). The definition of sexual act is as per above.

345 The maximum penalty for this offence increases to 10 years for a subsequent offence: *Criminal Law (Sexual Offences) Act 2006* (Irl) s 3(1)(b).

346 The maximum penalty for this offence increases to 15 years for a subsequent offence: *Criminal Law (Sexual Offences) Act 2006* (Irl) s 3(3)(b). A 'person in authority' is defined in section 1.

347 *Criminal Law (Rape) Act 1981* (Irl) s 2 and *Criminal Law (Rape) (Amendment) Act 1990* (Irl) s 4.

### Scotland

Following the publication of the 2007 report of the Scottish Law Commission entitled *Report on Rape and Other Sexual Offences*,<sup>348</sup> the Scottish Parliament passed the *Sexual Offences (Scotland) Act 2009*.

**Table 7: Offences relating to the sexual assault of children under the *Sexual Offences (Scotland) Act 2009***

Offence description	Maximum penalty
<b>Younger children</b>	
Rape of a young child (under 13) <sup>349</sup>	Life imprisonment and a fine
Sexual assault on a young child by penetration (under 13) <sup>350</sup>	Life imprisonment and a fine
Sexual assault on a young child (under 13) <sup>351</sup>	Life imprisonment and a fine
Causing a young child (under 13) to participate in sexual activity	Life imprisonment and/or a fine <sup>352</sup>
<b>Older children</b>	
Having intercourse with an older child (over 13 and under 16) <sup>353</sup>	10 years imprisonment and/or a fine
Engaging in penetrative sexual activity with or towards an older child (over 13 and under 16) <sup>354</sup>	10 years imprisonment and/or a fine
Causing an older child (over 13 and under 16) to engage in sexual activity	10 years imprisonment and/or a fine <sup>355</sup>
<b>Care, supervision or authority</b>	
Sexual abuse of trust (under 18) <sup>356</sup>	5 years imprisonment and/or a fine
<b>Rape</b>	
Intentional penile penetration of the vagina, anus or mouth without consent <sup>357</sup>	Life imprisonment and a fine
Sexual assault by penetration (without consent) <sup>358</sup>	Life imprisonment and a fine

348 Scottish Law Commission (2007), above n 49.

349 Rape is defined as the penile penetration of the vagina, anus or mouth of a person aged under 13: *Sexual Offences (Scotland) Act 2009* (Scot) s 18.

350 Sexual assault by penetration is defined as the penetration by any part of the offender's body (including the penis) of the vagina or anus of a person aged under 13: *Sexual Offences (Scotland) Act 2009* (Scot) s 19.

351 Sexual assault is defined as the sexual penetration of the vagina, anus or mouth of the young child, the intentional or reckless sexual touching of the young child, any intentional or reckless sexual activity with the young child that involves physical contact, the intentional or reckless ejaculation of semen onto the young child, or the intentional or reckless emission of urine or saliva onto the young child: *Sexual Offences (Scotland) Act 2009* (Scot) s 20. The maximum penalty for this offence is 12 months if tried summarily.

352 *Sexual Offences (Scotland) Act 2009* (Scot) s 21. The maximum penalty for this offence is 12 months if tried summarily.

353 Defined as the penile penetration of the vagina, anus or mouth of the younger child: *Sexual Offences (Scotland) Act 2009* (Scot) s 28. The maximum penalty for this offence is 12 months if tried summarily.

354 Defined as the intentional or reckless penetration (by any means) of the vagina, anus or mouth of the older child, the intentional or reckless sexual touching of the older child, any intentional or reckless sexual activity with the older child that involves physical contact, the intentional or reckless ejaculation of semen onto the older child and the intentional or reckless emission of urine or saliva onto the younger child: *Sexual Offences (Scotland) Act 2009* (Scot) s 29. The maximum penalty for this offence is 12 months if tried summarily.

355 *Sexual Offences (Scotland) Act 2009* (Scot) s 30. The maximum penalty for this offence is 12 months if tried summarily.

356 Defined as the intentional engagement in sexual activity with a person aged under 18 and who is in a position of trust in relation to the offender: *Sexual Offences (Scotland) Act 2009* (Scot) s 42. The maximum penalty for this offence is 12 months if tried summarily. The Scottish legislation identifies five conditions which meet the definition of 'position of trust'. Generally speaking, these include the abuse of people in institutional care, in medical care, in child protection accommodation, in educational environments or in situations where the offender has parental rights and responsibilities towards the child: *Sexual Offences (Scotland) Act 2009* (Scot) s 43.

357 *Sexual Offences (Scotland) Act 2009* (Scot) s 1.

358 Defined as the penetration (by any means) of the vagina or anus: *Sexual Offences (Scotland) Act 2009* (Scot) s 2.

## Canada

Canadian law is governed by a criminal code which sets out various sex offences in relation to children. There is no separate offence of rape or indecent assault – these are referred to as rape with different degrees of assault.

**Table 8** Offences relating to the sexual assault of children under Canadian law

Offence description	Maximum penalty
<b>Children</b>	
Sexual interference (child under 16) <sup>359</sup>	10 years imprisonment
Defence available if the complainant is over 12 and under 14 and the defendant is not more than 2 years older than the complainant, and not in a position of trust towards him or her. <sup>360</sup>	
Defence available if the complainant is over 14 and under 16 and the defendant is not more than 2 years older than the complainant, and not in a position of trust towards him or her, or is married to the complainant <sup>361</sup>	
<b>Care, supervision or authority</b>	
Sexual exploitation of a young person (over 16 but under 18) <sup>362</sup>	10 years imprisonment
<b>Rape</b> <sup>363</sup>	
Sexual assault <sup>364</sup>	10 years imprisonment
Sexual assault with a weapon, threats to a third party or causing bodily harm	14 years imprisonment
Aggravated sexual assault <sup>365</sup>	Life imprisonment

359 Defined as the touching, for a sexual purpose, with any part of the body or an object of any part of the body of a person under the age of 16: *Criminal Code*, RSC 1985, c. C-46, s 151.

360 *Criminal Code*, RSC 1985, c. C-46, s 150.1(2).

361 *Criminal Code*, RSC 1985, c. C-46, s 150.1 (2.1).

362 Defined as touching any part of the body with a body part or object for a sexual purpose, or inciting a young person to sexually touch the body of another person: *Criminal Code*, RSC 1985, c. C-46, s 153(1).

363 Consent is not a defence to any of these charges if the defendant's belief in consent arises from self-induced intoxication or wilful/reckless blindness and the defendant did not take reasonable steps to ascertain if the complainant was consenting.

364 *Criminal Code*, RSC 1985, c. C-46, 271.

365 Defined as wounding, maiming, disfiguring or endangering the life of the complainant during the sexual assault: *Criminal Code*, RSC 1985, c. C-46, s 273(2).

*New Zealand***Table 9:** Offences relating to the sexual assault of children under the *Crimes Act 1961* (NZ)

Offence description	Maximum penalty
<b>Younger children</b>	
Sexual conduct with a child under 12 <sup>366</sup>	14 years imprisonment
<b>Older children</b>	
Sexual conduct with a young person under 16 <sup>367</sup>	10 years imprisonment
<b>Care, supervision or authority</b>	
No specific offence	
<b>Rape</b>	
Sexual violation <sup>368</sup>	20 years imprisonment

<sup>366</sup> *Crimes Act 1961* (NZ) s 132.

<sup>367</sup> *Crimes Act 1961* (NZ) s 134.

<sup>368</sup> *Crimes Act 1961* (NZ) s 128B.

## Appendix 5: Predicting sentence outcomes for sexual penetration with a child offences: Regression analyses

Regression analyses were conducted in order to better understand the extent to which specific factors (hereafter referred to as 'predictors') influence sentence outcomes for sexual penetration of a child offences. Such analyses allow the influence of each predictor to be separately estimated.

### Sample

#### *Charge dataset*

The starting dataset was restricted to charges of sexual penetration with a child aged 10 to 16 and sexual penetration with a child aged under 10. Charges of sexual penetration with a child aged 10 to 16 and under care, supervision or authority were excluded. This charge dataset comprised 585 charges sentenced in the County Court between July 2006 and June 2008. The data were obtained from a higher courts sentencing database and from transcripts of judges' sentencing remarks.

#### *Principal sexual offence sample*

The charge dataset was inappropriate for use in a regression analysis, because multiple charges may relate to the same person and therefore were not independent observations. For example, a person may be sentenced for four counts of sexual penetration with a child under 10. Observations must be independent of one another in a regression analysis.

In order to create a dataset that did not violate the assumption of independence, cases with multiple charges were reduced to a single charge. The charge selected was the charge with most severe sentence (both type and quantum). If multiple charges shared the same sentence type and length, the charge with the youngest victim was selected. This process created a sample comprising the principal proven sexual penetration offence for each case. The final sample comprised 216 defendants.

## Methodology

Two measures of sentence outcome were used:

- the sentence type: immediate imprisonment (assigned a value of 1) versus some other sentence (assigned a value of 0); and
- the length of imprisonment term (measured in months).

These measures represented the dependant variables in two different regression analyses. The first analysis used a logistic regression, which quantifies the likelihood of a binary outcome according to a given predictor in the regression model, when other predictors in the model are held constant. This was used to assess the influence of factors on sentence type. The second analysis focuses only on charges that received imprisonment, and uses a linear regression to assess the influence of various factors on length of imprisonment term.<sup>369</sup>

The initial set of predictors to be considered in both analyses is listed in Table 10. These variables were chosen to test whether they would have some impact on sentence outcomes. There are practical reasons why some of the variables should have an impact. For example, sentencers are required to consider age of the victim and prior criminal history of a defendant in imposing a sentence. Other variables, such as the gender of the defendant, are not expected to have an effect on sentencing. The analyses are therefore exploratory – to test what factors have an effect on sentencing in child sex offence cases.

**Table 10:** Predictors included in the two models predicting sentence outcomes for sexual penetration with a child charges

Predictor	Definition	Type of data <sup>370</sup>
Statutory maximum penalty	Maximum penalty as stated in the <i>Crimes Act 1958 (Vic)</i>	Continuous in years
Plea	Type of plea entered	Binary (0=guilty, 1=not guilty)
Prior conviction for sexual offences	Whether mention was made in sentencing remarks of defendant having been convicted previously for one or more sexual offences	Continuous (number of convictions)
Age of victim	Victim's age at the time of offence	Continuous in years
Age of defendant	Defendant's age at time of offence	Continuous in years
Age difference	Age difference between defendant and victim	Continuous in years
Gender	Gender of defendant	Binary (0=female, 1=male)
Time between offence and sentence	Time difference between offence date and sentence date	Continuous in years
Multiple victims in case	Whether multiple offences in case committed against multiple victims	Binary (0=No, 1=Yes)
Multiple sex offences in case	Whether multiple sex offences were in case	Binary (0=No, 1=Yes)

<sup>369</sup> Although imprisonment term may not strictly be a continuous variable, it was treated as continuous for the purposes of these analyses. A separate logistic regression was performed with imprisonment term as a categorical variable and this yielded similar results to the linear regression.

<sup>370</sup> Continuous versions of prior convictions (number of priors), multiple victims (number of victims) and multiple sexual offences (number of sexual offences) were used in separate regression analyses. However, only minor differences were found in the predictive strength of these predictors when their continuous versions were used versus their binary versions. Only results for the binary versions of these predictors are reported.

Summary information about each variable considered in these analyses is presented in Tables 11 and 12.

**Table 11:** Distribution of categorical variables

Variable	Categories	Frequency
Statutory maximum penalty	10	80.1
	25	19.9
Plea type	Not Guilty	9.7
	Guilty	90.3
Prior convictions?	Yes	7.1
	No	92.9
Gender	Male	96.3
	Female	3.7
Multiple victims in case?	Yes	13.4
	No	86.6
Multiple sex offence charges in case?	Yes	28.7
	No	71.3
Imprisonment sentence	Yes	49.5
	No	50.5

**Table 12:** Median for metric variables

Variable	Median (years)	Number
Age of victim	14.0	216
Age of defendant	25.0	216
Age difference	12.0	216
Time between offence and sentence	2.0	216
Imprisonment term	30.0	106

Before proceeding with the regression analyses, it was important to test for presence of multicollinearity in the data. Multicollinearity occurs when independent variables are moderately to highly correlated with one another and leads to unstable results in regression modelling when such variables are included in a model. A number of variables did present substantial correlations with other variables. Statutory maximum and victim age were highly correlated ( $-0.867$ ), as were defendant age and age difference ( $0.997$ ).

In order to avoid multicollinearity, one variable in each of these pairs needed to be excluded in order to proceed with regression modelling. A statistical method was used to determine which variable to remove: the variable with the lowest correlation with sentence outcome measures was excluded (age of defendant and statutory maximum). Therefore, the final set of predictors included the following eight variables: plea, prior convictions for sexual offences, age of victim, age difference, gender of defendant, time between offence and sentence, multiple victims and multiple sexual offences.

## Results

Results of the logistic regression are presented first, followed by those of the linear regression.

### *Logistic regression*

Of the sample of 216 charges, 22 were removed for the logistic regression because of missing information in at least one of their variables. This left 194 charges or observations.

The logistic regression model with the eight predictors was found to be significantly better at predicting imprisonment than prediction using a constant-only model ( $\chi^2(8, 194) = 129.164, p < 0.0001$ ). This indicates the predictors as a set reliably distinguish an imprisonment from non-imprisonment sentence.

The variance in sentence type accounted for by the model was substantial, at 64.8 per cent (Nagelkerke R Square = 0.648) and classification using the model was impressive, with 85.6 per cent of imprisonment sentences and 89.7 per cent of non-imprisonment sentences correctly predicted. The overall success rate of the model was 87.6 per cent.

The goodness of fit for the model was tested using the Hosmer and Lemeshow which assesses the relationship between observed and expected values for observations within each group of the dependant variable (in this case sentence type). The test was not significant ( $\chi^2 = 9.011, p = 0.341$ ), indicating that the model had a good fit.

In logistic regression, the strength of the effect of each dependent variable is assessed using the factor by which the odds ratio of a binary outcome increases. The odds ratio is the ratio of the odds of an event occurring in one group (for example, imprisonment for not guilty pleas) to the odds of it occurring in another group (for example, imprisonment for guilty pleas).

Table 13 shows the regression coefficients, significance levels, odds ratios and 95 per cent confidence intervals for the odds ratios for each predictor.

**Table 13:** Logistic regression analysis of sentence type as a function of eight predictor variables

Predictor	Regression coefficient	Significance value	Odds ratio	95% confidence interval for odds ratio	
				Lower	Upper
Plea (not guilty)	2.036	0.010*	7.658	1.634	35.885
Priors (yes)	3.210	0.009**	24.776	2.239	274.181
Age of victim (years)	-0.267	0.028*	0.766	0.604	0.971
Age difference (years)	0.145	0.000***	1.156	1.093	1.223
Gender (male)	0.303	0.746	1.354	0.216	8.471
Multiple sex offence charges (yes)	0.967	0.078	2.630	0.899	7.694
Multiple victims (yes)	1.351	0.090	3.862	0.808	18.452
Time between offence and sentence (years)	-0.053	0.316	0.948	0.855	1.052

\*Significant at  $p < 0.05$

\*\*Significant at  $p < 0.01$

\*\*\*Significant at  $p < 0.0001$

Of the eight predictors, four were found to have a significant effect at the 5 per cent level on the odds ratio of imprisonment: plea type, prior sexual offences, age of victim and age difference. Odds ratios of greater than one indicate that that characteristic increases the odds of imprisonment, whereas odds ratios of less than one indicate the characteristic decreases the chances of imprisonment.

Of these predictors, the largest odds ratio was for prior sexual offences at 22.269, which means that the odds ratio of imprisonment increases by a factor of 22 for charges where the defendant has a prior history of sexual offending. The next strongest significant predictor was plea type (7.443) whereby a not guilty plea increased the odds of imprisonment by a factor of 7. Thus, a plea of not guilty and a prior history of sexual offending heavily influence the likelihood of an imprisonment sentence.

While the two age-related predictors were significant, they had opposite effects on the odds of imprisonment. The odds ratio of less than one (0.810) for age of victim suggests an increase of one year in a victim's age produces a *decrease* in the odds of imprisonment. Conversely, an increase of one year in the age difference between offender and victim produces a 15.4 per cent *increase* in the odds of imprisonment. This means that charges where the victim is younger and charges where the age difference is greater are more likely to receive imprisonment.

### *Linear regression*

The logistic regression found four predictors to significantly predict the probability of imprisonment. The next question is, for charges that received imprisonment, which of the initial set of eight predictors significantly predicts the length of the imprisonment term?

A linear regression was conducted only on charges that received a sentence of imprisonment ( $n = 106$ ). The purpose was to measure the effect of each predictor on imprisonment length. It is important to note that length of imprisonment term is measured in months.

Before proceeding with the analysis, the eight-predictor model was tested for violation of assumptions relating to the normality, linearity and homoscedasticity of residuals. This was done by plotting standardised residual scores against predicted values. It showed an even distribution of residuals for each predicted value, indicating these assumptions had not been violated.

Turning to the results of the eight-predictor regression model, the model was found to be significant in explaining the variance in the length of imprisonment term, accounting for 28.0 per cent ( $R^2 = 0.280$ ,  $F(8) = 4.232$ ,  $p < 0.0001$ ). While this level of explained variance is reasonably high, it is substantially lower than that found in the logistic regression in predicting the chances of imprisonment (64.8%).

Table 14 shows both standardised and unstandardised regression coefficients as well as the significance level of each predictor in the model.

**Table 14:** Regression results for each predictor on length of imprisonment term

	Unstandardized coefficients		Standardized coefficients	t	Significance value
	B	Std. Error	Beta		
Plea (not guilty)	0.685	3.299	0.020	0.208	0.836
Priors (yes)	-0.677	3.660	-0.018	-0.185	0.854
Age of victim (years)	-0.925	0.402	-0.247	-2.298	0.024*
Age difference (years)	0.259	0.096	0.282	2.681	0.009**
Gender (male)	2.505	6.988	0.033	0.359	0.721
Multiple sex offence charges (yes)	2.114	3.712	0.055	0.569	0.571
Multiple victims (yes)	3.454	3.071	0.109	1.125	0.264
Time between offence and sentence (years)	0.185	0.194	0.094	0.954	0.343

\*Significant at  $p < 0.05$

\*\*Significant at  $p < 0.01$

Only two of the predictor variables, age of victim and age difference, had a significant effect on the length of imprisonment term. Unstandardised coefficients show the degree of change in imprisonment length when the predictor variable increases by one original unit in the variable. Standardised coefficients show the same information but standardise the unit of measurement of each predictor and therefore allow comparison of strength across predictors when measurement units differ. In the case of victim age and age difference, the units of measurement are the same and therefore unstandardised coefficients may be meaningfully compared.

The unstandardised coefficient of  $-0.925$  for age of victim means that an increase of one year in the victim's age produces a 0.925 month decrease in imprisonment term. The coefficient of 0.259 for age difference means that an increase of one year in the age difference produces a 0.259 month increase in imprisonment term. Thus like in the logistic model, age-related predictors were important in predicting sentence outcome.

The result that plea type and prior convictions for sexual offences did not influence the length of imprisonment term was surprising given their significant effect on the type of sentence imposed found in the logistic regression. Prior convictions in fact was the strongest predictor of the chances of imprisonment. Therefore, further investigation was conducted into the effect of prior convictions. This time a continuous version of the prior convictions variable was used – that is, the number of prior convictions. Although the continuous version of the variable had a stronger influence than the binary version, the influence was still far from significant ( $B = 0.334$ ,  $t = 0.738$ ,  $p = 0.462$ ).

## Findings

The set of eight predictor variables was found to account for a significant amount of variation both in the likelihood of an imprisonment sentence and in the length of imprisonment sentence. The logistic regression model explained substantially more variance in likelihood of imprisonment (64.8%) than did the linear regression model for length of imprisonment term (28.0%). This suggests that these factors are more accurate in predicting whether or not a defendant receives imprisonment than in predicting the length of imprisonment term imposed.

In terms of the influence of individual variables, two age-related variables, age of victim and difference in age between offender and victim, were found to be influential – both on the likelihood of receiving imprisonment and on the length of imprisonment term. It should be noted that the effect of defendant age could not be assessed because it was highly correlated with age difference. It is likely however that, because of this high correlation, the effect of defendant age is similar to the effect of age discrepancy. The influence of these age-related variables is consistent with instructions to judges set out in the *Victorian Sentencing Manual*<sup>371</sup> which states that age discrepancy and age of victim are factors that should be considered in the sentencing of sex offences against children.

Two other variables were significant at predicting the likelihood of an imprisonment sentence, and were in fact substantially stronger than the age-related variables in this prediction. These were whether the offender had prior convictions for sexual offences – if they did have priors the odds of imprisonment jumped by a factor of 22 – and the type of plea entered – a not guilty plea increased the odds of imprisonment by a factor of 7. This is consistent with the requirements on judges stated in the *Sentencing Act (Vic) 1991* to consider plea type (section 2(e)) and an offender's character, including prior relevant convictions (sections 2(f) and 6(a)) in sentencing. These factors, however, were found not to be significant for length of imprisonment term.

All other variables examined were found to be of no statistical relevance to the sentence type or imprisonment length. These were gender of defendant, length of time between offence and sentence, whether there were multiple victims in the case and whether there were multiple sexual offences in the case. The effect of the statutory maximum penalty could not be assessed because of its high correlation with age of victim.

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371 Judicial College of Victoria (2006–), above n 148.

## Appendix 6: Victim age and sentencing outcomes: At what age does sentencing change most?

Regression analyses were conducted in order to determine the victim age at which sentencing practices change the most. It has already been established that as the age of the victim increases, there tends to be a decline in both the odds of a charge receiving imprisonment and the length of imprisonment term. The question addressed in this section is: at what victim age do sentencing practices change most dramatically?

### Methodology

In order to answer this question, regression models discussed in Appendix 5 were employed. However, in order to reduce the 'noise' created by non-statistically significant predictors, only the statistically significant predictors were included. For the logistic regression, prior sexual offences, plea type, age difference and victim age were included and for the linear model, age difference and victim age were included.

In order to address the question at hand, victim age was transformed from a metric variable into a number of different binary variables, using different age splits:

- under 10 versus 10 and over;
- under 11 versus 11 and over;
- under 12 versus 12 and over;
- under 13 versus 13 and over; and
- under 14 versus 14 and over.

For the regression models, the metric variable of victim age was removed and replaced with one of the binary age comparison variables. Separate models were created for each victim age variable, allowing comparison of the ability of each victim age comparison to influence sentence outcomes.

## Results

Table 15 shows the results for the different victim age comparisons from both the logistic regression and linear regression.

**Table 15:** The effect of different victim age comparisons on sentencing outcomes in separate regression models

Victim age comparison	Logistic regression		Linear regression
	Odds ratio	% change in odds of imprisonment	Regression coefficient
Under 10 versus 10 and over	0.281	-71.9	-9.119
Under 11 versus 11 and over	0.276	-72.4	-6.687
Under 12 versus 12 and over	0.247	-75.3	-7.758
Under 13 versus 13 and over	0.383	-61.7	-8.553
Under 14 versus 14 and over	0.295	-70.5	-5.541

The odds ratio is the factor by which the odds of imprisonment change as a result of a one unit increase in victim age group and is easily interpreted through the percentage change in the chances of imprisonment. For example, comparing victims aged under 10 versus 10 and over, the odds of imprisonment changed by a factor of 0.281, which represents a 71.9 per cent *reduction* in the odds of imprisonment when victims are aged 10 and over. The regression coefficients produced by the linear regression show the change in imprisonment term (in months) for a one unit increase in the age comparison predictors.

The negative signs for all of the percentage change values in odds of imprisonment and regression coefficient columns indicate that both the odds of imprisonment and imprisonment length decrease as victim age increases. This is consistent with other findings reported in this report (Appendix 5) regarding the relationship between victim age and sentencing.

In terms of the most influential age split, this differed for odds of imprisonment sentence and length of imprisonment sentence. The age split that was most influential in reducing the odds of imprisonment was under 12 versus 12 and over. There was a 75.3 per cent reduction in the odds of imprisonment when the victim was aged 12 years and over compared with those aged under 12 years. For imprisonment length, the most dramatic reduction was for the under 10 versus 10 and over comparison (-9.119): there was a predicted 9.1 month reduction in imprisonment lengths when victims were aged 10 and over versus victims aged under 10. The next largest change was for the comparison of victims under 13 years with victims 13 years and over (-8.553 months).

## Summary

These analyses assessed the impact of victim age on sentencing outcomes, and specifically attempted to identify the age at which there was most dramatic change in sentencing outcomes. In order to control for influential factors, a series of both logistic and linear regression models was created using both significant predictors as well as various victim age comparison variables (for example, victims aged under 10 versus those aged 10 and over).

In terms of the likelihood of imprisonment, the logistic regression models found that, after controlling for plea type, prior sex offence convictions and age difference, the victim age at which the likelihood of imprisonment decreased the most was 12. That is, the difference in the likelihood of imprisonment was greater for the comparison of victims under 12 with those aged 12 and over than for any other age comparison. In terms of the length of imprisonment term, after controlling for age difference, the age at which there was the greatest reduction in imprisonment term was 10 years, followed by 13 years.

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