

Crimes Amendment (Sexual Offences) Act 2016: An Introduction

Criminal Law Review



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Preface

From Special Counsel, Criminal Law Review

In 2004, the Victorian Law Reform Commission highlighted the complexity of our legal framework in its *Sexual Offences: Final Report*. Since then, Victoria's sexual offence laws have continued to be tested through numerous appeals and retrials, and subjected to scrutiny and criticism. Effective sexual offence laws are an essential component of strategies to address sexual offending.

The Royal Commission into Institutional Responses to Child Sexual Abuse has shed light on the breadth and depth of harm caused by each act of sexual offending. The Commission has also exposed the practices of sexual offenders and the strategies they may utilise to commit sexual offences.

As understanding improves of the nature and extent of sexual offending, and its impact on victims/survivors, our criminal justice system must adapt. Part of a thorough response to sexual offending involves clear, effective and modern sexual offence laws that are informed by this knowledge. The *Crimes Amendment (Sexual Offences) Act 2016* (the Act) represents the culmination of a comprehensive review of Victoria's sexual offence law that commenced six years ago. In 2013, the department publicly released the *Review of Sexual Offences: Consultation Paper*, which focused on opportunities to clarify, simplify and modernise Victoria's sexual offence laws. The extensive stakeholder feedback on the Consultation Paper allowed the department to further develop and refine the proposed reforms.

The first stage of these reforms resulted in the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014*, which was passed by Parliament in October 2014. This Act made a number of important improvements to sexual offence law, including the introduction of an objective fault element for the offences of rape and sexual assault. These reforms commenced on 1 July 2015.

The current Act reforms more than 50 sexual offences, ensuring they are clearer and effectively respond to modern forms of offending. A number of sexual offences against children will now capture offending via technology, while the new 'child abuse material' offences better define and capture the damaging nature of this material. Updated offences against persons with a cognitive impairment or mental illness reflect modern disability and mental health service delivery and treatment contexts. More helpful jury directions on consent and reasonable belief in consent build on the 2014 reforms, as well as recent improvements to jury directions in Victorian criminal trials.

This document is designed to assist the judiciary, lawyers, police and students in applying the new laws, and may also be a useful tool for members of the community who are interested in better understanding the law in this area.

As with previous stages, many of these reforms were developed in consultation with the Sexual Offences Advisory Group, which comprises judges of the County and Magistrates' Courts, and high-level representatives from the Office of Public Prosecutions, Victoria Legal Aid and the Criminal Bar Association. I greatly appreciate the expert knowledge and valuable contributions that members of the Advisory Group have provided over the course of many years.

I would also like to thank past and current members of Criminal Law Review, including Katya Zissermann, Steven Tudor, Jeen Boyd, Anna Tucker, Michèle Briggs and Philippa Ross for their diligence, determination and dedication to the sexual offences review.

Greg Byrne PSM

Special Counsel

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Abbreviations

2014 Act	<i>Crimes Amendment (Sexual Offences and Other Matters) Act 2014</i>
Act	<i>Crimes Amendment (Sexual Offences) Act 2016</i>
Adoption Act	<i>Adoption Act 1984</i>
Advisory Group	Sexual Offences Advisory Group
Charge Book	The Judicial College of Victoria's Criminal Charge Book
Consultation Paper	Criminal Law Review, Department of Justice, <i>Review of Sexual Offences: Consultation Paper</i> (September 2013)
Crimes Act	<i>Crimes Act 1958</i>
department	The Department of Justice and Regulation
Marriage Act	<i>Marriage Act 1961</i> (Cth)
NDIS	National Disability Insurance Scheme
Status of Children Act	<i>Status of Children Act 1974</i>
Summary Offences Act	<i>Summary Offences Act 1966</i>
VLRC	The Victorian Law Reform Commission

1 Introduction

The *Crimes Amendment (Sexual Offences) Act 2016* improves Victoria's sexual offence laws by:

- ◆ clarifying and modernising existing laws relating to:
 - sexual offences against children
 - child pornography
 - incest
 - sexual offences against persons with a cognitive impairment, and
 - a range of other sexual offences (including sexual servitude, loitering and bestiality)
- to make them clearer and more effective, and to respond to changes in offending, for example, by way of technological advances
- ◆ renaming and expanding child pornography offences to cover 'child abuse material'
- ◆ introducing the new offence of 'sexual activity directed at another person', and
- ◆ introducing more helpful jury directions on consent and reasonable belief in consent.

The reforms relating to jury directions commenced on 26 September 2016. The remaining reforms are expected to commence on 1 July 2017.

The Act builds on major reforms to rape and sexual assault laws contained in the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* by making further reforms to the general sexual offences in Subdivision (8A) of the *Crimes Act 1958*, and making significant reforms to other sexual offence Subdivisions.

The major changes include:

- ◆ clearer organisation of offences into Subdivisions containing offences with a clear hierarchy
- ◆ clearly setting out each element of offences, and exceptions and defences, rather than leaving some elements open or implied by the common law
- ◆ closing gaps in the law (e.g. new offences of encouraging a child to engage in sexual activity will address preparatory behaviour, and the new offence of sexual activity directed at another person will ensure that sexually intimidating behaviour is appropriately captured)
- ◆ updating offences to avoid discriminating on the basis of marital status or gender identity (e.g. by extending marriage exceptions to some domestic partnerships and amending relevant definitions)
- ◆ modernising offences to ensure that they cover offending by new technologies (e.g. to capture a person performing a sexual activity while video chatting with a child over Skype), and
- ◆ ensuring that certain conduct is not inappropriately criminalised (e.g. a new exception to the incest offences will ensure that a person who has been sexually abused by a parent, lineal ancestor or step parent while a child will not be subject to the incest offences if that abuse continues into adulthood).

This document explains key aspects of these reforms and outlines how the new provisions are intended to operate in practice. It is intended to assist anyone who has an interest in Victoria's new sexual offence laws, but especially lawyers and judges who will be working with the new laws.¹

To assist users of this document, the following appendices are also included:

- ◆ illustrative scenarios for the child abuse material reforms (Appendix 1).
- ◆ Ready Reckoners:

¹ It is convenient to refer to the provisions introduced by the Act as the 'new' provisions and to the current *Crimes Act* provisions as the 'existing' provisions. The 'existing' provisions are still operative in relation to offences alleged to have been committed prior to 1 July 2017 and the 2014 rape and sexual assault reforms continue to operate.

- linking the existing *Crimes Act* provisions to the new provisions that will apply after commencement of the Act (Appendix 2), and
- linking the new provisions in the *Crimes Act* that will apply after commencement of the Act with the existing provisions (Appendix 3).

Other Resources

Other resources that may be of assistance in understanding the Act include the Attorney-General's Second Reading Speech, Statement of Compatibility and Explanatory Memorandum for the Crimes Amendment (Sexual Offences) Bill 2016.

Related links

Victorian Legislation — www.legislation.vic.gov.au

Parliament of Victoria — www.parliament.vic.gov.au

Department of Justice and Regulation — www.justice.vic.gov.au

Judicial College of Victoria — www.judicialcollege.vic.edu.au

2 Background to the Act

2.1 Review of Sexual Offences: Consultation Paper and other publications

The Department of Justice's *Review of Sexual Offences: Consultation Paper* was released in October 2013. It contained 49 proposals and 10 questions. The department received 28 submissions from various criminal justice stakeholders and members of the public.

The Consultation Paper was produced following extensive consultation with the Sexual Offences Advisory Group, which included representatives from a range of criminal justice stakeholders, including the Courts, the Office of Public Prosecutions, the Criminal Bar Association and Victoria Legal Aid.² It was also developed within the policy framework developed by the Victorian Law Reform Commission in its *Sexual Offences: Final Report* (2004).

The Consultation Paper contained detailed discussion of the problems with many existing sexual offences. The Consultation Paper contained proposals for addressing those problems and also proposed new sexual offences to address gaps in, and to modernise, the law. These primarily concerned offences that are now located in new Subdivisions (8A)–(8C) of the *Crimes Act*. The provenance of many of the offences in these Subdivisions can be traced to the proposals in the Consultation Paper. Further consultation and drafting has led to improvements to those proposals.

A number of other recent inquiries and reports provided important background for the development of the Act. These include:

- ◆ the *Report of the Protecting Victoria's Vulnerable Children Inquiry* (the Cummins Inquiry) (February 2012), which included a recommendation that a new offence of grooming a child for sex be created
- ◆ the Victorian Parliament's Law Reform Committee's *Report on the Inquiry into Sexting* (May 2013), which made recommendations concerning defences to child pornography offences and new offences concerning distribution of intimate images without consent
- ◆ *Betrayal of Trust*, the Victorian Parliament's Family and Community Development Committee's report on its inquiry into the handling of child abuse by religious and other organisations (November 2013), which made recommendations regarding new offences of grooming, failure to report sexual offending against children, and failure to protect a child from sexual abuse, and
- ◆ the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse (commenced January 2013 and continuing).

This variety of inquiries and reports indicates the breadth of community concern about sexual offending and highlights the range of issues that need to be considered when developing reforms in this important and sensitive area of law.

2.2 Rape and sexual assault reforms in 2014

Following the Consultation Paper, major reforms were made to the law on rape and sexual assault in the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014*. The most important reforms of the 2014 Act included:

- ◆ a clear, simple and consistent drafting style for the offences of rape and sexual assault
- ◆ a new fault element in rape and sexual assault: the accused does not reasonably believe that the complainant consents

² Note, however, that the proposals and any views expressed in the Consultation Paper are the department's and do not necessarily reflect the views of any members of the Advisory Group.

- ◆ new jury directions in rape and sexual assault trials that are better tailored to the specifics of each case, and
- ◆ a new ‘course of conduct charge’, to assist in the prosecution of people who engage in repeated and systematic sexual abuse over a period of time.

These reforms commenced on 1 July 2015.

The 2014 Act also introduced new exceptions to child pornography offences for minors engaging in non-exploitative ‘sexting’ and two new summary offences relating to the distribution of intimate images. These reforms commenced on 3 November 2014.

The department’s paper, *Victoria’s New Sexual Offence Laws: An Introduction* (June 2015), contains further information on the 2014 Act.

3 General issues

3.1 Order of Subdivisions

The existing sexual offence provisions are largely contained in Subdivisions (8)–(8F) of the *Crimes Act*. Subdivision (8EA) contains one offence (loitering) and Subdivision (8F) contains only a note, as its other provisions were repealed in 2015.

The Act groups relevant offences and creates new Subdivisions as follows:

- ◆ Subdivision (8) — General provisions (definitions, objectives, guiding principles)
- ◆ Subdivision (8A) — Rape, sexual assault and associated sexual offences
- ◆ Subdivision (8B) — Sexual offences against children
- ◆ Subdivision (8C) — Incest offences
- ◆ Subdivision (8D) — Child abuse material
- ◆ Subdivision (8E) — Sexual offences against persons with a cognitive impairment or mental illness
- ◆ Subdivision (8F) — Sexual servitude, and
- ◆ Subdivision (8FA) — Other sexual offences.

Subdivision (8G), which deals with abrogation of obsolete rules of law, remains as it is (with only consequential amendments).

3.2 Structure of Subdivisions

The Act structures each of the Subdivisions as follows:

- ◆ Offence provisions.
- ◆ Exceptions and defences to offences (if relevant).
- ◆ What is not a defence (if relevant).

Similar offences, and exceptions and defences, are grouped together where possible. Separating out exceptions, defences and what is not a defence reduces repetition. This structure also reflects that exceptions etc. are not relevant in each case.

3.3 Structure of offences

The structure of offences in the Act is based on the new drafting style used in the 2014 Act. The following discussion is taken from the department's paper, *Victoria's New Sexual Offence Laws: An Introduction* (June 2015), with minor modifications.

Each element to be proved is distinctly identified

The new drafting style focuses on clearly defining the relevant offence. The approach is to separate the elements of the offence and present each element in its own distinct paragraph. This clearly identifies the elements that the prosecution must prove in a trial for the offence.

The basic pattern is to present the conduct element(s) first (such as sexual penetration), followed by a circumstance (such as lack of consent), followed by the main fault element in relation to the circumstance (such as the person did not have a reasonable belief in consent). The fault element of intention with regard to conduct has been incorporated into the conduct element as the two usually run very closely together, with intention rarely being in issue. ('Fault element' is the more contemporary term used to refer to what was traditionally — and inaccurately, in this context — called 'mens rea'. See the Glossary.)

This drafting approach will assist judges with formulating jury directions by clearly identifying the matters of which the jury needs to be satisfied beyond reasonable doubt. Question trails for juries can be readily generated by taking each element and turning it into a question. For example, the element 'the touching is sexual' in the sexual assault offences is easily converted

into the jury question: ‘Are you satisfied that when Albert touched Betty’s buttocks, the touching was sexual?’

Use of ‘A’ and ‘B’ to identify persons

Another distinctive feature of the new drafting style is its use of ‘A’ and ‘B’ (and ‘C’ and ‘D’, where relevant) to identify the different people involved in the offence elements. This approach helps to make the provisions clearer and avoids use of ‘the first mentioned person’, ‘the second mentioned person’, ‘another person’ and so on, which can become distracting and confusing.

The same technique is used to help readers understand the definition of ‘sexual penetration’. However, each provision is self-contained, which means that persons A and B in the offence provisions are not necessarily the same as persons A and B in the definition of ‘sexual penetration’ (see Note to new section 35A). Usually they will match, but with some of the less common permutations (such as causing a person to engage in sexual penetration), A and B in the offence elements might be different to A and B in the definition of ‘sexual penetration’.

3.4 Exceptions are distinctly identified

Exceptions set out the circumstances in which an offence is not committed. Exceptions to offences are distinctly and separately identified rather than incorporated into the offence itself. For example, the exception to sexual penetration for good faith medical procedures is provided for in a distinct section. In contrast, under the old law, this exception was built into the definition of the conduct element of sexual penetration. That is conceptually odd because it introduces the accused’s purpose into the definition of the physical element of conduct.

It is clearer to state directly the general scope of the offence in the offence definition and then to identify any exceptions that then restrict the scope of the offence. Mixing an exception into the elements of an offence, especially when the exception applies only rarely, can make it more difficult to identify the elements to be proved. A distinct statement of the exception also helps to make it clearer that an exception is a distinct matter, which is for the accused to raise.

3.5 Structure of defences

The Act is drafted on the basis that there is a difference between committing an offence and being guilty of an offence. A person commits an offence if they have committed the elements of an offence and no exception applies. A person is guilty of an offence if they have committed an offence and no defence applies. Accordingly, defences in the Act set out a basis for exculpating the accused, even where he or she has committed the offence. Under the Act:

- ◆ a legal burden (which the accused must prove on the balance of probabilities) applies to an element of a defence that:
 - involves the reasonable belief of the accused (e.g. a reasonable belief as to age), or
 - is otherwise within the particular knowledge of the accused (e.g. that an image depicts the accused as a child in new section 51N), and
- ◆ an evidential burden applies to all other elements of a defence.

The Act clearly sets out wherever a legal burden applies. Where the Act is silent as to burden (e.g. in new sections 49V and 50H), an evidential burden applies.

For clarity, where a defence contains both burdens, the Act states which burden applies to each element. For example, new section 49W provides that it is a defence to a charge for an offence against section 49B(1) if, at the time of the conduct constituting the offence:

- ◆ B was 12 years of age or more, and
- ◆ A reasonably believed that B was 16 years of age or more.

An evidential burden applies to the first element, and a legal burden applies to the second element (see new section 49W(4) and Note 3).

4 Definitions

Definitions relevant to sexual offences are currently contained in sections 34C–35 of Subdivision (8) and sections 37C–37H of Subdivision (8A) of the *Crimes Act*.

The Act replaces these with new sections 35–37. These sections are in Subdivision (8), and apply to Subdivisions (8A)–(8FA).

The following definitions replicate existing definitions:

- ◆ taking part in a sexual act (new section 35C)
- ◆ reasonable belief in consent (new section 36A), and
- ◆ effect of intoxication on reasonable belief (new section 36B).

Significant substantive changes to other definitions are outlined below.

4.1 Domestic partner

The definition of ‘domestic partner’ in new section 35 largely replicates the existing definition in section 35(1) but includes a new reference to ‘gender identity’ to recognise the identity of transgender and intersex people. Paragraph (b) of the definition now covers ‘a person to whom the person is not married but with whom the person is living as a couple on a genuine domestic basis (irrespective of gender or gender identity)’.

4.2 Sexual penetration

The definition of sexual penetration in new section 35A replicates key aspects of the current definition in section 37D. In particular, existing section 37D(1) and (3) are replicated in new section 35A(1) and (2).

Existing section 37D(2) is not replicated as the issues covered in that subsection (i.e. causing another person to sexually penetrate the complainant and causing the complainant to take part in an act of bestiality) are covered by the relevant offence provisions (for example, see new section 49A(1)(a)(iii)(C)).

Existing section 37D(4), which relates to sexual penetration of an animal, is covered by new section 35A(3). New section 35A(4) deals with being sexually penetrated by an animal (which is not covered in the existing definition), and new section 35A(5) provides that in relation to sexual penetration of an animal, a reference to the vagina or anus includes a reference to any similar part (e.g. a cloaca).

Unlike the existing definition, new section 35A does not state that, for sexual penetration by the use of a penis, it does not matter whether or not there is emission of semen. The Act removes this reference as the law has held for over a century that the emission or non-emission of semen is irrelevant to the question of whether penetration occurred.

In the eighteenth and nineteenth centuries, courts in England disagreed on the sufficiency of evidence required to prove the commission of a rape. All courts agreed that penetration was essential. Some also required the emission of semen. Some said that penetration was *prima facie* evidence of emission whilst others said emission was *prima facie* evidence of penetration. In practice it was difficult to prove emission of semen. This often depended on an assumption by the complainant.

In light of this inconsistency, in 1828, the Parliament of the United Kingdom of Great Britain and Ireland passed the *Offences against the Person Act*. Section 18 stated that it was not necessary ‘to prove the emission of seed’ as rape was to be ‘deemed complete upon proof of penetration only’. This approach was adopted in Australia. Subsequently, in Victoria, when a statutory offence of rape was introduced, section 2A of the *Crimes (Sexual Offences) Act 1980* expressly stated that ‘in no case where rape is charged is it necessary to prove the emission of semen’. Given that sexual penetration is concerned with penetration to any extent without consent, it is unnecessary to maintain the reference to emission of semen.

4.3 Touching

The definition of touching in new section 35B largely replicates the existing definition in section 37E, but recognises that touching the breasts of a person ‘who identifies as a female’ may be sexual. This ensures the definition does not discriminate against transgender or intersex persons.

4.4 Sexual activity

The definition of sexual activity in new section 35D is new. It is an inclusive definition of what may make an activity sexual, namely:

- ◆ the area of the body that is involved in the activity, including (but not limited to) the genital or anal region, the buttocks or, in the case of a female or a person who identifies as a female, the breasts
- ◆ the fact that the person engaging in the activity seeks or gets sexual arousal or sexual gratification from the activity, or
- ◆ any other aspect of the activity, including the circumstances in which it is engaged in.

An example of a sexual activity is a person (A) watching pornography in the presence of A’s daughter (B) and her friend (C).

This definition is used in a number of offences, including sexual activity directed at another person (new section 48), sexual activity in the presence of a child under 16 (new section 49F) and causing a child under 16 to be present during sexual activity (new section 49H).

4.5 Consent

New section 36 provides for the meaning of consent. It replicates existing section 34C and adds one further consent-negating circumstance (new subsection (2)(f)), as follows:

the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act

As the Note indicates, this new circumstance covers where a person gave genuine consent but subsequently becomes so affected by alcohol or another drug as to be incapable of consenting. If a person loses the capacity to consent, any consent they previously gave ceases to operate.

4.6 Care, supervision or authority

The non-exhaustive list of circumstances in which a person has a child under their care, supervision or authority in new section 37 is based on the list in existing section 48(4) but makes the following improvements:

- ◆ it expressly includes parents and step-parents (and includes definitions of these terms)
- ◆ the reference to having ‘parental responsibility’ for the child replaces the term ‘legal guardian’
- ◆ it expands the existing category relating to ‘a minister of religion with pastoral responsibility for the child’ to cover a broader range of religious or spiritual guides, and leaders or officials of a church or religious body who provide ‘care, advice or instruction’ to the child or have authority over the child. Such care, advice or instruction need not be religious in nature, and
- ◆ the term ‘out of home carer’ replaces ‘foster parent’. The term adopts the meaning of ‘out of home carer’ in section 74 of the *Children, Youth and Families Act 2005*, which includes a person who acts as a foster carer for an out of home care service, as well as a person engaged or employed by such a service to provide care or services to children.

5 Rape, sexual assault and associated sexual offences — Subdivision (8A)

New Subdivision (8A) contains general sexual offences. All of the offences in existing Subdivision (8A) remain in this Subdivision. The Act also moves general sexual offences (such as procuring sexual act by threat or fraud, and abduction or detention for a sexual purpose) from existing Subdivision (8E) into this Subdivision.

To reflect these new additions, the Act renames this Subdivision ‘Rape, sexual assault and associated sexual offences’. The Act also restructures the Subdivision and the offences in the Subdivision as discussed in Part 3.

Significant substantive changes to the existing law and the new offence of sexual activity directed at another person (new section 48) are outlined below.

5.1 Reforms to existing offences

The Act broadens a number of offences in this Subdivision, as discussed below.

5.1.1 Compelling and threat offences

The Act amends the following *Crimes Act* offences to specifically include causing a person to be penetrated or touched by another person or an animal:

- ◆ rape by compelling sexual penetration (section 39)
- ◆ sexual assault by compelling sexual touching (section 41), and
- ◆ threat to commit a sexual offence (section 43).

These changes ensure that all permutations of a sexual act are covered, and are consistent with equivalent offences in new Subdivision (8B) (Sexual offences against children) and new Subdivision (8E) (Sexual offences against persons with a cognitive impairment or mental illness).

Compelling offences

In these offences, the accused is not personally doing the sexual penetration or the sexual touching. Rather the complainant is doing the sexual penetration or sexual touching (or is being sexually penetrated or sexually touched), and is being compelled to do so by the accused.

The term ‘compel’ is not expressly defined. Instead, the concept of compelling is substantiated in the two elements of causing the complainant to take part in the relevant sexual act and the complainant not consenting to taking part in that act. How the accused might ‘cause’ the complainant to so act is left relatively open. It does not always require force or threats, but may, for example, involve deception. What matters is that the complainant does not consent to taking part in the act, but is being caused or made to do so by the accused. That constitutes the essence of compelling a person to do something.

The elements of the new rape by compelling sexual penetration offence are:

Rape by compelling sexual penetration (section 39)

- A person (A) intentionally causes another person (B)—
 - ◆ to sexually penetrate A; or
 - ◆ to sexually penetrate themselves; or
 - ◆ to sexually penetrate another person (C) or an animal; or
 - ◆ to be sexually penetrated by C or by an animal; and
- B does not consent to the sexual penetration; and
- A does not reasonably believe that B consents to the sexual penetration.

Amended section 41 (sexual assault by compelling sexual touching) replicates the elements of new section 39 but refers to touching instead of sexual penetration, and requires the touching to be sexual.

Threat offence

The Act does not amend the elements of section 43 (threat to commit a sexual offence), but amends section 43(2), which sets out what may constitute a threat, to include conveying an intention to cause B or C to be sexually penetrated or sexually touched by another person or by an animal (see new subsection (2), below). The elements of the offence remain as follows:

Threat to commit a sexual offence (section 43)

- A person (A) makes to another person (B) a threat to rape or sexually assault B or a third person (C); and
- A intends that B will believe, or believes that B will probably believe, that A will carry out the threat.

New section 43(2) provides that:

What may constitute a threat (section 43(2))

- Words or conduct may constitute a threat for the purposes of subsection (1) if by those words or that conduct an intention to do any of the following is conveyed—
 - ◆ to sexually penetrate or sexually touch B or C without B or C's consent;
 - ◆ to cause B or C, without B or C's consent, to sexually penetrate or sexually touch—
 - A; or
 - C or B (as the case requires); or
 - themselves; or
 - another person; or
 - an animal;
 - ◆ to cause B or C, without B or C's consent, to be sexually penetrated or sexually touched by another person or by an animal.

5.1.2 Procuring and abduction/detention offences

Existing sections 55 (abduction or detention) and 57 (procuring sexual penetration by threats or fraud) of the *Crimes Act* relate to sexual penetration. The Act replaces these offences with the following offences:

- ◆ procuring sexual act by threat (new section 44)
- ◆ procuring sexual act by fraud (new section 45), and
- ◆ abduction or detention for a sexual purpose (new section 47).

The new offences refer to ‘taking part in a sexual act’. This is defined in new section 35C to include both sexual penetration and sexual touching. The new offences are therefore broader than the existing offences. The new offences also set out each element clearly.

The elements of the new offences are:

Procuring sexual act by threat (section 44)

- A person (A) makes a threat to another person (B) that A will cause harm of any kind to B, another person or an animal; and
- A intends that B will believe, or believes that B will probably believe, that A will cause that harm; and
- as a result of A's threat, B or another person takes part (whether at the time the threat is made or at a later time) in a sexual act with A or another person; and
- A intends that, as a result of A's threat, an outcome mentioned in the preceding paragraph will occur.

Procuring sexual act by fraud (section 45)

- A person (A) makes a false or misleading representation; and
- A knows that the representation is false or misleading, or that the representation is probably false or misleading; and
- as a result of A's representation, another person (B) takes part (whether at the time the representation is made or at a later time) in a sexual act with A or another person; and
- A intends that, as a result of A's representation, an outcome mentioned in the preceding paragraph will occur.

Abduction or detention for a sexual purpose (section 47)

- A person (A) takes away or detains another person (B), or causes B to be taken away or detained by another person; and
- B does not consent to being taken away or detained; and
- A knows that—
 - ♦ B does not consent to being taken away or detained; or
 - ♦ B probably does not consent to being taken away or detained; and
- A intends that—
 - ♦ B will take part in a sexual act with A or another person (C) or both; or
 - ♦ A or C will marry B (whether or not B consents to being married).

5.1.3 Administration of an intoxicating substance for a sexual purpose

The Act replaces existing section 53 of the *Crimes Act* (administration of drugs, etc.) with the offence of administering an intoxicating substance for a sexual purpose (new section 46).

Existing section 53 contains two separate offences. The first applies where the accused intends to take part in an act of sexual penetration with the complainant, while the second applies where the accused's intention relates to the commission of an indecent act. However, it will often be difficult (and artificial) to distinguish the precise sexual intention of the accused (i.e. it may not be possible to identify whether the accused intended that the sexual act involve sexual penetration or sexual touching). Accordingly, new section 46 applies to both sexual penetration and sexual touching.

New section 46 also aligns the fault element with the rape offences by focusing on intention to impair a person's ability to give, withhold or withdraw consent. Existing section 53 refers to administering a drug (etc.) with the intention of rendering a person 'incapable of resistance'. Focusing on the ability to give, withhold or withdraw consent (rather than on the overpowering of a person's will) is consistent with modern understandings of lack of consent, which do not require proof that a complainant physically resisted a sexual act in order for lack of consent to be established.

The elements of the new offence are:

Administration of an intoxicating substance for a sexual purpose (section 46)

- A person (A)—
 - ♦ administers an intoxicating substance to another person (B); or
 - ♦ causes B to take an intoxicating substance; or
 - ♦ causes another person (C) to administer an intoxicating substance to B; and
- A intends that the intoxicating substance—
 - ♦ will impair B's capacity to give, withhold or withdraw consent to taking part in a sexual act; and
 - ♦ will facilitate B taking part in a sexual act with A or another person.

5.2 New offence of sexual activity directed at another person

New section 48 of the *Crimes Act* (sexual activity directed at another person) creates a new offence that will cover a broad spectrum of sexually intimidating behaviour that can occur in public or private.

Victoria's existing wilful and obscene exposure offences, comprising the common law offence of wilful exposure and section 19 of the *Summary Offences Act 1966* (indecent exposure), have two main limitations. First, the offences are restricted to exposure of the genitals and therefore do not cover other sexually intimidating behaviour. For example, a person may cause another person fear or distress by making violent sexual gestures or simulating a sexual act without exposing their genitals. Second, exposure of the genitals must occur in or within view of a public place (section 19), or where at least one other person is in a position to see the exposure (common law wilful exposure). Sexually intimidating behaviour can occur in both public and private. In fact, offenders will often target a person because they are alone in an isolated location. For example, a person may jump out and 'flash' a lone jogger or enter a person's backyard and expose themselves while expressing a desire to sexually penetrate that person.

The limitations of the existing offences make it appropriate to create a distinct, indictable offence of engaging in a sexual activity directed at another person that is not limited to exposure of the genitals in, or in view of, a public place or with another person able to witness the exposure. Sexually intimidating behaviour can be the result of significant premeditation and can be extremely threatening to the intended target, who may fear that the offender will sexually assault them or commit other offences. The new offence will adequately address the sexual nature and criminality of such conduct.

The elements of the new offence are:

Sexual activity directed at another person (section 48)
<ul style="list-style-type: none"> ▪ A person (A) engages in an activity; and ▪ the activity is sexual; and ▪ another person (B) sees the activity or a part of the activity; and ▪ A knows that B will see, or will probably see, the activity or a part of the activity; and ▪ A— <ul style="list-style-type: none"> ◆ intends that B will experience fear or distress from seeing the activity or a part of the activity; or ◆ knows that B will experience, or will probably experience, fear or distress from seeing the activity or a part of the activity.

The maximum penalty for this offence is 5 years imprisonment.

The new offence may occur in public or private, and requires the person to intend that seeing the 'sexual activity' cause another person fear or distress, or to be reckless as to that result. In the Consultation Paper, the proposed offence included an element that the person who saw the activity in fact experienced fear or distress. However, liability for the offence should not turn on the reaction of the person who witnesses the sexual activity. Victims may have a variety of subjective responses to sexually intimidating behaviour. For example, a victim with self-defence training may not be fearful and may take defensive action. The key aspect of the new offence is the sexually intimidating behaviour and the intention or recklessness of the accused as to the victim's fear or distress, which should be criminalised regardless of the victim's reaction.

Compared with the offence in section 19 of the *Summary Offences Act* (which the Act also amends — see Part 10.1.4), new section 48 will:

- ◆ capture more serious instances of sexual exposure
- ◆ apply whether or not the sexual activity occurs in public, or within view of a public place, and
- ◆ not be limited to exposure of the genitals.

New section 54C provides that the offence of wilful exposure at common law is abolished. The common law offence of wilful exposure is no longer necessary in light of the new hierarchy of exposure offences consisting of new section 48 and amended sections 17 and 19 of the *Summary Offences Act*.

6 Sexual offences against children — Subdivision (8B)

New Subdivision (8B) of the *Crimes Act* contains sexual offences against children. All of the offences in existing Subdivision (8C) are covered by this Subdivision. The Act also moves relevant sexual offences against children (such as abduction of a child for a sexual purpose and loitering) into this Subdivision from other Subdivisions, and introduces new offences.

Like the existing law, there are two main ‘categories’ of offences against children — those involving a child under 16 years of age, and those involving a child aged 16 or 17 years and under the accused’s care, supervision or authority. In addition, there is an offence of sexual penetration of a child under 12 years of age and sexual performance offences that apply when the child is under 18 years of age.

The Act restructures the Subdivision and the offences in the Subdivision as discussed in Part 3.

Significant substantive changes to the existing law are outlined below.

6.1 General — removal of consent

For general sexual offences in Subdivision (8A), such as rape and sexual assault, a lack of consent is an important element of the offence that the prosecution must prove beyond reasonable doubt. One of the reasons for creating specific offences for sexual offences committed against children is that consent is not usually relevant. Instead, consent arises in the context of defences to sexual offences against children. The defences are based on the presence of consent. For example, existing defences provide that a child under 12 years of age can never consent to sexual penetration and a child aged between 12 and 16 can only consent in certain circumstances.

Existing defences to sexual offences against children do not expressly include a fault element relevant to consent. Whether a fault element should be implied has not been authoritatively determined. The Judicial College of Victoria’s Criminal Charge Book acknowledges this unresolved question and suggests that the prosecution should prove awareness of non-consent ‘as a matter of prudence’.³

The Charge Book proposes this standard of awareness of non-consent for trials. However, there have been a number of changes in fault elements in relation to consent. In particular, this fault element is suggested for child sexual offences alleged to have been committed on or after 1 July 2015, even though amendments in the 2014 Act introduced an objective standard of consent. It is also not clear why a statutory fault element would apply rather than a common law standard.

The question of consent by a child and the corresponding fault element raises important policy considerations. It is appropriate for the law to require a person to exercise a higher degree of care when engaging in sexual activity with a young person. Sexual offences specifically tailored to protect children are underpinned by the particular vulnerability of children and the need to protect them from sexual abuse and exploitation.

To simplify the prosecution of these offences, the Act removes the element of consent from all exceptions and defences (except for the ‘similarity in age’ defence to sexual penetration of a child under 16, discussed below). In addition to simplifying prosecutions, this reflects that children cannot consent to sexual activity in the same way as adults, by reason of age or a relationship of care, supervision or authority.

As a consequence, relevant offences in this Subdivision now refer to general offences in Subdivision (8A) to ensure appropriate coverage. For example, new section 49P (abduction or detention of a child for a sexual purpose) and new section 49S (facilitating a sexual offence against a child) both refer to the general offences in sections 38(1), 39(1), 40(1) and 41(1) of the *Crimes Act*, to ensure that they capture rape and sexual assault (for example).

New section 49V contains the ‘similarity in age’ defence to the offence of sexual penetration of a child under 16. This defence replicates the defence in existing section 45(4)(b) of the *Crimes Act*. Unlike the similarity in age exceptions in new section 49U, section 49V refers to B’s

³ Judicial College of Victoria, *Victorian Criminal Charge Book*, 7.3.4.1.2C–2F (last updated 22 January 2016) and 7.3.4.2.2C–2F (last updated 27 April 2016).

consent. New sections 49D, 49F and 49H, to which new section 49U applies, include a ‘community standards’ element and expressly indicate that consent is not relevant to this issue. Adding consent to the exception in new section 49U would be very confusing. The offence in new section 49B(1) does not include a ‘community standards’ element and therefore the issue of consent can be addressed within the defence of similarity in age.

6.2 Reforms to the sexual penetration offences

Existing sections 45 and 48 of the *Crimes Act* contain sexual penetration offences. The Act replaces these offences with the following offences:

- ◆ sexual penetration of a child under the age of 12 (new section 49A)
- ◆ sexual penetration of a child under the age of 16 (new section 49B), and
- ◆ sexual penetration of a child aged 16 or 17 under care, supervision or authority (new section 49C).

Unlike the general sexual penetration offences in Subdivision (8A), the consent of the child is not relevant.

The elements of new section 49A are:

Sexual penetration of a child under the age of 12 (section 49A)

- A person (A) intentionally—
 - ◆ sexually penetrates another person (B); or
 - ◆ causes or allows B to sexually penetrate A; or
 - ◆ causes B—
 - to sexually penetrate themselves; or
 - to sexually penetrate another person (C); or
 - to be sexually penetrated by C; and
- B is a child under the age of 12 years.

New section 49B is the equivalent offence that applies where B is under the age of 16 years, and new section 49C is the equivalent offence that applies where B is 16 or 17, and is under the care, supervision or authority of the accused.

6.2.1 Sexual penetration of a child under 12 years, or under 16 years

Existing section 45 is drafted as a single offence — taking part in an act of sexual penetration with a child under the age of 16. However, the section specifies three different maximum penalties, depending on the existence of certain ‘circumstances of aggravation’. The maximum penalties are:

- ◆ 25 years imprisonment if the child was aged under 12
- ◆ 15 years imprisonment if the child was aged between 12 and 16, and was under the care, supervision or authority of the accused, or
- ◆ 10 years imprisonment in any other case where the child was aged between 12 and 16.

This is an unusual structure for an offence. This structure was introduced into the *Crimes Act* in 2000. Prior to 2000, two separate offences existed:

- ◆ sexual penetration of a child under the age of 10, with a maximum penalty of 25 years imprisonment, and
- ◆ sexual penetration of a child aged between 10 and 16, with a maximum penalty of either 15 years imprisonment if the child was under the care, supervision or authority of the accused, or 10 years imprisonment in any other case.

The offences were consolidated in 2000. The Second Reading Speech for the *Crimes (Amendment) Act 2000* explains that the consolidation was designed to address a problem where there was uncertainty as to whether the alleged offence was committed before or after the child turned 10. If the child could not recall when the alleged offence was committed and there was no other evidence, potentially neither offence could be proved. As a result, the accused would be acquitted.

Existing section 45 was created to remove the requirement that the prosecution prove that the child was under or over the age of 10 at the time the alleged offence was committed. In order to prove the offence under the section, the prosecution would have to prove that the child was under the age of 16 at the time of the offence. If it could also prove that the child was under 10 (this age was increased to 12 in 2010), the accused would be subject to a higher maximum penalty. If it could not prove that the child was under 10, the accused would not be acquitted, but would be subject to the lower maximum penalty of 10 years imprisonment.

Creating a single offence successfully addressed this problem. However, in order to do so, the offence introduced a number of new issues and complications. One difficulty arises from the fact that existing section 45(5) states that a circumstance of aggravation is not an element of the offence. However, other parts of the section treat the circumstances of aggravation as if they are elements of the offence. For example, the circumstance of aggravation must be stated in the indictment. In addition, the accused may have an aggravating circumstance dealt with either by the judge or the jury.

To simplify and clarify these offences, new sections 49A and 49B provide that B's age is a separate element of each offence, rather than including B's age as an aggravating circumstance. The new sections also include an express fault element of intent that is implied in existing section 45.

Where it is unclear whether B was under the age of 12 or aged 12 or over at the time of the alleged offence, these offences may overlap. Where there is insufficient evidence to prove that B was under 12, or the evidence as to B's age is equivocal, the offence in new section 49A could be charged with the offence in new section 49B as an alternative. The jury would determine B's age and return a verdict in accordance with that determination.

New section 49B does not include the aggravating circumstance of 'care, supervision or authority' in existing section 45(2)(b) (which increases the maximum penalty for the existing offence from 10 years to 15 years imprisonment). In the new offence, where B is under A's care, supervision or authority, this is an aggravating factor to be taken into account in sentencing. The maximum penalty for this new offence is level 4 imprisonment (15 years maximum). This is higher than the maximum penalty of level 3 imprisonment (10 years maximum) in existing section 45(2)(c) (where B was not under A's care, supervision or authority). The new maximum penalty better reflects the gravity of the offending and creates a logical difference between the maximum penalty for this offence and other sexual offences against a child that do not involve sexual penetration.

Like the existing offence (see section 45(9)), the maximum penalty for new section 49B means that it is not able to be heard and determined summarily. The higher maximum penalty means that it is no longer necessary for Parliament to state this expressly.

6.2.2 Sexual penetration of a child aged 16 or 17 and under care, supervision or authority

New section 49C is based on existing section 48, but simplifies the elements of the offence, and includes an express fault element of intention that is implied in section 48. The (amended) definition of care, supervision or authority is in new section 37.

6.3 Sexual assault and sexual activity offences

Existing sections 47 and 49 of the *Crimes Act* apply to 'indecent acts' with children. The Act replaces section 47 with the following offences:

- ◆ sexual assault of a child under the age of 16 (new section 49D)
- ◆ sexual activity in the presence of a child under the age of 16 (new section 49F), and
- ◆ causing a child under the age of 16 to be present during sexual activity (new section 49H).

New sections 49E, 49G and 49I, which contain the equivalent offences that apply to a child aged 16 or 17 years under the care, supervision or authority of the accused, replace existing section 49.

The new offences replace the outdated language of 'indecency' with the simpler and clearer wording of touching or activity (as the case requires) that is sexual and contrary to community standards of acceptable conduct. This reflects the current legal meaning of the term 'indecent'.

The definitions of sexual touching (new section 35B) and sexual activity (new section 35D) are broad. In sexual offences against children, the absence of the child's consent is not an element. Replacing the language of 'indecency' with the circumstances of the touching or activity being 'sexual' would broaden the scope of the offences considerably. Therefore, the Act requires that the touching or activity also be 'contrary to community standards of acceptable conduct'. This means that in the circumstances, the touching or activity does not conform to generally accepted standards of sexual behaviour.

The new offences expressly identify two factors as being relevant to this assessment: the purpose of the touching or activity, and whether the accused seeks or gets sexual arousal or sexual gratification from it. In many cases these factors will overlap but it is necessary to list them separately, so as to exclude touching or activity which is for a legitimate purpose or is not accompanied by a desire for sexual arousal or sexual gratification. This ensures that the new offences do not inappropriately criminalise non-exploitative touching or activity, and will exclude acts such as parents bathing children. As such, it is unnecessary to have a specific exception for good faith medical or hygienic purposes.

New sections 49D–49I also specify that the child's consent to the touching, and any belief by the accused that the child was consenting, must not be taken into account in determining whether the touching or activity was contrary to community standards. To allow otherwise would undermine the policy that consent is irrelevant to sexual offences against children, given a child's inability to provide informed consent in the same way as adults.

6.3.1 Sexual assault of a child

The offences of sexual assault against children are in new sections 49D and 49E. The elements of new section 49D are:

Sexual assault of a child under the age of 16 (section 49D)

- A person (A) intentionally—
 - ◆ touches another person (B); or
 - ◆ causes or allows B to touch A; or
 - ◆ causes B—
 - to touch, or to continue to touch, themselves; or
 - to touch, or to continue to touch, another person (C); or
 - to be touched, or to continue to be touched by, C; and
- B is a child under the age of 16 years; and
- the touching is—
 - ◆ sexual; and
 - ◆ contrary to community standards or acceptable conduct.

New section 49E is the equivalent provision that applies where B is aged 16 or 17, and is under the care, supervision or authority of the accused.

In addition to replacing the concept of 'indecent act', these offences include an express element of 'intent', which replaces the ambiguous element of 'wilfulness' in existing sections 47 and 49. The offences also set out the various permutations of sexual touching, for clarity.

6.3.2 Sexual activity in the presence of a child

New sections 49F and 49G cover sexual activity in the presence of a child. These are non-contact offences that do not involve sexual penetration or sexual touching. The elements of new section 49F are:

Sexual activity in the presence of a child under the age of 16 (section 49F)

- A person (A) intentionally engages in an activity; and
- the activity is sexual; and
- another person (B) is present when A engages in the activity; and
- A knows that B is, or probably is, present when A engages in the activity; and
- B is a child under the age of 16 years; and
- engaging in the activity in the presence of B is contrary to community standards of acceptable conduct.

New section 49G is the equivalent offence that applies where B is aged 16 or 17 years, and is under the care, supervision or authority of the accused.

These offences are broader than existing sections 47 and 49, as they provide that the child may be present by way of electronic communication that is received by the child in real time or close to real time. For example, the offence may apply where A engages in sexual activity while communicating with B over the internet. Updating these offences to specifically cover offending using new technologies addresses current case law that interprets the phrase ‘in the presence of’ to mean only in the physical presence of the child.⁴

The offences include an express fault element of intent, and require the prosecution to prove that A knew that B was, or probably was, present when A engaged in the activity. This clarifies uncertainty created by the element of ‘wilfulness’ in existing sections 47 and 49.

The offences have extra-territorial application, so long as one of their key aspects is, or occurs, in Victoria. For example, this will enable Victorian police to charge the offence if B was interstate when A engaged in the activity online, as long as A was in Victoria.

6.3.3 Causing a child to be present during sexual activity

New sections 49H and 49I relate to causing a child to be present during sexual activity. These cover situations where the accused causes a child to be present during another person’s sexual activity. These offences cover conduct not expressly covered by existing sections 47 and 49, however, this conduct may be covered by the reference to ‘being in any way a party to the commission of, an indecent act’ in the existing offences.

The elements of new section 49H are:

Causing a child under the age of 16 to be present during sexual activity (section 49H)

- Another person (B) engages in an activity; and
- the activity is sexual; and
- another person (C) is present when B engages in the activity; and
- a person (A) intentionally causes or allows C to be present when B engages in the activity; and
- C is a child under the age of 16 years; and
- A’s causing or allowing C to be present when B engages in the activity is contrary to community standards of acceptable conduct.

New section 49I is the equivalent offence that applies where B is aged 16 or 17 years, and is under the care, supervision or authority of the accused.

Like the offences of sexual activity in the presence of a child, these offences may apply even though the child (C) is not physically present during the sexual activity. The offences also have extra-territorial application.

6.4 Encouraging sexual activity offences

Existing section 58 of the *Crimes Act* relates to procuring sexual penetration of a child. The Act replaces this offence with the following offences:

- ◆ encouraging a child under the age of 16 to engage in, or be involved in, sexual activity (new section 49K), and
- ◆ encouraging a child aged 16 or 17 under care, supervision or authority to engage in, or be involved in, sexual activity (new section 49L).

⁴ See *R v Alexander and McKenzie* [2002] VSCA 183 and *Savage v The Queen* [2010] VSCA 220.

The elements of new section 49K are:

Encouraging a child under the age of 16 to engage in, or be involved in, sexual activity (section 49K)

- A person (A) is 18 years of age or more; and
- A encourages another person (B) to engage in, or be involved in, an activity; and
- the activity is sexual; and
- B is a child under the age of 16 years; and
- A seeks or gets sexual arousal or sexual gratification from—
 - ◆ the encouragement; or
 - ◆ the sexual activity that is encouraged.

New section 49L is the equivalent offence that applies where B is aged 16 or 17 years, and is under the care, supervision or authority of the accused.

The new offences use the more readily understood term ‘encourage’ rather than the outdated language of ‘solicit or procure’. ‘Encourage’ is broadly and non-exhaustively defined to include suggesting, requesting, urging or demanding. This ensures that the offences cover different forms of communication, such as asking a child to engage in sexual activity, offering money or gifts in exchange for the child being involved in sexual activity, or threatening to do something (such as informing the child’s parents about the child’s drug use) if the child does not engage in sexual activity.

Consistent with existing section 58, mere encouragement is sufficient for these offences. The prosecution does not need to prove that the child in fact engaged in, or was involved in, sexual activity. This reflects the preparatory nature of the encouragement offence. The new offences also make it clear that encouragement may take place in person or by means of electronic communication.

The new offences are broader than existing section 58, as they apply when the encouraged sexual activity does not constitute a sexual offence (e.g. when the accused encourages the child to masturbate or watch pornography). However, the offences require the encouragement to be for the sexual arousal or gratification of the accused (which ensures that criminal liability does not apply to everyday acts that occur for a legitimate purpose, such as a parent providing their child with information on safe sexual practices).

The new offences do not require proof that the accused:

- ◆ intended to encourage the child to engage in, or be involved in, a sexual activity (in the sense that the accused meant to encourage the child in that way), or
- ◆ intended that the child engage in, or be involved in, a sexual activity.

Proof of such intention is unnecessary because of the element that the accused seeks or gets sexual arousal or sexual gratification from the encouragement or the sexual activity that is encouraged. In relation to the first point, in proving that the accused sought or got sexual arousal or sexual gratification, the prosecution would, in effect, also be proving that the encouragement itself was intentional. As to the second point, the accused can seek or get sexual arousal or sexual gratification from the encouragement itself. This will capture the situation where an accused is ‘purely fantasising’, that is, encouraging the sexual activity without intending the child engage in, or be involved in, that activity.⁵

New section 49K may overlap with the grooming offence in existing section 49B of the *Crimes Act* (which will be replaced by new section 49M — see Part 6.6). Both offences are preparatory offences against children under the age of 16 years. However, not all grooming behaviour may be covered by the encouraging offence. Grooming can be described as the process by which a person takes steps to prepare a child for sexual activity. Grooming may commence with non-sexual acts aimed at developing a child’s trust, and then escalate over time to include acts such as massage or showing pornography to the child. Accordingly, the grooming offence goes further than the encouraging offence, by covering conduct that does not involve any encouragement, but assists an accused to cultivate a relationship where sexual offending is more likely.

⁵ See, for example, *DPP (Cth) v F M* [2013] VSCA 129, which dealt with section 474.26(1) of the *Criminal Code Act 1995* (Cth).

Other differences between the two offences include the person to whom the behaviour is directed (the grooming offence extends to grooming of a person under whose care, supervision or authority the child is) and the motivation behind the offending (sexual arousal or sexual gratification in respect of the encouraging offence, and facilitation of a sexual offence in respect of the grooming offence).

6.5 Abduction offence

Existing section 56 of the *Crimes Act* relates to the abduction of a child under the age of 16 to take part in an act of sexual penetration. The Act replaces this offence with the offence of abduction or detention of a child under the age of 16 for a sexual purpose (new section 49P). The elements of the new offence are:

Abduction or detention of a child under the age of 16 for a sexual purpose (section 49P)

- A person (A)—
 - ◆ takes away or detains another person (B); or
 - ◆ causes B to be taken away or detained by another person; and
- B is a child under the age of 16 years; and
- the person who has lawful charge of B (C) does not consent to B being taken away or detained; and
- A knows that—
 - ◆ B is a child under the age of 16 years; or
 - ◆ B is probably a child under the age of 16 years; and
- A knows that—
 - ◆ C does not consent to B being taken away or detained; or
 - ◆ C probably does not consent to B being taken away or detained; and
- A intends B will take part in a sexual act with A or another person or both; and
- B taking part in the sexual act would involve the commission by A, or the other person, or both, of an offence against section 38(1), 39(1), 40(1), 41(1) or a provision of this Subdivision (other than this section).

The new offence is broader than existing section 56 as it applies to both penetrative and non-penetrative sexual acts (see the definition of ‘taking part in a sexual act’ in new section 35C). This is appropriate as it may be difficult (and artificial) to ascertain the precise intention of the accused.

As consent has been removed as an element of exceptions and defences against offences in this Subdivision (except the ‘similarity in age’ defence to new section 49B), this offence now includes references to the general offences in sections 38(1), 39(1), 40(1) and 41(1) of the *Crimes Act* to ensure appropriate coverage.

The maximum penalty for the new offence is level 5 imprisonment (10 years maximum). This is a higher maximum penalty than existing section 56 but is consistent with the sentencing hierarchy for sexual offences against a child.

6.6 Reforms to other sexual offences against children

The Act replaces the following *Crimes Act* offences with new offences:

- ◆ grooming for sexual conduct with a child under 16 (new section 49M)
- ◆ loitering near schools etc. by sexual offender (new section 49N)
- ◆ failure by person in authority to protect a child from a sexual offence (new section 49O), and
- ◆ facilitating a sexual offence against a child (new section 49S).

The Act also replaces existing section 70AC (sexual performance involving a minor) with two new offences of causing or allowing a sexual performance involving a child (new section 49Q), and inviting or offering a sexual performance involving a child (new section 49R).

The new provisions improve the structure of the offences for simplicity and consistency. For example, new section 49N clarifies the elements of the loitering offence, and includes new definitions. Also, ‘reasonable excuse’ is now a distinct exception to the offence, rather than being built into the offence itself (see new section 49ZB).

The substance of the new offences is largely the same as the existing offences, except for some minor improvements. For example, the definition of ‘sexual offence’ in new section 49O no longer includes historical offences as that offence is not intended to have retrospective effect, and new section 49S now covers conduct engaged in outside Victoria which may be lawful in that jurisdiction but would constitute an offence if the conduct occurred in Victoria.

6.7 Exceptions, defences and what is not a defence

6.7.1 Exception for medical or hygienic purposes

The Act contains a new exception to the following offences for good faith medical or hygienic purposes:

- ◆ sexual penetration of a child under the age of 12 (new section 49A)
- ◆ sexual penetration of a child under the age of 16 (new section 49B), and
- ◆ sexual penetration of a child aged 16 or 17 under care, supervision or authority (new section 49C).

Under the current law, the exception is part of the definition of ‘sexual penetration’ in existing section 35(1) (that applies to Subdivisions (8B)–(8G)).

The new exception provides that a person (A) does not commit an offence against new sections 49A(1), 49B(1) or 49C(1) if:

Exception to sexual penetration offences — medical or hygienic purposes (section 49T)

- A’s conduct occurs in the course of a procedure carried out in good faith for medical or hygienic purposes.

This is consistent with the exception that applies to the general sexual penetration and sexual assault offences in Subdivision (8A).

The exception does not apply to the new sexual assault offences against children in new sections 49D and 49E, as the element in these offences (that the touching is sexual and contrary to community standards) makes the exception unnecessary.

6.7.2 Exceptions and defences for offences against children under 16

Similarity in age exception

The Act contains a similarity in age exception to the following offences against children under the age of 16 years:

- ◆ sexual assault (new section 49D)
- ◆ sexual activity in the presence of a child (new section 49F), and
- ◆ causing a child to be present during sexual activity (new section 49H).

The exception provides that a person (A) does not commit an offence against new sections 49D(1) or 49F(1) if:

Exceptions to offences against children under 16 — similarity in age (section 49U)

- at the time at which the offence is alleged to have been committed—
 - ◆ A is not more than 2 years older than B; and
 - ◆ B is 12 years of age or more.

(Subsection (2) provides for the same exception to an offence against section 49H(1), except that C replaces B.)

This exception is based on the defence in existing section 47(2)(b) but re-characterises this as an exception. If A is not more than 2 years older than B or C, A will very often also be a child, or a young person. In these circumstances, it is preferable to treat A as not having committed an offence.

This exception does not include an element of consent, which is found in the existing defence — see Part 6.1.

This exception also requires the child to be aged 12 years or more. This is consistent with the existing (and new) law in relation to defences to sexual penetration of a child under 16. This requirement reflects the protective intention of sexual offences against children and recognises that a child under the age of 12 should not be involved in sexual touching or activity.

Similarity in age defence

The Act contains a similarity in age defence for the offence of sexual penetration of a child under the age of 16 (new section 49B). Under new section 49V, a person (A) will have a defence to a charge against new section 49B(1) if:

Defence to offence against a child under 16 — similarity in age (section 49V)

- at the time of the conduct constituting the offence—
 - ♦ A was not more than 2 years older than B; and
 - ♦ B is 12 years of age or more; and
 - ♦ B consented to the sexual penetration.

This defence replicates the defence in existing section 45(4)(b). Unlike new section 49U, this defence refers to B's consent. New sections 49D, 49F and 49H include a 'community standards' element and expressly indicate that consent is not relevant to this issue. Adding consent to new section 49U would be very confusing. The offence in new section 49B(1) does not include a 'community standards' element and therefore the issue of consent can be addressed within the defence of similarity in age.

Reasonable belief as to age defence

The Act contains reasonable belief as to age defences to the following offences against children under the age of 16 years:

- ♦ sexual penetration (new section 49B)
- ♦ sexual assault (new section 49D)
- ♦ sexual activity in the presence of a child (new section 49F), and
- ♦ causing a child to be present during sexual activity (new section 49H).

Under new section 49W(1), a person (A) will have a defence to a charge for an offence against new sections 49B(1), 49D(1) or 49F(1) if:

Defences to offences against children under 16 — reasonable belief as to age (section 49W(1) and (2))

- at the time of the conduct constituting the offence—
 - ♦ B was 12 years of age or more; and
 - ♦ A reasonably believed that B was 16 years of age or more.

(Subsection (2) provides for the same defence to an offence against section 49H(1), except that C replaces B.)

The defences in new section 49W(1) and (2) are based on the defences in existing sections 45(4)(a) and 47(2)(a), but new sections 49D(1), 49F(1) and 49H(1) include an additional requirement that B (or C) is aged 12 or over. It is inappropriate for the law to recognise that an accused could have a reasonable belief that a child was aged 16 or over where the child was actually less than 12 years old. This is consistent with the similarity in age exception in new section 49U.

The Act also contains a reasonable belief in age defence to the ‘encouraging a child to engage in, or be involved in, sexual activity’ offence in new section 49K. Under new section 49W(3), a person (A) will have a defence to a charge for an offence against new section 49K(1) if:

Defences to offences against children under 16 — reasonable belief as to age (section 49W(3))

- at the time of the conduct constituting the offence, A reasonably believed that B was 16 years of age or more.

This is a new defence. It is based on the defence available for other sexual offences against a child under the age of 16 but does not require that B was 12 years of age or more. Such a requirement may result in unfairness in the context of the new section 49K offence when the encouragement takes place in circumstances where A reasonably believes that he or she is communicating with another adult (e.g. where A only communicates with B over the internet without having seen B).

Consent is not relevant to this section — see Part 6.1.

6.7.3 Exceptions and defences for offences against children aged 16 or 17 (or under 18)

Reasonable belief as to age defence

The Act contains a reasonable belief as to age defence to the following offences against children aged 16 or 17:

- ◆ sexual penetration (new section 49C)
- ◆ sexual assault (new section 49E)
- ◆ sexual activity (new section 49G)
- ◆ causing a child to be present during sexual activity (new section 49I), and
- ◆ encouraging a child to engage in sexual activity (new section 49L).

Under new section 49X(1), a person (A) will have a defence to a charge for an offence against new sections 49C(1), 49E(1), 49G(1), or 49L(1) if:

Defences to offences against children aged 16 or 17 or under 18 — reasonable belief as to age (section 49X(1) and (2))

- at the time of the conduct constituting the offence, A reasonably believed that B was 18 years of age or more.

(Subsection (2) provides for the same defence to an offence against section 49I(1), except that C replaces B.)

This defence is based on existing sections 48(2)(a) and 49(2)(a) of the *Crimes Act*.

The Act also contains a reasonable belief as to age defence to the following offences against children aged under 18:

- ◆ causing or allowing a sexual performance (new section 49Q), and
- ◆ inviting or offering a sexual performance (new section 49R).

Under new section 49X(3), a person (A) will have a defence to a charge for an offence against new sections 49Q(1) or 49R(1) if:

Defences to offences against children aged 16 or 17 or under 18 — reasonable belief as to age (section 49X(3))

- at the time of the conduct constituting the offence—
 - ◆ B was 12 years of age or more; and
 - ◆ A reasonably believed that B was 18 years of age or more.

This is a new defence, and is consistent with other defences in this Subdivision.

Consent is not relevant to this section — see Part 6.1.

Marriage or domestic partnership exception

The Act contains a marriage or domestic partnership exception for the following offences against children aged 16 or 17 under care, supervision or authority:

- ◆ sexual penetration (new section 49C)
- ◆ sexual assault (new section 49E)
- ◆ sexual activity (new section 49G)
- ◆ causing a child to be present during sexual activity (new section 49I), and
- ◆ encouraging a child to engage in sexual activity (new section 49L).

The exception provides that a person (A) does not commit an offence against new sections 49C(1), 49E(1), 49G(1) or 49L(1) if:

Exceptions to offences against children aged 16 or 17 — marriage or domestic partnership (section 49Y)

- at the time at which the offence is alleged to have been committed—
 - ◆ A and B are married to each other and the marriage is recognised as valid under the *Marriage Act 1961* of the Commonwealth; or
 - ◆ A—
 - is not more than 5 years older than B; and
 - is B's domestic partner and the domestic partnership commenced before B came under A's care, supervision or authority.

(Subsection (2) provides for the same exception to an offence against section 49I(1), except that C replaces B.)

Existing sections 48(1) and 49(1) include as an element of the offence that the accused is not married to the child. The new section reclassifies these elements as an exception, which extends to certain domestic partnerships in order to avoid discrimination against unmarried couples, including same sex couples. The limitations applied to domestic partnerships address the risk that B or C may be influenced or manipulated into a domestic partnership by A in order to facilitate sexual offences against B or C. This is because domestic partnerships are not subject to the judicial scrutiny required to permit the marriage of 16 or 17 year olds under the *Marriage Act*.

Consent is not relevant to this section — see Part 6.1.

Reasonable belief as to marriage or domestic partnership defence

The reasonable belief in marriage or domestic partnership defence applies to the same offences as the marriage or domestic partnership exception (i.e. new sections 49C, 49E, 49G, 49I and 49L). Under new section 49Z, a person (A) will have a defence to a charge for an offence against new sections 49C(1), 49E(1), 49G(1) or 49L(1) if:

Defences to offences against children aged 16 or 17 — reasonable belief as to marriage or domestic partnership (section 49Z)

- at the time of the conduct constituting the offence—
 - ◆ A reasonably believed that A and B were married to each other and the marriage was recognised as valid under the *Marriage Act 1961* of the Commonwealth; or
 - ◆ A—
 - was not more than 5 years older than B; and
 - reasonably believed that A was B's domestic partner and the domestic partnership commenced before B came under A's care, supervision or authority.

(Subsection (2) provides for the same exception to an offence against section 49I(1), except that C replaces B.)

These defences replace the defences in existing sections 48(2)(b) and 49(2)(b), and also extend to certain domestic partnerships (see discussion of section 49Y).

A reasonable belief that a person was married to the complainant must be accompanied by a belief that the marriage was recognised as valid under the *Marriage Act*. This prevents the

misuse of the defence in circumstances where the marriage would not be valid, for instance because one person is under the marital age, or the marriage would not be legally recognised in Australia, for example, because it was a polygamous marriage.

Consent is not relevant to this section — see Part 6.1.

Reasonable belief as to care, supervision or authority defence

The Act contains a reasonable belief as to care, supervision or authority defence. This defence applies to the same offences as the previous two sections (i.e. new sections 49C, 49E, 49G, 49I and 49L). Under new section 49ZA, a person (A) has a defence to a charge for an offence against new sections 49C(1), 49E(1), 49G(1) or 49L(1) if:

Defences to offences against children aged 16 or 17 — reasonable belief as to care, supervision or authority (section 49ZA)

- at the time of the conduct constituting the offence, A reasonably believed that B was not under A's care, supervision or authority.

(Subsection (2) provides for the same exception to an offence against section 49I(1), except that C replaces B.)

This is a new defence, and will apply where A had a mistaken but reasonable belief as to the nature of his or her actual relationship with B or C (rather than a mistaken belief as to the legal concept of care, supervision or authority).

6.7.4 What is not a defence

New section 49ZC makes it clear that some elements of the offences in this Subdivision are absolute liability elements.

Under existing law, these elements are left to be implied by the common law. This often makes it unclear whether a fault element must be proven in relation to an element, or whether the common law defence of honest and reasonable mistake of fact applies. Currently, whether that defence applies depends on the court's interpretation of the relevant element, unless this issue is clearly addressed in the offence.

Specifying absolute liability elements in the Act is clearer and more transparent. It is also consistent with the general sexual offences in Subdivision (8A).

The Act applies absolute liability to several objective standard elements of offences, for example, that the touching or activity is 'sexual'. It would be highly unusual (and defeat the protective intention of these offences) to apply a fault element to these objective elements. It would also make prosecuting these offences very complicated.

The section provides that it is not a defence to a charge that:

No defence of mistaken but honest and reasonable belief of certain matters (section 49ZC)

- at the time of the conduct constituting the offence, A was under a mistaken but honest and reasonable belief that—
 - ◆ for an offence against section 49A(1)—B was 12 years of age or more; or
 - ◆ for an offence against section 49D(1) or 49E(1)—the touching was not—
 - sexual; or
 - contrary to community standards of acceptable conduct; or
 - ◆ for an offence against section 49F(1) or 49G(1)—
 - the activity was not sexual; or
 - engaging in the activity in the presence of B was not contrary to community standards of acceptable conduct; or
 - ◆ for an offence against section 49H(1) or 49I(1)—
 - the activity was not sexual; or
 - A's causing or allowing C to be present when B engages in the activity was not contrary to community standards of acceptable conduct; or
 - ◆ for an offence against section 49K(1) or 49L(1)—the activity was not sexual; or
 - ◆ for an offence against section 49Q(1)—the sexual performance did not occur in circumstances that involved payment, reward or other benefit to any person in respect of the performance; or

No defence of mistaken but honest and reasonable belief of certain matters (section 49ZC)

- ♦ for an offence against section 49R(1)—the invitation or offer did not involve payment, reward or other benefit to any person in respect of the performance; or
- ♦ for an offence against section 49S(1)—B’s engaging in sexual conduct in relation to a child did not constitute an offence or, if the conduct takes place outside Victoria, would not constitute an offence.

7 Incest offences — Subdivision (8C)

New Subdivision (8C) of the *Crimes Act* contains incest offences. This Subdivision replaces the offences in existing Subdivision (8B). The Act restructures the Subdivision and the offences within the Subdivision as discussed in Part 3.

Significant substantive changes to the existing law are outlined below.

7.1 Reforms to existing offences

Existing section 44(1)–(4) contains incest offences. The Act replaces section 44(1)–(4) with the following offences:

- ◆ sexual penetration of a child or lineal descendant (new section 50C)
- ◆ sexual penetration of a step-child (new section 50D)
- ◆ sexual penetration of a parent, lineal ancestor or step-parent (new section 50E), and
- ◆ sexual penetration of a sibling or half-sibling (new section 50F).

The Act clarifies the coverage of the offences and the relationships to which they apply. It also provides clear exceptions and defences to the offences.

7.1.1 Terminology

The *Crimes Act* does not currently contain definitions specific to the incest offences. The coverage of the new offences is clearly outlined in the definitions in new section 50A.

Child and parent

The definitions of ‘child’ and ‘parent’ include relationships through birth, genetic relationships, and relationships by operation of the *Adoption Act 1984* or *Status of Children Act 1974*. This ensures that relationships formed from the use of assisted reproductive technology or adoption have the same legal status in respect of the incest offences as traditional genetic or biological relationships. It will mean that donors of sperm or ovum, a surrogate mother (who gives birth to a child through a surrogacy arrangement), commissioning parents and adoptive parents will be considered a ‘parent’ for the purpose of the incest offences. A child who is born as a result of assisted reproductive technology, a surrogacy arrangement, or who is adopted will be the ‘child’ of several parents under this definition. This broader coverage is intended to provide protection from familial sexual abuse and operates regardless of orders, presumptions and declarations under the *Adoption Act* or *Status of Children Act*.

The definition of ‘child’ in this Subdivision differs from the definition of ‘child’ in Subdivision (8D) (Child Abuse Material) because it relates to a person’s family relationship, not a person’s age.

Step-parent

‘Step-parent’ is defined as the spouse or domestic partner of a person’s parent, being a person who is not the person’s parent. The use of the term ‘domestic partner’ instead of ‘de facto spouse’ in this definition and in new section 50D (sexual penetration of a step-child) provides broader coverage than the existing incest offences. The existing definition of de facto spouse specifies the spouse as a person of the opposite sex. In contrast, domestic partner is defined irrespective of gender (see new section 35).

Sibling and half-sibling

‘Sibling’ is defined as a person who has the same parents as another person. ‘Half-sibling’ means a person who shares a common parent with another person. These definitions are linked to the definition of ‘parent’ and so will capture both genetic and non-genetic siblings and half-siblings (but not step-siblings).

Lineal ancestor and lineal descendant

‘Lineal ancestor’ means a lineal ancestor of the person’s parent. This will include a grandparent, great grandparent, and any further lineal ancestors of the person’s parent. ‘Lineal ancestor’ refers to a direct line of ancestors, and so does not include uncles, aunts or others who are related to a person’s parent in other ways. The interpretation of ‘lineal ancestor’ draws on the

definition of ‘parent’ and ‘child’ to include genetic relationships, relationships through birth, and those by operation of the *Adoption Act* or the *Status of Children Act*.

‘Lineal descendant’ means a lineal descendant of a person’s child. This will include a grandchild, great grandchild, and any further lineal descendants of the person’s child. ‘Lineal descendant’ refers to a direct line of descendants and so does not include nieces or nephews, or others who are related to a person’s child in other ways. The interpretation of ‘lineal descendant’ draws on the definition of ‘parent’ and ‘child’ to include genetic relationships, relationships by birth, and those by operation of the *Adoption Act* or the *Status of Children Act*.

7.1.2 Structure of offences

The new incest offences adopt a clear and consistent structure. Consistent with other sexual penetration offences, the new offences cover A sexually penetrating B, or A causing or allowing B to sexually penetrate A. This is clearer than the wording of the existing offences (which refers to ‘taking part in an act of sexual penetration’). The phrase ‘causes or allows’ reflects that the offences prohibit intentional sexual penetration regardless of whether the person is doing the penetrating, or being penetrated. Consent, or lack of consent, is not an element of the incest offences, which deal primarily with the unlawful familial sexual relationship. A defence (outlined below) is provided for circumstances in which a person does not consent to engaging in sexual penetration with a family member.

The elements of the offence of sexual penetration of a child or lineal descendant are:

Sexual penetration of a child or lineal descendant (section 50C)

- A person (A) intentionally—
 - ◆ sexually penetrates another person (B); or
 - ◆ causes or allows B to sexually penetrate A; and
- B is A's child or lineal descendant; and
- A knows that B is A's child or lineal descendant.

The other offences in this Subdivision (in new sections 50D, 50E and 50F) have the same structure as new section 50C. They apply to the following relationships between A and B:

- ◆ sexual penetration of a step-child (new section 50D)
- ◆ sexual penetration of a parent, lineal ancestor or step-parent (new section 50E), and
- ◆ sexual penetration of a sibling or half-sibling (new section 50F).

7.1.3 Rebuttable presumption of family relationship

The Act replaces the existing presumption as to family relationship in section 44(7) of the *Crimes Act* with a rebuttable presumption that in a proceeding for an offence against a provision of Subdivision (8C):

Rebuttable presumption as to family relationship (section 50B)

- A knows that A is related to B in the way alleged; and
- people who are reputed to be related to each other in a particular way are in fact related in that way.

The presumption as to family relationship applies to incest offences because of the difficulty of proving a family relationship with admissible evidence. It also recognises that only in very rare cases will a person be genuinely unaware of their family relationship with another person.

In cases of genetic family relationships, proof of the relationship would require DNA testing and expert evidence. Even a birth certificate, which is made admissible by the *Births, Deaths and Marriages Registration Act 1996*, can be challenged as an inaccurate statement of parenthood.

Where there is evidence of a reputed relationship, for example from family or community members, the presumption places an evidentiary onus on the accused to point to or adduce evidence regarding the non-existence of the relationship. Once the presumption is rebutted, the burden of proof will be on the prosecution to prove beyond reasonable doubt the family relationship alleged, and the accused’s knowledge of that relationship.

In the rare cases where there is evidence of a reputed relationship and the accused is not aware of that relationship, given the factual scenarios in which that might arise, the accused will be in a

unique position to point to or adduce evidence as to why he or she was not aware of the relationship.

Example 1 Rebutting the presumption — existence of relationship

A calls a witness to give medical evidence that A has always been infertile and is therefore not the biological grandfather of B. The presumption will be rebutted and the prosecution must prove beyond reasonable doubt the genetic relationship between A and B.

Example 2 Rebutting the presumption — knowledge of relationship

A is a genetic grandparent of B. B's mum used donated sperm to have B. A gives evidence that he did not know he was genetically related to B. The presumption will be rebutted and the prosecution must prove beyond reasonable doubt that A knew he was the grandparent of B. (This may raise issues about whether A knew B's mum and, if so, what relationship they had.)

7.1.4 Coverage of offences

The most significant change in coverage of the incest offences relates to offences against step-children.

The offence of sexual penetration of a step-child is in new section 50D. This offence applies regardless of the age of the step-child, while the existing offences in section 44(1) and (2) of the *Crimes Act* apply only where the step-child was under 18. This recognises that step-relationships can reflect as strong a bond as biological relationships, particularly where a child has been raised by a step-parent from a young age.

However, in response to the broadening of these offences, new exceptions exist for certain adult step-child and adult step-parent relationships in new sections 50I and 50J.

As discussed above at Part 7.1.1, the adoption of the term 'domestic partner' in place of 'de facto spouse' in the incest offences provides coverage of relationships regardless of gender. This ensures broader coverage of the step-children of domestic partners by the offences of sexual penetration of a step-child, and sexual penetration of a parent, step-parent or lineal ancestor.

The offence in new section 50D (sexual penetration of a step-child) is slightly narrower than existing section 44(2), in that it does not apply to the sexual penetration of a step-child of the person's spouse or domestic partner. This is because of the greater distance in the family relationship, and ensures the incest offences remain targeted at sexual penetration between close family members. These children will still be covered by the general sexual offences against children.

7.2 Exceptions, defences and what is not a defence

The Act introduces three exceptions and a defence to incest offences.

7.2.1 Exception for medical or hygienic purposes

New section 50G contains an exception to all the incest offences for conduct engaged in for medical or hygienic purposes. This is consistent with the exception that applies to the general sexual penetration and sexual assault offences in Subdivision (8A). It replaces the exclusion in paragraph (b) of the definition of 'sexual penetration' in existing section 35 of the *Crimes Act* (which the Act repeals).

7.2.2 Defence — accused did not consent

The defence in new section 50H replaces existing section 44(6) and (6A), and provides that a person (A) has a defence to a charge for an incest offence if:

Defence — accused did not consent (section 50H)

- A did not consent to the conduct constituting the offence.

This acknowledges that familial sexual abuse can involve threats, coercion and other conduct that may vitiate consent. A person should not be punished if they did not consent to engaging in incestuous conduct.

7.2.3 Exception to offences against section 50D

The exception in new section 50I provides that a person (A) does not commit the offence of sexual penetration of a step-child (new section 50D) where:

Exception to offences against section 50D (section 50I)

- B is 18 years of age or more; and
- A has not engaged in sexual activity with B when B was under 18 years of age; and
- B has not at any time been under A's care, supervision or authority.

This exception will apply to relationships between an adult step-parent and adult step-child, where the step-parent has never held a position of care, supervision or authority over the step-child, and never engaged in sexual activity with the step-child before they were 18.

The exception responds to the broadening of the incest offences to cover sexual penetration of a step-child regardless of age. The existing incest offence for sexual penetration of a step-child in section 44(2) of the *Crimes Act* only applies where the complainant is under 18 years of age. The new offence of sexual penetration of a step-child in new section 50D applies regardless of the age of the step-child.

The exception recognises that in some situations, such as the marriage of older adults, a step-parent has never played the role of parent, and a sexual relationship between consenting adults should not be considered incest.

The requirement that the step-parent has never engaged in sexual activity with B when B was under 18 years of age protects against the use of the exception where the older relative has groomed or previously abused the younger relative.

The requirement that B has not at any time been under A's care, supervision or authority reflects the policy of the incest offences, which is to prevent sexual abuse within family relationships. A step-parent or step-grandparent occupies the same family position as a biological parent or grandparent.

7.2.4 Exceptions to offences against section 50E

The two exceptions in new section 50J provide that a person (A) does not commit the offence of sexual penetration of a parent, step-parent or lineal ancestor (new section 50E) where:

Exceptions to offences against section 50E (section 50J)

- at the time at which the offence is alleged to have been committed—
 - B is A's step-parent; and
 - A has not at any time been under B's care, supervision or authority; or
- B engaged in sexual activity with A when A was under 18 years of age.

The first exception will apply to the same adult step-parent and adult step-child scenario as new section 50I.

The second exception will apply to scenarios where A has been the victim of sexual abuse, being sexual activity with a parent, step-parent or lineal ancestor, when A was under 18 years of age. The exception recognises that the offences should not criminalise a person who has been subject to sexual abuse that continues into adulthood.

7.2.5 Consent not a defence

New section 50K makes clear that consent is not a defence to the incest offences. This replaces existing section 44(5) of the *Crimes Act*.

This section provides that it is not a defence to a charge for an incest offence that:

Consent not a defence (section 50K)

- B consented to the conduct constituting the offence.

Consent is not a relevant consideration for the incest offences unless it relates to a lack of consent relevant to the defence in new section 50H — see Part 7.2.2.

8 Child abuse material offences — Subdivision (8D)

New Subdivision (8D) of the *Crimes Act* contains child abuse material offences. The Act moves these offences from existing Subdivision (13) and restructures them, as discussed in Part 3.

The Act also replaces references to ‘child pornography’ with ‘child abuse material’, creates new offences and broadens some existing offences, and provides clear definitions of conduct that include new ways people may use technology.

Significant substantive changes to the existing law are outlined below.

Appendix 1 contains illustrative scenarios to outline the operation of the new offences, exceptions and defences.

8.1 Reforms to terminology

The Act makes significant reforms to terminology to reflect the nature of the material, and the use of technology in offending.

The term ‘child’ replaces the term ‘minor’ in the offences. ‘Child’ is defined as a person under the age of 18 years. Given the recasting of the offences as ‘child abuse material’, it is appropriate that the language of the offences is similarly updated.

Exceptions and defences are provided for certain non-exploitative circumstances, such as where the child depicted is 16 or 17 years of age, and is either married to, or in a domestic partnership with, the other person, or where the other person is within two years of the age of the 16 or 17 year old child depicted. This recognises that a 16 or 17 year old in Victoria may consent to sexual activity and the depiction of that activity in limited circumstances, and that the role of the child abuse material offences is to protect children from exploitation.

‘Material’ is defined broadly to include any film, audio, photograph, printed matter, image, computer game or text, any electronic material or any other thing of any kind. The new definition is broad and inclusive, and reflects that child abuse material can come in many forms. ‘Electronic material’ includes data from which text, images or sound may be generated. The definition is inclusive and will encompass information held, accessed or distributed on a wide range of technology, from digital photos on mobile telephones or hard drives, to live chat and video streaming using the internet.

8.1.1 Child abuse material

The Act replaces the term ‘child pornography’ with the term ‘child abuse material’.

New section 51A provides that ‘child abuse material’ is material that:

Definition of child abuse material (section 51A)

- depicts or describes:
 - ◆ a person who is, or who appears or is implied to be, a child—
 - as a victim of torture, cruelty or physical abuse (whether or not the torture, cruelty or abuse is sexual); or
 - as a victim of sexual abuse; or
 - engaged in, or apparently engaging in, a sexual pose or sexual activity (whether or not in the presence of another person); or
 - in the presence of another person who is engaged in, or apparently engaged in, a sexual pose or sexual activity; or
 - ◆ the genital or anal region of a person who is, or who appears or is implied to be, a child; or
 - ◆ the breast area of a person who is, or who appears or is implied to be, a female child; and
- reasonable persons would regard as being, in the circumstances, offensive.

The definition of ‘child abuse material’ is clearer than the existing definition of child pornography and removes the outdated language of ‘indecency’. It draws on similar definitions in New South Wales and the Commonwealth, but is not identical.

The first limb: what the material ‘depicts or describes’

The first limb of the definition of ‘child abuse material’ outlines the contents of the material, that is, what the material depicts or describes.

Child abuse material includes ‘depictions or descriptions’, recognising that material may not be an image (a depiction) as it may come in a written or audio form (a description).

The phrase ‘who is, or appears or is implied to be’ ensures that the definition is not limited to depictions or descriptions of actual children. For example, a cartoon, drawing, collage or pornographic story may not depict or describe an actual child, but may contain a depiction or description of the sexual abuse of a child.

The new definition includes descriptions or depictions of the ‘torture, cruelty or physical abuse’ of a child (or person who appears or is implied to be a child), whether or not it is sexual. This reflects that depictions of the torture, cruelty or physical abuse of a child may be harmful, whether or not they have a sexual element. In some instances, these depictions will be for the sexual gratification of the viewer, in others, persons may view the pain or humiliation of a child for entertainment. This can generate a market for the production of similar material, resulting in torture or physical abuse of, or cruelty to, actual children to generate material, or may result in persons directly subjecting children to this conduct for their entertainment.

The new definition also includes depictions or descriptions of the genital or anal region of a person who is, appears, or is implied to be, a child, or the breast area of a child or person who is, appears, or is implied to be, a child. Although it is possible that innocent depictions or descriptions of these intimate areas of the body exist, they are overtly ‘sexual’ in the sense that they relate to sexual organs.

The second limb: reasonable persons would, in the circumstances, find it offensive

The second limb of the definition provides an objective test as to the nature of the material, which is whether ‘reasonable persons would, in the circumstances, find it offensive’.

A similar limb exists in the corresponding definitions used in Commonwealth, New South Wales, Northern Territory, Australian Capital Territory and Tasmanian child abuse material laws.

The limb uses the ‘reasonable persons’ standard. This standard is regularly used in the criminal law, and was recently discussed by the High Court in *Monis v The Queen* [2013] HCA 4 (French CJ at [41]).

The use of the plural ‘persons’ makes clear the role of societal or community standards, rather than individual or subjective views, in determining what is offensive. The phrase ‘in the circumstances’, acknowledges that the circumstances of each case will be unique and may alter whether material is considered offensive. Some depictions, such as a family photograph of a naked baby, will not be considered, in the circumstances, offensive by reasonable persons.

Where an offence contains a fault element in relation to child abuse material, for example that A knows that material is child abuse material, absolute liability will apply to this second limb of the definition. This ensures that it remains an objective standard, and does not rely on proof that the accused knows that reasonable persons would, in the circumstances, find the material offensive. This is discussed below at Part 8.3.5.

8.1.2 Use of technology

The Act updates terminology to ensure that the use of technology in offending is appropriately covered.

In particular, the offence of possession of child abuse material contains a definition of possession applicable only to electronic material (new section 51G(3)). This recognises that a person may be in possession of electronic material without having physical custody or control of the material. For example, if the electronic material is kept in a person’s online storage account which uses a server outside of Australia, the person may not have ‘physical custody or control’ of the material.

Similarly, the inclusive definitions of how material may be distributed (new section 51A(2)) and accessed (new section 51H(3)) cover distribution and access by both electronic and non-electronic means. For example, new section 51A(2) provides that distribution includes supplying or transmitting the material to any other person, and making the material available for access by any other person.

8.2 The new child abuse material offences

The existing child pornography offences are in sections 68, 69, 70, 70AAAB, 70AAAC and 70AAAD of the *Crimes Act*. The Act replaces these offences with the following offences ('child abuse material offences'):

- ◆ involving a child in the production of child abuse material (new section 51B)
- ◆ producing child abuse material (new section 51C)
- ◆ distributing child abuse material (new section 51D)
- ◆ administering a website used to deal with child abuse material (new section 51E)
- ◆ encouraging the use of a website to deal with child abuse material (new section 51F)
- ◆ possession of child abuse material (new section 51G)
- ◆ accessing child abuse material (new section 51H), and
- ◆ assisting a person to avoid apprehension (new section 51I).

These offences largely replicate existing offences, with a clearer structure and updated terminology. For example, the offence of involving a child in the production of child abuse material replaces the existing offence of procurement etc. of a minor for child pornography in section 69 of the *Crimes Act*. However, as discussed below, the offences of distributing child abuse material and accessing child abuse material cover conduct that is not currently criminalised by existing offences.

The new offences provide broad and comprehensive coverage in the *Crimes Act* for child abuse material offending. The offences cover child abuse material offending from preparatory conduct (involving a child in the production of child abuse material) to generating material (producing child abuse material), possessing material, distributing material, using and promoting websites to deal with material, and accessing material, as well as accessory conduct (assisting a person to avoid apprehension).

Consistent with the existing offences, the new offences have a maximum penalty of 10 years imprisonment.

8.2.1 Involving a child in the production of child abuse material

The offence in new section 51B has the following elements:

Involving a child in the production of child abuse material (section 51B)

- A person (A) intentionally involves another person (B) in the production of material; and
- B is a child; and
- A knows that B is, or probably is, a child; and
- the material is child abuse material; and
- A knows that the material is, or probably is, child abuse material.

This offence replaces the existing offence in section 69 of the *Crimes Act* of 'procurement etc. of a minor for child pornography'. The existing offence includes several alternative conduct elements. The new offence is simpler as it contains a single conduct element of involving a child in the production of child abuse material. It also contains a broad definition of the ways in which a child may be involved in the production of child abuse material that includes inviting, offering or encouraging B to be involved in the production of the material, and actually using B in the production of material (see new section 51B(3)).

The offence covers preparatory conduct (such as inviting a child to be involved in child abuse material, whether or not the material is produced) but also covers conduct that actually involves a child in the production of child abuse material. Further, a child may be involved in production of child abuse material without being depicted in the material. For example if A asks child B to video child C in a sexual pose, A has involved child B (as well as child C) in the production of child abuse material.

The offence may have limited overlap in certain factual scenarios with the offence of producing child abuse material (new section 51C). This is because a person who involves a child in the production of child abuse material is also likely to have produced child abuse material.

However, the conduct proscribed by the two offences is materially different. The offence in new section 51B is concerned with the harm caused by involving an actual child in the production of child abuse material. This includes the exposure of a child to sexual or violent themes or ideas, as well as any actual involvement in sexual or violent activity in the production of material.

8.2.2 Producing child abuse material

The offence in new section 51C has the following elements:

Producing child abuse material (section 51C)

- A person (A) intentionally produces material; and
- the material is child abuse material; and
- A knows that the material is, or probably is, child abuse material.

This offence replaces the existing offence of producing child pornography in section 68 of the *Crimes Act*.

New section 51C(2) provides an inclusive list of ways in which material may be produced. This includes generating material by filming, printing or copying, altering or manipulating material or reproducing or copying material. This means that the offence will apply to both the initial production of child abuse material and later copying of the child abuse material (e.g. if a person copies a file containing a digital photograph from one computer to another, or from the internet onto their individual hard drive). Producing child abuse material will also include altering or manipulating material, for example by creating a collage of images, or by digitally manipulating an image.

8.2.3 Distributing child abuse material

The offence in new section 51D has the following elements:

Distributing child abuse material (section 51D)

- A person (A) intentionally distributes material; and
- the material is child abuse material; and
- A knows that the material is, or probably is, child abuse material.

This offence replaces the existing offence in section 57A of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* for publication or transmission of child pornography, which is repealed by the Act. The new offence is broader as it applies to distribution whether or not it involves the internet.

New section 51A(2)(b) defines how material may be distributed. This includes distribution by publishing, exhibiting and communicating, sending, supplying or transmitting the material to any other person or making the material available for access by any other person. The definition is technologically neutral, in that it can apply to both 'real world' and online conduct. For example, a person may send material using the postal service or via email. The phrase 'making the material available for access' is intended to capture online conduct, such as uploading a file to online storage, a file sharing website or service, or a chat room, where it is available for others to access or download. However, this phrase might also apply to conduct involving physical material, such as placing a book containing child abuse material in a public place where it is 'available for access'. The definition is also relevant to certain defences (see new sections 51O, 51P, 51Q and 51R), which include limitations on distribution of material.

8.2.4 Child abuse material website offences

The existing offences for administering or encouraging the use of a child pornography website (sections 70AAAB and 70AAAC of the *Crimes Act*) have been re-enacted in new sections 51E (Administering a website used to deal with child abuse material) and 51F (Encouraging use of a website used to deal with child abuse material). The offence headings no longer refer to 'child pornography website' as the dominant purpose of such a website may not be to deal with child abuse material. Instead the offences refer to websites used to deal with child abuse material.

The substance of these offences is largely unchanged although the offences incorporate minor changes to drafting, consistent with the Act.

8.2.5 Accessing child abuse material

The new offence of accessing child abuse material in new section 51H has the following elements:

Accessing child abuse material (section 51H)

- A person (A) intentionally accesses material; and
- the material is child abuse material; and
- A knows that the material is, or probably is, child abuse material.

This offence ensures that intentionally viewing child abuse material is a criminal offence, which is not currently an offence under the *Crimes Act*. This new offence addresses this gap. The offence recognises that consumers of child abuse material engage in harmful behaviour whether or not they have ongoing possession of child abuse material. For example, a person may view a child abuse material movie playing at a friend's house, or seek out and view child abuse material on the internet without downloading it. Despite not possessing the material, such a person has contributed to the market for child abuse material and the associated direct or indirect harms to children.

New section 51H(3) defines how material may be accessed, including viewing material or displaying it by an electronic medium. Although most child abuse material is visual, some material may be audio or even tactile (e.g. a child sex doll). Accordingly, the definition of how material may be accessed is inclusive.

8.3 Exceptions, defences and what is not a defence

The Act restructures exceptions and defences consistently with the approach discussed in Part 3. The principal exceptions and defence apply to a wider range of offences than those in the current *Crimes Act*. This is because the offences cover a broad range of conduct and include some overlap, for example, a person who possesses material is likely to access that material, and may produce further material by copying it from one device to another.

8.3.1 Exceptions and defence applying to all child abuse material offences (except new section 51I)

The Act includes exceptions and defences that apply to all child abuse material offences, except for the new offence of assisting a person to avoid apprehension in new section 51I(1).

The broader application of these exceptions and defences reflects the breadth of coverage of the child abuse material offences, and the necessity to ensure that the offences do not inappropriately capture persons legally dealing with material, such as police officers acting in the course of their duties. It is also necessary to delineate certain content that will not constitute a child abuse material offence. The exception for classified material, and defence for material with artistic merit or for public benefit, ensures that the breadth of the definition of 'child abuse material' does not unduly limit freedom of expression and material used for a public benefit, such as education.

Exception — administration of the law

Under the new exception in new section 51J, a person (A) does not commit a child abuse material offence (other than an offence against new section 51I(1) for assisting a person to avoid apprehension) if:

Exception — administration of the law (section 51J)

- the conduct is engaged in by A in good faith in the course of official duties of A—
 - ◆ connected with the administration of the criminal justice system, including the investigation or prosecution of offences; or
 - ◆ as an employee of the Department of Justice and Regulation who is authorised to engage in that conduct by the Secretary to that Department.

This new exception for administration of the law replaces existing sections 68(2) and (3), 70(4) and (5), and 70AAAB(6)(a)(i), which provided more exhaustive lists of persons acting in the administration of the law. The Act restructures these provisions as a single, clear exception.

The exception recognises that many persons involved in the administration of the law may be required to handle child abuse material within the course of their duties. For example, this can include police, forensic specialists, prosecutors, court staff, judges and lawyers who are involved in a child abuse material case.

New section 51J(b) refers to an employee of the Department of Justice and Regulation who is authorised to engage in that conduct by the Secretary to that Department. This refers to a limited number of employees who are authorised because they may be required to deal with child abuse material in the course of their official duties, for example in monitoring a sex offender's compliance with the terms of their supervision order.

The exception applies to all child abuse material offences, except the offence in new section 51I of 'assisting a person to avoid apprehension'. This is because it would not be good faith conduct in the course of official duties for an official to assist a person to avoid apprehension. This is quite different from encouraging or advising people, including as part of public information campaigns, not to commit child abuse material offences.

Exception — classification

Under the new exception in new section 51K, a person (A) does not commit a child abuse material offence (other than an offence against new section 51I(1) for assisting a person to avoid apprehension) in respect of material that at the time at which the offence is alleged to have been committed:

Exception — classification (section 51K)

- was classified other than RC or would, if classified, have been classified as other than RC.

This new exception for material that has been classified replaces existing defences in sections 68(1A), 69(2), and 70(2) of the *Crimes Act*. However, the defences are re-characterised as an exception. This exception applies to all child abuse material offences except new section 51I (assisting a person to avoid apprehension).

The second note to the section provides that under the *Classification (Publications, Films, and Computer Games) Act 1995* of the Commonwealth, RC means Refused Classification. Refused Classification material includes films that 'describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not)'. This definition is very similar to the definition of child abuse material, and ensures that most material that is child abuse material would be classified as Refused Classification.

The exception removes ambiguity for material that has been classified, and received a categorisation of less than Refused Classification.

The phrase 'or would, if classified, have been classified as other than RC' recognises that some material will not have gone through the classification process. The accused will need to meet an evidential burden that the material would have been classified as other than RC.

Defence — artistic merit or public benefit

Under new section 51L, a person (A) will have a defence to a charge for a child abuse material offence (other than an offence against section 51I(1) for assisting a person to avoid apprehension) if:

Defence of artistic merit or public benefit (section 51L)

- the material—
 - ◆ was not produced with the involvement of a person who was, at the time it was produced, under the age of 18 years; and
 - ◆ possesses artistic merit; or
- the material is of public benefit.

The defence of artistic merit in new section 51L replaces the defence in existing section 70(2)(b) and (3) of the *Crimes Act*. It retains the existing safeguard that for the defence to apply, the material must not have been produced with the involvement of a child. The accused bears an evidential onus in relation to this limb of the defence. This ensures that no harm is caused to children as a result of the process of artistic production. It excludes the application of the defence to any art depicting child models or actors, for example photography or film. As with the

current defence, the accused bears the burden of proving the artistic merit of the material on the balance of probabilities.

The defence of public benefit replaces the existing defence of ‘genuine medical, legal, scientific or educational purpose’. It retains this coverage, but refocuses the defence on the ‘public benefit’. ‘Public benefit’ is defined to include material that is for a genuine medical, legal, scientific or educational purpose, but is not limited to those categories.

8.3.2 Exceptions and defence applying to children

The exceptions applying to children in existing section 70AAA of the *Crimes Act* were introduced in response to recommendations of the Victorian Parliamentary Law Reform Committee’s *Inquiry into Sexting* (2013). The rationale for the exceptions was to exclude the application of the child pornography offences to children who are involved in non-exploitative ‘sexting’ conduct.

Prior to the introduction of the exceptions, teenagers who created, possessed or distributed explicit images of themselves or their peers were committing a child pornography offence. This included a risk of conviction for a serious criminal offence, as well as possible registration on the sex offenders register. For non-exploitative, consensual sexting between peers, these serious consequences were unwarranted.

The Act restructures these exceptions as two exceptions (new section 51M(1) and (2)) and a defence (new section 51N).

The exceptions and defence apply to the following offences:

- ◆ involving a child in the production of child abuse material (new section 51B)
- ◆ producing child abuse material (new section 51C)
- ◆ distributing child abuse material (new section 51D)
- ◆ possession of child abuse material (new section 51G), and
- ◆ accessing child abuse material (new section 51H).

The new exceptions and defence aim to capture non-exploitative, non-predatory sexting between young people.

The new exceptions and defence focus on the nature of the depiction. The categories of depictions are:

- ◆ depicts the accused alone (new section 51M(1))
- ◆ depicts the accused as the victim of a criminal offence (new section 51M(2)), and
- ◆ does not depict the accused, or depicts the accused with another person(s) (new section 51N).

The new exceptions and defence have the same coverage as existing section 70AAA, except for the following:

- ◆ new section 51N applies to depictions of the accused with another child and an adult (provided the image does not depict a criminal offence punishable by imprisonment and the accused is not more than 2 years older than the youngest child depicted in the image), and
- ◆ a depiction of the accused as the perpetrator of an offence punishable by imprisonment against an adult will not fall within the exceptions or defence.

The elements of the exceptions have changed, as some safeguards in the existing exceptions relate to the age of the youngest child ‘whose depiction makes the image child pornography’. This is no longer necessarily relevant as the definition of ‘child abuse material’ includes the depiction of a person who is, or who is implied to be, a child in the presence of another person who is engaged in, or apparently engaged in, a sexual pose or sexual activity (paragraph (a)(i)(D) of the definition). The child’s depiction in such a case may not make the image child abuse material, as it may not be sexual or violent itself. Accordingly, new section 51N replaces this concept with a safeguard relating to the age of the youngest child depicted.

New section 51N is structured as a defence as it contains two mental elements that the accused must prove on the balance of probabilities. This is consistent with the structure of defences in Subdivision (8A).

Appendix 1 includes scenarios involving the child abuse material offences that include examples of the application of new sections 51M and 51N. The simplified exceptions and defence are outlined below.

The image depicts the accused alone

Under the first exception in new section 51M(1), a child (A) does not commit an offence against new sections 51B(1), 51C(1), 51D(1), 51G(1) or 51H(1) where:

Depicts A alone (section 51M(1))

- the child abuse material is an image; and
- the image depicts A alone.

This exception covers the scenario where the image depicts A alone. An example is where A takes a nude photograph of themselves using a mobile phone (a ‘selfie’).

The image depicts the accused as the victim of a criminal offence punishable by imprisonment

Under the second exception in new section 51M(2), a child (A) does not commit an offence against new sections 51B(1), 51C(1), 51D(1), 51G(1) or 51H(1) where:

Depicts A as the victim of an offence (section 51M(2))

- the child abuse material is an image; and
- A is the victim of a criminal offence punishable by imprisonment and the image depicts that offence.

This exception applies to protect a child from charges for a child abuse material offence where they themselves are the victim of a criminal offence depicted in the image. An example is where the image depicts A being raped by another person.

The image does not depict the accused, or depicts the accused with another person(s)

Under new section 51N, a child (A) will have a defence to a charge for an offence against new sections 51B(1), 51C(1), 51D(1), 51G(1) or 51H(1) if:

Does not depict the accused or depicts the accused with another person(s) (section 51N)

- the child abuse material is an image; and
- the image depicts one or more persons (whether or not it depicts A); and
- the image—
 - ♦ does not depict an act that is a criminal offence punishable by imprisonment; or
 - ♦ depicts an act that is a criminal offence punishable by imprisonment but A reasonably believes that it does not; and
- at the time of the conduct constituting the offence—
 - ♦ A was not more than 2 years older than the youngest child depicted in the image; or
 - ♦ A reasonably believed that they were not more than 2 years older than the youngest child depicted in the image.

This defence applies to a range of scenarios where the image depicts one or more persons (whether or not it depicts A).

The rationale for this defence is that it is not appropriate to criminalise dealings by children with depictions of lawful conduct. The defence includes a safeguard that the image does not depict a criminal offence punishable by imprisonment, or A reasonably believed that it does not. A bears the burden of proving the reasonable belief on the balance of probabilities. This safeguard underpins the rationale for the defence.

For example, A is 16 years old and can legally engage in a consensual sexual relationship with her 17 year old girlfriend (B). Under the defence, A can possess an image taken of herself engaging in sexual activity with B.

The defence also contains an additional safeguard that requires that, at the time of the conduct constituting the offence, A was not more than two years older than the youngest child depicted in the image, or reasonably believed they were not. A bears the burden of proving the reasonable belief on the balance of probabilities. This prevents the inappropriate use of the defence, for example if A is 17 years of age and possesses a sexual image of a child who is 8 years of age. Although no offence is depicted, the possession of the image by the 17 year old is exploitative and the child abuse material offences may appropriately apply to this conduct.

Offences under the *Summary Offences Act 1966*

The new exceptions and defence do not exclude all children from all criminal consequences of ‘sexting’ type activity.

The offences in section 41DA and 41DB of the *Summary Offences Act* apply to the distribution of an intimate image, and threat to distribute an intimate image. These offences apply where a person distributes an intimate image or threatens to distribute an intimate image, and that conduct is contrary to community standards of acceptable conduct. The threat offence also requires the accused (A) to intend the other person to believe that A will carry out the threat.

The new exceptions and defence to child abuse material offences contain safeguards, such as requiring the image not to depict a criminal offence punishable by imprisonment, which, if breached, mean that the exceptions and defence will not apply and a child may still be guilty of a child abuse material offence.

8.3.3 Other defences applying to child abuse material offences

The Act provides several defences applying to adults, which apply to the same range of child abuse material offences as the exceptions and defence applying to children.

The Act contains the following defences applying to the child abuse material offences in new sections 51B, 51C, 51D, 51G and 51H:

- ◆ image of oneself (does not apply to new section 51D) (new section 51O)
- ◆ accused not more than 2 years older than 16 or 17 year old child (new section 51P)
- ◆ marriage or domestic partnership (new section 51Q), and
- ◆ reasonable belief in marriage or domestic partnership (new section 51R).

These defences are based on relational factors between the accused and the child depicted. These defences contain many safeguards to ensure they do not apply to exploitative behaviour.

Defence — image of oneself

The Act contains a defence for an image of oneself for the following child abuse material offences:

- ◆ involving a child in the production of child abuse material (new section 51B)
- ◆ producing child abuse material (new section 51C)
- ◆ possession of child abuse material (new section 51G), and
- ◆ accessing child abuse material (new section 51H).

Under new section 51O, a person (A) will have a defence to a charge for an offence against new sections 51B(1), 51C(1), 51G(1) or 51H(1) if:

Defence — image of oneself (section 51O)
<ul style="list-style-type: none"> ▪ the child abuse material is an image; and ▪ the image depicts A as a child; and ▪ the image does not depict A committing a criminal offence punishable by imprisonment; and ▪ A does not distribute the image to any other person.

New section 51O replaces existing section 70(2)(e) of the *Crimes Act*.

The new defence applies to a wider range of offences, and contains additional safeguards to prevent its application to exploitative circumstances.

The defence includes a safeguard that A does not distribute the material to any other person. This ensures that A’s possession of the image of A does not cause images of A to be distributed to child abuse material offenders. As this safeguard prohibits distribution, the defence does not apply to the offence in section 51D(1) of distributing child abuse material.

Defence — accused not more than 2 years older than 16 or 17 year old child and acts with child's consent

The Act contains a defence where the accused is not more than 2 years older than a 16 or 17 year old child for the following child abuse material offences:

- ◆ involving a child in the production of child abuse material (new section 51B)
- ◆ producing child abuse material (new section 51C)
- ◆ distributing child abuse material (new section 51D)
- ◆ possession of child abuse material (new section 51G), and
- ◆ accessing child abuse material (new section 51H).

Under new section 51P, a person (A) will have a defence to a charge for an offence against new sections 51B(1), 51C(1), 51D(1), 51G(1) or 51H(1) if:

Defence — accused not more than 2 years older than 16 or 17 year old child and acts with child's consent (section 51P)

- the child abuse material is an image; and
- at the time at which the image was first made, the child (B) whose depiction in the image makes it child abuse material—
 - ◆ was aged 16 or 17 years; and
 - ◆ was not, or had not been, under A's care, supervision or authority; and
- the image does not depict an act that is a criminal offence punishable by imprisonment; and
- A did not distribute the image to any person other than B; and
- A is not more than 2 years older than B; and
- at the time of the conduct constituting the offence, A reasonably believed that B consented to that conduct.

New section 51P replaces existing section 70(2)(d) of the *Crimes Act*.

The existing defence applies to specified conduct, being making a film or photograph, or being given the film or photograph by a minor. The existing defence does not include any safeguard beyond the requirement that the accused is less than 2 years older than the minor was or appeared to be.

The new defence applies to a wider range of offences (because there are new offences to which this defence is relevant) and provides several additional safeguards to prevent the use of the defence in exploitative circumstances.

The child depicted in the image must be aged 16 or 17 years of age. The defence does not authorise the ongoing possession of a child abuse material image of a child under the age of 16.

The image must not depict a criminal offence punishable by imprisonment. Therefore, the defence does not permit dealing with images of sexual or violent offending against a child.

The accused must not distribute the image to any person other than the person depicted. This ensures images are not fed into the child abuse material market, or used exploitatively (for example, to blackmail or cause shame).

The accused must have a reasonable belief that the person depicted consents to the conduct that constitutes the offence (e.g. possession or accessing). If, for example, A has been told by B to delete the image, A's conduct in keeping the image will not fall within the defence as they will not have a reasonable belief that B consents.

Defences — marriage or domestic partnership

The Act contains two defences for marriage or domestic partnership, or reasonable belief in marriage or domestic partnership, for the following child abuse material offences:

- ◆ involving a child in the production of child abuse material (new section 51B)
- ◆ producing child abuse material (new section 51C)
- ◆ distributing child abuse material (new section 51D)
- ◆ possession of child abuse material (new section 51G), and
- ◆ accessing child abuse material (new section 51H).

New sections 51Q and 51R replace existing section 70(2)(c) of the *Crimes Act*. Existing section 70(2)(c) provides a defence for reasonable belief in marriage. Consistent with the exceptions and defences for sexual offences against children in Subdivision (8B) (see discussion at Part 6.7.3), the Act creates two defences:

- ◆ marriage or domestic partnership, and
- ◆ reasonable belief in marriage or domestic partnership.

The existing defence does not contain safeguards. The new defences contain several safeguards, consistent with other child abuse material defences, to ensure the defences do not apply to exploitative circumstances.

As one of these safeguards contains a mental element, that the accused (A) reasonably believed that the other person (B) consented to the conduct constituting the offence, the provisions are both structured as defences. This is different to Subdivision (8B) where ‘marriage or domestic partnership’ is structured as an exception.

Marriage or domestic partnership

Under new section 51Q, a person (A) will have a defence to a charge for an offence against new sections 51B(1), 51C(1), 51D(1), 51G(1) or 51H(1) if:

Defence — marriage or domestic partnership (section 51Q)

- the child abuse material is an image; and
- the image is child abuse material because of its depiction of another person (B); and
- the image does not depict a criminal offence punishable by imprisonment; and
- A does not distribute the image to any person other than B; and
- at the time at which the image was first made—
 - ◆ B was 16 or 17 years of age; and
 - ◆ either A and B were married to each other and the marriage was recognised as valid under the *Marriage Act 1961* of the Commonwealth or A was B's domestic partner and was no more than 2 years older than B; and
 - ◆ where A was B's domestic partner, if B was under A's care, supervision or authority, the domestic partnership commenced before B came under A's care, supervision or authority; and
- at the time of the conduct constituting the offence—
 - ◆ either A and B were married to each other and the marriage was recognised as valid under the *Marriage Act 1961* of the Commonwealth or A was B's domestic partner and was no more than 2 years older than B; and
 - ◆ A reasonably believed that B consented to the conduct constituting the offence.

New section 51Q contains a new defence that applies to an actual marriage or domestic partnership. The closest similar defence is in existing section 70(2)(c) of the *Crimes Act*. The existing defence applies where the accused believes on reasonable grounds that they are married to the child. This new defence is not based on a belief as to marriage, but depends upon there actually being a marriage that is recognised under the *Marriage Act*. The new defence also recognises domestic partnerships. However, because domestic partnerships do not require any court based approval (in contrast to the application of the *Marriage Act* where a child needs a court's permission to marry) several further safeguards apply. At the time the image was made, the accused must have been no more than two years older than B (who was 16 or 17 years old) and B must not have been under the care, supervision or authority of A at any time before the domestic partnership commenced. A further safeguard applies to both circumstances (marriage and domestic partnership) in that at the time of the conduct constituting the offence (which may be different from the time when the image was created) A reasonably believed that B consented to the conduct. A must prove this last element of the defence on the balance of probabilities.

Reasonable belief in marriage or domestic partnership

Under new section 51R, a person (A) will have a defence to a charge for an offence against new sections 51B(1), 51C(1), 51D(1), 51G(1) or 51H(1) if:

Defence — reasonable belief in marriage or domestic partnership (section 51R)

- the child abuse material is an image; and
- the image is child abuse material because of its depiction of another person (B); and
- the image does not depict a criminal offence punishable by imprisonment; and
- A does not distribute the image to any person other than B; and
- at the time at which the image was first made, A reasonably believed that—
 - ◆ B was 16 or 17 years of age; and
 - ◆ either A and B were married to each other and the marriage was recognised as valid under the *Marriage Act 1961* of the Commonwealth or A was B's domestic partner and was no more than 2 years older than B; and
 - ◆ where A was B's domestic partner, if B was under A's care, supervision or authority, the domestic partnership commenced before B came under A's care, supervision or authority; and
- at the time of the conduct constituting the offence, A reasonably believed that—
 - ◆ either A and B were married to each other and the marriage was recognised as valid under the *Marriage Act 1961* of the Commonwealth or A was B's domestic partner and was no more than 2 years older than B; and
 - ◆ B consented to the conduct constituting the offence.

New section 51R applies to a reasonable belief in a marriage or domestic partnership. The defence replaces existing section 70(2)(c) of the *Crimes Act*. The defence in new section 51R is very similar to the defence in new section 51Q. The key difference is that while new section 51Q applies where there is a marriage or domestic partnership, new section 51R applies where A has a reasonable belief that there is a marriage or domestic partnership.

As this defence is based on A's belief as to the status of the relationship, A must prove on the balance of probabilities that they had this belief. The reasonable belief must be in relation to a legal marriage under the *Marriage Act*. This ensures that the defence does not apply to beliefs about marriage that would not meet the requirements of the *Marriage Act*.

8.3.4 Defences applying to individual child abuse material offences

The Act contains two defences which apply to individual child abuse material offences:

- ◆ reasonable steps to prevent use of a website for child abuse material (new section 51S), and
- ◆ unsolicited possession (new section 51T).

These defences recognise particular factual circumstances in which a person may have committed a child abuse material offence, but should be not guilty of an offence.

Defence — reasonable steps to prevent use of a website for child abuse material

Under new section 51S, a person (A) will have a defence to a charge for an offence against new section 51E(1) of administering a child abuse material website if:

Defence — reasonable steps to prevent use of a website for child abuse material (section 51S)

- A, on becoming aware that the website is being used, or has been used, by another person to deal with child abuse material, takes all reasonable steps in the circumstances to prevent any person from being able to use the website to deal with child abuse material.

The new defence replaces the existing defence in section 70AAAB(4) and (5) of the *Crimes Act*, and replicates its coverage.

New section 51S(2) lists factors the court must have regard to in determining whether A took 'all reasonable steps in the circumstances'. These factors recognise that there are different kinds of websites used and people have different capacities to take remedial action. For example, a large legitimate website may be being abused and the problem can be fixed without the whole website being shut down.

Defence — unsolicited possession

The Act introduces a new defence of unsolicited possession (new section 51T), that applies only to the offence of possession of child abuse material in new section 51G.

New section 51T provides that a person (A) will have a defence to a charge for an offence against new section 51G(1) of possession of child abuse material if:

Defence — unsolicited possession (section 51T)

- A did not intentionally come into possession of the child abuse material; and
- on becoming aware of having come into possession of child abuse material, A, as soon as it was practicable to do so, took all reasonable steps in the circumstances to cease possessing the material.

As the offence requires knowing but not intentional possession there are limited circumstances in which it is possible a person could become aware they are possessing child abuse material, but not have intended to possess it. Similar defences exist in some other jurisdictions, for example section 91HA of the *Crimes Act 1900* (NSW). The defence is not necessary for other child abuse material offences, because they include fault elements of intention or recklessness (e.g. intentionally accessing material that the person knows is, or probably is, child abuse material).

The defence recognises that a person may, for example, be sent an email containing child abuse material without having solicited that email. Upon realising that the email contains child abuse material, the person would be guilty of the offence of possession of child abuse material.

The accused bears the burden of proving the defence on the balance of probabilities. This ensures that the defence is not misused by persons who have intentionally possessed child abuse material.

8.3.5 What is not a defence

New section 51U makes it clear that an element in any child abuse material offence that a person knows that material is, or probably is, child abuse material, does not apply to paragraph (b) of the definition of child abuse material. This means that the element of each of these offences (that reasonable persons would regard the material as being offensive) is an absolute liability element.

Whether reasonable persons would regard material as offensive is an objective element of the offences. To apply a fault element to this, or a defence of reasonable mistake, would be difficult to prove and contrary to the intention of the offences.

The section provides that it is not a defence to a charge for a child abuse material offence that:

No defence of mistaken but honest and reasonable belief that child abuse material not offensive (section 51U)

- at the time of the conduct constituting the offence, A was under a mistaken but honest and reasonable belief that reasonable persons would not regard the child abuse material as being, in the circumstances, offensive.

8.4 Child abuse material disposal order

Where there is a conviction in a criminal proceeding, the disposal order provisions in sections 77 and 78 of the *Confiscation Act 1997* apply.

The Act provides for a new ‘child abuse material disposal order’ for disposal of child abuse material where there is no finding of guilt or conviction in a criminal proceeding, or where there is no criminal proceeding. This replaces existing section 70AA of the *Crimes Act*.

New section 51W provides when an application may be made in relation to a seized thing or material on a seized thing, and the process for an application, including notification to persons with an interest in the seized thing or electronic material on the seized thing.

New section 51X provides the effect of a child abuse material disposal order, sets out when the court may make a child abuse material disposal order, and provides for an appeal process against a finding.

New section 51X(2) provides that the court may only make a child abuse material disposal order:

Test for making of child abuse material disposal order (section 51X(2))

- if satisfied, on the balance of probabilities, that—
 - ♦ the seized thing is, or the electronic material contained in the seized thing includes, child abuse material; and
 - ♦ the return to a person of the seized thing, or of the electronic material contained in the seized thing, may result in the commission of a child abuse material offence; or
- if satisfied, on the balance of probabilities, that—
 - ♦ the seized thing contains encrypted or password protected electronic material; and
 - ♦ there are reasonable grounds to believe that the electronic material includes child abuse material.

The first test (new section 51X(2)(a)) will apply in cases where a seized thing is evidently child abuse material, or contains child abuse material.

The second test (new section 51X(2)(b)) will apply to an application in relation to encrypted or password protected material, because the court will not be able to make a definitive finding as to the nature of that material. For this test, the court must be satisfied that there are reasonable grounds to believe that the electronic material includes child abuse material. Ancillary evidence will be necessary to give rise to ‘reasonable grounds’. This will depend on the circumstances of each case, but may include evidence of:

- ♦ a recent history of downloads from child abuse material websites to the device containing encrypted or password protected material
- ♦ file names indicating the contents are child abuse material, or
- ♦ the simultaneous seizure by police of other devices belonging to the same person, which were not encrypted or password protected, and contained child abuse material.

New section 51Y provides that nothing in new sections 51W or 51X prevents the disposal of material by consent. This ensures that, where there is agreement about disposal of material (e.g. wiping of files from a phone), there is no need for a lengthy court procedure.

These procedures apply to an application to dispose of child abuse material. A separate procedure applies where police are seeking access to a person’s computer, if they believe it contains child abuse material. For example, section 465AAA of the *Crimes Act* allows a magistrate to include in a search warrant an authorisation allowing police to direct a specified person to assist them to access data on a computer. The failure to comply with a direction to assist is a summary offence punishable by a maximum of two years imprisonment.

The procedures for a child abuse material disposal order are likely to be used at the end of a police investigation or a prosecution, to ensure that child abuse material is not returned to individuals in the community.

9 Sexual offences against persons with a cognitive impairment or mental illness — Subdivision (8E)

New Subdivision (8E) of the *Crimes Act* contains sexual offences against persons with a cognitive impairment or mental illness. The Act replaces existing Subdivision (8D) of the *Crimes Act* with the new Subdivision. The Subdivision and offences are structured as discussed in Part 3.

Significant substantive changes are outlined below.

9.1 Reforms to existing offences

The Act removes references to ‘indecency’, and standardises the two sets of offences in existing sections 51 and 52 of the *Crimes Act* into a single set of offences. The Act also reforms terminology to respond to changes in service delivery.

The new offences are:

- ◆ sexual penetration of a person with a cognitive impairment or mental illness (new section 52B)
- ◆ sexual assault of a person with a cognitive impairment or mental illness (new section 52C)
- ◆ sexual activity in presence of a person with a cognitive impairment or mental illness (new section 52D), and
- ◆ causing a person with a cognitive impairment or mental illness to be present during sexual activity (new section 52E).

9.1.1 Terminology

New section 52A contains definitions applicable to Subdivision (8E).

In a change from the existing law, ‘cognitive impairment’ and ‘mental illness’ are separately defined. This recognises that many forms of mental illness will not constitute a cognitive impairment as medically defined.

The Act contains new definitions of ‘worker’, ‘service provider’ and ‘treatment or support services’. These new definitions expand the coverage of the offences to service delivery regardless of location.

Service provider

The new definition of ‘service provider’ replaces in part the existing term ‘facility’ in existing section 50(1).

The new definition is broader, to recognise that a wide range of services are provided to persons with a cognitive impairment or mental illness, and these are not all based in a ‘facility’. Increasingly, services may be delivered in the home or community.

Service provider (section 52A)

- **service provider** includes—
 - ◆ a disability service provider within the meaning of the *Disability Act 2006*; and
 - ◆ a residential service; and
 - ◆ a designated mental health service within the meaning of the *Mental Health Act 2014*; and
 - ◆ a person who, or a body that, delivers treatment or support services to persons with a cognitive impairment or mental illness;

A service provider may be specified under statute, or may be ‘a person who, or body that, delivers treatment or support services to persons with a cognitive impairment or mental illness’. This definition ensures that new forms of service delivery under the National Disability Insurance Scheme, or service delivery that occurs without registration under existing regulatory schemes, are included in the scope of the offences.

A range of residential services exist, some of which fall within statutory definitions of a ‘disability service provider’ or ‘designated mental health service’, although others do not. The inclusion of ‘residential services’ ensures that services such as an aged care home providing residential services to a person with a cognitive impairment (whether young or old) are included in the scope of the offences.

Treatment or support services

The phrase ‘treatment or support services’ replaces in part the existing phrase ‘medical or therapeutic services’ in existing section 51. ‘Medical or therapeutic services’ is currently undefined, and introduces ambiguity into the scope of the existing offences.

Treatment or support services (section 52A)

- **treatment or support services** means any of the following delivered in a professional capacity—
 - ◆ mental health treatment;
 - ◆ medical treatment;
 - ◆ therapeutic services;
 - ◆ personal care or support services;

Example

A worker supporting a person with a cognitive impairment to undertake tasks such as bathing and dressing.

The phrase ‘treatment or support services’ applies in the definition of ‘service provider’ and in the new offences. It is used to describe professional or specialist services delivered to persons with a cognitive impairment or mental illness. This can include disability specific services, such as a personal care attendant or psychiatrist, or general services, such as a medical doctor or dentist.

Worker

The term ‘worker’ replaces the existing definition in section 50(1). A worker may be a volunteer or an employee.

The existing definition is limited to ‘a person who delivers or assists in delivering, at a facility...a program specially designed to meet the developmental or educational needs of persons with a cognitive impairment residing at the facility or attending to take part in the program’.

The new definition is broader and recognises that many workers for service providers will not directly deliver services ‘specially designed’ for persons with a cognitive impairment or mental illness, but nonetheless provide services to those people. The general term ‘services’ is used, in contrast to the phrase ‘treatment or support services’, which are likely to be more specialised.

Worker (section 52A)

- **worker** means a person—
 - ◆ who delivers, assists in delivering, or who manages the delivery of, services to persons with a cognitive impairment or mental illness; and
- Example*
- A cook at a supported residential service.*
- ◆ who does so for or on behalf of a service provider (whether paid or unpaid); and
- Example*
- A volunteer bus driver for a mental health service.*
- ◆ who is not a person with a cognitive impairment or mental illness who receives treatment or support services from that service provider.

The definition of ‘worker’ excludes persons with a cognitive impairment or mental illness who receive treatment or support from the service provider. This is similar to an exclusion provided in the existing definition. The exclusion recognises that many service providers will engage clients of their service in work associated with the service, such as assisting a carer to organise an activity. The intent of the offences is not to target people with a cognitive impairment or mental illness who are receiving services. The general sexual offences in Subdivision (8A) of the *Crimes Act* will continue to apply in those circumstances.

9.1.2 Offences

Existing sections 51 and 52 of the *Crimes Act* contain two sets of offences: the first, applying to workers, and the second, applying to providers of ‘medical or therapeutic services’. These offences replicate each other. Accordingly, for simplicity, the Act contains a single set of offences that apply to both workers and providers.

The new offences largely mirror the structure of sexual offences against a child aged 16 or 17, and under care, supervision or authority (see Subdivision (8B)). However, unlike those offences, the sexual penetration and sexual touching elements of the offences include sexual penetration or sexual touching involving an animal. Although not common, the inclusion of sexual penetration or touching involving an animal recognises that offenders may use an animal in the sexual abuse of another person.

As in Subdivision (8B), consent, or lack of consent, is not an element of these offences.

The offences recognise the particular vulnerability of persons with a cognitive impairment or mental illness to coercion or abuse. As the offences are based on the person’s vulnerability in the context of the care-giving relationship, they do not depend upon, and are not precluded by, legal capacity to consent. Where a person does not have legal capacity to consent, or does have the capacity to consent but does not consent, the offences of rape and sexual assault will also apply.

9.1.3 Reforms to the sexual penetration offences

The new offence of sexual penetration of a person with a cognitive impairment or mental illness (new section 52B) replaces the existing sexual penetration offences in sections 51(1) and 52(1) of the *Crimes Act*.

The elements of the new offence are:

Sexual penetration of a person with a cognitive impairment or mental illness (section 52B)
<ul style="list-style-type: none"> ■ A person (A) intentionally— <ul style="list-style-type: none"> ◆ sexually penetrates another person (B); or ◆ causes or allows B to sexually penetrate A; or ◆ causes B— <ul style="list-style-type: none"> ○ to sexually penetrate themselves; or ○ to sexually penetrate another person (C) or an animal; or ○ to be sexually penetrated by C or by an animal; and ■ B has a cognitive impairment or mental illness; and ■ A— <ul style="list-style-type: none"> ◆ provides treatment or support services to B; or ◆ is a worker for a service provider that provides treatment or support services to B.

9.1.4 Reforms to the ‘indecent act’ offences

The following new offences replace the existing offences of indecent act in sections 51(2) and 52(2) of the *Crimes Act*:

- ◆ sexual assault of a person with a cognitive impairment or mental illness (new section 52C)
- ◆ sexual activity in presence of a person with a cognitive impairment or mental illness (new section 52D), and
- ◆ causing a person with a cognitive impairment or mental illness to be present during sexual activity (new section 52E).

These offences are consistent, wherever possible, with the equivalent Subdivision (8B) offences. For example, the offence of sexual activity in the presence of a person with a cognitive impairment or mental illness has the following elements:

Sexual activity in the presence of a person with a cognitive impairment or mental illness (section 52D)

- A person (A) intentionally engages in an activity; and
- the activity is sexual; and
- another person (B) is present when A engages in the activity; and
- A knows that B is, or probably is, present when A engages in the activity; and
- B has a cognitive impairment or mental illness; and
- A—
 - ◆ provides treatment or support services to B; or
 - ◆ is a worker for a service provider that provides treatment or support services to B; and
- engaging in the activity in the presence of B is contrary to community standards of acceptable conduct.

The offence replaces the outdated language of ‘indecency’ with the clearer concept of sexual touching that is ‘contrary to community standards of acceptable conduct’. This reflects the current legal meaning of ‘indecent’. This element will exclude acts such as carers bathing a person with a cognitive impairment or mental illness, and makes it unnecessary to have a specific exception for good faith medical or hygienic purposes applying to these offences.

The elements of this offence are discussed above in relation to the offence of sexual activity in the presence of a child in Subdivision (8B) — see Part 6.3.2.

9.2 Exceptions, defences and what is not a defence

The Act restructures exceptions and defences consistently with the approach discussed in Part 3.

9.2.1 Exceptions to sexual penetration offence — medical, hygienic, veterinary, agricultural or scientific purposes

New section 52F provides an exception to the sexual penetration offence in new section 52B for medical, hygienic, veterinary, agricultural or scientific purposes. This is consistent with the exception that applies to the general sexual penetration and sexual assault offences in Subdivision (8A).

New section 52F provides that a person (A) does not commit an offence against new section 52B(1) of sexual penetration of a person with a cognitive impairment or mental illness if:

Exception — medical, hygienic, veterinary, agricultural or scientific purposes (section 52F)

- the sexual penetration is of a person and is done in the course of a procedure carried out in good faith for medical or hygienic purposes; or
- the sexual penetration is of an animal and is caused by A to be done in the course of a procedure being carried out in good faith for veterinary or agricultural purposes or scientific research purposes.

Example

A is a support worker assisting B on a farm. B assists in birthing a calf. During this process, A causes B to insert B's hand into the cow's vagina. A has not committed an offence against section 52B(1).

The exception does not apply to the sexual touching or sexual activity offences in new sections 52C, 52D or 52E, as the elements in these offences (that the touching or activity is sexual and contrary to community standards) make the exception unnecessary.

9.2.2 Exception and defences — marriage or domestic partnership

The Act contains a marriage or domestic partnership exception, and a reasonable belief in marriage or domestic partnership defence, to the offences in this Subdivision. These are consistent, wherever possible, with the equivalent exceptions and defences in Subdivision (8B) — see Part 6.7. The exception provides that a person (A) does not commit an offence under Subdivision (8E) if:

Exception — marriage or domestic partnership (section 52G)

- at the time at which the offence is alleged to have been committed—
 - ♦ A and the person who has a cognitive impairment or mental illness are married to each other and the marriage is recognised as valid under the *Marriage Act 1961* of the Commonwealth; or
 - ♦ A is the domestic partner of the person who has a cognitive impairment or mental illness.

The exception applies where there is an actual marriage or domestic partnership.

This replaces the current exception for marriage and domestic partnership that is incorporated within the offences in existing sections 51 and 52. Consistent with the approach to exceptions adopted in the Act, the exception is distinctly and separately identified.

New section 52H provides a defence for reasonable belief in marriage or domestic partnership. Under new section 52H, a person (A) will have a defence to a charge for an offence under Subdivision (8E) if:

Defence — reasonable belief in marriage or domestic partnership (section 52H)

- at the time of the conduct constituting the offence, A reasonably believed that—
 - ♦ A and the person who has a cognitive impairment or mental illness were married to each other and that the marriage was recognised as valid under the *Marriage Act 1961* of the Commonwealth; or
 - ♦ A was the domestic partner of the person who has a cognitive impairment or mental illness.

The defence applies where there is not an actual marriage or domestic partnership, but A reasonably believed there was. The accused bears the burden of proving the defence on the balance of probabilities.

New section 52H replaces the existing defence in sections 51(5) and 52(3) of the *Crimes Act*. Unlike the existing provisions, the defence does not include an element of consent. Consistent with the approach taken in Subdivision (8B), and given that consent is not relevant to offences in this Subdivision, the Act removes the element of consent from applicable exceptions and defences in this Subdivision. This will simplify prosecutions and reflects that these offences are concerned with the abuse of a person's vulnerability in the context of the care-giving relationship.

9.2.3 Defence — reasonable belief a person does not have a cognitive impairment or mental illness

The Act contains a new defence of reasonable belief that a person does not have a cognitive impairment or mental illness. Under new section 52I, a person (A) will have a defence to a charge for an offence under Subdivision (8E) if:

Defence — reasonable belief person does not have a cognitive impairment or mental illness (section 52I)

- at the time of the conduct constituting the offence, A reasonably believed that the person who has a cognitive impairment or mental illness did not have a cognitive impairment or mental illness.

The defence is a statutory iteration of the common law honest and reasonable mistake of fact defence, but places the burden of proving the defence on the accused to the balance of probabilities. This reflects the protective rationale of the offences, and that requiring the prosecution to prove beyond reasonable doubt A's knowledge of B's cognitive impairment or mental illness would shift the focus of a case onto issues of capacity and impairment, rather than the obligation on the worker or service provider not to engage in sexual conduct with a client with a cognitive impairment or mental illness.

Example

A is a dentist and provides treatment to B. B has a mental illness. The service is unrelated to the mental illness, and A has never been informed by B or anyone else about B's mental illness. A asks B out for a drink, and after having a drink A and B kiss and touch each other.

A will not be guilty of the offence of sexual assault of a person with a cognitive impairment or mental illness in new section 52C because A reasonably believed that B did not have a mental illness.

9.2.4 Defence — reasonable belief the service provider does not provide treatment or support services to the person with a cognitive impairment or mental illness

New section 52J contains a defence that applies to workers for a service provider. Under new section 52J, a person (A), who is a worker for a service provider, will have a defence to a charge for an offence under Subdivision (8E) if:

Defence — reasonable belief the service provider does not provide treatment or support services to the person with a cognitive impairment or mental illness (section 52J)

- at the time of the conduct constituting the offence, A reasonably believed that the service provider was not providing treatment or support services to the person who has a cognitive impairment or mental illness.

The defence recognises that A may work for a service provider but not be aware that B is receiving services from that service provider and should not be guilty of a criminal offence. For example, where a person works for a large social services organisation that delivers a range of services across many different locations, that person may have very little knowledge of the identity of service recipients in other areas of the organisation.

This defence is a statutory iteration of the common law honest and reasonable mistake of fact defence, but places the burden of proving the defence on the accused to the balance of probabilities. This reflects the protective rationale of the offences, and that if A genuinely did not know that B received treatment or support from the service provider for whom A works, then A is likely in a unique position to explain why he or she did not know this.

If a person in A's position does not know that B has a cognitive impairment or mental illness, then the new defence of reasonable belief that the person does not have a cognitive impairment or mental illness in new section 52I may also be available.

Example

A is a case worker in the disability area of a large non-government organisation. A meets B at a party, and B talks candidly about being diagnosed with severe depression. A goes home with B, and they have sexual intercourse. A and B have never met before, and A does not know much about B. At breakfast the next day, B mentions that he attends a particular mental health service. A realises that this service is run by A's employer.

A will be not guilty of the offence of sexual penetration of a person with a cognitive impairment or mental illness in new section 52B, because at the time of the sexual intercourse A had a reasonable belief that A's employer did not provide treatment or services to B.

9.2.5 What is not a defence

New section 52K makes it clear that some elements of the offences in this Subdivision are absolute liability elements.

A provides services to B, or is a worker for a service provider

New section 52K(1) makes clear that the elements of the offences that A provides treatment or support services to B, or A is a worker for a service provider, are absolute liability elements of the offences. It provides that it is not a defence to a charge that:

Absolute liability elements — A provides treatment or support services to B, and A is a worker for a service provider (section 52K(1))

- at the time of the conduct constituting the offence, A was under a mistaken but honest and reasonable belief that—
 - ♦ for an offence against section 52B(1), 52C(1) or 52D(1)—A did not provide treatment or support services to B or was not a worker for a service provider; or
 - ♦ for an offence against section 52E(1)—A did not provide treatment or support services to C or was not a worker for a service provider.

This provision recognises that where a person is directly providing services to another person, or is working for an organisation, these are factors that will be within the knowledge of the accused.

If the defence of honest and reasonable mistake of fact was available, there would likely be ambiguity around whether the mistake was as to fact, or matters of law. For example, the defence might be used to dispute whether a person knew that they fell within the legal category of ‘worker’, or that services provided were ‘treatment or support’ services. This would undermine the policy of the offences, which is to impose a standard of acceptable conduct on those providing services to vulnerable people.

‘sexual’ and ‘contrary to community standards of acceptable conduct’

New section 52K(2) provides that it is not a defence to a charge that:

Absolute liability elements — ‘sexual’ and ‘contrary to community standards of acceptable conduct’ (section 52K(2))

- at the time of the conduct constituting the offence, A was under a mistaken but honest and reasonable belief that—
 - ♦ for an offence against section 52C(1)—the touching was not—
 - sexual; or
 - contrary to community standards of acceptable conduct; or
 - ♦ for an offence against section 52D(1)—
 - the activity was not sexual; or
 - engaging in the activity in the presence of B was not contrary to community standards of acceptable conduct; or
 - ♦ for an offence against section 52E(1)—
 - the activity was not sexual; or
 - A's causing or allowing C to be present when B engages in the activity was not contrary to community standards of acceptable conduct.

New section 52K(2) provides that objective elements of the offences, such as whether touching was sexual or contrary to community standards of acceptable conduct, are absolute liability elements of the offences.

This is consistent with the approach in Subdivision (8B) — see Part 6.7.4.

10 Other reforms

10.1 Reforms to other sexual offences

The Act also reforms sexual offences relating to interference with a corpse, sexual servitude, bestiality and sexual exposure.

10.1.1 Interference with a corpse — Subdivision (5)

The Act replaces existing section 34B of the *Crimes Act* with three new offences:

- ◆ sexual activity with the corpse of a human being (new section 34B)
- ◆ removal of body parts from the corpse of a human being (new section 34BA), and
- ◆ offensive conduct involving human remains (new section 34BB).

New sections 34BC–34BE contain related provisions, relating to location of the corpse or human remains, exceptions and what is not a defence.

The new offences are restructured for clarity and consistency with other sexual offences in the Act, and use modern language (rather than outdated language such as ‘indecent act’). The sexual activity and removal of body parts offences have the same maximum penalty as existing section 34B (5 years imprisonment).

The ‘offensive conduct’ offence is a new summary offence with a maximum penalty of two years imprisonment. This offence may be slightly broader than existing section 34B as it clearly captures offensive conduct that is non-sexual in nature. It is unclear whether the existing offence covers such conduct. This section also defines when conduct is ‘offensive’, by drawing on discussion of the meaning of the term ‘offensive’ in *Monis v The Queen* [2013] HCA 4 (French CJ at [41]).

10.1.2 Sexual servitude — Subdivision (8F)

The Act replaces the sexual servitude offences in existing Subdivision (8EAA) with new sections 53A to 53G in Subdivision (8F).

The new offences largely replicate existing offences but have been redrafted for consistency in structure and style. The only major policy change is the introduction of an alternative limb to the offences in new sections 53B–53D where the victim is not free to leave the place where commercial sexual services are provided (see, for example, new section 53B(1)(b)(ii), (1)(c)(i)(B) and (1)(c)(ii)(B)). This makes the offences consistent with similar Commonwealth and New South Wales offences.

There is also a new definition of ‘use’ which, in relation to a debt or purported debt, includes imposing, arranging, negotiating or referring to the debt or purported debt. This should assist to ensure that the offences cover people who are both directly and indirectly involved in commercial sexual servitude (for example, those who exert force or detain sex workers, as well as recruiters and financers).

10.1.3 Bestiality — Subdivision (8FA)

The Act replaces the offence of bestiality in existing section 59 of the *Crimes Act* with new section 54A in Subdivision (8FA). The new offence has been redrafted for consistency in structure and style with rape and sexual assault offences in Subdivision (8A). The elements of the new offence are:

Bestiality (section 54A)
A person (A) intentionally— <ul style="list-style-type: none"> ■ sexually penetrates an animal; or ■ causes or allows an animal to sexually penetrate A.

The maximum penalty for this offence remains at level 6 imprisonment (5 years maximum).

New section 54B provides an exception to this offence for good faith veterinary or agricultural purposes or scientific research purposes. This is a new exception, consistent with the other sexual penetration offences in the Act.

10.1.4 Sexual exposure

The Act replaces the existing offence of obscene exposure in section 19 of the *Summary Offences Act* with a new offence of sexual exposure. The elements of the new offence are:

Sexual exposure (section 19 of the *Summary Offences Act* 1966)

- A person (A) exposes (to any extent) A's genitals; and
- A intends to expose (to any extent) A's genitals; and
- the exposure is sexual; and
- the exposure is in, or is within the view of, a public place.

The maximum penalty for this offence remains at level 7 imprisonment (2 years maximum).

It is not a defence to this offence that A was under a mistaken but honest and reasonable belief that the exposure was not sexual. However, it is a defence that A was under a mistaken but honest and reasonable belief that the exposure was not in, or within the view of, a public place.

A's exposure of A's genitals may be sexual due to the fact that A seeks or gets sexual arousal or sexual gratification from the exposure, or any other aspect of the exposure (including the circumstances in which it takes place and whether it is contrary to community standards of acceptable conduct).

A's exposure of A's genitals is not sexual only because it is the genitals that are exposed. This is designed to ensure the offence does not apply where exposure of the genitals is not sexual (e.g. a person who exposes their genitals because they need to urinate urgently). It may be that such conduct is considered 'offensive'. In these situations, the summary offence of 'obscene, indecent, threatening language and behaviour etc. in public' in section 17 of the *Summary Offences Act* (which carries a lower maximum penalty) may apply.

The Act also amends section 17 to provide that behaviour that is indecent, offensive or insulting may include behaviour that involves a person exposing (to any extent) the person's anal or genital region (for example, mooning or streaking). Given the amendments to section 19, this amendment will ensure that section 17 captures non-sexual genital or anal exposure.

10.2 Reforms to jury directions

The Act reforms section 46 of the *Jury Directions Act 2015* to better assist jurors to understand and apply the consent and reasonable belief in consent reforms introduced by the 2014 Act. These reforms commenced on 26 September 2016.

Misconceptions about consent

New section 46(3)(c)–(e) relate to consent, and require the trial judge, on request, to:

Section 46(3)(c)–(e) of the *Jury Directions Act 2015*

- inform the jury that experience shows that—
 - ◆ there are many different circumstances in which people do not consent to a sexual act; and
 - ◆ people who do not consent to a sexual act may not be physically injured or subjected to violence, or threatened with physical injury or violence; or
- inform the jury that experience shows that—
 - ◆ people may react differently to a sexual act to which they did not consent and that there is no typical, proper or normal response; and
 - ◆ people who do not consent to a sexual act may not protest or physically resist the act (for example, the person may freeze and not do or say anything); or
- inform the jury that experience shows that people who do not consent to a sexual act with a particular person on one occasion, may have on one or more other occasions engaged in or been involved in consensual sexual activity—
 - ◆ with that person or another person; or
 - ◆ of the same kind or a different kind.

These directions focus on lack of consent (rather than the existing provision, which focuses on what is sufficient evidence of consent), and will more clearly address misconceptions jurors may have about rape and sexual assault.

The direction that people who do not consent to a sexual act may not protest or physically resist the act clearly links with the communicative model of consent. As the example notes, a person may freeze as a reaction to the sexual act.

Reasonable belief in consent

The reforms to section 47 of the *Jury Directions Act 2015* relate to the element in offences of a reasonable belief in consent. They require the trial judge, on request, to direct the jury that:

Section 47(3)(c) of the *Jury Directions Act 2015*

- a belief in consent based solely on a general assumption about the circumstances in which people consent to a sexual act (whether or not that assumption is informed by any particular culture, religion or other influence) is not a reasonable belief; and
- a belief in consent based on a combination of matters including such a general assumption is not a reasonable belief to the extent that it is based on such an assumption.

These directions are designed to make clear that stereotyped opinions about sexual behaviour are not to be taken into account when assessing the reasonableness of a belief in consent. An example is an assumption by an accused that the complainant was consenting to sex with him because she was dressed provocatively and got drunk with him.

Section 47(3)(d) of the *Jury Directions Act 2015*

- in determining whether the accused had a reasonable belief in consent, the jury must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent.

This direction is designed to make clear that the jury should not assess what the accused himself or herself considered to be ‘reasonable’, but what the general community would objectively consider to be reasonable to expect of its members. This is based on a recommendation made by Judge Peter Rook QC and Robert Ward CBS in the United Kingdom’s authoritative textbook *Sexual Offences: Law and Practice* (4th ed, 2010).

Section 47(3)(e) of the *Jury Directions Act 2015*

- in determining whether the accused had a reasonable belief in consent, the jury may take into account any personal attribute, characteristic or circumstance of the accused.

This direction provides that the jury may consider any personal attribute, characteristic or circumstance of the accused when determining whether the accused had a reasonable belief in consent. New section 47(4) restricts this direction, providing that a good reason for not giving this direction is that the personal attribute, characteristic or circumstance—

- ◆ did not affect, or is not likely to have affected, the accused's perception or understanding of the objective circumstances; or
- ◆ was something that the accused was able to control; or
- ◆ was a subjective value, wish or bias held by the accused, whether or not that value, wish or bias was informed by any particular culture, religion or other influence.

The direction is based on case law in other jurisdictions which have a similar objective fault element (see, for example, *Aubertin v Western Australia* [2006] WASCA 229).

Victoria's New Sexual Offence Laws: An Introduction (June 2015) discussed case law that was considered relevant to the directions contained in new section 47(3)(c)–(e). (For ease of reference, those parts of that report are set out below.)

The 2014 Act left these matters for courts to determine, which was expected to be informed by the case law set out below. The new provisions set out essential aspects of directions discussed in these cases, providing clear guidance and a framework for giving relevant jury directions.

A hybrid standard of reasonableness

Reasonableness is an objective concept. There are broadly two types of approach to the construction of a reasonableness standard. On the first approach, the standard is set as that of the 'reasonable person' or 'ordinary person', which is a purely objective standard. The reasonable or ordinary person is a relatively abstract and hypothetical person, who does not necessarily share any of the personal characteristics of the particular accused, though he or she needs to be located in the same general circumstances as the accused. (This is the standard that applied in the former defence of provocation: see *Stingel v The Queen* (1990) 171 CLR 312.) This can set a very high standard of reasonableness for an accused, depending on how far the accused's personal characteristics make them diverge from the abstract reasonable or ordinary person.

The other approach to constructing a reasonableness standard is a hybrid standard of reasonableness. This does not involve the construction and use of a reasonable person. The test focuses on the accused's belief and whether that belief was reasonable in the circumstances. This approach will involve considering some of the accused's particular characteristics and the circumstances of his situation. The standard then becomes a matter of what it would be reasonable for a person with those relevant characteristics and in that situation to believe.

Existing section 37G (new section 36A) should be read as involving a hybrid standard of reasonableness. It provides that 'whether or not a person reasonably believes that another person is consenting to an act depends on the circumstances'. It does not refer to 'all the circumstances' and does not refer to 'the reasonable or ordinary person'. This indicates that some of the circumstances will be relevant, but not necessarily all. If there is evidence that the accused's youth, any perceptual disability, or limited intellectual capacity affected the accused's capacity to understand the circumstances, and are matters over which he has no control, these matters may be relevant in determining what the accused may have reasonably believed. Other characteristics of the accused may also be relevant in some cases. Which characteristics and circumstances are relevant will largely depend on the particular case, though there is some guidance from other jurisdictions to inform the identification of what is relevant (to be discussed below).

Guidance from other jurisdictions

There are several cases and learned commentaries that provide some guidance as to how courts and juries should approach the task of applying the reasonableness standard under Victoria's sexual offence laws.

The Western Australian Court of Appeal provides very helpful guidance in *Aubertin v Western Australia* [2006] WASCA 229. This was an appeal dealing with the reasonable mistake defence in sexual offences. At [43], McLure JA (later President of the Court of Appeal) (with whom Roberts-Smith and Buss JJA agreed) said that:

The mixed element [i.e. that the accused's belief must be reasonable] is not wholly objective; reasonableness is not to be adjudged by the standard of the hypothetical ordinary or reasonable person. The mixed element is a combination of subjective and objective aspects. The requirement that the belief be reasonable imports an objective standard. The subjective aspect is that the reasonableness is to be judged by reference to the personal attributes and characteristics of the accused *that are capable of affecting his or her appreciation or perception of the circumstances in which he or she found himself or herself*. However, the ambit of what constitutes the personal attributes and circumstances of a particular accused has not to my knowledge been identified or exhaustively enumerated. It covers matters over which an accused has no control such as age (maturity), gender, ethnicity, as well as physical, intellectual and other disabilities. This list does not purport to be exhaustive. [Emphasis added.]

Her Honour then, at [46], further expanded on what matters are not relevant in the assessment of the reasonableness of a belief in consent:

[A] person's values, whether they be informed by cultural, religious or other influences, are not part of a person's characteristics or attributes for the purpose of assessing the reasonableness of an accused's belief. For example, values resulting in extreme views as to the appropriate mode of dress for women, from which inferences about consent are purportedly drawn, cannot positively affect or inform the reasonableness of an accused's belief. *Values do not impact on the capacity to perceive or appreciate primary objective facts or the capacity to process that information*. In any event, reasonableness must be judged in the light of generally accepted community standards and attitudes. [Emphasis added.]

In a similar context, the Queensland Court of Appeal has held that an accused's mental illness can be relevant to the assessment of the reasonableness of belief. In *R v Dunrobin* [2008] QCA 116, Muir JA (with whom Fryberg and Lyons JJ agreed) said, at [45], that:

[t]he jury should have been instructed also that the appellant's mental condition [which had been diagnosed as chronic paranoid schizophrenia] was relevant to the appreciation of what, on his part, constituted a reasonable belief. In that regard the jury should have been referred by the primary judge to the evidence of Dr De Alwis which bore on the appellant's capacity to comprehend completely and accurately what the complainant was attempting to convey to him at relevant times by words and conduct. The jury, uninstructed, was not in a position to know the relevance of the appellant's psychiatric condition to the questions to be determined by them in relation to the s 24 defence.

His Honour also cited this passage from Holmes J's judgment in *R v Mrzljak* [2004] QCA 420 at [90]:

It is not the handicap per se which bears on the excuse of mistake. It is the fact that the handicap results in the accused having to form his belief on a more limited set of information that is relevant, just as other external circumstances affecting the accused's opportunity to develop and test his perception are relevant. A jury cannot assess the rationality of a belief in isolation from the circumstances in which, and the information on which, it is formed.

In the United Kingdom's authoritative text *Sexual Offences: Law and Practice* (4th ed, 2010) by Judge Peter Rook QC and Robert Ward CBS, the authors suggest (at [1.244]) that:

in a rape case, when determining whether a defendant's belief was reasonable, the jury should be directed to consider what society should reasonably expect of a person in all the circumstances and with the defendant's relevant characteristics when it comes to appreciating the risk that a person is not consenting to sex. Those characteristics should not include psychosis or delusional thinking nor matters which are character defects, such as alcoholism or excessive vanity. They certainly should include extreme youth, blindness, deafness and learning disability. Then it will be for the jury to decide whether any of the relevant characteristics have any bearing on the issue of reasonable belief.

The way in which mental impairment is relevant can vary, depending on the nature of the impairment and the particular case. In *B v The Queen* [2013] EWCA Crim 3, in a case involving an accused who was 'affected by paranoid schizophrenia and harbouring a number of delusional beliefs' (at [1]), the Court of Appeal of England and Wales held that the reasonableness of the accused's belief was not to be assessed by reference to those delusional beliefs. Lord Justice Hughes, for the Court, held (at [41]–[42]):

We conclude that unless and until the state of mind amounts to insanity in law, then under the rule enacted in the *Sexual Offences Act* beliefs in consent arising from conditions such as delusional psychotic illness or personality disorders must be judged by objective standards of reasonableness and not by taking into account a mental disorder which induced a belief which could not reasonably arise without it. The defendant's mental condition, and its impact on his behaviour, is of course extremely relevant to sentence. If punishment is inappropriate, a non-custodial sentence may result when otherwise there would have been a substantial sentence of imprisonment, and whether a hospital order is needed by the time of trial or not. In other cases it may significantly mitigate the punishment required. In yet others, it may result in a substantial custodial sentence recognising the danger which the defendant presents.

It does not follow that there will not be cases in which the personality or abilities of the defendant may be relevant to whether his positive belief in consent was reasonable. It may be that cases could arise in which the reasonableness of such belief depends on the reading by the defendant of subtle social signals, and in which his impaired ability to do so is relevant to the reasonableness of his belief. We do not attempt exhaustively to foresee the circumstances which might arise in which a belief might be held which is not in any sense irrational, even though most people would not have held it. Whether (for example) a particular defendant of less than ordinary intelligence or with demonstrated inability to recognise behavioural cues might be such a case, or whether his belief ought properly to be characterised as unreasonable, must await a decision on specific facts. It is possible, we think, that beliefs generated by such factors may not properly be described as irrational and might be judged by a jury not to be unreasonable on their particular facts. But once a belief could be judged reasonable only by a process which labelled a plainly irrational belief as reasonable, it is clear that it cannot be open to the jury so to determine without stepping outside the Act. [Emphases added.]

It is possible that the UK takes a narrower view of what is relevant in this context. This is a matter on which some case law is likely to be necessary to provide further guidance, though in the ten years of such laws in the UK, this issue has not arisen often.

Summary

The above guidance on reasonableness provided by case law and commentaries in other jurisdictions may be summarised as follows:

- ◆ A personal attribute or characteristic of the accused may be relevant in assessing whether he or she reasonably believed in consent if that attribute or characteristic:
 - was capable of affecting his or her capacity to appreciate or perceive the objective circumstances, and
 - is something over which he or she had no control (e.g. youth or visual, auditory or intellectual disability).
- ◆ The values held by the accused (whether informed by cultural, religious or other influences) are not relevant.
- ◆ When determining whether or not a belief in consent was reasonable, the jury should consider what the community should reasonably expect of a person with the accused's relevant attributes and characteristics, and in the relevant circumstances.

The above general principles mean that in many cases the personal attributes and characteristics of the accused will not be relevant to the application of the objective test of reasonableness. Many attributes and characteristics that may in fact have influenced the accused in forming a belief in consent will be matters which the person does have capacity to control (e.g. flaws such as vanity) or misogynistic values and attitudes (e.g. the opinion that women who wear revealing clothing are more likely to be willing to have sex with strangers) and therefore are not relevant.

The fact that there are few cases on this issue from different jurisdictions indicates that qualifications on what is reasonable are not common and do not arise frequently, even though there may be many accused with an intellectual disability or cognitive impairment that may affect them to some degree.

11 Glossary of key terms

This glossary outlines key terms and concepts relating to criminal offences, and how they are dealt with in the Act.

This is an updated version of the glossary contained in the Consultation Paper, available at www.justice.com.au. That glossary contains a more extensive discussion of offence elements.

absolute liability

Absolute liability can apply to a physical element of an offence (usually a circumstance). This means that the prosecution is not required to prove a fault element in relation to that physical element. It also means that the accused cannot rely on a defence of honest and reasonable mistake of fact (or any other defence) in relation to that physical element. Absolute liability imposes a higher standard on an accused than strict liability.

The offences in the Act list all applicable fault elements where they apply. The Act specifies absolute liability elements by specifically providing no defence of mistaken but honest or reasonable belief of certain matters. See, for example, new section 49ZC.

burden of proof

In a criminal trial the prosecution must prove that the accused is guilty of the offence charged. This responsibility is known as the ‘burden of proof’. To establish a defence, the accused may have to prove something (for example, that he or she believed on reasonable grounds that the child was aged 16 or older). The expression ‘burden of proof’ is a general one which can be further explained by two specific ‘burdens’ — the evidential burden and the legal burden.

circumstance

A circumstance is a physical element of an offence. (Other physical elements are conduct and results.) Circumstances are used to provide greater context for the conduct of an offence. For example, in the new offence in section 49A of sexual penetration of a child under the age of 12, the conduct is sexually penetrating another person (B). This element alone is insufficient to create a criminal offence. In order to properly describe when sexually penetrating another person will be criminal, the offence also requires proof that B is under the age of 12 years. This is a circumstance element of the offence. Another example of a circumstance is that B is A’s child or lineal descendant, in the new offence in section 50C of sexual penetration of a child or lineal descendant.

Unlike conduct, a circumstance is not essential for the creation of a criminal offence. However, circumstances are very common in sexual offences. This is because the conduct in most sexual offences is sexual intercourse, an activity which is inherently lawful. Circumstance elements are therefore required to clearly define the situations in which sexual intercourse is unlawful.

conduct

Conduct is a physical element of an offence. (Other physical elements are circumstances or results.) It is not possible to create an offence without conduct. Conduct is usually an act, such as A sexually penetrates another person (B).

Conduct can also be a failure or omission to act. This type of conduct is not very common amongst sexual offences, however is captured by the definition of ‘sexual penetration’ in the Act where A, having introduced a part of A’s body or an object into B’s vagina, continues to keep it there. The conduct can be considered an omission — failing to remove the body part or object from B’s vagina.

defence

A defence provides a basis for exculpating the accused, even where he or she has committed an offence. This is different from an exception, which limits the scope of an offence by setting out particular conditions under which no offence is committed. An accused who falls within an exception to an offence does not commit that offence. In contrast, an

accused who has a defence may have committed the offence, but is nevertheless not guilty of the offence.

An example of a defence is new section 51N which provides a defence to child abuse material offences for child accused.

element An offence consists of elements. An element of an offence is a matter that the prosecution must prove beyond reasonable doubt if the accused is to be found to have committed that offence. An element can be either a physical element or a fault element.

exception An exception limits the scope of an offence by setting out particular conditions under which no offence is committed.

An accused who falls within an exception to an offence does not commit that offence. In contrast, an accused who has a defence may have committed the offence, but is not guilty of the offence.

fault element A fault element describes the ‘fault’ (usually the state of mind) of an accused in relation to a physical element. An offence can have more than one fault element.

Why do we need fault elements?

It would be possible to create a criminal offence using only physical elements. However, for serious offences the criminal law adopts the principle that physical elements alone are usually insufficient to create criminal liability.

To create serious criminal liability the prosecution must prove that an accused was at ‘fault’ in relation to the physical elements of the offence. For example, if a person (A) causes injury to another person (B), this is not sufficient to find that A has committed an offence. It is also necessary to prove that A intended to cause injury to B or was reckless about causing injury to B.

Is a fault element the same as ‘mens rea’?

The expression ‘fault element’ is similar to the common law expression ‘mens rea’, meaning ‘guilty mind’. However, there is an important difference. The common law refers to ‘the mens rea of an offence’. This can make ‘mens rea’ appear to be an indivisible notion, which in turn can make it difficult to identify precisely which state of mind applies to each physical element of the offence. This can be confusing.

For example, new section 49B contains the offence of sexual penetration of a child under the age of 16, which has two physical elements — taking part in an act of sexual penetration with a person (conduct) and the fact that the other person is a child is under 16 (circumstance). If we say that the ‘mens rea’ for this offence is ‘intention’, what does this mean? Does it simply mean that the accused intended to engage in sexual penetration? Does it mean that the accused intended that the child be aged under 16? Or does it mean that the accused intended to engage in sexual penetration with a person and knew that the person was a child under 16?

Approach

In order to be as clear as possible and to avoid confusion, the Act lists each physical element separately and specifies whether a fault element applies to that physical element.

For example, the offence in new section 51C of producing child abuse material has two physical elements:

- ◆ A produces material (conduct), and
- ◆ the material is child abuse material (circumstance).

The Act clearly states the fault element applicable to the conduct and to the circumstance of the offence. This is intention as to conduct (A intentionally produces material), and knowledge or recklessness as to

circumstance (A knows that the material is, or probably is, child abuse material).

All of the sexual offences in the Act contain at least one fault element. Standard fault elements are adopted for most offences. This is an improvement on the current law, which uses different fault elements to refer to similar concepts. This can create confusion.

The three main fault elements used in the Act are intention, knowledge, and recklessness.

These fault elements are predominantly used in similar ways, for intentionally engaging in conduct (e.g. A intentionally sexually penetrates B), knowledge of a circumstance (e.g. A knows that material is child abuse material), and recklessness as to a circumstance (e.g. A knows that B is probably a child under the age of 16).

There are occasions where none of these fault elements applies appropriately, and a different fault element is used.

Sometimes a fault element does not relate to or attach to any physical element of the offence. This is known as an 'ulterior fault element'. In the Act, the offence of abduction or detention of a child under the age of 16 for a sexual purpose in new section 49P contains an ulterior fault element. In order to prove this offence it is necessary to prove that A took away or detained a child aged under 16 with the intention that the child take part in a sexual act with A or another person. However, it is not necessary to prove that the child in fact did take part in a sexual act with A or another person.

jury direction

Jury directions are the instructions a judge gives to a jury to help it to decide whether a person is guilty of an offence.

The Act amends jury directions relating to consent and reasonable belief in consent, which are relevant to rape and sexual assault offences.

maximum penalty

Most sexual offences specify a maximum penalty by referring to a 'penalty level'. This is a reference to the penalty scale which is set out in the *Sentencing Act 1991*.

The maximum penalty for an offence is set having regard to a number of considerations. It needs to cover the worst case scenario for that offence. It must also have a logical relationship with related offences, so that more serious offences have a higher maximum penalty and less serious offences have a lower maximum penalty.

The Act does not make changes to the sentencing structure for sexual offences. However, it does make changes to the maximum penalty for some existing sexual offences in order to create a more logical and appropriate hierarchy of maximum penalties.

physical element

Physical elements are essential to creating an offence. They are sometimes described as the 'actus reus' or 'guilty act' of an offence. They are usually classified as either conduct, circumstance or result elements.

In the Act, conduct elements include where a person sexually penetrates or touches another person, or engages in sexual activity in the presence of another person. Circumstance elements include the age of a child, or whether material is child abuse material. Result elements are uncommon in sexual offences, however, the sexual servitude offences include the result element that, as a result of the accused's (A's) conduct, another person (B) is caused to provide, or to continue to provide, commercial sexual services or to not be free to leave the place or area where B provides commercial sexual services.

result

A result is a physical element of an offence. (Other physical elements are circumstances or conduct.) Very few sexual offences include a result. The offence of procuring sexual act by threat in new section 44 contains the result element that, as a result of A's threat, B or another person takes part (whether at the time the threat is made or at a later time) in a sexual act with A or another person. An example of a non-sexual offence

with a result is intentionally causing serious injury to another person (B). The result element is that B received a serious injury.

standard of proof

The party which bears a legal burden with respect to an element, exception or defence must prove the existence or non-existence of that matter to a particular standard. This is known as the standard of proof. It is essentially a matter of how strong or convincing the evidence must be for the proposition in question to be proved. The standard of proof varies depending on whether the legal burden is on the prosecution or the accused.

Where the prosecution bears the legal burden of proving an element or of disproving an exception or defence, it must do so ‘beyond reasonable doubt’. Where the accused bears the legal burden (usually in relation to a defence), the accused must prove the defence or other matter ‘on the balance of probabilities’. This is a lower standard than that required of the prosecution.

For example, new section 49Z(3) provides that the accused bears the burden of proving (on the balance of probabilities) matters referred to in new section 49Z(1)(a) or (b)(ii) or (2)(a) or (b)(ii), which relate to certain defences.

strict liability

Strict liability can apply to a physical element of an offence. This means that the prosecution is not required to prove a fault element in relation to that physical element. However, the accused can rely on a defence of honest and reasonable mistake of fact in relation to that physical element. (See also, absolute liability.)

The High Court held in *He Kaw Teh v The Queen* (1985) 157 CLR 523 that there is a presumption that ‘mens rea’ is an essential ingredient of any offence. Thus, the common law often operates to imply the existence of a fault element in an offence.

In the Act, some strict liability elements have a statutory defence which is equivalent to the defence of ‘honest and reasonable mistake of fact’. For example, new section 52J provides a defence where the accused is a worker and has a reasonable belief that the service provider does not provide treatment or services to the person with the cognitive impairment or mental illness. This is equivalent to the common law ‘honest and reasonable mistake of fact’ defence applying to this element of the offence.

Appendix 1 Child abuse material offence scenarios

Below are a number of fictional scenarios that illustrate the operation of the new child abuse material offences, exceptions and defences introduced by the *Crimes Amendment (Sexual Offences) Act 2016*, and the existing summary offences relating to distribution of intimate images in the *Summary Offences Act 1966*.

Some of these scenarios were also included in the department's paper, *Victoria's New Sexual Offence Laws: An Introduction* (2015).

The scenarios cover a range of situations in which young people may find themselves. However, not every possible situation is covered.

Please note that these scenarios are only concerned with Victorian laws and are focused on the new child abuse material offences, exceptions and defences. Where relevant, they will also refer to the related *Summary Offences Act* offences.

Other offences, such as sexual offences against children or Commonwealth offences regarding use of a carriage service, may also be applicable in some scenarios but these will not be covered in any detail. Please also note that the discussion of the new laws is only in a brief and summary form, illustrating how the new laws are expected to work.

Scenario 1: James, Lachlan and Simon

James is 37 years old and lives with his partner and her seven year old daughter. While his partner is at work, James takes photographs of his partner's daughter when naked with his mobile phone. James keeps the photos on his phone and also uploads them to his computer by copying the image files over. James then uploads the images to his personal online storage account. James controls access to the storage account as he has a password, and he can move and delete files stored inside it. He can also grant other people access if he wants to.

James is the member of an online discussion board. He logs on to the discussion board and chats with other members. The discussion board talks about a range of topics, but there are several threads where child abuse material is discussed and traded. James goes to one of these threads and shares a link to his personal online storage account, granting access to those who click on the link. He writes 'nude child shots here'. Those who click on the link can view the image files in James' account.

Lachlan is also a member of the discussion board. Lachlan goes to the thread on child abuse material, sees James' link and, having seen the words 'nude child shots here', he clicks on it. Lachlan looks at the images, then right clicks on them, and downloads the images to his laptop.

Simon is the administrator for the website containing the discussion board. He has noticed the threads on the website about child abuse material. He posts a notification to users of the threads saying that they are not permitted and will be deleted. Simon then deletes the threads containing the dealings in child abuse material. He starts up an ongoing search that will locate certain child abuse material terms in the discussion board, so that he can be aware when it happens in future and delete those threads. Finally, Simon calls the Office of the Children's eSafety Commissioner and gets advice on what else to do to keep the website free of child abuse material. Simon follows the directions of the Office of the Children's eSafety Commissioner.

How do the new laws apply?

James

James is guilty of several child abuse material offences. He is guilty of involving a child in the production of child abuse material, and producing child abuse material, for taking the photos. He is also guilty of possession of child abuse material, for having the photos on his phone, computer and online storage account.

The new definition of possession of electronic material provides that controlling access to the material will constitute possession, even where a person doesn't have physical possession of the electronic material. Given James controls access to the online storage account, he is guilty of possession of child abuse material for the images he stores there.

James is guilty of a second offence of producing child abuse material for copying the files from his phone to computer, and from his computer to his online storage account. Each time an image file is copied, it is duplicated, which is a form of producing child abuse material.

For sharing the link to the online storage account containing the images, James is guilty of the new offence of distributing child abuse material. This is distribution by making the material available for access by any other person.

Lachlan

Lachlan is guilty of the new offence of accessing child abuse material. Lachlan knew the content of the images based on James's description, and intentionally accessed the child abuse material images, by viewing them.

Lachlan is also guilty of the offence of possession of child abuse material. He knowingly downloaded the images to his hard drive.

Simon

Simon may be guilty of the offence of administering a child abuse material website. He is the administrator for a website, and knows that others are using the website to deal with child abuse material.

However, Simon is likely to be able to use the new defence of taking reasonable steps to prevent the use of the website for child abuse material. He has followed several of the advised steps, including:

- ◆ modifying the operation of the website, by deleting the threads which deal with child abuse material, and setting up a search to continue this practice in future, and
- ◆ notifying a relevant industry regulatory authority that the website is being used to deal with child abuse material and following any reasonable directions from the authority.

The defence of reasonable steps to prevent the use of the website for child abuse material will be decided according to what are 'reasonable steps' in each case.

Scenario 2: Amalia, Rob and Dave

Amalia, 13, likes taking selfies and posting them on a photo sharing application (app) on her mobile phone. Her favourite accounts on the app include makeup looks, fashion and celebrities. The celebrity and fashion accounts often have bikini shots, or images of topless or naked celebrities.

One weekend at home, Amalia experiments by taking naked selfies, mimicking a pose she has seen on the app by celebrity Sebrine. Amalia posts the photos and tags them #onlythirteen #growingupfast #Sebrine.

Rob sees Amalia's photos on her account when searching for images of Sebrine. He clicks through Amalia's other images, and sees some of her in school uniform and with her siblings, and can see that she is very young. He takes a screenshot of the naked photos and saves it to his mobile phone.

Dave is Amalia's 32 year old uncle. He follows her feed on the app, along with those of other family members. When Dave sees the naked photos of Amalia, he immediately calls her and tells her to take them down before her parents see them. Amalia deletes the photos from the app.

How do the new laws apply?

Amalia

Amalia is a young teenager engaged in non-exploitative sexual exploration. The child abuse material offences are not intended to capture this conduct. Accordingly, Amalia has not committed a child abuse material offence as she will fall within the exception applying to children for dealing with an image of herself.

Rob

Whether Rob is guilty of an offence will depend on whether he knew that the images depicted a child. However, as Amalia used the hashtag #onlythirteen, and Rob saw related images that suggested she was a child, he may be found to have known that he was looking at child abuse material.

If so, Rob will be guilty of possession of child abuse material, for knowingly storing the images on his mobile phone, and accessing child abuse material, for any time he has intentionally looked at these images.

Dave

Dave did not intentionally view the images of Amalia, as he only saw them because they came up in his feed. He will not have committed the offence of intentionally accessing child abuse material.

If Dave had repeatedly looked at the images, or saved the images on his phone or computer, he would be guilty of accessing or possessing child abuse material.

Scenario 3: Ashleigh, Aaron and Brandon

Ashleigh, 16, meets Aaron, 18, at the 18th birthday party of Brandon, a mutual friend. After chatting and drinking for a little while, they go to Brandon's bedroom for some privacy, kissing and touching each other. They chat over the internet in the days following the party, often sending messages containing naked selfies of each other.

After a week, they organise to meet up again on a Friday night at Aaron's house. Aaron's parents often travel to their holiday house for weekends, leaving Aaron alone in the house. Aaron has invited Ashleigh and a few of his mates (including Brandon) around for pizza and beers.

As the night progresses, Ashleigh and Aaron leave the group and head to Aaron's room. They kiss and Aaron performs oral sex on Ashleigh. Afterwards, they continue to kiss and touch each other, and Aaron asks Ashleigh if he can take a photo of her performing oral sex on him. Ashleigh is not sure if she wants to. Sensing her reluctance, Aaron assures her that the image will just be between them. Trusting Aaron, Ashleigh allows him to take the photo.

Some weeks after Aaron's pizza and beer night, Brandon tells Ashleigh he has seen the photo Aaron took of Ashleigh performing oral sex on him. He tells her that a couple of days after the party Aaron sent it by text message to Brandon and his other mates who were at Aaron's house that night. Brandon says he feels bad about the photo being sent and thought Ashleigh should know about it. He knows that Ashleigh is only 16. Ashleigh asks Brandon to forward the photo to her phone so she has evidence of what Aaron did. Brandon does so, and, at Ashleigh's request, deletes from his phone the original text message from Aaron containing the photo.

Ashleigh is distraught and embarrassed by the photo. Aaron does not go to Ashleigh's school, but she is worried that the image will be uploaded online and more people will find it. Not knowing what to do, she tells her parents she is unwell and stays home from school for a number of days. On the third day, Ashleigh's mother is worried that there is something wrong that Ashleigh is not telling her. After some discussion with Ashleigh, she is told about Aaron and the picture. Ashleigh's mother, outraged at Aaron's actions and worried about her daughter's privacy, takes Ashleigh to the police station to find out what they can do.

How do the new laws apply?

Aaron

Because Aaron is 18, he is an adult and none of the exceptions or defences applying to children apply to him. However, the defence where the accused is not more than two years older than a 16 or 17 year old child and acts with the child's consent may apply to some of his conduct. For example, it appears that when Aaron and Ashleigh sent each other naked selfies, Ashleigh consented to this conduct. Therefore Aaron may have a defence to accessing and possession of those images.

Ashleigh appears to have consented to Aaron taking the photo of her giving him oral sex, and so he may also have the defence where the accused is not more than two years older than a 16 or 17 year old and acts with the child's consent, for his conduct of involving a child in the production of child abuse material. However, Ashleigh did not consent to Aaron distributing the image of her giving him oral sex to his friends. He would not have a defence to this conduct, and is guilty of the offence of distributing child abuse material, and of the summary offence of distribution of an intimate image in section 41DA of the *Summary Offences Act*.

Ashleigh

Ashleigh has exchanged child abuse material, being naked images of herself, with Aaron on the internet. Ashleigh would not have committed a child abuse material offence, because the images

she is dealing with are of herself alone. The law recognises that these are non-exploitative images taken by a child of themselves by providing the exception for a child for an image depicting themselves.

Ashleigh possesses child abuse material on her mobile phone, being the photo of oral sex. However, Ashleigh would have the defence applying to children as the image depicts one or more persons, does not depict an act that is a criminal offence punishable by imprisonment (as it is a consenting act between a 16 and 18 year old) and at the time of the conduct constituting the offence (the possession of the image) Ashleigh is not more than two years older than the youngest person depicted in the image (herself).

Brandon

Brandon was 18 when he came into possession of child abuse material in the form of the photo of Ashleigh and Aaron. While Brandon did not knowingly take possession of it (because it was sent to him by Aaron), he did keep possession of it up until he deleted it at Ashleigh's request. It is an offence to knowingly possess child abuse material. Deleting the photo some weeks later does not mean that he is not guilty. Similarly, Aaron's mates who also received the photo would be guilty of the possession offence if they knew Ashleigh's age and did not immediately delete the photo, unless they are under 18 and fall within one of the exceptions or defences applying to children.

Brandon may be guilty of distribution of child abuse material for sending the image to Ashleigh. However, the defence where the accused is not more than two years older than a 16 or 17 year old child and acts with the child's consent would apply, as Ashleigh is 16 and consented to the distribution by asking that Brandon send it to her.

There is also a possibility that Brandon could be charged with the summary offence of distribution of an intimate image because he sent the image to Ashleigh. However, his distribution of the image (at her request and in the context of him telling her about the photo out of concern for her) is not contrary to community standards of acceptable conduct.

Scenario 4: Thomas, Mia, Michael, Van and Chloe

Thomas, 17, met Mia, 16, at an under-18 music gig in the city. They danced, kissed and flirted in the mosh pit of the gig, leaving together when the gig was over. Thomas later added Mia on an instant messaging app and over the course of the next couple of weeks they proceeded to send sexually explicit selfies to each other. The two began going out together, and after a couple of weeks began to engage in consensual sexual intercourse.

One time, at Mia's house, while having sex, Mia suggested to Thomas that they video themselves. Mia and Thomas agreed to keep the video just between them. Thomas recorded them using his mobile phone, and sent the video to Mia the following day.

Later that week, Thomas was boasting to his older friend Michael, 19, who did not believe that Mia had had sex with Thomas. In order to prove Michael wrong, Thomas showed him the video. Michael, upon seeing the video, demanded a copy.

When Thomas refused, Michael eventually left the matter alone, but later, when Thomas had left the room, Michael blue-toothed the video to his phone. Michael then sent the video on to his friends Van, 19, and Chloe, 17. A few weeks later, Michael was charged with another, unrelated offence. His phone was seized and examined by the police. The police also found the video of Mia and Thomas on his phone, and saw that he had sent the video on to Van and Chloe. When questioned by the police about the video, Michael explained how he came by it and what he had done with it.

How do the new laws apply?

Thomas

For the production and distribution of images of himself, the exception applying to children for an image of themselves will apply and Thomas will not have committed an offence. When he turns 18, the defence applying to images of oneself will apply.

In relation to the selfies of Mia, Thomas continues to possess child abuse material, but, as he is 17, the images do not depict a criminal offence, and he is not more than two years older than the youngest child depicted, he will have the defence applying to children available.

Thomas may have committed the offences of involving a child in the production of child abuse material, producing child abuse material, possession of child abuse material and distributing

child abuse material, for the video of himself and Mia. However, as he is 17, the images do not depict a criminal offence, and as he is not more than two years older than Mia, he will have the defence applying to children available.

Thomas will need to cease possession of all of the child abuse material images that depict Mia, or Mia and himself, soon, as the defence applying to children will cease to apply when he turns 18.

The offence of distribution of child abuse material may have been committed when he showed Michael the video as he could be said to be 'exhibiting' the image, although the defence applying to children would apply. However, the summary offence of distribution of an intimate image in section 41DA of the *Summary Offences Act* may also be relevant. As he did not have Mia's consent to show Michael, it is likely that his distribution of the image would be found to be contrary to community standards of acceptable conduct and Thomas would be guilty of that offence.

Mia

In relation to the selfies of herself, and the exchange of selfies with Thomas, Mia will be in the same situation as Thomas. In relation to the video, although Mia may have committed the offence of involving a child in the production of child abuse material, she will have the defence applying to children, as she is not more than two years older than the youngest child depicted (herself) and the image does not depict a criminal offence punishable by imprisonment.

Michael

Michael is guilty of possessing child abuse material, for keeping the video, and distributing child abuse material, for sending it to Chloe and Van.

He has also committed the summary offence of distribution of an intimate image for sending the video to Van and Chloe, as the persons whose images were distributed were under 18 and it would be contrary to community standards of acceptable conduct to send them.

When Michael blue-toothed the video from Thomas's phone to his own, he was 'distributing' the video because he was making the image 'available for access by any other person' and so has committed the offence of distributing child abuse material and the summary offence of distribution of an intimate image for that conduct as well.

Van

Van risks being found guilty of possessing child abuse material in the form of the video of Thomas and Mia on his phone, if he was aware of their ages and did not delete the video straight away.

If Van deletes the video straight away, he may be able to establish the defence of unsolicited possession, as he was sent it without requesting it or seeking it out, and immediately took steps to cease possessing the video.

Chloe

Chloe is under 18 and so potentially comes within the scope the defence applying to children as the image does not depict an offence and she is not more than two years older than Mia, the youngest child in the image. She will need to delete the image before she turns 18, when the defence will cease to apply.

Scenario 5: Ryan and Liam

Ryan is 17 and has recently been sent a video of two young people by a friend, Liam, 19. The video shows a male and female having consensual sex. The couple in the video look like they are in their late teens. Liam sent the video in a group message to a few of his friends, with the comment 'See what I got off the Aussie Uni Hotties site!'. Ryan does not know either of the young people in the video. Ryan believes that the female in the video is 18 because he saw a notice on the website that said 'All people appearing in these videos are 18 years of age and have consented to making these videos'. Ryan thought that was probably true because he thinks that all university students are at least 18. As it happens, the police have managed to break a child abuse material production ring based in Melbourne that operates, among others, the website Liam used, and know that the male in the video, Sean, is 16 and the female, Alice, is 14. Police have tracked down Liam as a user of the website and have interviewed him. He told police who he had sent the video to.

How do the new laws apply?

Ryan and Liam

Whether Ryan or Liam have committed a child abuse material offence will depend on whether they knew that Alice and Sean were under 18 years of age, or knew that they were probably under 18. The website represents those depicted to be 'Aussie Uni Hotties' and over 18 years of age. The couple looked like they were in their late teens. As this is the case, it may be difficult for the prosecution to prove that Ryan or Liam knowingly possessed child abuse material, or that Liam distributed child abuse material, which requires them to prove that he knew it was, or probably was, child abuse material.

The definition of child abuse material is material that depicts or describes a person who is, or appears or is implied to be, a child. Material may be represented as depicting adults (and may depict actual adults), but where the person depicted appears or is implied to be under 18 and the depiction falls within the definition, it will be child abuse material (e.g. if it depicts a person dressed in children's clothes or in a child-like scenario).

Scenario 6: Xavier and Penny

Xavier meets Penny at a party for year 12 graduation. Xavier is 17. Most of Xavier's school friends are there, but there are a few people from year 12 at other schools. Penny is 13 and is at the party because her older brother is graduating. Xavier and Penny talk in the kitchen. Xavier thinks he's seen her around, but can't remember where. Xavier talks about the time he got caught sneaking in to the local pub. Penny laughs and in order to impress Xavier and fit in, she says she can't wait until she turns 18 in six months, so she can get in easily. Xavier assumes that Penny must go to one of the other local high schools.

Xavier and Penny hang around throughout the party, and end up kissing on the couch. They exchange phone numbers. After Xavier leaves, Penny texts Xavier a topless photo of herself.

The next day, Xavier's friends rib him about making out with his friend's younger sister and refer to her actual age.

Xavier is embarrassed, he didn't realise Penny was so young. Xavier deletes the photo from his phone and stops responding to Penny's text messages.

Xavier

Xavier may have committed the offence of possession of child abuse material, however it is likely he will have the defence applying to children. The image does not depict a criminal offence punishable by imprisonment, and at the time of receiving and keeping the photo, Xavier reasonably believed that he was not more than two years older than the child depicted in the image, as Penny had said she was turning 18 in six months.

Penny

Penny would not commit an offence, as the exception applying to children will apply to her for producing an image of herself.

Scenario 7: Nathan and Dylan

Nathan, 15, is unsure about his sexuality and is interested in talking to other guys about it. Looking to get in touch with guys who might have experienced similar feelings at this age, he downloaded a dating app, lying about his age in order to access it.

On the app, Nathan began talking to Dylan, 19. Nathan found Dylan easy to chat to and soon admitted his real age. Dylan said he understood how Nathan was feeling and talked about his own similar experiences at Nathan's age. Their relationship progressed, and Nathan and Dylan met up several times. Eventually, they began a sexual relationship. During the course of this, Dylan and Nathan took a number of sexually explicit photos of themselves having sex together.

After a couple of months, Nathan tried to break up with Dylan. Angry at Nathan after all the support and friendship he had provided, Dylan threatened to send the images to Nathan's friends and family.

How do the new laws apply?

Nathan

Nathan was involved in the production of child abuse material and still possesses the images. However, as he is 15 and the images depict an offence being committed against him (sexual penetration of a child under the age of 16) then the exception applying to the victim of an offence will apply to him.

Dylan

Dylan has committed the sexual offence of sexual penetration of a child under the age of 16.

He has also committed the offences of involving a child in the production of child abuse material, producing child abuse material, and possession of child abuse material.

By threatening to send the images to Nathan's family, he has also committed the summary offence of making a threat to distribute an intimate image.

Scenario 8: Sean, Grace and Daniel

Sean, 20, recently purchased a new phone and is transferring all his files from his old phone onto his computer before getting rid of his old mobile. As he downloads the files, he realises that some of the photos are of his old girlfriend, Grace, from when he was in high school. They had gone out for two years from when he was 15, and she was 14, to when he was 17.

She was the first person he had slept with, and during the period that they had dated, they often sent nudie selfies to one another and also took a number of sexually explicit pictures of themselves together. All of these photos were still on Sean's phone, although he had forgotten that they were there. Sean, not really wanting to delete the photos, transfers them to his computer.

However, Sean has forgotten that after he broke up with Grace he sent some of the naked pictures of Grace to his friend Daniel, who is the same age as Sean. Daniel, now 20, still has the images stored on his computer and looks at them from time to time.

Grace, now 19, has also recently bought a new computer and phone. She still has the photos that they made and shared stored on her old laptop. She does not use her old laptop or phone, and has forgotten that she did not delete the photos from these devices.

A few weeks after purchasing his new phone Sean is arrested for another offence. During a search investigating that offence, Sean's computer is seized by police, and the photos of Grace and Sean are discovered when the files are examined.

How do the new laws apply?

Grace and Sean

Before they turned 18, the images taken and shared between Grace and Sean would fall within either the exception for children for images of themselves, or the defence applying to children — as the images do not depict a criminal offence, and neither of them are more than two years older than the youngest child depicted (Grace).

When Grace and Sean are adults, they can continue to possess images of themselves alone, as the defence of image of oneself is available.

Grace and Sean will have a defence where the accused is not more than two years older than a 16 or 17 year old child and acts with the child's consent, for images of each other as 16 or 17 year olds, provided they do not distribute them to anyone other than each other, and reasonably believe that the other person consents to their conduct with the images (i.e. the ongoing possession).

However, any child abuse material images possessed by Grace and Sean as adults that depict them together as children under the age of 16, or the other person alone (a selfie) under the age of 16, will result in the commission of a child abuse material offence. While youthful sexual exploration may be an acceptable reason to exempt children from criminal responsibility for the existence of these images, it does not excuse ongoing dealing with these images as adults.

In relation to his sending the images of Grace to Daniel when he was 17, Sean has committed the summary offence of distributing an intimate image. (However, as this summary offence was committed more than 12 months ago, he cannot be charged.)

Daniel

Daniel has committed the offences of possession of child abuse material and accessing child abuse material.

When Daniel received the photos, he was under 18, not more than two years older than Grace and the image did not depict a criminal offence. The defence applying to children would have applied to him.

However, now that Daniel is over 18, the exceptions and defence applying to children no longer apply to him.

Although he is not more than two years older than Grace, Daniel was given the images by Sean and it is unlikely that Daniel has a reasonable belief that Grace consents to his ongoing possession of the images. This means the defence for an adult not more than two years older than the 16 or 17 year old child depicted would not apply to Daniel.

As the protection of the exceptions and defences applying to children ends when a person turns 18, Daniel should have deleted all the images before his 18th birthday.

Appendix 2 Ready Reckoner — *Crimes Act 1958* to *Crimes Amendment (Sexual Offences) Act 2016*

The table below provides a summary of how the old provisions correlate to the new provisions. All section references are to the *Crimes Act 1958*, unless otherwise indicated.

Key	
No/limited change	
Moderate change	
Significant change	

Old provision	New provision	New section heading	Comments	Extent of change
Subdivision (5) Corpses				
34B(1)	34BC	Location of corpse or human remains immaterial	Reflects existing law (but includes human remains).	No/limited change
34B(1)(a)	34B	Sexual activity with the corpse of a human being	Updates structure and language of offence. For example, ‘interfere sexually’ and ‘indecent act’ replaced with ‘sexual activity’, which includes both penetrative and non-penetrative sexual conduct.	Moderate change
34B(1)(a)	34BB	Offensive conduct involving human remains	Updates structure and clarifies scope of offence. For example, captures ‘offensive conduct’, which is not necessarily sexual (it is unclear whether the existing offence applies to non-sexual conduct). Broadens offence to include ‘human remains’, not just the corpse of a human being.	Moderate change
34B(1)(b)	34BA	Removal of body parts from the corpse of a human being	Updates structure of offence.	No/limited change
34B(2)(a)	34BD(a)	Exceptions	Broadens exception for preparing a corpse to capture human remains, as reflected in relevant offences. Applies to offences in this Subdivision.	No/limited change
34B(2)(b)	34BD(b)	Exceptions	Broadens exception for medical, hygienic or scientific purposes to capture forensic or law enforcement purposes (e.g. a forensic scientist assisting with a coronial inquest). Applies to offences in this Subdivision.	Moderate change
Subdivision (8) Sexual offences (general provisions)				
34C	36	Consent	Replicates existing provision with the addition of a new consent-negating circumstance (section 36(2)(f)).	Moderate change
35 (Subdivisions (8B) to (8G))	35	Definitions <i>animal</i> <i>domestic partner</i>	Amended definition of ‘ <i>domestic partner</i> ’ applies irrespective of gender identity to recognise transgender and intersex status. New definition of ‘ <i>animal</i> ’.	Moderate change

Old provision	New provision	New section heading	Comments	Extent of change
35 (Subdivisions (8B) to (8G))	35A	Sexual penetration	Based on existing section 37D but simplifies structure. For example, 'compelled' variations of sexual penetration have been removed and located directly within the offence provisions (sections 39 and 41) for consistency. Removes reference to emission of semen, as this is unnecessary.	
35(1) Paragraph (b) of <i>sexual penetration</i>	49T	Exception to sexual penetration offences—medical or hygienic purposes	Reflects current law but relocates the exception in paragraph (b) of the definition of 'sexual penetration' in existing section 35(1) (that applies to existing Subdivisions (8B)-(8G)) to a standalone provision. Applies to an offence against new sections 49A, 49B and 49C.	
	50G	Exception—medical or hygienic purposes	Reflects current law but relocates the exception in paragraph (b) of the definition of 'sexual penetration' in existing section 35(1) (that applies to existing Subdivisions (8B)-(8G)) to a standalone provision. Applies to offences in this Subdivision.	
	52F(a)	Exceptions to sexual penetration offence—medical or hygienic purposes	Reflects current law but relocates the exception in paragraph (b) of the definition of 'sexual penetration' in existing section 35(1) (that applies to existing Subdivisions (8B)-(8G)) to a standalone provision. Applies to an offence against new section 52B.	

Subdivision (8A) Rape and sexual assault

37C	35	Definitions <i>animal</i> <i>domestic partner</i>	Amended definition of 'domestic partner' applies irrespective of gender identity to recognise transgender and intersex status. New definition of 'animal'.	
37D	35A	Sexual penetration	Based on existing section 37D but simplifies structure. For example, 'compelled' variations of sexual penetration have been removed and located directly within the offence provisions (sections 39 and 41) for consistency. Removes reference to emission of semen, as this is unnecessary.	
37E	35B	Touching	Largely replicates existing provision but language recognises transgender and intersex status.	
37F	35C	Taking part in a sexual act	Replicates existing definition.	
37G	36A	Reasonable belief in consent	Reflects existing law.	
37H	36B	Effect of intoxication on reasonable belief	Reflects existing law.	
38	38	Rape	No change to offence in subsection (1). Exception in existing subsection (3) moved to new section 48A.	
38(3)	48A(1)(a)	Exceptions—medical or hygienic purposes	Relocates exceptions in a separate provision rather than within the specific offence provisions. Applies to an offence against sections 38 and 40.	
39	39	Rape by compelling sexual penetration	Amends offence in subsection (1) to include all variations of compelled sexual penetration. Exceptions in existing subsection (3) moved to new section 48A.	
39(3)(a)	48A(1)(b)	Exceptions—medical or hygienic purposes	Relocates exceptions in a separate provision rather than within the specific offence provisions. Applies to an offence against sections 39 and 41.	

Old provision	New provision	New section heading	Comments	Extent of change
39(3)(b)	48A(2)	Exceptions—veterinary, agricultural or scientific purposes	Reflects existing law with minor clarification to separate scientific research purposes from agricultural purposes. Applies to an offence against sections 39 and 41.	
40	40	Sexual assault	No change to offence in subsection (1). Exception in existing subsection (4) moved to new section 48A. Absolute liability element in existing subsection (3) moved to new section 48B.	
40(3)	48B	No defence of mistaken but honest and reasonable belief that touching or activity was not sexual	Reflects existing law but relocates absolute liability elements to a separate provision rather than within the specific offence provisions.	
40(4)	48A(1)(a)	Exceptions—medical or hygienic purposes	Relocates exceptions in a separate provision rather than within the specific offence provisions. Applies to an offence against sections 38 and 40.	
41	41	Sexual assault by compelling sexual touching	Amends offence in subsection (1) to include all variations of compelled sexual touching. Exceptions in existing subsection (4) moved to new section 48A. Absolute liability element in existing subsection (3) moved to new section 48B.	
41(3)	48B	No defence of mistaken but honest and reasonable belief that touching or activity was not sexual	Reflects existing law but relocates absolute liability elements to a separate provision rather than within the specific offence provisions.	
41(4)(a)	48A(1)(b)	Exceptions—medical or hygienic purposes	Relocates exceptions in a separate provision rather than within the specific offence provisions. Applies to an offence against sections 39 and 41.	
41(4)(b)	48A(2)	Exceptions—veterinary, agricultural or scientific purposes	Reflects existing law with minor clarification to separate scientific research purposes from agricultural purposes. Applies to an offence against sections 39 and 41.	
42	42	Assault with intent to commit a sexual offence	Not amended.	
43	43	Threat to commit a sexual offence	Minor changes for consistency with amendments to other provisions.	

Subdivision (8B) Incest

44(1)	50C	Sexual penetration of a child or lineal descendant	Updates structure and language, and clarifies scope of offence. For example, the offence in new section 50C no longer captures sexual penetration of a step-child, which is covered by new section 50D (the existing offences in section 44(1) and (2) overlap as they both include step-children).	
	50D	Sexual penetration of a step-child	Medical or hygienic purposes exception in existing definition of 'sexual penetration' moved to new section 50G. Defence in existing subsections (6) and (6A) moved to new section 50H.	

Old provision	New provision	New section heading	Comments	Extent of change
44(2)	50D	Sexual penetration of a step-child	<p>Updates structure and language, and clarifies scope of offence. For example, the offence no longer captures sexual penetration of the step-child of a person's de facto spouse. However, the offence is expanded to cover sexual penetration of the child of a domestic partner regardless of age of child (existing offence is restricted to a child under the age of 18).</p> <p>'Step-child' is not defined in new section 50A as the definition is contained in the offence.</p> <p>Medical or hygienic purposes exception in existing definition of 'sexual penetration' moved to new section 50G.</p> <p>Defence in existing subsections (6) and (6A) moved to new section 50H.</p> <p>New exception in new section 50I.</p>	
44(3)	50E	Sexual penetration of a parent, lineal ancestor or step-parent	<p>Reflects existing offence but updates structure.</p> <p>Medical or hygienic purposes exception in existing definition of 'sexual penetration' moved to new section 50G.</p> <p>Defence in existing subsections (6) and (6A) moved to new section 50H.</p> <p>New exception in new section 50J.</p>	
44(4)	50F	Sexual penetration of a sibling or half-sibling	<p>Reflects existing offence but updates structure.</p> <p>Medical or hygienic purposes exception in existing definition of 'sexual penetration' moved to new section 50G.</p> <p>Defence in existing subsections (6) and (6A) moved to new section 50H.</p>	
44(5)	50K	Consent not a defence	Reflects existing law. Applies to offences in this Subdivision.	
44(6)	50H	Defence—accused did not consent	<p>Reflects exception in existing section 44(6) and (6A). Language of 'compels' replaced with the concept of lack of consent, which encompasses the concept of 'compelling' in existing subsection (6A).</p> <p>Applies to offences in this Subdivision.</p>	
44(6A)				
44(7)	50B	Rebuttable presumption as to family relationship	Reflects existing law.	
Subdivision (8C) Sexual offences against children				
45(1) with (2)(a)	49A	Sexual penetration of a child under the age of 12	<p>Updates structure and language. For example, the provision removes complex aggravating circumstances, sets out each element clearly and includes an express fault element of intent.</p> <p>Medical or hygienic purposes exception in existing definition of 'sexual penetration' moved to new section 49T.</p>	
45(1) with (2)(b) and (c)	49B	Sexual penetration of a child under the age of 16	<p>Updates structure and language. For example, the provision removes complex aggravating circumstances, sets out each element clearly and includes an express fault element of intent.</p> <p>Increases maximum penalty.</p> <p>Medical or hygienic purposes exception in existing definition of 'sexual penetration' moved to new section 49T.</p> <p>Defences in existing subsection (4)(a) and (b) moved to new sections 49V and 49W. Defence in existing subsection (4)(c) abolished as a child under 16 cannot marry in Australia.</p>	

Old provision	New provision	New section heading	Comments	Extent of change
45(4)(a)	49W	Defences to offences against children under 16—reasonable belief as to age	Based on existing defence but removes element of consent. Requires the child to be aged 12 or more for consistency, and to reflect the protective intention of sexual offences against children. Applies to an offence against new sections 49B, 49D, 49F, 49H and 49K.	
45(4)(b)	49V	Defence to offence against a child under 16—similarity in age	Replicates existing defence. Applies to an offence against new section 49B.	
47(1)	49D	Sexual assault of a child under the age of 16	Updates structure and language. For example, includes an express fault element of intent and replaces outdated language of ‘wilfulness’ and ‘indecency’ with ‘sexual touching’ that is ‘contrary to community standards’. Defences in existing subsection (2)(a) and (b) moved to new sections 49U (exception) and 49W (defence). Defence in existing subsection (2)(c) abolished as a child under 16 cannot marry in Australia.	
	49F	Sexual activity in the presence of a child under the age of 16	Updates structure and language. For example, includes an express fault element of intent and replaces outdated language of ‘wilfulness’ and ‘indecency’ with ‘sexual activity’ that is ‘contrary to community standards’. Allows for offending via technology and has extra-territorial application. Exceptions and defences apply as in new section 49D.	
	49H	Causing a child under the age of 16 to be present during sexual activity	Covers conduct (causing/allowing a child to be present during <i>another person’s</i> sexual activity) that is not expressly captured by existing section 47. Allows for offending via technology and has extra-territorial application. Exceptions and defences apply as in new section 49D.	
47(2)(a)	49W	Defences to offences against children under 16—reasonable belief as to age	Based on existing defence but removes element of consent. Requires the child to be aged 12 or more for consistency, and to reflect the protective intention of sexual offences against children. Applies to an offence against new sections 49B, 49D, 49F, 49H and 49K.	
47(2)(b)	49U	Exceptions to offences against children under 16—similarity in age	Based on the existing defence but removes element of consent. Requires the child to be aged 12 or more for consistency, and to reflect the protective intention of sexual offences against children. Applies to an offence against new sections 49D, 49F and 49H.	

Old provision	New provision	New section heading	Comments	Extent of change
47A	49J	Persistent sexual abuse of a child under the age of 16	Largely replicates existing provision but improves structure. New subsection (5) clarifies which offences are covered by the offence.	
48(1)	49C	Sexual penetration of a child aged 16 or 17 under care, supervision or authority	Updates structure and language. For example, sets out each element clearly and includes an express fault element of intent. 'Marriage' element of offence in existing subsection (1) reclassified as an exception in new section 49Y. Medical or hygienic purposes exception in existing definition of 'sexual penetration' moved to new section 49T. Defences in existing subsection (2) moved to new sections 49X and 49Z. New defence in section 49ZA.	
48(1) — reflects element	49Y	Exceptions to offences against children aged 16 or 17—marriage or domestic partnership	Exception based on 'marriage' element of the existing offences. Broadens exception by applying to domestic partnerships in addition to marriages. Applies to an offence against new sections 49C, 49E, 49G, 49I and 49L.	
48(2)(a)	49X	Defences to offences against children aged 16 or 17 or under 18—reasonable belief as to age	Based on existing defence but removes element of consent. Applies to an offence against new sections 49C, 49E, 49G, 49I and 49L. For an offence against new sections 49Q and 49R, requires the child to be aged 12 or more for consistency, and to reflect the protective intention of sexual offences against children.	
48(2)(b)	49Z	Defences to offences against children aged 16 or 17—reasonable belief as to marriage or domestic partnership	Based on existing defence but removes element of consent. Broadens defence by applying to domestic partnerships, in addition to marriages. Applies to an offence against new sections 49C, 49E, 49G, 49I and 49L.	
48(4)	37 (Subdivision (8))	Care, supervision or authority	Makes several improvements to existing law. For example, expressly includes parents and step-parents, and expands category of 'religious or spiritual guide, leaders or officials of a church or religious body'. Updates language in line with changes to other legislation. For example, 'out of home carer' and 'person having parental responsibility' replace 'foster parent' and 'legal guardian', respectively.	

Old provision	New provision	New section heading	Comments	Extent of change
49(1)	49E	Sexual assault of a child aged 16 or 17 under care, supervision or authority	Updates structure and language. For example, includes an express fault element of intent and replaces outdated language of 'wilfulness' and 'indecency' with 'sexual touching' that is 'contrary to community standards'. 'Marriage' element of offence in existing subsection (1) reclassified as an exception in new section 49Y. Defences in existing subsection (2) moved to new sections 49X and 49Z. New defence in section 49ZA.	
	49G	Sexual activity in the presence of a child aged 16 or 17 under care, supervision or authority	Updates structure and language. For example, includes an express fault element of intent and replaces outdated language of 'wilfulness' and 'indecency' with 'sexual activity' that is 'contrary to community standards'. Allows for offending via technology and has extra-territorial application. Exceptions and defences apply as in new section 49E.	
	49I	Causing a child aged 16 or 17 under care, supervision or authority to be present during sexual activity	Covers conduct (causing/allowing a child to be present during <i>another person's</i> sexual activity) that is not expressly captured by existing section 49. Allows for offending via technology and has extra-territorial application. Exceptions and defences apply as in new section 49E.	
49(1) — reflects element	49Y	Exceptions to offences against children aged 16 or 17—marriage or domestic partnership	Exception based on 'marriage' element of the existing offences. Broadens exception by applying to domestic partnerships in addition to marriages. Applies to an offence against new sections 49C, 49E, 49G, 49I and 49L.	
49(2)(a)	49X	Defences to offences against children aged 16 or 17 or under 18—reasonable belief as to age	Based on existing defence but removes element of consent. Applies to an offence against new sections 49C, 49E, 49G, 49I and 49L. For an offence against new sections 49Q and 49R, requires the child to be aged 12 or more for consistency, and to reflect the protective intention of sexual offences against children.	
49(2)(b)	49Z	Defences to offences against children aged 16 or 17—reasonable belief as to marriage or domestic partnership	Based on existing defence but removes element of consent. Broadens defence by applying to domestic partnerships, in addition to marriages. Applies to an offence against new sections 49C, 49E, 49G, 49I and 49L.	
49A	49S	Facilitating a sexual offence against a child	Updates structure and language. For example, sets out each element of the offence and refers to general sexual offences in subsection (1)(d)(i). Broadens offence by covering conduct engaged in outside Victoria that may be lawful in that jurisdiction but would constitute an offence if the conduct occurred in Victoria.	
49B	49M	Grooming for sexual conduct with a child under the age of 16	Largely replicates existing offence but improves structure and removes historical offences from the definition of 'sexual offence'.	
49C	49O	Failure by a person in authority to protect a child from a sexual offence	Largely replicates existing offence with improvements. For example, applies if a person occupies a position 'in relation to' a relevant organisation and removes historical offences against this section from the definition of 'sexual offence'.	

Old provision	New provision	New section heading	Comments	Extent of change
Subdivision (8D) Sexual offences against persons with a cognitive impairment				
50	52A	Definitions <i>cognitive impairment</i> <i>intellectual disability</i> <i>mental illness</i> <i>residential service</i> <i>service provider</i> <i>treatment or support services</i> <i>worker</i>	New definitions clarify the scope of offences in this Subdivision by defining and updating important terminology. For example, ' <i>mental illness</i> ' is defined separately to cognitive impairment to reflect that a person with a mental illness may not have a cognitive impairment. The phrase ' <i>treatment or support services</i> ' replaces the use of the phrase ' <i>medical or therapeutic services</i> ', and provides a clear list of relevant services.	
51(1)	52B	Sexual penetration of a person with a cognitive impairment or mental illness	Updates structure and language. For example, includes an express fault element of intent and combines the two existing offences into a single offence. Reflects the structure adopted for sexual penetration offences in the Act. 'Spouse or domestic partner' element of existing offences reclassified as an exception in new section 52G. Medical or hygienic purposes exception in existing definition of ' <i>sexual penetration</i> ' moved to new section 52F(a). Defences in existing sections 51(3) and (5), and 52(3) moved to new sections 51H and 51I. New defence in new section 52J.	
51(2)	52C	Sexual assault of a person with a cognitive impairment or mental illness	Updates structure and language. For example, includes an express fault element of intent and replaces outdated language of ' <i>indecency</i> ' with ' <i>sexual touching</i> ' that is ' <i>contrary to community standards</i> '. Also combines the two existing offences into a single offence. 'Spouse or domestic partner' element of existing offences reclassified as an exception in new section 52G. Defences in existing sections 51(3) and (5), and 52(3) moved to new sections 51H and 51I. New defence in new section 52J.	
	52D	Sexual activity in presence of a person with a cognitive impairment or mental illness	Updates structure and language. For example, includes an express fault element of intent and replaces outdated language of ' <i>indecency</i> ' with ' <i>sexual activity</i> ' that is ' <i>contrary to community standards</i> '. Also combines the two existing offences into a single offence. Exceptions and defences apply as in new section 52C.	
	52E	Causing a person with a cognitive impairment or mental illness to be present during sexual activity	Combines the two existing offences into a single offence and covers conduct (causing/allowing a person with a cognitive impairment or mental illness to be present during <i>another person's</i> sexual activity) that is not expressly captured by existing offences. Exceptions and defences apply as in new section 52C.	
51(1) and (2) — reflects element	52G	Exception—marriage or domestic partnership	Exception based on 'spouse or domestic partner' element of the existing offences. Applies to offences in this Subdivision.	

Old provision	New provision	New section heading	Comments	Extent of change
51(3)	52I	Defence—reasonable belief a person does not have a cognitive impairment or mental illness	Based on existing defence in section 51(3). A statutory form of the 'honest and reasonable mistake of fact' defence. Applies to offences in this Subdivision.	
51(5)	52H	Defence—reasonable belief in marriage or domestic partnership	Based on existing defence but removes element of consent. Applies to offences in this Subdivision.	
52(1)	52B	Sexual penetration of a person with a cognitive impairment or mental illness	Updates structure and language. For example, includes an express fault element of intent and combines the two existing offences into a single offence. Reflects the structure adopted for sexual penetration offences in the Act. 'Spouse or domestic partner' element of existing offences reclassified as an exception in new section 52G. Medical or hygienic purposes exception in existing definition of ' <i>sexual penetration</i> ' moved to new section 52F(a). Defences in existing sections 51(3) and (5), and 52(3) moved to new sections 51H and 51I. New defence in new section 52J.	
52(2)	52C	Sexual assault of a person with a cognitive impairment or mental illness	Updates structure and language. For example, includes an express fault element of intent and replaces outdated language of 'indecency' with 'sexual touching' that is 'contrary to community standards'. Also combines the two existing offences into a single offence. 'Spouse or domestic partner' element of existing offences reclassified as an exception in new section 52G. Defences in existing sections 51(3) and (5), and 52(3) moved to new sections 51H and 51I. New defence in new section 52J.	
	52D	Sexual activity in presence of a person with a cognitive impairment or mental illness	Updates structure and language. For example, includes an express fault element of intent and replaces outdated language of 'indecency' with 'sexual activity' that is 'contrary to community standards'. Also combines the two existing offences into a single offence. Exceptions and defences apply as in new section 52C.	
	52E	Causing a person with a cognitive impairment or mental illness to be present during sexual activity	Combines the two existing offences into a single offence and covers conduct (causing/allowing a person with a cognitive impairment or mental illness to be present during <i>another person's</i> sexual activity) that is not expressly captured by existing offences. Exceptions and defences apply as in new section 52C.	
52(1) and (2) — reflects element	52G	Exception—marriage or domestic partnership	Exception based on 'spouse or domestic partner' element of the existing offences. Applies to offences in this Subdivision.	
52(3)	52H	Defence—reasonable belief in marriage or domestic partnership	Based on existing defence but removes element of consent. Applies to offences in this Subdivision.	

Old provision	New provision	New section heading	Comments	Extent of change
Subdivision (8E) Other sexual offences				
53(1)	46	Administration of an intoxicating substance for a sexual purpose	Updates structure and language of provision. For example, focuses on capacity to impair consent rather than ability to resist.	
53(2)			Combines two existing offences capturing sexual penetration and indecent act as it is often difficult and artificial to distinguish the precise sexual intention of the accused.	
54				
55	47	Abduction or detention for a sexual purpose	Updates structure and language for consistency with corresponding offence against child under 16 (new section 49P). Broadens offence to capture sexual touching as well as sexual penetration.	
56	49P	Abduction or detention of a child under the age of 16 for a sexual purpose	Updates structure and broadens offence. For example, captures both penetrative and non-penetrative sexual acts as it is often difficult and artificial to distinguish the precise sexual intention of the accused. Expressly includes general sexual offences in subsection (1)(g). 'Marriage' element of existing offences removed. Increases maximum penalty for consistency with sentencing hierarchy.	
57(1)	44	Procuring sexual act by threat	Updates structure and language of provision. For example, replaces outdated language of 'procuring'. Broadens offence to capture sexual touching as well as sexual penetration.	
57(2)	45	Procuring sexual act by fraud	Updates structure and language of provision. For example, 'false or misleading representation' replaces 'fraudulent means'. Broadens offence to capture sexual touching as well as sexual penetration.	
58(1)	49K	Encouraging a child under the age of 16 to engage in, or be involved in, sexual activity	Updates structure and language. For example, replaces 'solicit or procure' with 'encourage'. Broadens offence to capture sexual activity and encouragement via technology. The encouraged activity need not constitute an offence. Defence expressly provided for in new section 49W.	
58(2)				
58(3)	49L	Encouraging a child aged 16 or 17 under care, supervision or authority to engage in, or be involved in, sexual activity	Updates structure and language. For example, replaces 'solicit or procure' with 'encourage'. Broadens offence to capture sexual activity encouragement via technology. The encouraged activity need not constitute an offence. 'Marriage' element of offence reclassified as an exception in new section 49Y. Defences expressly provided for in new sections 49X, 49Y and 49ZA.	
59(1)	54A	Bestiality	Updates offence for consistency in structure and style with general sexual offences in Subdivision (8A). New exception in section 54B.	
60A				

Old provision	New provision	New section heading	Comments	Extent of change
Subdivision (8EAA) Sexual servitude				
60AB(1)	53A	Definitions <i>commercial sexual services</i> <i>threat</i> <i>use</i>	Includes new definition of 'use' in relation to a debt or purported debt.	
60AB(2)	53B	Using force, threat etc. to cause another person to provide commercial sexual services	Updates structure of provision and broadens offence (by covering where the accused's conduct causes the other person to not be free to leave the place or area where that person provides commercial sexual services) for consistency with similar Commonwealth and NSW offences.	
60AB(3)	53C	Causing another person to provide commercial sexual services in circumstances involving sexual servitude	Updates structure of provision and broadens offence (in the same way as new section 53B) for consistency with similar Commonwealth and NSW offences.	
60AB(4)	53D	Conducting a business in circumstances involving sexual servitude	Updates structure of provision and broadens offence (in the same way as new section 53B) for consistency with similar Commonwealth and NSW offences.	
60AB(5)				
60AC	53E	Aggravated sexual servitude	Reflects existing law.	
60AD	53F	Deceptive recruiting for commercial sexual services	Reflects existing law.	
60AE	53G	Aggravated deceptive recruiting for commercial sexual services	Reflects existing law.	
Subdivision (8EA) Loitering by sexual offender				
60B	49N	Loitering near schools etc. by sexual offender	Largely replicates existing offence but includes clearer elements and definitions. For example, provides an express fault element of knowledge that the place is a school (etc.) and defines 'relevant offence' and 'sexual offence'. 'Reasonable excuse' element reclassified as an exception in new section 49ZB.	
60B(2)(b) — reflects element	49ZB	Exception to loitering offence	Exception based on 'reasonable excuse' element of existing offence. Applies to an offence against new section 49N.	

Old provision	New provision	New section heading	Comments	Extent of change
Subdivision (13) Child pornography				
67A	51A	<i>Definitions</i> <i>administer</i> <i>authorised classifier</i> <i>child</i> <i>child abuse material</i> <i>child abuse material disposal order</i> <i>child abuse material offence</i> <i>classified</i> <i>Commonwealth Act deal</i> <i>electronic material</i> <i>encourage</i> <i>law enforcement agency</i> <i>material</i> <i>police officer</i> <i>relevant industry</i> <i>regulatory authority</i> <i>seized thing</i> <i>website</i>	New definitions clarify the scope of offences in this Subdivision by defining and updating important terminology. For example, ' <i>child abuse material</i> ' replaces ' <i>child pornography</i> ' and includes depictions of non-sexual abuse of children. ' <i>Material</i> ' is a broad, inclusive definition and is not limited to any particular media. An ' <i>image</i> ' may be still, moving, recorded or unrecorded.	
68(1)	51C	Producing child abuse material	Updates structure and broadens scope of offence. For example, clearly sets out each element of the offence and provides an inclusive definition of the ways in which material may be produced. Defences in existing subsections (1A), (2), (3) and (4) moved to new sections 51J (exception) and 51K (exception). New exceptions in new section 51M. New defences in new sections 51L, 51N, 51O, 51P, 51Q and 51R.	
68(1A)	51K	Exception—classification	Based on existing defence but reclassified as an exception. Broadens application to all child abuse material offences in this Subdivision (other than new section 51I).	
68(2)	51J(a)	Exception—administration of the law	Based on existing exceptions but simplified to ensure coverage of a variety of roles associated with the criminal justice system. Applies to all child abuse material offences in this Subdivision (other than new section 51I).	
68(3)				
68(4)				
69(1)	51B	Involving a child in the production of child abuse material	Updates structure and broadens scope of offence. For example, clearly sets out each element of the offence and replaces 'procuring' with the clearer and broader term 'involving'. Defence in existing subsection (2) moved to new section 51K (exception). New exceptions in new sections 51J and 51M. New defences in new sections 51L, 51N, 51O, 51P, 51Q and 51R.	
69(2)	51K	Exception—classification	Based on existing defence but reclassified as an exception. Broadens application to all child abuse material offences in this Subdivision (other than new section 51I).	

Old provision	New provision	New section heading	Comments	Extent of change
70(1)	51G	Possession of child abuse material	<p>Updates structure and broadens scope of offence. For example, provides a new definition of possession of electronic material that departs from the common law definition of possession. Also captures, for example, online storage accounts.</p> <p>New offence has extra-territorial application.</p> <p>Exceptions in existing subsections (4), (5) and (6) moved to new section 51J.</p> <p>New exception in new section 51M.</p> <p>Defence in existing subsections (2) and (3) moved to new sections 51K (exception), 51L, 51O, 51P, 51Q and 51R.</p> <p>New defences in new sections 51N and 51T.</p>	
70(2)(a)	51K	Exception—classification	<p>Based on existing defence but reclassified as an exception.</p> <p>Broadens application to all child abuse material offences in this Subdivision (other than new section 51I).</p>	
70(2)(b) with (3)	51L	Defence of artistic merit or public benefit	<p>Based on existing defence but broadens application to all child abuse material offences in this Subdivision (other than new section 51I).</p> <p>Introduces concept of 'public benefit', which is inclusive and incorporates genuine medical, legal, scientific or educational purposes.</p>	
70(2)(c)	51Q	Defence—marriage or domestic partnership	Based on existing defence but applies to a broader range of offences (i.e. an offence against new sections 51B, 51C, 51D, 51G and 51H).	
	51R	Defence—reasonable belief in marriage or domestic partnership	Broadens exception by applying to domestic partnerships, in addition to marriages.	
70(2)(d)	51P	Defence—accused not more than 2 years older than 16 or 17 year old child and acts with child's consent	<p>Based on existing defence but applies to a broader range of offences (i.e. an offence against new sections 51B, 51C, 51D, 51G and 51H).</p> <p>Inserts additional safeguards to prevent its application in exploitative or unlawful scenarios.</p>	
70(2)(e)	51O	Defence—image of oneself	<p>Based on existing defence but applies to a broader range of offences (i.e. an offence against new sections 51B, 51C, 51G and 51H).</p> <p>Inserts additional safeguards to prevent its application in exploitative or unlawful scenarios.</p>	
70(4)	51J(a)	Exception—administration of the law	Based on existing exceptions but simplified to ensure coverage of a variety of roles associated with the criminal justice system.	
70(5)				
70(6)	51J(b)		Applies to all child abuse material offences in this Subdivision (other than new section 51I).	
70AAA(1)	51M	Exceptions applying to children	<p>Amends aspects of existing exception applicable to children and clarifies elements. For example, the exception no longer applies to a depiction of an act that is a criminal offence punishable by imprisonment.</p> <p>Applies to an offence against new sections 51B, 51C, 51D, 51G and 51H.</p>	
70AAA(3)				
70AAA(2)	51N	Defence applying to children	<p>Replaces aspects of existing exception applicable to children but reclassifies this as a defence.</p> <p>Clarifies elements of defence, for example, the defence applies to depictions of one or more persons (whether or not they include the accused, or other children or an adult).</p>	
70AAA(4)				
			Applies to an offence against new sections 51B, 51C, 51D, 51G and 51H.	

Old provision	New provision	New section heading	Comments	Extent of change
70AAAB(1)	51E	Administering a child abuse material website	Reflects existing law. Exceptions in existing subsections (4), (5) and (6)(a) moved to new sections 51J and 51S. New defence in new section 51L reflects defence in existing subsection (6)(b).	
70AAAB(4)	51S	Exception—reasonable steps to prevent use of website for child abuse material	Reflects existing law. Applies to an offence against new section 51E.	
70AAAB(5)				
70AAAB(6)(a)(i)	51J(a)	Exception—administration of the law	Based on existing exceptions but simplified to ensure coverage of a variety of roles associated with the criminal justice system. Applies to all child abuse material offences in this Subdivision (other than new section 51I).	
70AAAB(6)(a)(ii)	51J(b)			
70AAC(1)	51F	Encouraging use of a website to deal with child abuse material	Reflects existing law. New exceptions in new sections 51J and 51K. New defence in new section 51L.	
70AAAD	51I	Assisting a person to avoid apprehension	Reflects existing law.	
70AAAE	51V	Use of random sample evidence in child abuse material cases	Replicates existing provision with a new definition of ' <i>seized material</i> '.	
70AA	51W	Application for child abuse material disposal order	Together with new section 51X, provides for new scheme for disposal of child abuse material. Relevant where there is no finding of guilt or conviction in a criminal proceeding, or where there is no criminal proceeding. Sets out application process for child abuse material disposal order.	
Subdivision (14) Sexual performances involving a minor				
70AC(a) 70AC(d)	49R	Inviting or offering a sexual performance involving a child	Updates structure and language. For example, defines 'sexual performance' and refers to 'other benefit' to capture benefits that are not financial or difficult to quantify. Allows for offending via technology. Defence expressly provided for in new section 49X.	
70AC(b) 70AC(c)	49Q	Causing or allowing a sexual performance involving a child	Updates structure and language. For example, defines 'sexual performance' and refers to 'other benefit' to capture benefits that are not financial or difficult to quantify. Allows for offending via technology. Defence expressly provided for in new section 49X.	
Summary Offences Act 1966				
17		Obscene, indecent, threatening language and behaviour etc. in public	Clarifies behaviour that may constitute 'indecent, offensive or insulting' behaviour.	
19		Sexual exposure	Updates structure and language of offence. For example, sets out each element clearly and uses the term 'sexual' exposure, which reflects the existing meaning of 'obscene'.	

Appendix 3 Ready Reckoner — *Crimes Amendment (Sexual Offences) Act 2016* to *Crimes Act 1958*

The table below provides a summary of how the new provisions correlate to the old provisions. All section references are to the *Crimes Act 1958*, unless otherwise indicated.

Key	
No/limited change	
Moderate change	
Significant change	

New provision	Old provision	New section heading	Comments	Extent of change
Subdivision (5) Corpses				
34B	34B(1)(a)	Sexual activity with the corpse of a human being	Updates structure and language of offence. For example, 'interfere sexually' and 'indecent act' replaced with 'sexual activity', which includes both penetrative and non-penetrative sexual conduct.	Moderate change
34BA	34B(1)(b)	Removal of body parts from the corpse of a human being	Updates structure of offence.	No/limited change
34BB	34B(1)(a)	Offensive conduct involving human remains	Updates structure and clarifies scope of offence. For example, captures 'offensive conduct', which is not necessarily sexual (it is unclear whether the existing offence applies to non-sexual conduct). Broadens offence to include 'human remains', not just the corpse of a human being.	Moderate change
34BC	34B(1)	Location of corpse or human remains immaterial	Reflects existing law (but includes human remains).	No/limited change
34BD(a)	34B(2)(a)	Exceptions	Broadens exception for preparing a corpse to capture human remains, as reflected in relevant offences. Applies to offences in this Subdivision.	No/limited change
34BD(b)	34B(2)(b)	Exceptions	Broadens exception for medical, hygienic or scientific purposes to capture forensic or law enforcement purposes (e.g. a forensic scientist assisting with a coronial inquest). Applies to offences in this Subdivision.	Moderate change
34BE		No defence of mistaken but honest and reasonable belief that activity was not sexual or conduct was not offensive	Specifies absolute liability elements in Subdivision (5), consistent with sexual offences in Division (8) of Part I of the <i>Crimes Act 1958</i> .	Significant change

New provision	Old provision	New section heading	Comments	Extent of change
Subdivision (8) Sexual offences (general provisions)				
35	35 (Subdivisions (8B) to (8G))	Definitions <i>animal</i> <i>domestic partner</i>	Amended definition of ' <i>domestic partner</i> ' applies irrespective of gender identity to recognise transgender and intersex status. New definition of ' <i>animal</i> '.	
	37C (Subdivision (8A))			
35A	35 (Subdivisions (8B) to (8G))	Sexual penetration	Based on existing section 37D but simplifies structure. For example, 'compelled' variations of sexual penetration have been removed and located directly within the offence provisions (sections 39 and 41) for consistency. Removes reference to emission of semen, as this is unnecessary.	
	37D (Subdivision (8A))			
35B	37E (Subdivision (8A))	Touching	Largely replicates existing provision but language recognises transgender and intersex status.	
35C	37F (Subdivision (8A))	Taking part in a sexual act	Replicates existing definition.	
35D		Sexual activity	New definition that is used in a number of offences, including new sections 48, 49F and 49H.	
36	34C	Consent	Replicates existing provision with the addition of a new consent-negating circumstance (section 36(2)(f)).	
36A	37G (Subdivision (8A))	Reasonable belief in consent	Reflects existing law.	
36B	37H (Subdivision (8A))	Effect of intoxication on reasonable belief	Reflects existing law.	
37	48(4)	Care, supervision or authority	Makes several improvements to existing law. For example, expressly includes parents and step-parents, and expands category of 'religious or spiritual guide, leaders or officials of a church or religious body'. Updates language in line with changes to other legislation. For example, 'out of home carer' and 'person having parental responsibility' replace 'foster parent' and 'legal guardian', respectively.	
Subdivision (8A) Rape, sexual assault and associated sexual offences				
38	38	Rape	No change to offence in subsection (1). Exception in existing subsection (3) moved to new section 48A.	
39	39	Rape by compelling sexual penetration	Amends offence in subsection (1) to include all variations of compelled sexual penetration. Exceptions in existing subsection (3) moved to new section 48A.	
40	40	Sexual assault	No change to offence in subsection (1). Exception in existing subsection (4) moved to new section 48A. Absolute liability element in existing subsection (3) moved to new section 48B.	

New provision	Old provision	New section heading	Comments	Extent of change
41	41	Sexual assault by compelling sexual touching	Amends offence in subsection (1) to include all variations of compelled sexual touching. Exceptions in existing subsection (4) moved to new section 48A. Absolute liability element in existing subsection (3) moved to new section 48B.	
42	42	Assault with intent to commit a sexual offence	Not amended.	
43	43	Threat to commit a sexual offence	Minor changes for consistency with amendments to other provisions.	
44	57(1)	Procuring sexual act by threat	Updates structure and language of provision. For example, replaces outdated language of 'procuring'. Broadens offence to capture sexual touching as well as sexual penetration.	
45	57(2)	Procuring sexual act by fraud	Updates structure and language of provision. For example, 'false or misleading representation' replaces 'fraudulent means'. Broadens offence to capture sexual touching as well as sexual penetration.	
46	53(1) 53(2)	Administration of an intoxicating substance for a sexual purpose	Updates structure and language of provision. For example, focuses on capacity to impair consent rather than ability to resist. Combines two existing offences capturing sexual penetration and indecent act as it is often difficult and artificial to distinguish the precise sexual intention of the accused.	
47	55	Abduction or detention for a sexual purpose	Updates structure and language for consistency with corresponding offence against child under 16 (new section 49P). Broadens offence to capture sexual touching as well as sexual penetration.	
48		Sexual activity directed at another person	New offence that captures a person engaging in a sexual activity directed at another person in public or private. Not limited to exposure of genitals but the accused must intend that seeing the activity cause fear or distress to the other person, or be reckless as to that result.	
48A(1)(a)	38(3) 40(4)	Exceptions—medical or hygienic purposes	Relocates exceptions in a separate provision rather than within the specific offence provisions. Applies to an offence against sections 38 and 40.	
48A(1)(b)	39(3)(a) 41(4)(a)		Relocates exceptions in a separate provision rather than within the specific offence provisions. Applies to an offence against sections 39 and 41.	
48A(2)	39(3)(b) 41(4)(b)	Exceptions—veterinary, agricultural or scientific purposes	Reflects existing law with minor clarification to separate scientific research purposes from agricultural purposes. Applies to an offence against sections 39 and 41.	
48B	40(3) 41(3)	No defence of mistaken but honest and reasonable belief that touching or activity was not sexual	Reflects existing law but relocates absolute liability elements to a separate provision rather than within the specific offence provisions.	

New provision	Old provision	New section heading	Comments	Extent of change
Subdivision (8B) Sexual offences against children				
49A	45(1) with (2)(a)	Sexual penetration of a child under the age of 12	Updates structure and language. For example, the provision removes complex aggravating circumstances, sets out each element clearly and includes an express fault element of intent. Medical or hygienic purposes exception in existing definition of ' <i>sexual penetration</i> ' moved to new section 49T.	
49B	45(1) with (2)(b) and (c)	Sexual penetration of a child under the age of 16	Updates structure and language. For example, the provision removes complex aggravating circumstances, sets out each element clearly and includes an express fault element of intent. Increases maximum penalty. Medical or hygienic purposes exception in existing definition of ' <i>sexual penetration</i> ' moved to new section 49T. Defences in existing subsection (4)(a) and (b) moved to new sections 49V and 49W. Defence in existing subsection (4)(c) abolished as a child under 16 cannot marry in Australia.	
49C	48(1)	Sexual penetration of a child aged 16 or 17 under care, supervision or authority	Updates structure and language. For example, sets out each element clearly and includes an express fault element of intent. 'Marriage' element of offence in existing subsection (1) reclassified as an exception in new section 49Y. Medical or hygienic purposes exception in existing definition of ' <i>sexual penetration</i> ' moved to new section 49T. Defences in existing subsection (2) moved to new sections 49X and 49Z. New defence in section 49ZA.	
49D	47(1)	Sexual assault of a child under the age of 16	Updates structure and language. For example, includes an express fault element of intent and replaces outdated language of 'wilfulness' and 'indecency' with 'sexual touching' that is 'contrary to community standards'. Defences in existing subsection (2)(a) and (b) moved to new sections 49U (exception) and 49W (defence). Defence in existing subsection (2)(c) abolished as a child under 16 cannot marry in Australia.	
49E	49(1)	Sexual assault of a child aged 16 or 17 under care, supervision or authority	Updates structure and language. For example, includes an express fault element of intent and replaces outdated language of 'wilfulness' and 'indecency' with 'sexual touching' that is 'contrary to community standards'. 'Marriage' element of offence in existing subsection (1) reclassified as an exception in new section 49Y. Defences in existing subsection (2) moved to new sections 49X and 49Z. New defence in section 49ZA.	
49F	47(1)	Sexual activity in the presence of a child under the age of 16	Updates structure and language. For example, includes an express fault element of intent and replaces outdated language of 'wilfulness' and 'indecency' with 'sexual activity' that is 'contrary to community standards'. Allows for offending via technology and has extra-territorial application. Exceptions and defences apply as in new section 49D.	

New provision	Old provision	New section heading	Comments	Extent of change
49G	49(1)	Sexual activity in the presence of a child aged 16 or 17 under care, supervision or authority	Updates structure and language. For example, includes an express fault element of intent and replaces outdated language of 'wilfulness' and 'indecency' with 'sexual activity' that is 'contrary to community standards'. Allows for offending via technology and has extra-territorial application. Exceptions and defences apply as in new section 49E.	
49H	47(1)	Causing a child under the age of 16 to be present during sexual activity	Covers conduct (causing/allowing a child to be present during <i>another person's</i> sexual activity) that is not expressly captured by existing section 47. Allows for offending via technology and has extra-territorial application. Exceptions and defences apply as in new section 49D.	
49I	49(1)	Causing a child aged 16 or 17 under care, supervision or authority to be present during sexual activity	Covers conduct (causing/allowing a child to be present during <i>another person's</i> sexual activity) that is not expressly captured by existing section 49. Allows for offending via technology and has extra-territorial application. Exceptions and defences apply as in new section 49E.	
49J	47A	Persistent sexual abuse of a child under the age of 16	Largely replicates existing provision but improves structure. New subsection (5) clarifies which offences are covered by the offence.	
49K	58(1)	Encouraging a child under the age of 16 to engage in, or be involved in, sexual activity	Updates structure and language. For example, replaces 'solicit or procure' with 'encourage'. Broadens offence to capture sexual activity and encouragement via technology. The encouraged activity need not constitute an offence. Defence expressly provided for in new section 49W.	
	58(2)			
49L	58(3)	Encouraging a child aged 16 or 17 under care, supervision or authority to engage in, or be involved in, sexual activity	Updates structure and language. For example, replaces 'solicit or procure' with 'encourage'. Broadens offence to capture sexual activity encouragement via technology. The encouraged activity need not constitute an offence. 'Marriage' element of offence reclassified as an exception in new section 49Y. Defences expressly provided for in new sections 49X, 49Y and 49ZA.	
49M	49B	Grooming for sexual conduct with a child under the age of 16	Largely replicates existing offence but improves structure and removes historical offences from the definition of 'sexual offence'.	
49N	60B	Loitering near schools etc. by sexual offender	Largely replicates existing offence but includes clearer elements and definitions. For example, provides an express fault element of knowledge that the place is a school (etc.) and defines 'relevant offence' and 'sexual offence'. 'Reasonable excuse' element reclassified as an exception in new section 49ZB.	
49O	49C	Failure by a person in authority to protect a child from a sexual offence	Largely replicates existing offence with improvements. For example, applies if a person occupies a position 'in relation to' a relevant organisation and removes historical offences against this section from the definition of 'sexual offence'.	

New provision	Old provision	New section heading	Comments	Extent of change
49P	56(1)	Abduction or detention of a child under the age of 16 for a sexual purpose	Updates structure and broadens offence. For example, captures both penetrative and non-penetrative sexual acts as it is often difficult and artificial to distinguish the precise sexual intention of the accused.	
	56(2)		Expressly includes general sexual offences in subsection (1)(g). 'Marriage' element of existing offences removed. Increases maximum penalty for consistency with sentencing hierarchy.	
49Q	70AC(b)	Causing or allowing a sexual performance involving a child	Updates structure and language. For example, defines 'sexual performance' and refers to 'other benefit' to capture benefits that are not financial or difficult to quantify. Allows for offending via technology. Defence expressly provided for in new section 49X.	
	70AC(c)			
49R	70AC(a)	Inviting or offering a sexual performance involving a child	Updates structure and language. For example, defines 'sexual performance' and refers to 'other benefit' to capture benefits that are not financial or difficult to quantify. Allows for offending via technology. Defence expressly provided for in new section 49X.	
	70AC(d)			
49S	49A	Facilitating a sexual offence against a child	Updates structure and language. For example, sets out each element of the offence and refers to general sexual offences in subsection (1)(d)(i). Broadens offence by covering conduct engaged in outside Victoria that may be lawful in that jurisdiction but would constitute an offence if the conduct occurred in Victoria.	
49T	35(1) Paragraph (b) of <i>sexual penetration</i>	Exception to sexual penetration offences—medical or hygienic purposes	Reflects current law but relocates the exception in paragraph (b) of the definition of 'sexual penetration' in existing section 35(1) (that applies to existing Subdivisions (8B)–(8G)) to a standalone provision. Applies to an offence against new sections 49A, 49B and 49C.	
49U	47(2)(b)	Exceptions to offences against children under 16—similarity in age	Based on the existing defence but removes element of consent. Requires the child to be aged 12 or more for consistency, and to reflect the protective intention of sexual offences against children. Applies to an offence against new sections 49D, 49F and 49H.	
49V	45(4)(b)	Defence to offence against a child under 16—similarity in age	Replicates existing defence. Applies to an offence against new section 49B.	
49W	45(4)(a)	Defences to offences against children under 16	Based on existing defence but removes element of consent.	
	47(2)(a)	—reasonable belief as to age	Requires the child to be aged 12 or more for consistency, and to reflect the protective intention of sexual offences against children. Applies to an offence against new sections 49B, 49D, 49F, 49H and 49K.	
49X	48(2)(a)	Defences to offences against children aged 16	Based on existing defence but removes element of consent.	
	49(2)(a)	or 17 or under 18—reasonable belief as to age	Applies to an offence against new sections 49C, 49E, 49G, 49I and 49L. For an offence against new sections 49Q and 49R, requires the child to be aged 12 or more for consistency, and to reflect the protective intention of sexual offences against children.	

New provision	Old provision	New section heading	Comments	Extent of change
49Y	48(1) and 49(1)—reflects element	Exceptions to offences against children aged 16 or 17—marriage or domestic partnership	Exception based on ‘marriage’ element of the existing offences. Broadens exception by applying to domestic partnerships in addition to marriages. Applies to an offence against new sections 49C, 49E, 49G, 49I and 49L.	
49Z	48(2)(b)	Defences to offences against children aged 16 or 17—reasonable belief as to marriage or domestic partnership	Based on existing defence but removes element of consent. Broadens defence by applying to domestic partnerships, in addition to marriages. Applies to an offence against new sections 49C, 49E, 49G, 49I and 49L.	
	49(2)(b)			
49ZA		Defences to offences against children aged 16 or 17—reasonable belief as to care, supervision or authority	New defence that applies to an offence against new sections 49C, 49E, 49G, 49I and 49L.	
49ZB	60B(2)(b) — reflects element	Exception to loitering offence	Exception based on ‘reasonable excuse’ element of existing offence. Applies to an offence against new section 49N.	
49ZC		No defence of mistaken but honest and reasonable belief of certain matters	Specifies absolute liability elements of offences in Subdivision (8B).	

Subdivision (8C) Incest

50A		Definitions <i>child</i> <i>half-sibling</i> <i>lineal ancestor</i> <i>lineal descendant</i> <i>parent</i> <i>sibling</i> <i>step-parent</i>	New definitions clarify the scope of offences in this Subdivision by defining and updating important terminology. For example, ‘ <i>child</i> ’ includes a child by birth, a genetic child, a child by operation of the <i>Adoption Act 1984</i> and a child by operation of the <i>Status of Children Act 1974</i> .	
50B	44(7)	Rebuttable presumption as to family relationship	Reflects existing law.	
50C	44(1)	Sexual penetration of a child or lineal descendant	Updates structure and language, and clarifies scope of offence. For example, the offence no longer captures sexual penetration of a step-child, which is covered by new section 50D (the existing offences in section 44(1) and (2) overlap as they both include step-children). Medical or hygienic purposes exception in existing definition of ‘sexual penetration’ moved to new section 50G. Defence in existing subsections (6) and (6A) moved to new section 50H.	

New provision	Old provision	New section heading	Comments	Extent of change
50D	44(1)	Sexual penetration of a step-child	<p>Updates structure and language, and clarifies scope of offence. For example, the offence no longer captures sexual penetration of the step-child of a person's de facto spouse. However, the offence is expanded to cover sexual penetration of the child of a domestic partner regardless of age of child (existing offence is restricted to a child under the age of 18).</p> <p>'Step-child' is not defined in new section 50A as the definition is contained in the offence.</p> <p>Medical or hygienic purposes exception in existing definition of 'sexual penetration' moved to new section 50G.</p> <p>Defence in existing subsections (6) and (6A) moved to new section 50H.</p> <p>New exception in new section 50I.</p>	
	44(2)			
50E	44(3)	Sexual penetration of a parent, lineal ancestor or step-parent	<p>Reflects existing offence but updates structure.</p> <p>Medical or hygienic purposes exception in existing definition of 'sexual penetration' moved to new section 50G.</p> <p>Defence in existing subsections (6) and (6A) moved to new section 50H.</p> <p>New exception in new section 50J.</p>	
50F	44(4)	Sexual penetration of a sibling or half-sibling	<p>Reflects existing offence but updates structure.</p> <p>Medical or hygienic purposes exception in existing definition of 'sexual penetration' moved to new section 50G.</p> <p>Defence in existing subsections (6) and (6A) moved to new section 50H.</p>	
50G	35(1) Paragraph (b) of <i>sexual penetration</i>	Exception—medical or hygienic purposes	<p>Reflects current law but relocates the exception in paragraph (b) of the definition of 'sexual penetration' in existing section 35(1) (that applies to existing Subdivisions (8B)-(8G)) to a standalone provision.</p> <p>Applies to offences in this Subdivision.</p>	
50H	44(6) and (6A)	Defence—accused did not consent	<p>Reflects exception in existing section 44(6) and (6A).</p> <p>Language of 'compels' replaced with the concept of lack of consent, which encompasses the concept of 'compelling' in existing subsection (6A).</p> <p>Applies to offences in this Subdivision.</p>	
50I		Exceptions to offences against section 50D	<p>New exception provides protection of a step-parent in a consenting sexual relationship with an adult step-child where a relationship of care, supervision or authority has not existed.</p>	
50J(1)		Exceptions to offences against section 50E	New exception for an adult step-child, which covers the same situation as new section 50I.	
50J(2)			New exception for childhood victims of sexual abuse that continues into adulthood, recognising that the person should not be criminalised for ongoing victimisation.	
50K	44(5)	Consent not a defence	Reflects existing law. Applies to offences in this Subdivision.	

New provision	Old provision	New section heading	Comments	Extent of change
Subdivision (8D) <i>Child abuse material</i>				
51A	67A	<i>Definitions</i> <i>administer</i> <i>authorised classifier</i> <i>child</i> <i>child abuse material</i> <i>child abuse material disposal order</i> <i>child abuse material offence</i> <i>classified</i> <i>Commonwealth Act deal</i> <i>electronic material</i> <i>encourage</i> <i>law enforcement agency</i> <i>material</i> <i>police officer</i> <i>relevant industry</i> <i>regulatory authority</i> <i>seized thing</i> <i>website</i>	New definitions clarify the scope of offences in this Subdivision by defining and updating important terminology. For example, ' <i>child abuse material</i> ' replaces ' <i>child pornography</i> ' and includes depictions of non-sexual abuse of children. ' <i>Material</i> ' is a broad, inclusive definition and is not limited to any particular media. An ' <i>image</i> ' may be still, moving, recorded or unrecorded.	
51B	69(1)	Involving a child in the production of child abuse material	Updates structure and broadens scope of offence. For example, clearly sets out each element of the offence and replaces 'procuring' with the clearer and broader term 'involving'. Defence in existing subsection (2) moved to new section 51K (exception). New exceptions in new sections 51J and 51M. New defences in new sections 51L, 51N, 51O, 51P, 51Q and 51R.	
51C	68(1)	Producing child abuse material	Updates structure and broadens scope of offence. For example, clearly sets out each element of the offence and provides an inclusive definition of the ways in which material may be produced. Defences in existing subsections (1A), (2), (3) and (4) moved to new sections 51J (exception) and 51K (exception). New exceptions in new section 51M. New defences in new sections 51L, 51N, 51O, 51P, 51Q and 51R.	
51D		Distributing child abuse material	New offence in <i>Crimes Act 1958</i> , which replaces existing section 57A of the <i>Classification (Publications, Films, Computer Games) (Enforcement) Act 1995</i> . Ways in which material may be distributed is set out in new section 51A(2)(b). Clarifies elements of offence and broadens offence as is not limited to online publication or transmission. New offence has extra-territorial application. New exceptions in new sections 51J, 51K and 51M. New defences in new sections 51L, 51P, 51Q and 51R.	
51E	70AAAB(1)	Administering a child abuse material website	Reflects existing law. Exceptions in existing subsections (4), (5) and (6)(a) moved to new sections 51J and 51S. New defence in new section 51L reflects defence in existing subsection (6)(b).	

New provision	Old provision	New section heading	Comments	Extent of change
51F	70AAC(1)	Encouraging use of a website to deal with child abuse material	Reflects existing law. New exceptions in new sections 51J and 51K. New defence in new section 51L.	
51G	70(1)	Possession of child abuse material	Updates structure and broadens scope of offence. For example, provides a new definition of possession of electronic material that departs from the common law definition of possession. Also captures, for example, online storage accounts. New offence has extra-territorial application. Exceptions in existing subsections (4), (5) and (6) moved to new section 51J. New exception in new section 51M. Defence in existing subsections (2) and (3) moved to new sections 51K (exception), 51L, 51O, 51P, 51Q and 51R. New defences in new sections 51N and 51T.	
51H		Accessing child abuse material	New offence that criminalises a person accessing child abuse material. Applies to the access of physical or electronic material. Exceptions in new sections 51J, 51K and 51M. Defences in new sections 51L, 51N, 51O, 51P, 51Q and 51R.	
51I	70AAAD	Assisting a person to avoid apprehension	Reflects existing law.	
51J(a)	68(2) and (3) 70(4) and (5) 70AAAB(6)(a)(i)	Exception—administration of the law	Based on existing exceptions but simplified to ensure coverage of a variety of roles associated with the criminal justice system. Applies to all child abuse material offences in this Subdivision (other than new section 51I).	
51J(b)	68(4) 70(6) 70AAAB(6)(a)(ii)	Exception—administration of the law		
51K	68(1A) 69(2) 70(2)(a)	Exception—classification	Based on existing defence but reclassified as an exception. Broadens application to all child abuse material offences in this Subdivision (other than new section 51I).	
51L	70(2)(b) with (3)	Defence of artistic merit or public benefit	Based on existing defence but broadens application to all child abuse material offences in this Subdivision (other than new section 51I). Introduces concept of 'public benefit', which is inclusive and incorporates genuine medical, legal, scientific or educational purposes.	
51M	70AAA(1) 70AAA(3)	Exceptions applying to children	Amends aspects of existing exception applicable to children and clarifies elements. For example, the exception no longer applies to a depiction of an act that is a criminal offence punishable by imprisonment. Applies to an offence against new sections 51B, 51C, 51D, 51G and 51H.	

New provision	Old provision	New section heading	Comments	Extent of change
51N	70AAA(2)	Defence applying to children	Replaces aspects of existing exception applicable to children but reclassifies this as a defence. Clarifies elements of defence, for example, the defence applies to depictions of one or more persons (whether or not they include the accused, or other children or an adult).	
	70AAA(4)		Applies to an offence against new sections 51B, 51C, 51D, 51G and 51H.	
51O	70(2)(e)	Defence—image of oneself	Based on existing defence but applies to a broader range of offences (i.e. an offence against new sections 51B, 51C, 51G and 51H). Inserts additional safeguards to prevent its application in exploitative or unlawful scenarios.	
51P	70(2)(d)	Defence—accused not more than 2 years older than 16 or 17 year old child and acts with child's consent	Based on existing defence but applies to a broader range of offences (i.e. an offence against new sections 51B, 51C, 51D, 51G and 51H). Inserts additional safeguards to prevent its application in exploitative or unlawful scenarios.	
51Q	70(2)(c)	Defence—marriage or domestic partnership	Based on existing defence but applies to a broader range of offences (i.e. an offence against new sections 51B, 51C, 51D, 51G and 51H). Broadens exception by applying to domestic partnerships, in addition to marriages.	
51R	70(2)(c)	Defence—reasonable belief in marriage or domestic partnership	Based on existing defence but applies to a broader range of offences (i.e. an offence against new sections 51B, 51C, 51D, 51G and 51H). Broadens exception by applying to domestic partnerships, in addition to marriages.	
51S	70AAAB(4) and (5)	Exception—reasonable steps to prevent use of website for child abuse material	Reflects existing law. Applies to an offence against new section 51E.	
51T		Defence—unsolicited possession	New defence that applies to an offence against new section 51G. Based on similar defences in other jurisdictions (e.g. section 130E(3) of the Criminal Code of Tasmania).	
51U		No defence of mistaken but honest and reasonable belief that child abuse material not offensive	Specifies absolute liability elements of offences in Subdivision (8D).	
51V	70AAAE	Use of random sample evidence in child abuse material cases	Replicates existing provision with a new definition of ' <i>seized material</i> '.	
51W	70AA	Application for child abuse material disposal order	Together with new section 51X, provides for new scheme for disposal of child abuse material. Relevant where there is no finding of guilt or conviction in a criminal proceeding, or where there is no criminal proceeding. Sets out application process for child abuse material disposal order.	
51X		Child abuse material disposal order	Together with new section 51W, provides for new scheme for disposal of child abuse material. Sets out when court may order disposal of child abuse material	
51Y		Disposal of thing or material by consent	For the avoidance of doubt, provides that disposal arrangements for child abuse material can be made by consent.	

New provision	Old provision	New section heading	Comments	Extent of change
Subdivision (8E) Sexual offences against persons with a cognitive impairment or mental illness				
52A	50	Definitions <i>cognitive impairment</i> <i>intellectual disability</i> <i>mental illness</i> <i>residential service</i> <i>service provider</i> <i>treatment or support services</i> <i>worker</i>	New definitions clarify the scope of offences in this Subdivision by defining and updating important terminology. For example, ' <i>mental illness</i> ' is defined separately to <i>cognitive impairment</i> to reflect that a person with a mental illness may not have a cognitive impairment. The phrase ' <i>treatment or support services</i> ' replaces the use of the phrase ' <i>medical or therapeutic services</i> ', and provides a clear list of relevant services.	
52B	51(1)	Sexual penetration of a person with a cognitive impairment or mental illness	Updates structure and language. For example, includes an express fault element of intent and combines the two existing offences into a single offence.	
	52(1)		Reflects the structure adopted for sexual penetration offences in the Act. 'Spouse or domestic partner' element of existing offences reclassified as an exception in new section 52G. Medical or hygienic purposes exception in existing definition of ' <i>sexual penetration</i> ' moved to new section 52F(a). Defences in existing sections 51(3) and (5), and 52(3) moved to new sections 51H and 51I. New defence in new section 52J.	
52C	51(2)	Sexual assault of a person with a cognitive impairment or mental illness	Updates structure and language. For example, includes an express fault element of intent and replaces outdated language of ' <i>indecency</i> ' with ' <i>sexual touching</i> ' that is ' <i>contrary to community standards</i> '. Also combines the two existing offences into a single offence.	
	52(2)		'Spouse or domestic partner' element of existing offences reclassified as an exception in new section 52G. Defences in existing sections 51(3) and (5), and 52(3) moved to new sections 51H and 51I. New defence in new section 52J.	
52D	51(2)	Sexual activity in presence of a person with a cognitive impairment or mental illness	Updates structure and language. For example, includes an express fault element of intent and replaces outdated language of ' <i>indecency</i> ' with ' <i>sexual activity</i> ' that is ' <i>contrary to community standards</i> '. Also combines the two existing offences into a single offence.	
	52(2)		Exceptions and defences apply as in new section 52C.	
52E	51(2)	Causing a person with a cognitive impairment or mental illness to be present during sexual activity	Combines the two existing offences into a single offence and covers conduct (causing/allowing a person with a cognitive impairment or mental illness to be present during <i>another person's sexual activity</i>) that is not expressly captured by existing offences. Exceptions and defences apply as in new section 52C.	
	52(2)			
52F(a)	35(1) Paragraph (b) of <i>sexual penetration</i>	Exceptions to sexual penetration offence—medical or hygienic purposes	Reflects current law but relocates the exception in paragraph (b) of the definition of ' <i>sexual penetration</i> ' in existing section 35(1) (that applies to existing Subdivisions (8B)-(8G)) to a standalone provision. Applies to an offence against new section 52B.	

New provision	Old provision	New section heading	Comments	Extent of change
52F(b)		Exceptions to sexual penetration offence—veterinary, agricultural or scientific purposes	New exception to include veterinary, agricultural and scientific purposes to reflect that the coverage of offences includes animals. Consistent with other offences involving sexual penetration. Applies to an offence against new section 52B.	
52G	51(1) and (2)—reflects element	Exception—marriage or domestic partnership	Exception based on 'spouse or domestic partner' element of the existing offences. Applies to offences in this Subdivision.	
	52(1) and (2)—reflects element			
52H	51(5)	Defence—reasonable belief in marriage or domestic partnership	Based on existing defence but removes element of consent. Applies to offences in this Subdivision.	
	52(3)			
52I	51(3)	Defence—reasonable belief a person does not have a cognitive impairment or mental illness	Based on existing defence in section 51(3). A statutory form of the 'honest and reasonable mistake of fact' defence. Applies to offences in this Subdivision.	
52J		Defence—reasonable belief the service provider does not provide treatment or support services to the person with a cognitive impairment or mental illness	New defence that applies to offences in this Subdivision.	
52K		No defence of mistaken but honest and reasonable belief of certain matters	Specifies absolute liability elements of offences in Subdivision (8E).	

Subdivision (8F) Sexual servitude

53A	60AB(1)	Definitions <i>commercial sexual services</i> <i>threat</i> <i>use</i>	Includes new definition of 'use' in relation to a debt or purported debt.	
53B	60AB(2)	Using force, threat etc. to cause another person to provide commercial sexual services	Updates structure of provision and broadens offence (by covering where the accused's conduct causes the other person to not be free to leave the place or area where that person provides commercial sexual services) for consistency with similar Commonwealth and NSW offences.	
53C	60AB(3)	Causing another person to provide commercial sexual services in circumstances involving sexual servitude	Updates structure of provision and broadens offence (in the same way as new section 53B) for consistency with similar Commonwealth and NSW offences.	
53D	60AB(4)	Conducting a business in circumstances involving sexual servitude	Updates structure of provision and broadens offence (in the same way as new section 53B) for consistency with similar Commonwealth and NSW offences.	
53E	60AC	Aggravated sexual servitude	Reflects existing law.	

New provision	Old provision	New section heading	Comments	Extent of change
53F	60AD	Deceptive recruiting for commercial sexual services	Reflects existing law.	
53G	60AE	Aggravated deceptive recruiting for commercial sexual services	Reflects existing law.	
Subdivision (8FA) Other sexual offences				
54A	59(1)	Bestiality	Updates offence for consistency in structure and style with general sexual offences in Subdivision (8A). New exception in section 54B.	
54B		Exception – veterinary, agricultural or scientific research	New exception consistent with other offences involving sexual penetration.	
Summary Offences Act 1966				
17		Obscene, indecent, threatening language and behaviour etc. in public	Clarifies behaviour that may constitute ‘indecent, offensive or insulting’ behaviour.	
19		Sexual exposure	Updates structure and language of offence. For example, sets out each element clearly and uses the term ‘sexual’ exposure, which reflects the existing meaning of ‘obscene’.	

