THE LAW REFORM COMMISSION
of
WESTERN AUSTRALIA

Project 113
Sexual Offences

Discussion Paper Volume 2: Offences and Maximum Penalties

February 2023

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Acknowledgements

The Commission gratefully acknowledges the contribution of Dr Jamie Walvisch, who was the principal author for this reference, and Amanda Blackburn who assisted in writing parts of the Discussion Paper and providing project management for this reference. The Commission also acknowledges the research assistance provided by Kate Dromey.

The Commission also extends its thanks to Fiona Cohen and Nimilandra Nageswaran, and to Peter Williams and the Strategic Communications team at the Department of Justice for their continued support of the Commission in connection with this reference.

The Commission respectfully acknowledges the traditional custodians of the land as being the first peoples of this country. We embrace the vast Aboriginal cultural diversity throughout Western Australia and recognise their continuing connection to country, water and sky.

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Preface

The Hon John Quigley MLA, Attorney General for Western Australia, has asked the Law Reform Commission of Western Australia (the **Commission**) to review sexual offences in Western Australia and provide advice for consideration by the Western Australian Government on possible amendments to enhance and update the offence provisions (and related or ancillary provisions or legal rules).

This review of sexual offences (**Project 113**) is one of three projects that form part of the Government's plan to develop Western Australia's first sexual violence prevention and response strategy. In the Discussion Paper, we explain how you can be involved in the other projects.

On 20 December 2022 the Commission published two papers as part of Project 113:

- A Background Paper commissioned from leading academics and researchers to provide context regarding sexual violence in our community and the factors that may contribute to it.
- Discussion Paper Volume 1, which addresses a range of aspects of existing sexual offence laws in Western Australia, including the definition of consent, the mistake of fact defence and jury directions.

Submissions on the issues raised in Discussion Paper Volume 1 may be made until 17 March 2023.

The Commission has now completed this Volume, being Volume 2 of the Discussion Paper, which deals primarily with the substantive sexual offences. It should be read together with Volume 1 of the Discussion Paper and the Background Paper.

The Discussion Paper includes references to preliminary views that we have received from stakeholders. The views expressed are those of the stakeholders identified and do not necessarily reflect the views of the Commission.

The Commission once again invites your views on the issues considered in the Discussion Paper.

Thank you for taking the time to read Volume 2 of the Discussion Paper and to contribute to the process of law reform to improve Western Australia's sexual offence laws.

The Hon. CF Jenkins

K Chivers

S Murray

Law Reform Commission of Western Australia

List of Defined Terms

ABS	Australian Bureau of Statistics.
Accused / accused person	The alleged perpetrator of a sexual offence in circumstances where charges have been laid.
Affirmative model of consent / affirmative consent	A model of consent in which participants communicate their willingness to engage in sexual activity and take measures to ascertain that the other participant is consenting.
Aggravating factor	Factor which makes a particular instance of an offence more serious and suggests that a more severe sentence should be imposed.
ALRC	Australian Law Reform Commission.
Background Paper	S Tarrant, H Douglas and H Tubex, *Project 113 – Sexual Offences: Background Paper* (Law Reform Commission of Western Australia, 2022).
Balance of probabilities	A standard of proof which requires the jury to be satisfied that it is more likely than not that the fact in issue occurred.
Beyond reasonable doubt	The standard of proof to which the prosecution must prove all criminal offences, including sexual offences. It is the highest standard of proof used in Australian law.
Code	The general term for a statute which does not rely principally on previously existing common law principles. The *Criminal Code Compilation Act 1913* (WA) is an example of a code.
The *Code*	*Criminal Code Compilation Act 1913* (WA).
Code jurisdictions	Jurisdictions which only rely on statute law, for example, Western Australia and Queensland.
Commission	Law Reform Commission of Western Australia.
Common law	Laws made by judges in legal cases.
Common law jurisdictions	Jurisdictions which rely on a combination of the common law and statute law, for example, Victoria and New South Wales.
Complainant	A person against whom a sexual offence is alleged to have been committed.
Complaint	A report about sexual violence made to the police.
Discussion Paper Volume 1	Volume 1 of the Commission's Sexual Offences Discussion Paper.
Discussion Paper Volume 2	Volume 2 of the Commission's Sexual Offences Discussion Paper (this document).
Elements	Aspects of an offence that the prosecution must prove beyond reasonable doubt for the accused to be convicted.

Hong Kong LRC	Hong Kong Law Reform Commission.
Intentional sexual offences	Sexual offences which require the prosecution to prove that the accused knew that the complainant was not consenting.
Irish LRC	Irish Law Reform Commission.
Judicial officer	A magistrate or judge.
Jury direction	Instructions that the judge gives to the jury, including about the relevant law and a summary of each party's case.
Mistake of age defence	A legal defence which allows an accused to be acquitted of a sexual offence against a child if they held a mistaken belief about the child's age. In Western Australia, the defence only applies where the child was aged 13-15-years'-old at the time of the offence. It requires the accused to prove, on the balance of probabilities, that they believed on reasonable grounds that the child was of or over the age of 16, and that they are not more than three years older than the child.
Mistake of fact defence	A legal defence which allows an accused to be acquitted if they made an honest and reasonable mistake about a key fact. In the context of sexual offences, it will most commonly be argued that the accused made an honest and reasonable mistake about the complainant's consent.
Mitigating factor	Factor which suggests that a more lenient sentence should be imposed.
Murray Report	MJ Murray, *The Criminal Code: A General Review* (Attorney General's Department, Western Australia, 1983).
Negligent sexual offences	Sexual offences which occur in circumstances where the accused was not aware that the complainant was not consenting but should have been.
NSW Act	*Crimes Act 1900* (NSW).
NSWLRC	New South Wales Law Reform Commission.
OCVOC	Office of the Commissioner for Victims of Crime.
OCVOC review	A review of the end-to-end criminal justice process for victim-survivors of sexual offending, from reporting an offence to the release of the offender, which is being carried out by the OCVOC.
ODPP	Office of the Director of Public Prosecutions of Western Australia.
Offender	A person who has been convicted of a sexual offence.
Project 113	The Commission's review of Western Australia's sexual offence laws.
Prostitution Act	*Prostitution Act 2000* (WA).
Queensland Code	*Criminal Code Act 1899* (Qld).
Royal Commission	The Royal Commission into Institutional Responses to Child Sexual Abuse.

Scottish LC	Scottish Law Commission.
Sentence	The punishment that a judicial officer imposes on an offender.
Sentencing Act	*Sentencing Act 1995* (WA).
Sex	The physical or biological characteristics with which a person was born.
Sexual assault	Term used by the ABS to describe acts which would be a criminal offence in a state or territory. It is also a specific type of sexual offence in some jurisdictions. We only use this term when discussing ABS data or referring to another source in which the term is used.
Sexual offence	The specific acts of sexual violence which are defined as crimes. Examples include sexual penetration without consent, indecent assault and sexual offences against children.
Sexual orientation	A person's emotional, affectional or sexual attraction to people of a different gender, the same gender or more than one gender.
Sexual violence	All sexual activity that occurs without consent, or which involves the sexual exploitation of vulnerable people, regardless of whether the activity was reported to the police, charged as a criminal offence or proceeded to trial. The activity does not need to have involved physical violence.
Similar age defence	A legal defence which allows an accused to be acquitted of a sexual offence against a child if they are of a similar age to the child. Western Australia does not currently have a similar age defence.
Special verdict	A verdict about a fact which is relevant to a charged offence.
Statute law	Laws made by Parliament in statutes (also known as legislation).
Stealthing	Non-consensual condom removal.
Subjective element	An element of the mistake of fact defence that relates to the accused's subjective belief that the complainant consented to the sexual activity.
Terms of Reference	The Terms of Reference set by the Attorney General for Western Australia in order to determine the area of potential reform.
Tasmanian Code	*Criminal Code Act 1924* (Tas).
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities.
Victorian Act	*Crimes Act 1958* (Vic)
VLRC	Victorian Law Reform Commission.
Young Offenders Act	*Young Offenders Act 1994* (WA).

1. Introduction

Chapter overview

Discussion Paper Volume 2 provides you with information about Western Australia's sexual offence laws and seeks your views on whether they should be reformed. This Chapter provides an overview of the review, outlines what will be addressed in this Discussion Paper and explains the process for making a submission.

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Terms of Reference

Pursuant to section 11(2)(b) of the *Law Reform Commission Act 1972* (WA), the Law Reform Commission of Western Australia is to review Chapter XXXI of the *Criminal Code Compilation Act 1913* (WA) (Code) and sections 186, 191 and 192 of the *Code* and provide advice for consideration by the Government on possible amendments to enhance and update these provisions (and related or ancillary provisions or legal rules), having regard to contemporary understanding of, and community expectations relating to, sexual offences.

In carrying out its review, the Commission should consider whether there is a need for any reform and, if so, the scope of reform regarding the law relating to consent (including knowledge of consent) and, in particular:

a) whether the concept of affirmative consent should be reflected in the legislation;

b) how section 24 of the *Code* (dealing with mistake of fact) applies to the offences created by the above-mentioned provisions;

c) how consent may be vitiated, including through coercion, fraud or deception, for example, through 'stealthing'; and

d) whether special verdicts should be used.

Introduction

1.1 The Attorney General of Western Australia has asked the Law Reform Commission of Western Australia (the **Commission**) to review Western Australia's sexual offence laws (**Project 113**). We have been asked to provide advice to the Government about the ways in which these laws should be changed, having regard to the way that sexual offences are currently understood in the community. Our Terms of Reference are set out above.

1.2 The Attorney General has also asked the Office of the Commissioner for Victims of Crime (**OCVOC**) to:

- Review the end-to-end criminal justice process for victim-survivors of sexual offending, from reporting an offence to the release of the offender (the **OCVOC review**); and

- Lead the development of Western Australia's first sexual violence prevention and response strategy. The purpose of this strategy is 'to improve outcomes for victim-survivors of sexual violence, focusing on primary prevention, support for victim-survivors' recovery and holding perpetrators to account'.[1]

1.3 This is the second volume of the Discussion Paper that provide you with information about the issues that the Commission will be examining in Project 113. It asks some questions for your consideration and explains how you can share your views with the Commission.

1.4 We want to hear your views. We are interested in hearing from anyone who has professional or personal experience in the area, and from those who have ideas for reform, or want to comment on what is working, what needs to be fixed and how to fix it.

Overview of the Discussion Paper

1.5 In December 2022 we published **Discussion Paper Volume 1**, which focusses on the law of consent in relation to sexual offences and the mistake of fact defence. It also considers issues relating to objectives and guiding principles, jury directions, special verdicts, and the implementation and monitoring of reforms. It contains the following 8 chapters:

- Chapter 1 explains why the Government is reviewing sexual offence laws and outlines the issues that we will and will not be examining in this review. It also examines the language we use in the Discussion Paper and the principles that will guide us in this review.
- Chapter 2 outlines the way in which we currently address sexual offending in Western Australia. It explores the trial process and the way in which offences can be proven.
- Chapter 3 considers whether the *Criminal Code Act Compilation Act 1913* (WA) (the ***Code***) should contain any objectives or guiding principles.
- Chapter 4 examines the issue of consent. It discusses the way in which consent should be defined. It also considers the circumstances in which consent should not be considered free and voluntary.
- Chapter 5 addresses the mistake of fact defence. It discusses when a belief should be considered to be reasonable, and whether an accused person should be required to take steps to find out if the other person is consenting.
- Chapter 6 focuses on jury directions. It considers whether there is a need to legislate for such directions, and the content of possible directions.
- Chapter 7 explores the issue of special verdicts. It discusses the way in which special verdicts operate and considers whether it would be desirable for Western Australian law to allow for a special verdict to be given in sexual offence cases.
- Chapter 8 considers the implementation and monitoring of reforms.

1.6 Discussion Paper Volume 1 includes 50 questions for your consideration. It calls for submissions on these questions, or on any other matter relevant to the topics we discuss. Submissions on Discussion Paper Volume 1 are due by 17 March 2023.

1.7 Volume 2 of the Commission's Sexual Offences Discussion Paper (**Discussion Paper Volume 2**) does not address any of the matters considered in Discussion Paper Volume 1. It

[1] Department of Justice, *Sexual Violence Prevention and Response Strategy* (Web page, 2 September 2022) <https://www.wa.gov.au/organisation/department-of-justice/commissioner-victims-of-crime/sexual-violence-prevention-and-response-strategy>.

is intended to be read in conjunction with that volume of the Discussion Paper. We use the language outlined in that paper and are guided by the same principles. We recommend that you read that paper if you are interested to know the background to this review, the details of what we will and will not be examining, and our process.

1.8 The focus of Discussion Paper Volume 2 is solely on the sexual offences that should be included in the *Code* and the penalties that should be set for those offences. It contains the following substantive chapters:

- Chapter 2 provides a brief overview and history of Western Australia's sexual offence laws. It sets out the offences we will be examining in this review.
- Chapter 3 considers options for reforming the definitions that are contained in section 319 of the *Code*, such as the definitions of sexual penetration and vagina.
- Chapter 4 considers options for reforming the offence of sexual penetration without consent.
- Chapter 5 considers options for reforming the offence of sexual coercion.
- Chapter 6 considers options for reforming the offence of indecent assault.
- Chapter 7 considers options for reforming sexual offences against children.
- Chapter 8 considers options for reforming sexual offences against people who, at the time of the sexual activity, have a mental impairment which makes them incapable of understanding the nature of the act or of guarding themselves against sexual exploitation.[2]
- Chapter 9 considers options for reforming sexual offences against lineal relatives and de facto children.
- Chapter 10 considers options for reforming the offences of sexual servitude and the deceptive recruiting of people for commercial sexual servitude.
- Chapter 11 considers options for reforming certain offences in the *Code* that relate to procuring people for prostitution and involving young people in prostitution.
- Chapter 12 considers whether Western Australia should introduce a mental state requirement to its sexual offences and create a negligent form of them.
- Chapter 13 considers options for creating new sexual offences.
- Chapter 14 considers options for reforming the aggravated versions of existing sexual offences.
- Chapter 15 considers options for reforming the alternative verdict provisions for sexual offences.
- Chapter 16 considers options for reforming the penalties that are available for sexual offences.
- Chapter 17 considers whether there is merit in changing the structure of Chapter XXXI of the *Code.*

[2] The *Code* currently refers to such person as 'incapable persons'. As this is the term that is used in the *Code*, we use this term throughout Discussion Paper Volume 2. By doing so we are not suggesting that it is an appropriate term. We consider the terminology that should be used in this regard in Chapter 8.

1.9 In each Chapter we make various suggestions for reform. These suggestions are not intended to be exhaustive. We welcome submissions about other ways in which you think the law in these areas should be reformed.

1.10 At the end of the Discussion Paper there are seven appendices:

- Appendix 1 contains a list of preliminary submissions received by the Commission.
- Appendix 2 provides data on the number of sexual offences charges laid in Western Australia between 1 January 2017 and 17 October 2022.
- Appendix 3 sets out various jurisdictional approaches to the mistake of age defence.
- Appendix 4 sets out various jurisdictional approaches to defining 'incapable person' (or its equivalent term).
- Appendix 5 sets out various jurisdictional approaches to the sexual conduct that is prohibited in relation to incapable persons.
- Appendix 6 sets out the current maximum penalty levels for Western Australia's sexual offences.
- Appendix 7 sets out all of the questions we ask in Discussion Paper Volume 2.

1.11 While the focus of Discussion Paper Volume 2 is on sexual offence laws, it is our view that the law cannot be addressed in isolation. It is necessary to understand the environment in which the law operates, and the cultural, structural and systemic factors that contribute to the problems we are trying to address. For this reason, the Commission engaged three legal academics, Professor Heather Douglas and Associate Professors Stella Tarrant and Hilde Tubex, to draft a **Background Paper** for us. The Background Paper discusses social issues relevant for considering sexual offence laws. It examines the issues from three perspectives: the harmfulness of sexual violence; common misconceptions about sexual violence; and complainants' experiences of the criminal justice system. The paper identifies relevant Western Australian data on sexual offending in each section. Additional Western Australian data is set out in an Appendix to the paper. The Background Paper can be downloaded from the Commission's website.

1.12 One of the main purposes of Discussion Paper Volume 2 is to ensure that Western Australia's sexual offence provisions are comprehensive and appropriately targeted to the needs of the community. In this regard, we agree with the Victorian Law Reform Commission (**VLRC**) that this is a particularly important task, as:

> The way sexual offences are defined sets standards for behaviour. The way they are defined shapes the community's understandings of sexual violence. Sexual offences set the boundaries for what sexual interactions are acceptable in society. …
>
> The way sexual offences are defined can help, or make it more difficult, to investigate or prosecute someone for sexual offending. Having sexual offences that are defined well supports an effective justice system response to sexual violence.[3]

[3] Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) [14.2]-[14.3].

Making a submission

1.13 Throughout Discussion Paper Volume 2 we ask several questions. We are hoping that you will tell us your thoughts on these questions. The best way to do so is in writing.

1.14 There is no standard format for making a written submission. You can choose to answer some or all of the questions we have asked. You can also simply tell us your views, or about your experiences, without directly answering any question. Please keep in mind, however, that we are only able to look at sexual offence laws. We cannot consider any of the issues mentioned in the section 'What we will not we be examining' in Chapter 1 of Discussion Paper Volume 1. We are bound to follow any legal requirements, including in relation to mandatory reporting, that operate in Western Australia.

1.15 Please make your submission by 6 April 2023. You can make your submission by:

- **Emailing it to lrcwa@justice.wa.gov.au;**
- **Posting it to Law Reform Commission of Western Australia, GPO Box F317, PERTH WA 6841; or**
- **Submitting it to an online portal. The portal is available at: https://justice.wa.gov.au/lrcwa-project113.**

1.16 Your submission may include your name or organisation. If submitted through the portal it must include a valid email address.

1.17 You should tell us if you want your submission to be confidential. If you do not ask for it to be kept confidential, we will treat it as public. This means that we may refer to it in our Final Report and if we form the view that your submission may be relevant to the OCVOC review, we may forward it to the OCVOC.

1.18 If you want to make a submission, but cannot do so in writing, please contact us on 08 9264 1626 to make alternative arrangements. Please let us know if you need an interpreter or other assistance.

1.19 We are aware that the content of documents published under this reference or that participation in consultation may evoke feelings of distress. Support is available from various services, including:

- Sexual Assault Resource Centre Crisis Counselling: 08 6458 1828 or 1800 199 888 (8.30 am – 11.00 pm, 7 days a week).
- 1800Respect: 1800 737 732 (24 hours, 7 days a week).

1.20 Please note that we do not provide legal advice. If you need help with a legal issue, you can contact Legal Aid WA, a community legal centre or a solicitor. In an emergency, or if you or someone you know is in immediate danger, call the police now on 000.

2. Overview of Western Australia's sexual offence provisions

Chapter overview

This Chapter provides a brief overview of Western Australia's sexual offence provisions. It examines the history of those provisions and sets out the offences we will be examining in this review. It also considers the frequency with which the relevant offences have been charged over the past five years.

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History of Western Australia's sexual offence provisions

2.1 Prior to 1985, the *Code* did not contain a chapter that specifically focused on sexual offences. Sexual offences were included in Chapter XXII (Offences against morality), Chapter XXX (Assaults) and Chapter XXXII (Assaults on females: abduction). The most serious sexual offence was rape, which in general terms was defined as a man having carnal knowledge[1] of a woman or girl, who was not his wife, without her consent.[2]

2.2 In 1983, prior to his appointment as a judge of the Supreme Court, the then Crown Counsel for Western Australia, the Hon. Michael Murray AM QC, published a review of the *Code* (the **Murray Report**) in which he made various recommendations for reforming the law of sexual offences, including:[3]

- Consolidating the sexual offences into one chapter of the *Code*.
- Expanding the rape offence to include the non-consensual sexual penetration of men or boys.
- Changing the name of the rape offence to sexual assault, to emphasise that 'what we are concerned with here is the forcible or non-consensual interference with the person of another, rather than with an act of intercourse as a sexual activity which has simply in some way gone wrong'.[4]
- Including a general definition of consent that applies to all non-consensual sexual offences and broadening the circumstances in which consent is negated.[5]

2.3 These recommendations were enacted by the *Acts Amendment (Sexual Assaults) Act 1985* (WA), which inserted a new chapter into the *Code*: Chapter XXXIA – Sexual Assaults. The most serious offence in this Chapter was sexual assault, which was expressed in gender neutral terms.[6] It made it an offence for anyone to sexually penetrate another person without

1 Carnal knowledge was not defined in the *Code* but was understood to mean sexual penetration.
2 *Criminal Code Act Compilation Act 1913* (WA) s 325 (repealed in 1985).
3 MJ Murray, *The Criminal Code: A General Review* (Attorney General's Department, Western Australia, 1983) 218-222. Michael Murray QC AM served as a judge of the Supreme Court of Western Australia from 1990-2012.
4 Ibid 218-9.
5 These reforms are discussed in more detail in Chapter 4 of Discussion Paper Volume 1.
6 *Criminal Code Act Compilation Act 1913* (WA) s 324D (repealed in 1992).

their consent. This included men who sexually penetrated their wives without consent – they were no longer immune from prosecution.

2.4 Further significant changes to the structure and substance of sexual offence laws were made by the *Acts Amendment (Sexual Offences) Act 1992* (WA), including:

- Moving the sexual offences to a new Chapter XXXI in the *Code*,[7] titled 'sexual offences'.
- Broadening the definition of 'to sexually penetrate' to include penetration of the urethra and the act of fellatio.[8]
- Extending the definition of 'vagina', so that penetration of the labia majora is classified as a form of sexual penetration.[9]
- Grouping sexual offences against children by age: children under 13 years,[10] children of or over 13 and under 16 years,[11] and children of or over 16 and under 18 years.[12]
- Proscribing the same five sexual offences against children for each age group: sexual penetration; procuring, inciting or encouraging sexual behaviour; indecent dealing; procuring, inciting or encouraging an indecent act; indecent recording.[13]
- Expanding the categories of people considered to be in a position of authority over a child to those who have 'care, supervision or authority', and providing that they could be charged with an offence against a child of or over 16 and under 18 years.[14]
- Creating other new offences: showing offensive material to a child under 16 years;[15] having a sexual relationship with a child under 16 years;[16] and sexual coercion.[17]
- Expanding and restructuring offences against 'incapable people'.[18]
- Widening the laws prohibiting sexual relationships between lineal relatives.[19]

2.5 The basic structure and substance of most of these offences has remained unchanged since 1992. There have, however, been some sporadic amendments, including:

- In 2002 the mistake of age defence for certain sexual offences against children[20] was limited to people who were not more than three years older than the child at the time of the alleged offence.[21]
- In 2004 sexual servitude offences were added to the *Code* for the first time.[22]

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7 The original Chapter XXXI of the *Code* had been deleted at an earlier point in time.

8 *Criminal Code Act Compilation Act 1913* (WA) s 319(1).

9 Ibid.

10 Ibid s 320.

11 Ibid s 321.

12 Ibid s 322.

13 Three of these offences were new: procuring, inciting or encouraging sexual behaviour; procuring, inciting or encouraging an indecent act; indecent recording.

14 *Criminal Code Act Compilation Act 1913* (WA) s 322.

15 Ibid s 204A.

16 Ibid s 321A.

17 Ibid ss 327 and 328.

18 Ibid s 330.

19 Ibid s 329.

20 Ibid ss 321(9)-9(a); 321A(9).

21 *Acts Amendment (Lesbian and Gay Reform) Act 2002* (WA).

22 *Criminal Code Amendment Act 2004* (WA) s 25. The sexual servitude offences are contained in *Criminal Code Act Compilation Act 1913* (WA) ss 331A-331D.

- In 2020 the lawful marriage defence was repealed for certain sexual offences against children.[23]

Offences we will be examining

2.6 The Terms of Reference require us to review all the offences within Chapter XXXI of the *Code* as well as the offences created by sections 186, 191 and 192 of *Code*. We have listed these offences in Table 2.1.

***Code* section**	**Offence Description**
186	Occupier or owner allowing a young person to be on premises for unlawful carnal knowledge.
191	Procuring a person to be a prostitute.
192	Procuring a person to have unlawful carnal knowledge by threat, fraud or administering a drug.
320	Sexual offences against a child under 13 years.
321	Sexual offences against a child of or over 13 years but under 16 years.
321A	Persistent sexual conduct with a child aged under 16 years.
322	Sexual offences against a child of or over 16 but under 18 years, where the child is under the offender's care, supervision or authority.
323	Indecent assault.
324	Aggravated indecent assault.
325	Sexual penetration without consent.
326	Aggravated sexual penetration without consent.
327	Sexual coercion.
328	Aggravated sexual coercion.
329	Sexual offences against relatives.
330	Sexual offences against incapable persons.
331B	Sexual servitude.
331C	Conducting a business involving sexual servitude.
331D	Deceptive recruiting for commercial sexual servitude.

Table 2.1: Offences the Commission will be examining.

[23] *Criminal Code Amendment (Child Marriage) Act 2020* (WA) ss 4 and 5.

2.7 There are other sexual offences in the *Code* and in other legislation that are beyond the scope of what we are able to review under our Terms of Reference. These include: committing obscene or indecent acts in public,[24] child exploitation material (child pornography) offences,[25] intimate image offences,[26] electronic communication offences,[27] showing offensive material to children[28] and prostitution offences.[29] Accordingly, we do not discuss these offences in Discussion Paper Volume 2.

Current charging of sexual offences

2.8 The Western Australia Police Force has provided us with data which show the frequency with which the offences we are considering have been charged, where the associated brief was created between 1 January 2017 and 17 October 2022. We have set out this data in Appendix 2.

2.9 It can be seen from the data that the number of charges laid for most offences has remained stable or increased over time. The one exception is sexual offences against relatives, which has, on average, decreased in 2022.

2.10 Of interest is the lack of charges laid under sections 186, 191 and 192 of the *Code*. This infrequency of usage should be borne in mind when considering possible reforms to these provisions.

[24] *Criminal Code Act Compilation Act 1913* (WA) ss 202-204.
[25] Ibid ss 217A-221B.
[26] Ibid ss 221BA-BF.
[27] Ibid s 204B.
[28] Ibid s 204A.
[29] Ibid s 190; *Prostitution Act 2000* (WA).

3. Definitional Issues

Chapter overview

This Chapter examines the definitions that are contained in section 319 of the *Code*. It sets out various options for reform, including expanding the definition of sexual penetration to include analingus; clarifying or reforming the *Code's* definition of vagina; and including surgically constructed or altered body parts in the *Code.*

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Introduction

3.1. The first provision in Chapter XXXI of the *Code* (section 319) is titled 'Terms used'. It defines various terms that are used in Chapter XXXI, such as sexual penetration and indecent act.

3.2. As these terms may be relevant to multiple offences, we address them in this standalone chapter, rather than when examining specific offences. Where a defined term is used in the context of a specific offence, we note that fact in the chapter in which we examine the offence and refer to the discussion of that term in this chapter.

3.3. One of the terms that is defined in section 319 is consent. We consider the meaning of consent in detail in Chapter 4 of Discussion Paper Volume 1 and so do not address it in this chapter.

3.4. We also do not consider the term circumstances of aggravation in this chapter. We discuss this term in Chapter 14.

Sexual penetration

3.5. Various provisions make it an offence to sexually penetrate another person in certain circumstances.[1] The concept of sexual penetration is also included within the definition of sexual behaviour,[2] which is a key component of several other offences.[3]

3.6. The *Code* defines the term 'to sexually penetrate' to mean:

> (a) to penetrate the vagina (which term includes the labia majora), the anus, or the urethra of any person with —
>
> (i) any part of the body of another person; or
>
> (ii) an object manipulated by another person,

1 *Criminal Code Act Compilation Act 1913* (WA) ss 320(2), 321(2), 322(2), 325(1), 326(1), 329(2), 329(7), 330(2).
2 Ibid s 319(4).
3 Ibid ss 320(3), 321(3), 321A, 322(3), 327(1), 328(1), 329(3), 330(3).

except where the penetration is carried out for proper medical purposes; or

(b) to manipulate any part of the body of another person so as to cause penetration of the vagina (which term includes the labia majora), the anus, or the urethra of the offender by part of the other person's body; or

(c) to introduce any part of the penis of a person into the mouth of another person; or

(d) to engage in cunnilingus or fellatio; or

(e) to continue sexual penetration as defined in paragraph (a), (b), (c) or (d).[4]

3.7. It can be seen from this definition that sexual penetration is broadly defined. It not only includes acts which involve actual penetration of the vagina, anus or urethra, but it also includes engaging in fellatio (oral stimulation of the male genitals) and cunnilingus (oral stimulation of the female genitals) even if there is no penetration of the genitalia.

3.8. It has been noted, however, that the definition does not include non-penetrative analingus (oral stimulation of the anus). In its preliminary submission, Pride WA suggested that the definition of penetration should be broadened to do so:

> Analingus is a sexual practice similar to cunnilingus. It is a common practice amongst, and most commonly associated with, men who have sex with men; though it is also a sexual practice engaged in by people of other sexual orientations. No express reason has been given as to why analingus is not included in the definition of 'to sexually penetrate' in the same way cunnilingus has been. However, it would be fair to assume this omission is due to historical societal views as to the acceptability of this sexual practice and the consequences of extending the definition to include this practice. More specifically, an outdated and offensive concern that to make it a criminal offence to engage in analingus without consent would inversely make it 'acceptable' to engage in analingus if consent is given. The continuing omission of analingus as a form of sexual penetration is a continuing of this historical persecution.[5]

3.9. We are interested to hear your views on whether the definition of sexual penetration should be amended in any way. We note that any reforms to the definition of sexual penetration would have broad application, due to the large number of offences which involve sexual penetration.

1. Should the definition of sexual penetration in the *Code* be amended in any way? For example, should it be extended to include analingus (oral stimulation of the anus)?

Sexual behaviour, carnal knowledge and carnal connection

3.10. Various provisions make it an offence to procure, incite, encourage or compel a person to engage in sexual behaviour in particular circumstances.[6]

3.11. The *Code* provides that a person engages in sexual behaviour if the person:

(a) sexually penetrates any person; or

[4] Ibid s 319(1).

[5] Preliminary Submission 7 (Pride WA) 2.

[6] *Criminal Code Act Compilation Act 1913* (WA) ss 320(3), 321(3), 321A, 322(3), 327(1), 328(1), 329(3), 330(3).

(b) has carnal knowledge of an animal; or

(c) penetrates the person's own vagina (which term includes the labia majora), anus, or urethra with any object or any part of the person's body for other than proper medical purposes.[7]

3.12. This definition includes the term sexual penetration, which we discuss above. Consequently, any reforms that are made to the concept of sexual penetration would also apply to offences that refer to engaging in sexual behaviour.

3.13. This definition also includes the term carnal knowledge. At common law, carnal knowledge meant any degree of penetration of a woman by the penis.[8] Section 6 of the *Code* states that 'when the term carnal knowledge or the term carnal connection is used in defining an offence, it is implied that the offence, so far as regards that element of it, is complete upon penetration. Penetration includes penetration of the anus of a female or male person'.

3.14. The common law and section 6 definitions both relate to human sexual interactions. Notwithstanding that, the Code makes reference to carnal knowledge of an animal, which is somewhat at odds with those definitions. It seems likely that in the context of the *Code*, it relates to penile penetration of an animal, although that is not clear. Given this lack of clarity, it may be desirable to amend this aspect of the definition. The distinction between carnal knowledge and carnal connection (which is used in sections 186 and 191 of the *Code*: see Chapter 11) is also not clear.

3.15. In addition, carnal knowledge and carnal connection are gendered and outdated terms. They have already been replaced by the non-gendered term sexual penetration (discussed above) in most parts of the *Code*. In their preliminary submissions the Department of Health and Magenta recommended removing all gendered terms from the *Code* to promote equity and protect people who are non-binary.[9]

3.16. In its preliminary submission, Pride WA also noted that by explicitly referring to anal penetration, but not vaginal penetration, the drafting of section 6 implies that anal sex is outside the norm. It suggested that references to carnal knowledge in the *Code* should either be replaced with a reference to sexual penetration, sexual acts or sexual dealings, or the definition of carnal knowledge should be rephrased so as to also explicitly include penetration of a vagina. Its preference was to replace the term with a phrase that 'does not have historically prejudicial connotations'.[10]

2. Should the terms carnal knowledge and carnal connection in sections 186, 191, 192 and 319(4) of the *Code* be replaced? If so, what terms should be used instead?

3. Should the definition of sexual behaviour be amended in any other way?

Vagina

3.17. The definitions of sexual penetration and sexual behaviour in section 319(1) of the *Code* include penetrating the 'vagina (which term includes the labia majora)'. It has been noted that

7 Ibid s 319(4).

8 *R v Lines* (1844) 1 Carr & K 393; *R v Randell* (1991) 53 A Crim R 389; *Holland v The Queen* (1993) 117 ALR 193; *PGA v The Queen* [2012] HCA 21.

9 Preliminary Submission 17 (Department of Health) 2; Preliminary Submission 3 (Magenta) 2.

10 Preliminary Submission 17 (Department of Health) 3-4.

this definition is anatomically inaccurate:[11] the labia majora is part of the vulva; whereas the vagina is 'the passage leading from the uterus to the vulva'.[12]

3.18. The Macquarie Dictionary does, however, acknowledge that in non-technical use, the word vagina is used to refer to the female external genitalia (that is, the vulva).[13] In this regard, the definition is not inaccurate. It is, however, incomplete. In addition to the labia majora, the vulva includes the mons pubis, labia minora, clitoris, urethra, vulva vestibule, vestibular bulbs, Bartholin's glands, Skene's glands and vaginal opening.[14] It is not clear from the definition of sexual penetration in section 319(1) whether all of these parts of the vulva are also included in the definition of vagina.

3.19. One option for reform would be to retain an extended definition of the term vagina but to clearly define its scope. For example, section 319(1) could specify any other parts of the vulva that are or are not included in the definition.

3.20. Alternatively, the *Code* could be amended to include other parts of the female genitalia alongside the vagina. For example, section 319(1) could state that sexual penetration includes penetrating the vagina or the vulva (including the labia majora and the labia minora).

3.21. It may be thought, however, that the current definition is sufficient to indicate that an extended legal definition of vagina applies, and that the reference to the labia majora includes all parts of the female genitalia located physically within the labia majora. Consequently, this reform may be considered unnecessary.

3.22. We are interested to hear your views on whether there is a need to reform the definitions of sexual penetration or sexual behaviour in this regard, and if so, how they should be reformed.

4. Should the definition of vagina in section 319(1) of the *Code* be clarified or reformed in any way?

Surgically constructed or altered body parts

3.23. Section 319 of the *Code* currently makes various references to the vagina, penis and urethra. It is unclear whether these terms are limited to the body parts that a person is born with, or whether they extend to surgically constructed or altered body parts.

3.24. One possibility for reform would be to make it clear that these terms include surgically constructed or altered body parts. Such an approach was suggested by Pride WA in its preliminary submission. It noted that:

> Since the *Code* was first drafted, it has become common practice for transgender individuals to undergo gender reaffirming surgery. Similarly, individuals with intersex variants may also undergo 'gender-normalizing' surgery. During these procedures a vagina or penis and urethra may be surgically constructed.
>
> Due to the lack of certainty in the definition of these terms, it is open for the Judiciary, Western Australian Police or a juror to decide whether the offences relating to sexual

[11] Preliminary Submission 9 (Sexual Assault Resource Centre and the Women's Health, Genetics and Mental Health Directorate).

[12] Macquarie Dictionary online <https://www.macquariedictionary.com.au/features/word/search/?search_word_type=Dictionary&word=vagina>; *Holland v The Queen* (1993) 117 ALR 193, [11].

[13] Ibid.

[14] JD Nguyen and H Duong, 'Anatomy, Abdomen and Pelvis: Female External Genitalia', *StatPearls* (July 2022) <https://www.ncbi.nlm.nih.gov/books/NBK547703/>.

> penetration and sexual behaviour should apply to a surgically constructed vagina, penis or urethra as to any other vagina, penis or urethra. And, in doing so, to decide whether, *inter alia*, transgender people and people with intersex variants should be forwarded the same protection against sexual offences, through general deterrence, as other members of Western Australia are.[15]

3.25. To ensure that the law protects people of all genders, sexes and sexual orientations,[16] Pride WA recommended that section 319(1) be amended to include words to the following effect:

> A reference in this Chapter to a vagina, penis or urethra includes a surgically constructed or reconstructed vagina, penis or urethra analogous to a naturally occurring vagina, penis or urethra (whether the person concerned is male, female, or of indeterminate sex).[17]

3.26. The New South Wales Law Reform Commission (**NSWLRC**) similarly recommended that the sexual offences division of the *Crimes Act 1900* (NSW) (the **NSW Act**) should provide that it is not relevant 'whether a part of the body … is surgically constructed or not'.[18] In making this recommendation, the NSWLRC recognised that transgender people experience high rates of sexual violence.[19] Consequently, it wanted to ensure that there was no risk that surgically constructed body parts would be excluded from the scope of the sexual offence provisions.[20] It was of the view that this reform would 'ensure that the law treats people with surgically constructed body parts, and people without them, consistently'.[21] This reform was implemented by the NSW Government.[22] A similar approach has also been taken in various other jurisdictions.[23]

3.27. We are interested to hear your views on whether the *Code* should specify that references to body parts include references to surgically constructed or altered body parts.

5 Should the *Code* specify that references to relevant body parts (such as vagina, penis or urethra) include references to surgically constructed or altered body parts?

Child

3.28. Various sexual offences refer to children.[24] The *Code* defines a child to be:

> (a) any boy or girl under the age of 18 years; and
>
> (b) in the absence of positive evidence as to age, any boy or girl apparently under the age of 18 years.[25]

3.29. The language of this provision is gendered. There appears to be little reason for retaining this gendered terminology: the term 'boy or girl' could readily be replaced by the term 'person'. It

15 Preliminary Submission 7 (Pride WA) 2-3.
16 This is one of the guiding principles of our review: see Discussion Paper Volume 1, [1.82]-[1.83].
17 Preliminary Submission 7 (Pride WA) 7.
18 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) Rec 9.1.
19 Ibid [9.5].
20 Ibid.
21 Ibid [9.11].
22 *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) sch 1(1); *Crimes Act 1900* (NSW) s 61H(4).
23 See, eg, *Crimes Act 1958* (Vic) s 35(3); *Crimes Act 1900* (ACT) s 50(2); *Crimes Act 1961* (NZ) s 2(1).
24 Sexual offences against children are discussed in Chapter 7.
25 *Criminal Code Act Compilation Act 1913* (WA) s 1.

is our preliminary view that when amending the *Code*, this definition should be made gender neutral.

6. Are there any other sexual offence-related definitions in the *Code* that should be amended in any way?

4. Sexual penetration without consent

Chapter overview

This Chapter examines the offence of sexual penetration without consent contained in section 325 of the *Code*. It considers three possible options for reform: removing the distinction between penetrative and non-penetrative forms of sexual assault; creating a distinction between penile and non-penile forms of penetration; changing the name of the offence.

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Remove the distinction between penetrative and non-penetrative sexual assaults 17
Create a distinction between forms of penetration 20
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Introduction

4.1. Rape, being the unlawful penile-vaginal intercourse of a woman by a man knowing that she is not consenting to the intercourse,[1] was historically considered the most serious sexual offence. This is because it was considered to be an attack on the victim's honour and value.[2]

4.2. Over time, all Australian jurisdictions have legislated to extend and modify the common law offence of rape.[3] While there remain various differences between jurisdictions, the revised offences are no longer gender-specific and generally include the non-consensual penetration of the genitalia by a penis, object, part of a body or mouth.[4] These acts are considered to constitute a serious violation of the victim's sexual autonomy.

4.3. The penetrative offence is still described as rape in Tasmania, Victoria and South Australia. It is called sexual intercourse without consent in the ACT and the Northern Territory, sexual penetration without consent in Western Australia, and sexual assault in NSW.[5]

4.4. The offence of sexual penetration without consent is contained in section 325 of the *Code*. Section 326 of the *Code* contains an aggravated version of this offence. We discuss aggravated versions of offences in Chapter 14.

4.5. The maximum penalty for sexual penetration without consent is 14 years' imprisonment, and for aggravated sexual penetration without consent is 20 years' imprisonment. We discuss maximum penalties in Chapter 16.

4.6. Sections 325 and 326 also set out certain sentencing requirements that must be complied with in specific circumstances, such as where the offence is committed in the course of an

1 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Response* (Final Report, October 2010) [25.8]. Penile-vaginal intercourse was previously called carnal knowledge. We discuss the use of this terminology in Chapter 3.

2 Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) [3.1].

3 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Response* (Final Report, October 2010) [25.8].

4 In some jurisdictions it is limited to penetration of the vagina or anus: see, eg, *Crimes Act 1900* (ACT) s 50.

5 See ibid s 54; *Crimes Act 1900* (NSW) s 61I; *Criminal Code Act 1983* (NT) s 192(3); *Criminal Law Consolidation Act 1935* (SA) s 48; *Criminal Code Act 1924* (Tas) s 185; *Crimes Act 1958* (Vic) s 38; *Criminal Code Act Compilation Act 1913* (WA) s 325.

aggravated home burglary or by a juvenile offender. We also discuss these statutory sentencing requirements in Chapter 16.

4.7. Between January 2017 and October 2022, 1,067 people were charged with sexual penetration without consent, and 1,023 people were charged with aggravated sexual penetration without consent (see Appendix 2).

Elements and definitions

4.8. Section 325(1) of the *Code* states:

> A person who sexually penetrates another person without the consent of that person is guilty of a crime and is liable to imprisonment for 14 years.

4.9. This offence has two elements that the prosecution must prove beyond reasonable doubt:

i. The accused sexually penetrated the complainant; and

ii. The complainant did not consent to the sexual penetration.

4.10. We discuss the definition of sexual penetration, and some possible options for reform, in Chapter 3. We consider the meaning of consent in Discussion Paper Volume 1 Chapter 4.

4.11. Unlike many other Australian jurisdictions,[6] in Western Australia the prosecution is not required to prove that the accused knew or believed that the victim did not consent or was reckless as to whether the victim consented. That knowledge may, however, be relevant to proof of any defences, such as the defence of mistake of fact.[7] We discuss the possibility of adding a mental state requirement to Western Australia's sexual offences in Chapter 12.

Possible reforms

Remove the distinction between penetrative and non-penetrative sexual assaults

4.12. The *Code* currently differentiates between penetrative and non-penetrative sexual assaults. In Western Australia, the latter are referred to as indecent assaults.[8] They have a significantly lower maximum penalty,[9] which reflects the fact that they have historically been considered to be less serious in nature.

4.13. Not all jurisdictions maintain a distinction between penetrative and non-penetrative sexual assaults. For example, in Canada penetrative and non-penetrative sexual assaults both fall within the scope of the offence of sexual assault.[10] Accordingly, one option for reform would be to remove the distinction between penetrative and non-penetrative sexual assaults, merging the offences of sexual penetration without consent and indecent assault.

4.14. In considering the approach to sentencing offenders convicted of the Canadian offence of sexual assault, the Supreme Court of Canada explained some of the reasoning for this unified approach as follows:

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6 For a discussion of this issue, see Discussion Paper Volume 1, [2.16]-[2.20]; [5.6]-[5.7].

7 See Discussion Paper Volume 1, Chapter 5.

8 *Criminal Code Act Compilation Act 1913* (WA) s 323. We discuss the offence of indecent assault in Chapter 6.

9 The maximum penalty for sexual penetration without consent is 14 years' imprisonment; the maximum penalty for indecent assault is 5 year's imprisonment. We discuss maximum penalties in Chapter 16.

10 *Criminal Code*, RSC, 1985, c C-46 s 271 and definition of 'assault' in s 265.

> First … courts should not assume that there is any clear correlation between the type of physical act and the harm to the victim. … Judges can legitimately consider the greater risk of harm that may flow from specific physical acts such as penetration. However … an excessive focus on the physical act can lead courts to underemphasize the emotional and psychological harm to the victim that all forms of sexual violence can cause. Sexual violence that does not involve penetration is still 'extremely serious' and can have a devastating effect on the victim. This Court … has held that 'even mild non-consensual touching of a sexual nature can have profound implications for the complainant.' The modern understanding of sexual offences requires greater emphasis on these forms of psychological and emotional harm, rather than only on bodily integrity. …
>
> There is no basis to assume, as some courts appear to have done, that sexual touching without penetration can be 'relatively benign.' Some decisions also appear to justify a lower sentence by labelling the conduct as merely sexual touching without any analysis of the harm to the victim. Implicit in these decisions is the belief that conduct that is unfortunately referred to as 'fondling' or 'caressing' is inherently less harmful than other forms of sexual touching. This is a myth that must be rejected. …
>
> Third, we would emphasize that courts must recognize the wrongfulness of sexual violence even in cases where the degree of physical interference is less pronounced. Of course, increases in the degree of physical interference increase the wrongfulness of the sexual violence. However, sexual violence against children remains inherently wrongful regardless of the degree of physical interference. Specifically, courts must recognize the violence and exploitation in any physical interference of a sexual nature with a child, regardless of whether penetration was involved.
>
> Fourth, it is an error to understand the degree of physical interference factor in terms of a type of hierarchy of physical acts. The type of physical act can be a relevant factor to determine the degree of physical interference. However, courts have at times spoken of the degree of physical interference as a type of ladder of physical acts with touching and masturbation at the least wrongful end of the scale, fellatio and cunnilingus in the mid-range, and penile penetration at the most wrongful end of the scale. This is an error — there is no type of hierarchy of physical acts for the purposes of determining the degree of physical interference. … Physical acts such as digital penetration and fellatio can be just as serious a violation of the victim's bodily integrity as penile penetration. Similarly, it is an error to assume that an assault that involves touching is inherently less physically intrusive than an assault that involves fellatio, cunnilingus, or penetration. For instance, depending on the circumstances of the case, touching that is both extensive and intrusive can be equally or even more physically intrusive than an act of fellatio, cunnilingus, or penetration.[11]

4.15. Although these comments were made in the context of sentencing, they can also be read as justifying why there should be a single sexual offence that does not distinguish between penetrative and non-penetrative offences, or between different types of penetration. Rather, these matters would be for the court's consideration at sentencing.

4.16. In a submission to the VLRC, Professor Jeremy Gans argued for the adoption of such an approach. He submitted that it is arbitrary for sexual penetration to be classified as a more serious offence (by virtue of its higher maximum penalty) than other types of sexual touching. Rhetorically, he asked:

> Is touching or licking someone's labia majora meaningfully different to touching their labia minora? Is touching or licking one side of someone's clitoris meaningfully

[11] *R v Friesen* [2020] SCC 9, [140]-[146] (citations omitted).

> different to touching or licking the other side? Is touching or licking a person's anal verge different to touching or licking their anal canal? Is kissing or licking the side of someone's penis different to kissing or licking the tip?[12]

4.17. Additionally, Professor Gans argued that treating sexual penetration as a separate, more serious offence than other types of sexual touching can create practical problems, requiring more invasive questioning of the complainant both by investigators and lawyers. This is because only some acts, such as fully penetrative penile-vaginal sex, fully penetrative finger-vaginal sex and fully penetrative penile-anal sex, can be readily described in simple terms that fit well with the language of the section (for example, 'penetrates' and 'into'). In Professor Gan's view, other acts, such as those that involve only slight penetration, can result in confusion, because lay people may not think of them as involving penetration at all.

4.18. Professor Gans contended that resolving this confusion may require detailed and potentially traumatic discussions of sexual acts and anatomy. This may occur because the terms used for the actions involved (for example, licking, rubbing, touching) are imprecise; there are precise but often poorly understood terms for human anatomy (for example, vulva, inner or outer labia, clitoris, sphincter, foreskin); and there is variation in the location, size and shape of parts of genitals and how people describe them. The nature of the acts that need to be described, or the explicitness of the discussion required, may cause embarrassment. Clarifying any confusion may require additional discussion, which may need to be more explicit and intimate than, for example, a description of either fully penetrative or entirely non-penetrative acts. It may require description of physical feelings and sensations, complex and subtle conduct such as licking or rubbing, explicit descriptions of movement, positioning, sounds, pain, hair or ejaculation.

4.19. In support of his submission, Professor Gans said:

> Every one of these problems is significantly heightened when the discussions are with children. … Most of the Victorian cases where appeal courts have focused on the definition of sexual penetration involve allegations against children. … Alleged child victims of sexual offences in Victoria are, and sometimes must be, questioned in great detail about whether or not there was slight penetration of their bodies. … The question posed by this submission is whether Victoria's current law makes otherwise unnecessary, and highly intrusive, discussions – specifically, questioning about slight differences in sexual acts, differences that are especially hard for children to appreciate, and that appear to have little connection to the gravity of the alleged offending or the harm the children allegedly endured – an undue legal necessity.[13]

4.20. Professor Gans reasoned that the distinction between sexual penetration and other types of sexual touching distracts attention from the nature and degree of harm suffered by the victim.[14]

4.21. By contrast, when it considered this issue, the Scottish Law Commission (**Scottish LC**) recommended maintaining a distinction between penetrative and non-penetrative sexual assaults.[15] It noted that most people it had consulted supported drawing this distinction,[16] and it was of the view that:

> Penetration is a particularly serious attack on a person's physical (and emotional) integrity and a major infringement of his or her sexual autonomy. The point is not that

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12 J Gans, Submission No 31 to Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (Report, September 2021) 11.

13 Ibid 12.

14 Ibid 17.

15 Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) [3.21].

16 Ibid [3.16].

> non-penetrative sexual assaults are necessarily of lesser seriousness; some may be, but not all are, and much depends on the circumstances and nature of the assault. Rather, sexual penetration of another person's body without that person's consent is a distinctive type of attack on that person and the law should mark out the different forms of wrong which are involved in each type of sexual attack. [17]

7. Should the *Code* continue to distinguish between penetrative and non-penetrative forms of sexual assault?

Create a distinction between forms of penetration

4.22. While the *Code* currently differentiates between penetrative and non-penetrative forms of sexual assault, it does not differentiate between forms of penetration. All forms of penetration (for example, penile penetration, oral penetration and digital penetration) are treated equally.

4.23. A second possibility for reform (if the distinction between penetrative and non-penetrative forms of sexual assault is retained) would be to differentiate between forms of penetration. For example, different offences could be created for penile and non-penile penetration. Such an approach was recommended by the Scottish LC, which was of the view that:

> as the penis is a sexual organ, penetration with a penis represents a quite different form of wrong from other forms of penetration. There is an added dimension to the sexual nature of an attack when it involves penetration with the sexual organ of another person, which for practical purposes means the penis.[18]

4.24. Furthermore, penile penetration may carry the additional physical risks of unwanted pregnancy and disease transmission compared to other forms of penetration. It may therefore be thought that it should be treated differently from forms of non-penile penetration.

4.25. On the other hand, it has been argued that:

- There is no clear correlation between the type of penetration and the harm caused to the complainant. Penile and non-penile penetration may be equally harmful.[19]
- There is no hierarchy of sexual penetration. Penile and non-penile penetration constitute equally serious violations of the complainant's sexual autonomy and bodily integrity.[20]
- The wrongfulness and seriousness of an offence should be determined by all of the circumstances of the case, not by reference to the particular form of penetration.[21]

8. Should the *Code* distinguish between different forms of penetration? For example, should there be different offences for penile and non-penile penetration without consent?

17 Ibid [3.11].

18 Ibid [3.12].

19 See, eg, *R v Friesen* [2020] SCC 9, [142].

20 See, eg, ibid, [146]; *C v The State of Western Australia* [2006] WASCA 261, [35]; *The State of Western Australia v Akizuki* [2008] WASCA 267, [68].

21 See ibid.

Change the name of the offence

4.26. As noted above, around Australia different names have been given to the penetrative sexual offence:

- In Victoria, Queensland, SA and Tasmania it is called rape.[22]
- In NSW it is called sexual assault.[23]
- In the ACT and NT it is called sexual intercourse without consent.[24]
- In Western Australia it is called sexual penetration without consent.[25]

4.27. One possibility for reform would be to rename the Western Australian version of the offence. For example, it has been suggested that it may be preferable to call the offence rape because:

- The term rape 'is synonymous in our culture with a particularly heinous form of behaviour' and 'the stigmatic effects of the word have important functions in labelling a particular form of wrongdoing'.[26] By contrast, the term sexual penetration without consent or sexual assault may reduce the perceived seriousness of the wrongdoing.
- The term rape is widely known in the community. By contrast, the term sexual penetration without consent may not be as well understood by juries and members of the public.
- Juries may not understand why the term rape is not used and might wrongly assume that the offence of sexual penetration without consent involves less serious conduct.[27]

4.28. Alternatively, the term sexual assault may be considered preferable, as it makes it clear that the offence involves an act of violence.[28]

4.29. Arguments in favour of retaining the current term of sexual penetration without consent include:

- It is more modern than rape, is gender neutral and clearly explains the elements of the offence.
- It is not specifically associated with penile-vaginal penetration (unlike rape).
- It has been used for over 30 years and is well understood by people working in the area. Changing the name may result in confusion.

9. Should the name of the penetrative sexual offence – sexual penetration without consent – be changed? If so, what should it be called?

10. Should any other changes be made to the offence of sexual penetration without consent?

[22] *Crimes Act 1958* (Vic) s 38; *Criminal Code Act 1899* (Qld) s 48; *Criminal Law Consolidation Act 1935* (SA) s 48; *Criminal Code Act 1924* (Tas) s 185.

[23] *Crimes Act 1900* (NSW) s 61I.

[24] *Crimes Act 1900* (ACT) s 54; *Criminal Code Act 1983* (NT) s 192.

[25] *Criminal Code Act Compilation Act 1913* (WA) s 325.

[26] Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) [3.13].

[27] Preliminary Submission 16 (ODPP) 6.

[28] Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Response* (Final Report, October 2010) [24.86].

5. Sexual coercion

Chapter overview

This Chapter examines the offence of sexual coercion contained in section 326 of the *Code*. It considers three possible options for reform: making it clear that the sexual behaviour must be non-consensual; changing the name of the offence; preventing a potential overlap with the offence of sexual penetration without consent.

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Introduction

5.1. The *Code* includes two general penetrative sexual offences:[1]

- Sexual penetration without consent.[2] This offence broadly applies to cases in which the accused sexually penetrated the complainant or caused the complainant to sexually penetrate the accused. We discuss this offence in Chapter 4.
- Sexual coercion.[3] This offence broadly applies to cases in which the accused caused the complainant to sexually penetrate a person, an animal or themselves.

5.2. The offence of sexual coercion is contained in section 327 of the *Code*. Section 328 of the *Code* also contains an aggravated sexual coercion offence. We discuss aggravated versions of offences in Chapter 14.

5.3. The maximum penalty for sexual coercion is 14 years' imprisonment, and for aggravated sexual penetration without consent is 20 years' imprisonment. We discuss maximum penalties in Chapter 16.

5.4. Sections 327 and 328 also set out certain sentencing requirements that must be complied with in specific circumstances, such as where the offence is committed in the course of an aggravated home burglary or by a juvenile offender. We also discuss these statutory sentencing requirements in Chapter 16.

5.5. There are few Court of Appeal decisions that relate to these offences, and our understanding is that they are not used frequently.[4] Since 2017 only five charges of sexual coercion and 90 charges of aggravated sexual coercion were laid (see Appendix 2). We welcome submissions about the factual circumstances in which sexual coercion charges are laid and the reasons why it is not more commonly used.

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1 The *Code* also has various specific penetrative sexual offences, such as sexual offences against children or relatives.

2 *Criminal Code Act Compilation Act 1913* (WA) s 325.

3 Ibid s 327.

4 The only case the Commission has been able to locate is *AMH v The State of Western Australia* [2016] WASCA 180. In that case the accused had forced the complainant to insert an empty soft drink bottle into her vagina. The appeal case did not raise any substantive legal issues: it was an appeal against the sentence imposed.

Elements and definitions

5.6. Section 327(1) of the *Code* states:

> A person who compels another person to engage in sexual behaviour is guilty of a crime and is liable to imprisonment for 14 years.

5.7. This offence has two elements that the prosecution must prove beyond reasonable doubt:

i. The complainant engaged in sexual behaviour; and

ii. The accused compelled the complainant to engage in the sexual behaviour.

5.8. Section 319(4) of the *Code* provides that a person engages in sexual behaviour if they sexually penetrate any person, have carnal knowledge of an animal, or penetrate their own vagina, anus or urethra with an object a part of their person's body (other than for proper medical purposes). We discuss this definition, and raise some possible options for reform, in Chapter 3.

Possible reforms

Make it clear that the sexual behaviour must be non-consensual

5.9. Section 327 does not explicitly require proof that the complainant did not consent to engaging in the sexual behaviour. However, the word 'compels' indicates that the behaviour in which the complainant was required to engage must have been non-consensual.

5.10. One option for reform would be to make it clear that:

- The sexual behaviour must be non-consensual; and
- The *Code's* consent provisions (such as the definition of consent in section 319(1)) apply to this offence.[5]

11. Should the offence of sexual coercion be amended to make it clear that the sexual behaviour must have been non-consensual?

Change the name of the offence

5.11. Various different names have been given to this type of offence. For example:

- In Western Australia and Scotland it is called sexual coercion.[6]
- In Victoria it is called rape by compelling sexual penetration.[7]
- In NSW it is called sexual assault by forced self-manipulation.[8]
- In England it is called causing a person to engage in sexual activity without consent.[9]

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5 See Discussion Paper Volume 1, Chapter 4 for a detailed discussion of the *Code's* consent provisions.

6 *Criminal Code Act Compilation Act 1913* (WA) s 327; *Sexual Offences (Scotland) Act 2009* (Scot) c 4.

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

8 *Crimes Act 1900* (NSW) s 80A.

9 *Sexual Offences Act 2003* (UK) s 4.

5.12. One possibility for reform would be to rename the Western Australian version of the offence. For example, it has been suggested that the English formulation is preferable to the Western Australian and Scottish formulation because:

> The English approach gives a clearer idea of the major ingredients of the offence, namely, the act of causing another person to engage in some form of sexual activity and the absence of consent by the other person. This is preferable to the approach adopted by the Scottish [and Western Australian] legislation, where the name of the offence indicates only that the offence covers coercion of some kind but fails to give any indication of the other major ingredients, namely, the act of 'causing' and the absence of consent by another person to participate in the compelled sexual activity.[10]

12. Should the name of the sexual coercion offence be changed? If so, what should it be called?

Prevent a potential overlap with the offence of sexual penetration without consent

5.13. Under the current law, it seems that if the accused physically forces the complainant to penetrate the accused's vagina, anus or urethra with a part of the complainant's body, they could be convicted of either sexual penetration without consent[11] or sexual coercion.[12]

5.14. This potential overlap arises because:

- The offence of sexual penetration without consent requires proof that the accused 'sexually penetrated' the complainant, which is defined in section 319 of the *Code* to include 'to manipulate any part of the body of another person so as to cause penetration of the vagina (which term includes the *labia majora*), the anus, or the urethra of the offender by part of the other person's body'.
- The offence of sexual coercion requires proof that the complainant was compelled to 'engage in sexual behaviour', which is defined in section 319 of the *Code* to include circumstances in which they 'sexually penetrate any person'. This does not appear to be limited to people other than the accused.

5.15. There are two main ways in which this overlap could be addressed:

- The *Code* could be amended to provide that the offence of sexual coercion does not apply where the accused manipulates a part of the complainant's body to cause it to penetrate the accused. This would mean that such conduct would solely be treated as a form of sexual penetration without consent.
- The part of the section 319 definition of 'to sexually penetrate' which refers to the manipulation of the complainant's body to cause penetration of the accused could be repealed. This would mean that such conduct would solely be treated as a form of sexual coercion.

5.16. We are interested to hear your views on whether there is a need to address this potential overlap, and if so, how it should be addressed.

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10 Law Reform Commission of Hong Kong, *Review of Substantive Sexual Offences* (Report, December 2019) [2.141].

11 *Criminal Code Act Compilation Act 1913* (WA) s 325.

12 Ibid s 327.

13. Is there a need to address the potential overlap between the offences of sexual coercion and sexual penetration without consent? If so, how should this overlap be addressed?

14. Should any other changes be made to the offence of sexual coercion?

6. Indecent assault

Chapter overview

This Chapter examines the offence of indecent assault contained in section 323 of the *Code*. It considers four possible options for reform: defining indecency; making it clear that the definition of consent applies to indecent assault; addressing the withdrawal of consent; changing the name of the offence.

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Introduction

6.1. The offences of sexual penetration without consent and sexual coercion are both designed to address penetrative sexual acts. By contrast, the offence of indecent assault does not require proof of sexual penetration: it involves other forms of sexual touching or threats to sexually touch.

6.2. The offence of indecent assault is contained in section 323 of the *Code*. Section 324 of the *Code* also contains an aggravated indecent assault offence. We discuss aggravated versions of offences in Chapter 14.

6.3. The maximum penalty for indecent assault is 5 years' imprisonment, and for aggravated sexual penetration without consent is 7 years' imprisonment. We discuss maximum penalties in Chapter 16.

6.4. Section 324 also sets out certain sentencing requirements that must be complied with in specific circumstances, such as where the offence is committed in the course of an aggravated home burglary or by a juvenile offender. We discuss these statutory sentencing requirements in Chapter 16.

6.5. Since 2017, 1,623 people have been charged with indecent assault, and 365 people have been charged with aggravated indecent assault (see Appendix 2).

Elements and definitions

6.6. Section 323 of the *Code* states:

> A person who unlawfully and indecently assaults another person is guilty of a crime and liable to imprisonment for 5 years.

6.7. This offence has four elements that the prosecution must prove beyond reasonable doubt:

i. The accused assaulted the complainant;

ii. The complainant did not consent to the assault or their consent was obtained by fraud;

iii. The assault was committed in circumstances of indecency; and

iv. The assault was unlawful.

Assault

6.8. Assault is defined in section 222 of the *Code* as follows:

> A person who strikes, touches, or moves, or otherwise applies force of any kind to the person of another, either directly or indirectly, without his consent, or with his consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without his consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose, is said to assault that other person, and the act is called an assault.
>
> The term *applies force* includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatever if applied in such a degree as to cause injury or personal discomfort.[1]

6.9. It can be seen from this definition that an assault does not require physical contact: it can be committed by threatening or attempting to touch or apply force. For example, it may be an assault for a person to expose their genitals and walk towards someone whilst making sexually suggestive comments.[2]

6.10. Where an assault is committed by the application of force, there is no need for the prosecution to prove that the accused intended to apply force.[3] However, if the assault is committed by the attempted or threatened application of force, the prosecution must prove that the accused either intended to use force or to cause the complainant to apprehend the use of force.[4]

Consent

6.11. It can be seen from the definition of assault in section 222 of the *Code* that the assault, absent fraud, must have been committed without the complainant's consent. It has been held that the definition of consent in section 319 applies to this offence.[5] We discuss consent in sexual offences in Discussion Paper Volume 1 Chapter 4.

6.12. The prosecution is not required to prove that the accused knew or believed that the victim did not consent or was reckless as to whether the victim consented.[6] We discuss the possibility of adding a mental state requirement to Western Australia's sexual offences in Chapter 12.

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1 Ibid s 222.

2 *Rolfe* (1952) 36 Cr App R 4.

3 *Hayman v Cartwright* (2018) 53 WAR 137, [81]. This was a case of general assault rather than indecent assault. However, it seems likely that the same principles would apply to the offence of indecent assault.

4 *Rossi v Carter* [2000] WASCA 321, [12].

5 *Higgins v The State of Western Australia* [2016] WASCA 142.

6 *BRK v The Queen* [2001] WASCA 161, [23]-[24]. The accused's mental state may, however, be relevant to the mistake of fact defence: see Discussion Paper Volume 1, Chapter 5.

Indecency

6.13. The assault must have been committed in circumstances of indecency. Indecency is given its ordinary meaning: that which offends against currently accepted standards of decency.[7] It is not sufficient that the conduct was merely unbecoming or offensive.[8] It is a matter for the jury to determine in each case whether the circumstances were indecent.

6.14. Indecency refers to the involvement of the human body, bodily actions or bodily functions in a sexual way.[9] Consequently, to be indecent the conduct must have a sexual connotation. The sexual character of the assault is determined objectively – by how the complainant might be expected to characterise it.[10]

6.15. An act may have a sexual connotation due to the area of the body that the accused touches or uses to touch the complainant with, such as the genitals, anus or breasts.[11]

6.16. If the alleged assault has a clear sexual connotation due to the area of the body involved, it should be considered indecent regardless of the accused's motivation for the conduct.[12]

6.17. If an act does not have a clear sexual connotation (for example, a kiss on the cheek) it must be accompanied by an intention to obtain sexual gratification. Outwardly innocent acts may be indecent because of the purpose for which they are committed.[13]

Unlawful

6.18. Section 223 of the *Code* provides that an assault is unlawful unless it is authorised, justified or excused by law. Chapter V of the *Code* sets out various circumstances in which this will be the case, such as where the assault occurred by accident or was unwilled.

Possible reforms

Define indecency

6.19. The *Code* does not currently define the concept of indecency: it relies on definitions provided through case law. One option for reform would be to add a definition of indecency (or the equivalent term if the name of the offence is modified: see below) to the *Code.*

6.20. If this were to be done, it would be necessary to determine the perspective from which indecency should be judged. In this regard, the Scottish LC has noted that there are four possibilities:

> The first is to take a purely objective approach: would the reasonable person regard the conduct as sexual in nature? A second is to view the conduct through the eyes of the perpetrator: was the purpose of the conduct to seek sexual stimulation? A further

7 See generally LexisNexis Australia, *Carter's Criminal Law of Queensland* [352.20] (September 2013) and [210.20] (October 2017), citing *R v Dunn* [1973] 2 NZLR 481; *A-G v Huber* (1971) 2 SASR 142; *Harkin v The Queen* (1989) 38 A Crim R 296. See also *R v BAS* [2005] QCA 97, [15]–[17], [50] and *R v Jones* (2011) A Crim R 379 as to the element of 'indecency' in the *Criminal Code Act 1899* (Qld) ss 210(1)(a) and 352(1)(a).

8 *R v Bryant* [1984] 2 Qd R 545; *R v McBride* [2008] QCA 412.

9 *Drago v The Queen* (1992) 8 WAR 488.

10 Ibid.

11 *The State of Western Australia v Jackson* [2019] WASCA 118, [56]; *HTD v The State of Western Australia* [2019] WASCA 39, [19]; *Harkin v The Queen* (1989) 38 A Crim R 296.

12 *The State of Western Australia v Jackson* [2019] WASCA 118, [57]; *Drago v The Queen* (1992) 8 WAR 488, 492; *HTD v The State of Western Australia* [2019] WASCA 39, [19].

13 *Drago v The Queen* (1992) 8 WAR 488.

> option is to adopt the perspective of the victim: whatever the attacker's intentions, did the victim perceive the attack on her as sexual? A final option is to combine these viewpoints.[14]

6.21. The Scottish LC was of the view that a purely objective approach should be taken for the following reasons:

> We took the view that adopting purely subjective approaches could lead to odd results (for example an accused could not be convicted of a sexual assault where he genuinely believed that touching a woman's vagina or breasts was not sexual in nature). We also considered that attempting to combine objective and subjective elements made the resulting tests too complex to apply. We proposed the use of an objective test. This proposal was accepted by our consultees and we continue in our view that this is the appropriate test. It should be borne in mind that any assault involving a purely subjective sexual element (from the perspective of either the perpetrator or the victim) could still be charged as an assault. Moreover, on conviction of an offender in these circumstances, the court would still have the power to order the use of the sex offender notification procedure.
>
> We recommend that: For purposes of the law on sexual assault a penetration, touching or contact is sexual if a reasonable person would consider it to be sexual.[15]

6.22. By contrast, in England a combined objective/subjective approach has been taken to defining the term sexual. Section 78 of the *Sexual Offences Act 2003* (UK) provides that an activity is sexual if a reasonable person would consider that:

> a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or
>
> b) because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.

6.23. This approach is similar to that which has been taken in the Western Australian cases.[16] It provides that in some cases an activity will, because of its nature, always be considered sexual; whereas in other cases the circumstances or the accused's purpose may make it sexual.

15. Should the *Code* include a definition of indecency for the purposes of the offence of indecent assault? If so, how should it be defined?

Make it clear that the section 319 definition of consent applies to indecent assaults

6.24. As noted above, under the current law the prosecution must prove that, absent fraud, the assault was committed without the complainant's consent. This is not, however, made explicit in the offence provision: it is a consequence of the general definition of assault set out in section 222 of the *Code*.

6.25. In the case of *Higgins*,[17] it was argued that because section 222 of the *Code* is not in Chapter XXXI, the definition of consent set out in section 319 does not apply to the offence

[14] Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) [3.42].
[15] Ibid [3.43], Rec 15.
[16] See [6.13]−[6.17].
[17] *Higgins v The State of Western Australia* [2016] WASCA 142.

of indecent assault. This argument was rejected by the Court of Appeal, which held that the section 319 definition of consent does apply to the indecent assault offence.

6.26. Whilst this decision has clarified the law, it may be helpful for the *Code* to make it clear that the definition of consent in section 319 of the *Code* applies to the offence of indecent assault.

16. Should the *Code* be amended to clarify that the section 319 definition of consent applies to the offence of indecent assault?

Address the withdrawal of consent

6.27. The offence of sexual penetration without consent is not just committed where the accused sexually penetrates the complainant without consent. It is also committed where the accused continues to penetrate the complainant after consent has been withdrawn.[18]

6.28. One option for reform would be to similarly provide that the offence of indecent assault is committed where the accused continues to indecently touch or threaten the complainant after consent has been withdrawn. This would be consistent with the principles of sexual autonomy and bodily integrity discussed in Discussion Paper Volume 1,[19] which provide that people should be free to refuse to engage in sexual activities at any time for any reason and should have the right not to have their body sexually touched or interfered with without their consent.

17. Should the *Code* provide that the offence of indecent assault is committed where the accused continues to indecently touch or threaten the complainant after consent has been withdrawn?

Change the name of the offence

6.29. Around Australia different names have been given to the non-penetrative sexual offence:

- In Queensland and Victoria it is called sexual assault.[20]
- In NSW it is called sexual touching.[21]
- In the ACT it is called an act of indecency without consent.[22]
- In the NT it is called an act of gross indecency.[23]
- In South Australia, Tasmania and Western Australia it is called indecent assault.[24]

6.30. One option for reform would be to change the name of the offence. For example, it may be thought that sexual touching is preferable to indecent assault or sexual assault, because touching is a concept that is easy for members of the community and juries to understand. Conversely, indecent assault or sexual assault may be considered preferable as they emphasise the nature of the offence as an act of violence.

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18 *Criminal Code Act Compilation Act 1913* (WA) ss 319(1), 325.

19 See [1.76]-[1.78].

20 *Criminal Code Act 1899* (Qld) s 352; *Crimes Act 1958* (Vic) s 40.

21 *Crimes Act 1900* (NSW) s 61KC.

22 *Crimes Act 1900* (ACT) s 60.

23 *Criminal Code Act 1983* (NT) s 192(4).

24 *Criminal Law Consolidation Act 1935* (SA) s 56; *Criminal Code Act 1924* (Tas) s 127; *Criminal Code Act Compilation Act 1913* (WA) s 323.

6.31. In considering this issue, it should be borne in mind that the current offence of indecent assault is not restricted to cases involving physical contact: it also applies to force which is attempted or threatened.[25] Consequently, if the offence is renamed sexual touching, it would either need to be reduced in scope (to only apply to cases which involve physical contact) or made clear that the concept of touching includes threatened or attempted contact.

18. Should the name of the indecent assault offence be changed? If so, what should it be called?

19. Should any other changes be made to the offence of indecent assault?

[25] *Criminal Code Act Compilation Act 1913* (WA) ss 222, 323.

7. Sexual offences against children

Chapter overview

This Chapter examines sections 320, 321, 321A and 322 of the *Code*, which contain various sexual offences that can be committed against children. It considers several possible options for reform of these offences, including defining key terms such as 'indecent' and 'care, supervision or authority', changing the age of consent, and reforming the mistake of age and lawful marriage defences.

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Introduction

7.1. Chapter XXXI of the *Code* contains various sexual offences against children.[1] These are divided into four categories:

- Section 320 contains discrete sexual offences against children under 13.
- Section 321 contains discrete sexual offences against children of or over 13 but under 16.
- Section 322 contains discrete sexual offences against children of or over 16.[2]
- Section 321A contains the offence of persistent sexual conduct with a child under 16.

7.2. The offences set out in sections 320-322 prohibit sexual acts with children that take place on specific occasions. These offences require proof that the accused committed one (or more) of the following acts against a child of the relevant age:

- Sexual penetration.

[1] Ibid ss 320, 321, 321A, 322.

[2] These offences can only be committed by a person who has care, supervision or authority over the child.

- Procuring, inciting or encouraging sexual behaviour.
- Indecent dealing.
- Procuring, inciting or encouraging an indecent act.
- Indecent recording.

7.3. By contrast, the offence in section 321A criminalises persistent sexual conduct with a child. This requires proof that the accused committed certain sexual conduct on at least three occasions on different days.

7.4. These offences do not require proof that the child did not consent to the sexual acts: they are established simply by proving that the accused committed the relevant conduct and that the complainant was of the relevant age. We note that under the *Code* children under 13 are deemed incapable of consenting.[3] This issue is discussed in Chapter 4 of Discussion Paper Volume 1.

7.5. The maximum penalties for sexual offences against children range from 4 years' imprisonment to 20 years' imprisonment depending on the offence committed and the circumstances in which it was committed. We discuss maximum penalties in Chapter 16.

7.6. The child sexual offence provisions also set out certain sentencing requirements that must be complied with in specific circumstances, such as where the offence is committed in the course of an aggravated home burglary or by a juvenile offender. We also discuss these statutory sentencing requirements in Chapter 16.

7.7. Since 2017, 5,941 people have been charged with sexual offences against children under 13; 3,843 people have been charged with sexual offences against children of or over 13 but under 16; 278 people have been charged with sexual offences against children of or over 16; and 347 people have been charged with persistent sexual conduct with a child under 16 (see Appendix 2).

7.8. We note that in this chapter we only consider the existing sexual offences against children. We consider the possible enactment of new child sexual offences in Chapter 13.

Elements and definitions

Child

7.9. As noted in Chapter 3, a child is a person who is under the age of 18 years or who, in the absence of any positive evidence as to age, is apparently under the age of 18 years.[4]

7.10. This means that where it is alleged that the accused committed a sexual offence against a child who is of or over 16,[5] the prosecution must generally prove that at the time of the alleged act the complainant was under 18. If, however, there is no positive evidence of the complainant's age, it will be sufficient for the prosecution to prove that the complainant appeared to be under the age of 18 at that time.

[3] *Criminal Code Act Compilation Act 1913* (WA) s 319(2)(c).

[4] Ibid s 1.

[5] These offences can only be committed by a person who has care, supervision or authority over the child.

Sexual penetration of a child

7.11. It is an offence to sexually penetrate a child who is under 13,[6] of or over 13 but under 16,[7] or of or over 16 and under the care, supervision or authority of the accused.[8]

7.12. For each of these offences the prosecution must prove the following two elements beyond reasonable doubt:

i. The accused sexually penetrated the complainant; and

ii. The complainant was of the relevant age at the time of the sexual penetration.

7.13. We discuss the definition of sexual penetration, and some possible options for reform, in Chapter 3.

7.14. If the accused is charged with committing a sexual offence against a child who is of or over 16,[9] the prosecution must also prove that the complainant was under the accused's care, supervision or authority. We discuss the meaning of these terms below.

Procuring, inciting, or encouraging a child to engage in sexual behaviour

7.15. It is an offence to procure, incite or encourage a child to engage in sexual behaviour. Separate versions of this offence apply to children who are under 13,[10] over 13 but under 16,[11] and over 16 and under the care, supervision or authority of the accused.[12]

7.16. For each of these offences the prosecution must prove the following two elements beyond reasonable doubt:

i. The accused procured, incited or encouraged the complainant to engage in sexual behaviour; and

ii. The complainant was of the relevant age at the time of the procurement, incitement or encouragement.

7.17. We discuss the definition of sexual behaviour, and some possible options for reform, in Chapters 3 and 5.

7.18. The *Code* defines the word 'incites' to include 'solicits and endeavours to persuade'.[13] The *Code* does not define the terms 'procures' or 'encourages'.

7.19. If the accused is charged with procuring, inciting, or encouraging a child who is of or over 16 to engage in sexual behaviour,[14] the prosecution must also prove that the complainant was under the accused's care, supervision or authority. We discuss the meaning of these terms below.

6 *Criminal Code Act Compilation Act 1913* (WA) s 320(2).
7 Ibid s 321(2).
8 Ibid s 322(2).
9 Ibid.
10 Ibid s 320(3).
11 Ibid s 321(3).
12 Ibid s 322(3).
13 Ibid s 1.
14 Ibid s 322(3).

Indecently dealing with a child

7.20. It is an offence to indecently deal with a child who is under 13,[15] of or over 13 but under 16,[16] or of or over 16 and under the care, supervision or authority of the accused.[17]

7.21. For each of these offences the prosecution must prove the following two elements beyond reasonable doubt:

i. The accused indecently dealt with the complainant; and

ii. The complainant was of the relevant age at the time of the indecent dealing.

7.22. The *Code* defines 'deal with' to include 'doing any act which, if done without consent, would constitute an assault'.[18] We discuss the meaning of assault in [6.8]−[6.10].

7.23. The *Code* provides that indecently dealing with a child includes:

- Procuring or permitting the child to deal indecently with the person;
- Procuring the child to deal indecently with another person; or
- Committing an indecent act in the presence of the child or incapable person.[19]

7.24. If the accused is charged with indecently dealing with a child who is of or over 16,[20] the prosecution must also prove that the complainant was under the accused's care, supervision or authority. We discuss the meaning of these terms below.

Procures, incites or encourages a child to do an indecent act

7.25. It is an offence to procure, incite or encourage a child to do an indecent act. Separate versions of this offence apply to children who are under 13,[21] of or over 13 but under 16,[22] and of or over 16 and under the care, supervision or authority of the accused.[23]

7.26. For each of these offences the prosecution must prove the following two elements beyond reasonable doubt:

i. The accused procured, incited or encouraged the complainant to do an indecent act; and

ii. The complainant was of the relevant age at the time of the procurement, incitement or encouragement.

7.27. We discuss the meaning of procures, incites or encourages in [7.15]−[7.19].

7.28. The phrase indecent act is not defined. However, the *Code* provides that it includes an indecent act which is:

- committed in the presence of or viewed by any person; or

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15 Ibid s 320(4).
16 Ibid s 321(4).
17 Ibid s 322(4).
18 Ibid s 319.
19 Ibid s 319(3). See [7.28]-[7.29] for a discussion of the meaning of indecent act.
20 Ibid s 322(4).
21 Ibid s 320(5).
22 Ibid s 321(5).
23 Ibid s 322(5).

- photographed, videotaped, or recorded in any manner.[24]

7.29. If the accused is charged with procuring, inciting, or encouraging a child who is of or over 16 to do an indecent act,[25] the prosecution must also prove that the complainant was under the accused's care, supervision or authority. We discuss the meaning of these terms below.

Indecently records a child

7.30. It is an offence to indecently record a child who is under 13,[26] 13 or over but under 16,[27] or 16 or over and under the care, supervision or authority of the accused.[28]

7.31. For each of these offences the prosecution must prove the following two elements beyond reasonable doubt:

i. The accused indecently recorded the complainant; and

ii. The complainant was of the relevant age at the time of the indecent recording.

7.32. The *Code* defines 'to indecently record' to mean 'to take, or permit to be taken, or make, or permit to be made, an indecent photograph, film, video tape, or other recording (including a sound recording)'.[29]

7.33. If the accused is charged with indecently recording a child who is of or over 16,[30] the prosecution must also prove that the complainant was under the accused's care, supervision or authority. We discuss the meaning of these terms below.

Persistent sexual conduct with a child under 16 years

7.34. It is an offence to persistently engage in sexual conduct with a child under the age of 16.[31]

7.35. This offence is different from the other sexual offences against children contained in Chapter XXXI of the *Code*. Those offences are targeted at individual acts that take place on specific occasions. By contrast, this offence is targeted at conduct that occurs over a period of time.

7.36. This offence was previously titled 'having a sexual relationship with a child under 16'. Its name was changed in 2008 due to a view that the word 'relationship' inappropriately implied mutuality and consent.[32]

7.37. The prosecution must prove the following two elements beyond reasonable doubt:

i. The accused did a relevant sexual act in relation to the child on at least three occasions on different days;[33] and

ii. The complainant was under 16 at the time the acts were done.

7.38. The *Code* defines the relevant sexual acts to be:

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24 Ibid s 319(1).
25 Ibid s 322(5).
26 Ibid s 320(6).
27 Ibid s 321(6).
28 Ibid s 322(6).
29 Ibid s 319(1).
30 Ibid s 322(6).
31 Ibid s 321A(4).
32 Explanatory Memorandum, Criminal Law and Evidence Amendment Bill 2006, cl 10.
33 *Criminal Code Act Compilation Act 1913* (WA) s 321A(2).

- Sexually penetrating, or attempting to sexually penetrate, the complainant.
- Indecently dealing with, or attempting to indecently deal with, the complainant.
- Procuring, inciting or encouraging the complainant to engage in sexual behaviour, where the complainant in fact engages in sexual behaviour.[34]

7.39. We discuss the definitions of sexual penetration and sexual behaviour, and some possible options for reform, in Chapters 3 and 5. We discuss the meaning of indecent dealing in [7.20]−[7.24]. We discuss the meaning of procuring, inciting or encouraging in [7.15]−[7.19].

7.40. The prosecution does not need to prove that the sexual acts were of the same type. They also do not need to have all taken place in Western Australia, although at least one of them must have.[35]

7.41. If there is evidence of sexual offences having been committed on more than three occasions, the jury does not have to unanimously agree as to which three acts comprise the persistent sexual conduct. It simply needs to be satisfied that the accused did a relevant sexual act in relation to the child on at least three occasions on different days.[36]

7.42. A charge for this offence must specify the period during which it is alleged that the sexual conduct occurred. However, it does not need to specify the dates, or in any other way particularise the circumstances, of the sexual acts alleged to constitute the sexual conduct.[37] A court cannot order the prosecution to provide particulars of the sexual acts alleged.[38]

7.43. These provisions were a legislative response to *S v R,*[39] in which the High Court overturned convictions for incest where the complainant's evidence was that her father had frequently had intercourse with her, but she 'blanked them all out' and was unable to give details of specific occasions on which sexual activity took place. The provisions were designed to allow the prosecution to bring charges where the nature and effect of the repetitive sexual conduct is that the complainant cannot recall or distinguish particular incidents.[40]

7.44. An indictment for this offence must be signed by the Director of Public Prosecutions or the Deputy Director of Public Prosecutions.[41]

Care, supervision or authority

7.45. Section 322 of the Code creates sexual offences against children who are of or over 16 years and under the accused's care, supervision or authority.

7.46. The *Code* does not define the phrase care, supervision or authority. The meaning of this phrase has also not been considered by the Western Australian Court of Appeal.

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34 Ibid s 321A(1).

35 Ibid s 321A(3).

36 Ibid s 321A(11). This provision was expressly intended to overcome the decision of the High Court in *KBT v The Queen* (1997) 191 CLR 417, which required a jury to be unanimous about which of the alleged offences occurred: Explanatory Memorandum, Criminal Law and Evidence Amendment Bill 2006, cl 10.

37 *Criminal Code Act Compilation Act 1913* (WA) s 321A(5).

38 Ibid s 321A(8).

39 *S v R* (1989) 168 CLR 266.

40 Explanatory Memorandum, Criminal Law and Evidence Amendment Bill 2006, cl 10.

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

7.47. In *R v Howes*,[42] a Victorian case considering identical wording in the Victorian Act, it was held that the words are to be given their ordinary dictionary meaning and the trial judge should explain those meanings to the jury. Justice Brooking suggested that the trial judge could:

- Give the jury a dictionary definition of authority, this being 'power to influence the conduct and actions of others; personal or practicable influence';[43] and
- Tell the jury that the reason behind the legislation is to prevent 'exploitation by persons in a position of care, supervision and authority', and that the legislation is designed to protect young people, often from themselves.[44]

Mistake of age defence

7.48. Where the accused is charged with a sexual offence against a child who is of or over 13 but under 16, or with persistent sexual conduct with a child under 16, they may raise the mistake of age defence.[45]

7.49. For this defence to succeed the accused must prove, on the balance of probabilities, that:

- They believed on reasonable grounds that the child was of or over the age of 16; and
- They were not more than three years older than the child.

7.50. The mistake of age defence is not available if the child was under the care, supervision or authority of the accused.[46]

7.51. The *Code* provides that:

- It is not a defence to a charge under section 320 (a sexual offence against a child under 13) that the accused did not know the victim's age or believed the victim was of or over 13.[47]
- It is not a defence to a charge under section 322 (a sexual offence against a child of or over 16) that the accused believed, on reasonable grounds, that the child was of or over 18.[48]

Lawful marriage defence

7.52. Where the accused is charged with a sexual offence against a child who is of or over 16, they may raise the lawful marriage defence.[49]

7.53. For this defence to succeed the accused must prove, on the balance of probabilities, that they were lawfully married to the child.

7.54. The lawful marriage defence is not available in relation to any of the other sexual offences against children contained in Chapter XXXI of the *Code*.

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42 [2000] VSCA 159
43 Ibid.
44 Ibid.
45 *Criminal Code Act Compilation Act 1913* (WA) ss 321(9), 321A(9).
46 Ibid s 321(9a).
47 Ibid s 331.
48 Ibid s 322(7).
49 Ibid s 322(8).

Possible reforms

Define procures, incites or encourages

7.55. Sections 320-322 contain offences which use the undefined phrase procures, incites or encourages. The Code provides only limited assistance in relation to the meaning of incites to the extent that it states that it includes solicits and endeavours to persuade.[50]

7.56. One view is that the phrase procures, incites or encourages is comprised of common words that can be easily understood by juries. An alternative view is that the phrase is capable of having different meanings and that it would help to ensure that juries used the correct meaning if it was defined in the *Code*.

7.57. Juries are often told that procure means to produce by endeavour, for example by asking or demanding, and that an accused procures an offence by setting out to see that it happens and taking the appropriate steps to produce that happening.[51] Such a meaning could be inserted into the *Code*.

7.58. Given the ordinary meaning of procures, there is an issue as to whether the other two descriptors are required. The *Code* meaning of incites reinforces a view that there is very little, if any, difference in meaning between it and procures and encourages. If incites and encourages add something to the meaning of procures, for example by encouragement not requiring proof that the encouragement had brought about the desired result, it is arguable that this distinction ought to be made clear in the *Code*.

20. Should the phrase procures, incites or encourages be defined or amended in any way?

Define indecent

7.59. At [6.19]−[6.23] we discuss whether a definition of indecent, or any replacement term such as sexual, should be defined in the *Code*. Similar issues arise as to whether a statutory definition of indecent (or any substituted word, such as sexual), which would apply to child sexual offences that use the word, ought to be inserted into the *Code*.

7.60. A preliminary submission from WorkSafe[52] supported clarifying the definition of indecent act (as well as clarifying the meaning of other undefined or poorly defined terms):

> I support a review of defined terms in Chapter XXXI with a view to clarifying any obscure or unclear definitions. For instance, amending terms which are circularly defined, such as 'indecent act' which means an indecent act which is (a) committed in the presence of or viewed by any person; or (b) photographed, videotaped, or recorded in any manner'. Circular definitions can be unhelpful if the reader must either already know the meaning of the term, or if the term to be defined is used in the definition itself.[53]

7.61. We welcome submissions about this definitional issue.

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50 Ibid s 1.

51 *Humphrey v The Queen* [2003] WASCA 53, [5]; *R v Castiglione* [1963] NSWR 1, 6; *Attorney-General's Reference* [1975] 1 QB 773, 777.

52 Preliminary Submission 4 (Darren Kavanagh, WorkSafe Western Australia Commissioner) 2-3.

53 Ibid.

21. Should the *Code* include a definition of indecency for the purposes of the child sexual offences that use this term? If so, how should it be defined?

Define care, supervision or authority

7.62. Section 322 of the Code creates sexual offences against children who are of or over 16 years and under 18 years and under the accused's care, supervision or authority.

7.63. The rationale of the section seems to be that whilst children of 16 and 17 years may generally be capable of deciding whether or not to consent to sexual activity (see [7.70]−[7.75]), they may still be vulnerable to the influence of those whom they perceive as holding positions of power or superiority.[54]

7.64. The offence does not require that the child's consent to any sexual activity is in fact influenced by the relationship of care, supervision or authority. The offence is complete if sexual activity is proved and the relevant relationship of care, supervision or authority is established.[55]

7.65. The phrase 'care, supervision or authority' is not a defined term in Western Australia. It is not necessary to show that the accused cared for, supervised and had authority over the complainant: they only need to be in one of those positions. This means that if an accused has care of the complainant, they do not also need to be in a position of supervision or authority, although they may well be in both of those positions as a question of fact. Determining whether the complainant is under the accused's care, supervision or authority will depend upon the specific circumstances of the accused's position and the relationship between the accused and the complainant.

7.66. One possible option for reform would be to replace the phrase care, supervision or authority with another descriptor. For example, in the ACT, NSW and the NT, the relevant legislation instead refers to a young person being under the 'special care' of the accused.[56]

7.67. A second (and related) option for reform would be to define the term(s) used in the legislation. This has been done in the ACT, NSW and the NT, where the relevant legislation provides an exhaustive definition of the phrase special care.[57] The definitions of special care vary slightly between the three jurisdictions. The NSW definition is:

> A young person (the complainant) is under the *special care* of another person (the accused person) if, and only if
>
> a) the accused person is any of the following who is not a close family member of the complainant—
>
> i. the parent or the parent of a parent of the complainant,
>
> ii. the guardian or authorised carer of the complainant,
>
> iii. the spouse or de facto partner of a person referred to in subparagraph (i) or (ii), or
>
> b) the accused person is a teacher at, or the principal or a deputy principal of, the school at which the complainant is a student, or

[54] LexisNexis Australia, *Criminal Law Western Australia* [322.10] (October 2022).
[55] *R v Howes* [2000] VSCA 159.
[56] *Crimes Act 1900* (ACT) s 55A(2); *Crimes Act 1900* (NSW) s 73; *Criminal Code Act 1983* (NT) s 128.
[57] *Crimes Act 1900* (ACT) s 55A(2); *Crimes Act 1900* (NSW) s 73; *Criminal Code Act 1983* (NT) s 128.

c) the accused person performs work at the school at which the complainant is a student, in which the accused person has students at the school, including the complainant, under the authority of the accused person, or

d) the accused person has an established personal relationship with the complainant in connection with the provision of religious, sporting, musical or other instruction to the complainant, in which relationship the complainant is under the authority of the accused person, or

e) the accused person is a custodial officer of an institution of which the complainant is an inmate, or

f) the accused person is a health professional and the complainant is a patient of the health professional, or

g) the accused person—

   i. performs work for an organisation that provides residential care to young persons placed in out-of-home care (within the meaning of the Children and Young Persons (Care and Protection) Act 1998), and

   ii. has an established personal relationship with the complainant in connection with the provision of that residential care to the complainant, in which relationship the complainant is under the authority of the accused person, or

h) the accused person—

   i. performs work for an organisation that provides refuge or crisis accommodation, and

   ii. has an established personal relationship with the complainant in connection with the provision of that accommodation to the complainant, in which relationship the complainant is under the authority of the accused person.

7.68. The Hong Kong Law Reform Commission (**Hong Kong LRC**) considered that legislation providing an exhaustive definition of a like term is desirable because 'such a list would make it clear to people the type of relationships covered by the legislation'.[58] Yet a closed detailed definition can be inflexible and unable to adapt to changing societal relationships. Also, a closed definition may omit persons who a jury may conclude rightly, in the absence of a statutory definition, had the care of the victim. For example, even the NSW definition, as detailed as it is, does not include the employees of the complainant's health professionals with whom the complainant had a personal relationship because of the relationship with the health professional. It may be appropriate for juries to make the decision as to whether an accused had the care, supervision or authority of the victim based on the facts of the particular case.

22. Should the phrase 'care, supervision or authority', as used in the context of sexual offences against children, be replaced by another descriptor? If so, what term(s) should be used?

23. Should the *Code* define the phrase 'care, supervision or authority' (or its replacement)? If so, how should it be defined?

[58] Law Reform Commission of Hong Kong, *Review of Substantive Sexual Offences* (Report, December 2019) [3.253].

Change the age of consent

7.69. The effect of the child sexual offence provisions in Western Australia is that it is illegal to engage in sexual activity with a child under 16 years.[59] All comparable jurisdictions criminalise sexual activity with children below a certain age regardless of the child's subjective attitude towards the activity. Generally, in Australia the age of consent is 16 years, but it is 17 years in Tasmania[60] and South Australia.[61]

7.70. Sections 320 and 321 of the *Code* were introduced in 1992. In his Second Reading speech introducing the amending legislation the then Attorney General said:

> There have been many complaints about the pressure put on young girls in sexual abuse cases to make them say that they have consented to the offence. The new section 321 is designed so that an adequate penalty can be imposed in a serious case without the need to prove that the child did not consent ... Where a charge is laid under the new section 321, the offence would cover both consensual and non-consensual acts, but the question of consent would only be relevant to the issue of penalty. These provisions will considerably reduce the trauma for child witnesses, and remove any need for questioning them about intimate details of what actually occurred.[62]

7.71. In *Marris v The Queen*, Wheeler J explained that consent is not an element of sexual offences against children under the age of 16 years for the following reasons:

> A child is not in a position to assess fully the meaning and consequences of sexual activity. It is clear that Parliament understood that both for that reason, and because of the disparity in power (physical, social, emotional and so on) which exists between a child and an adult, the concept of a child's 'consenting' to sexual intercourse with an adult should not find a place in the legislation.[63]

7.72. The Court of Appeal elaborated on this point in *Cross v The State in Western Australia*:

> Part of the purpose of section 321 of the Code is to protect children. That purpose is not only to protect children from sexual predators, but also to protect children from themselves. Section 321 reflects a recognition that a person aged less than 16 may have very limited capacity to resist moral, social, emotional or other pressure, particularly from a person more mature than themselves.
>
> Section 321 also reflects the view of the legislature that it is undesirable that young people should embark upon sexual activity at an age at which they may be unable to fully comprehend or cope with its social and emotional consequences. Parliament has delineated that age as 16; that must be respected by the courts regardless of the level of maturity and sexual experience of a particular complainant. In a sense, Parliament has chosen to protect children under 16 by depriving them of the capacity to consent, in a legally effective manner, to sexual conduct. That can be seen as reflecting a judgment that children under 16 are not in a position to give true or real or informed consent to the conduct criminalised in section 321. Even where a young person aged less than 16 appears to wish to engage in sexual activity, there is, in

59 The relevant age is 18 years if the child is under the accused's care, supervision or authority.
60 See, eg, *Criminal Code Act 1924* (Tas) s 124.
61 *Criminal Law Consolidation Act 1935* (SA) s 49(3).
62 *Parliamentary Debates*, Legislative Council, 6 May 1992, 1803 (Joseph Berinson).
63 *Marris v The Queen* [2003] WASCA 171, [12].

> effect, a duty cast upon others to refrain from acting on, or encouraging, those wishes.[64]

7.73. In *Riggall v The State of Western Australia,*[65] Wheeler JA expressed the view that there was a degree of arbitrariness in using 16 years as the age at which a person could consent to sexual activity. Her Honour noted that views on the age at which a person could give consent ranged from 15-21 years and she acknowledged that some children under 16 years had the capacity to consent to sexual activity.[66] Her Honour further expanded on this concept in *The State of Western Australia v SJH*:

> As I have noted, the lines drawn by the provisions of Ch XXXI of the Code reveal a legislative desire not to lump all sexual offences against children into one category, but to identify factors which are likely to affect a child's ability to understand, and to consent to or to resist, sexual contact with another. However, the substantive criminal law necessarily deals in the drawing of arbitrary lines, in most cases. Conduct must be able to be clearly identified as either an offence or not an offence. There are no 'partial' offences.
>
> Sentencing, however, is a different matter. It is at that point that close attention to the legislative purpose, the interests of the community in protecting children, the interests of the victim of an offence, and the real culpability of the offender, ought to be reflected in a sentence which is appropriate to all of the circumstances of the case.
>
> …
>
> It follows, in my view, not only from the legislative structure, the pre-existing legal context and the Parliamentary Debates, but also from what can be derived from materials objectively analysing the actual experiences of young people, that, while sexual experiences containing an element of 'abuse' may be very harmful and should receive a sentence of significant severity, not all sexual contact is experienced as abusive or harmful. There are young people who consider, sometimes (although not always) correctly, that they are 'ready' to engage in sexual conduct with a particular partner, and either to initiate sexual contact or to give an informed and voluntary consent to such contact, notwithstanding that they are under 16. In those circumstances, the gravamen of the criminality of the offending partner lies in disregard of the law, rather than in the particular circumstances of the case. There may be substantial variations in what is the appropriate punishment, depending on the circumstances.[67]

7.74. One of the guiding principles of our review is that sexual offence laws should protect people who are vulnerable to sexual exploitation.[68] The Scottish LC examined the logic of the protective principle, in the following passage:

> The preliminary question which has to be considered is whether offences based on a protective principle continue to be a necessary part of the law on sexual offences. In particular, the question arises what this principle adds to the principle that sexual activity which does not involve the consent of all the parties to it should be criminalised. … Either such persons can and do consent to sexual activity, in which case the sexual activity is legally permissible; or they cannot or do not give consent, in which case the activity involves a breach of their sexual autonomy and hence should be criminal. Moreover, in this project we have adopted a further guiding

64 *Cross v The State of Western Australia* [2018] WASCA 86 [43]-[44].
65 [2008] WASCA 69.
66 Ibid [21], [43].
67 *The State of Western Australia v SJH* [2010] WASCA 40, [63]-[64], [76].
68 See Discussion Paper Volume 1, [1.75]−[1.90].

principle for reform of sexual offences, namely that where sexual activity is genuinely consensual, then it should not be criminalised in the absence of clear and convincing reasons. The criminal law has a role not simply in protecting sexual autonomy but in promoting it.

However, there are also arguments in favour of retaining offences based on a protective principle, even if a richer model of consent were to be introduced. In the first place, some provisions involving children and other vulnerable people are fully consistent with the principle that sexual activity not involving the consent of the participants should be criminal. For example, a rule which states that a child under the age of 10 is not capable of giving consent to sexual intercourse can be interpreted as embodying a general rule that as a matter of fact most children of that age lack the intellectual capacity to give such consent. The rule is then a useful mechanism for by-passing problems of proof of lack of consent in individual cases.

Nonetheless, it has to be accepted that not all rules which fall within a protective principle can be justified in this way. Although it is probably true (for example) that no child under the age of 10 could give meaningful consent to sexual intercourse, the same does not necessarily hold for children aged 14 or 15. …

A further justification for protective offences is not simply to do with the question of consent or no consent. Rather, these 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 or with persons with a serious mental disorder is wrong and the law should say so explicitly rather than subsuming such cases in a more general principle of consent. Protective offences are not inconsistent with the general consent model. They try to spell out in detail what is implicit in that model in respect of vulnerable persons.

There are two quite different types of wrong involved in these cases. The first involves the judgment that certain forms of sexual activity are in breach of social and moral norms. The activity in question is intrinsically wrongful. … [the consent] model does not sufficiently bring out what is at the core of the wrongdoing. Consent is a key element of the law on sexual offences because it protects the sexual autonomy of a person who has capacity to give consent but who on any particular occasion chooses not to engage in the activity. There is an additional wrong where the person involved lacks any capacity either to give or to withhold consent. …

Another category of wrong concerns people whose capacity to consent is not fully lacking but is in some way underdeveloped. This is true of (some) children in their teens … In these types of case, the law does not mark out conduct which is intrinsically wrong but rather aims to protect persons who, although they may be able to consent to sexual activity, are vulnerable to exploitation by others. …

On this view, the protective principle has two quite separate rationales, and it is important that the law makes each of these explicit. The rationales are (1) that sex with young children and with persons with serious mental disorders is wrong and (2) that persons who are vulnerable to sexual exploitation should be protected. It is important that the difference between these two principles should be borne in mind when making proposals for formulating offences to give effect to them. Whereas the first deals with cases where there is no consent at all, the second principle is concerned with situations where consent is given but the validity of that consent is made doubtful by the circumstances of vulnerability. …

In the specific context of older children, the main arguments are, first, that because of the relative immaturity of the child, doubts remain about the validity of the consent, especially where the other party concerned is older and more experienced than the

> child. What the law is seeking to prevent is the exploitation of the child's vulnerability to give consent without fully appreciating what is involved. The second aim of the law is to make a symbolic statement about child protection.[69]

7.75. In response to questions raised in parliamentary debate in 1992 as to whether the proposed sections 320 and 321 would criminalise consenting acts between teenagers the Attorney General replied:

> [In] both the existing law and the present Bill, the clear intention and target is not sexual activity as such, but sexual activity involving some element of abuse. The whole point of this legislation is to protect children and not to prosecute them. In this context, there is no reason to doubt that the prosecuting authorities and the courts will continue to act on that basis.[70]

7.76. If it is accepted that Western Australia's child sex offences should protect children who are vulnerable to sexual exploitation and protect the sexual autonomy and bodily integrity of young people, there is an issue as to whether Western Australia's age of consent of 16 years appropriately finds a balance between these guiding principles. Views about this issue should take into account whether the introduction of a defence to sexual offences for an accused person who is close in age to the child complainant and where the child consented (**similar age defence**) would affect whether the appropriate balance had been struck and whether the mistake of age defence affects whether the appropriate balance had been struck. We discuss these two topics in the following sections.

24. Is 16 years the appropriate age below which all sexual activity with children should be prohibited regardless of a child's subjective attitude towards the activity? If not, what is the appropriate age?

Change the age categories

7.77. Most comparable jurisdictions also provide that a higher maximum penalty for a child sexual offence is available if the complainant is below a certain age. This age is 10 years in the ACT, NSW, and the NT, 12 years in Queensland, Victoria and New Zealand, 13 years in Western Australia and 14 years in South Australia. In Tasmania and Canada the maximum penalty does not vary based on the child's age.

7.78. The availability of higher maximum penalties for sexual offences against young children reflects the view that sexual contact with young children is a more serious offence than sexual offences against older children.[71]

7.79. Table 7.1 summarises the differences between jurisdictions with respect to the separation of child sexual offences by age.

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69 Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) [4.2]–[4.9]; [4.45].

70 *Parliamentary Debates*, Legislative Council, 14 May 1992, 2361 (Joseph Berinson).

71 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5: Sexual Offences Against the Person* (Report, 1999) 125.

Jurisdiction	Age of child and type of sexual conduct
ACT	• Offences against child under 10 years. • Offences against child under 16 years. • Offences against child of or over 16 years but under 18 years.[72]
NSW	• Offences against child under 10 years. • Offences against child between 10 and 16 years, but with different maximum penalties depending on whether child is between 10 and 14 years or between 14 and 16 years.[73]
NT	• Offences against child under 10 years. • Offences against child of or over 10 years and under 16 years. • Offences against child of or over 16 years and under 17 years.[74]
Queensland	• Offences against child under 12 years. • Offences against child of or over 12 years but under 16 years.[75]
South Australia	• Sexual intercourse against child under 14 years. • Sexual intercourse against child under 17 years. • Sexual intercourse against child under 18 years. • For indecent assault the maximum penalty is higher if the victim was a child under 14 years. • For gross indecency against a person under 16 years there is a single maximum penalty.[76]
Tasmania	• Offences are separated by the type of sexual conduct. A child is someone under 17 years. All child sexual offences in the Tasmanian Code have the same maximum penalty.[77]
Victoria	• Offences against child under 12 years. • Offences against child under 16 years. • Offences against child aged 16 or 17 years. • Grooming offences against a child under 16 years have a single maximum penalty.[78]
Western Australia	• Offences against child under 13 years. • Offences against child of or over 13 years but under 16 years. • Offences against child of or over 16 years but under 18 years.[79]
Canada	• Offences are separated by the type of sexual conduct and whether the offence is indictable or summary.[80]
UK	• Offences against child under 13 years. • Offences against child under 16 years.[81]
New Zealand	• Offences against child under 12 years. • Offences against a young person under 16 years.[82]

Table 7.1: Jurisdictional comparison of child sexual offences by age of child

7.80. The primary principle justifying a higher maximum penalty for offences against very young children is likely to be the desire to protect them because of their vulnerability to adult pressure and persuasion to engage in sexual activity when they do not understand the meaning or consequences of it. Secondly, sexual activity between children and adults is contrary to all societal norms. Both these principles may lead to the conclusion that severe maximum penalties are needed to mark society's abhorrence of sexual activity with young children and the younger the child the higher the maximum penalty ought to be. The age of 13 years may be thought to be an age where children will have started to be aware of what is inappropriate touching by an adult and may therefore be less susceptible to adult pressure and persuasion to engage in sexual activity with an adult.

7.81. However, the variation in the age below which a higher maximum penalty will be available in Australian jurisdictions suggests that there may not be an ideal age and, as we discuss in the previous section in relation to the age of consent, there may be a degree of arbitrariness in selecting the age. It may be that Tasmania has the preferable approach, which is to leave it to the sentencing judge to determine the seriousness of the offence taking into account the age of the victim. Further, whilst consistency between Australian jurisdictions is a desirable aim, it may not be possible to achieve given the existing differences between jurisdictions. Nevertheless, we welcome submissions as to whether Western Australia should raise, lower, maintain or abolish the age of 13 years under which a higher maximum penalty will apply to child sex offenders.

25. Should the age below which a higher maximum penalty for child sexual offences is available (13 years) be raised, lowered, maintained or abolished? If raised or lowered, what should the new age be?

Reform the mistake of age defence

7.82. For child sex offences in section 321 of the *Code*, where the child complainant must be of or over 13 years but under 16 years, it is a defence for the accused to prove, on the balance of probabilities,[83] that:

- They believed on reasonable grounds that the child was of or over the age of 16 years; and
- They are not more than three years older than the child (**mistake of age defence**).[84]

7.83. There is no comparable defence for offences in section 320 (where the child is under 13 years of age) or for offences in section 322 (where the child is under the accused's care, supervision

72 *Crimes Act 1900* (ACT) ss 55, 55A, 61, 61A.
73 *Crimes Act 1900* (NSW) ss 66A, 66B, 66C, 66DA – 66DB.
74 *Criminal Code 1983* (NT) s 127.
75 *Criminal Code 1899* (Qld) ss 215, 217, 218A, 218B.
76 *Criminal Law Consolidation Act 1935* (SA) ss 49, 56, 58.
77 See, eg, *Criminal Code Act 1924* (Tas) ss 124, 389(3).
78 *Crimes Act 1958* (Vic) ss 49A-49I, 49K-49M.
79 *Criminal Code Compilation Act 1913* (WA) ss 320, 321, 322.
80 *Criminal Code*, RSC, 1985, C-46 s 151.
81 *Sexual Offences Act 2003* (UK) ss 5-15A.
82 *Crimes Act 1961* (NZ) ss 132, 134.
83 *Indich v The Queen* [1999] WASCA 146, [14].
84 *Criminal Code Act Compilation Act 1913* (WA) s 321(9).

or authority).[85] The mistake of fact defence will also not be available in relation to these offences, as knowledge of the complainant's age is not an element of the offences.

7.84. Appendix 3 summarises the approaches taken to the mistake of age defence around Australia and in some international jurisdictions. It can be seen from this Appendix that in the NT and Queensland the defence operates similarly to that in Western Australia, but there is no restriction on the difference between the age of the accused and the age of the child.[86]

7.85. In Western Australia, prior to 2002, the mistake of age defence was available to accused persons of all ages, not only those accused who are within three years of the complainant's age. The limitation on the defence was introduced as part of the *Acts Amendment (Lesbian and Gay Law Reform) Act 2002*. That Act changed a number of laws in order to equalise the rights of homosexual and heterosexual people,[87] including providing that the age of consent is 16 years regardless of the participants' genders.

7.86. The then Western Australian Government's rationale for restricting the mistake of age defence to cases where the accused is not more than three years older than the child appears to have been a political response to a fear that lowering the age of consent to 16 years 'exposes boys under the age of 16 years to paedophilic behaviour from older men'. [88]

7.87. Besides such fears it is unclear what the policy reason is for restricting the mistaken belief as to age defence to those within three years of the complainant's age. Arguably, accused who are further in age from the child might be less able to gauge a child's age (based on factors such as the child's appearance) than those who are closer to the child's age.

7.88. In *Riggall v the State of Western Australia* Wheeler JA said:

> If the belief held by the accused was, in truth, both honest and reasonable, it is difficult to see, with respect, how making it available only to those within three years of the age of the complainant would provide additional protection for the young. A person who was genuinely mistaken about his or her sexual partner's age, believing them to be over 16, would, by definition, believe that they were engaging in conduct which was not proscribed by the criminal law and would, therefore, be unlikely to be deterred by s 321(9). The answer to that apparent difficulty may lie in the observation that the question of whether a belief was reasonable was a matter for a jury to decide. It may be that, in relation to this particular offence, Parliament considered that juries might be unduly gullible and sought, therefore, to limit their role.[89]

7.89. Addressing the purpose of the 2002 amendments, Wheeler JA further said:

> In my view, the 'mischief' at which the 2002 amendments to s 321 were aimed can be seen from the debates to be essentially the same as the mischief at which the 1992 legislation was aimed. That is, it was intended to protect children from abuse by those who would seek to prey on their vulnerability. It would be wrong for the court to

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85 Ibid s 321(9a).

86 *Criminal Code 1983* (NT) ss 127(4), 130(3C), 131(3), 131A(6), 132(5); *Criminal Code 1899* (Qld) ss 210(5), 213(4), 215(5).

87 For example, it repealed the offences of indecency and gross indecency that had been limited to acts between males, extended access to invitro-fertilisation technology to lesbian couples and single women, removed the restriction on partners in same sex relationships on adopting children, recognised the rights of the same-sex partners of deceased persons to make decisions about cremation and post-mortem examinations, and recognised the right of same-sex partners of deceased persons to make claims on the deceased's estate under the Inheritance Act.

88 *Parliamentary Debates*, Legislative Assembly, 14 November 2001, 5520 (Jim McGinty; Attorney General).

89 *Riggall v The State of Western Australia* [2008] WASCA 69, [45].

> fail to recognise, as Parliament undoubtedly recognised, that not every person under 16 is equally vulnerable in that sense, nor every offender equally predatory.[90]

7.90. The Scottish LC raised a similar argument:

> The current law on mistake as to age contains significant qualifications. It allows an accused to show that he had reasonable cause to believe that the child was of or over 16 years of age but the defence is only open to an accused who is himself under the age of 24. Furthermore, the defence is not available where the accused has previously been charged with a like offence. In the Discussion Paper we stated that this defence, sometimes referred to as the 'young man's defence', is unprincipled, and could be explained only in terms of a political compromise in the enactment of a previous version of the defence. Instead we viewed any question of the accused's own age as bearing on his credibility but that it should not be a formal restriction to raising the defence.[91]

7.91. In *The State of Western Australia v SJH* Wheeler JA said:

> So far as older children are concerned, s 321 sets out a hierarchy of penalties … Those penalties seem to me clearly to reflect a concern with disparity in power. … Section 321(9) provides a limited defence based both upon the belief of the offender as to the child's age and the age difference between the two, which again may be taken as an indicator of likely disparity in power.[92]

7.92. Wheeler JA did not spell out what she meant by a 'likely disparity in power' but it might be that her Honour meant to express that an older person is likely to have a greater ability, or should be expected to take a greater responsibility, to ascertain the age of their sexual partner, as opposed to a person who is closer to their young sexual partner's age.

7.93. The introduction of the age restriction in Western Australia in 2002 for what may be regarded as invalid reasons, and the fact that there is no such restriction in any comparable jurisdiction, raises a question as to whether that requirement should be maintained.

7.94. In the ACT, when raising the mistake of age defence in relation to a charge of sexual intercourse or gross indecency with a young person, the accused must not only prove that they believed on reasonable grounds that the child was above 16 years, but they must also prove that the child consented to the sexual activity.[93] This is also the case in New Zealand, in relation to a charge of sexual conduct with a child under 16.[94] In New Zealand the accused must also prove that they took reasonable steps to find out whether the child was of or over 16.[95]

7.95. In Western Australia, the mistake of age defence is not available where the child was under the accused's care, supervision or authority. This limitation is presumably based on an assumption that where an accused is in a position of care, supervision or authority they will either know, or ought to know, the child's age. However, some jurisdictions (for example Victoria and South Australia) allow the defence to operate even where the accused was in a position of care, supervision or authority.

7.96. Most Australian jurisdictions have a mistake of age defence for sexual offences against older children, where consent is not an element of the offence. However, there are marked

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90 Ibid [47].

91 Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) [4.60].

92 *The State of Western Australia v SJH* [2010] WASCA 40, [61].

93 *Crimes Act 1900* (ACT) ss 55(5)(a), 61(5).

94 *Crimes Act 1961* (NZ) s 134A.

95 Ibid.

differences between the way they operate. This suggests that there is no one best or model approach to this issue. Further, the requirement in ACT and New Zealand that there be proof that the complainant consented no matter what the accused thought about the age of the child is worthy of consideration. If the protective principle is the predominant purpose of the offences to which the defence applies, it may be that the defence should not apply unless not only did the accused believe that the victim was of an age at which they could consent to the sexual activity, but that they did in fact consent. Also worth consideration is the Canadian and New Zealand requirements that for the defence to operate the accused must have taken reasonable steps to ascertain the age of the complainant.

26. Should the mistake of age defence be amended in any way? For example:

- **Should the requirement that the accused be not more than three years older than the complainant be removed?**
- **Should the defence be limited to cases in which the complainant consented to the sexual activity?**
- **Should the accused be required to prove, on the balance of probabilities, that they took reasonable steps to ascertain the age of the complainant?**

Reform the lawful marriage defence

7.97. Lawful marriage is a defence to charges in section 322 of the *Code* involving sexual activity with a child of or over 16 years.

7.98. In its preliminary submission, the ODPP suggested that it might be appropriate to extend the defence of marriage to other types of relationships.[96]

7.99. The term marriage in section 330(9) of the *Code* must be interpreted as a reference to a marriage as defined in the section 5 of the *Marriage Act 1961* (Cth) being 'the union of two people to the exclusion of all others, voluntarily entered into for life'.

7.100. There are at least three options for reform to section 330 of the *Code*. The first is to repeal the provision. The second is to leave the defence but to clarify, as Victoria does, the meaning of marriage for the purpose of the section. The third is to expand the defence to other relationships, such as de facto relationships. The fourth option would be to leave the provision as it is.

7.101. In Western Australia, the term de facto relationship, when used in a statute, means:

> A relationship (other than a legal marriage) between 2 persons who live together in a marriage-like relationship.
>
> 2. The following factors are indicators of whether or not a de facto relationship exists between 2 persons, but are not essential —
>
> a. the length of the relationship between them;
>
> b. whether the 2 persons have resided together;
>
> c. the nature and extent of common residence;
>
> d. whether there is, or has been, a sexual relationship between them;

[96] Preliminary Submission 16 (ODPP) 6.

e. the degree of financial dependence or interdependence, and any arrangements for financial support, between them;

f. the ownership, use and acquisition of their property (including property they own individually);

g. the degree of mutual commitment by them to a shared life;

h. whether they care for and support children;

i. the reputation, and public aspects, of the relationship between them.

3. It does not matter whether —

a. the persons are different sexes or the same sex; or

b. either of the persons is legally married to someone else or in another de facto relationship.[97]

7.102. If the defence is to remain, principles of equality in a community, such as the Western Australia community, where many couples choose not to undergo a formal marriage ceremony, may support an extension of the defence to couples in de facto relationships.

7.103. At [8.50]−[8.58] we discuss whether the defence of lawful marriage should exist in relation to sexual offences against incapable persons and whether the term lawful marriage should be expanded to include de facto relationships. Similar issues arise as to whether the defence of lawful marriage should exist and whether it should be expanded to include de facto relationships in the context of sexual activity with a child of or over 16 years.

27. Should marriage continue to be a defence to charges involving sexual activity with persons of or over the age of 16 years? If so, should the defence be extended to other types of relationships or be amended in any other way?

Create a new similar age defence

7.104. In the ACT, Victoria and Tasmania there is similar age defence, which is a defence to sexual offences which applies where the accused person is close in age to the child complainant. Table 7.2 compares the approach in different jurisdictions to this issue. Western Australia does not have a similar age defence.

[97] *Interpretation Act 1984* (WA) s 13A.

Jurisdiction	Availability of defence
ACT	• Available for charges of sexual penetration of or commission of act of indecency against a child under 16 years. • Child must be of or above 10 years old. • The accused must not be more than 2 years older than the child. • The child must have consented to the relevant sexual activity.[98]
NSW	• Available for charges of sexual intercourse with child of or over 10 but under 16 years, sexual touching of a child of or over 10 but under 16 years, sexual act with/towards child of or over 10 but under 16 years, sexual intercourse with young person of or over 16 but under 18 years where the young person is under special care, sexual touching of young person of or over 16 but under 18 years where the young person is under special care. • Child must be of or over 14 years. • The accused must be not more than 2 years older than the complainant.[99]
NT, Queensland, South Australia , Western Australia and New Zealand	• No similar age defence available.
Tasmania	• Available for charges of sexual penetration of a child under 17 years, indecent act with a child under 17 years, procuring a child under 17 years, communication with intent to procure a child under 17 years. • If the child was of or above 15 years, the accused must not be more than 5 years older than the child. • If the child was of or above 12 years but less than 15 years, the accused must not be more than 3 years older than the child. • The child must have consented to the relevant sexual activity.[100]
Victoria	• Available for charges of sexual penetration of a child under 16 years. • The child must have been of or over 12 years. • The accused must not be more than 2 years older than the child. • The child must have consented to the relevant sexual activity.[101]

Table 7.2: Similar age defence by jurisdiction

98 *Crimes Act 1900* (ACT) ss 55(5), 61(5).
99 *Crimes Act 1900* (NSW) s 80AG.
100 *Criminal Code Act 1924* (Tas) ss 124(3), 125B(3), 125C(4), 125D(5).
101 *Crimes Act 1958* (Vic) s 49V.

7.105. Although a similar age defence is available in a range of jurisdictions, the age at which it becomes available in respect of sexual activity with a particular complainant varies. The complainant must be at least 10 years' old in the ACT but at least 12 years' old in Victoria and Tasmania. Additionally, in the ACT and Victoria, the accused must have been within two years of the child's age. In NSW, the complainant must be at least 14 years' old and the age difference between the accused and complainant cannot be more than two years. In Tasmania, the closeness in age that is required for the defence to be available varies depending on the child's age – for children 15 years or above a five-year age difference is permitted, whereas for children of or above 12 years but less than 15 years the defence is only available to accused persons who are within three years of the child's age.

7.106. To allow a defence of this sort is presumably based on three assumptions: firstly, that some children aged less than 16 years may be capable of consenting to sexual activity or at the very least exercising some autonomy in deciding whether to engage in sexual activity; secondly, that there may be circumstances in which sexual activity between children or young people is not exploitative or the result of an unequal wielding of power; and thirdly, that if both of the earlier assumptions are met then there may be circumstances in which a child under 16 years subjectively wishes to consent to sexual activity. Further, if the first two assumptions are met then arguably the protective principle does not justify criminalising young people's choices to participate in sexual activity. The autonomy principle would justify permitting the third assumption to take effect.

7.107. However, these assumptions and the differences in how the defence operates in other jurisdictions, raise questions: at what age should we consider that a child may be capable of consenting to sexual activity with a person who is close in age to them? How large an age gap should we permit? Should the permitted age gap vary depending on the child's age?

7.108. The *Code* does not allow children under 16 years to consent to sexual activity even with those close to them in age. However, for offences committed against a child of or over 13 and under 16 years lower maximum penalties apply for offenders who are under the age of 18 years, if the child is not under the offender's care, supervision or authority.[102]

7.109. In its submission to the ALRC's review of family violence, Legal Aid NSW contended that:

> An age of consent of 16 may well be out of touch with the sexual habits of many teenagers below this age and a fixed age of consent means that many teenagers engaging in consensual sex are committing a criminal offence.[103]

7.110. The ALRC noted that other stakeholders echoed this view, 'emphasising the need for provisions to "reflect contemporary practices in sexual relations between young people", provided such relations are consensual'.[104]

7.111. The Scottish LC has similarly observed that:

> There are problems in applying sexual offences relating to consensual sexual activity with young children to cases where the participants are themselves children. Many instances of children engaging in sexual contact with other children do not involve any degree of exploitation. Indeed, for many teenage children sexual exploration is

[102] *Criminal Code Act Compilation Act 1913* (WA) ss 321(7)(c), 321(8)(c).

[103] Legal Aid NSW, *Submission FV 219*, quoted in Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Response* (Final Report, October 2010) [25.42].

[104] Ibid [25.42], quoting National Association of Services Against Sexual Violence, *Submission FV 195*.

> regarded as a normal part of growing up. It seems quite inappropriate to criminalise consensual activities which in themselves involve no discernible social wrong.[105]

7.112. The Hong Kong LRC considered that there are three possible approaches to the issue of consensual sexual activity between persons who are 13 to 16 years of age:

- Consensual sexual activity between persons who are between 13 and 16 years of age is criminalised but with prosecutorial discretion being exercised as to whether a charge is brought;
- Consensual sexual activity between persons who are between 13 and 16 years of age is criminalised but exemption from liability is provided for where the teenagers are close in age; or
- Consensual sexual activity between persons who are between 13 and 16 years of age is not a criminal offence.[106]

7.113. The Hong Kong LRC concluded:

> Our view is that one cannot assume that sexual relationships between children will be fully consensual just because they are close in age.
>
> The protective principle would also mean that children should not be encouraged to engage in sexual activity before they are emotionally and physically ready to cope with the consequences.
>
> The fact that young people do engage in sexual activity is not a proper grounds for legalising the activity and giving them any form of encouragement to do so. The law should set parameters for young people's behaviour.
>
> … Prosecutorial discretion can ensure that only appropriate cases are brought to court. Cases not involving sexual exploitation can be dealt with by cautions … We therefore maintain the view that it is desirable to have guidelines for the exercise of prosecutorial discretion.[107]

7.114. In light of the competing arguments raised in the above material, we are interested to hear your views on whether Western Australia should introduce a similar age defence and if so, for which child sex offences, and what the permitted gap between the participants should be.

28. Should the law allow a child of a certain age to consent to sexual activity with persons who are close to the child's age? If so, what should the age of the child be and what should be the permitted age gap between the participants?

Reform the offence of persistent sexual conduct with a child under 16 years

7.115. As noted above, section 321A(4) criminalises persistent sexual conduct with children under the age of 16 years. This type of offence has recently been considered by the Royal Commission into Institutional Responses to Child Sexual Abuse (**the Royal Commission**). It recommended that each state and territory government should amend its relevant offence to largely mirror the comparable Queensland offence,[108] but with additional provisions stating the

[105] Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) [4.52].
[106] Law Reform Commission of Hong Kong, *Review of Substantive Sexual Offences* (Report, December 2019) [3.49].
[107] Ibid [3.51]-[3.54].
[108] *Criminal Code Act 1899* (Qld) s 229B.

offence applies retrospectively to sexual acts that were unlawful at the time they were committed.[109]

7.116. The *actus reus* of the Queensland offence is the maintaining of an unlawful sexual relationship with a child.[110] Indicia of maintaining a relationship include the duration of the alleged relationship, the number of acts and the nature of acts engaged in.[111] All members of the jury must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship involving unlawful sexual acts existed.[112] The jury must be satisfied that more than one unlawful sexual act occurred,[113] but the prosecution does not have to particularise the acts. The jury need not be satisfied of the particulars of any act and jury members need not be satisfied about the same unlawful sexual acts.[114] The provision allowing the jury not to agree on two or more unlawful sexual acts has been held not to offend Chapter III of the *Commonwealth Constitution*.[115]

7.117. In making its recommendation, the Royal Commission was strongly influenced by the findings of memory research conducted on its behalf.[116] Those findings included that it should be expected complainants will find it difficult to provide particulars of child sexual abuse because:

- A person will only encode in their memory information they notice or attend to during an event. There is a rapid decline in memory after the event, so many aspects that were attended to during the event will be forgotten soon after if they were not encoded into long term memory. A person will not be able to retrieve from memory details that they did not encode during the event or that they have not consolidated into long term memory.
- Research indicates both that children are not necessarily able to think in terms of temporal details and that the scantness of temporal detail does not mean the memory is otherwise inaccurate.
- In respect of repeated events people, particularly children, are likely to have good recall of the events' core features – what usually or always happened – but are likely to have more difficulty recalling details that changed between events.
- In respect of a series of repeated events adults are likely to have better memories of the first event and the most recent event, but research is more limited about children's memory of first and last events.[117]

7.118. The Royal Commission considered it important that there be an offence which does not require particularisation which is inconsistent with the ways in which chid complainants are likely to be able to remember the events in question, particularly if there were repeated occasions of abuse.[118] The Royal Commission said:

> Many children who are subjected to repeated occasions of child sexual abuse in similar circumstances are unlikely to be able to distinguish the particular occasions of

[109] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Parts III-VI, 2017) 74.
[110] *Criminal Code Act 1899* (Qld) s 229B(1); *R v LAF* [2015] QCA 130, [4].
[111] *R v DAT* [2009] QCA 181, [17].
[112] *Criminal Code Act 1899* (Qld) s 229B(3).
[113] Ibid s 229B(2).
[114] Ibid s 229B(4).
[115] *R v CAZ* [2011] QCA 231, [52]-[53]. The High Court refused to grant special leave to appeal on this point: Transcript of proceedings, *CAZ v The Queen* (High Court of Australia, B26/2012, French CJ, Crennan J, 5 October 2012) T354-369. The High Court again refused special leave to appeal in *MAW v The Queen* (High Court of Australia, B20/2008, Kirby J, Heydon J, Kiefel J, 30 September 2008) 208-233.
[116] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Parts III-VI, 2017) 65.
[117] Ibid 61-65.
[118] Ibid 65-66.

> abuse from each other. Many children may have composite memories of repeated occasions of abuse and may recall events and give evidence in that form. Even as adults, survivors may be in no better position to distinguish particular occasions of abuse from each other than they were as children. These circumstances are features of this type of abuse rather than any indication that the account that the victim or survivor has given is untrue or unreliable.[119]

7.119. For these reasons, the Royal Commission recommended the enactment of an offence substantially based on the Queensland offence which focuses on the existence of a relationship rather than the occurrence of a number of unlawful acts.[120]

7.120. The Queensland offence is titled 'Maintaining a sexual relationship with a child'.[121] The Royal Commission expressed concern about the use of the word relationship given the exploitative nature of child sexual abuse.[122] However the Royal Commission ultimately recommended an offence with the same title because it considered the use of the term relationship may focus the jury's attention on what it needs to be satisfied of, being the existence of a relationship and not particular underlying acts.[123] Further, the Royal Commission was comforted by the fact that the Queensland offence has been considered by the Queensland Court of Appeal on a number of occasions and the High Court has twice refused special leave to appeal in relation to convictions for the Queensland offence.[124]

7.121. The Royal Commission received a number of submissions about unfairness created by the retrospective action of many persistent child sexual abuse offences exposing the offender to much higher maximum penalties than applied to the individual acts of abuse at the time they were committed.[125] As a result its recommendations include that the ideal offence should apply retrospectively, but only to sexual acts that were unlawful at the time they were committed, and that sentencing courts should be obliged to have regard to any lower statutory maximum penalties that would have applied if the offender was charged and convicted of individual offences at a time proximate to their occurrence.[126]

7.122. The Royal Commission recommended all Australian jurisdictions amend their persistent child sexual offences so that:

- The *actus reus* is the maintaining of an unlawful sexual relationship with a child (rather than the occurrence of a specified number of sexual acts);
- An unlawful sexual relationship is established by more than one unlawful sexual act;
- The trier of fact must be satisfied beyond reasonable doubt that the unlawful sexual relationship existed but, where the trier of fact is a jury, jurors need not be satisfied of the same unlawful sexual acts;
- The offence applies retrospectively but only to sexual acts that were unlawful at the time they were committed; and

[119] Ibid 75.
[120] Ibid 68.
[121] *Criminal Code Act 1899* (Qld) s 229B.
[122] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Parts III-VI, 2017) 71.
[123] Ibid.
[124] Ibid 73.
[125] Ibid 69.
[126] Ibid.

- On sentencing, regard is to be had to relevant lower statutory maximum penalties if the offence is charged with retrospective application.[127]

7.123. The Western Australian Government has accepted, in principle, the Royal Commission's recommendation, but has not yet introduced a Bill to give effect to this in principle acceptance.[128]

29. Should the offence of persistent sexual conduct with a child under the age of 16 be amended in any way? If so, how should it be amended?

Permit the prosecution to charge a course of conduct as a single count

7.124. In some jurisdictions legislation permits the prosecution to charge what would otherwise be multiple counts of the same sexual offence as a single count on the indictment. In Victoria, the *Criminal Procedure Act 2009* (Vic) allows an indictment to charge a course of conduct as a single count on the indictment.[129] Similar provisions exist in the United Kingdom (**UK**)[130] and New Zealand.[131]

7.125. Western Australia does not have a course of conduct provision for child sexual offences. However, the concept is similar to that in the *Criminal Procedure Act 2004* (WA) which allows for multiple counts of assault, illegal possession of an object or stealing to be charged as one offence.[132] However, the provisions in Victoria, New Zealand and the UK apply to sexual charges of all types and also to charges which occurred on separate occasions (whereas the Western Australian provision in relation to assault requires that the different assaults occurred as part of the one incident).

7.126. Under the Victorian legislation the prosecution must prove beyond reasonable doubt that the occasions constituting an offence committed by the accused, taken together, amount to a course of conduct having regard to their time, place or purpose of commission or any other relevant matter.[133] The prosecution need not prove the number of incidents, dates, times, places, circumstances or occasions or that there were any distinctive features differentiating any of the incidents or the general circumstances of any particular incident.[134]

7.127. The Explanatory Memorandum states that Victoria's Parliament intended the complainant would be permitted to give evidence:

> That the offending occurred on a regular basis (such as every week or month, or whenever mum went on night shift). Where there is a large gap in time between offending, it may be difficult to conclude there was a course of conduct. However, it may be that there are two episodes of offending separated by a 12 month gap.
>
> In relation to place, there may have been a regular place where these offences occur, such as the child's bedroom. However, if the incidents occurred in different places,

[127] Ibid 74 and Rec 21.

[128] Western Australian Government, *The WA Government's Six-Month Response to Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse* (Department of Premier and Cabinet, 2019) <https://www.wa.gov.au/government/publications/the-wa-governments-six-month-response-recommendations-of-the-royal-commission-institutional-responses-child-sexual-abuse>.

[129] *Criminal Procedure Act 2008* (Vic) sch 1 cl 4A.

[130] *Criminal Procedure Rules 2010* (UK) rule 14.2(2).

[131] *Criminal Procedure Act 2011* (NZ) s 20.

[132] *Criminal Procedure Act 2004* (WA) sch 1, rule 8.

[133] *Criminal Procedure Act 2008* (Vic) sch 1, cl 4A(8).

[134] Ibid sch 1, cl 4A(10).

> this will not preclude a course of conduct from being established, as the course of conduct may be completely opportunistic. In such circumstances, a higher degree of regularity may be more important in establishing the course of conduct.
>
> In relation to purpose of commission, in most cases, the purpose will be sexual gratification or exercising power over the victim.[135]

7.128. The Victorian course of conduct provision explicitly amends the common law to permit the complainant to give evidence of what the accused 'would do' (that is, what would typically or routinely occur).[136]

7.129. The Victorian Director of Public Prosecution's policy for using course of conduct charges expresses a preference for using a substantive charge and requires the prosecutor to consider whether the charge adequately reflects the criminality of the offending and whether there is a reasonable explanation as to why the state of the evidence and/or the complainant's allegations are sparse or lack detail as to dates or exact circumstances.[137] The policy provides that a course of conduct charge is not to be used simply to overcome the evidentiary deficiencies of a superficial investigation and that a course of conduct charge should not be used merely as an alternative method of prosecuting what would otherwise be a series of substantive charges.[138]

7.130. In its review of sexual offences, the Victorian Department of Justice noted that the Victorian course of conduct provision will not suit all cases of repeated child sexual abuse.[139] For example, it may be hard to argue that a small number of incidents over a long period constitutes a course of conduct.[140] Also, the Victorian legislation requires the multiple incidents to all be examples of the same type of offending.[141]

7.131. The Royal Commission considered that course of conduct provisions may be helpful where the repeated sexual abuse was of the same kind (for example, all penetrative sexual offences or all indecent assaults) as it may 'address the difficulties where abuse has been repeated so often and in such similar circumstances as to make the identification of individual occasions impossible for the complainant'.[142]

7.132. The Royal Commission noted that the Queensland offence of maintaining an unlawful sexual relationship with a child and the Victorian course of conduct charge provision focus on different aspects of the problem of persistent child sexual abuse and how complainants remember and give evidence. It concluded that it is preferable that jurisdictions have both provisions available 'so that the prosecution could choose which one to use on a case-by-case basis and having regard to the evidence that was available in the case'.[143]

7.133. The Royal Commission recommended that State and Territory governments should:

- Consider introducing legislation to establish legislative authority for course of conduct charges in relation to child sexual abuse offences if legislative authority may assist in using course of conduct charges; and

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135 Explanatory Memorandum, Crimes Amendment (Sexual Offences and Other Matters) Bill 2014 (Vic) 26-7.
136 Ibid 28-9.
137 Director of Public Prosecutions Victoria, *Director's Policy – Course of Conduct Charges* (2015) [30]-[32].
138 Ibid [31]-[32].
139 Department of Justice (Vic), Criminal Law Review Division, *Review of Sexual Offences* (2013) [12.1.5].
140 Ibid.
141 Ibid.
142 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Parts III-VI, 2017) 67.
143 Ibid 70.

- Consider providing for any of the two or more unlawful sexual acts that are particularised for the maintaining an unlawful sexual relationship offence to be particularised as courses of conduct.[144]

7.134. The Western Australian Government has accepted, in principle, the Royal Commission's recommendation, but has not yet introduced a Bill to give effect to this in principle acceptance.[145]

30. Should the *Code* permit the prosecution to charge a course of conduct as a single count on the indictment? If so, how should this power be framed?

Change the names of the offences

7.135. At [4.26]- [4.29] we discuss whether sexual penetration without consent should be referred to as rape or sexual intercourse or some other term. Similar issues arise as to whether the term sexual penetration of a child should be replaced with rape, sexual intercourse or some other term.

7.136. At [6.29]−[6.31] we discuss whether indecent assault should be referred to as sexual touching, sexual assault or some other term. Similar issues arise as to whether the word indecent when used in relation to sexual offences against a child (indecent act, indecently deals and indecently records) with a child should be replaced with the word sexual or some other term.

7.137. We welcome submissions about these issues and other terminology issues.

31. Should there be any changes to the terminology used to describe child sexual offences, such as replacing sexual penetration and/or indecent with other terms?

32. Should any other changes be made to the sexual offences against children?

[144] Ibid 74, Recs 23 and 24.

[145] Western Australian Government, *The WA Government's Six-Month Response to Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse* (Department of Premier and Cabinet, 2019) <https://www.wa.gov.au/government/publications/the-wa-governments-six-month-response-recommendations-of-the-royal-commission-institutional-responses-child-sexual-abuse>.

8. Sexual offences against incapable persons

Chapter overview

This Chapter examines section 330 of the *Code*, which contains various sexual offences that can be committed against persons who, at the time of the sexual activity, have a mental impairment which makes them incapable of understanding the nature of the act or of guarding themselves against sexual exploitation ('incapable persons'). It considers six possible options for reform: changing the language used in the provision; reforming the definition of 'incapable person'; reforming the sexual acts which are prohibited; reforming the lawful marriage defence; permitting sexual activity between incapable persons; repealing specific offences against incapable persons.

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Introduction

8.1. Section 330 of *Code* contains various sexual offences that can be committed against a person that the *Code* refers to as an 'incapable person'. This is a person who, at the time of the sexual activity, has a mental impairment which makes them incapable of understanding the nature of the act or of guarding themselves against sexual exploitation.

8.2. We are aware of the importance of using non-stigmatising language when referring to the people we discuss in this chapter, and we consider the terminology that should be used in [8.13]-[8.17]. Throughout this chapter we use the term incapable person, as that is the term that is used in the *Code*. In doing so, we are not suggesting that it is an appropriate term. We are interested to hear your views on the best terminology to use.

8.3. The maximum penalties for sexual offences against incapable persons range from 7 years' imprisonment to 20 years' imprisonment depending on the offence committed and the circumstances in which it is committed. We discuss maximum penalties in Chapter 16.

8.4. Section 330 also sets out certain sentencing requirements that must be complied with in specific circumstances, such as where the offence is committed in the course of an aggravated home burglary or by a juvenile offender. We also discuss these statutory sentencing requirements in Chapter 16.

8.5. Since 2017, 55 people have been charged with sexual offences against incapable persons (see Appendix 2). Almost half of these charges were laid in 2022. We would be interested to hear if there is a reason for this recent increase in the number of people charged with these offences.

Elements and definitions

8.6. Section 330 of the *Code* contains five sexual offences which can be committed against an incapable person:

- Sexual penetration.
- Procuring, inciting or encouraging sexual behaviour.
- Indecent dealing.
- Procuring, inciting or encouraging an indecent act.
- Indecent recording.

8.7. These are the same five types of sexual act that are prohibited in relation to children. The definitions of these terms, and some possible reforms to them, are outlined in Chapter 7.

8.8. To establish an offence under section 330, the prosecution must prove the following three matters beyond reasonable doubt:

i. The accused committed the relevant sexual act (for example, sexual penetration);

ii. The complainant was an incapable person; and

iii. The accused knew or ought to have known that the complainant was an incapable person.

8.9. An incapable person is defined as:

> a person who is so mentally impaired as to be incapable —
>
> (a) of understanding the nature of the act the subject of the charge against the accused person; or
>
> (b) of guarding himself or herself against sexual exploitation.[1]

8.10. The *Code* defines mental impairment to mean 'intellectual disability, mental illness, brain damage or senility'; and mental illness to mean 'an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but [it] does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli'.[2]

8.11. The prosecution is not required to prove that the complainant did not consent to the sexual act. Lack of consent is not an element of any of the offences created by section 330.

8.12. It is a defence for the accused to prove that they were married to the incapable person.[3]

Possible reforms

Change the language used in the provision

8.13. The Western Australian model of specific sexual offences against incapable persons is not reflected in all Australian jurisdictions. Nevertheless, all jurisdictions use similar terminology to provide additional protections of some kind to people with relevant incapacities and

1 *Criminal Code Act Compilation Act 1913* (WA) s 330(1).
2 Ibid s 1.
3 Ibid s 330(9).

vulnerabilities. Table 8.1 indicates the terms used in other jurisdictions, whether they be used in specific offences or in other ways.

Jurisdiction	Term
ACT	Vulnerable person.[4]
NSW and SA	Person with a cognitive impairment.[5]
NT	Mentally ill or handicapped person.[6]
Queensland	Person with an impairment of the mind.[7]
Tasmania	Person with mental impairment.[8]
Victoria	Person with cognitive impairment or mental illness.[9]
Western Australia	Incapable person.[10]
Canada	Person with disability.[11]
UK	Persons with a mental disorder[12].
New Zealand	Person with significant impairment.[13]

Table 8.1: Alternative terminology for 'incapable persons'

8.14. The *Code* should use terminology that is respectful, and not insulting or demeaning. We are aware of efforts in literature and policy formation to encourage the use of positive language (for example: ability rather than disability and capacity not incapacity).[14] We are also aware of what has been referred to as 'the euphemism treadmill' – that is, language which appears at a time to be respectful, but which eventually comes to have a derogatory meaning.[15]

8.15. Arguments against the use of the term incapable person include:

- It does not make clear the nature of the incapability.
- It suggests that everything about the person is incapable or abnormal.
- It does not use positive language.

4 *Crimes Act 1900* (ACT) s 36A.
5 *Crimes Act 1900* (NSW) s 66F; *Criminal Law Consolidation Act 1935* (SA) ss 49(6), 51.
6 *Criminal Code 1983* (NT) s 130(2).
7 *Criminal Code 1899* (Qld) s 216(1).
8 *Criminal Code 1924* (Tas) s 126.
9 *Crimes Act 1958* (Vic) ss 52B-E.
10 *Criminal Code Compilation Act 1913* (WA) s 330.
11 *Criminal Code RSC 1985* C-46 s 153.1
12 *Sexual Offences Act 2003* (UK) ss 30-33, 34-37, 38-41.
13 *Crimes Act 1961* (NZ) s 138.
14 Law Reform Commission (Ireland), *Sexual Offences and Capacity to Consent* (Report No LRC 109-2013, November 2013) 1.
15 Ibid.

- It does not distinguish between people who have no capacity to give or withhold consent and those who have some capacity but are vulnerable to exploitation.

8.16. If these arguments are thought to be persuasive a different term should be used, such as those used in other jurisdictions (see Table 8.1). For example, one option would be to use the term 'person with disability', as is done in Canada. However, such a term appears to be too wide, as on face value it would include many people who can and do consent to sexual activity, particularly people with physical disabilities. Another option is to attempt to exclude such persons by using a term such as person with severe disabilities. However, this phrase could also be considered too wide, as again many people with severe disabilities can and do consent to sexual activity and are not vulnerable to sexual abuse.

8.17. Another option would be to use the phrase 'person with relevant incapacities or vulnerabilities', and to define this term in the *Code*. This option has the advantage of being more accurate and fulsome. However, it is also wordy and one view is that it is therefore likely to be abbreviated in some way which will mitigate its advantages. We are interested to hear your views on what term should be used in the *Code*.

33. Should the *Code* use a different term to incapable persons? If so, what term should be used?

Reform the definition of incapable person

8.18. Different jurisdictions define the terms used in their legislation in different ways. The approaches taken by the other Australian jurisdictions, as well as some international jurisdictions, are summarised in Appendix 4.

8.19. When criminalising sexual activity with incapable persons there are two approaches to defining the category of person to whom the offences apply.

8.20. The first is the status approach, which asks whether the victim meets the definition of whichever term is used, such as mentally impaired person, and if so deems them unable to consent to sexual activity in any circumstances.[16]

8.21. The second is the functional approach which:

> Recognises that a person whose capacity is limited may be capable of making decisions in one area but may not have the requisite capacity to understand the nature and consequences of making a decision in another area or be able to communicate their decision on the matter. Thus, it rejects the idea that once capacity has been established in one area it is seen as conclusive proof of capacity in other areas regardless of the circumstances. The functional approach defines capacity as the ability, with suitable assistance if needed, to understand the nature and consequences of a decision within the context of the available range of choices; and to communicate that decision. It also recognises that capacity or lack of capacity is not a permanent state but may fluctuate.[17]

8.22. When recommending a functional test of incapacity, the Irish LRC argued that:

> A person's state of health or ill-health is not and should not be seen as being directly connected with a person's decision-making capacity. This is because illness, whether physical or mental, often has no effect on a person's decision-making capacity,

[16] Ibid [1.08].
[17] Ibid [1.09].

> though it sometimes does. The key point is to recognise that decision-making capacity and health should not be conflated …
>
> While a relevant person's lack of capacity to consent may arise because of (a) a disability, (b) ill health or (c) any other reason, the fact of disability or of ill health or the presence of any other reason does not, in itself, mean that the relevant person lacks capacity to consent…[18]

8.23. According to the Irish LRC, the functional approach is the most commonly used basis internationally for criminalising sexual activity against people with relevant incapacities and vulnerabilities.[19] For example, the Irish LRC noted that in the USA most States define capacity in a functional way, specifically as the ability to understand the sexual nature of an act and the voluntary nature of participation in a sexual act.[20] A small number of states also require an understanding of the consequences of an act, including the moral dimension of sexual conduct.[21]

8.24. The Western Australian definition requires the person to have a mental impairment which has caused at least one of the specified incapacities (to understand the nature of the act the subject of the charge or to guard themselves against sexual exploitation). The Court of Appeal has said that the phrase 'guarding against sexual exploitation' should be given its ordinary everyday meaning, which incorporates being capable of taking the appropriate precautions against or resisting being taken advantage of by someone for the perpetrator's own sexual gratification.[22]

8.25. This is similar to the New Zealand definition which requires a significant impairment which has caused one or more incapacities. The incapacities are related to sexual activity. The Western Australia and New Zealand definitions are examples of combinations of the status and functional approaches.

8.26. The definitions in the ACT, NSW, South Australia, NT and Queensland are fundamentally status approaches. Although they require consideration of whether a particular condition (disability/disorder/disease/illness) has caused a particular incapacity, the incapacity is general and not specific to sexual activity or understanding thereof (for example, a reduced ability to communicate, learn, be mobile or participate in community life (ACT); to require supervision or social habilitation (NSW/SA); to be unable to manage themselves or exercise responsible behaviour (NT); to have substantially reduced communication, social interaction or learning or to require support (Queensland)). Thus, they do not use a functional approach to the question of whether a victim is capable of understanding the nature of a sexual act or their ability not to participate in it, or whether they can communicate their decision. Functionality is only relevant to the determination of whether they have the relevant status.

8.27. The Irish LRC considered that there is a need to ensure 'the threshold of understanding … be sufficiently high to protect people who do not have the ability to understand what they are consenting to even with the benefit of assisted decision-making support and accommodation but not so high that people who may have capacity to consent are prohibited from having a sexual life'.[23]

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18 Ibid [12]-[15].

19 Ibid [2.03].

20 Ibid [3.23].

21 Ibid.

22 *Cox v The State of Western Australia* [2011] WASCA 30.

23 Law Reform Commission (Ireland), *Sexual Offences and Capacity to Consent* (Report No LRC 109-2013, November 2013) [3.09].

8.28. The Irish LRC ultimately recommended a functional definition based on whether the person has three abilities:

- To understand the nature and reasonably foreseeable consequences of sexual activity;
- To understand relevant information (including the likely consequences of making available choices, for example, the decision as to whether or not to use contraception); and
- To communicate that decision.[24]

8.29. The advantage of a purely functional approach is that it is unnecessary for the legislature to attempt to define all the circumstances that may cause the relevant incapacity. The legislature need only state the functions the absence of which will trigger the application of the protective laws. It is then for the decider of fact to determine whether the evidence adduced at trial proves that the relevant incapacity exists. If it does, the victim will meet the test for the added protections in the law. As we discuss below, that may be that the law will deem that they did not consent to the relevant sexual activity, or consent may be irrelevant to proof of a sexual offence committed against them or some other protection.

8.30. Deciding the question of function may be difficult as many people with relevant incapacities and vulnerabilities have varying degrees of functioning depending on the task, their familiarity with the task and the environment in which they are called on to exercise that function. To rely solely on a functional approach may require people with relevant incapacities and vulnerabilities to give evidence, be cross examined and to endure the stressful court process so that their relevant functioning can be determined.

8.31. The advantage of a purely status approach is that once the appropriate status categories are determined by the legislature, deciders of fact only need to decide whether the evidence at trial proves that the victim meets the threshold test for one of those categories. This may be achieved by relying on expert evidence rather than by testing the victim in evidence. This is because the status categories are often medical or psychiatric statuses. However, the status approach may consequently be viewed as being less likely to produce a just result, as the determination of whether a complainant has the relevant status will not necessarily reflect their functional capacities. Further, a pure status test may insult people with the specified statuses, as the statutory assumption that people with a specified status require additional protections because they cannot guard themselves against sexual abuse or understand the nature and quality of a sexual act may be wrong in particular instances.

8.32. Western Australia's combination of the two approaches may be seen as an attempt to meet the deficiencies of the status approach by the addition of a functionality test. However, by combining the two, it may be considered that the advantages of using only one approach have been lost.

8.33. The *Code's* definition of incapable person incorporates the definitions of mental impairment and mental illness, also defined terms in the *Code*. The definition of mental impairment is broad but it has limitations, principally by virtue of the limitations in the definition of mental illness. For example, it does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli. Thus, it does not include drug induced mental illnesses.

[24] Ibid [3.04]-[3.60].

34. Should the definition of incapable person be amended in any way? If so, how should it be defined?

35. Should the definitions of mental illness and/or mental impairment that apply in relation to sexual offences against incapable persons be amended in any way? If so, how should they be defined?

Reform the prohibited sexual acts

8.34. There are differences between jurisdictions in the additional protections that the criminal law provides to persons with relevant incapacities and vulnerabilities. Appendix 5 compares the types of sexual behaviour that are criminalised in different jurisdictions and whether those offences can be committed by anyone or only by carers.

8.35. In Western Australia, the same five sexual acts that are prohibited against children are prohibited against incapable persons. A similar list of sexual acts is prohibited in Queensland. Other Australian States and Territories have more limited status-based protections, which often apply only where the accused provides care or services the victim. However, many of them have a more expansive definition of consent or an extensive list of circumstances in which there is not consent. These provide functional protections.

8.36. In the UK there are separate offences which involve using inducements, threats or deception to procure sexual activity with a person with a mental disorder.[25] The Irish LRC noted that such offences are:

> Designed to protect adults whose mental impairment is not so severe that they are unable to make a choice but who are nevertheless vulnerable to relatively low levels of inducement, threats or deception. They encompass persons whose capacity is not of such a character that it renders the complainant unable to choose whether or not to engage in the sexual activity. In other words, the provisions apply where the ability to choose is easily overridden and agreement to sexual activity can be secured through relatively low levels of inducement, threat or deception. They recognise that threats that would probably be ignored by others can assume a greater significance for a person with intellectual disability.[26]

8.37. There is also a distinction between jurisdictions as to whether the relevant offence can only be committed by carers (however that term is defined) or whether it can be committed by anyone. There are further differences in how jurisdictions treat the issue of the accused's knowledge of or state of mind about the complainant's relevant incapacities and vulnerabilities.

8.38. In the ACT, NT, Tasmania, Victoria and the UK the relevant offences can only be committed by carers and the prosecution does not have to prove any specific knowledge or state of mind.[27] Where it exists, a mistake of fact defence will relieve an accused of liability if there is evidence to raise the defence.

8.39. In Western Australia, Queensland and New Zealand the relevant offence can be committed by anyone, not just carers.[28] In Western Australia and New Zealand, the prosecution must

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[25] *Sexual Offences Act 2003* (UK) s 34.

[26] Law Reform Commission (Ireland), *Sexual Offences and Capacity to Consent* (Report No LRC 109-2013, November 2013) [2.43].

[27] *Crimes Act 1900* (ACT) s 36A; *Criminal Code 1983 (NT)* ss 130(2), 192(2); *Criminal Code 1924* (Tas) s 2A, 126; *Crimes Act 1958* (Vic) ss 52B-52E; *Sexual Offences Act 2003* (UK) ss 30-33, 34-37, 38-41.

[28] *Criminal Code* Compilation Act 1913 (WA) s 330; *Criminal Code 1899* (Qld) s 216(1); *Crimes Act 1961* (NZ) s 138.

prove the accused knew the complainant was an incapable person/person with a significant impairment. In Queensland this is not the case.

8.40. In South Australia, the law distinguishes between offences by service providers, for whom the prosecution does not have to prove any knowledge or state of mind, and offences by others for whom the prosecution must prove the complainant 'is by reason of intellectual disability unable to understand the nature or consequences of sexual intercourse'.[29] Similarly, in NSW, which has both an offence directed specifically at carers and an offence directed at anyone, the prosecution does not have to prove that carers had any particular knowledge or state of mind, whereas in the offence that is not specific to carers the prosecution must prove the accused intended to take advantage of the complainant's cognitive impairment.[30]

8.41. The UK also distinguishes between offences committed by carers and offences committed by anyone. For offences committed by carers there is a rebuttable presumption that the accused knew or could reasonably be expected to know the complainant had a mental disorder. For offences committed by anyone the prosecution must prove the accused knew or could reasonably be expected to know the complainant had a mental disorder.[31]

8.42. In Victoria, the relevant offence can only be committed by treatment or service providers. In such cases, it is presumed that the accused knew about the existence of the complainant's cognitive impairment or mental illness. The accused can, however, rebut this presumption by proving on the balance of probabilities that they reasonably believed the complainant did not have a cognitive impairment or mental illness.[32]

8.43. The VLRC noted that while persons providing medical or therapeutic services to a person with cognitive impairment will generally be aware that the person has a cognitive impairment, this will not necessarily be the case, particularly in the case of those providing therapeutic rather than medical services.[33] The VLRC gave the example of a physical therapist who conducts an exercise class with a group of people with various disabilities who may be unaware of the nature of their various disabilities. In this situation, the therapist might engage in a sexual act with a person with a cognitive impairment without being aware that the person had a cognitive impairment.[34] The VLRC recommended that where the services are not related to the cognitive impairment, the service provider should not be guilty of the offence unless they knew that the victim had a cognitive impairment.[35]

8.44. Arguments in favour of special offences for carers include:

- The community, the families of persons with relevant incapacities or vulnerabilities, and the persons themselves place great trust in carers. Carers have unique access to and knowledge of the persons under their care. A separate offence category recognises this trust, responsibility, knowledge and access and identifies and appropriately stigmatises those who breach it.

29 *Criminal Law Consolidation Act 1935* (SA) s 46, 49(6), 51.
30 *Crimes Act 1900* (NSW) s 66F.
31 *Sexual Offences Act 2003* (UK) ss 30-33, 34-37, 38-41
32 *Crimes Act 1958* (Vic) s 52I.
33 Victorian Law Reform Commission, *Sexual Offences* (Final Report, 2004) [6.47].
34 Ibid [6.48].
35 Ibid.

- The prevalence of abuse by carers; in most studies carers represent a significant percentage of those who sexually assault people with relevant incapacities or vulnerabilities.[36]
- There is under-reporting of sexual abuse against persons with relevant incapacities or vulnerabilities, and victims may be particularly reluctant to complain about offences committed by carers for reasons including the carer's position of control and dominance, the victim's ongoing dependence on the carer's services and a lack of education.[37] The existence of a specific offence may encourage greater reporting.

8.45. Arguments against special offences for carers include:

- It is unnecessary and duplicitous to have a special offence as anyone is capable of committing such an offence, and variations in facts and their aggravating or mitigating features can be recognised by the court at the sentencing stage.
- Disability is a social construct created by social norms that fail to incorporate the diversity of human beings and different ways of living. In this context there should be 'one law of sexual assault that recognises the similarities and differences among all [people] rather than a distinct provision that tries to carve out a group of [people] as "different" from other [people]'.[38]

8.46. The laws of the jurisdictions compared in Appendix 5 differ in many respects. Principally these relate to:

- The terminology used to describe the victims.
- Whether a mainly functional or status approach is taken to the protection of persons with relevant disabilities and vulnerabilities.
- Whether it is an element of the offence that the accused was in a relationship of trust with the victim.
- Whether it is an element of the offence that the accused knew that the victim had a relevant disability or vulnerability.
- Whether it is an element of the offence that proof of additional circumstances, such as mala fides, harm or financial benefit is required.
- Whether there are separate offences that can only be committed by carers.

8.47. At [8.19]−[8.32] we discuss how both status and functional based approaches have advantages and limitations with respect to their ability to protect persons with relevant disabilities.

8.48. If it is thought that additional protections are required beyond those provided by other sexual offences, which usually require proof of lack of consent, these may be provided by status-based protections. Possibilities include:

- A full suite of sexual offences against persons with relevant disabilities and vulnerabilities (however described) that do not require proof of lack of consent.

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[36] J Benedet and I Grant, 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief' (2007) 52 *McGill Law Journal* 243, 255, citing D Sobsey, *Violence and Abuse in the Lives of People with Disabilities: The End of Silent Acceptance?* (Paul H Brookes, 1994) 69.

[37] J Benedet and I Grant, 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief' (2007) 52 *McGill Law Journal* 243, 257.

[38] J Benedet and I Grant, 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues' (2007) 52 *McGill Law Journal* 515, 517-8.

- A limited number of serious sexual offences against persons with relevant disabilities and vulnerabilities (however described) that do not require proof of lack of consent.
- A full suite of sexual offences or a limited number of serious sexual offences against persons with relevant disabilities and vulnerabilities (however described) that do not require proof of lack of consent, committed by persons who provide care and/or services to those persons.
- A full suite of sexual offences or a limited number of serious sexual offences against persons with relevant disabilities and vulnerabilities (however described) that do not require proof of lack of consent, committed by persons who provide care and/or services to those persons and who engaged in the activity with the intention of taking advantage of the victim.
- A full suite of sexual offences or a limited number of serious sexual offences against persons with relevant disabilities and vulnerabilities (however described) that are contrary to community standards and that do not require proof of lack of consent, committed by persons who provide care and/or services to those persons.
- A full suite of sexual offences or a limited number of serious sexual offences against persons with relevant disabilities and vulnerabilities (however described) that recklessly resulted in harm to the victim or resulted in a financial benefit to the accused or an associate of the accused, that do not require proof of lack of consent, committed by persons who provide care and/or services to those persons.
- An offence of procuring sexual activity with a person with a relevant disability and vulnerability (however described) by inducements, threats or deception.

8.49. There may be other options for the reform of sexual assault laws against incapable persons that are not referred to above. We welcome submissions about other possible options for reform.

36. Do Western Australia's laws protecting incapable persons provide appropriate protection?

37. Should the types of sexual activity against incapable persons that are criminalised be changed? If so, how?

38. Should Western Australia distinguish between offences against incapable persons committed by carers and those committed by non-carers?

39. If a special offence is to be created for carers how should 'carer' (or another suitable term) be defined?

40. Should Western Australian law require the prosecution to prove that the accused knew the complainant was an incapable person? Should the answer to this question depend on whether the law distinguishes between offences by carers and offences by non-carers?

Reform the lawful marriage defence

8.50. It is a defence to a charge under section 330 of the *Code* that the accused was lawfully married to the incapable person.[39]

[39] *Criminal Code Act Compilation Act 1913* (WA) s 330(9).

8.51. Some other jurisdictions also recognise the existence of similar relationships as a defence. For example, a similar defence exists in the UK.[40] In relation to offences committed by carers it is a defence for the accused to prove that a sexual relationship existed prior to the provision of care services by the accused. The rationale for this defence is that in many situations a person who lacks capacity is cared for by their partner, and that where a person retains some capacity it would be wrong and unreasonable to intrude into such couples' private lives.[41]

8.52. Victoria has a defence of a marriage 'recognised as valid under the *Marriage Act 1961* of the Commonwealth' to offences against persons with a cognitive impairment or mental illness.[42]

8.53. However, the Irish LRC recommended against marriage being a defence to offences by carers, because it considered that 'a situation where a sexual relationship between a person who either lacks capacity to consent or has capacity to consent but is nonetheless vulnerable to abuse and exploitation and a person who is in a position of trust or authority over them, pre-dated the relationship of trust or authority, could also be exploitative'.[43]

8.54. In its preliminary submission the ODPP suggested that it might be appropriate to extend the defence of marriage to other types of relationships.[44]

8.55. The term marriage in section 330(9) of the *Code* must be interpreted as a reference to a marriage as defined in the section 5 of the *Marriage Act 1961* (Cth) being 'the union of two people to the exclusion of all others, voluntarily entered into for life'.

8.56. There are at least three options for reform to section 330 of the *Code*. The first is to repeal the provision. The second is to leave the defence but to clarify, as Victoria does, the meaning of marriage for the purpose of the section. The third is to expand the defence to other relationships, such as de facto relationships. The fourth option would be to leave the provision as it is.

8.57. In Western Australia, the term de facto relationship when used in a statute means:

> A relationship (other than a legal marriage) between 2 persons who live together in a marriage-like relationship.
>
> 4. The following factors are indicators of whether or not a de facto relationship exists between 2 persons, but are not essential —
>
> a. the length of the relationship between them;
>
> b. whether the 2 persons have resided together;
>
> c. the nature and extent of common residence;
>
> d. whether there is, or has been, a sexual relationship between them;
>
> e. the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
>
> f. the ownership, use and acquisition of their property (including property they own individually);

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40 *Sexual Offences Act 2003* (UK) s 44; *The Sexual Offences (Northern Ireland) Order 2008* (NI) Art 57; *Sexual Offences (Scotland) Act 2009* (Scot) s 47(2).

41 Home Office (UK), *Setting the Boundaries: Reforming the Law on Sex Offences* (Home Office, 2000) [4.8.17].

42 *Crimes Act 1958* (Vic) s 52G.

43 Law Reform Commission (Ireland), *Sexual Offences and Capacity to Consent* (Report No LRC 109-2013, November 2013) [4.35].

44 Preliminary Submission 16 (ODPP) 6.

g. the degree of mutual commitment by them to a shared life;

h. whether they care for and support children;

i. the reputation, and public aspects, of the relationship between them.

5. It does not matter whether —

a. the persons are different sexes or the same sex; or

b. either of the persons is legally married to someone else or in another de facto relationship.[45]

8.58. If the defence is to remain, principles of equality in a community, such as the Western Australia community, where many couples choose not to undergo a formal marriage ceremony, may support an extension of the defence to couples in de facto relationships.

41. Should marriage continue to be a defence to charges involving sexual activity with incapable persons? If so, should the defence be extended to other types of relationships or be amended in any other way?

Permit sexual activity between incapable persons

8.59. Western Australian law appears to criminalise sexual behaviour between two people who both meet the *Code*'s definition of incapable person. This may be considered to be an infringement of the right of such persons to engage in meaningful relationships and thus of their sexual autonomy. People living in institutions may have little opportunity to develop relationships with people from outside their institution,[46] and denying such people the opportunity to develop sexual relationships may be perceived as particularly wrong.

8.60. The Irish LRC recommended that 'a relationship between two relevant persons … should not in itself be prohibited where … there is no exploitation or abuse of either relevant person'.[47] The Irish LRC recommended that 'exploitation or abuse' in this context should be defined widely so as to include physical, sexual or emotional elements.[48]

8.61. A contrary argument is that if a person with a relevant incapacity or vulnerability should be protected by the criminal law from people committing sexual acts against them, that protection should exist no matter the character or motivation of the perpetrator. If the perpetrator deserves to be relieved of criminal responsibility for an act, then they should rely on standard defences and excuses available to them and any other accused, such as mistake of fact or mental impairment.

42. Should Western Australian law permit sexual activity between two people who both meet the definition of incapable persons? If so, how should the *Code* be amended to enable this to occur?

45 *Interpretation Act 1984* (WA) s 13A.

46 J Benedet and I Grant, 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief' (2007) 52 *McGill Law Journal* 243.

47 Law Reform Commission (Ireland), *Sexual Offences and Capacity to Consent* (Report No LRC 109-2013, November 2013) [1.17].

48 Ibid.

Repeal specific offences against incapable persons

8.62. Criminalising sexual offences against incapable persons is justified by the protective principle, which is one of the guiding principles we identified in Chapter 1 of Discussion Paper Volume 1.

8.63. The prevalence of sexual abuse against incapable persons is another reason to criminalise such behaviour in order to deter it from occurring.[49] Numerous studies have recognised that people with disabilities are at greater risk of sexual abuse than the general population.[50] For example, the Australian Bureau of Statistics Personal Safety Survey found that since the age of 15, 21 percent of people with disability report experiencing sexual violence compared to 10 percent of people without disability, and in the 12 months preceding the survey, people with disability were at 2.2 times the risk of sexual violence in comparison to people without disability.[51] Canadian studies have found that women with a disability are two to ten times more likely to be the victim of a sexual assault than women without a disability.[52] As with sexual assault generally, women with disabilities are more likely than men with disabilities to be sexually assaulted, although the rate of sexual assault against men with mental disabilities is also higher than for other men.[53] Additionally, it is generally accepted in the literature that sexual abuse against people with disabilities is under-reported.[54]

8.64. Whilst the protective principle and the prevalence of sexual abuse against incapable persons are reasons to criminalise sexual acts against or with such persons, these principles conflict with the principle of autonomy, also set out in Chapter 1 of Discussion Paper Volume 1 as one of the principles guiding this review.

8.65. Commentators have identified the need to recognise the rights of incapable persons to engage in sexual activity and promote their sexual autonomy as far as possible.[55] For example, Burton, Crofts and Tarrant have noted that:

> There are deep difficulties …in concluding that any intercourse with a person with an intellectual impairment is rape. To do so is to deprive such a person of the expression of their sexuality, without any consideration of the extent of the impairment.[56]

[49] Ibid [1.19].

[50] Ibid.

[51] Centre of Research Excellence in Disability and Health (CRE-DH), 'Nature and Extent of Violence, Abuse, Neglect and Exploitation against People with Disability in Australia ' (Research Report for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability, March 2021) 9.

[52] J Benedet and I Grant, 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief' (2007) 52 *McGill Law Journal* 243, 255.

[53] Ibid 255; Centre of Research Excellence in Disability and Health (CRE-DH), 'Nature and Extent of Violence, Abuse, Neglect and Exploitation against People with Disability in Australia ' (Research Report for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability, March 2021) 10.

[54] Law Reform Commission (Ireland), *Sexual Offences and Capacity to Consent* (Report No LRC 109-2013, November 2013) [1.35].

[55] See, eg, Home Office (UK), *Setting the Boundaries: Reforming the Law on Sex Offences* (Home Office, 2000) [4.1.3].

[56] K Burton, T Crofts and S Tarrant, *Criminal Codes: Commentary & Materials* (Thomson Reuters (Professional) Australia Pty Ltd, 7th ed, 2018) [5.200].

8.66. The Victorian Law Reform Commission observed:

> The difficulty for the legal system in striking an appropriate balance between these interests is compounded by the considerable diversity of people with mental impairment in terms of extent of impairment, living circumstances, and sexual interest and knowledge.[57]

8.67. Some commentators have gone further, arguing that:

> The supposed dichotomy between, on the one hand, the need to protect women from sexual exploitation and, on the other hand, the need to promote the sexual autonomy of women, is not a useful or accurate way of thinking about sexual violence. Rather, freedom from sexual violence is a necessary precondition for sexual autonomy.[58]

8.68. When legislating in a way that limits a person's right to engage in sexual activity or protects people from sexual abuse it may also be necessary to consider Australia's obligations as a ratifier of the United Nations Convention on the Rights of Persons with Disabilities (**UNCRPD**). Relevant articles of the UNCRPD oblige ratifying countries to:

- Prohibit discrimination on the basis of disability (whilst recognising that measures which are necessary to achieve de facto equality of disabled persons are not discrimination).
- Ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law.
- Ensure access to justice for persons with disabilities.
- Take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

8.69. It can be argued that separate sexual offences for sexual activity with or against incapable persons are not required, because:

- Such persons are afforded sufficient protection by the general law (for example, if the sexual activity that took place was sexual penetration and a person lacks capacity to consent, then the sexual activity is without consent and the perpetrator can be prosecuted for the offence of sexual penetration without consent).
- Specific offences limit the sexual freedom of people with restricted decision-making capacity.
- It is discriminatory (particularly in light of the UNCRPD) to target a group and treat them differently from the general population.[59]

8.70. In its review of this matter, the NSWLRC considered these arguments, but recommended the retention of specific offences.[60] It noted that the general non-consensual offences are difficult to prosecute successfully and may be insufficient to protect people with an intellectual

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[57] Law Reform Commission of Victoria, *Sexual Offences Against People with Impaired Mental Functioning* (Report No 15, 1988) 3.

[58] J Benedet and I Grant, 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief' (2007) 52 *McGill Law Journal* 243, 245.

[59] Law Reform Commission for New South Wales, *People with an Intellectual Disability and the Criminal Justice System* (Report No 80, 1996) [8.17].

[60] Ibid [8.33]-[8.36].

disability.[61] It concluded that without specific offence provisions, 'inappropriate sexual conduct involving a particularly vulnerable group of people may be left unsanctioned'.[62]

8.71. The Irish Law Reform Commission (**Irish LRC**) noted that a submission it received on this issue:

> Urged the adoption of a disability-neutral approach in relation to consent in the criminal law. The submission argued that under the UNCRPD persons with disabilities have equal rights to consent to sexual activity and should not be held to a higher standard than others when it comes to informed consent. It was submitted that all sexual offences legislation should be made disability-neutral which would require the repeal of any disability-specific offence which sets out a different standard of consent for people with disabilities when compared to other adults.[63]

8.72. The Irish LRC ultimately rejected this argument, concluding that there is a:

> General presumption of capacity … and, in the case of relevant persons, the provision of appropriate supports can improve the person's capacity to understand the nature of sexual activity and to recognise abusive situations. There remains, however, a small group of people who, even with the provision of suitable supports, would not have the requisite capacity to understand these issues and would be unable to protect themselves against exploitation or abuse. In addition, [it is] … particularly difficult to prosecute the most serious sex offences when the victim has a severe intellectual disability … For example, a successful rape prosecution relies on proving lack of consent and, in the case of victims with severe disabilities, evidential and communication difficulties may operate to frustrate a conviction. As noted above, in addition to persons who lack capacity, there are persons who have some degree of ability or capacity to consent to sexual relationships but who, even assuming provision of appropriate education and other supports, may be induced or persuaded into a sexual relationship and targeted by others for their own sexual gratification.[64]

8.73. In Discussion Paper Volume 1 Chapter 4 we consider whether the definition of consent should list circumstances in which the complainant does not consent, including stating explicitly that the complainant does not consent if they do not have the capacity to consent or do not understand the physical nature of the acts, the sexual character of the acts and that they can refuse to consent to the acts.[65] If the definition of consent is expanded in such a manner, arguably there is less need for separate offences against incapable persons.

8.74. In all other Australian jurisdictions, the definition of consent states that the complainant does not consent if they do not have the capacity to consent, or do not understand the physical nature of the acts, the sexual character of the acts and that they can refuse to consent to the acts. In addition, each of those jurisdictions has some form of legislation that specifically applies to sexual offences against incapable persons.

43. Should Western Australian law continue to include separate sexual offences against incapable persons?

44. Should any other changes be made to the sexual offences against incapable persons?

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61 Ibid [8.18].

62 Ibid [8.33].

63 Law Reform Commission (Ireland), *Sexual Offences and Capacity to Consent* (Report No LRC 109-2013, November 2013) [2.56].

64 Ibid [2.66].

65 See [4.67]−[4.79].

9. Sexual offences against lineal relatives and de facto children

Chapter overview

This Chapter examines section 329 of the *Code*, which contains various sexual offences that can be committed against a person's lineal relatives or de facto children. It considers three possible options for reform: reforming the definitions of lineal relative and/or de facto child; repealing specific sexual offences against children by lineal relatives or de facto parents; decriminalising consensual sexual acts between adult lineal relatives.

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Introduction

9.1. Section 329 of *Code* contains various sexual offences that a person can commit against their lineal relative or de facto child.

9.2. The maximum penalties for sexual offences against lineal relatives and de facto children range from 3 years' imprisonment to 20 years' imprisonment depending on the offence committed and the circumstances in which it is committed. We discuss maximum penalties in Chapter 16.

9.3. Since 2017, 4,166 people have been charged with sexual offences against lineal relatives and/or de facto children (see Appendix 2). The number of charges laid has significantly decreased in 2022. We would be interested to hear if there is a reason for this change.

Elements and definitions

Offences against child relatives

9.4. Section 329 of the *Code* contains five sexual offences which can be committed against a child who the accused knows is their lineal relative or de facto child:

- Sexual penetration.
- Procuring, inciting or encouraging sexual behaviour.
- Indecent dealing.
- Procuring, inciting or encouraging an indecent act.
- Indecent recording.

9.5. These are the same five types of sexual act that are prohibited in relation to children generally. The definitions of these terms, and some possible reforms to them, are outlined in Chapter 7.

9.6. To establish one of these offences, the prosecution must prove the following four matters beyond reasonable doubt:

i. The accused committed the relevant sexual act (for example, sexual penetration);

ii. The complainant was a lineal relative or de facto child of the accused;

iii. The accused knew the complainant was their lineal relative or de facto child; and

iv. The complainant was a child at the time of the sexual act.

9.7. A lineal relative is defined to mean a person who is:

> A lineal ancestor, lineal descendant, brother, or sister, whether the relationship is of the whole blood or half blood, whether or not the relationship is traced through, or to, a person whose parents were not married to each other at the time of the person's birth, or subsequently, and whether the relationship is a natural relationship or a relationship established by a written law.[1]

9.8. A de facto child is defined to mean a step-child of the accused, or a child or step-child of a de facto partner of the accused.[2] The offence was expanded to include de facto children as part of the broad reforms of sexual offences which were enacted in 1992. The reason for this reform was explained in the second reading speech as follows:

> The *Criminal Code* already makes it an offence to have sexual relations with a lineal relative. In today's society many children are being brought up in households where there is a step parent or a de facto partner of the parent living in the household. Children are just as vulnerable to exploitation by such people as they are to exploitation by blood relatives, and the new provision extends the prohibition on sexual misconduct to these people.[3]

9.9. A child is a person who is under the age of 18 years or who, in the absence of any positive evidence as to age, is apparently under the age of 18 years.[4]

9.10. It is not a defence to a charge under section 329 to prove that the accused did not know the complainant was under 18 or believed they were over that age.[5]

9.11. The offences in section 329 do not depend on proof of absence of consent; they will be committed regardless of whether or not the sexual activity was consensual.[6]

Offences against adult relatives

9.12. Section 329 of the *Code* also contains two sexual offences which relate to adults:

- Section 329(7) provides that it is an offence to sexually penetrate a person over 18 years knowing that person is a lineal relative;[7] and
- Section 329(8) provides that it is an offence for a person aged over 18 years to consent to sexual penetration by a person who they know is their lineal relative.[8]

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1 *Criminal Code Act Compilation Act 1913* (WA) s 329(1).
2 Ibid s 329(1).
3 Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 May 1992, 2767 (Phillip Smith).
4 *Criminal Code Act Compilation Act 1913* (WA) s 1.
5 Ibid s 331.
6 *Smith v The State of Western Australia* [2012] WASCA 239.
7 *Criminal Code Act Compilation Act 1913* (WA) s 329(7).
8 Ibid s 329(8).

9.13. For a person to be convicted of an offence under section 329(7), the prosecution must prove the following three matters, beyond reasonable doubt:

i. The accused sexually penetrated the complainant;

ii. The complainant was a lineal relative of the accused; and

iii. The accused knew the complainant was their lineal relative or de facto child.

9.14. For a person to be convicted of an offence under section 329(8), the prosecution must prove the following four matters, beyond reasonable doubt:

i. The accused was sexually penetrated by the complainant;

ii. The accused consented to the sexual penetration;

iii. The complainant was a lineal relative of the accused; and

iv. The accused knew the complainant was their lineal relative or de facto child.

9.15. Sexual activity, other than sexual penetration, between adults who are lineal relatives is not prohibited.

9.16. Unlike the section 329 offences which involve children, these offences do not apply to de facto children: they only apply to lineal relatives. Parliamentary debates do not explain the basis for this limitation.[9]

Evidentiary presumptions

9.17. For all offences in section 329 of the *Code* it is presumed, in the absence of evidence to the contrary, that:

- The accused knew they were related to the complainant;[10] and
- People who are reputed to be related to each other are in fact related to each other in that way.[11]

Possible reforms

Reform the definitions of lineal relative or de facto child

9.18. One possible option for reform would be to expand the definitions of lineal relative or de facto child to include other relationships. Some possibilities in this regard include:

- Adopted children.
- Foster children.
- Surrogate relationships.
- Extended family and kinship relationships and structures that exist in some communities, such as Aboriginal and Torres Strait Islander communities and some culturally and linguistically diverse communities.[12]

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9 *Smith v The State of Western Australia* [2012] WASCA 239, [17].

10 *Criminal Code Act Compilation Act 1913* (WA) s 329(11).

11 Ibid.

12 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Response* (Final Report, October 2010) [25.37].

9.19. Adopted children, foster children and surrogate relationships are probably already covered by the *Code* definitions, as they are likely to be considered relationships established by a written law. It may, however, be worth making this clear. For example, in the UK the definition of the phrase child family member is specifically stated to include foster relationships;[13] and in Queensland lineal descendant is defined to include a relationship that arises as the result of an order being made under surrogacy legislation.[14]

9.20. Another option for reform would be to reduce the scope of the definitions. For example, it may be considered desirable to restrict the definitions to sexual acts between certain relatives (for example, parent and natural child). Other sexual activity between relatives and with children could instead be dealt with under the general sexual offence laws (where appropriate).

45. Should the definitions of lineal relative and de facto child in section 329 of the *Code* be amended in any way? If so, how?

Repeal specific sexual offences against children by lineal relatives or de facto parents

9.21. It is unlikely to be controversial that sexual acts against children committed by their family members should remain illegal. However, it is less clear whether such acts should be the subject of a separate offence provision, given:

- Sections 320-322 already prohibit the same types of sexual activity against children if they are under 16, or if they are of or over 16 and under the accused's care, supervision or authority;
- The offences in sections 320-322 carry significant maximum penalties; and
- It is highly likely that a judge would consider the fact that the offender was related to the child to be a factor which aggravates an offence under sections 320-322, warranting a higher penalty.[15] This will especially be the case if the relationship between the offender and child was such that the offence involved a breach of trust.

9.22. It may also be argued that categorising this conduct as a sexual offence by a relative disguises or detracts from the true wrongfulness of the behaviour, which is that it is an act of abuse. In this regard, in *R v J* Toohey J said:

> Although in one sense the term 'incest' produces an immediate reaction of disapproval, it sometimes serves to conceal the implications for the girl concerned. In an article 'Rape of Girl-Children by Male Family Members' 215 *ANZJ Criminology* (1982) 90, Elizabeth Ward comments: 'What other writers refer to as "father-daughter" incest, I shall call "girl-child rape". My reason for doing this is that the term "incest" focuses attention upon what is involved in "sexual activity" rather than what is happening to the girl-child. "Incest" is the label applied to sexual unions such as those between adult siblings, as well as non-consensual unions between a girl-child and an adult male. This reference to a "case of incest" serves to deny in linguistic and affective terms the fact that a form of abuse has taken place'.[16]

9.23. On the other hand, it may be argued that maintaining a specific offence for this type of sexual activity emphasises the heinousness of the breach of trust and the harm that is likely to occur

[13] *Sexual Offences Act 2003* (UK) s 27(1).
[14] *Criminal Code Act 1899* (Qld) s 222(7A).
[15] Aggravating factors are discussed in Chapter 16.
[16] *R v J* (1982-1983) 45 ALR 331, 335-336.

from such offences. Whilst it may not technically be necessary to separately criminalise the behaviour (as it is already covered by sections 320-322), legislatures do on occasions criminalise particular behaviour as a separate offence in order to mark a community's abhorrence of that type of behaviour.

46. Should sexual acts against children by a relative continue to be dealt with as a separate offence under section 329 of the *Code*, or should they be dealt with under the general child sexual offence provisions contained in sections 320-322 of the *Code*?

Decriminalise all consensual sexual acts between adult lineal relatives

9.24. The sexual penetration offences created by sections 329(7) and 329(8) criminalise what would otherwise be lawful sexual activity between consenting adults. It is arguable that the criminal law should not interfere in such activity. To justify prohibition there needs to be some other aspect of moral wrong or harm.

9.25. Traditionally, this prohibition has been justified on the basis that there is a higher risk of genetic disabilities amongst offspring.[17] However, the criminal law does not prohibit sexual activity between other persons who have a greater than standard chance of producing a child with a genetic disability.[18] Further, the broad definition of sexual penetration means that sexual activity other than just penile-vaginal intercourse is prohibited.[19]

9.26. Arguments in favour of retaining sexual penetration offences between consenting adult lineal relatives include:

- Sexual activity between related adults may be considered immoral or contrary to religious teachings.
- Allowing sexual relationships between close relatives would be disruptive of society's structures. Society is based on a structure whereby parent and child relationships remain non-sexual, caring and supportive throughout life. This structure is buttressed by criminal laws that deter both the parent and the child (once an adult) from viewing the other as a possible sexual partner.
- Patterns of sexual abuse against children commonly involve the offending behaviour commencing when the complainant is a child but continuing into adulthood. Decriminalising consenting sexual activity involving sexual penetration between lineal adult relatives would leave such complainants with no protection, 'even though the consent of the young adult was very much vitiated by the long standing abuse that occurred whilst the child was under the age of consent'.[20]

9.27. If sexual offences between consenting adult lineal relatives are to be retained, their scope should be considered. At present, all forms of sexual penetration are covered. If the basis of the law is genetics, then it is arguable that only penile-vaginal penetration should be criminalised. Conversely, if the basis is broader than genetics it is arguable that non-penetrative sexual activities should also be covered.

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17 See, eg, C Farrelly, 'The Case for Re-thinking Incest Laws' (2008) 34(9) *Journal of Medical Ethics* e11.

18 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5: Sexual Offences Against the Person* (Report, 1999) 191.

19 Ibid.

20 Ibid.

47. **Should sexual activity between consenting adults who are related be prohibited? If so, which types of sexual activity should be prohibited?**

48. **Should any other changes be made to the sexual offences against lineal relatives or de facto children?**

10. Sexual servitude and deceptive recruiting offences

Chapter overview

This Chapter examines three offences in the *Code* that relate to the forced provision of sexual services: sexual servitude (section 331B); conducting a business involving sexual servitude (section 331C); deceptive recruiting for a commercial sexual service (section 331D). It considers whether the offence of deceptive recruiting for a commercial sexual service should be repealed.

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Introduction

10.1. The *Code* contains three offences relating to the forced provision of sexual services:

- Sexual servitude (section 331B).
- Conducting a business involving sexual servitude (section 331C).
- Deceptive recruiting for a commercial sexual service (section 331D).

10.2. These offences were enacted in the context of Australia's international obligations to prohibit servitude and the trafficking in persons for the purpose of sexual exploitation.[1] In November 1998, the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General released a report on slavery.[2] The report proposed the enactment of legislation relating to slavery offences and sexual servitude. The Standing Committee of Attorneys-General agreed to enact Commonwealth and State legislation to give effect to the proposals. These offences are modelled on the Commonwealth legislation.[3]

10.3. The maximum penalties for these offences range from 7 years' imprisonment to 20 years' imprisonment depending on the offence committed and the circumstances in which it is committed. We discuss maximum penalties in Chapter 16.

10.4. These offences are rarely used. Since 2017, only four people have been charged with sexual servitude in Western Australia, and no people have been charged with conducting a business involving sexual servitude or deceptive recruiting for commercial sexual services (see Appendix 2). We would be interested to hear if there is a reason for the limited use of these offences.

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1 Under instruments which include the 1979 Convention on the Elimination of all Forms of Discrimination Against Women, the 1989 Convention on the Rights of the Child and the 1948 Universal Declaration of Human Rights.

2 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 9: Offences Against Humanity: Slavery* (Report, November 1998).

3 *Criminal Code Act 1995* (Cth) ss 270.5-270.5.

Elements and definitions

Sexual service

10.5. The *Code* defines the term sexual service to mean 'the use or display of the body of the person providing the service for the sexual arousal or sexual gratification of others'.[4] This is a broad definition, which arguably captures behaviour such as erotic dancing as well as prostitution.[5]

Sexual servitude

10.6. Section 331B of the *Code* provides that:

> A person who compels another person to provide or to continue to provide a sexual service is guilty of a crime and is liable:
>
> (a) if the other person is a child or an incapable person, to imprisonment for 20 years; or
>
> (b) otherwise, to imprisonment for 14 years.

10.7. This offence has two elements that the prosecution must prove beyond reasonable doubt:

i. The complainant provided a sexual service; and

ii. The accused compelled the complainant to provide, or to continue to provide, that service.

10.8. Section 331B does not explicitly require proof that the complainant did not consent to providing the sexual service. However, the word 'compels' indicates that the behaviour in which the complainant was required to engage must have been non-consensual.

Conducting a business involving sexual servitude

10.9. Section 331C(2) of the *Code* provides that:

> A person who conducts a business that involves any other person being compelled to provide or to continue to provide a sexual service is guilty of a crime and is liable:
>
> (a) if the other person is a child or an incapable person, to imprisonment for 20 years; or
>
> (b) otherwise, to imprisonment for 14 years.

10.10. This offence has three elements that the prosecution must prove beyond reasonable doubt:

i. The complainant provided a sexual service as part of a business;

ii. The complainant was compelled to provide, or to continue to provide, that service; and

iii. The accused conducted the business.

10.11. The *Code* defines conducting a business to include:

(a) taking part in the management of the business; and

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4 *Criminal Code Act Compilation Act 1913* (WA) s 331A.

5 LexisNexis Australia, *Criminal Law Western Australia* [331A.1] (October 2022).

(b) exercising control or direction over the business; and

(c) providing finance for the business.[6]

Deceptive recruiting for a commercial sexual service

10.12. Section 331D of the *Code* contains two offences of deceptive recruiting for a commercial sexual service:

- Section 331D(2) applies where a child or an incapable person is recruited.
- Section 331D(1) applies where the person recruited is neither a child nor an incapable person.

10.13. Child is defined to mean a person who is under the age of 18 years.[7] Incapable person is given the same meaning as in section 330(1) of the *Code*.[8] We discuss the meaning of incapable person in [8.9]−[8.33].

10.14. Both offences require the prosecution to prove the following three elements beyond reasonable doubt:

i. The accused offered the complainant employment or some other form of engagement to provide personal services;

ii. At the time of making the offer the accused knew that the complainant would, in the course of or in connection with the employment or engagement, be asked or expected to provide a commercial sexual service; and

iii. At the time of making the offer the accused knew that the continuation of the complainant's employment or engagement, or their advancement in the employment or engagement, would be dependent on their preparedness to provide a sexual service.[9]

10.15. Where the complainant is neither a child nor an incapable person, the prosecution must also prove that the accused did not disclose that knowledge to the complainant when they made the offer of employment or engagement.[10]

Possible reforms

Repeal the offence of deceptive recruiting for a commercial sexual service

10.16. In its preliminary submission, Magenta noted that at the Commonwealth level there are already general laws which address deceptive recruiting. It was of the view that:

- The duplication between the Commonwealth and Western Australian laws can result in poor outcomes for victims of deceptive recruiting for sexual services.
- The Commonwealth laws provide better outcomes for victims of deceptive recruiting for sexual services than the offences in section 331D.

6 *Criminal Code Act Compilation Act 1913* (WA) s 331C(1).
7 Ibid s 331A.
8 Ibid.
9 Ibid s 331D.
10 Ibid s 331D(1)(c).

- Where a case under the Commonwealth law involves sexual servitude or non-consensual sex, that can appropriately be dealt with as an **aggravating factor** (a factor which makes a particular instance of an offence more serious and suggests that a more severe sentence should be imposed).

10.17. Consequently, Magenta argued that section 331D should be repealed.

10.18. We are interested to hear your views on whether the offence of deceptive recruiting for a commercial sexual service should be repealed, or whether the offences in sections 331B-D should be amended in any way.

49. Should the offence of deceptive recruiting for a commercial sexual service be repealed? If not, should it be amended in any way?

50. Should the offences of sexual servitude or conducting a business involving sexual servitude be amended in any way?

11. Procuring and prostitution

Chapter overview

This Chapter examines three offences in the *Code* that relate to procuring people for prostitution and involving young people in prostitution: allowing a young person to be on premises for unlawful carnal knowledge (section 186); procuring a person to be a prostitute (section 191); procuring a person to have unlawful carnal knowledge by threat, fraud or administering a drug (section 192). It considers whether these offences should be repealed or reformed, whether the language used in the provisions should be changed, and whether the term 'procures' should be defined.

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Introduction

11.1. In addition to the offences in Chapter XXXI, we have been asked to review sections 186, 191 and 192 of the *Code*. These sections are located in Chapter XXII, which is titled offences against morality.

11.2. In general terms:[1]

- Section 186 provides that it is an offence for a person to induce or permit a child to be on premises they own, occupy or manage for the purposes of engaging in sexual penetration.
- Section 191 provides that it is an offence to procure a person to become a prostitute.
- Section 192 provides that it is an offence to procure sex by threats, intimidation, fraud or the administration of drugs.

11.3. The maximum penalties for these offences range from 2 years' imprisonment to 20 years' imprisonment depending on the offence committed and the circumstances in which it is committed. We discuss maximum penalties in Chapter 16.

11.4. These offences are rarely used. Since 2017, only one person has been charged with a section 186 offence, one person with a section 191 offence and two people with a section 192 offence (see Appendix 2). We would be interested to hear if there is a reason for the limited use of these offences. We would also be interested to hear about the circumstances in which these offences are used.

[1] See [11.5]-[11.20] for a discussion of the precise scope of these offences.

Elements and definitions

Allowing a young person to be on premises for unlawful carnal knowledge

11.5. Section 186 of the *Code* provides that:

> Any person who, being the owner or occupier of any premises, or having or acting or assisting in the management or control of any premises, induces or knowingly permits any child of such age as in this section is mentioned to resort to or be in or upon such premises for the purpose of being unlawfully carnally known by any person, whether a particular person or not is guilty of a crime, and;
>
> (a) if the child is under the age of 16 years, is liable to imprisonment for 2 years; and
>
> (b) if the child is under the age of 13 years, is liable to imprisonment for 20 years.

11.6. This offence has two elements that the prosecution must prove beyond reasonable doubt:

i. The accused owned, occupied, managed, controlled or assisted in the management of certain premises; and

ii. The accused induced or knowingly permitted a child under 16 to be on the premises for the purpose of being unlawfully carnally known by a person.

11.7. We discuss the definition of carnal knowledge, and some possible options for reform, in Chapter 3.

11.8. There is no need for the prosecution to prove a lack of consent. The *Code* explicitly provides that it is not a defence that the child consented to the sexual activity.[2]

11.9. The accused may raise a mistake of age defence.[3] For this defence to succeed the accused must prove, on the balance of probabilities, that they believed on reasonable grounds that the child was of or above the age of 16.

11.10. It is unclear whether the accused can raise the mistake of fact defence in relation to other mistakes they may have made.[4] For example, they may have been mistaken about the purpose for which the child was on the premises. We welcome submissions on this issue.

Procuring a person to be a prostitute

11.11. Section 191(1) of the *Code* provides that:

> Any person who —
>
> (a) Procures a girl or woman who is under the age of 21 years, and is not a common prostitute or of known immoral character to have unlawful carnal connection with a man, either in Western Australia or elsewhere; or
>
> (b) Procures a woman or girl to become a common prostitute either in Western Australia or elsewhere; or

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2 *Criminal Code Act Compilation Act 1913* (WA) s 186(3).

3 Ibid s 186(2).

4 The mistake of fact defence is set out in ibid s 24. It is discussed in detail in Chapter 5 of Discussion Paper Volume 1.

(c) Procures a woman or girl to leave Western Australia, with intent that she may become an inmate of a brothel, elsewhere; or

(d) Procures a woman or girl to leave her usual place of abode in Western Australia, such place not being a brothel, with intent that she may, for the purposes of prostitution, become an inmate of a brothel, either in Western Australia or elsewhere; or

(e) Procures a man or boy for any of the above purposes;

is guilty of a crime, and is liable to imprisonment for 2 years.

11.12. There are four ways in which this offence can be committed:

- By procuring a child under 21 to have unlawful carnal connection with a man.
- By procuring a person to become a prostitute.
- By procuring a person to leave Western Australia to become an inmate of a brothel.
- By procuring a person to leave their usual residence to become an inmate of a brothel.

11.13. We discuss the definition of carnal connection, and some possible options for reform, in Chapter 3. The *Code* does not define the meaning of 'procures'.

11.14. There is no need for the prosecution to prove a lack of consent. The *Code* explicitly provides that it is not a defence that the complainant consented to the relevant act.[5]

11.15. If the accused is charged with procuring a child under 21 to have unlawful carnal connection with a man (section 192(a)), ignorance of age or mistake as to age is not a defence.[6]

Procuring a person to have unlawful carnal knowledge by threat, fraud or administering a drug

11.16. Section 192 of the *Code* provides that:

1) Any person who —

(a) By threats or intimidation of any kind procures a woman or girl to have unlawful carnal connection with a man, either in Western Australia or elsewhere; or

(b) By any false pretence procures a woman or girl, who is not a common prostitute or of known immoral character, to have unlawful carnal connection with a man, either in Western Australia or elsewhere; or

(c) Administers to a woman or girl, or causes a woman or girl to take, any drug or other thing with intent to stupefy or overpower her in order to enable any man, whether a particular man or not, to have unlawful carnal knowledge of her; or

(d) Does any of the foregoing acts with respect to a man or boy;

is guilty of a crime, and is liable to imprisonment for 2 years.

5 Ibid s 191(2).
6 Ibid s 205.

11.17. This offence sets out three ways in which it is an offence to procure unlawful carnal connection or knowledge:

- By threatening or intimidating the complainant.
- By using false pretences on the complainant.
- By administering a drug to the complainant with the intent of stupefying or overpowering them.

11.18. It is unclear whether there is a difference between the terms carnal connection and carnal knowledge. Given the history of the term carnal knowledge, it seems likely that both are limited to penile penetration, and do not extend to other types of sexual activity.

11.19. The person with whom the complainant is procured to have unlawful carnal connection or knowledge with may be either the accused or a third party.[7] It appears that this person must be a man: it is not unlawful to procure a person to have unlawful carnal connection with a woman. The complainant may, however, be either a man or a woman.

11.20. There is no need for the prosecution to prove a lack of consent. The *Code* explicitly provides that it is not a defence that the complainant consented to the relevant act.[8]

Possible reforms

Repeal or reform section 186

11.21. It is arguable that the conduct addressed by section 186, which prohibits a person from inducing or knowingly permitting a child under 16 to be on premises they own, occupy, manage or control for the purpose of being unlawfully carnally known by a person, is already adequately covered by the child sexual offences in Chapter XXXI of the *Code*.[9] Consequently, one option for reform would be to repeal this provision.

11.22. In response, it may be argued that the offences in Chapter XXXI do not adequately punish child sexual abuse committed for profit or reward. However, there are significant maximum penalties for the relevant Chapter XXXI offences, and if they were engaged in for purposes connected with sex work significant penalties could be expected to be imposed. For example, the offence of procuring, inciting or encouraging a child between the ages of 13 and 16 years to engage in sexual behaviour carries a maximum penalty of 14 years' imprisonment.[10]

11.23. The *Prostitution Act 2000* (WA) (**Prostitution Act**) contains other offences, also carrying maximum penalties of 14 years' imprisonment, relating to children and prostitution specifically, namely:

- Causing, permitting or seeking to induce a child to act as a prostitute.[11]
- Obtaining money from child prostitutes.[12]
- Committing prostitution at a place where a child is present.[13]

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7 *R v Lloyd* (1904) 6 WALR 160, 161.

8 *Criminal Code Act Compilation Act 1913* (WA) s 192(2).

9 See, eg, ibid s 321(3). Child sexual offences are discussed in Chapter 7.

10 Ibid s 321(3).

11 *Prostitution Act 2000* (WA) s 16.

12 Ibid s 17.

13 Ibid s 20.

- Allowing a child to be somewhere that prostitution is taking place.[14]

11.24. If the offence is to be retained, it may be desirable to clarify or extend its scope. Possible options for reform include:

- Replacing the term carnal knowledge (see [3.13]-[3.16]).
- Extending the scope of the offence to other forms of sexual activity.

11.25. If the offence is to be retained, it may also be desirable to relocate it to Chapter XXXI of the *Code* or to the Prostitution Act. This issue is addressed in Chapter 17.

51. Should the offence in section 186 of the *Code* (which prohibits a person from inducing or knowingly permitting a child under 16 to be on premises they own, occupy, manage or control for the purpose of being unlawfully carnally known by a person) remain an offence? If so, should it be amended in any way?

Repeal or reform section 191

11.26. As noted above, section 191 sets out various ways in which it is an offence to procure a person to become a prostitute. The Prostitution Act contains several other offences relating to prostitution. These include a person acting as a prostitute if they:

- Are a child;
- Have been declared under section 32A of the *Misuse of Drugs Act 1981* (WA) to be a drug trafficker; or
- Have been found guilty of prescribed offences, being mainly offences linked to child sexual abuse, child exploitation material and prostitution.[15]

11.27. The effect of section 191 read together with other provisions in Chapter XXII of the *Code* and the Prostitution Act is that in Western Australia, in relation to adults:

- It is not an offence for an adult without a prescribed criminal record to be a sex worker.
- It is an offence to procure an adult person to become a sex worker.
- It is an offence to be involved in prostitution, for example, by being involved in the running of a brothel or living off the earnings of prostitution.

11.28. We received a number of preliminary submissions about section 191. For example, Magenta WA submitted that section 191 (as well as section 190) should be repealed as:

> these are out of date laws which are not enforced and simply serve to endanger sex workers. Existing offences which apply to all persons, including laws related to sex without consent, and advertising codes which prevent lascivious advertising material in many public places, already adequately protect sex workers and the public on the issues covered by these sections. … On the other hand, these offences have considerable negative impacts on sex workers, making it more difficult for sex workers to work safely or to seek support from services, such as the Police or health services. These offences related to sex work push sex work underground unnecessarily, contradicting the way sex work is dealt with in Western Australia – it is totally legal to be a sex worker in WA and federally, so the laws in the Code which mention sex

[14] Ibid s 21.
[15] Ibid s 14.

> workers are totally out-of-date and out of step with our contemporary approaches to the industry.[16]

11.29. A person's view as to whether section 191 ought to be repealed may depend on their view as to whether the sex work industry itself should be criminalised or not. There are differing views on that in the community. In the event that a person considers that sex work should be criminalised, then there is still a question to be considered as to whether these offences play any useful role in reducing the prevalence of sex workers in Western Australian communities, given that other aspects of sex work are criminalised and/or regulated by the Prostitution Act.

11.30. If the offence in section 191(a) is to be retained, it may be considered desirable to extend its scope to include cases in which a person is procured to have carnal knowledge with a woman. In this regard, in its preliminary submission the ODPP argued that limiting this offence to cases in which a person is procured to have carnal knowledge with a man is unjustifiable.[17]

11.31. If the offence is to be retained, it may also be desirable to relocate it to Chapter XXXI of the *Code* or to the Prostitution Act. This issue is addressed in Chapter 17.

52. Should the offences in section 191 of the Code (which relate to procuring a person to be a prostitute) remain offences? If so, should they be amended in any way?

Repeal or reform section 192

11.32. As noted above, section 192 sets out three ways in which it is an offence to procure unlawful carnal connection or knowledge:

- By threatening or intimidating the complainant.
- By using false pretences on the complainant.
- By administering a drug to the complainant with the intent of stupefying or overpowering them.

11.33. The offence of procuring by false pretences may capture scenarios in which a person agrees to sexual activity because of a particular representation which turns out to be untrue. As we discuss in Discussion Paper Volume 1,[18] the number and type of false representations which might induce a person to engage in sexual activity are very broad. There is potential overlap between this variety of the procuring offence and any sexual offence in which lack of consent is an element, where the prosecution's case is that the complainant's consent was obtained via deceit or fraudulent means. There is also the possibility of creating a separate offence of breaching conditional consent. At [13.22]−[13.25] we discuss introducing an offence of breach of conditional consent.

11.34. In some jurisdictions similar offences require that the drug was administered without the complainant's knowledge or that the accused administered a different amount or concentration to that which the complainant was aware of or had consented to.[19] In Western Australia the offence does not require a lack of knowledge on the complainant's part.

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16 Preliminary Submission 3 (Magenta) 2, 4-5.
17 Preliminary Submission 16 (ODPP) 6.
18 See [4.99]−[4.224].
19 See, eg, *Sexual Offences Act 2003* (UK) s 61.

11.35. The Queensland Code[20] has a similar section to section 192 titled Procuring sexual acts by coercion. It uses modern terminology and is gender neutral as it refers to a sexual act rather than carnal knowledge or carnal connection and is not limited to the sexual act taking place with a man. Otherwise, it is very similar to section 192.

11.36. In Victoria, the comparable offence is titled Procuring sexual act by fraud.[21] A person commits an offence under this provision if they make a false or misleading representation knowing that it is false or misleading, or knowing that it is probably false or misleading, and if the complainant either takes part in the sexual act as a result of the representation or the person intends that the complainant will take part in a sexual act.

11.37. Legal academic Jianlin Chen has suggested that the lack of modernisation or repeal of the offences in section 192(1) was an oversight in 1985 when other sexual offences in the *Code* were changed:

> During the 1985 amendments, there was no mention of the procurement offence throughout the legislative debates in Western Australia… This suggests that the continued existence of the procurement offence is less a conscious legislative decision, and more so due to neglect. The case for neglect is strengthened by the fact that the procurement offence in Western Australia has remained largely unchanged as other Australian jurisdictions have updated and expanded their respective procurement offences. This resulted in a Western Australian procurement offence that is restricted to women who are 'not a common prostitute or of known immoral character'.[22]

11.38. Section 192(2) provides that it is no defence to a charge of an offence against section 192(1) that the act of the accused person by which the offence was committed was done with the consent of the person with respect to whom the act was done. It is unclear whether the act of the accused referred to in section 192(2) is the threat, intimidation, false pretence and/or administering of the drug rather than the carnal knowledge or carnal connection which is achieved. It seems unlikely that a person would consent to being threatened, intimidated or deceived, although there are circumstances where it is conceivable that a person would consent to the administering of a drug (for example for social or recreational purposes). Regardless of whether the act of the accused is the threat, intimidation, false pretence or administering of the drug, or the carnal knowledge or carnal connection, the effect of section 192(2) is that the complainant's consent is irrelevant to whether an offence under section 192 is committed. There is an issue as to whether consent of the complainant ought to be a defence to an offence pursuant section 192(1)(c).

11.39. The two procuring offences created by section 192(1)(a) and (b) appear to require that carnal connection occurs as a result of the accused's wrongful words and/or actions. However, the third offence in the section of administering a drug to enable unlawful carnal knowledge does not require that carnal knowledge occurs, only that the accused administered the drug to the complainant with the intention of enabling carnal knowledge. The Scottish LC observed that there is value in an offence 'which makes the administering of the substance in itself criminal … in that it marks out the conduct as intrinsically wrong'.[23] If this is the justification for the offence in section 192(1)(c) there may be merit in consent not being defence to the charge.

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20 *Criminal Code Act 1899* (Qld) s 218.

21 *Crimes Act 1958* (Vic) s 45.

22 J Chen, 'Fraudulent Sex Criminalisation in Australia: Disparity, Disarray and the Underrated Procurement Offence' (2020) 43(2) *UNSW Law Journal* 581, 605.

23 Scottish Law Commission, *Report on Rape and Other Sexual Offences* (Report No 209, 2007) [3.64].

11.40. The wording of section 192 raises many interpretation and terminology issues. If this conclusion is reached, there is a question as to whether the substance of the offences in the section ought to remain but they should be modernised and clarified, or whether the offences should be repealed. Although the offences may have some role to play in filling gaps in the criminal law, if history has shown through their lack of use that the hole is insignificant, that conclusion may lend weight to the view that the section ought to be repealed.

11.41. If the offences in section 192 are to be retained, it may also be considered desirable to:

- Extend their scope to include cases in which a person is procured to have carnal knowledge with a woman.
- Relocate the offences to Chapter XXXI of the *Code* or to the Prostitution Act. This issue is addressed in Chapter 17.

53. Should the offences in section 192 of the *Code* (which relate to procuring sex by threats, intimidation, fraud or the administration of drugs) remain offences? If so, should they be amended in any way?

Change the language used in the provisions

11.42. Sections 186, 191 and 192 of the *Code* all refer to either carnal knowledge or a carnal connection. It is unclear why these sections continue to do so, when these terms have been replaced in most other sections of the *Code* with terms better understood by the community. We discuss the use of these terms, and possible options for reform, in Chapter 3.

11.43. Sections 191 and 192 use the terms common prostitute and prostitute. Section 191 refers to persons who are of known immoral character. Multiple preliminary submissions objected to the use of these terms. Pride WA suggested that reference to an 'individual who commonly engages in sex work' is preferable to the term common prostitute.[24] The ODPP submitted that 'the expressions used in sections 191 and 192 of the *Code* … and the ideas they connote, are archaic and offensive'.[25]

11.44. WAAC submitted that 'references to "known immoral character" are open to interpretation and allow for unjustified negative imputations that disproportionately impact marginalised and vulnerable communities'. They recommended that they be removed.[26] Magenta WA argued for removal of references to the term common prostitute.[27]

11.45. The Health Department of WA submitted that the phrase 'is not a common prostitute or of known immoral character' should be 'reviewed to ensure there are no adverse impacts on marginalised and vulnerable sex workers, with careful consideration given to the potential for changes in terminology to positively impact on protections for sex workers'.[28] The Health Department also submitted that language should be standardised across legislation, including the Prostitution Act.[29]

[24] Preliminary Submission 7 (Pride WA) 4.
[25] Preliminary Submission 16 (ODPP) 6.
[26] Preliminary Submission 10 (WAAC) 1.
[27] Preliminary Submission 3 (Magenta) 3.
[28] Preliminary Submission 17 (Department of Health) 3.
[29] Ibid 2.

54. If the offences in sections 191 and 192 are to remain offences, should the terms common prostitute and known immoral character be replaced? If so, what terms should be used instead?

Define procures

11.46. The word procures is used sections 191 and 192, but it is not defined.

11.47. One view is that it is a common word that can be easily understood by juries. An alternative view is that the word is capable of having different meanings and that it would help to ensure that juries used the correct meaning if it was defined in the *Code*.

11.48. Juries are often told that procure means to produce by endeavour, for example by asking or demanding, and that an accused procures an offence by setting out to see that it happens and taking the appropriate steps to produce that happening.[30] Such a meaning could be inserted into the *Code*. It should be noted that the use of the word procures implies that the offending activity occurred. That is, the procuration must have successfully brought about the desired result. This can be compared with words such as incite and encourage used in other sections of the *Code*,[31] which focus on the conduct and intention of the accused rather than the result of the accused's conduct.

55. If the offences in sections 191 and 192 are to remain offences, should the word procures be defined? If so, how should it be defined?

[30] *Humphrey v The Queen* [2003] WASCA 53; *R v Castiglione* [1963] NSWR 1, 6; *Attorney-General's Reference* [1975] 1 QB 773, 777.

[31] *Criminal Code Act Compilation Act 1913* (WA) ss 320(3), 321(3), 321A, 322(3), 327(1), 328(1), 329(3), 330(3).

12. Introducing a mental state requirement

Chapter overview

This Chapter considers whether Western Australia should introduce a mental state requirement to its sexual offences and create a negligent form of those offences.

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Introduction

12.1. In Discussion Paper Volume 1 we noted that there is a distinction between common law and code jurisdictions.[1] In common law jurisdictions, the prosecution must prove that the accused had a specific mental state as part of the offence. For example, in Victoria (a common law jurisdiction) the offence of rape requires proof that:

- The accused sexually penetrated the complainant;
- The complainant did not consent to the sexual penetration; and
- The accused did not reasonably believe the complainant consented (the mental state requirement).[2]

12.2. By contrast, sexual offences in code jurisdictions (such as Western Australia) do not usually contain a mental state requirement.[3] They only require proof that the accused committed the relevant conduct (for example, sexual penetration) and (if relevant) that the complainant did not consent to that conduct.[4]

12.3. Although sexual offences in Western Australia do not contain a mental state element, the accused's mental state is relevant to the mistake of fact defence.[5] In Western Australia this defence is set out in section 24 of the *Code*, which provides that:

> A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.
>
> The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

12.4. Unless excluded by law, this defence applies to all offences.[6] It allows an accused to be acquitted if they have made an honest and reasonable mistake about a key fact. In the context

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1 See [2.16]-[2.21].

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

3 The one exception is the NT, which includes a mental state requirement as part of its sexual offences: see *Criminal Code Act 1983* (NT) ss 192(3)-(4A); 43AK (the **NT Code**).

4 While a lack of consent is relevant to many sexual offences, there are some sexual offences where this does not need to be proven. These include sexual offences against children.

5 *Criminal Code Act Compilation Act 1913* (WA) s 24; *Criminal Code Act 1899* (Qld) s 24; *Criminal Code Act 1924* (Tas) ss 14-14A.

6 *Criminal Code Act Compilation Act 1913* (WA) s 24.

of sexual offences, it will most commonly be argued that the accused made a mistake about the complainant's consent. We consider the mistake of fact defence in detail in Chapter 5 of Discussion Paper Volume 1.

12.5. One possible option for reform would be to introduce a mental state requirement into the *Code's* sexual offence provisions. For example, it could be provided that an accused can only be convicted of an offence if they knew that the complainant was not consenting or were aware of that possibility.

12.6. This would require a significant restructuring of the offence provisions as well as the mistake of fact defence. Depending on the way in which the mental state requirement is defined, it may also make little substantive difference to the law. For example, in Victoria and NSW the prosecution can establish that the accused had the necessary mental state by proving that they did not reasonably believe the complainant was consenting.[7] This is the same position that is currently taken in Western Australia, where the accused raises the mistake of fact defence.

12.7. There may, however, be some benefits to this approach. For example, it would allow the *Code* to draw a distinction between:

- A more serious form of the offence, where the accused knew that the complainant was not consenting but proceeded regardless (**intentional sexual offences**).
- A less serious form of the offence, where the accused was not aware that the complainant was consenting but should have been (**negligent sexual offences**).

12.8. We discuss this possibility below. We welcome submissions on any other benefits that may result from introducing a mental state requirement into the *Code's* sexual offence provisions.

Negligent sexual offences

12.9. Under current Western Australian law, an accused who honestly but unreasonably believes the complainant is consenting should be convicted of the offence with which they are charged: the mistake of fact defence is only available for honest and reasonable beliefs.[8] However, the fact that they honestly believed the complainant was consenting may be relevant to sentencing, as was explained by the Court of Appeal in *Taylor v The State of Western Australia*:

> In general, an offender who has been convicted of a sexual offence which includes, as an element, the absence of consent, and who honestly but unreasonably believed that the victim was consenting to the act in question, will be less culpable than an offender who did not have an honest belief that the victim was consenting. However, whether and, if so, to what extent an honest belief will, in a particular case, be a mitigating factor, depends on all the relevant facts and circumstances.[9]

12.10. Rather than leaving this matter to sentencing, it would be possible to create a two-tiered approach to some or all sexual offences that require proof of lack of consent: the more serious intentional sexual offences and the less serious negligent sexual offences.

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7 See, eg, *Crimes Act 1958* (Vic) s 38; *Crimes Act 1900* (NSW) s 61HK.

8 *Criminal Code Act Compilation Act 1913* (WA) s 24.

9 *Taylor v The State of Western Australia* [2019] WASCA 217, [96]. See also *BGE v The State of Western Australia* [2013] WASCA 136, [28] applying the same principle to child sex offences where the offender believed that the victim was 16 years' old and consented to the sexual activity.

12.11. Negligent sexual offences would capture cases where the accused honestly but unreasonably believed the complainant was consenting. It would also capture cases where the accused did not give any consideration to whether or not the complainant was consenting but should have done so.

12.12. Sweden has recently created a negligent rape offence.[10] According to the Swedish government, the offence covers situations such as 'when a person should be aware of the risk that the other person is not participating voluntarily but still engages in a sexual act with that person'.[11]

12.13. In its review of sexual offences, the NSWLRC considered whether an offence it referred to as negligent sexual assault should be created. It provided the following arguments in support of such an offence:

- It is unjust to subject a person who honestly, but unreasonably, believed there was consent to the same maximum penalty as a person who either knows or is indifferent to the absence of consent.
- A separate offence would assist judges to impose an appropriate sentence, whereas judges currently do not know on what basis the jury has found that the accused person knew that the complainant did not consent.
- The *Crimes Act* already contains examples of graded offences, in which the most serious penalties apply to offences with the highest level of culpability.[12]
- Jury directions would be simpler, and more targeted, in cases where the prosecution decides only to pursue the lesser offence.
- The lesser offence may be more readily prosecuted.
- An accused person may be willing to plead guilty to the lesser offence, sparing complainants the trauma of a trial, and also increasing conviction rates.[13]

12.14. The NSWLRC noted that submissions overwhelmingly opposed this idea, and it did not recommend the creation of a negligent sexual assault offence.[14] It stated that 'there is a firm view that a person who holds an unreasonable belief in consent, and who engages in non-consensual sexual intercourse, is guilty of the offence of sexual assault'.[15] Other reasons that were given for opposing an offence of negligent sexual assault included:

- The harm to those who experience sexual assault is serious, regardless of the state of mind of the offender.
- The offence would signal to the community that some forms of sexual assault are not to be treated as seriously as others, which would be a backward step.
- The law should not downgrade the criminal liability of an accused person who fails to appreciate the absence of consent due to misogynistic attitudes.

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10 See Sweden, Ministry of Justice, *Consent: The Basic Requirement of New Sexual Offences Legislation* (Fact Sheet, April 2018).

11 Ibid 1.

12 The NSWLRC provided the following examples from NSW: murder and negligent manslaughter; intentionally, recklessly or negligently causing grievious bodily harm; negligent, furious or reckless driving.

13 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.82].

14 Ibid [7.86]-[7.90].

15 Ibid [7.83].

- It is impossible to say that [negligent sexual assault] cases … are necessarily less culpable than cases involving actual knowledge or recklessness, so culpability should be evaluated on a case-by-case basis.[16]

12.15. These concerns were echoed in recent reviews undertaken in Ireland[17] and Northern Ireland,[18] which both also opposed the creation of negligent sexual offences. The Irish LRC noted that:

> Another serious concern raised in the submissions was that such a lesser offence could render the more serious offence of rape obsolete in some cases. This is because the lesser offence would, by its nature, be easier to prosecute and that, even if prosecuted as a fall-back charge to rape, juries could also feel more secure in opting for the lesser charge or verdict. This could reduce the relevance of the offence of rape in legal proceedings and ultimately diminish the deterrent effect of rape.[19]

12.16. In the Northern Irish review, Sir John Gillen concluded:

> I am entirely opposed to the concept of 'gross negligence rape'. My abiding concern remains that convicting for negligent rape (on the lesser sentence that follows) does not fully acknowledge the egregious harm done to the victim who is raped even if negligently. These offences are so heinous and the consequences for the victim so dire that any such charge risks undermining the true seriousness of rape and the destruction of the sexual autonomy that is the cornerstone of our legislation. There should be no hierarchy of rape or serious sexual offence.[20]

12.17. To these opposing arguments we would add that implementing such a reform in the Western Australian context would require a significant restructuring of the sexual offences: it would be necessary to create both the intentional and negligent versions of the relevant offences. There may also be less justification for introducing negligent sexual offences into Western Australia, given that the current sexual offences do not require proof that the accused knew that the complainant was not consenting to the relevant sexual activity.

56. Should a mental state requirement be added to any of the *Code's* sexual offence provisions? If so, which provisions should include such a requirement and what should the requirement be?

57. Should the *Code* include negligent sexual offences?

16 Ibid [7.84].

17 Law Reform Commission (Ireland), *Knowledge or Belief Concerning Consent in Rape Law* (Report, 2019) Rec 4.01; [4.1]–[4.8]; Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 2019) Rec 156; [11.88]–[11.94].

18 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) [7.85].

19 Law Reform Commission (Ireland), *Knowledge or Belief Concerning Consent in Rape Law* (Report, 2019) [4.5].

20 Gillen Review, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 2019) [11.88].

13. Other possible offences

Chapter overview

This Chapter considers the possible creation of new sexual offences. It examines five potential offences: persistent sexual conduct with a child of or over 16; a broad grooming offence; failing to protect a child within an institution; breach of conditional consent; committing non-assaultive offences with the intention of committing a sexual offence.

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Introduction

13.1. The offences in the *Code* are currently grouped in the following categories:

- Circumstances where the complainant does not consent to the sexual activity.
- Circumstances where the complainant is too young to consent to the sexual activity.
- Circumstances where the criminal law deems the complainant incapable of consenting to the sexual activity for a reason other than youth.
- Circumstances where the criminal law deems that the complainant and accused are too closely related to engage in some sexual activity.[1]

13.2. It may be desirable to add other offences to Chapter XXXI. In this Chapter we focus on five possible additions: persistent sexual conduct with a child of or over 16; a broad grooming offence; failing to protect a child within an institution; breach of conditional consent; and committing non-assaultive offences with the intention of committing a sexual offence. There are other possible additions that could be made. We welcome submissions on any other sexual offences that you think should be included.

13.3. We note that our Terms of Reference only allow us to consider offences that should be added to Chapter XXXI of the *Code*. We cannot consider offences that properly belong in other Acts or other parts of the *Code*. This includes prostitution offences (which are addressed in the Prostitution Act); child exploitation offences (which are addressed in Chapter XXV of the *Code*) and intimate image offences (which are addressed in Chapter XXVA of the *Code*).

Persistent sexual conduct with a child of or over 16

13.4. In Chapter 7 we discuss the offence of persistent sexual conduct with a child under 16.[2] This offence is different from the other sexual offences against children contained in Chapter XXXI

[1] K Burton, T Crofts and S Tarrant, *Criminal Codes: Commentary & Materials* (Thomson Reuters (Professional) Australia Pty Ltd, 7th ed, 2018) [5.20].

[2] *Criminal Code Act Compilation Act 1913* (WA) s 321A.

of the *Code*. Those offences are targeted at individual acts that take place on specific occasions. By contrast, this offence is targeted at conduct that occurs over a period of time.

13.5. The offence set out in section 321A of the *Code* only applies to children under 16: it does not apply to people who engage in persistent sexual conduct with 16 or 17-year-old children. Presumably, this is because parliament considered that a child of or over 16 years should be able to recall sufficient detail of individual sexual offences committed against them to be able to prove individual offences.

13.6. However, given such persistent sexual conduct may occur soon after a child turns 16, and may consist of many instances that would be difficult for anybody to recall individually, it may be desirable to enact a similar offence which applies to persistent sexual conduct with a child of or over 16 years, who is under the care, supervision or authority of the accused.

13.7. We are interested to hear your views on whether such an offence should be enacted.

58. Should the *Code* include an offence of persistent sexual conduct with a child of or over the age of 16 years who is under the care, supervision or authority of the accused?

Grooming

13.8. Grooming refers to a preparatory stage of child sexual abuse where an adult gains the trust of a child (and potentially other significant people in the child's life) in order to take sexual advantage of the child.[3]

13.9. Grooming offences in Australia include:

- Online and electronic grooming offences which focus on conduct involving online or other electronic communication.
- Specific conduct grooming offences which focus on specific conduct such as sharing indecent images or providing a child with drugs or alcohol.
- Broad grooming offences which criminalise any conduct that aims to groom a child for later sexual activity.[4]

13.10. An example of a broad grooming offence is section 49M of the *Crimes Act 1958* (Vic) (**Victorian Act**). This offence provides that a person commits an offence if they:

- Communicate with a child under 16 or a person who has care, supervision or authority over the child; and
- They intend that the communication facilitate the child engaging or being involved in the commission of a sexual offence by the person or by another adult.

13.11. Western Australia does not have any broad grooming offences. The *Code* contains provisions which appear to be aimed at preventing some forms of grooming of children, including section 204A (showing offensive material to a child) and section 204B (using electronic communication to procure, or expose a child to indecent matter).

13.12. The Royal Commission recommended that:

- Each state and territory government should introduce legislation to amend its criminal legislation to adopt a broad grooming offence that captures any communication or conduct

[3] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Parts III-VI, 2017) 75.
[4] Ibid 77.

with a child undertaken with the intention of grooming the child to be involved in a sexual offence; and

- Each state and territory government (other than Victoria) should introduce legislation to extend its broad grooming offence to the grooming of persons other than the child.[5]

13.13. The Western Australian Government has accepted, in principle, the Royal Commission's recommendation, but has not yet introduced a Bill to give effect to this in principle acceptance.[6]

59. Should the *Code* include a broad grooming offence? If so, how should that offence be framed?

Failing to protect a child within an institution

13.14. The Royal Commission recommended that State and Territory governments should introduce legislation to create a criminal offence of failing to protect a child within a relevant institution from a substantial risk of sexual abuse by an adult associated with the institution.[7] The Royal Commission recommended that the offence should apply where: an adult person knows that there is a substantial risk that another adult person associated with the institution will commit a sexual offence against: a child under 16; or a child of 16 or 17 years of age if the person associated with the institution is in a position of authority in relation to the child.[8]

13.15. Western Australia already has laws obliging persons in certain positions of authority to report suspected child sexual abuse.[9] Those positions are currently doctors, nurses, midwives, teachers, police officers, boarding supervisors and ministers of religion.[10] As of 1 November 2022 the categories of persons obliged to report have been extended to include early childhood workers, out-of-home care workers, registered psychologists, school counsellors, youth justice workers, and certain officers of the Department of Communities.[11]

13.16. The Royal Commission explained:

> In the Consultation Paper, we suggested that … a duty to protect is primarily designed to prevent child sexual abuse rather than to bring abuse that has occurred to the attention of the police. We also suggested that a failure to protect offence could apply to action taken or not taken before it is known that an offence has been committed.
>
> We stated that, while reporting to police might be one of the steps that could be taken to protect a child, it might not be sufficient to reduce or remove the risk of child sexual abuse. In some circumstances, it might be criminally negligent not to take other available steps, particularly if the risk is immediate and other steps are available that will allow an intervention to occur more quickly.

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5 Ibid 97, Recs 25 and 26.

6 Western Australian Government, *The WA Government's Six-Month Response to Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse* (Department of Premier and Cabinet, 2019) <https://www.wa.gov.au/government/publications/the-wa-governments-six-month-response-recommendations-of-the-royal-commission-institutional-responses-child-sexual-abuse>.

7 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Parts III-VI, 2017) 249, Rec 36.

8 Ibid.

9 *Children and Community Services Act 2004* (WA) s 124B.

10 Ibid.

11 *Children and Community Services Amendment Act 2021 2021* (WA).

> We stated that any offence should not be unfairly onerous in terms of who it applies to and what it requires of them. It should not be so onerous that it prevents institutions from continuing to provide services to children or requires institutions to distort how they provide services by adopting unnecessarily expensive or risk-averse behaviour…[12]

13.17. The Royal Commission said that the basis for its recommendation for a failure to protect offence is:

> Many of our case studies, including the examples discussed in section 15.2, reveal circumstances where steps were not taken to protect children in institutions. These include examples where persons were allowed to continue to work with a particular child after concerns were raised, and they continued to abuse the particular child. They also include examples where persons who had allegations made against them were allowed to continue to work with many other children and they went on to abuse other children….
>
> We also consider that a failure to protect offence gives appropriate emphasis to the obligation of those in responsible positions in institutions to protect children in their care from sexual abuse. We agree that prevention of institutional child sexual abuse is the goal, but we consider that the failure to protect offence reinforces the importance of prevention and attaches appropriate criminal consequences to serious failures to take available steps to prevent abuse. That is, the criminal offence complements, rather than competes with, regulatory and other measures to improve prevention.[13]

13.18. Victoria, SA, Queensland and the ACT have introduced legislation to this effect. In Victoria, SA and Queensland the offence is failing to protect a child from sexual abuse. In ACT the offence is failing to protect a vulnerable person (not just a child) from a criminal offence (not just a sexual offence).[14]

13.19. In each jurisdiction the accused's failure to take the necessary steps to protect the child or vulnerable person must be negligent. A fact sheet published by the Victorian government explained the negligence element as a failure that:

> involves a great falling short of the standard of care that a reasonable person would exercise in the same circumstances. The offence does not require a person in authority to eliminate all possible risks of child sexual abuse.
>
> For example, a person in authority who knows that an adult associated with the organisation poses a substantial risk to children, and moves that adult from one location in an organisation to another location where they still have contact with children, is likely to be committing the offence. Another example is where a person in authority employs someone in a role that involves contact with children, when the person in authority knows the employee left their last job because of allegations of sexually inappropriate behaviour involving children.[15]

13.20. Western Australia does not currently have a criminal offence that meets the gap identified by the Royal Commission. Preventing the sexual abuse of children in institutional settings by

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12 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Parts III-VI, 2017) 234.

13 Ibid 245, 246.

14 *Crimes Act 1958* (Vic) s 49O; *Criminal Law Consolidation Act 1935* (SA) s 65; *Criminal Code Act 1899* (Qld) s 229BB; *Crimes Act 1900* (ACT) s 36B.

15 Department of Justice and Community Safety (Vic), *Failure to Protect: A New Criminal Offence to Protect Children from Sexual Abuse* (Web Page) <https://www.justice.vic.gov.au/safer-communities/protecting-children-and-families/failure-to-protect-a-new-criminal-offence-to#:~:text=A%20person%20in%20authority%20will%20commit%20an%20offence%20if%20he,authority%20of%20a%20relevant%20organisation>.

encouraging people to report to their superiors their suspicions that child abuse could occur if something is not done to prevent it or to in some other way protect the child before an offence occurs, appears to have merit. However, consideration needs to be given to whether it is appropriate to criminalise the failure to do so. Should it be a criminal offence to fail to act in circumstances where no offence has been committed and may never be committed? The law does not criminalise a person's failure to intervene to stop an assault that is actually occurring; let alone intervene to prevent an assault that may never occur. Does the protective principle in the case of vulnerable children in an institution justify such a substantial change in the criminal law? If it does, what limitations should be placed on the offence as to the circumstances to which it applies and the persons to whom it applies so as to ensure that it is not 'unfairly onerous'.

13.21. The Western Australian Government has decided to give further consideration to the recommendation to introduce an offence of failing to protect a child within an institution.[16]

60. Should the *Code* include an offence of failing to protect a child within an institution? If so, how should that offence be framed?

Breach of conditional consent

13.22. It will sometimes be the case that a person only agrees to engaging in a sexual activity on certain conditions. For example, they may only agree to have sex with a person if they will marry them. A question arises as to what consequences (if any) should follow if the other party engages in the sexual activity but fails to comply with the condition.

13.23. One way to address this situation would be to provide that the sexual activity was non-consensual: that consent was contingent on compliance with the relevant condition. This would allow for the person who failed to comply with the condition to be convicted of a relevant sexual offence (for example, sexual penetration without consent). We discuss this option in Chapter 4 of Discussion Paper Volume 1.

13.24. A second way to address this situation would be to rely on an offence such as procuring sexual acts by fraud. We discuss this offence in Chapter 11.

13.25. A third way to address this situation would be to create a specific offence of breach of conditional consent. This option was suggested by Magenta in its preliminary submission. It referred to the examples of a person who fails to comply with a condition to use or condom or pay for sexual services, and argued that:

> Both of these examples are appropriate to be dealt with under sexual offences, as they are both offences done with sexual intent and in a sexual context, and have an effect on the victims of these offences similar to other sexual offences. We believe it is important that both of these types of conditional consent are dealt with under sexual offences, rather than another type of fraud.
>
> It is our position that creating a new sexual offence to include these types of offending would be the best option. These offences do not meet the seriousness of some of the

[16] Western Australian Government, *The WA Government's Six-Month Response to Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse* (Department of Premier and Cabinet, 2019) <https://www.wa.gov.au/government/publications/the-wa-governments-six-month-response-recommendations-of-the-royal-commission-institutional-responses-child-sexual-abuse>.

current sexual offences of 'sexual penetration without consent' while exceeding the seriousness of 'indecent assault'.[17]

13.26. We are interested to hear your views on whether an offence of breaching conditional consent should be enacted, and if so how it should be framed.

61. Should the *Code* include an offence of breaching conditional consent? If so, how should that offence be framed?

Committing non-assaultive offences with an intent to commit sexual acts

13.27. Under current Western Australian law, it is an offence to assault another person with the intention of committing or facilitating the commission of a crime.[18] This includes assaulting a person with the intention of committing a sexual offence.

13.28. One possibility for reform would be to add a new provision which provides that it is a crime to commit other, non-assaultive offences with the intention of committing or facilitating the commission of a sexual offence. This could be limited to specific offences (for example, burglary) or extended to the commission of all offences.

13.29. Such an approach has been taken in the UK, which has:

- A general offence of committing an offence with intent to commit a sexual offence;[19] and
- A specific offence of trespassing with intent to commit a sexual offence.[20]

13.30. In its review of sexual offences, the Hong Kong LRC recommended the introduction of an offence modelled on the UK provision.[21]

13.31. Although Western Australia does not have a comparable offence, a number of sexual offences have a mandatory minimum sentence if the offence is committed in the course of a home burglary. We discuss this sentencing requirement in Chapter 16.

13.32. We are interested to hear your views on whether the *Code* should provide that it is a crime to commit a non-assaultive offence with the intention of committing or facilitating the commission of a sexual offence, and if so how that offence should be framed. We are also interested to hear any suggestions you may have of other sexual offences that should be added to Chapter XXXI of the *Code*.

62. Should the *Code* include an offence of committing a non-assaultive offence with the intention of committing or facilitating the commission of a sexual offence? If so, should this be limited to specific offences or extended to the commission of all offences?

63. Are there any other sexual offences that should be included in Chapter XXXI of the *Code*?

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17 Preliminary Submission 3 (Magenta) 4.

18 *Criminal Code Act Compilation Act 1913* (WA) s 317(a).

19 *Sexual Offences Act 2003* (UK) s 63.

20 Ibid s 62.

21 Law Reform Commission of Hong Kong, *Review of Substantive Sexual Offences* (Report, December 2019) [4.91].

14. Aggravated offences

Chapter overview

This Chapter examines the issue of aggravated offences. It considers whether the existing circumstances of aggravation set out in the *Code* should be reformed in any way, and whether any new aggravated offences should be created.

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Introduction

14.1. Chapter XXXI of the *Code* includes three offences which have basic and aggravated versions:

- Sexual penetration without consent.[1]
- Indecent assault.[2]
- Sexual coercion.[3]

14.2. The elements of the aggravated versions of these offences are identical to the elements of the basic versions except they include an additional element that the prosecution must prove beyond reasonable doubt: that the offence was committed in defined circumstances of aggravation.

14.3. As the defined circumstances of aggravation make the offence more serious, a higher maximum penalty is attached to the aggravated versions of the offences. For example, the maximum penalty for the basic version of sexual penetration without consent is 14 years' imprisonment; and for the aggravated version is 20 years' imprisonment.

14.4. It is important to note that there is a difference between an aggravated version of an offence and an aggravating factor:

- An aggravated version of an offence is a different and more serious offence than the basic offence. It is for the jury to determine if the accused should be convicted of that offence. If it finds that the prosecution has proven all the elements of the aggravated version of an offence, it should specifically convict the accused of that offence. The name of the aggravated offence (for example, aggravated sexual penetration without consent) will be recorded on the offender's criminal record.
- An aggravating factor is a factor which makes a particular instance of an offence more serious and suggests that a more severe sentence should be imposed. It is a sentencing matter to be considered by the judge in their sentencing determination. If proven, it will make the penalty imposed on the offender more severe. It will not, however, change the

1 *Criminal Code Act Compilation Act 1913* (WA) ss 325-326.
2 Ibid ss 323-324.
3 Ibid ss 327-328.

offence for which the offender has been convicted. We discuss aggravating factors in Chapter 16.

14.5. In this Chapter we examine the circumstances of aggravation that are currently included in the *Code* and consider whether they should be reformed in any way.

Elements and definitions

14.6. Chapter XXXI of the *Code* sits within Part V of the *Code*.[4] Section 221 sets out a general definition of circumstances of aggravation that applies to all sections in that Part of the *Code*. It covers circumstances in which:

- The offender is in a family relationship with the victim of the offence.[5]
- A child was present when the offence was committed.[6]
- The offender's conduct constituted a breach of an order under the *Restraining Orders Act 1997* (WA).
- The victim is of or over the age of 60 years.

14.7. Section 319 of the *Code* sets out additional aggravating circumstances that only apply to the offences in Chapter XXXI. It provides that:

> ***circumstances of aggravation***, without limiting the definition of that expression in section 221, includes circumstances in which —
>
> (a) at or immediately before or immediately after the commission of the offence —
>
> (i) the offender is armed with any dangerous or offensive weapon or instrument or pretends to be so armed; or
>
> (ii) the offender is in company with another person or persons; or
>
> (iii) the offender does bodily harm to any person; or
>
> (iv) the offender does an act which is likely seriously and substantially to degrade or humiliate the victim; or
>
> (v) the offender threatens to kill the victim; or
>
> (b) the victim is of or over the age of 13 years and under the age of 16 years.

[4] Part V of the *Code* is titled 'offences against the person and relating to parental rights and duties and against the reputation of individuals'.

[5] 'Family Relationship' has the extensive meaning given in the *Restraining Orders Act 1997* (WA) s 4. This circumstance of aggravation does not apply if the offender was a child at the time of the commission of the offence: *Criminal Code Act Compilation Act 1913* (WA) s 221(1A).

[6] See [3.28] for the meaning of 'child'. This circumstance of aggravation does not apply if the offender was a child at the time of the commission of the offence: *Criminal Code Act Compilation Act 1913* (WA) s 221(1A).

Possible reforms

Reform the circumstances of aggravation

14.8. One possibility for reform would be to add new circumstances of aggravation to the list in section 319. Some possibilities in this regard, which are included in the legislation of other jurisdictions, include:

- The offender breaks and enters into any dwelling house or other building with the intention of committing the offence or any other serious indictable offence.[7]
- The offender deprives the victim of their liberty for a period before or after the commission of the offence.[8]
- The offender supplies the victim with alcohol or drugs with the intention of facilitating the commission of the offence.[9]
- The victim has a serious physical disability or a cognitive impairment.[10]
- The victim is under the offender's 'authority', or 'care, supervision or authority'.[11]
- The indecent assault or act of gross indecency includes bringing into contact any part of the genitalia or the anus of a person with any part of the mouth of a person.[12]

14.9. It would also be possible to remove or amend the circumstances of aggravation that are currently included in the *Code*.

64. Should the circumstances of aggravation listed in section 319 of the *Code* be amended in any way?

Create new aggravated offences

14.10. Another possibility for reform would be to create new aggravated versions of offences. For example, it would be possible to:

- Create aggravated versions for offences which do not currently have them (such as the sexual offences against children).
- Create additional levels of aggravation for the offences which already have aggravated versions. For example, it would be possible to have three levels of seriousness for those offences: the basic version, a mid-level aggravated version and a high-level aggravated version.

---

7 *Crimes Act 1900* (NSW) s 61J(2)(h). While this is not currently included in the circumstances of aggravation, certain sentencing requirements must be complied with where the offence is committed in the course of an aggravated home burglary. These requirements are discussed in Chapter 16.

8 Ibid s 61J(2)(i).

9 *Sentencing Act 1997* (Tas) s 11A(1)(f).

10 *Crimes Act 1900* (NSW) s 61J(2)(f) and (g). While this is not currently listed as a circumstance of aggravation, it is an offence for a person to engage in certain sexual activities with an 'incapable person': see Chapter 8.

11 Ibid s 61J(2)(e); *Sentencing Act 1997* (Tas) s 11A(1)(a). While this is not currently listed as a circumstance of aggravation, it is an offence for a person to engage in certain sexual activities with a child who is under their care, supervision or authority: see Chapter 7. The fact that the complainant was under the offender's care, supervision or authority may also affect the maximum penalty that is available: see Chapter 16.

12 *Penalties and Sentences Act 1992* (Qld) s 352(2).

14.11. Some jurisdictions have adopted the latter course, introducing graded sexual offences that reflect the presence of different levels of physical violence. For example, in the ACT the offence of rape has been replaced by four offences:

- Sexual assault in the first degree involves the infliction of grievous bodily harm on a person with intent to engage in sexual intercourse with that person, or with a third person who is present nearby. It is punishable by 17 years' imprisonment if committed alone, or 20 years' imprisonment if committed in company with another person.[13]
- Sexual assault in the second degree involves the infliction of actual bodily harm on a person with intent to engage in sexual intercourse with that person, or with a third person who is present nearby. It is punishable by 14 years' imprisonment if committed alone, or 17 years' imprisonment if committed in company with another person.[14]
- Sexual assault in the third degree involves an unlawful assault or a threat to inflict grievous or actual bodily harm on a person with intent to engage in sexual intercourse with that person, or with a third person who is present nearby. It is punishable by 12 years' imprisonment if committed alone, or 14 years' imprisonment if committed in company with another person.[15]
- Sexual intercourse without consent involves engaging in sexual intercourse without consent, knowing that the other person is not consenting or being reckless as to their consent. It is punishable by 12 years' imprisonment if committed alone, or 14 years' imprisonment if committed in company with another person.[16]

14.12. The intention of this approach is to focus on sexual assault as an act of violence. Proponents argue that recasting sexual assault as primarily violent, rather than sexual, removes some of the stigma attached to survivors of rape and some of the difficulties of prosecution.[17] This change in emphasis is reflected in the changes to offence names which have often accompanied adoptions of graded schemes: movement away from the language of rape towards the language of assault is said to emphasise the violent aspects of sexual assaults and their commonalities with other forms of criminal assault.[18] It is also suggested that this change in language removes some of the cultural myths about rape from trials, which might disincline a jury to convict a person who does not fit the paradigm of a rapist.[19]

14.13. Supporters of graded sexual offence schemes also claim they have the potential to increase charges, guilty pleas and convictions by enabling an accused to be charged with a sexual offence of *some* form, rather than with a non-sexual assault alone (which might occur where it is only possibly to charge an accused with a more serious sexual offence).[20]

14.14. Conversely, critics of graded schemes point out that it has always been possible to lay additional charges to deal with extrinsic violence, such that grading offences unnecessarily duplicates other aggravated assaults and limits a judge's sentencing discretion.[21] Further,

13 *Crimes Act 1900* (ACT) s 51.
14 Ibid s 52.
15 Ibid s 53.
16 Ibid s 54.
17 M Heath, 'Disputed Truths: Australian Reform of the Sexual Conduct Elements of Common Law Rape' in P Easteal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press, 1998) 13, 23.
18 Ibid 23.
19 Ibid 24.
20 Ibid 23.
21 Ibid.

some support retention of the terminology of rape on the basis that only that term can sufficiently convey the gravity of the crime and stigmatise the relevant conduct.[22]

65. Should the *Code* include any additional aggravated offences?

[22] Ibid.

15. Statutory alternatives

Chapter overview

This Chapter examines the issue of statutory alternative offences. It sets out the statutory alternatives for each of the offences under review, and considers whether there is a need to add any additional statutory alternatives.

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Introduction

15.1. Generally, a jury[1] can only consider whether an accused person is guilty of the offence with which they have been charged, and as a result can only convict or acquit the accused of that offence.[2]

15.2. There are two exceptions to this rule:[3]

- If the prosecution notice or the indictment state that the accused is charged with a second offence as an alternative to the first offence.
- If the *Code* or other legislation specifies that a different offence is an alternative offence to the offence with which the accused is charged.

15.3. In either of these two circumstances the jury may find the accused not guilty of the offence charged and guilty of the alternative offence.

15.4. Most statutory alternatives are listed immediately after the offence provision to which they apply. In addition, section 10D of the *Code* specifies an alternative to all substantive offences in the *Code*. It provides:

> If a person is charged with committing an offence (the principal offence), the person, instead of being convicted as charged, may be convicted of —
>
> (a) attempting to commit; or
>
> (b) inciting another person to commit; or
>
> (c) becoming an accessory after the fact to,
>
> the principal offence or any alternative offence of which a person might be convicted instead of the principal offence.

15.5. The use of statutory alternatives can be illustrated by considering section 325(1) (sexual penetration without consent). The provision states that its statutory alternatives are sections 322(2) or (4), 323 or 324. This means that if the accused has been charged with sexual penetration without consent, and the jury acquits them of that offence, it can go on to consider

1 The term jury includes a judge or magistrate sitting without a jury to try a charge.
2 *Criminal Code Act Compilation Act 1913* (WA) s 10A.
3 Ibid.

whether they are guilty of an offence under any of sections 322(2) or (4), 323 or 324, or any of the offences in section 10D.

15.6. Statutory alternatives are particularly useful in three circumstances:

- Where the charged offence requires proof that the complainant was a particular age. The inclusion of a statutory alternative allows a jury which finds that the prosecution has proven all elements of the charged offence other than the complainant's age to convict the accused of an appropriate offence. For example, if the accused is charged with sexually penetrating a child under 13,[4] the jury may be satisfied of all the elements of the offence except that the complainant was under 13. If it is satisfied that the complainant was under 16 at the relevant time, it could instead convict the accused of sexually penetrating a child of or over 13 and under 16.[5]
- Where two offences differ slightly in nature, and it is unclear which the accused committed. The inclusion of a statutory alternative will allow the jury to convict the accused of the appropriate offence. For example, if the accused is charged with sexual penetration without consent,[6] and the jury is satisfied that there was non-consensual sexual contact between the parties but is not satisfied that it amounted to sexual penetration, it could instead convict the accused of indecent assault.[7]
- Where aggravated versions of offences exist.[8] The inclusion of a statutory alternative allows a jury which is satisfied that the elements of the basic offence have been proven, but which is not satisfied that the offence was committed in circumstances of aggravation, to convict the accused of the basic offence. For example, if a person is charged with aggravated sexual penetration without consent,[9] and the jury is satisfied that there was non-consensual sexual penetration but is not satisfied that it occurred in a circumstance of aggravation, it can convict the accused of sexual penetration without consent.[10]

Current statutory alternatives

15.7. Table 15.1 sets out the statutory alternatives for each of the offences we are considering.

4 Ibid s 320(2).
5 Ibid s 321(2).
6 Ibid s 325.
7 Ibid s 323.
8 See Chapter 14 for a discussion of aggravated offences.
9 *Criminal Code Act Compilation Act 1913* (WA) s 326.
10 Ibid s 325.

Charged offence	Alternative offences							
186(1)	191(1)	-	-	-	-	-	-	-
191(1)(a)	186(1)	-	-	-	-	-	-	-
191(1)(b)-(d)	None							
192(1)	None	-	-	-	-	-	-	-
320(2)	320(4)	321(2)	321(4)	322(2)	322(4)	-	-	-
320(3)	320(4)	320(5)	321(3)	321(4)	321(5)	322(3)	322(4)	322(5)
320(4)	321(4)	322(4)	-	-	-	-	-	-
320(5)	321(5)	322(5)	-	-	-	-	-	-
320(6)	321(6)	322(6)	-	-	-	-	-	-
321(2)	321(4)	322(2)	322(4)	-	-	-	-	-
321(3)	321(4)	321(5)	322(3)	322(4)	322(5)	-	-	-
321(4)	322(4)	-	-	-	-	-	-	-
321(5)	322(5)	-	-	-	-	-	-	-
321(6)	322(6)	-	-	-	-	-	-	-
321A(4)	320(2)	320(4)	321(2)	321(4)	320(3)	321(3)		
322(2)	322(4)	-	-	-	-	-	-	-
322(3)	322(4)	322(5)	-	-	-	-	-	-
322(4)-(6)	None	-	-	-	-	-	-	-
323	None	-	-	-	-	-	-	-
324(1)	321(4)	322(4)	323	-	-	-	-	-
325(1)	322(2)	322(4)	323	324	-	-	-	-
326(1)	321(2)	321(4)	322(2)	322(4)	323	324	325	
327(1)	322(3)	322(4)	322(5)					
328(1)	321(3)	321(4)	321(5)	322(3)	322(4)	322(5)	327	
329(2)	321(2)	321(4)	322(2)	322(4)	329(4)			
329(3)	321(3)	321(4)	321(5)	322(3)	322(4)	322(5)	329(4)	329(5)
329(4)	321(4)	322(4)	-	-	-	-	-	-
329(5)	321(5)	322(5)	-	-	-	-	-	-
329(6)	321(6)	322(6)	-	-	-	-	-	-
329(7)-(8)	None	-	-	-	-	-	-	-
330(2)	322(2)	322(4)	323	324	325	326	330(4)	
330(3)	322(3)	322(4)	322(5)	327	328	330(4)	330(5)	
330(4)	322(4)	323	324					
330(5)	322(5)	-	-	-	-	-	-	-
330(6)	322(6)	-	-	-	-	-	-	-
331B-D	None	-	-	-	-	-	-	-

Table 15.1: *Code* sexual offences and their statutory alternatives

Possible reforms

15.8. We invite submissions as to whether there are any sexual offences for which it would be logical to have additional statutory alternatives, or whether any of the existing alternatives should be removed. Possibilities include:

- Sexual penetration without consent (section 325(1)) and/or aggravated sexual penetration without consent (section 326(1)) could be added as statutory alternatives to sexually penetrating a child under 16 (section 321(2)) and/or sexually penetrating a child of or over 16 (section 322(2)). This would capture the situation where the jury is not satisfied that the sexual penetration took place when the child was of the relevant age.
- Indecent assault (section 323) and/or aggravated indecent assault (section 324(1)) could be added as a statutory alternative to indecently dealing with a child under 16 (section 321(4)) and/or indecently dealing with a child of or over 16 (section 321(4)). This would capture the situation where the jury is not satisfied that the indecent dealing took place when the child was of the relevant age.

66. Should the statutory alternatives for sexual offences be amended in any way?

16. Penalties

Chapter overview

This Chapter examines the penalties for sexual offences that are set out in the *Code*. It outlines the sentencing process, the development of Western Australia's sexual offence sentencing laws, and the current penalty levels. It considers four possible options for reform: changing the maximum penalties; changing the factors that affect the maximum penalties; changing the circumstances in which a penalty is mandated; introducing rebuttable sentencing presumptions.

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Introduction

16.1. Sentencing is an essential part of the criminal justice system. The sentence that an offender receives for a sexual offence is important to offenders, victims and the community.

16.2. The sentencing process is complex, and requires judges to take into account various factors, principles, procedures and practices. These are set out in several statutes (most notably, the *Sentencing Act 1995* (WA) (the **Sentencing Act**) and the *Young Offenders Act 1994* (WA) (the **Young Offenders Act**)) as well as the common law.

16.3. Our Terms of Reference do not permit us to review sentencing law generally. We are only permitted to consider:

- What the maximum statutory penalty should be for the sexual offences under review;[1] and
- Any specific sentencing requirements that should be included in Chapter XXXI of the *Code*, such as mandatory minimum sentences or periods of imprisonment.

16.4. We cannot make recommendations about matters such as:

- The aggravating and mitigating factors that a judge should consider when determining what penalty should be imposed on a sexual offender within the range established by the *Code*.
- The principles that should be applied in determining an appropriate sentence.

[1] Those contained in Chapter XXXI of the *Criminal Code Act Compilation Act* (WA), as well as sections 186, 191 and 192 of the *Code*.

- Measures that occur after a court imposes a sentence, such as sex offender registration, supervision measures imposed as part of a sentence, supervision measures imposed as part of parole, or supervision or detention orders imposed after sentence.[2]

16.5. Although we cannot make recommendations about these general sentencing matters, it is necessary to understand the sentencing framework in order to consider the issues that fall within the scope of our review. Consequently, this chapter starts by providing an overview of the sentencing process. It then outlines the development of Western Australia's sexual offence sentencing laws, discusses the current penalty levels, and considers various options for reform.

The sentencing process

16.6. The offence provisions in the *Code* set out the maximum penalty that may be imposed on a person who is found guilty of the relevant offence or who pleads guilty to that offence.[3] For example, the maximum penalty that may be imposed on a person who is found guilty of sexual penetration without consent is 14 years' imprisonment.[4]

16.7. The maximum penalty will not be imposed in every case: it is reserved for the worst offences. Judges generally have some discretion about the penalty they impose.[5] This may include a term of imprisonment, a conditional or suspended imprisonment order, an intensive supervision order, a community-based order or a fine.[6]

16.8. After a person is found guilty of an offence, the court will usually hold a sentencing hearing to gather information relevant to their sentencing determination. At this hearing defence counsel may raise any matters which suggest a more lenient sentence should be imposed (**mitigating factors**) and the prosecution may raise any aggravating factors.

16.9. At the conclusion of the sentencing hearing the judge will determine the sanction to impose, taking into account factors such as the seriousness of the offence, the offender's culpability and the impact the offence had on the victim. Any aggravating factors must be proven beyond reasonable doubt;[7] and any mitigating factors must be proven on the balance of probabilities.[8]

16.10. Aggravating and mitigating factors tend not to change over time. However, the weight that sentencing and appellate courts give to such factors does change depending on such matters as changes in society's views as to the seriousness of an offence, or changes to the prevalence of an offence. If the seriousness of an offence or its prevalence increases, less weight will be given to mitigating factors personal to an offender, and sentences for the relevant offence will increase.

16.11. For example, in 1996 Murray J[9] listed the following factors as being relevant when sentencing child sex offenders:

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2 These are addressed in the *Community Protection (Offender Reporting) Act 2004* (WA).

3 For the sake of simplicity, for the remainder of this chapter we will only refer to people who are found guilty of an offence. However, the stated principles equally apply to people who plead guilty.

4 *Criminal Code Act Compilation Act 1913* (WA) s 325(1).

5 See *Sentencing Act 1995* (WA) s 9. This discretion may be confined by the specification of a mandatory minimum penalty.

6 Ibid s 39.

7 *Marker v The Queen* [2002] WASCA 282; *Langridge v The Queen* (1996) 17 WAR 346; *R v Olbrich* (1999) 199 CLR 270.

8 *Marker v The Queen* [2002] WASCA 282.

9 *Dempsey v The Queen* (Supreme Court of Western Australia, 9 February 1996).

1. The nature of the conduct in question, the degree of perversion or deviance demonstrated.
2. The relative ages of the offender and the victim.
3. Whether the offender was in a position of trust or authority with respect to the victim, thus better enabling the commission of the offence.
4. Whether there was, apart from such position of trust or authority, any element of coercive or forceful behaviour on the part of the offender.
5. The circumstances of the victim and the degree to which that person was not only taken advantage of, but their corruption was contributed to by the commission of the offence.
6. Whether the offence was repeated and if so, over what period or periods of time so as to enable the court to consider whether it was of an isolated character or displayed recidivism on the part of the offender.
7. The degree of remorse displayed and whether any such contrition has been effectively followed up by determined efforts to achieve the offender's rehabilitation.
8. The youth of the offender.
9. The extent to which the victim's co-operation in the commission of the offences was secured by friendship or by the offer of some reward.
10. The actual impact of the commission of the offence upon the child established by a victim impact statement or otherwise.
11. Whether the offender has a prior relevant criminal history.
12. The prevalence of such offences in the community at the time and the degree to which particular circumstances indicate a heightened need to seek to achieve the protection of the community and particularly of young persons from the commission of such offences, whether with or without their consent.[10]

16.12. Whilst all these factors remain relevant,[11] the weight given to the mitigating factors personal to the offender, such as youth or old age, remorse and prior good character has decreased as a result of the increasing seriousness with which courts view these offences. The result has been that sentences for child sex offences have increased over time.[12]

16.13. The Sentencing Act sets out certain principles of sentencing, which must be applied by judicial officers when sentencing an offender. These are:

1. A sentence imposed on an offender must be commensurate with the seriousness of the offence.
2. The seriousness of the offence must be determined by taking into account:
    a. the statutory penalty for the offence;
    b. the circumstances of the commission of the offence including the vulnerability of any victim of the offence;

[10] Ibid 6.

[11] See, eg, *Cross v The State of Western Australia* [2018] WASCA 86, [47]-[48] (Buss P, Mazza and Beech JJA). See also *SCN v The State of Western Australia* [2017] WASCA 138, [104] (Buss P, Beech JA and Hall J); *Simon v The State of Western Australia* [2009] WASCA 10, [24] (Steytler P); *Marris v The Queen* [2003] WASCA 171, [11] (Wheeler J); *R v Avery* [2002] WASCA 136, [9] (Wallwork, Murray and McKechnie JJ); *R v Hunt* [2002] WASCA 324, [7], [17] (Templeman, McKechnie and McLure JJ).

[12] *VIM v The State of Western Australia* [2005] WASCA 233; *KC v The State of Western Australia* [2008] WASCA 216, [34]-[35]; *JJR v The State of Western Australia* [2018] WASCA 51, [102].

c. any aggravating factors; and

d. any mitigating factors.

…

4. A court must not impose a sentence of imprisonment on an offender unless it decides that –

a. the seriousness of the offence is such that only imprisonment can be justified; or

b. the protection of the community requires it.[13]

16.14. In determining an appropriate sentence, a judicial officer should also be guided by the general objectives of sentencing. Unlike the sentencing legislation in other Australian jurisdictions,[14] the Sentencing Act does not specify these objectives. However, they are well established in case law.[15] They include:

- Punishment: to punish the offender for the offence in a way that is just and appropriate in all the circumstances.
- Deterrence: to deter the offender and other people from committing the same or similar offences.
- Protection: to protect the community from the offender.
- Rehabilitation: to promote the rehabilitation of the offender.
- Denunciation: to denounce the conduct of the offender.

16.15. The weight that a judicial officer should give to each of these sentencing objectives may be affected by the type of offence that has been committed. Courts have routinely identified that the primary purposes of sentencing for sexual offences are punishment and deterrence. This means that less weight is given to an offender's personal mitigating circumstances.[16]

Development of Western Australia's sexual offence sentencing laws

16.16. Prior to 1985 the most serious sexual offence in Western Australia was rape. The maximum penalty for rape was life imprisonment. Other sexual offences had lesser penalties. For example, the maximum penalty for what is now known as sexual penetration of an incapable person was 5 years' imprisonment.

16.17. In 1985 the *Acts Amendment (Sexual Assaults) Act 1985* (WA) made significant changes to Western Australia's sexual offence laws. These included replacing the offence of rape with the offences of sexual assault and aggravated sexual assault. The maximum penalty for sexual assault was 14 years' imprisonment and for aggravated sexual assault was 20 years' imprisonment. The maximum penalty for what is now known as sexual penetration of an incapable person was increased to 14 years' imprisonment.

16.18. In 1992 further substantive changes were made, including moving most sexual offences to Chapter XXXI and changing the name of the sexual assault offence to sexual penetration

13 *Sentencing Act 1995* (WA) s 6.

14 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1997* (NT) s 5; *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing Act) 1988* (SA) s 10; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5.

15 See, eg, *Veen v R [No.1]* (1979) 143 CLR 458; *Veen v R [No.2]* (1988) 164 CLR 465.

16 See, eg, *LTT v The State of Western Australia* [2022] WASCA 31, [58].

without consent. The offences, and their maximum penalties, have remained largely unchanged since then.

16.19. The most significant change since 1992 was the introduction, in 2015, of mandatory penalties for certain sexual offences[17] that are committed during the course of an aggravated home burglary:[18]

- If the offender is an adult, the court must impose a sentence that is at least 75 percent of the specified maximum penalty. For example, a court sentencing an adult who commits the offence of sexual penetration without consent during an aggravated home burglary (which has a maximum penalty of 14 years' imprisonment) must impose a sentence of at least 10.5 years' immediate imprisonment.[19]
- If the offender is a juvenile, the court must impose a term of imprisonment of at least three years, must not suspend the term of imprisonment and must record a conviction against the offender.

Current penalty levels

16.20. The maximum penalty available for each of the sexual offences under review is a term of imprisonment. These range from 2 years' imprisonment for procuring a person to be a prostitute and fraudulently procuring a person to have carnal knowledge to 20 years' imprisonment for aggravated penetrative sexual offences. Appendix 6 sets out the maximum penalties for each of the offences we are considering.

16.21. As noted above, the *Code* sets out minimum levels of imprisonment that must be imposed on offenders who commit certain sexual offences during an aggravated home burglary. In all other cases, the full range of sentencing options is available. However, it is rare for a person convicted of a sexual offence involving sexual penetration, an aggravated version of an offence,[20] or an offence which is committed against a child to receive any type of sentence besides a term of immediate imprisonment. This reflects the seriousness with which courts and the community regard sexual offending.

16.22. In relation to sentences for sexual offences against adults, the Court of Appeal has said:

> It is well established that, ordinarily, a term of immediate imprisonment is the only appropriate penalty for the offences of non-aggravated and aggravated sexual penetration without consent. A lesser type of sentence will be imposed only in exceptional circumstances. … Reflecting that customary sentencing approach, the parties were unable to identify any case in which this court has imposed or upheld a sentence of suspended or conditionally suspended imprisonment for an offence against s 325 or s 326 of the *Criminal Code*.[21]

16.23. In relation to sentences for sexual offences against children, the Court of Appeal has said:

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17 The relevant offences are: sexual offences against a child aged under 13 (s 320(7)-(9)); sexual offences against a child aged of or over 13 and under 16 (s 321(14)-(16)); aggravated indecent assault (s 324(3)-(5)); sexual penetration without consent (s 325(2)-(4)); aggravated sexual penetration without consent (s 326(2)-(4)); sexual coercion (s 327(2)-(4)); aggravated sexual coercion (s 328(2)-(4)).

18 An aggravated home burglary is a home burglary where the offender is armed, pretends to be in possession of an explosive, is in company with another person, does bodily harm to another person, threatens to kill or injure anyone, detains anyone, or knew or ought to have known someone was at home: *Criminal Code Act Compilation Act 1913* (WA) ss 1, 400.

19 Ibid s 325(2).

20 See Chapter 14.

21 *The State of Western Australia v Syred* [2020] WASCA 185, [27].

> Ordinarily … a sentence of immediate imprisonment is imposed for sexual offending against children. However, that fact does not relieve a sentencing judge of the obligation to assess whether, having regard to all the facts and circumstances and all the sentencing factors in the particular case, it is appropriate to suspend the term of imprisonment. …
>
> There are cases in which suspended imprisonment has been imposed for non-penetrative sexual offending against children. However, each involved unusual and exceptional combinations of mitigating factors which justified the suspension of the terms of imprisonment.[22]

16.24. Although courts almost always impose terms of immediate imprisonment for sexual offending, the length of the term can vary considerably even when comparing cases of the same type of offence. Western Australian courts have frequently said that there is no 'tariff' (or guideline as to an appropriate type or length of sentence) for sexual offences because 'the circumstances of sexual offences and sexual offenders are widely variable. This means that the sentence imposed in one case can only provide limited guidance in deciding what sentence should be imposed for a similar offence in another case'.[23]

Possible reforms

Change the maximum penalties

16.25. One option for reform would be to increase the maximum penalties available for some or all of the offences under review. For example, the maximum penalty for sexual penetration without consent (section 325) could be increased from 14 years' imprisonment to 20 years' imprisonment.

16.26. While the maximum penalty is only one factor which a court will consider when sentencing an offender, maximum penalties are significant because:

> … they are an important yardstick in determining the appropriate sentence to reflect the seriousness of a matter. Legislative maxima also have a significant role in communicating how the government views the seriousness of certain offences.[24]

16.27. In this regard, the High Court has held that if Parliament increases the maximum penalty for an offence, that is an indication to courts that sentences for that offence should be increased.[25]

16.28. In its review of responses to sexual violence, the Sexual Assault Prevention and Response Steering Committee (ACT) emphasised the importance of ensuring that maximum penalties appropriately reflect the seriousness of sexual offences, and noted that people who experience sexual violence often consider that the current penalties are inadequate. It stated:

> Victim survivors collectively stress the need for the justice system to hold individual offenders to account and to also send a message to the community that sexual violence is not acceptable. Victim survivors consider that suspended or partially suspended sentences and reductions to sentences for pleading guilty do not adequately reflect and represent the severity and ongoing long-term impacts of the offence on victim survivors and their families. There was support for the maximum

[22] *The State of Western Australia v Shephard* [2018] WASCA 140, [41], [44].

[23] *MRW v The State of Western Australia* [2022] WASCA 98, [54].

[24] Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (Report, December 2021) 151.

[25] *Muldrock v The Queen* [2011] HCA 39, [31].

> penalty for sexual violence to be increased to better reflect the severity of sexual violence offences and the harm caused.
>
> Some victim survivors reported that their knowledge of inadequate sentencing was the reason they did not report to police at all, as the potential outcome was simply not worth the retraumatisation of engaging with the justice system.[26]

16.29. Similar points were made by the Women's Legal Service in its preliminary submission. It advocated for a reconsideration of Western Australia's maximum penalties, to make them consistent with the higher maximum penalties set by other Australian jurisdictions:

> In Western Australia a person who sexually penetrates another person without consent or compels another to engage in sexual activity via coercion is liable for up to 14 years imprisonment. This is 25 years in Victoria, 21 years in Tasmania, and life imprisonment in Northern Territory, Queensland and South Australia. Maximum penalties should reflect the long-term impact of sexual violence on not only those who have experienced this, but also their family and friends and other networks. Inadequate penalties are also a disincentive to reporting sexual violence offences.[27]

16.30. Unfortunately, it is not possible to directly compare maximum penalty levels across jurisdictions. This is because sexual offence definitions and related sentencing rules (for example, the minimum periods of imprisonment to be served before an offender is eligible for parole) vary widely between jurisdictions. To the extent that it is possible to make a comparison, the maximum penalties in Australian jurisdictions and in comparable overseas jurisdictions vary considerably. For example, the maximum penalty for sexual penetration without consent (or the most similar offence) is:

- 12 years' imprisonment for the basic offence and 20 years' imprisonment for the most aggravated offence in the ACT.[28]
- 14 years' imprisonment for the basic offence and 20 years' imprisonment for the aggravated offence in Western Australia.[29]
- 14 years' imprisonment for the basic offence, 20 years' imprisonment for the aggravated offence, and life imprisonment if the offender was in company and inflicts bodily harm or deprives the victim of their liberty in NSW.[30]
- 20 years' imprisonment in New Zealand.[31]
- 21 years' imprisonment in Tasmania.[32]
- 25 years' imprisonment with a standard sentence of 10 years' imprisonment in Victoria.[33]
- Life imprisonment in the UK, Queensland, SA and the NT.[34]

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26 Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (Report, December 2021) 40-1.

27 Preliminary Submission 11 (Women's Legal Service WA) 5.

28 *Crimes Act 1900* (ACT) ss 51-54.

29 *Criminal Code Act Compilation Act 1913* (WA) ss 325-326.

30 *Crimes Act 1900* (NSW) ss 61I, 61J, 61JA.

31 *Crimes Act 1961* (NZ) ss 128B, 129.

32 *Criminal Code Act 1924* (Tas) s 185.

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

34 *Sexual Offences Act 2003* (UK) ss 1, 2; *Criminal Code Act 1899* (Qld) ss 349-350; *Criminal Law Consolidation Act 1935* (SA) s 48; *Criminal Code Act 1983* (NT) s 192.

16.31. The maximum penalty for sexual penetration of a child is:

- 14 years' imprisonment if the child is under 12 years in New Zealand.[35]
- 17 years' imprisonment if the child is under 10 years in the ACT.[36]
- 20 years' imprisonment if the child is under 13 years in Western Australia.[37]
- 21 years' imprisonment if the child is under 17 years in Tasmania.[38]
- 25 years' imprisonment if the child is under 10 years in Victoria and the NT.[39]
- Life imprisonment if the child is under 14 years in SA, under 13 years in the UK, under 12 years in Queensland or under 10 years in NSW.[40]

16.32. While it is often suggested that maximum penalties for sexual offences should be increased, in New Zealand it has been recognised that high maximum penalties can have unintended and undesirable consequences:

> It seems generally accepted among consultees that the custodial presumption in section 128B(2) of the *Crimes Act 1961* and the high sentencing tariffs that attach to sexual violence offences are a contributing factor to under-reporting (the offence of sexual violation/rape carries a maximum sentence of 20 years' imprisonment, with six to eight years the recommended starting point for offending at the lower end of the spectrum). These factors also mean perpetrators have a strong incentive to aggressively defend a charge rather than to admit it. This Report does not consider a change to the custodial presumption or propose amending the maximum penalties that attach to sexual violence offences or guidelines for their imposition. However, a review of these factors could be warranted in the future in order to address these issues.[41]

16.33. Another matter to consider is that increasing the maximum penalty by a certain amount (for example, 5 years) will not mean that all sentences will increase by that amount. This is because the maximum penalty simply sets the upper bound of the range within which the sentence must be set. A judge will still be free to set a penalty anywhere within that range, with the maximum penalty constituting just one sentencing consideration. While increasing the maximum penalty provides an indication to courts that sentences for that offence should be increased,[42] the amount a particular offender's sentence will increase will not be directly related to the amount the maximum penalty increases.

16.34. Under the *Code's* current sentencing scheme, the various sexual offences are graded according to seriousness: the offences which are considered the most serious have the highest maximum penalty. If this system is maintained, in determining the maximum penalties for each offence consideration should be given to their relative seriousness.

16.35. An alternative option would be to provide the same maximum penalty for all sexual offences and allow judges to determine the appropriate penalty within the set range. This is the

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35 *Crimes Act 1961* (NZ) s 132.

36 *Crimes Act 1900* (ACT) s 55.

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

38 *Criminal Code Act 1924* (Tas) s 124.

39 *Crimes Act 1958* (Vic) s 49A; *Criminal Code Act 1983* (NT) s 127.

40 *Sexual Offences Act 2003* (UK) ss 5, 6; *Criminal Code Act 1899* (Qld) s 215; *Criminal Law Consolidation Act 1935* (SA) s 49; *Criminal Code Act 1983* (NT) s 127.

41 Law Commission (New Zealand), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, December 2015) [1.5].

42 *Muldrock v The Queen* [2011] HCA 39, [31].

approach that is taken in Tasmania, where there is a general maximum penalty for offences in the *Criminal Code Act 1924* (Tas) of 21 years' imprisonment (except for murder and treason, for which the maximum penalty is life imprisonment).[43]

16.36. The Tasmanian Sentencing Advisory Council has explained Tasmania's approach to sentencing as follows:

> The [Tasmanian Code], unlike the approach in other Australian jurisdictions, does not contain graduated penalties that would allow for a determination of the relative seriousness of the different offences. This is because there is a general maximum penalty for all offences (other than murder and treason). This is imprisonment for 21 years, or a fine or both. Although 21 years is the general maximum penalty in the *Criminal Code*, this does not mean that offenders who are sentenced for any offence under the *Code* will get the maximum penalty. The courts (rather than the legislature) have established a range of sentences for different offences.[44]

16.37. The unusual nature of the Tasmania sentencing regime for sexual offences has been the subject of comment. For example, Professor Warner has noted that:

> While this appears to be a radical departure from the position in other jurisdictions, in practice it is not so significant. Because the maximum penalty must necessarily be set at a very high level to allow for the gravest possible crime of that nature likely to occur, it bears little relationship to the usual sentence for the particular crime.[45]

16.38. A single maximum penalty for all sexual offences would be inconsistent both with Western Australia's current sentencing regime for sexual offences and with its sentencing regime for other offences that fall within a category of offence. For example, offences against the person have a range of maximum penalties starting with the lowest maximum penalty for common assault to the highest maximum penalty for murder.

16.39. The sentencing regime in Western Australia as a whole must be taken into account when considering whether a single maximum penalty for sexual offences should be introduced. It may be inappropriate to recommend a single maximum penalty for all sexual offences in light of Western Australia's current sentencing regime, and our Terms of Reference constrain our ability to recommend changes to the broader sentencing regime.

67. Should the maximum penalties for any of the sexual offences under review be changed? If so, what maximum penalties should be set?

Change the factors that affect the maximum penalties

16.40. The maximum penalty for a particular sexual offence sometimes varies depending on certain factors. For example:

- The maximum penalties for certain sexual offences against children or incapable persons increase if the complainant was under the offender's care, supervision or authority.[46]

[43] *Criminal Code Act 1924* (Tas) ss 389(3), 56, 158.

[44] Tasmania Sentencing Advisory Council, *A Guide to Sentencing in Tasmania* (Tasmania Sentencing Advisory Council, 2020) 39.

[45] K Warner, *Sentencing: Issues Paper No 2* (Law Reform Institute of Tasmania, 2002) 118.

[46] *Criminal Code Act Compilation Act 1913* (WA) ss 321(7)-(8), 330(7)-(8).

- The maximum penalties for certain sexual offences against lineal relatives or de facto children increase if the complainant was under 16 at the time of the offence.[47]
- The maximum penalties for certain sexual servitude offences increase if the complainant was a child or an incapable person.[48]
- The maximum penalties for certain sexual offences against children decrease if the offender was under 18 at the time of the offence, and the complainant was not under their care, supervision or authority.[49]

16.41. Other possible options for reform include:

- Reforming the factors which increase or decrease the maximum penalty.
- Adding new factors which will increase or decrease the maximum penalty.

16.42. In the sections below we considered the scope of the current factors which affect the determination of the maximum penalty.

Care, supervision or authority

16.43. The maximum penalties for the following sexual offences against incapable persons[50] and children aged of or over 13 and under 16[51] increase if the complainant was under the offender's care, supervision or authority:

- Sexual penetration; procuring, inciting or encouraging to engage in sexual behaviour: increase from 14 years' imprisonment to 20 years' imprisonment.[52]
- Indecent dealing; procuring, inciting or encouraging to do an indecent act; indecent recording: increase from 7 years' imprisonment to 10 years' imprisonment.[53]

16.44. This increase in the maximum penalty reflects the increased seriousness of offences which involve a breach of the trust placed in the accused to look after the complainant. It is also presumably intended to act as an additional deterrent to offending in such circumstances.

16.45. We discuss the meaning of the phrase care, supervision or authority, as well as some possible options for reform, in the context of sexual offences against children (see [7.62]-[7.68]). The matters raised in that context will be equally relevant here; and unless otherwise specified, any reforms made to the terms used or the definition of those terms will apply in both contexts.

16.46. It should be noted, however, that in the sentencing context this phrase does not only apply to child complainants: it also applies to complainants who are incapable persons. This may raise different considerations when determining what terms should be used and the way in which those terms should be defined.

16.47. In this regard, we note that other jurisdictions have taken various approaches to labelling and defining the relevant terms in the context of incapable persons. For example:

- In NSW, the Act refers to a 'person responsible for care'.[54] This is defined to cover voluntary carers, health professionals, educators, home carers and supervisors of a

47 Ibid ss 329(9)-(10).
48 Ibid ss 331B, 331C(2).
49 Ibid ss 321(7)-(8).
50 Ibid s 330: see Chapter 8.
51 Ibid s 321: see Chapter 7.
52 Ibid ss 321(7), 330(7).
53 Ibid ss 321(8), 330(8).
54 *Crimes Act 1900* (NSW) s 66F(1).

person with a cognitive impairment (where the care is provided at a facility at which persons with a cognitive impairment are detained, reside or attend, or at the home of that person in the course of a program under which any such facility or other government or community organisation provides care to persons with a cognitive impairment).[55]

- In Victoria, the legislation prohibits person A from engaging in sexual activities with person B where person A is a 'person who provides treatment or support services' to person B and person B has a 'cognitive impairment or mental illness'.[56]
- In the UK, section 42 of the *Sexual Offences Act* 2003 (UK) identifies several ways that a person may be involved in the care of another. The relevant sexual offences apply where the complainant is in residential care or receiving services provided by the National Health Service or another medical body, and the nature of the accused's employment by the care or service provider has brought them or is likely to bring them into regular face to face contact with the complainant. The offences also apply to those who provide care, assistance or services to the complainant in connection with their mental disorder, whether or not in the course of employment, and as such, have had or are likely to have regular face to face contact with the complainant.[57]

16.48. The absence of an express definition of the phrase 'care, supervision or authority' in the *Code* leaves room for uncertainty on the question of whether it covers an incapable person who has been provided with medical treatment by the offender, but where there is no other form of care, supervision or authority. That is, does 'care' include medical treatment or does it requires something more? Use of the wording from the Victorian Act would make it clear that such an offender would be liable to the increased maximum penalty.

16.49. The absence of a definition also leaves room for uncertainty about whether an incapable person who is under the offender's 'care, supervision or authority' includes an incapable person who has been provided with accommodation by the offender, but has not been provided with any other service. It is also unclear whether a complainant who was under the 'care, supervision or authority' of an organisation will be considered to be in the care of an offender who was a contractor or employee of that organisation.

16.50. In Chapter 7 we noted two possible options for reforming the phrase 'care, supervision or authority': replacing the phrase with another descriptor; and defining the term(s) used. If either of these approaches are adopted, it will be necessary to determine whether the revised descriptors and/or definitions should also apply in the sentencing context, or whether different terms and/or definitions should be used.

16.51. Another possible option for reform would be to remove the distinction between offences committed against people who are in the care, supervision or authority of the offender and those who are not; and to specify that the higher maximum penalty applies in all cases. Such a reform would recognise the seriousness of all sexual offending. It would be for the judge to determine what sentence should be imposed given the particular circumstances of the case.

16.52. A fourth option for reform would be to change the offences to which this sentencing factor applies. For example, it could be expanded to apply to other offences (such as indecent assault). Alternatively, it could be confined to just one of the existing categories of offence to which it applies (for example, children 13 or over but under 16).

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55 Ibid.

56 *Crimes Act 1958* (Vic) ss 52A-52E.

57 UK Home Office, *Circular 021/2004: Guidance on Part 1 of the English Sexual Offences Act 2003* (Home Office London, 2004) 181.

68. Should there be any change to the circumstances in which a maximum penalty is increased due to the complainant being under the accused's care, supervision or authority?

Offences against children and incapable persons

16.53. The maximum penalties for the following sexual offences against lineal relatives or de facto children[58] increase if the complainant was under 16 at the time of the offence:

- Sexual penetration; procuring, inciting or encouraging to engage in sexual behaviour: increase from 10 years' imprisonment to 20 years' imprisonment.[59]
- Indecent dealing; procuring, inciting or encouraging to do an indecent act; indecent recording: increase from 5 years' imprisonment to 10 years' imprisonment.[60]

16.54. The maximum penalties for the following sexual servitude offences[61] increase if the complainant was a child[62] or an incapable person[63] at the time of the offence:

- Sexual servitude: increase from 14 years' imprisonment to 20 years' imprisonment.[64]
- Conducting a business involving sexual servitude: increase from 14 years' imprisonment to 20 years' imprisonment.[65]

16.55. The maximum penalty for the offence of allowing a young person to be on premises for unlawful carnal knowledge[66] increases from 2 years' imprisonment (if the complainant is 13-15 years' old) to 20 years' imprisonment (if the complainant is under 13).[67]

16.56. The penalties available for various other offences also differ, depending on the age of the complainant. For example, the maximum penalty for sexual penetration without consent of an adult is 14 years' imprisonment;[68] and the maximum penalty for sexual penetration of a child aged under 13 years is 20 years' imprisonment.[69] However, this is not a case of the maximum penalty for a specific offence changing depending on the circumstances (which is the focus of this section): these are different offences, which each have their own maximum penalty.

16.57. The rationale for creating higher maximum penalties for offences against children and incapable persons is presumably based on their greater vulnerability to victimisation. In the case of children, it may also be based on an awareness of the long-term effects that such offending may have. In this regard, the Western Australian Court of Appeal has said:

> It is fair to observe that if one goes back more than a decade in relation to such cases, there is frequently a degree of emphasis placed upon factors such as loss of virginity or risk of pregnancy (in relation to young girls) and to considerations such as threats of force or violence. These factors remain of significance.

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58 *Criminal Code Act Compilation Act 1913* (WA) s 329: see Chapter 9.
59 Ibid s 329(9).
60 Ibid s 329(10).
61 Ibid ss 331B-C: see Chapter 10.
62 For the purpose of this provision, child is defined to mean a person under 18: ibid s 331A.
63 For the purpose of this provision, incapable person is defined to have the same meaning given by section 330(1): see [8.9]-[8.10].
64 *Criminal Code Act Compilation Act 1913* (WA) s 331B.
65 Ibid s 331C(2).
66 Ibid s 186: see Chapter 11.
67 Ibid s 186(1).
68 Ibid s 325.
69 Ibid s 320(2).

> However … courts now understand much more clearly the destructive effect of all such offending (whether accompanied by overt violence or not) upon a child's capacity to trust others and to form relationships, and upon the child's sense of self-worth. Particularly in cases of frequent or prolonged abuse, an inability to form adult relationships, or an inability to maintain them, exaggerated doubts and fears in relation to the parenting of the complainant's own children, and disrupted schooling which adversely affects the complainant's future educational and employment prospects, are very common. Also frequently encountered in such cases are drug or alcohol abuse, self-harm, and attempted suicide.
>
> … It is now understood, however, that most child complainants feel that the abuse is to some degree their fault and that broken family relationships are their responsibility, so that the estrangement of a complainant from other members of the family which often occurs where family members 'take sides', is rightly seen now as yet another serious consequence of the offender's choice to offend in that way.
>
> In cases where the offender is not a family member or trusted adult, even in a loose sense, the effect upon family relationships and the child's sense of trust is not such a significant factor, but, depending upon the circumstances, there can nevertheless be very serious consequences in terms of loss of confidence in dealing with others, and damage to self-esteem, even where there are not overt threats, force or violence.
>
> The effects to which we have referred are particularly evident in cases where sexual offending against the child has been frequent and/or has occurred over a long period. … in cases of prolonged offending against a child is that the whole of the victim's childhood and potential for normal development is taken from him or her.[70]

16.58. In the case of children, the increased maximum penalties apply only where the victim is, in fact, under the relevant age or between the relevant ages. They do not apply where the child is apparently of the relevant age or within the relevant age range. By contrast, the definition of child in section 1 of the *Code* provides that, in the absence of positive evidence of age, any person apparently under the age of 18 years is a child. One possible option for reform would be enact a similar provision in relation to the maximum penalty provisions. This would allow a judge to sentence an offender on the basis that the complainant was a child of the relevant age where proof of age of the victim is not available, but the offender ought to have appreciated the victim was of the relevant age or within the relevant age range because of their physical appearance or because of other circumstances known to them.

16.59. Another possible option for reform would be to remove the distinction between offences committed against children and/or incapable persons; and to specify that the higher maximum penalty applies in all cases. Such a reform would recognise the seriousness of all sexual offending. It would be for the judge to determine what sentence should be imposed given the particular circumstances of the case.

16.60. A third option for reform would be to change the relevant age groupings. For example, the increased maximum penalty for sexual offences against lineal relatives or de facto children could be changed to children under 13 rather than 16.

[70] *VIM v The State of Western Australia* [2005] WASCA 233, [289]-[294].

69. Should there be any change to the circumstances in which a maximum penalty is increased due to the complainant being a child or an incapable person?

70. In the case of children, should the higher maximum penalty apply where proof of the complainant's age is not available, but the complainant was apparently within the relevant age range?

Child offenders

16.61. Offenders who are less than 18 years old at the time they commit any offence, including sexual offences, are sentenced differently to adults.[71] The principles of juvenile justice, which are set out in section 7 of the Young Offenders Act, apply. These principles provide that a young person's rehabilitation is an important, if not dominant, consideration.[72] General and personal deterrence have a role to play, but generally a tempered role.[73] Additional types of penalties to those available for adult offenders are available for child offenders.[74] Sentences of imprisonment for young people are generally only imposed as a last resort.[75]

16.62. Under the *Code*, the maximum penalties for the following offences against children aged of or over 13 and under 16[76] are also reduced if the offender was under 18 at the time of the offence, and the complainant was not under their care, supervision or authority:

- Sexual penetration; procuring, inciting or encouraging to engage in sexual behaviour: decrease from 14 years' imprisonment to 7 years' imprisonment.[77]
- Indecent dealing; procuring, inciting or encouraging to do an indecent act; indecent recording: decrease from 7 years' imprisonment to 4 years' imprisonment.[78]

16.63. These reduced penalties appear to be a statutory recognition of the mitigatory effect of youth. They also allow for the possibility that such offending may have occurred in the context of a relationship between the offender and the complainant. However, it is unusual for the *Code* to recognise such mitigatory factors in statutory maximum penalties. They are usually matters that are left to courts to weigh in determining the appropriate sentence for an offender.

16.64. The more prescriptive approach taken in section 321 of the *Code* reflects its legislative history, described in depth by Wheeler JA in several Court of Appeal cases.[79] Prior to the substantive reforms to the *Code* which began in 1985, it was extremely difficult to successfully prosecute serious sexual offences against children.[80] Often, in an attempt to secure conviction, even very serious offences would be charged as indecent dealing.[81] At the time, that offence could be

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71 *Young Offenders Act 1994* (WA) s 4.

72 *JL (A Child) v The State of Western Australia* [2008] WASCA 70, [29].

73 Ibid [30].

74 For example, the Young Offenders Act allows a judge sentencing a young person to refer the young person to a juvenile justice team (s 28), impose no punishment (s 66) or impose no punishment in return for the young person or a responsible adult making certain undertakings or promises to the Court (s 67).

75 *M (A Child) & Ors* [1999] WASCA 111, [15], [17].

76 *Criminal Code Act Compilation Act 1913* (WA) s 321: see Chapter 6.

77 Ibid s 321(7).

78 Ibid s 321(8).

79 *Marris v The Queen* [2003] WASCA 171; *Deering v The State of Western Australia* [2007] WASCA 212; *Riggall v The State of Western Australia* [2008] WASCA 69.

80 Such difficulty arose from several factors: the accepted jury directions at the time; the legal position that 'consent' to intercourse may be 'hesitant, reluctant, grudging or tearful' (*Holman v The Queen* [1970] WAR 2, 6); and the statutory prohibition against conviction of sexual offences upon the uncorroborated testimony of one witness: see *Riggall v The State of Western Australia* [2008] WASCA 69, [25]-[28].

81 Under the then section 202 of the *Criminal Code Act Compilation Act 1913* (WA).

dealt with summarily at the accused's election,[82] such that the maximum penalty available was 18 months' imprisonment.[83] The result was that those offenders who were convicted often received punishments which were 'hopelessly inadequate'.[84]

16.65. Section 321 was designed so that a court could impose an adequate penalty without the need to prove that the child did not consent,[85] in light of the strong consensus that 'sexual abuse of children was inadequately punished, or unpunished'.[86] Parliament did, however, recognise that the 'new approach' of grouping offences by reference to the complainant's age meant that the section covered 'a wide range of conduct, all of which is viewed very seriously by the community, but some of which is considered to be of less gravity'.[87] The then Attorney General gave the following examples and in doing so, explained the section's more prescriptive approach to penalties:

> For a 40 year old man to have sexual intercourse with a 14 year old girl who is not consenting, a severe penalty would be expected. However, where two young people, say a boy of 17 and a girl of 15, who had been going out for some time had sexual intercourse, many people would accept that a penalty at the lower end of the range would be appropriate. The Bill addresses these problems by reducing the maximum penalty in relation to a victim aged between 13 and 16 years where the offender is under 18 years, and increasing the maximum penalty where the child is under the care, supervision, or authority of the offender. In the ordinary way, the courts will exercise their discretion in choosing an appropriate penalty within the wider range now available to fit the circumstances of each case.[88]

16.66. One of the primary concerns expressed about the breadth of section 321 at the time it was introduced was that it encompassed behaviour that was consensual, private sexual activity between juveniles who were capable of consenting to such activity. Some segments of the community considered that that type of sexual activity ought not to be penalised at all.[89] The then Attorney-General responded pragmatically to these concerns by saying that while such activity could theoretically be prosecuted under section 321, the expectation was that it would not, because:

> The clear intention and target is not sexual activity as such, but sexual activity involving some element of abuse. The whole point of this legislation is to protect children and not to prosecute them. In this context, there is no reason to doubt that the prosecuting authorities and the courts will continue to act on that basis.[90]

16.67. The Court of Appeal has, accordingly, treated the element of 'abuse' as a concept of considerable importance in relation to sentencing for offences under section 321.[91] Generally, a significant disparity in age between the persons involved will be taken as one matter evincing

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82 Pursuant to section 20B of the *Child Welfare Act 1947* (WA) (which was repealed in 1988).

83 *Riggall v The State of Western Australia* [2008] WASCA 69, [29].

84 Ibid [31].

85 Western Australia, *Parliamentary Debates*, Legislative Council, 6 May 1992, 1803.

86 *Riggall v The State of Western Australia* [2008] WASCA 69, [33] (Wheeler JA, with whom Buss JA and Miller JA agreed).

87 Western Australia, *Parliamentary Debates*, Legislative Council, 6 May 1992, 1803.

88 Ibid.

89 For example, the Hon Derrick Tomlinson referred to the Attorney-General's comment that 'where two young people, say a boy of 17 and a girl of 15, who had been going out for some time had sexual intercourse, many people would accept that a penalty at the lower end of the range would be appropriate', and queried whether the Bill should provide for the possibility, even if highly improbable, of prosecuting juveniles for quite healthy sexual behaviour: Western Australia, *Parliamentary Debates*, Legislative Council, 14 May 1992, 2361.

90 Ibid.

91 *Deering v The State of Western Australia* [2007] WASCA 212, [17]-[18] (Wheeler JA, with Owen & Miller JJA agreeing); *Riggall v The State of Western Australia* [2008] WASCA 69, [48] (Wheeler JA, with Buss & Miller JJA agreeing).

such abuse.[92] The Court has also stated that 'generally, a sensible exercise of the prosecutorial discretion will have the result that, where there is not even arguably an element of abuse, a matter will not come before the court for sentence'.[93]

16.68. In Chapter 7 we raise the possibility of introducing a similar age defence.[94] If such a defence is introduced, it may no longer be necessary to provide for a lesser maximum penalty for child offenders (as they may instead be able to rely on the defence, depending on the scope of the defence and the disparity in age). However, in the event that it remains an offence for children to commit sexual offences, consideration should be given to possible reforms to this provision. Options for reform include:

- Eliminating the reduced penalty for child offenders and leaving it to the judge's discretion to determine the effect their age should have on the penalty imposed.
- Expanding the circumstances in which the maximum penalty is reduced for child offenders. For example, the maximum penalty for sexual offences against children under 13[95] could be reduced where the offender is also under 13.[96]

71. Should there be any change to the circumstances in which a maximum penalty is reduced due to the offender being a child?

Change the circumstances in which a penalty is mandated

16.69. It is possible for Parliament to mandate certain penalties. It is beyond our Terms of Reference to examine mandatory penalties generally. We will only consider mandated penalties for sexual offences under review..

16.70. As noted above, the *Code* currently mandates specific penalties that must be imposed if certain sexual offences[97] are committed during the course of an aggravated home burglary:

- If the offender is an adult, the court must impose a sentence that is at least 75 percent of the specified maximum penalty.[98]
- If the offender is a juvenile, the court must impose a term of imprisonment of at least three years, must not suspend the term of imprisonment and must record a conviction against the offender.[99]

16.71. The Second Reading Speech of the Bill which introduced these mandatory penalties explained the reason for their introduction as follows:

> Those who have been present at home when their home is invaded are at risk of assault and harm, even sexual assault, and of being maimed or killed. Fortunately, such instances are uncommon. Nevertheless, the community views with disquiet the frequency of home burglaries and is understandably alarmed when offences of

92 *Riggall v The State of Western Australia* [2008] WASCA 69, [48] (Wheeler JA, with Buss & Miller JJA agreeing).

93 Ibid [48] (Wheeler JA, with Buss & Miller JJA agreeing).

94 See [7.104]-[7.114].

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

96 The age of criminal responsibility in Western Australia is currently 10.

97 The relevant offences are: sexual offences against a child under 13 (s 320); sexual offences against children of or over 13 and under 16 (s 321); aggravated indecent assault (s 324); sexual penetration without consent (s 325); aggravated sexual penetration without consent (s 326); sexual coercion (s 327); aggravated sexual coercion (s 328); and sexual offences against an incapable person (s 330).

98 *Criminal Code Act Compilation Act 1913* (WA) ss 320(7); 321(14); 324(3); 325(2); 326(2); 327(2); 328(2); 330(10).

99 Ibid ss 320(8); 321(15); 324(4); 325(3); 326(3); 327(3); 328(3); 330(11).

> violence occur in the course of those burglaries. Citizens are also concerned that those who perpetrate such outrages appear not to be punished with sufficient severity by the courts.[100]

16.72. At the same time as Parliament introduced these penalties for sexual offences, it also introduced mandatory sentencing requirements for other violent offences committed during home burglaries, including murder, manslaughter, attempted unlawful killing, and aggravated grievous bodily harm.[101]

16.73. Mandatory sentencing has frequently been criticised by the judiciary and other bodies. For example, the Law Council of Australia has said:

> In the Law Council's view, mandatory sentencing laws are arbitrary and limit an individual's right to a fair trial by preventing judges from imposing an appropriate penalty based on the unique circumstances of each offence and offender. Mandatory sentencing disproportionately impacts upon particular groups within society, including Indigenous peoples, juveniles, persons with a mental illness or cognitive impairment, or the impoverished. Such regimes are costly and there is a lack of evidence as to their effectiveness as a deterrent or their ability to reduce crime.[102]

16.74. The Western Australian Court of Appeal has observed that the mandatory sentencing requirements for sexual offences committed during home burglaries leave the sentencer with little discretion. In *Harris v The State of Western Australia*,[103] President Buss and Mazza J said:

> When sentencing an offender for a crime which is subject to a mandatory minimum penalty of the kind prescribed by s 326(2) of the *Code*, the appropriate sentence must be determined having regard to all relevant sentencing factors, including where the offending falls in the range between the least serious category of offending, for which the mandatory minimum penalty is appropriate, and the worst category of offending, for which the maximum sentence is appropriate.
>
> For an offence of aggravated sexual assault without consent committed in the course of an aggravated home burglary, the difference between the sentences for a case in the least serious category and a case in the worst category is 5 years' imprisonment. It is within this relatively narrow band that a sentencing judge must decide the appropriate term of imprisonment.[104]

16.75. It may be argued that mandatory minimum sentences for sexual offences make it impossible for sentencing courts to recognise the differences between offenders. For example, the current mandatory minimum periods mean that there can be no more than 3.5 years' imprisonment difference between the sentence imposed on an 18 year old first time offender from a disadvantaged background who, when drunk for the first time, committed an unplanned offence of sexual penetration during an aggravated home burglary on the one hand, and the sentence imposed on a mature age offender with multiple convictions for sexual offences who, when sober, committed a planned offence of sexual penetration during an aggravated home burglary. The first offender must be sentenced to at least 10.5 years' imprisonment and the latter offender could, at most, be sentenced to 14 years' imprisonment.

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[100] Western Australia, *Parliamentary Debates*, Legislative Council, 24 March 2015, 1917-19 (The Hon. M Mischin, Attorney General).

[101] *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015* (WA).

[102] Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (Law Council of Australia, 2021) 5.

[103] *Harris v The State of Western Australia* [2022] WASCA 84.

[104] Ibid [37]-[38].

16.76. As a matter of practicality, courts can impose concurrent or cumulative sentences for other offences for which the offender is to be sentenced at the same time.[105] However, that practical means of imposing sentences that seek to achieve justice does not address the underlying issue, being whether mandatory minimum sentences determined by reference to the maximum penalty should not exist for sexual offences.

16.77. On the one view, the fact that mandatory minimum sentences for sexual offences leave the sentencer with limited discretion to sentence having regard to the individual circumstances of the offence and offender is merely reflective of Parliament's intent that there should be a narrow scope for taking into account the personal circumstances of an offender who committed a sexual assault during an aggravated home burglary, due to the seriousness of such an offence. On this view, there is no need to change the current approach.

16.78. However, if greater flexibility and discretion is thought to be desirable, there are a variety of ways of redressing this issue in the context of sexual offences. These include:

- Repealing the mandatory sentencing provisions and leaving it to the sentencing judge to determine the extent to which the offence was aggravated by the fact that it was committed during an aggravated home burglary.
- Replacing the mandatory sentencing provisions with new aggravated versions of the relevant sexual offences that apply to sexual offences committed during an aggravated home burglary.[106]
- Reducing the length of the mandatory sentencing provisions, in order to give sentencing courts greater scope for taking into account factors relevant to the offender.
- Limiting the application of mandatory penalties to certain classes of offender, or providing that there are circumstances in which the penalties do not apply (such as where the offender has a severe mental health problem or cognitive impairment).

16.79. If the *Code* is to retain mandatory sentencing provisions for sexual offences, there may be other circumstances – apart from aggravated home burglaries – to which such provisions should apply.

16.80. There may also be other types of mandatory sentencing provisions that could be introduced into the *Code* for sexual offences. For example, the *Code* could specify that judges must impose a sentence of imprisonment in relation to certain offences. Such a reform could help address concerns about the inappropriate imposition of non-custodial sentences. In this regard, the ACT's Sexual Assault Prevention and Response Steering Committee has stated that:

> There are a range of sentences that the court may impose for sexual offences. However, for certain serious sexual offences … non-custodial sentences may fail to be adequately proportionate to the seriousness of the perpetrator's conduct or the magnitude of the harm caused to the victim survivor.
>
> Further, Intensive Corrections Orders (ICOs) and suspended sentences may also be unable to adequately recognise the harm caused or the gravity of the offending, given they are inherently more lenient than custodial imprisonment and carry lesser punitive effect.

[105] It is likely that such offenders would also be charged with, and convicted of, the offence of aggravated home burglary and possibly other offences such as indecent assault or deprivation of liberty.

[106] See Chapter 14 for a discussion of aggravated offences.

> Yet despite this there have been some cases in the ACT where the court has imposed either a non-custodial sentence, an ICO or a suspended sentence for perpetrators found guilty of such serious sexual offences. This is concerning, given these identified sexual offences are recognised by the community and the ACT Government as among the most serious and damaging types of offences. Current practices suggest that sentencing outcomes are not consistently reflecting this.[107]

16.81. It is important to note, however, that the ACT's Sexual Assault Prevention and Response Steering Committee did not recommend the introduction of mandatory terms of imprisonment. It instead recommended introducing a rebuttable presumption of imprisonment. Rebuttable sentencing presumptions are addressed in the next section.

72. In what circumstances, if any, should mandatory sentencing provisions be used in relation to the *Code's* sexual offences?

Introduce rebuttable sentencing presumptions

16.82. One potential problem with mandatory sentencing regimes is that there may be exceptional cases in which the mandatory sentence is not justified. To address this concern, it would be possible to instead enact rebuttable sentencing presumptions. These provide that a certain sentence should ordinarily be imposed on an offender, but leave scope for judges to avoid imposing such a sentence in exceptional circumstances.

16.83. Such an approach has been taken in Victoria, where some serious sexual offences, such as rape and sexual penetration of a child under 12, are defined as Category 1 offences. A court must ordinarily impose a sentence of imprisonment on an adult who is convicted of a Category 1 offence.[108] There are, however, limited circumstances (which relate to offenders with impaired mental functioning) in which this need not occur.[109]

16.84. Similarly, in New Zealand an offender convicted of sexual violation must be sentenced to imprisonment unless, having regard to the particular circumstances of the person convicted, and the particular circumstances of the offence, including the nature of the conduct constituting it, the court thinks that the person should not be sentenced to imprisonment.[110]

16.85. If rebuttable sentencing presumptions are introduced, it will be necessary to specify the circumstances in which the ordinary sentencing presumption will be rebutted. It can be seen from the examples provided about that quite different approaches have been taken to this issue in Victoria and New Zealand. Victoria has taken a very restrictive approach, only allowing the presumption to be overcome in specified exceptional circumstances. By contrast, New Zealand provides judges with broader discretion.

73. In what circumstances, if any, should rebuttable sentencing presumptions be used in relation to the *Code's* sexual offences?

74. If rebuttable sentencing presumptions are introduced, in what circumstances should the ordinary sentencing presumption be rebutted?

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[107] Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take Action to Prevent, Believe and Heal* (Report, December 2021).

[108] *Sentencing Act 1991* (Vic) s 5(2G).

[109] See ibid s 5(2GA).

[110] *Crimes Act 1961* (NZ) s 128B. The offence of sexual violation is New Zealand's version of the penetrative sexual offence.

75. Are there any other ways in which the penalty provisions for sexual offences should be reformed?

17. Structure of Chapter XXXI of the *Code*

Chapter overview

This Chapter considers whether there is merit in changing the structure of Chapter XXXI of the *Code*.

Structure of Chapter XXXI 133
Position of offences in the *Code* 134

Structure of Chapter XXXI

17.1. Most of the sexual offences we are reviewing are contained in Chapter XXXI of the *Code*. That Chapter currently has the following structure:

- Interpretation provisions.
- Sexual offences against children (grouped together in sections dealing with discrete age groups).
- Sexual offences against adults divided by the nature and/or seriousness of the conduct.
- Sexual offences against lineal relatives and de facto children.
- Sexual offences against incapable persons.
- Sexual servitude offences.

17.2. It is not our intention to review too critically the structure of Chapter XXXI, as most groupings of offences can be structured in various ways, none of which impact on the substance of the offences. However, there are two issues on which we invite submissions.

17.3. First, does it make any difference in substance or readability if the sexual offences against children are divided by age or the nature of the offence? In this regard, at least three different approaches could be taken:

- It is possible to group the relevant offences by age. This is the approach currently taken in Western Australia, where offences are grouped into offences against children under 13,[1] children of or over 13 and under 16,[2] and children of or over 16.[3]
- It is possible to group the relevant offences by the nature of the sexual activity. This is the approach taken in NSW, where there are subdivisions on sexual assaults against children,[4] sexual touching of children,[5] sexual acts involving children,[6] persistent sexual

1 *Criminal Code Act Compilation Act 1913* (WA) s 320.
2 Ibid s 321.
3 Ibid s 322.
4 *Crimes Act 1900* (NSW) Division 10, Subdivision 5.
5 Ibid Division 10, Subdivision 6.
6 Ibid Division 10, Subdivision 7.

assault of children,[7] and procurement and grooming of children.[8] Within each subdivision there are offences of committing that type of activity with children of different age groups.

- It is possible for each offence to relate to a particular sexual activity committed against a specific age group. This is the approach taken in Victoria, where, for example, there are separate offences for sexual penetration of a child under 12,[9] sexual penetration of a child under 16,[10] sexual penetration of a child aged 16 or 17,[11] sexual assault of a child under 16,[12] and sexual assault of a child aged 16 or 17.[13] It seems that this method significantly increases the length of the Part of the Victorian Act dealing with sexual offences.

17.4. Secondly, is there any reason why the sexual offences against children should be the first offences Chapter XXXI, as is currently the position in Western Australia? In contrast, the relevant chapters of the ACT, NSW and Victorian legislation all set out the sexual offences against adults before setting out the sexual offences against children.

76. How should the sexual offences against children be grouped in the *Code*?

77. Should sexual offences against adults or children appear first in the *Code*?

Position of offences in the *Code*

17.5. One final issue that arises for consideration is the location of the chapter that sets out the sexual offence provision in the *Code*.

17.6. At present, most of the sexual offence provisions are contained in Chapter XXXI of the *Code*. That Chapter is contained in Part V of the *Code*, which includes homicide offences, assaults, threat offences, stalking and various other offences against the person.

17.7. It is not unusual for sexual offences to be grouped with other offences against the person. This is the approach that is taken in Queensland[14] and NSW.[15] However, this is not the only place to gather sexual offences. It is possible, for example, for sexual offences to be grouped in their own section of the relevant legislation. This is the approach that has been adopted in the ACT.[16]

17.8. Amending the *Code* to place sexual offences in a separate Part of it may be considered desirable, in order to give sexual offences pre-eminence and to mark their unique and serious nature. On the other hand, it may be thought that the current location of Chapter XXXI, within the Part of the *Code* that deals with offences against the person, is appropriate given that it contains a group of offences against the person with particular similarities of a sexual nature.

17.9. Not all of the offences we are reviewing are contained in Chapter XXXI: sections 186 (owner or occupier allowing a young person to be on premises for carnal knowledge), 191 (procuring

7 Ibid Division 10, Subdivision 8.
8 Ibid Division 10, Subdivision 9.
9 *Crimes Act 1958* (Vic) s 49A.
10 Ibid s 49B.
11 Ibid s 49C.
12 Ibid s 49D.
13 Ibid s 49E.
14 Most sexual offences in Queensland are contained in Chapter 32 of the *Criminal Code Act 1899* (Qld), which is contained in Part 5: Offences against the person and relating to marriage and parental rights and duties.
15 Most sexual offences in NSW are contained in Division 10 of the *Crimes Act 1900* (NSW), which is contained in Part 3: Offences against the person.
16 *Crimes Act 1900* (ACT) Part 2: Sexual offences.

a person to be a prostitute) and 192 (procuring a person to have unlawful carnal knowledge by threat, fraud or administering drug) are contained in Chapter XXII, which is titled 'offences against morality'. Chapter XXII is contained in Part IV of the *Code*, which is titled 'acts injurious to the public in general'. If these offences are to be retained, it is worth considering whether they should be moved to Chapter XXXI or to a different Act.

17.10. It is arguable that if section 191 is to be retained, it ought to remain with section 190 (being involved with prostitution), as both of these offences relate to prostitution. It may be desirable, however, for these offences to be moved to Chapter XXXI (to be grouped with the other sexual offences) or the Prostitution Act (to be grouped with other prostitution-related matters).

17.11. Queensland has a provision similar to section 192,[17] which is also located in a Chapter titled 'offences against morality'. This position reflects historical and possibly anachronistic thinking about the nature of the offence. Victoria also has a similar offence,[18] which is contained in a subdivision titled 'rape, sexual assault and associated offences'.[19]

78. Should the sexual offences be placed in a separate Part of the *Code*, or should they remain within Part V of the *Code*?

79. If the offences set out in sections 186, 191 and 192 are retained, should they be moved to a different part of the *Code* or a different Act? If so, where should they be located?

80. Are there any issues or options for reform that have not been raised in the Discussion Paper that you think the Commission should consider?

[17] *Criminal Code Act 1899* (Qld) s 218.
[18] *Crimes Act 1958* (Vic) s 45.
[19] Ibid Part 1, Division 1, Subdivision 8A.

Appendix 1: List of preliminary submissions

1. Her Honour Chief Judge Julie Wager, District Court of Western Australia.
2. Office of Multicultural Interests.
3. Magenta.
4. Darren Kavanagh, WorkSafe Western Australia Commissioner.
5. Jacqueline McGowan-Jones, Commissioner for Children and Young People.
6. Council on the Ageing (WA).
7. Pride WA.
8. Health and Disability Services Complaints Office.
9. Sexual Assault Resource Centre and the Women's Health, Genetics and Mental Health Directorate.
10. WAAC.
11. Women's Legal Service WA.
12. Sexual Health Quarters.
13. The Law Society of Western Australia.
14. Centre for Women's Safety and Wellbeing.
15. Western Australia Police Force.
16. ODPP.
17. Department of Health.
18. Ethnic Communities Council of Western Australia.

Appendix 2: Count of Western Australia's sexual offence charges 2017-2022

Code section	Offence description	Calendar year						
		2017	2018	2019	2020	2021	2022[1]	Total
186	Allowing a young person to be on premises for unlawful carnal knowledge	0	1	0	0	0	0	1
191	Procuring a person to be a prostitute	0	0	0	1	0	0	1
192	Procuring a person to have unlawful carnal knowledge by threat, fraud or administering a drug	0	0	0	2	0	0	2
320	Sexual offences against a child under 13	957	1,099	545	1,016	1,349	975	5,941
321	Sexual offences against a child aged 13-15	599	717	478	734	646	669	3,843
321A	Persistent sexual conduct with a child under 16	34	64	38	93	50	68	347
322	Sexual offences against a child under the offender's care, supervision or authority	14	43	17	31	127	46	278
323	Indecent assault	200	244	234	299	364	282	1,623
324	Aggravated indecent assault	33	70	54	78	71	59	365
325	Sexual penetration without consent	105	110	189	210	216	237	1,067
326	Aggravated sexual penetration without consent	94	161	114	230	224	200	1,023
327	Sexual coercion	0	0	1	0	0	4	5
328	Aggravated sexual coercion	4	35	8	39	2	2	90
329	Sexual offences against relatives	688	869	586	793	828	402	4,166
330	Sexual offences against incapable persons	4	5	9	1	11	25	55
331B	Sexual servitude	0	0	4	0	0	0	4
331C	Conducting a business involving sexual servitude	0	0	0	0	0	0	0
331D	Deceptive recruiting for commercial sexual servitude	0	0	0	0	0	0	0
Total		**2,732**	**3,418**	**2,277**	**3,527**	**3,888**	**2,969**	**18,811**

[1] 1 January 2022 to 17 October 2022 inclusive. The data in this table were provided by the Western Australia Police Force.

Appendix 3: Statutory mistake of age defences by jurisdiction

Jurisdiction	Application and scope of the defence
ACT	• Applies to the offences of sexual intercourse with a young person; sexual intercourse with a young person under special care; act of indecency with a young person; act of indecency with a young person under special care; grooming.[1] • For the following offences, the accused must prove[2] that they believed on reasonable grounds that the child was of or over 16 and consented to the relevant sexual activity: sexual intercourse with a young person; act of indecency with a young person. • For the following offences, the accused must prove that they believed on reasonable grounds that the child was of or over 18: sexual intercourse with a young person under special care; act of indecency with a young person under special care. • For the offence of grooming, the accused must prove that they believed on reasonable grounds that the child was of or over 16.
NSW	• Applies to the offences of procuring or grooming a child under 16 for unlawful sexual activity.[3] • The accused must prove that they reasonably believed that the other person was not a child. • For charges of sexual intercourse with a child of or over 10 but under 16 the common law defence of honest and reasonable mistake of fact is available.[4] Once the mistake of fact defence is raised the prosecution must prove, beyond reasonable doubt, that the accused did not honestly believe, on reasonable grounds, that the child was of or over 16.[5]
NT	• Applies to the offences of sexual intercourse or gross indecency with a child under 16; sexual intercourse or gross indecency with a child under 16 by a provider of services to mentally ill or handicapped persons; attempts to procure a child under 16 to have sexual intercourse or engage in an act of gross indecency; sexual relationship with a child under 16; indecent dealing with a child under 16.[6] • The accused must prove that the child was of or over 14 and they believed on reasonable grounds that the child was of or over 16.

1 *Crimes Act 1900* (ACT) ss 55(5)(a), 55A(4), 61(5), 66(6).

2 In this table, whenever it is stated that the accused must prove a matter, the matter must be proven on the balance of probabilities.

3 *Crimes Act 1900* (NSW) s 66EB(7).

4 *CTM v The Queen* (2008) 247 ALR 1, [35].

5 Ibid.

6 *Criminal Code 1983* (NT) ss 127(4), 130(3C), 131(3), 131A(6), 132(5). For a charge of sexual intercourse or gross indecency with a child under 16 by a provider of services to mentally ill or handicapped persons, the accused must also prove that they did not know the child was mentally ill or handicapped: ibid s 130(3C)(c).

Queensland	• Applies to the offences of carnal knowledge with a child under 16; indecent treatment of a child under 16; owner or occupier permitting carnal knowledge or indecent treatment of children under 16 on premises.[7] • If the offence is alleged to have been committed against a child of or over 12, the accused must prove that they believed on reasonable grounds that the child was of or over 16.
South Australia	• Applies to the offences of sexual intercourse with a child under 17; sexual intercourse with a child under 18 by a person in a position of authority over the child; indecent assault; procuring a child under 17 to do an indecent act.[8] • Where the accused was in a position of authority over the child, the defence only applies if the position of authority solely existed because the accused provided religious, sporting, musical or other instruction to the child. In such cases, the accused must prove that the child was of or over 17 and they believed on reasonable grounds that the child was of or over 18. For a charge of indecent assault, the accused must also prove that the child consented. • Where the accused was not in a position of authority over the child, the accused must prove that the child was of or over 16 and they believed on reasonable grounds that the child was of or over 17. For a charge of indecent assault, the accused must also prove that the child consented.
Tasmania	• Applies to the offences of penetrative sexual abuse of a child under 17; indecent act with a child under 17; procuring a child for sexual abuse; communications with intent to procure a child to engage in an unlawful sexual act; indecent assault.[9] • The defence is only available if the child was of or over 13. The accused must prove that they honestly and reasonably believed the child was of or over 17. A mistaken belief as to age is not honest or reasonable if the accused did not take all reasonable steps to ascertain the child's age, or the accused was in a state of self-induced intoxication and the mistake was not one the accused would have made if not intoxicated.

7 *Criminal Code 1899* (Qld) ss 210(5), 213(4), 215(5).

8 *Criminal Law Consolidation Act* 1935 (SA) ss 49(4) and (5a), 57(3), 63B(4)-(4a).

9 *Criminal Code Act 1904* (Tas) ss 14, 14B.

Victoria	• Applies to the offences of sexual penetration, sexual assault or sexual activity in the presence of a child under 16; sexual penetration, sexual assault or sexual activity in the presence of a 16 or 17-year-old-child under care, supervision or authority; causing a child under 16 to be present whilst another is engaging in sexual activity; causing a 16 or 17-year-old-child under care, supervision or authority to be present whilst another is engaging in sexual activity; encouraging a child under 16 to engage in sexual activity; encouraging a 16 or 17-year-old-child under care, supervision or authority to engage in sexual activity; causing, allowing, inviting or offering a sexual performance involving a child.[10] • For the following offences, the child must have been of or over 12, and the accused must prove that they reasonably believed the child was of or over 16: sexual penetration, sexual assault or sexual activity in the presence of a child under 16; causing a child under 16 to be present whilst another is engaging in sexual activity. • For the offence of encouraging a child under 16 to engage in sexual activity, the accused must prove that they reasonably believed the child was of or over 16. • For the following offences, the accused must prove that they reasonably believed the child was of or over 18: sexual penetration, sexual assault or sexual activity in the presence of a 16 or 17-year-old-child under care, supervision or authority; causing a 16 or 17-year-old-child under care, supervision or authority to be present whilst another is engaging in sexual activity; encouraging a 16 or 17-year-old-child under care, supervision or authority to engage in sexual activity. • For the following offences, the child must have been of or over 12, and the accused must prove that they reasonably believed the child was of or over 18: causing, allowing, inviting or offering a sexual performance involving a child. • The reasonableness of the accused's belief will depend on the circumstances. This includes any steps the accused took to find out the child's age.
Western Australia	• Applies to all sex offences against a child of or over 13 but under 16.[11] • The accused must prove that they believed on reasonable grounds that the child was of or over 16 and that they were not more than three years older than the child. • The defence does not apply where the child was under the accused's care, supervision or authority.

[10] *Crimes Act 1958* (Vic) ss 49W-X.

[11] *Criminal Code Compilation Act 1913* (WA) ss 321(9)-(9a).

Canada	• There is no statutory mistake of age defence. However, the common law mistake of age defence, which allows an accused to raise a mistaken belief in age to negate the *mens rea* of an offence no matter how unreasonable that mistake was, has been limited by statute.[12] • The statutory limitation provides that the mistake of age defence is not available unless the accused took all reasonable steps to ascertain the age of the child. • The statutory limitation applies to the following offences: sexual interference with a child under 16; invitation to sexual touching of a child under 16; bestiality in the presence of a child under 16; exposing genitals to a child under 16; sexual assault of a child under 16; sexual assault of a child under 16 with a weapon; aggravated sexual assault of a child under 16.
UK	• Applies to the offences of sexual activity with a child under 16; causing or inciting a child under 16 to engage in sexual activity; engaging in sexual activity in the presence of a child under 16; causing a child under 16 to watch a sexual act; meeting a child under 16 following sexual grooming; sexual communication with a child under 16; sexual abuse of a child under 18 where the accused is in a position of trust; causing or inciting a child under 18 to engage in sexual activity where the accused is in position of trust; sexual activity in the presence of a child under 18 where the accused is in a position of trust; causing a child under 18 to watch a sexual act where the accused is in a position of trust.[13] • For the following offences, the prosecution must prove, beyond reasonable doubt, that the child was under 13, or was 13-15 and the accused did not reasonably believe they were 16 or over: sexual activity with a child under 16; causing or inciting a child under 16 to engage in sexual activity; engaging in sexual activity in the presence of a child under 16; causing a child under 16 to watch a sexual act. • For the following offences, the prosecution must prove, beyond reasonable doubt, that the accused did not reasonably believe they were 16 or over: meeting a child under 16 following sexual grooming; sexual communication with a child under 16. • For the following offences, the prosecution must prove, beyond reasonable doubt, that the child was under 13, or was 13-17 and the accused did not reasonably believe they were 18 or over: sexual abuse of a child under 18 where the accused is in a position of trust; causing or inciting a child under 18 to engage in sexual activity where the accused is in a position of trust; sexual activity in the presence of a child under 18 where the accused is in a position of trust; causing a child under 18 to watch a sexual act where the accused is in position of trust. The accused is to be taken not to have reasonably believed the person was 18 or over unless there is sufficient evidence to raise the issue.

[12] *Criminal Code RSC 1985*, C-46 s 153.1(4).

[13] *Sexual Offences Act 2003* (UK), ss 9(1)(c), 10(1)(c), 11(1)(d), 12(1)(c), 15(1)(d), 15A(1)(c), 16(1)(e), 16(3), 17(1)(e), 17(3), 18(1)(f), 18(3), 19(1)(e), 19(3).

New Zealand	• Applies to the offences of dealing in people under 18 for sexual exploitation; indecent communication with a child under 16; meeting a child following sexual grooming; sexual conduct with a child under 16.[14] • For the following offences, the accused must prove that they believed on reasonable grounds that the child was of or over 18: dealing in people under 18 for sexual exploitation; meeting a child following sexual grooming. • For the following offences, the accused must prove that they took reasonable steps to find out whether the child was of or over 16 and they believed on reasonable grounds that the child was of or over 16: indecent communication with a child under 16; sexual conduct with a child under 16. • For the offence of sexual conduct with a child under 16, the accused must also prove that the child consented.

[14] *Crimes Act 1961* (NZ) ss 98AA(2), 124A(3), 131B(2), 134A.

Appendix 4: Definitions of 'incapable person' (or equivalent term) by jurisdiction

Jurisdiction	Relevant term	Definition of term
ACT	Vulnerable person	An adult who: (a) has a disability within the meaning of the *Disability Services Act 1991*(ACT); or (b) is at least 60 years old and— (i) has a disorder, illness or disease that affects the person's thought processes, perception of reality, emotions or judgement or otherwise results in disturbed behaviour; or (ii) has an impairment that— (A) is intellectual, psychiatric, sensory or physical in nature; and (B) results in a substantially reduced capacity of the person for communication, learning or mobility; or (iii) for any other reason is socially isolated or unable to participate in the life of the person's community. Disability is defined in the *Disability Services Act 1991*(ACT) to mean a disability: (a) that is attributable to an intellectual, psychiatric, sensory or physical impairment or a combination of those impairments; and (b) that is permanent or likely to be permanent; and (c) that results in— (i) a substantially reduced capacity of the person for communication, learning or mobility; and (ii) the need for continuing support services; and (d) that may or may not be of a chronic episodic nature.[15]

[15] *Crimes Act 1900* (ACT) s 36A.

NSW	Person with a cognitive impairment	A person who has — (a) an intellectual disability, or (b) a developmental disorder (including an autistic spectrum disorder), or (c) a neurological disorder, or (d) dementia, or (e) a severe mental illness, or (f) a brain injury, that results in the person requiring supervision or social habilitation in connection with daily life activities.[16]
NT	Mentally ill or handicapped person	A person who, because of abnormality of mind, is unable to manage himself or herself or to exercise responsible behaviour.[17]
Queensland	Person with an impairment of the mind	A person with a disability that— (a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and (b) results in— (i) a substantial reduction of the person's capacity for communication, social interaction or learning; and (ii) the person needing support.[18]

[16] *Crimes Act 1900* (NSW) s 61HD.
[17] *Criminal Code 1983* (NT) s 126.
[18] *Criminal Code 1899* (Qld) s 1.

South Australia	Cognitive impairment	A non-exhaustive list which includes persons who have (a) an intellectual disability; (b) a developmental disorder (including an autistic spectrum disorder); (c) a neurological disorder; (d) dementia; (e) mental impairment; (f) a brain injury.[19]
Victoria	Cognitive impairment or mental illness	Cognitive impairment: includes impairment because of intellectual disability, dementia, neurological disorder or brain injury. Mental illness has the same meaning as in the *Mental Health Act 2014* (Vic): A medical condition that is characterised by a significant disturbance of thought, mood, perception or memory. The definition lists a large number of personal circumstances that do not constitute a mental illness.[20]
Tasmania	Mental impairment	Means senility, intellectual disability, mental illness or brain damage. Mental illness has the same meaning as in the *Mental Health Act* 2013 (Tas): (a) a person is taken to have a mental illness if he or she experiences, temporarily, repeatedly or continually – (i) a serious impairment of thought (which may include delusions); or (ii) a serious impairment of mood, volition, perception or cognition; and (b) nothing prevents the serious or permanent physiological, biochemical or psychological effects of alcohol use or drug-taking from being regarded as an indication that a person has a mental illness. The definition lists a large number of personal circumstances that do not constitute a mental illness.[21]

[19] *Criminal Law Consolidation Act 1935* (SA) s 51(5).
[20] *Crimes Act* 1958 (Vic) s 52A.
[21] *Criminal Code 1924* (Tas) s 126(4).

Western Australia	Incapable person	A person who is so mentally impaired as to be incapable — (a) of understanding the nature of the act the subject of the charge against the accused person; or (b) of guarding himself or herself against sexual exploitation. The term mental impairment means intellectual disability, mental illness, brain damage or senility. The term mental illness means an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli.[22]
Canada	Person with a mental or physical disability	This phrase is not defined.[23]
UK	Mental disorder	Mental disorder means any disorder or disability of the mind, but dependence on alcohol or drugs is not considered to be a disorder or disability of the mind.[24]
New Zealand	Person with a significant impairment	A person with an intellectual, mental, or physical condition or impairment (or a combination of two or more intellectual, mental, or physical conditions or impairments) that affects a person to such an extent that it significantly impairs the person's capacity— (a) to understand the nature of sexual conduct; or (b) to understand the nature of decisions about sexual conduct; or (c) to foresee the consequences of decisions about sexual conduct; or (d) to communicate decisions about sexual conduct.[25]

[22] *Criminal Code Compilation Act 1913* (WA) ss 1 and 330(1).
[23] *Criminal Code RSC 1985 C-46* s 153.
[24] *Sexual Offences Act 2003* (UK) s79(6); *Mental Health Act* 1983 (UK) s 1.
[25] *Crimes Act* 1961 (NZ) s 138.

Appendix 5: Prohibited sexual conduct with 'incapable persons' by jurisdiction

Jurisdiction	Sexual conduct that is prohibited and by whom
ACT	Abusive conduct towards a vulnerable person which recklessly results in harm to the vulnerable person or a financial benefit for the accused or someone else associated with the accused and the accused is responsible for providing care to the vulnerable person. 'Abusive conduct' means an act or omission— (a) that is directed at the vulnerable person, and is of a violent, threatening, intimidating or sexually inappropriate nature; (b) that— (i) is directed at the vulnerable person, or someone known to the vulnerable person, and is reasonably likely to— (A) make the vulnerable person dependent on or subordinate to the abusive person; (B) isolate the vulnerable person from friends or family; (C) limit the vulnerable person's access to services needed by the vulnerable person; (D) deprive or restrict the vulnerable person's freedom of action; or (E) frighten, humiliate, degrade or punish the vulnerable person; and (ii) is not reasonably necessary for the safe and effective care of the vulnerable person, or for the safety of another person who is present or nearby. For sexual offences requiring proof of lack of consent, consent is defined as requiring a complainant to have said or done something to communicate consent.[26]
NSW	Sexual intercourse with a person who has a cognitive impairment by an accused who is either responsible for the care of that person (whether generally or at the time of the sexual intercourse) or has the intention of taking advantage of the victim. The consent of a person who has a cognitive impairment is not a defence to charges of sexual touching, doing or inciting a sexual act or attempts to commit those offences, if the accused was responsible for the care of that person (whether generally or at the time of the conduct constituting the offence), or the accused engaged in the conduct constituting the offence with the intention of taking advantage of that person's cognitive impairment. For sexual offences requiring proof of lack of consent, consent is not given if the person does not say or do anything to communicate consent, the person does not have the capacity to consent to sexual activity, or the person is mistaken about the nature or purpose of the activity.[27]

[26] *Crimes Act 1900* (ACT) s 36A.
[27] *Crimes Act 1900* (NSW) s 66F.

NT	Sexual intercourse and acts of gross indecency with a mentally ill or handicapped person by an accused who provides disability support services to the complainant. For sexual offences requiring proof of lack of consent a person does not consent if they are incapable of understanding the sexual nature of the act or if they are mistaken about the sexual nature of the act.[28]
Queensland	Carnal knowledge; indecent dealing; procuring to commit an indecent act; permitting themself to be indecently dealt with; exposing person to indecent act; indecently recording where the person has an impairment of the mind.[29]
South Australia	Sexual intercourse with a person the accused knows is by reason of intellectual disability unable to understand the nature or consequences of sexual intercourse. Procuring or obtaining sexual intercourse or indecent contact by undue influence; behaving in an indecent manner and sexual exploitation of a person with a cognitive impairment to whom the accused provides a service. For sexual offences requiring proof of lack of consent, consent is not given if the activity occurs while the person is affected by a physical, mental or intellectual condition or impairment such that the person is incapable of freely and voluntarily agreeing; or the person is unable to understand the nature of the activity; or the person is mistaken about the nature of the activity.[30]
Tasmania	Penetrative sexual abuse of a person with mental impairment for whom the accused is responsible for their care. For sexual offences requiring proof of lack of consent, consent is not given if the complainant does not say or do anything to indicate consent, is reasonably mistaken about the nature or purpose of the act or is unable to understand the nature of the act.[31]
Victoria	Sexual penetration; sexual assault; sexual activity in the presence of the person and causing the person to be present during sexual activity where the person has a cognitive impairment or mental illness and the accused provides treatment or support services to the person or is a worker for a service provider that provides treatment or support services to the person. For sexual offences requiring proof of lack of consent, consent is not given if the person is incapable of understanding the sexual nature of the act; the person is mistaken about the sexual nature of the act; the person mistakenly believes that the act is for medical or hygienic purposes; the person does not say or do anything to indicate consent to the act.[32]

[28] *Criminal Code 1983 (NT)* ss 130(2), 192(2).
[29] *Criminal Code 1899* (Qld) s 216(1).
[30] *Criminal Law Consolidation Act 1935* (SA) s 46, 49(6), 51.
[31] *Criminal Code 1924* (Tas) s 2A, 126.
[32] *Crimes Act 1958* (Vic) ss 52B-52E.

Western Australia	Sexual penetration; indecent dealing; procuring/inciting/encouraging to engage in sexual behaviour; procuring /inciting/encouraging to do an indecent act; indecent recording of a person who the accused knew or ought to have known was an incapable person.[33]
Canada	Touching the complainant's, the accused's or another person's body for a sexual purpose. Consent is not obtained if it is expressed by the words or conduct of someone other than the complainant, the complainant is unconscious, the complainant is incapable of consenting for a reason other than they are unconscious, the accused counsels or incites the complainant to engage in the activity by abusing a position of trust, power or authority, the complainant expresses a lack of agreement to engage in the activity or to continue engaging in the activity.[34]
UK	Sexual activity with a person with a mental disorder impeding choice; causing/inciting a person with a mental disorder impeding choice to engage in sexual activity; engaging in sexual activity in the presence of a person with a mental disorder impeding choice or causing a person with a mental disorder impeding choice to watch a sexual act; inducement, threat or deception to procure sexual activity with a person with a mental disorder. Offences specific to care workers: care workers sexually touching a person with a mental disorder, causing/inciting person with mental disorder to engage in sexual activity, engaging in sexual activity in the presence of person with mental disorder, causing person with mental disorder to watch a sexual act. It is proved that the accused knew or could reasonably be expected to have known that the complainant had a mental disorder unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know it.[35]
New Zealand	Exploitative sexual connection; attempting exploitative sexual connection; exploitatively doing an indecent act. Sexual connection is defined so as to cover rape/sexual penetration. Sexual connection or indecent acts are exploitative if the accused knows the complainant is a person with a significant impairment and obtained the complainant's acquiescence in, submission to, participation in, or undertaking of the sexual connection or indecent act by taking advantage of the impairment.[36]

[33] *Criminal Code* Compilation Act 1913 (WA) s 330.
[34] *Criminal Code RSC 1985 C-46* s 153.1.
[35] *Sexual Offences Act 2003* (UK) ss 30-33, 34-37, 38-41.
[36] *Crimes Act 1961* (NZ*)* s 138.

Appendix 6: Current maximum penalty levels for Western Australia's sexual offences

Maximum penalty	*Code* Offences
20 years' imprisonment	• Occupier or owner allowing a young person to be on premises for unlawful carnal knowledge: child under 13 (s 186) • Sexual penetration: child under 13 (s 320(2)); 13–15-year-old child under the offender's care, supervision or authority (s 321(2)); child relative or de facto child under 16 (s 329(2)); incapable person under the offender's care, supervision or authority (s 330(2)) • Procuring, inciting or encouraging to engage in sexual behaviour: child under 13 (s 320(3)); 13–15-year-old child under the care, supervision or authority of offender (s 321(3)); child relative or de facto child under 16 (s 329(3)); incapable person under the offender's care, supervision or authority (s 330(3)) • Persistent sexual conduct with a child under 16 (s 321A(4)) • Aggravated sexual penetration without consent (s 326(1)) • Aggravated sexual coercion (s 328(1)) • Sexual servitude (s 331B(1)): person is a child or an incapable person • Conducting a business involving sexual servitude: person is a child or an incapable person (s 331C(1))
14 years' imprisonment	• Sexual penetration: 13–15-year-old child: basic offence (s 321(2)); adult without consent (s 325(1)); incapable person: basic offence (s 330(2)) • Procuring, inciting or encouraging to engage in sexual behaviour: 13–15-year-old child: basic offence (s 321(3)); incapable person: basic offence (s 330(3)) • Sexual coercion (s 327(1)) • Sexual servitude: basic offence (s 331B(1)) • Conducting a business involving sexual servitude: basic offence (s 331C(1))
10 years' imprisonment	• Indecent dealing: child under 13 (s 320(4)); child relative or de facto child under 16 (s 329(4)); incapable person under the offender's care, supervision or authority (s 330(4)) • Procuring, inciting or encouraging to do an indecent act: child under 13 (s 320(5)); child relative or a de facto child under 16 (s 329(5)); incapable person under the offender's care, supervision or authority (s 330(5)) • Indecent recording: child under 13 (s 320(6)); child relative or a de facto child: child under 16 (s 329(6)); incapable person under the offender's care, supervision or authority (s 330(6)) • Sexual penetration: child over 16 under the offender's care, supervision or authority (s 322(2)); 16-17-year-old child relative or de facto child (s 329(2)) • Procuring, inciting or encouraging to engage in sexual behaviour: child over 16 under the offender's care, supervision or authority (s 322(3)); 16-17-year-old child relative or de facto child (s 329(3))

7 years' imprisonment	• Sexual penetration of a 13–15-year-old child: offender under 18 (s 321(2)) • Procuring, inciting or encouraging a 13–15-year-old to engage in sexual behaviour: offender under 18 (s 321(3)) • Aggravated indecent assault (s 324(1)) • Indecently dealing with an incapable person: basic offence (s 330(4)) • Procuring, inciting or encouraging an incapable person to do an indecent act: basic offence (s 330(5)) • Indecently recording an incapable person: basic offence (s 330(6)) • Deceptive recruiting for a commercial sexual service (s 331D(1))
5 years' imprisonment	• Indecent dealing: child over 16 where the child is under the offender's care, supervision or authority (s 322(4)); 16-17-year-old-child relative or de facto child (s 329(4)) • Procuring, inciting or encouraging to do an indecent act: child over 16 under the offender's care, supervision or authority (s 322(5)); 16-17-year-old-child relative or de facto child (s 329(5)) • Indecent recording: child over 16 where the child is under the offender's care, supervision or authority (s 322(6)); 16-17-year-old-child relative or de facto child (s 329(6)) • Indecent assault (s 323)
3 year's imprisonment	• Sexual penetration of an adult relative (s 329(7)) • Consenting to be sexually penetrated by an adult relative (s 329(8))
2 years' imprisonment	• Occupier or owner allowing a young person to be on premises for unlawful carnal knowledge: child aged 13-15 (s 186) • Procuring a person to be a prostitute (s 191) • Procuring a person to have unlawful carnal knowledge by threat, fraud or administering a drug (s 192)

Appendix 7: List of questions asked in the Discussion Paper

Chapter 3: Definitional issues

Sexual penetration

1. Should the definition of sexual penetration in the *Code* be amended in any way? For example, should it be extended to include analingus (oral stimulation of the anus)?

Sexual behaviour, carnal knowledge and carnal connection

2. Should the terms carnal knowledge and carnal connection in sections 186, 191, 192 and 319(4) of the *Code* be replaced? If so, what terms should be used instead?
3. Should the definition of sexual behaviour be amended in any other way?

Vagina

4. Should the definition of vagina in section 319(1) of the *Code* be clarified or reformed in any way?

Surgically constructed or altered body parts

5. Should the *Code* specify that references to relevant body parts (such as vagina, penis or urethra) include references to surgically constructed or altered body parts?

Other reforms

6. Are there any other sexual offence-related definitions in the *Code* that should be amended in any way?

Chapter 4: Sexual penetration without consent

Remove the distinction between penetrative and non-penetrative sexual assaults

7. Should the *Code* continue to distinguish between penetrative and non-penetrative forms of sexual assault?

Create a distinction between forms of penetration

8. Should the *Code* distinguish between different forms of penetration? For example, should there be different offences for penile and non-penile penetration without consent?

Change the name of the offence

9. Should the name of the penetrative sexual offence – sexual penetration without consent – be changed? If so, what should it be called?

Other reforms

10. Should any other changes be made to the offence of sexual penetration without consent?

Chapter 5: Sexual coercion

Make it clear that the sexual behaviour must be non-consensual

11. Should the offence of sexual coercion be amended to make it clear that the sexual behaviour must have been non-consensual?

Change the name of the offence

12. Should the name of the sexual coercion offence be changed? If so, what should it be called?

Prevent a potential overlap with the offence of sexual penetration without consent

13. Is there a need to address the potential overlap between the offences of sexual coercion and sexual penetration without consent? If so, how should this overlap be addressed?

Other reforms

14. Should any other changes be made to the offence of sexual coercion?

Chapter 6: Indecent assault

Define indecency

15. Should the *Code* include a definition of indecency for the purposes of the offence of indecent assault? If so, how should it be defined?

Make it clear that the section 319 definition of consent applies to indecent assaults

16. Should the *Code* be amended to clarify that the section 319 definition of consent applies to the offence of indecent assault?

Address the withdrawal of consent

17. Should the *Code* provide that the offence of indecent assault is committed where the accused continues to indecently touch or threaten the complainant after consent has been withdrawn?

Change the name of the offence

18. Should the name of the indecent assault offence be changed? If so, what should it be called?

Other reforms

19. Should any other changes be made to the offence of indecent assault?

Chapter 7: Sexual offences against children

Define procures, incites or encourages

20. Should the phrase procures, incites or encourages be defined or amended in any way?

Define indecent

21. Should the *Code* include a definition of indecency for the purposes of the child sexual offences that use this term? If so, how should it be defined?

Define care, supervision or authority

22. Should the phrase ‘care, supervision or authority’, as used in the context of sexual offences against children, be replaced by another descriptor? If so, what term(s) should be used?
23. Should the *Code* define the phrase ‘care, supervision or authority’ (or its replacement)? If so, how should it be defined?

Change the age of consent

24. Is 16 years the appropriate age below which all sexual activity with children should be prohibited regardless of a child’s subjective attitude towards the activity? If not, what is the appropriate age?

Change the age categories

25. Should the age below which a higher maximum penalty for child sexual offences is available (13 years) be raised, lowered, maintained or abolished? If raised or lowered, what should the new age be?

Reform the mistake of age defence

26. Should the mistake of age defence be amended in any way? For example:
    - Should the requirement that the accused be not more than three years older than the complainant be removed?
    - Should the defence be limited to cases in which the complainant consented to the sexual activity?
    - Should the accused be required to prove, on the balance of probabilities, that they took reasonable steps to ascertain the age of the complainant?

Reform the lawful marriage defence

27. Should marriage continue to be a defence to charges involving sexual activity with persons of or over the age of 16 years? If so, should the defence be extended to other types of relationships or be amended in any other way?

Create a new similar age defence

28. Should the law allow a child of a certain age to consent to sexual activity with persons who are close to the child's age? If so, what should the age of the child be and what should be the permitted age gap between the participants?

Reform the offence of persistent sexual conduct with a child under 16 years

29. Should the offence of persistent sexual conduct with a child under the age of 16 be amended in any way? If so, how should it be amended?

Permit the prosecution to charge a course of conduct as a single count

30. Should the *Code* permit the prosecution to charge a course of conduct as a single count on the indictment? If so, how should this power be framed?

Change the name of the offences

31. Should there be any changes to the terminology used to describe child sexual offences, such as replacing sexual penetration and/or indecent with other terms?

Other reforms

32. Should any other changes be made to the sexual offences against children?

Chapter 8: Sexual offences against incapable persons

Change the language used in the provision

33. Should the *Code* use a different term to incapable persons? If so, what term should be used?

Reform the definition of incapable person

34. Should the definition of incapable person be amended in any way? If so, how should it be defined?
35. Should the definitions of mental illness and/or mental impairment that apply in relation to sexual offences against incapable persons be amended in any way? If so, how should they be defined?

Reform the prohibited sexual acts

36. Do Western Australia's laws protecting incapable persons provide appropriate protection?
37. Should the types of sexual activity against incapable persons that are criminalised be changed? If so, how?
38. Should Western Australia distinguish between offences against incapable persons committed by carers and those committed by non-carers?

39. If a special offence is to be created for carers how should ‘carer’ (or another suitable term) be defined?

40. Should Western Australian law require the prosecution to prove that the accused knew the complainant was an incapable person? Should the answer to this question depend on whether the law distinguishes between offences by carers and offences by non-carers?

Reform the lawful marriage defence

41. Should marriage continue to be a defence to charges involving sexual activity with incapable persons? If so, should the defence be extended to other types of relationships or be amended in any other way?

Permit sexual activity between incapable persons

42. Should Western Australian law permit sexual activity between two people who both meet the definition of incapable persons? If so, how should the *Code* be amended to enable this to occur?

Repeal specific offences against incapable persons

43. Should Western Australian law continue to include separate sexual offences against incapable persons?

Other reforms

44. Should any other changes be made to the sexual offences against incapable persons?

Chapter 9: Sexual offences against lineal relatives and de facto children

Reform the definitions of lineal relative or de facto child

45. Should the definitions of lineal relative and de facto child in section 329 of the *Code* be amended in any way? If so, how?

Repeal specific sexual offences against children by lineal relatives or de facto parents

46. Should sexual acts against children by a relative continue to be dealt with as a separate offence under section 329 of the *Code*, or should they be dealt with under the general child sexual offence provisions contained in sections 320-322 of the *Code*?

Decriminalise all consensual sexual acts between adult lineal relatives

47. Should sexual activity between consenting adults who are related be prohibited? If so, which types of sexual activity should be prohibited?

Other reforms

48. Should any other changes be made to the sexual offences against lineal relatives or de facto children?

Chapter 10: Sexual servitude and deceptive recruiting offences

Repeal the offence of deceptive recruiting for a commercial sexual service

49. Should the offence of deceptive recruiting for a commercial sexual service be repealed? If not, should it be amended in any way?

Other reforms

50. Should the offences of sexual servitude or conducting a business involving sexual servitude be amended in any way?

Chapter 11: Procuring and prostitution

Repeal or reform section 186

51. Should the offence in section 186 of the *Code* (which prohibits a person from inducing or knowingly permitting a child under 16 to be on premises they own, occupy, manage or control for the purpose of being unlawfully carnally known by a person) remain an offence? If so, should it be amended in any way?

Repeal or reform section 191

52. Should the offences in section 191 of the *Code* (which relate to procuring a person to be a prostitute) remain offences? If so, should they be amended in any way?

Repeal or reform section 192

53. Should the offences in section 192 of the *Code* (which relate to procuring sex by threats, intimidation, fraud or the administration of drugs) remain offences? If so, should they be amended in any way?

Change the language used in the provisions

54. If the offences in sections 191 and 192 are to remain offences, should the terms common prostitute and known immoral character be replaced? If so, what terms should be used instead?

Define procures

55. If the offences in sections 191 and 192 are to remain offences, should the word procures be defined? If so, how should it be defined?

Chapter 12: Introducing a mental state requirement

Introducing a mental state requirement

56. Should a mental state requirement be added to any of the *Code's* sexual offence provisions? If so, which provisions should include such a requirement and what should the requirement be?

Negligent sexual offences

57. Should the *Code* include negligent sexual offences?

Chapter 13: Other possible offences

Persistent sexual conduct with a child of or over 16

58. Should the *Code* include an offence of persistent sexual conduct with a child of or over the age of 16 years who is under the care, supervision or authority of the accused?

Grooming

59. Should the *Code* include a broad grooming offence? If so, how should that offence be framed?

Failing to protect a child within an institution

60. Should the *Code* include an offence of failing to protect a child within an institution? If so, how should that offence be framed?

Breach of conditional consent

61. Should the *Code* include an offence of breaching conditional consent? If so, how should that offence be framed?

Committing non-assaultive offences with an intent to commit sexual acts

62. Should the *Code* include an offence of committing a non-assaultive offence with the intention of committing or facilitating the commission of a sexual offence? If so, should this be limited to specific offences or extended to the commission of all offences?

Other reforms

63. Are there any other sexual offences that should be included in Chapter XXXI of the *Code*?

Chapter 14: Aggravated offences

Reform the circumstances of aggravation

64. Should the circumstances of aggravation listed in section 319 of the *Code* be amended in any way?

Create new aggravated offences

65. Should the *Code* include any additional aggravated offences?

Chapter 15: Statutory alternatives

66. Should the statutory alternatives for sexual offences be amended in any way?

Chapter 16: Penalties

Change the maximum penalties

67. Should the maximum penalties for any of the sexual offences under review be changed? If so, what maximum penalties should be set?

Care, supervision or authority

68. Should there be any change to the circumstances in which a maximum penalty is increased due to the complainant being under the accused's care, supervision or authority?

Offences against children and incapable persons

69. Should there be any change to the circumstances in which a maximum penalty is increased due to the complainant being a child or an incapable person?

70. In the case of children, should the higher maximum penalty apply where proof of the complainant's age is not available, but the complainant was apparently within the relevant age range?

Child offenders

71. Should there be any change to the circumstances in which a maximum penalty is reduced due to the offender being a child?

Change the circumstances in which a penalty is mandated

72. In what circumstances, if any, should mandatory sentencing provisions be used in relation to the *Code's* sexual offences?

Introduce rebuttable sentencing presumptions

73. In what circumstances, if any, should rebuttable sentencing presumptions be used in relation to the *Code's* sexual offences?

74. If rebuttable sentencing presumptions are introduced, in what circumstances should the ordinary sentencing presumption be rebutted?

Other reforms

75. Are there any other ways in which the penalty provisions for sexual offences should be reformed?

Chapter 17: Structure of Chapter XXXI of the *Code*

Structure of Chapter XXXI

76. How should the sexual offences against children be grouped in the *Code*?

77. Should sexual offences against adults or children appear first in the *Code*?

Position of offences in the Code

78. Should the sexual offences be placed in a separate Part of the *Code*, or should they remain within Part V of the *Code*?

79. If the offences set out in sections 186, 191 and 192 are retained, should they be moved to a different part of the *Code* or a different Act? If so, where should they be located?

Other Reforms

80. Are there any issues or options for reform that have not been raised in the Discussion Paper that you think the Commission should consider?

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