Warning to readers

This paper contains subject matter – particularly in the case studies – that may be distressing to readers. These case studies are based on real cases and contain explicit material describing sexual assaults.

People who have personal concerns about sexual assault can contact the Sexual Assault Crisis Line on 1800 806 292.

Consultation process

The Council is committed to giving all members of the community the opportunity to express their views about sentencing law reform. The purpose of this paper is to assist discussion about the maximum penalties for the offence of taking part in an act of sexual penetration with a child under the age of 16. The Council intends to use the results of these consultations to inform its advice to the Attorney-General.

This paper briefly describes the context of the reference, and provides information about the offence of sexual penetration with a child under 16 and related offences in Victoria. It concludes with a series of questions, which will form the basis of the Council’s consultations.

The Council has also produced a separate publication entitled Sentencing for Sexual Penetration Offences: A Statistical Report, which may be of assistance in considering some of the issues raised by this reference. This publication analyses data on sentencing outcomes in Victoria for sexual penetration offences according to various factors including the age of the victim. This publication is available by contacting the Council or at www.sentencingcouncil.vic.gov.au.
Terms of reference

The Attorney-General has sought the advice of the Sentencing Advisory Council (the Council) on the adequacy of the current maximum penalties that apply to the different circumstances in which the offence of taking part in an act of sexual penetration with a child under the age of 16 may be committed.

The applicable maximum penalties for this offence have recently been the subject of some commentary in the context of a County Court case involving the sexual penetration of a victim who had turned 10 years old two weeks prior to the offence.

Section 45 of the Crimes Act 1958 (Vic) makes it an offence for a person to take part in an act of sexual penetration with a child under the age of 16. There are currently three different maximum penalties that apply to this offence depending on the factual circumstance in which the offence is committed:

- Sexual penetration with a child under the age of 10 attracts a maximum penalty of 25 years’ imprisonment.
- Sexual penetration with a child aged between 10 and under 16 and under the care, supervision or authority of the offender attracts a maximum penalty of 15 years’ imprisonment.
- Sexual penetration with a child aged between 10 and under 16 and not under the care, supervision or authority of the offender, attracts a maximum penalty of 10 years’ imprisonment.

Scope of the reference

Sexual offences in general raise a number of complex issues such as low reporting rates and the experience of victims of sexual offences during criminal proceedings. Many of these issues have been considered by previous policy reviews.

This reference is specifically concerned with the current statutory maximum penalties for the offence of sexual penetration with a child under the age of 16. It is not intended to be a review of all the sexual offences relating to children contained in the Crimes Act 1958 (Vic), and will not consider any procedural issues in relation to the prosecution of sexual offences against children.

Moreover, although most people convicted of sexual offences against children will be subject to the registration and reporting provisions of the Sex Offenders Registration Act 2004 (Vic), other than where relevant this reference will not address any of the legal and social issues arising from the registration of sex offenders. 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.
Historical context

Victorian law has consistently recognised that offences involving sexual penetration with children under the age of 16 should attract significant maximum penalties; however the relationship between the different offences has varied over time. Figure 1 shows the maximum penalties for offences involving sexual penetration with children between 1864–2009.

Figure 1 demonstrates that while the statutory maximum penalties for rape and sexual penetration with a child under the age of 10 have changed over time, the maximum penalties for sexual penetration with a child under the age of 16 and sexual penetration with a child aged between 10 and under 16 and under the care, supervision or authority of the offender have remained constant at 10 years and 15 years respectively since 1928.

Some key points at which legislation governing sexual offences against children has been amended include (see also Appendix 1):

- In 1981 the definition of ‘sexual penetration’ for the purposes of the offences of rape and sexual penetration with a child under the age of 16 was expanded beyond penetration of the vagina by the penis to include penetration of the vagina, anus or mouth by a penis or other object, and both parties to an act of sexual penetration were deemed to be ‘taking part’ in that act.
- In 1981 the maximum penalty for the offence of rape was reduced to 10 years’ imprisonment, but a new offence of ‘rape with aggravating circumstances’ was created and carried a maximum penalty of 20 years’ imprisonment.
- In 1992 the offence of ‘rape with aggravating circumstances’ was abolished and the maximum penalty for rape was raised to 25 years’ imprisonment.
- In 2000 the previously separate offences of sexual penetration with a child under the age of 10, sexual penetration with a child aged between 10 and under 16 and under the care, supervision or authority of the offender, and sexual penetration with a child aged between 10 and under 16 were consolidated into the current single offence of sexual penetration with a child under the age of 16.

Figure 1: Maximum penalties for selected sex offences in Victoria between 1864–2009
The offence

To establish the offence of taking part in an act of sexual penetration with a child under the age of 16, the prosecution must prove beyond 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.

The offence of sexual penetration with a child under the age of 16 is intended to reflect the premise that children under the age of 16 are not sufficiently mature to meaningfully consent to sexual penetration. The aim of the law 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’.7

The issue of consent

In contrast to the offence of rape, it is not necessary to prove that the victim was not consenting, or that the offender knew or ought to have known that the victim was not or might not be consenting. The only exception to this arises where the victim is over the age of 10 and 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, two people may be legally married under the laws of another country even though they could not legally marry in Australia); or
- was not more than two years older than the child.8

Although consent is generally not relevant for determining a person’s guilt in relation to this offence, it may be relevant when assessing the relative culpability of the offender at sentence. Courts have recognised that the level of culpability involved where the victim and the offender are close in age and engaging in a consensual sexual relationship is significantly different to where an older adult exploits the vulnerability of a much younger victim.10

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.11

Statutory aggravating factors

Section 5(2) of the Sentencing Act 1991 (Vic) provides that one of the factors a court must have regard to when sentencing an offender is the presence of any aggravating or mitigating factors. Aggravating factors do not have to be specified in legislation in order to be taken into account at sentencing. For example, if an adult gives a 15 year old child alcohol or other drugs to encourage the child to take part in an act of sexual penetration, the court may consider this as a factor increasing the culpability of the adult. The existence of this aggravating factor will not change the statutory maximum penalty applicable to the offence, however it may affect the sentence imposed by the judge in that particular case.

However, for a small number of Victorian offences, certain factual circumstances that are said to aggravate the offending conduct are included in the legislative description of the offence. In this situation, the aggravated form of the offence carries a higher maximum penalty. This is called a ‘statutory aggravating factor’ and is intended to reflect the fact that an offender’s level of culpability is higher if a relevant statutory aggravating circumstance is present.

There are two statutory aggravating factors applying to the offence of sexual penetration with a child under the age of 16. These are the age of the child at the time of the offending, and whether the child was under the ‘care, supervision or authority’ of the offender at the time the offence was committed.

The inclusion of statutory aggravating factors within the offence of sexual penetration with a child under the age of 16 means that there are three different forms the offence can take. These are:

- Taking part in an act of sexual penetration with a child under the age of 10.
  - **Aggravating factor** – the age of the victim (under 10 years) at the time of the offence.
  - The maximum penalty for this form of the offence is 25 years’ imprisonment.12
- Taking part in an act of sexual penetration with a child aged between 10 and under 16 and under the care, supervision or authority of the offender.
  - **Aggravating factor** – that the offender was in a position of care, supervision and authority in relation to the victim.
  - The maximum penalty for this form of the offence is 15 years’ imprisonment.13
- Taking part in an act of sexual penetration with a child aged between 10 and under 16.
  - Acts of sexual penetration with a child aged between 10 and under 16 and not under the care, supervision or authority of the offender.
  - The maximum penalty for this form of the offence is 10 years’ imprisonment.14
Aggravating factor of age

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 (refer Appendices 1 and 2, and Figure 1 above).

Prior to 1997, the maximum penalty for the offence of sexual penetration with a child under the age of 10 was 20 years’ imprisonment. In 1997, this was increased to 25 years’ imprisonment with the aim of putting it ‘on the same footing as rape’. Therefore, while this offence can be charged as an alternative to rape, the offender would be liable to the same maximum penalty, regardless of which substantive offence was charged. As the Law Reform Commission of Victoria found: ‘Tender years incapacitate children from giving valid consent, hence the use of a different offence to protect children from serious sexual assault’.

Under English common law, since at least 1576, consent has been ‘immaterial’ in relation to children under the age of 10 as ‘by reason of [their] tender years, [they] are incapable of judgement and discretion’. Whether the offence should continue to be split between younger and older children is a matter of public policy that has been addressed by a number of Victorian and Australian law reform bodies. The age at which children develop sexually may also be a factor relevant to the setting of a legislative aggravating factor in relation to this offence.

The issue of age as an aggravating factor 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 that 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.

Despite this, the NSW 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.

The reasoning of the New South Wales Sentencing Council is reflected in the structure of the Victorian offence of sexual penetration with a child under the age of 16, which provides for a more serious offence where the victim is less than 10 years old at the time of the offence.

Case Study 1 – Sexual penetration with a child aged under 10

Mr D was in a relationship with Ms X, who had three daughters. Over a period of two months, D committed a variety of indecent acts against X’s eight year old daughter, and on one occasion inserted his finger into her vagina.

This form of the offence can also arise where the offender has access to a child over a short period of time and takes advantage of that situation, as illustrated in Case Study 2.

Case Study 2 – Sexual penetration with a child aged under 10

Thirty-four year old D attended a family barbeque at the home of the 5 year old complainant, C. D became very drunk and was also using marijuana. He ‘passed out’ on a fold out couch and later in the evening C and another child were put to bed in the same couch. During the course of the evening D inserted C’s penis into his mouth.
Aggravating factor of care, supervision or authority

A higher statutory maximum penalty has also consistently applied to offences of sexual penetration with a child older than 10 where the offender was 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. 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 Appendices 1 and 2).

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 under 16 and not under the care, supervision or authority of the offender carries a maximum penalty of 10 years’ imprisonment.

Although section 45 of the *Crimes Act 1958* (Vic) does not define the legal meaning of ‘care, supervision and authority’, 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’. This category includes, but is not limited to, relationships involving teachers, family friends, foster parents, employers, health professionals, counsellors and youth workers.

Case study 3 provides an example of a factual circumstance in which the offence of sexual penetration with a child under the age of 16 (care, supervision or authority) could be charged.

**Case Study 3 – Sexual penetration with a child aged between 10 and under 16 and under the care, supervision or authority of the offender**

Thirteen year old C was spending the night at the home of her friend X. At one point in the evening, C was sitting with X’s father, D, on a couch watching television. C was beginning to fall asleep when D rubbed her on the vagina and then put his finger into her vagina. C told him to stop and moved away. The offending was subsequently reported to the police.

This form of the offence can also include cases where the victim is seemingly consenting to the sexual penetration (as illustrated in Case Study 4). The victim’s ‘consent’ in this instance is, however, unlikely to reduce an offender’s culpability for the purposes of sentencing, because it arises from his or her abuse of the relationship of care, supervision or authority.

**Case Study 4 – Sexual penetration with a child aged between 10 and under 16 and under the care, supervision or authority of the offender**

Thirty year old D taught 15 year old C’s maths class. C sent D a number of ‘flirtatious’ text messages, which D responded to. D arranged to meet with C and told her that nothing could happen between them because he did not want to lose his job. C continued to send text messages to D asking to meet him outside school, because she had a crush on him. D eventually agreed to such a meeting. D arranged to pick C up from her part-time job and take her to his home. At D’s home, he penetrated C’s mouth with his penis. D then penetrated C’s vagina with his penis.
No statutory aggravating factor

The maximum penalty for the offence of taking part in an act of sexual penetration with a child under the age of 16 in the absence of any statutory aggravating factors has historically remained constant at 10 years’ imprisonment (see Figure 1 and Appendices 1 and 2).

This form of the offence covers a wide range of criminal behaviour; however there are generally two situations in which this offence would be charged.

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.

Case Study 5 – Sexual penetration with a child under the age of 16

D was a 19 year old male and C a 15 year old female when they met. They formed a relationship and had sexual intercourse on a regular basis over a three month period. C’s mother was aware of the relationship. C learned she was pregnant. C’s older sister then reported the matter to police. D was interviewed by police and admitted the relationship and also that he knew C was under the age of 16. D and C remained in a relationship.

During the period June 2006 to July 2007, 25.7 per cent of charges dealt with 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 legally consent.

The second situation 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 (see Case Study 6).

Case Study 6 – Sexual penetration with a child under the age of 16

D was a 23 year old male and C was a 14 year old male. They ‘met’ in an internet chat room. C falsely told D that he was 15 years old and sexually experienced. C and D chatted online briefly and then agreed to meet. C and D met and spent some time talking in D’s car. C asked D if he wanted to see him naked. D touched and kissed C. D inserted his penis into C’s mouth. C then did the same to D. C got out of D’s car and went home. Later that afternoon, C sent D a text message saying that he felt scared and confused by what had happened. C also reported the matter to the police.

The above scenarios are in contrast to the offence of rape, where a victim’s lack of consent is a necessary fact that must be proven beyond a reasonable doubt in order for the offence to be made out.

Case Study 7 – Rape

D, a 44 year old male, shared a house with a young male, X. X’s girlfriend, C, was 15 years old. C went to D and X’s house at 2am, but her boyfriend was not home. She went to the computer room and began to use the internet. D, who had been drinking, came into the room and began to kiss C. He then took her into the bedroom and orally and vaginally raped her, while she cried and tried to resist him. D then left the room and C fled the house. C was later found naked and distressed in the street.

The relative age difference between the victim and the offender is also a relevant factor capable of either increasing or lessening the offender’s culpability for the offending. In one case involving a ‘consensual’ relationship, it was considered significant that the offender was ‘more than 50% older than the victim and of the two he was clearly the more intelligent and mature’. 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 and 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.
Related offences

The Crimes Act 1958 (Vic) contains a number of 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, indecent act with or in the presence of a child under 16 and incest. These elements of these offences are detailed in Appendix 3 and the varying maximum penalties, including the penalties for sexual penetration with a child, are set out in Figure 2.

Figure 2 demonstrates that the statutory aggravating factors of ‘care, supervision or authority’ and age do not apply to the offence of indecent act with or in the presence of a child under 16. This offence, which involves indecent acts falling short of sexual penetration, has a single maximum penalty of 10 years’ imprisonment that is applicable to all forms of relevant offending conduct.

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 the sense that a particular offence may be charged either in preference to, or as an alternative to that offence.

For example:

- Where there has been an act of sexual penetration with a child and the accused person is a family member of a complainant, incest may be the most relevant charge.
- Where it is unclear whether an act of sexual penetration has taken place, 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.

In certain circumstances, the prosecution may also elect to withdraw one offence and proceed with a lesser offence in exchange for a plea of guilty, for example by withdrawing a rape charge in respect of an accused person who is prepared to plead guilty to a charge of sexual penetration with a child under 16. Decisions such as these are made on an individual case basis, and reasons for taking such a course may include weaknesses in the Crown case, a desire to prevent a traumatised victim from having to give evidence in court and whether it is in the interests of public policy to accept a plea of guilty in the circumstances of a particular case.

The effect of the range of sexual offences within the Crimes Act 1958 (Vic) and the practice of plea negotiation is therefore that not all offences that involve an act of sexual penetration will be charged as sexual penetration with a child under 16.

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 possible that some of the ‘worst’ examples of offending could be charged as either rape or incest, each of which carries 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 which could result in a higher total effective sentence.
<table>
<thead>
<tr>
<th>Victim aged &lt; 16</th>
<th>Statutory Maximum Penalty (years)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual penetration with a child aged &lt; 10 and under CSA of offender</td>
<td>25</td>
</tr>
<tr>
<td>Sexual penetration with a child aged 10 &lt; 16 and under CSA of offender</td>
<td>15</td>
</tr>
<tr>
<td>Sexual penetration with a child aged 10 &lt; 16</td>
<td>10</td>
</tr>
<tr>
<td>Indecent act with a child aged &lt; 16</td>
<td>10</td>
</tr>
<tr>
<td>Victim aged 16-17</td>
<td></td>
</tr>
<tr>
<td>Sexual penetration with a child aged 16–17 and under CSA of offender</td>
<td>10</td>
</tr>
<tr>
<td>Indecent act with a child aged 16–17 and under CSA of offender</td>
<td>5</td>
</tr>
<tr>
<td>All ages</td>
<td></td>
</tr>
<tr>
<td>Indecent assault</td>
<td>10</td>
</tr>
<tr>
<td>Rape</td>
<td>25</td>
</tr>
<tr>
<td>Familial</td>
<td></td>
</tr>
<tr>
<td>Incest</td>
<td>25</td>
</tr>
</tbody>
</table>
Maximum penalties

The purposes of a maximum penalty

In order to consider the current maximum penalties for the offence of sexual penetration with a child under 16, it is useful to consider more generally the purposes of statutory maximum penalties. There are three main purposes of maximum penalties, which are described in turn below.

1. The principle of legality

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. It provides a legislatively defined ‘ceiling’ on the lawful action permitted by the state against an individual who commits an offence. 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.

2. Offence seriousness

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. 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.’ The concept of offence seriousness will mean different things to different people, depending on the emphasis placed on particular elements of the offences.

3. Deterrence

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.

Approaches to setting a maximum penalty

There are different ways in which offences can be scaled in order to determine where to place them along the scale of statutory maximum penalties. One approach is to consider the seriousness of criminal conduct by reference to the degree of harm caused or risked by the offender’s actions and the culpability of the offender.

Harm

Harm can be described as the ‘degree of injury done or risked by the act’. Harm inflicted or risked may affect the interests of individuals and/or the state. The most serious harm is generally considered to be that which affects individual person integrity, such as murder, sexual offences and other offences which involve the application of physical force to another. Harm encompasses both the physical and mental harm caused by an offence against the person.

Culpability

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 commit a certain act, such as intentionally causing serious injury, reflects a higher level of culpability than where the requirement is only that the offender was negligent, such as negligently causing serious injury.
Current maximum penalty framework

Section 109 of the Sentencing Act 1991 (Vic) contains a scale of statutory maximum penalties of imprisonment. The penalty scale was intended to provide some consistency by grouping offences according to their relative seriousness at different penalty levels. Level 1 is life imprisonment and is applicable to the offences considered to be the most serious, including murder. 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’s and 6 months’ imprisonment respectively.

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 relative seriousness. Accordingly, where offences are divided by statutory aggravating factors with different maximum penalties, care should be taken to ensure that the distinctions created by those factors warrant a five-year difference in maximum penalty.

Changes in maximum penalty

The Court of Appeal has recently clarified the relevance of an increase to the statutory maximum penalty. The Court has stated that any increase will have the greatest relevance for a sentence for an offence in the worst category of that offence, however:

> 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 may only be of general assistance, it becomes the ‘yardstick’ which must be balanced with all other relevant factors.

The law in relation to the effect of a decrease in maximum penalty is less clear, however decreases are now relatively uncommon.

Victorian law has consistently recognised that offences involving sexual penetration with children under the age of 16 should attract significant maximum penalties, however the relationship between the different offences has varied over time (see Figure 1 above).
## Appendix 1

### Legislative history of offences involving sexual penetration with a child under the age of 10

<table>
<thead>
<tr>
<th>YEAR</th>
<th>OFFENCE</th>
<th>LEGISLATION</th>
<th>s.</th>
<th>PENALTY</th>
<th>CONSENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1928</td>
<td>Carnal knowledge of a girl under the age of 10</td>
<td>Crimes Act 1928</td>
<td>42</td>
<td>Death</td>
<td>Not a defence</td>
</tr>
<tr>
<td>1958</td>
<td>Carnal knowledge of a girl under the age of 10</td>
<td>Crimes Act 1958</td>
<td>46</td>
<td>20 years</td>
<td>Not a defence</td>
</tr>
<tr>
<td>1981</td>
<td>Sexual penetration with a child under the age of 10</td>
<td>Crimes (Sexual Offences) Act 1980 &lt;br&gt;Effective 1 March 1981</td>
<td>47</td>
<td>20 years</td>
<td>Not a defence</td>
</tr>
<tr>
<td>1991</td>
<td>Sexual penetration with a child under the age of 10</td>
<td>Crimes (Sexual Offences) Act 1991 &lt;br&gt;Effective 5 August 1991</td>
<td>45</td>
<td>20 years</td>
<td>Not a defence</td>
</tr>
<tr>
<td>2000</td>
<td>Sexual penetration with a child under the age of 16, where child is under the age of 10</td>
<td>Crimes (Amendment) Act 2000 &lt;br&gt;Effective 22 November 2000 &lt;br&gt;Retrospective and applicable to offences committed on or after 5 August 1991</td>
<td>45</td>
<td>25 years</td>
<td>Not a defence</td>
</tr>
</tbody>
</table>
Appendix 2

Legislative history of offences involving sexual penetration with a child aged between 10 and under 16

<table>
<thead>
<tr>
<th>YEAR</th>
<th>OFFENCE</th>
<th>LEGISLATION</th>
<th>s.</th>
<th>PENALTY</th>
<th>CONSENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1928</td>
<td>Carnal knowledge of a girl aged between 10 and under 16</td>
<td>Crimes Act 1928</td>
<td>44</td>
<td>10 years</td>
<td>No defence unless complainant older than or same age as defendant</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>15 years if teacher/pupil</td>
<td></td>
</tr>
<tr>
<td>1958</td>
<td>Carnal knowledge of a girl aged between 10 and under 16</td>
<td>Crimes Act 1958</td>
<td>48</td>
<td>10 years</td>
<td>No defence unless complainant older than or same age as defendant</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>15 years if teacher/pupil</td>
<td></td>
</tr>
<tr>
<td>1981</td>
<td>Sexual penetration with a child aged between 10 and under 16</td>
<td>Crimes (Sexual Offences) Act 1980</td>
<td>48</td>
<td>10 years</td>
<td>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</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Effective 1 March 1981</td>
<td></td>
<td>15 years if under care, supervision or authority of accused</td>
<td></td>
</tr>
<tr>
<td>1991</td>
<td>Sexual penetration with a child aged between 10 and under 16</td>
<td>Crimes (Sexual Offences) Act 1991</td>
<td>46</td>
<td>10 years</td>
<td>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 or she was married to the complainant</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Effective 5 August 1991</td>
<td></td>
<td>15 years if under care, supervision or authority of defendant</td>
<td></td>
</tr>
<tr>
<td>2000</td>
<td>Sexual penetration with a child aged between 10 and under 16</td>
<td>Crimes (Amendment) Act 2000</td>
<td>45</td>
<td>10 years</td>
<td>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 or she was married to the complainant</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Effective 22 November 2000</td>
<td></td>
<td>15 years if under care, supervision or authority of accused</td>
<td></td>
</tr>
</tbody>
</table>
Appendix 3

Other sexual offences capable of being charged in relation to children

**Indecent act with or in the presence of a child under the age of sixteen**
The offence of indecent act with a child under the age of 16 requires a person to have performed an indecent act with or in the presence of a child under the age of 16. 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’ ([DPP v Scott](https://www.globeandmail.com/news/queens-counsels-office/law/2004/04/28/040428大家都想知道的其他儿童性行为罪案/)) ([2004] VSC 129).

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.

The maximum penalty for indecent act with or in the presence of a child under the age of 16 is 10 years' imprisonment.

**Rape**
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.

The maximum penalty for rape is 25 years’ imprisonment.

**Incest**
Incest is the act of sexual penetration between lineal descendants and some legal or de facto relatives. While incest can involve a range of lineal relationships and is not confined to minors, the [Crimes Act 1958 (Vic)](https://www.legislation.vic.gov.au/home) provides for a higher maximum penalty where the victim is under the age of 18 years and is the natural, step or de facto child of the accused. Consent is not a defence to the offence of incest. The [Crimes Act 1958 (Vic)](https://www.legislation.vic.gov.au/home) sets out varying maximum terms of imprisonment ranging from 5 to 25 years depending on the lineal relationship and the age of the victim.

The maximum penalty for incest where the victim is under the age of 18 and is the natural, step or de facto child of the accused is 25 years’ imprisonment.

**Indecent assault**
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.

The maximum penalty for indecent assault is 10 years’ imprisonment.
Endnotes

1 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 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).

2 In 2006, and in response to the Victorian Law Reform Commission’s 2004 Sexual Offences: Law and Procedure Final Report, the Victorian Government allocated $34.2 million over four years to a package of measures designed to reform the way in which the criminal justice system responds to sexual offending. Legislative changes implemented following the VLRC Final Report included, but were not limited to, changes to directions given to juries in sexual offence cases, alternative arrangements for the giving of evidence in relation to child complainants, protection of therapeutic communications made to counsellors and other health care professionals and the creation of a number of new sexual offences. Procedural and operational reforms included the establishment of specialist sex offence lists in Victorian Courts, a specialist sexual offences prosecution unit at the Office of Public Prosecutions, training in issues surrounding sexual assault for judges and other legal professionals and the establishment of a child witness service to assist child witnesses during the court process. See Department of Justice, Annual Report 2008 (2008) 25.

3 These issues have been considered by the VLRC in its Sexual Offences: Law and Procedure Final Report (2004).


5 In 1991, this definition was expanded again to include digital penetration (or penetration by any body part other than the penis) of the vagina or anus; Crimes (Sexual Offences) Act 1991 s 37.

6 Section 35 of the Crimes Act 1958 (Vic) defines sexual penetration as:
(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.

7 The Queen v Nguyen [2001] VSCA 139 (Unreported, Callaway, Buchanan and Chernov JJA, 9 August 2001) [14].

8 Crimes Act 1958 (Vic) s 45(4).

9 Unless a relevant defence can be established.


12 Crimes Act 1958 (Vic) s 45(2)(a).

13 Crimes Act 1958 (Vic) s 45(2)(b).

14 Crimes Act 1958 (Vic) s 45(2)(c).

15 Sentencing and Other Acts (Amendment) Act 1997 (Vic) s 60(1) (see schedule 1, item 22).

16 Victoria, Parliamentary Debates, Legislative Assembly 24 April 1997, 872 (Mrs Wade, Attorney General).


19 For example, the Model Criminal Code suggested ‘a separate offence, with a higher maximum penalty, with regard to sexual penetration of or by a child below the “no defence age”’. The Code repeats this structure in its proposed offences of ‘indecent touching of a child’ and an ‘indecent act directed at a child’. The purpose of this structure was ‘to reflect explicitly … the idea that sexual contact with younger children is to be an even more serious offence than sexual contact with older children’. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Model Criminal Code. Chapter 5, Sexual Offences Against the Person (1999).

20 NSW Sentencing Council, Penalties Relating to Sexual Assault Offences in New South Wales, August 2008 (Vol 1) [32–3].

21 Ibid.


24 Section 48 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.

25 The Queen v Nguyen [2001] VSCA 139 (Unreported, Callaway, Buchanan and Chernov JJA, 9 August 2001) [14].

26 Fox and Freiberg (1999) above n 10, 938.

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

28 Office of Public Prosecutions (2008) above n 11, [2.9], [2.6.6]. See also Office of Public Prosecutions, Early Resolution of Cases: Policy 22 (2008) [22.3.5].


30 Ibid [45]–[46].

31 Ibid [47].

32 Ibid [102].

33 Ibid.

34 Ibid [50].

35 Ibid [105].

36 Ibid.

37 R v AB (No. 2) [2008] VSCA 39 (Unreported, Williams CJ, Maxwell P and Redlich JA, 12 March 2008) [51].

38 Ibid.
Making a submission

The Sentencing Advisory Council is seeking submissions on issues raised in this paper. In making a submission, please refer to the questions listed below.

The deadline for submissions is 1 May 2009.

When making a submission to the Council, please identify how you would like your submission to be treated, based on the following three categories:

- **Public submission** – the Council may refer to or quote directly from the submission, and name the source of the submission in relevant publications. Public submissions may also be provided to any person or organisation who requests a copy, at the completion of the particular reference.

- **Anonymous submission** – the Council may refer to or quote directly from the submission in relevant publications, but will not identify the source of the submission. Anonymous submissions, with all identifying information removed, may also be provided to any person or organisation who requests a copy, at the completion of the particular reference.

- **Confidential submission** – the submission will not be quoted or referred to in any report or publication. Confidential submissions will only be used to inform the Council generally in their deliberations of the particular issue under investigation. Confidential submissions will not be provided to any person outside of the Sentencing Advisory Council.

The Council intends to use submissions received, and the results of consultations undertaken, to provide advice to the Attorney-General in relation to the current maximum penalties for the offence of sexual penetration with a child under 16.

Questions

1. Do the current maximum penalties for the offence of taking part in an act of sexual penetration with a child under the age of 16 appropriately reflect the range of offending in each form of the offence?

2. What are the advantages and disadvantages of having age as a statutory aggravating factor for this offence?

3. What are the advantages and disadvantages of having ‘care, supervision or authority’ as a statutory aggravating factor for this offence where the victim is between 10 and under 16?

4. If you think that there should be some change to the current offence structure, should there be:
   a. graduated penalties for different statutory aggravating factors?
   b. one penalty to encompass all the relevant offending?