

Chapter 9

Other Legislative Changes

INTRODUCTION

9.1 The Interim Report recommended changes to a number of sexual offences. Chapter 7 of this Report makes final recommendations for offences designed to protect people with a cognitive impairment. This Chapter discusses changes to:

- incest;
- sexual offences against children, including the offences of maintaining a sexual relationship with a child, participation in a sexual act with a young person by a person in a position of care, supervision or authority and procuring; and
- offences which involve compelling a person to commit a sexual act.

We also confirm recommendations made in the Interim Report for the inclusion of an objects and interpretation clause in the *Crimes Act 1958* and the *Evidence Act 1956*.

9.2 The Discussion Paper asked questions about a number of other offences. These related to:

- indecent acts;
- facilitating sexual offences with children;
- abducting a child;
- permitting unlawful sexual penetration to occur; and
- producing child pornography or procuring a child to participate in making child pornography.¹¹⁵⁷

1157 *Crimes Act 1958* ss 47, 49, 49A, 56, 54, 68 and 69.

9.3 In deciding whether changes to substantive offences should be recommended the Commission has taken account of the fact that such changes may make police and prosecution processes more complex. If offences are redrafted and offending behaviour occurs over a period of time it is necessary to charge an accused under the old offence for one period and the new offence from the period when the amendment comes into force. The Commission has decided that unless there is an obvious defect in the legislation, or a strong demand for change, substantive offences should not be changed. Based on our research and consultations we do not recommend any change to these offences.

INCEST

ISSUES

9.4 The Commission believes that the offence of incest needs to be updated to change the focus of the provisions from prohibiting sexual penetration in particular relationships¹¹⁵⁸ to protecting children and young people from exploitation and abuse within the family. This policy is already reflected in provisions which make the offence applicable to cases such as sexual penetration by a parent's de facto partner.¹¹⁵⁹ However in our view the current provisions require further amendment.

9.5 Arguments for reforming incest provisions are discussed at length in the Interim Report.¹¹⁶⁰ The main issues covered are:

- Lack of consent is not an element of the offence of incest. However use of the word 'incest' stigmatises victims of the offence and reflects powerful social myths which suggest that children (particularly girls) may be willing participants in sexual acts with siblings or parents.¹¹⁶¹ This is reflected in the dynamics of incest trials, where complainants are often cross-examined about whether they consented to penetration.¹¹⁶²

1158 Discussion Paper para 6.15.

1159 *Crimes Act 1958* s 44(2).

1160 Interim Report paras 8.1–20.

1161 See *R v J* (1982-83) 45 ALR 331,335–6, Toohey J.

1162 Elizabeth Ward, 'Rape of Girl-Children By Male Family Members' (1982) 15 ANZJ Crim 90; Leslie Feiner, 'The Whole Truth: Restoring Reality to Children's Narrative in Long-Term Incest Cases' (1997) 87 (4) *The Journal of Criminal Law & Criminology* 1385; Shannon Caroline Taylor, *The Legal Construction of Victims/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the*

- Sub-section 44 (3) of the *Crimes Act 1958*, which covers sexual penetration of a person aged 18 or older by family members,¹¹⁶³ is drafted in such a way that the offence can apply to both parties even though one person may initiate abuse and the other may be the victim of it. This is also the case with section 44(4) which involves sexual penetration by a sibling.¹¹⁶⁴ Although it is not common for the person who reports the abuse to be charged as a co-offender, we believe the possibility of charge may act as a disincentive for an adult victim to report the offence. Coercion is a defence but this is only useful to victims once they are charged and have gone to trial. Further, the exploitative power dynamics that can exist in families do not fit neatly within the notion of coercion.

9.6 Our interim recommendations were to:

- change the name of the offence from incest to ‘intra-familial sexual penetration’ which we think more accurately reflects the nature of the offence;
- retain two offences of intra-familial sexual penetration covering the same acts which are now treated as incest under section 44(1) and (2);
- create an offence of intra-familial sexual penetration to cover penetration by a person of their sibling who is under 18. This is an amendment to the current section 44(4); and
- create an offence of persistent sexual abuse of a sibling. This provision will cover circumstances where there is sexual intercourse between adult siblings, but where prior to that the accused has engaged in sexual contact with the victim.

9.7 Like the current offence of incest, the recommendations cover the case where a person over 18 takes part in an act of penetration with their parent, lineal ancestor or step-parent.¹¹⁶⁵ We propose that in that situation the parent could be prosecuted but not the child. This, of course, relates to the situation of abuse of

Victorian County Court of Australia in 1995. (Unpublished Ph.D, University of Ballarat, 2001) and see Interim Report para 8.3.

1163 *Crimes Act 1958* s 44(3) covers sexual penetration involving a father or mother or lineal ancestor or a step parent.

1164 Section 44(4) currently applies regardless of age of either sibling.

1165 Section 44(2) also covers the case where the de facto spouse of a parent sexually penetrates the child, lineal descendant or step-child of the parent, where the child is under the age of 18. No change is proposed to this provision.

the child by the parent. Where a child over 18 takes part in an act of penetration with a parent, without the parent's consent, the child could be charged with rape.

9.8 The proposed amendments also protect adults who are sexually penetrated by a sibling in cases where penetration is a continuation of abuse occurring during childhood.

SUBMISSIONS

9.9 Submissions to the Interim Report were overwhelmingly supportive of the proposed changes.¹¹⁶⁶ Three submissions¹¹⁶⁷ preferred the use of the terms 'intra-familial rape' and 'intra-familial sexual assault' for penetrative and non-penetrative offences. We understand the reasons why the term 'rape' is considered preferable to describe the nature of the offence but have avoided it because of the issues it raises in relation to consent. The Commission does not believe it is helpful to use terms that may raise the issue of consent in this context.

9.10 One submission, from the Domestic Violence and Incest Resource Centre, specifically supported the use of terminology referring to intra-familial sexual abuse as it recognises 'the unique violation of trust and respect involved in such crime'.¹¹⁶⁸

9.11 The only submission received that did not support our recommendations was from the Criminal Bar. The Criminal Bar submitted that the current law as to incest and related offences should be retained. They did not object to our recommendation that a person who takes part in such 'offending behaviour' under the coercion of the other person should not be guilty of an offence. However they disagreed with all other recommendations.

RECOMMENDATIONS FOR REFORM

9.12 We confirm the recommendations made in the Interim Report. The recommendation relating to persistent sexual abuse of a sibling has been amended slightly to make the elements clearer. It should also be noted that the presumption of relationship and the accused's knowledge of relationship in our recommendation is contained in the current incest provisions and does not change

1166 Submissions 16, 19, 20, 26, 27, 30, 37, 41, 44, 47, 48, 51.

1167 Submissions 30, 37, 47.

1168 Submission 20.

the current law. For the purpose of our recommendations the meaning of sibling also remains the same (it covers sister, half-sister, brother or half-brother).

! RECOMMENDATION(S)

175. An offence of intra-familial sexual penetration should be created, in place of the existing offence of incest:
- A person must not take part in an act of sexual penetration with a person whom he or she knows to be his or her child or other lineal descendant or his or her step-child.
 - A person must not take part in an act of sexual penetration with a person under the age of 18 whom he or she knows to be the child or other lineal descendant or the step-child of his or her de facto spouse.
 - A person must not sexually penetrate a person under the age of 18 whom he or she knows to be his or her sibling.
176. Consent should not be a defence to the above intra-familial sexual penetration offences.
177. A person who takes part in a prohibited act of intra-familial sexual penetration under the coercion of the other person who took part in that act is not guilty of an offence.
178. In all proceedings for offences of intra-familial sexual penetration it shall be presumed in the absence of evidence to the contrary:
- that the accused knew that he or she was related to the other person in the way alleged; and
 - that people who are reputed to be related to each other in a particular way are in fact related in that way.
179. A new offence should be created to make it an offence where:
- (1) the accused took part in an act of sexual penetration of his or her sibling when the sibling was 18 years or older; and

**RECOMMENDATION(S)**

(2) prior to the sibling attaining the age of 18 years, the accused took part in one or more acts that would constitute an offence under *Crimes Act 1958* section 38 (rape), section 44 (sexual penetration of a person under the age of 18 years by a sibling); section 45 (sexual penetration of a child under 16); section 47 (indecent act with a child under 16); section 48 (sexual penetration of a person aged 16 or 17 under the care, supervision and authority of the accused); section 49 (indecent act with a person aged 16 or 17¹¹⁶⁹ under the care, supervision and authority of the accused); or the 'compelling sexual penetration offence (see para 9.13 below).

180. It is not necessary to prove an act referred to in sub-section (2) with the same degree of specificity as to date, time, place, circumstances or occasion as would be required if the accused were charged with an offence constituted by that act instead of an offence against sub-section (1).
181. A prosecution for this offence must not be commenced without the consent of the Director of Public Prosecutions.

COMPELLING OFFENCES

9.13 Under section 38 of the *Crimes Act 1958*, a person commits the offence of rape if they compel a male person to sexually penetrate them or another person with his penis, or compel him not to withdraw his penis from them or another person. In the Interim Report¹¹⁷⁰ we recommended that compelling a person to penetrate another should be an offence regardless of the gender of the victim or whether the penetration is penile, digital, oral or by an object. We also recommended that it be an offence to compel someone to self-penetrate, or penetrate or be penetrated by an animal. This approach is consistent with that recommended by the Model Criminal Code Officers Committee.¹¹⁷¹

1169 *Crimes Act 1958*, s 49 currently covers only the case where the child is 16 years old. In para 9.19 below, we propose that section 49 should also include the case where the child is 17, to make the care supervision and authority offences consistent.

1170 Interim Report paras 8.21–23.

1171 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5: Sexual Offences Against the Person Report* (1999) 67 and Appendix 2, 314.

9.14 Submissions received on this issue, including those from the Victorian Bar and VLA, were supportive of the recommendations.¹¹⁷² The only submission received that did not support the changes was from the Criminal Bar, which said that these behaviours are currently criminal acts and new provisions were unnecessary.¹¹⁷³

9.15 The Commission believes that it is important that the criminality involved in these actions should be made clear. We confirm our recommendations in the Interim Report.

!	RECOMMENDATION(S)
	<p>182. Section 38(3) of the <i>Crimes Act 1958</i> should be amended to include, within the crime of rape, the situation where:</p> <ul style="list-style-type: none">• a person (the offender) compels another person (the victim) to sexually penetrate the offender or a third person, irrespective of whether the person who is penetrated consents to the act; or• a person (the offender) prevents a person who has sexually penetrated the offender or a third person from ceasing to sexually penetrate the other person, irrespective of whether the person who is penetrated consents to the act. <p>183. Section 38(4) of the <i>Crimes Act 1958</i> should be amended by removing the word 'male'.</p> <p>184. <i>The Crimes Act 1958</i> should be amended to create a new offence of compelling sexual penetration, with the same penalty that applies to rape. The offence would apply where a person (the offender) compels another person (the victim) to sexually penetrate the victim or to sexually penetrate or be penetrated by an animal.</p>

1172 Submissions 19, 41, 44, 48 and 54.

1173 Submission 42.

SEXUAL OFFENCES AGAINST CHILDREN AND YOUNG PEOPLE

CARE, SUPERVISION AND AUTHORITY OFFENCES

9.16 Section 48 of the *Crimes Act 1958* makes it an offence for a person to take part in an act of sexual penetration with a person aged 16 or 17 to whom he or she is not married and who is under his or her care, supervision and authority. Section 49 creates an offence of committing or being party to an indecent act with, or in the presence of, a 16-year-old to whom he or she is not married and who is under his or her care, supervision or authority. The current legislation does not define what is meant by ‘care, supervision and authority’ or who might be in that position in relation to a young person.

Issues Raised in Interim Report

9.17 Issues related to these offences discussed in the Discussion Paper¹¹⁷⁴ and the Interim Report¹¹⁷⁵ were:

- whether the legislation should specify the relationships which are covered by way of an exhaustive or non-exhaustive list; and
- whether the age of consent should be consistent for both penetrative offences and participation in indecent acts.

9.18 We suggested that the inclusion of a non-exhaustive list in the legislation would educate the community about the types of relationships in which sexual contact is prohibited because it may involve exploitation of a young person. We further recommended that there was no rational basis for retaining a different age of consent for penetrative and non-penetrative offences. Protection against sexual exploitation within a relationship of care or authority should continue until a young person becomes an adult. As is currently the case it should be a defence that the accused reasonably believed that the young person was 18 or older.

Submissions

9.19 Submissions to the Interim Report were supportive of these recommendations,¹¹⁷⁶ apart from the Criminal Bar. The Criminal Bar

1174 Discussion Paper paras 6.76–88.

1175 Interim Report paras 8.56–67.

1176 Submissions 19, 41, 44, 48, 49, and 54.

submitted¹¹⁷⁷ that as the position of trust is an aggravating feature the list of relationships should be exhaustive. They also thought that the different age of consent relevant to penetrative and non-penetrative acts should be retained. In contrast, the Victorian Bar believed there would be advantages in setting out the types of relationships which might give rise to an offence, but stressed that a decision as to whether there was a relationship of care supervision and authority should be left to the jury.¹¹⁷⁸ The Department of Human Services thought that consistency in age across the offences was important.¹¹⁷⁹

Recommendations

9.20 Our interim recommendations are confirmed.

!	RECOMMENDATION(S)
	<p>185. Sections 48 and 49 of the <i>Crimes Act 1958</i> should include a non-exhaustive list of the relationships covered by the section including the relationships of:</p> <ul style="list-style-type: none"> • teacher and student; • foster parent, legal guardian, and the child for whom they are caring; • in the case of section 49 (which penalises non-penetrative sexual acts) parents, including step-parents and adoptive parents and their children;¹¹⁸⁰ • religious instructors; • employers; • youth workers; • sports coaches; • counsellors; • health professionals and young people who are patients; and

1177 Submission 42.

1178 Submission 48.

1179 Submission 44.

1180 Penetrative acts are already caught by the proposed offence of inter-familial sexual penetration.



RECOMMENDATION(S)

- police and prison officers and young people in custody.
186. The age of consent for sexual activity with a person over whom someone is in a position of care, supervision and authority should be 18 years, regardless of whether the sexual acts involve sexual penetration.
187. The defence of reasonable belief that the young person was aged 18 years or more should continue to apply.

PROCURING AND SOLICITING OFFENCES

9.21 Section 58 of the *Crimes Act 1958* makes it an offence for a person to ‘procure’ a child under 16 years to take part in an act of penetration outside marriage with another person or to procure the person to take part in that act with the child. Section 60(1) creates a summary offence of soliciting. This offence applies where an accused person solicits or actively encourages a child under 18 years to take part in an act of sexual penetration or an indecent act with the accused or another person, and the child is under the care, supervision or authority of the accused.

Issues from Interim Report

9.22 A detailed discussion of the issues and problems surrounding these offences can be found in the Interim Report.¹¹⁸¹ In summary:

- there is evidence that the development of the internet has created new opportunities to facilitate child sexual offences—current offences are inadequate to deal with soliciting or procuring conducted over the internet;
- although the current law covers attempts to commit offences, the offence of attempting to procure may not adequately cover sexual grooming activities commonly used by child sexual offenders.

9.23 Our interim recommendation was that an expanded general offence was preferable to an internet-specific offence. In our view the criminality of the conduct should not be based on the medium used by the alleged offender.

1181 Interim Report paras 8.68–86.

9.24 The need for reform in this area may to some extent be overtaken by proposed new Commonwealth legislation. The *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004*, which is proposed for introduction in the winter 2004 sitting of Federal Parliament, proposes new internet procuring and ‘grooming’ offences. Procuring offences will apply when the sender uses the internet to facilitate a meeting during which the child recipient is intended to engage in sexual conduct with the sender, another adult or another child in the presence of the sender or another adult. The ‘grooming’ offences cover the sending of an indecent communication to a child with the intention of making it easier to procure the recipient to engage in sexual activity, or making it more likely that the child will engage in or submit to sexual activity with the sender or another person.

9.25 In the Interim Report we recommend that where an offer is made to a child to participate in some form of sexual activity, or the child is urged or persuaded by an adult to take part in sexual acts, this will be sufficient to constitute an offence. The new offence will require that the accused do something more than engage in sexually explicit conversation with the child. In our view a person should only be criminally liable once he or she has formed the intent to commit a wrongful act.

Submissions

9.26 Submissions received on this issue were supportive of the recommendations.¹¹⁸² This included the Victorian Bar, Criminal Bar and VLA. The Victorian Bar noted that:

There are circumstances where persons may escape prosecution for an offence because their behaviour, such as encouraging a child to perform an indecent act, is not presently adequately covered or covered at all by any statutory offence.¹¹⁸³

Recommendation

9.27 The Commission confirms the recommendations made in the Interim Report.

1182 Submissions 19, 42, 44, 48 and 54.

1183 Submission 48.



RECOMMENDATION(S)

188. Section 60 of the *Crimes Act 1958* 'Soliciting Acts of Sexual Penetration or Indecent Acts' should be repealed.
189. Section 58 of the *Crimes Act 1958* should be amended to make it an offence for:
- a person aged 18 years or over to solicit or procure a child under the age of 16 to take part in an act of sexual penetration or an indecent act outside marriage with him or her or another person;
 - a person over 18 years to solicit or procure another person to take part in an act of sexual penetration or an indecent act outside marriage with a child under the age of 16;
 - a person over 18 years to solicit or procure a 16 or 17-year-old child to whom he or she is not married and who is under his or her care, supervision or authority to take part in an act of sexual penetration or an indecent act with him or her or another person.
190. The section should also provide that:
- a person in Victoria who solicits or procures a child outside Victoria to take part in sexual penetration or an indecent act which, if committed in Victoria, would be an offence is guilty of this offence;
 - a person outside Victoria who solicits or procures a child outside Victoria to take part in an act of sexual penetration or indecent act in Victoria is guilty of this offence.

UNLAWFUL SEXUAL PENETRATION OF A CHILD

9.28 Section 45 of the *Crimes Act 1958* makes it an offence for a person to take part in an act of sexual penetration with a person under the age of 16. If the complainant is aged between 10 and 16, the accused can rely on several defences. One defence is that the complainant consented and the accused believed on reasonable grounds that the complainant was older than 16. Another is that the

complainant consented and the accused believed they were married.¹¹⁸⁴ In the Discussion Paper we examined two conflicting decisions relating to burden of proof, which raised the question as to whether the burden of proof should be clarified.¹¹⁸⁵

9.29 In the 1984 case *R v Douglas*,¹¹⁸⁶ the Supreme Court of Victoria decided that where an accused person relies on a defence based on facts which are ‘peculiarly within his own knowledge’, then the accused must convince the jury on the balance of probabilities that the defence is established. In relation to section 45, the accused would therefore have to prove that he held the belief and that his belief was reasonable.

9.30 Shortly after the decision of Douglas, the High Court decided the case of *He Kaw Teh v The Queen*.¹¹⁸⁷ That case involved a defence of honest and reasonable mistake of fact. The High Court applied the principle that if the defence arose on the facts in the case, the defendant did not have to prove the defence, but rather the prosecution had to disprove it.¹¹⁸⁸

9.31 Since *He Kaw Teh*, judges have disagreed as to which of these decisions applies to Section 45. In the Discussion Paper we asked:¹¹⁸⁹

- whether the burden of proof should be clarified; and
- if so, should the general principle apply, so that if the accused raises the defence of belief as to age the prosecution has to prove beyond reasonable doubt that it is not true, or should the burden of proof be on the accused to prove on the balance of probabilities that he believed the person was 16 or older?

Submissions

9.32 We received 10 responses to this issue.¹¹⁹⁰ Three submissions,¹¹⁹¹ including the Criminal Bar and Victoria Police, argued that the burden of proof should

1184 Since in Australia people usually can’t marry until they are 18, this is likely to apply only to couples married in another country who later came to Victoria.

1185 Discussion Paper paras 6.25–6.

1186 [1985] VR 721.

1187 (1985) 157 CLR 523.

1188 See, for example, (1985) 157 CLR 523, 574–5 (Brennan J) and 592–4 (Dawson J).

1189 Discussion Paper Questions 21 and 22.

1190 Submissions 4, 6, 7, 8, 9, 12, 13, 17, 23 and 28.

remain with the prosecution and that general principles should apply. The Law Institute endorsed the burden of proof being clarified. They noted that placing the burden on the accused:

is contrary to the common law presumption, and (it is) exceptional that an accused person who seeks to rely on a defence will be required to prove it... It is noted in the instance of...other 'affirmative' offences, if the defence is required to discharge a burden of proof, it is upon the balance of probabilities and, of course, not beyond reasonable doubt.

9.33 Six submissions supported the burden of proof being placed on the accused person. The Gatehouse Centre¹¹⁹² thought that it was unacceptable for the accused to raise the defence without having to justify why he or she held that belief.

Recommendation

9.34 The Commission is of the view that standards should be set particularly high for people who engage in sexual activity with children and young people over 10 and under 16.¹¹⁹³ We prefer the view of the Supreme Court of Victoria in the case of *Douglas*. The accused's belief is a fact 'peculiarly within his own knowledge' and he or she should be required to convince the jury on the balance of probabilities that the defence is established. In coming to this recommendation, we also take into account the fact that this defence is only available when the complainant consented to penetration.



RECOMMENDATION(S)

191. Section 45 of the *Crimes Act 1958* should be amended to make it clear that where the accused is charged with unlawful sexual penetration of a person aged between 10 and 16 and the complainant consented, the onus is on the accused to establish the defence of reasonable belief as to age or marriage on the balance of probabilities.

1191 Submissions 28, 9 and 17.

1192 Submission 13.

1193 Note that the defence of reasonable belief as to age does not apply if the child is under 10, see *Crimes Act 1958* s 45(4).

PERSISTENT SEXUAL ABUSE OF A CHILD

9.35 Section 47A of the *Crimes Act 1958* makes it an offence for a person to ‘maintain a sexual relationship’ with a person aged under 18. We discussed this offence in detail in the Discussion Paper.¹¹⁹⁴ Our view, expressed in the Discussion Paper, is that it is inappropriate to describe child sexual abuse as a ‘sexual relationship’. Our recommendation is that the offence should be renamed ‘persistent sexual abuse of a child’, as is recommended in the Model Criminal Code (MCC).¹¹⁹⁵

9.36 In the Discussion Paper we outlined some changes that were made to section 47A in 1997.¹¹⁹⁶ These changes broadened the range of offences covered by section 47A and changed the sub-section which sets out what the prosecution has to prove. This change made it clearer that the acts alleged did not have to be proved with the same degree of specificity as they would if the accused was charged with individual offences rather than under the ‘continuing’ offence of section 47A.

9.37 The Discussion Paper compared section 47A with the offence proposed in the Model Criminal Code¹¹⁹⁷ and asked a number of questions. In summary these were:

- whether the law in Victoria is working;
- whether the MCC approach to this offence is preferable;
- whether changes to section 47A are required to ensure that those who repeatedly sexually abuse a child over a period of time can be adequately prosecuted; and
- whether section 47A requires a provision which deals with double jeopardy (the double jeopardy principle prevents a person from being tried again for an offence for which they have previously been tried).¹¹⁹⁸

1194 Discussion Paper paras 6.35–66. Section 47A was not covered in the Interim Report.

1195 Above n 1171, 132.

1196 Discussion Paper paras 6.48–9.

1197 Above n 1171, 138.

1198 Discussion Paper paras 6.49–66, Questions 27, 28, 29 and 30.

Submissions and Consultation

9.38 Nine submissions to the Discussion Paper dealt with section 47A issues. Although some specific questions elicited support for the way the offence is drafted in the MCC, a general question as to whether the MCC offence overcame problems in prosecuting people who sexually abuse children over a long period of time did not elicit a positive response. None of the respondents were firmly of the view that the offence had overcome the problems.

9.39 The Criminal Bar¹¹⁹⁹ did not oppose the change of name to ‘persistent sexual abuse of a child’. However, they opposed any other amendment to section 47A, including an amendment which would enable it to cover situations where one of the unlawful acts was committed outside Victoria. They submitted that the elements of section 47A are clear and would not be assisted by the MCC approach. The submission pointed out the difficulties for the criminal justice system in dealing with sexual offences which occur over a lengthy period.

The inherent problems are common to the MCCOC recommendations. No amount of re-drafting will solve the problems associated with stale allegations, young witnesses or witnesses recounting events said to have occurred to them when they were of tender years, the absence of corroboration, the destruction of evidence and the frailty of human memory.

9.40 The Commission sought views on whether the provision could apply unfairly to an accused person who had been tried under section 47A, and was later charged with a specific sexual offence or offences which occurred during the same period covered by the section 47A offence. The Criminal Bar did not see any need for a specific provision relating to double jeopardy to be included in section 47A. They thought that this problem was already covered by the existing common law of double jeopardy, and referred to the Court of Appeal case of *R v GJB*.¹²⁰⁰ This case dealt with the application of the double jeopardy principle where a single presentment¹²⁰¹ included specific offences as well as a section 47A offence.

1199 Submission 28.

1200 *R v GJB* [2002] VSCA 54.

1201 A ‘presentment’ is the form used by the OPP to present charges against the accused. This case dealt with the situation where the accused was tried for both section 47A and specific offences, relating to the same time period, in the same trial. Double jeopardy more usually arises when the accused is charged later with an offence for which he has already been tried.

9.41 In *R v GJB* a man had been charged under section 47A with maintaining a sexual relationship. For that charge the prosecution relied on various acts of vaginal intercourse, which were said to have occurred over a specified period. He was also charged with specific offences, based on other acts of sexual penetration and indecent acts, which occurred over the same period. The separate sexual penetration charges involved different forms of sexual penetration from those acts relied on for the section 47A charge. The accused pleaded guilty to all offences but later appealed against his conviction on the separate sexual penetration charges.

9.42 The Court of Appeal found that each of the acts within the time period covered by the section 47A offence must be charged as particulars of that offence. To charge an accused with section 47A as well as specific sexual offences in relation to the same complainant, which occurred during the same period of time covered by the section 47A offence, was inconsistent with the principle of double jeopardy. The accused could be charged with specific offences as an alternative to the section 47A offence but could not be convicted of both.

There is nothing in the provisions of [section 47A] which entitles the prosecution to exclude from the particulars of the offence preferred under section 47A a portion of the known relevant acts done by an accused in relation to the girl within the period of the relationships sought to be proven, and to charge the excluded relevant acts as additional specific offences.¹²⁰²

9.43 The Court of Appeal said that it was ‘oppressive and unfair’ to the accused to charge him with both an offence under section 47A and also ‘by manipulation of particulars’ with a series of other substantive offences which could have supported the charge under section 47A.¹²⁰³ It appears to follow from this reasoning that the acquittal of a person of a charge under section 47A may prevent them from being prosecuted later for a specific offence which occurred over the same period. It is arguable however that if the accused was acquitted of an offence under section 47A which was based on allegations of indecent assault, and later evidence came to light that a penetrative offence had occurred during the same time period, the accused could be prosecuted separately for the penetrative offence because of the different nature of the offence.

1202 [2002] 4 VSCA 355, 364, Winneke P.

1203 [2002] 4 VSCA 355, 365, Winneke P.

9.44 The OPP did not provide a submission to the Discussion Paper. The Commission met with OPP solicitors¹²⁰⁴ to ascertain whether they thought that changes to section 47A were necessary. The OPP did not support any changes to section 47A and believe that it currently works well. In their view the way the offence is drafted in the MCC is less clear and more restrictive than the Victorian legislation.

9.45 In order to encourage police to thoroughly investigate offences against children and young people, OPP policy is to rely where possible on the child's specific recollections, and on specific offences. Despite that policy OPP solicitors say that section 47A is used more frequently since the 1997 amendments and often used as an alternative to specific offences. They were also of the view that there was no need for a specific double jeopardy provision in section 47A.

9.46 The issue of double jeopardy is currently under review by the Standing Committee of Attorneys-General. Their Model Criminal Code Committee has produced a Discussion Paper¹²⁰⁵ which recommends that the laws on double jeopardy be changed so that a person acquitted of an offence could still be prosecuted for an administration of justice offence or the original or related offence in three circumstances:

- prosecution for an administration of justice offence connected to the original trial;
- retrial of the original or similar offence where there is fresh and compelling evidence; and
- retrial of the original or similar offence where the acquittal is tainted.

It is also recommended that these amendments apply retrospectively. There is currently no agreement between Australian States and Territories as to the changes although the proposals are still being considered.

9.47 In light of the views expressed by the OPP and the Criminal Bar, and the fact that the double jeopardy principle is currently under review, the Commission does not support any change to section 47A other than changing the name of the offence.

1204 Meeting with Gary Ching, Gabriele Cannon, Luisa Dipietrantonio and Jacquelyn Verkade, 3 December 2003.

1205 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 2: Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals* Discussion Paper (2003).

! RECOMMENDATION(S)

192. Section 47A of the *Crimes Act 1958* should be amended to replace the words 'maintain a sexual relationship with a child', wherever they appear, with the words 'persistent sexual abuse of a child'.

INCLUSION OF OBJECTS AND INTERPRETATION CLAUSE

9.48 In the Interim Report we discussed the need for education of participants in the criminal justice system about the social context and serious nature of sexual assault. Chapter 3 of this report makes final recommendations about strategies to promote cultural change within the criminal justice system. We also support the inclusion of objects and interpretation clauses at the beginning of the provisions on sexual offences in the *Crimes Act 1958* and in the *Evidence Act 1958*. The arguments for including such provisions are set out in the Interim Report.¹²⁰⁶

Submissions

9.49 Ten submissions received by the Commission commented on these recommendations.¹²⁰⁷ All the submissions supported the inclusion of an objects clause in the *Crimes Act 1958*. The Victorian Bar and the Criminal Bar¹²⁰⁸ both objected to the inclusion of interpretive clauses in the *Crimes Act 1958* and the *Evidence Act 1958*. The Criminal Bar believed that better understanding of the purpose of the legislation should be achieved through the educative process outlined in Chapter 3. The Victorian Bar thought that it was unnecessary and may lead to difficulties and that it was inappropriate to suggest legislation should be interpreted in a particular way. All other submissions were supportive of interpretive clauses although most wanted additions about specific issues.

Recommendations

9.50 The Commission acknowledges that many submissions asked for other matters to be added to the interpretive clause. We have made two small changes to include a reference to young people as well as children, and to people with disabilities. We have not made the many other additions suggested due to the

1206 Interim Report paras 8.87–9.

1207 Submissions 19, 20, 22, 30, 40, 41, 42, 44, 48, 49.

1208 Submissions 48 and 42.

length and detail which would result. In order to be effective these provisions need to be as succinct as possible. Apart from these additions, our recommendations remain as they were in the Interim Report.

!	RECOMMENDATION(S)
193.	<p>The <i>Crimes Act 1958</i> should include a statement of the objectives of Part 1 subdivisions 8A to 8G in the following terms:</p> <p>The aim of subdivisions 8A to 8G are to:</p> <ul style="list-style-type: none">(i) uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity;(ii) protect children, young people and people with cognitive impairment from sexual exploitation;
194.	<p>The Act should also contain an interpretative clause in the following terms:</p> <p>In interpreting subdivision 8A to 8G the court is required to consider the unique character of sexual assault and the way in which sexual assault affects the lives of victims. In particular, the court must have regard to the high incidence of sexual violence within society and the fact that:</p> <ul style="list-style-type: none">• sexual offences are significantly under-reported;• women, children and young people, and people with disabilities are overwhelmingly the victims of sexual assault;• offenders are commonly known to victims; and• sexual offences occur in circumstances where there are unlikely to be any physical signs of an offence having occurred.
195.	<p>A similar interpretative clause should be included in the <i>Evidence Act 1958</i> to apply to provisions relevant to sexual offence trials including Part 2 Division IIA, Sections 37A to 37C and sections 39 to 41.</p>