

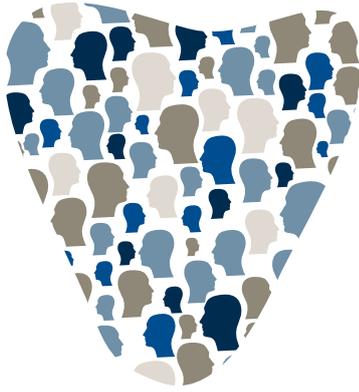


sentencing
ADVISORY
COUNCIL

MANDATORY SENTENCING FOR SERIOUS SEX OFFENCES AGAINST CHILDREN

FINAL REPORT No.7

September 2016



About this Final Advice

This reference to the Sentencing Advisory Council was made by the Attorney-General and Minister for Justice, the Hon Vanessa Goodwin MLC in October 2015.

In April 2016, the Council provided a consultation paper to stakeholders, which set out the Council's preliminary views and sought feedback in relation to the implementation of minimum mandatory sentencing for those who commit serious sexual offences against children.

This final report reiterates the Council's previous recommendation against the introduction of mandatory sentencing for sex offenders. However, in light of the terms of reference, it includes preliminary advice in relation to the implementation of minimum mandatory sentencing for those who commit serious sexual offences against children.

Information on the Sentencing Advisory Council

The Sentencing Advisory Council was established in June 2010 by the then Attorney-General and Minister for Justice, the Hon Lara Giddings MP. The Council was established, in part, as an advisory body to the Attorney-General. Its other functions are to bridge the gap between the community, the courts and the government by informing, educating and advising on sentencing issues in Tasmania. At the time that this paper was concluded, the Council members were Emeritus Professor Arie Freiberg AM (Chair), Dr Jeremy Prichard, Mr Scott Tilyard, Mr Peter Dixon, Ms Kim Baumeler, Mr Graham Hill, Professor Rob White, Ms Terese Henning, Ms Jo Flanagan and Ms Linda Mason. It is noted that Ms Kate Cuthbertson has recently joined the Council but did not take part in the Council's deliberations relating to this project.

Acknowledgements

The Council would like to thank all those who provided information in relation to this reference, in particular Hugh Donnelly, Pierrette Mizzi and Brandi Baylock, Judicial Commission of New South Wales; Fiona Young, Supreme Court Library, Queensland; Dorothy Shea, Supreme Court Library, Tasmania; Michelle Lowe, Department of Justice, Tasmania.

This paper was written by Dr Rebecca Bradfield.

Consultations

In preparing this final report, the Council met with the following:

- Mr Chris Gunson, President Tasmanian Bar
- Mr Daryl Coates, Director of Public Prosecutions
- Mr Greg Barnes and Ms Jennifer White, Prisoners Legal Service
- Mr Luke Rheinberger, Executive Director Law Society and Jackie Hartnett and Jonathon McCarthy, members of the Criminal Law Committee
- Catherine Edwards, Julie Schade and Cassandra Dowling, Victims Support Service
- The Honourable Chief Justice Alan Blow, Supreme Court of Tasmania.

The Council also received a written submission from Tasmania Police.

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Executive Summary

TERMS OF REFERENCE

The Tasmanian Liberal Party made a pre-election commitment to impose minimum mandatory sentences for those who commit serious sexual offences against children with a view to protecting children from sexual abuse. In October 2015, the Attorney-General and Minister for Justice, the Hon Vanessa Goodwin MLC requested that the Sentencing Advisory Council provide a report on the implementation of minimum mandatory sentencing for those who commit serious sexual offences against children, including advice as to which offences should be captured within the scope of the mandatory sentencing provisions and what those mandatory minimum sentences should be.

The following terms of reference were given to the Council:

- (1) Investigate the implementation of minimum mandatory sentences for those who commit serious sexual offences against children.
- (2) Examine Tasmania's current legislation for sentencing sex offenders and provide preliminary advice on the legislative means required to implement mandatory sentencing for serious sex offences committed against children.
- (3) Provide a report within six months of the commencement of this project.

'Serious Sexual Offences' include all serious sexual crimes listed in Appendix D of the *Criminal Code Act 1924* (Tas) and include:

- Section 124: Sexual intercourse with young person under the age of 17 years;
- Section 125A: Maintaining sexual relationship with young person under the age of 17 years;
- Section 125C(2): Procuring unlawful sexual intercourse with person under the age of 17 years;

- Section 126: Sexual intercourse with person with mental impairment;
- Section 127A: Aggravated sexual assault;
- Section 130: Involving person under age of 18 years in production of child exploitation material;
- Section 130A: Producing child exploitation material;
- Section 130B: Distributing child exploitation material;
- Section 133: Incest;
- Section 178A: Performing female genital mutilation;
- Section 185: Rape.

As well, these crimes under the *Criminal Code Act 1924* (Tas):

- Section 125B: Indecent act with young person;
- Section 127: Indecent assault.

As well, these offences under the *Sex Industry Offences Act 2005* (Tas):

- Section 9(1): Procuring or otherwise causing or permitting a child to provide sexual services in a sexual services business;
- Section 9(2): Receiving a fee or reward that a person knows is derived, directly or indirectly, from sexual services provided by a child in a sexual services business.

In April 2016, the Council provided a copy of a consultation paper to key stakeholders, setting out the Council's preliminary views. The Council sought the feedback of stakeholders about the views it had expressed in relation to the implementation of mandatory sentencing in Tasmania for serious child sex offences and offered to meet in person with these stakeholders and/or receive written submissions. The Council met with six stakeholders.

APPROACH OF COUNCIL AND THE STRUCTURE OF THIS PAPER

The Council has previously indicated that it does not recommend the introduction of mandatory sentencing in Tasmania.¹ In its consideration of sex offence sentencing, the Council expressed its concerns about sentencing levels for sex offences in some circumstances and the Council indicated that a mechanism needed to be found to provide for an incremental increase in sentencing for sex offences in appropriate cases. However, the Council stated that this view should not be interpreted to mean that the Council was recommending a blanket increase in sentences for all sex offenders.² The Council's assessment of the appropriateness of sentencing for sex offences was examined from multiple perspectives and was based on a thorough examination of current sentencing practices. The Council made recommendations about legislative responses that may address its concerns with a view to providing for an increase in sentencing in appropriate cases. The suggested legislative responses did not include a recommendation to introduce mandatory minimum sentences.

Accordingly, in Part A, the Council elaborates on its reservations about a broad-based mandatory sentencing scheme for sexual offences.

However, to respond to the Government's stated intention to introduce a mandatory sentencing scheme, Part B of the paper sets out a model for a mandatory minimum sentencing scheme in Tasmania. The proposed elements of this scheme should be understood as the Council's 'preliminary advice', as requested in its terms of reference, and should not be taken as its endorsement of such a scheme. Part B should be read in the light of its views expressed in Part A.

PART A

As part of its consideration of the implementation of a mandatory minimum sentencing scheme as requested by the terms of reference, the Council has identified objections to the implementation of the scheme. These are that:

- (1) mandatory minimum sentences provide an incomplete guidance system to the courts;
- (2) mandatory minimum sentences may lead to unrealistic expectations in the community that changes to sentencing policy will deter potential offenders when there is no evidence to suggest that increased penalty levels act as a deterrent;
- (3) mandatory minimum sentences may reduce the incentive to enter a plea of guilty;
- (4) mandatory minimum sentences reduce transparency and consistency because discretion is transferred from judges to prosecutors;
- (5) mandatory minimum sentences will result in significant financial costs; and
- (6) that it may be prudent to wait until the Supreme Court has had an opportunity to respond to the significant changes in sentencing practice resulting from the government's proposed sentencing reforms. The Council also notes that an examination of recent sentencing practice reveals a change in judicial attitudes to (and an increase in the sentences imposed on) those who commit serious sexual offences against children.

After consideration of these concerns, and as a result of the process of conceptualising the principles that should guide the introduction of a mandatory minimum sentencing scheme, the Council's view remains that mandatory sentencing is inherently flawed. The Council has grave concerns that the introduction of mandatory minimum sentencing for sexual offences in Tasmania will create injustice by unduly fettering judicial discretion.

Accordingly, the Council reiterates its previous recommendation that mandatory sentencing not be introduced in Tasmania.

This should not be taken to mean that Council considers that sexual offences committed against children are not serious or that serious sex offenders ought not to receive appropriate sentences. Instead, the Council's view is that the introduction of mandatory minimum sentences will create unjustified unfairness without achieving its stated aims of deterring offenders and increasing transparency. Further, any attempt to ameliorate the injustices of a mandatory sentencing scheme by restricting its operation to deserving cases (as the Council outlines in Part B) creates difficulties and introduces undue complexity in the sentencing process.

¹ See Sentencing Advisory Council (Tasmania) (TSAC), *Sex Offence Sentencing*, Final Report No 4 (2015). Recommendation 5 provided that Tasmania should not introduce mandatory sentencing penalties under the *Criminal Code* (Tas) for sex offences: at xi.

² *Ibid* vii.

PART B

In addressing the terms of reference, the Council's investigation of the implementation of minimum mandatory sentences for those who commit serious sexual offences against children considers the following issues:

- (1) the offences that the scheme should be limited to, which are addressed in Chapter 2;
- (2) the structure of the mandatory minimum sentencing scheme, which is addressed in Chapter 3;
- (3) exceptions to the mandatory minimum sentencing scheme, which are addressed in Chapter 4;
- (4) the levels of the mandatory minimum sentences, which are addressed in Chapter 5.

OFFENCES THAT THE MANDATORY MINIMUM SCHEME SHOULD BE LIMITED TO

The Council acknowledges that all sexual offending against children is inherently serious. However, as requested by the Attorney-General, it is necessary to determine which offences should be included in the minimum mandatory sentencing scheme as an initial matter in the Council's investigation of the implementation of a scheme for those who commit serious sexual offences against children.

As a consequence of the significant changes in sentencing methodology that will follow from the introduction of mandatory minimum sentences, it is the Council's view that it does not follow that all sexual offences that can be committed against children should automatically be included in the scheme. Instead, in making this determination, the Council's approach has been to isolate sexual offences that can be committed against children and then evaluate those offences according to coherent and transparent principles. Accordingly, the Council has considered the following issues:

- (1) Is the offence a sexual offence that can be committed against children?
- (2) Are there sound reasons for the inclusion of the offence in the scheme?

In determining whether an offence should be included in the mandatory minimum scheme, the Council has adapted criteria from a number of sources to develop a set of principles for application in the Tasmanian context. The approach of the Council has been to evaluate the offences according to the following principles:

- the offence is triable on indictment only;
- the offence is prevalent;
- the offence involves a vulnerable victim, which clearly includes sexual offences against children;
- the offence involves elements of aggravation;
- there is a special risk or better understanding of serious consequences for victims and the community, including the need to recognise the exceptional harm which the offence might cause;
- the offence is subject to a pattern of inadequate sentencing.

These principles take into account offence characteristics (indictable, prevalence, vulnerable victim and aggravation) as well as whether there are problems with the current sentencing practice for the offence (risk and understanding of consequences and inadequate sentencing).

Based on an application of these principles, the Council considers that the mandatory minimum sentencing scheme should be limited to the following offences:

- rape (where the complainant is under the age of 17);
- aggravated sexual assault where the complainant is under the age of 17 in cases where there are aggravating circumstances;
- maintaining a sexual relationship with a young person in cases where there are aggravating circumstances; and
- sexual intercourse with a young person in cases where there are aggravating circumstances.

The Council's view is that the aggravating circumstances identified should be matters relevant to sentence to be taken into account by the judge in deciding whether a case should be subject to the mandatory minimum penalty or not. These aggravating circumstances are:

- the young person was aged under 12 at the time of the offending or at the time the offending commenced;
- the young person was under the care, supervision or authority of the offender;
- the offender took advantage of the victim being under the influence of alcohol or a drug in order to commit the offence, or the circumstances of the offence involved the offender supplying the victim with alcohol and/or drugs; or
- the offender filmed or recorded the offence.

These offences are considered to be appropriate for inclusion because they are extremely serious offences, where the circumstances of the offending reflect community concerns, the serious harm caused by this type of offence, the offender's higher culpability and the prevalence of the offence.

THE STRUCTURE OF THE MANDATORY MINIMUM SENTENCING SCHEME

In implementing a mandatory minimum sentencing scheme in Tasmania, consideration needs to be given to the overall structure of the scheme, including the following issues:

The type of mandatory minimum sentencing scheme

After considering the different models that exist for the introduction of a mandatory minimum sentencing scheme, the Council's preferred model is a mandatory minimum head sentence of imprisonment with the current parole system continuing to operate. A mandatory minimum head sentence means that the court must impose the minimum period of imprisonment as the head sentence. As required by Term of Reference 2, the Council's advice is that the changes required to introduce a mandatory minimum sentencing scheme should be implemented by amendments to the *Sentencing Act 1997* (Tas).

The relationship between the mandatory minimum sentence for a single count and global sentencing

In developing a mandatory minimum sentencing scheme, the mandatory minimum term needs to be set by reference to a single count of the offence. The Council's preferred approach is one that preserves the current Tasmanian practice of using global sentencing even in cases where a mandatory minimum penalty exists and is one that avoids complexity wherever possible.

The relationship between the mandatory minimum sentence for a single count and the need for concurrent or cumulative serving of sentences for other offences

An issue that arises when an offender is facing sentencing for more than one offence and the court does not impose a global sentence but instead imposes more than one sentence is whether the mandatory minimum sentence should be served concurrently or cumulatively. The Council's view is that it is not desirable to create a statutory exception to the usual rules that

apply in relation to concurrent and cumulative sentences and there should not be a statutory requirement that the mandatory minimum term should be served cumulatively with other sentences.

The effect of a mandatory minimum sentence on the sentencing range

Aside from the restriction a mandatory minimum sentencing scheme places on the discretion of the sentencing judge to impose a sentence below the minimum term, there is also uncertainty as to the intended effect of the scheme on the distribution of sentences for offences with a mandatory minimum term. There are two competing views:

- that the mandatory minimum operates as a statement of the new foundation for the sentencing range and so gives rise to a new distribution model (the 'range' interpretation);
- that it operates as a floor, so that sentences below the new minimum will be increased but other sentences will be unaffected (the 'floor' interpretation).

The Council's view is that the mandatory minimum sentence should operate as a floor rather than distorting all sentences upwards.

EXCEPTIONS TO THE MANDATORY MINIMUM SENTENCING SCHEME

Limited judicial discretion should be allowed in the mandatory sentencing scheme, which allows the court to depart from the mandatory penalty in particular circumstances. It is the Council's view that exceptions are required in the Tasmanian scheme to mitigate potential injustices.

Structure of exceptions – general test or list of circumstances

The nature of judicial discretion that is retained within the context of a mandatory minimum sentencing scheme depends on the legislative provision. There are differences in terms of the circumstances covered by the exceptions and also the broader structural question of whether the exceptions should be contained in a broad test (such as 'exceptional circumstances' or 'special reasons') or whether such exceptions should be contained in an exhaustive or non-exhaustive list of reasons.

It is the Council's view that the exceptions to the mandatory minimum scheme should be a non-exhaustive list of 'special reasons' that reflect circumstances which significantly reduce the culpability of the offender. There should also be a general provision

that allows a court to find special reasons if 'there are substantial and compelling circumstances that justify doing so'.

In addition, the test for all exceptions to mandatory penalties should be consistent within the *Sentencing Act 1997* (Tas), and so the provision relating to serious injury caused to a police officer should be amended to reflect the approach adopted for sexual offences.

Special reasons for exceptions

Offenders under 18

The view of the Council is that it is appropriate that offenders who are under 18 at the time of the commission of the offence be excluded from a mandatory minimum scheme.

Offenders with cognitive impairment

The Council's view is that an exception should be created for offenders with impaired mental functioning that is causally linked to the offence and substantially reduces their culpability or would result in the offender being subject to significantly more than the ordinary burden or risks of imprisonment.

Guilty plea

The Council's view is that a guilty plea should not be an exception per se but if an offender enters a plea of guilty a sentencing discount should be provided that allows a judge to impose a sentence less than the specified mandatory minimum sentence. This hybrid model recognises the utilitarian value of a guilty plea.

The introduction of a sentencing discount for a guilty plea to reduce the specified mandatory minimum sentence requires decisions to be made about the most appropriate model to be used. In particular, it is necessary to decide the means by which the discount is determined. There are two broad approaches:

- (1) to specify that the court is to provide a sentencing discount if an offender enters a plea of guilty to an offence attracting a mandatory minimum penalty but not quantify the discount that is to be provided;
- (2) to specify that the court is to provide a sentencing discount if an offender enters a plea of guilty to an offence attracting a mandatory minimum penalty and to quantify the discount that is provided (either in legislation or by the courts).

The Council does not have a concluded view on this matter that requires further research and feedback. A related issue is whether a statutory provision setting out the applicable principles in relation to a plea of guilty should be introduced that applies in all cases and not only to cases where the mandatory minimum sentence applies. This is also beyond the scope of this paper.

Assistance by the accused to the police or an undertaking by the accused to assist the Crown

The Council's view is that assistance by the accused to the police or an undertaking by the accused to assist the Crown should not result in an automatic exception from the mandatory minimum scheme. Nevertheless, in the circumstances of an individual case, it may be a matter that the court takes into account in deciding whether there are substantial and compelling circumstances to exempt the offender from the scheme.

Circumstances relating to the case

The Council's view is that the nature of the relationship between the offender and the complainant (that is, a genuine relationship) and the relative ages of the offender and the complainant (that is, closeness in age) should be specifically recognised as 'special reasons' to exempt the offender from the mandatory minimum scheme.

LEVELS OF THE MANDATORY MINIMUM SENTENCING SCHEME

As part of its advice about the implementation of mandatory minimum penalties for serious sex offences in Tasmania, the Council was asked to set out what the mandatory minimum penalties should be.

The approach of the Council to setting mandatory minimum penalties

In developing a clear conceptual framework for the selection of sentencing levels, the Council initially examined approaches used in other jurisdictions to setting mandatory minimum sentence levels and found these to be of limited assistance.

In the absence of graduated maximum penalties in Tasmania that could be used as guideposts to set the mandatory minimum sentences, the process for setting the mandatory minimum penalties needs to be done by conducting an analysis on an offence-by-offence basis. This is a comparatively difficult and time-consuming process. It also is less transparent and potentially more arbitrary. However, in establishing a coherent and transparent approach to setting minimum penalty levels for each offence, the Council has been informed by the following factors:

- (1) current sentencing practice in the Supreme Court of Tasmania;
- (2) the Council's previous examination of the adequacy of current sentencing practice;
- (3) indications from the Court of Criminal Appeal about the adequacy of sentencing for particular offences;
- (4) public opinion in relation to relative offence seriousness and sentencing levels; and
- (5) sentencing levels in other jurisdictions.

The Council acknowledges that setting the levels of the mandatory minimum terms is complex and views may differ as to the approach that should be adopted and the appropriate level of the mandatory minimum penalties. In expressing its views on mandatory minimum sentencing levels, the Council notes that these necessarily involve a value judgment but that the levels have been arrived at based on the Council's collective knowledge and experience. The Council has also taken into account the feedback from stakeholders in formulating its views about the appropriate levels to be set.

The Council's views are that these mandatory minimum levels reflect the objective seriousness of the offence and provide a clear indication that this conduct is not acceptable to the community. In addition, the Council's view is that this structure also reflects the relative seriousness of the offences with rape being the most serious (given that there is no consent), followed by maintaining a sexual relationship with a young person (given that it consists of three unlawful sexual acts), then sexual intercourse with a young person in circumstances of aggravation (given that it involves penile penetration) followed by aggravated sexual assault. These sentences are proposed as the minimum sentences that are applicable and the court can impose longer sentences in appropriate cases.

Mandatory minimum penalty levels for specific offences included within the mandatory minimum scheme

The Council's view is that the following mandatory minimum levels are appropriate (unless an exception applies):

Offence	Mandatory minimum sentence
Rape where complainant under 17	4 years
Maintaining a sexual relationship with a young person in circumstances of aggravation	3 years unless rape is one of the unlawful sexual acts and then 4 years
Sexual intercourse with a young person in circumstances of aggravation	2 years
Aggravated sexual assault (in circumstances of aggravation) where complainant under 17	18 months

Preliminary Advice (Part B)

Application of mandatory minimum sentences to indictable offences

Preliminary advice 1 (Part B [2.2.2])

1. That mandatory minimum sentencing for serious child sexual offences should only apply to indictable offences.

Application of mandatory minimum sentencing to the Magistrates Court

Preliminary advice 2 (Part B [2.2.2])

2. That mandatory minimum sentencing for serious child sexual offences should not be applicable in the Magistrates Court.

Offence prevalence

Preliminary advice 3 (Part B [2.2.2])

3. That a mandatory minimum sentence is not necessary or appropriate for an offence that has no or very few cases.

Rape

Preliminary advice 4 (Part B [2.2.2])

4. That rape should be included in the mandatory minimum sentencing scheme where the complainant is under 17.

Maintaining a sexual relationship with a young person and sexual intercourse with a young person

Preliminary advice 5 (Part B [2.2.2])

5. That there should be some limits placed on the circumstances in which the offences of maintaining a sexual relationship with a young person and sexual intercourse with a young person are included in the mandatory minimum sentencing scheme.

Preliminary advice 6 (Part B [2.2.2])

6. That an aggravated offence of maintaining a sexual relationship with a young person or an aggravated offence of sexual intercourse with a young person should not be created.

Preliminary advice 7 (Part B [2.2.2])

7. That the offence of maintaining a sexual relationship with a young person and the offence of sexual intercourse with a young person should only be included in the mandatory minimum sentencing scheme where there are aggravating circumstances.

Preliminary advice 8 (Part B [2.2.2])

8. The existence of aggravating circumstances should be a matter to be determined by the sentencing judge.

Preliminary advice 9 (Part B [2.2.2])

9. Aggravating circumstances should be as follows:
- the young person was aged under 12 at the time of the offending or at the time the offending commenced; or
 - the young person was under the care, supervision or authority of the offender; or
 - the offender took advantage of the victim being under the influence of alcohol or a drug in order to commit the offence, or the circumstances of the offence involved the offender supplying the victim with alcohol and/or drugs; or
 - the offender filmed or recorded the offence.

Aggravated sexual assault

Preliminary advice 10 (Part B [2.2.2])

10. That limits should be placed on the circumstances in which aggravated sexual assault is included in the mandatory minimum sentencing scheme to exclude 'consensual' relationship cases and to only apply where the complainant is under the age of 17.

Preliminary advice 11 (Part B [2.2.2])

11. That aggravated sexual assault should only be included in the mandatory minimum sentencing scheme where there are aggravating circumstances (as defined). This is a matter to be determined by the sentencing judge.

Structure of scheme

Preliminary advice 12 (Part B [3.1.2])

12. That the preferred model for the introduction of a mandatory minimum sentencing scheme is for a mandatory minimum head sentence of imprisonment with the current parole system continuing to operate.

Preliminary advice 13 (Part B [3.1.2])

13. That the mandatory minimum sentencing scheme should be created by amendments to the *Sentencing Act 1997* (Tas).

Preliminary advice 14 (Part B [3.1.2])

14. That the mandatory minimum head sentences need to be expressed as a particular period of time rather than as a proportion of the maximum penalty.

Application to global sentencing

Preliminary advice 15 (Part B [3.2])

15. That mandatory minimum sentences should apply whether the court imposes a single or global sentence.

Concurrent and cumulative sentencing

Preliminary advice 16 (Part B [3.3])

16. That it is not desirable to create a statutory exception to the usual rules that apply in relation to concurrent and cumulative sentences and there should not be a statutory requirement that the mandatory minimum term should be served cumulatively with other sentences.

The effect of mandatory minimum sentencing

Preliminary advice 17 (Part B [3.4.3])

17. That the mandatory minimum sentence should operate as a floor rather than increasing all sentences.

Exceptions to the mandatory minimum sentencing scheme

Preliminary advice 18 (Part B [4.1])

18. That exceptions should be provided in the Tasmanian mandatory minimum sentencing scheme.

Nature of test for exceptions

Preliminary advice 19 (Part B [4.2.1])

19. That the exceptions to the mandatory minimum scheme should be a non-exhaustive list of ‘special reasons’ that reflect circumstances which significantly reduce the culpability of the offender.

Preliminary advice 20 (Part B [4.2.1])

20. That there should be a general provision in the legislation that allows a court to find special reasons if there are substantial and compelling circumstances that justify doing so.

Preliminary advice 21 (Part B [4.2.1])

21. That the test for all exceptions to mandatory penalties should be consistent within the *Sentencing Act 1997* (Tas), and so the provision relating to serious injury caused to a police officer should be amended to reflect the approach adopted for sexual offences.

Offenders under 18

Preliminary advice 22 (Part B [4.2.2])

22. That offenders who are under 18 at the time of the commission of the offence should be excluded from the mandatory minimum sentencing scheme

Offenders with cognitive impairments

Preliminary advice 23 (Part B [4.2.2])

23. That offenders with impaired mental functioning that is causally linked to the offence and substantially reduces their culpability or would result in the offender being subject to significantly more than the ordinary burden or risks of imprisonment should be excluded from the mandatory minimum sentencing scheme.

Guilty plea

Preliminary advice 24 (Part B [4.2.2])

24. That there should not be a specific exception based on a plea of guilty as a special reason to warrant departure from the mandatory minimum scheme.

Preliminary advice 25 (Part B [4.2.2])

25. That an offender who enters a plea of guilty should receive a sentencing discount from the specified mandatory minimum sentence.

Cooperation with authorities

Preliminary advice 26 (Part B [4.2.2])

26. That there should not be a specific exception based on cooperation with authorities as a special reason to warrant departure from the mandatory minimum scheme.

Circumstances relating to the case

Preliminary advice 27 (Part B [4.2.2])

27. That there should be a specific exception in circumstances where the complainant is relatively close in age to the offender and consent is given in the context of a genuine and equal relationship to warrant departure from the mandatory minimum scheme.

Mandatory minimum penalty for rape

Preliminary advice 28 (Part B [5.2.1])

28. That a sentence of actual imprisonment is appropriate in cases where the offender is charged with a single count of rape where the complainant is under 17 unless an exception applies.

Preliminary advice 29 (Part B [5.2.1])

29. That the mandatory minimum sentence for rape should be four years’ imprisonment unless an exception applies.

Mandatory minimum penalty for aggravated sexual assault

Preliminary advice 30 (Part B [5.2.2])

30. That a sentence of actual imprisonment is appropriate in cases where the offender is charged with a single count of aggravated sexual assault where the complainant is under 17 (outside of the ‘consensual’ relationship context) unless an exception applies.

Preliminary advice 31 (Part B [5.2.2])

31. That the mandatory minimum sentence for a single count of aggravated sexual assault in circumstances of aggravation (as defined) should be 18 months’ imprisonment unless an exception applies.

Mandatory minimum sentencing for maintaining a sexual relationship with a young person

Preliminary advice 32 (Part B [5.2.3])

32. That a sentence of actual imprisonment is appropriate in cases where the offender is charged with a single count of maintaining a sexual relationship with a young person in circumstances of aggravation (as defined) unless an exception applies.

Preliminary advice 33 (Part B [5.2.3])

33. That the appropriate mandatory minimum sentencing level is three years for maintaining a sexual relationship with a young person in aggravating circumstances (as defined) and four years if one or more of the unlawful sexual acts is rape unless an exception applies.

Mandatory minimum sentence for sexual intercourse with a young person

Preliminary advice 34 (Part B [5.2.4])

34. That a sentence of actual imprisonment is appropriate in cases where the offender is charged with a single count of sexual intercourse with a young person in circumstances of aggravation unless an exception applies.

Preliminary advice 35 (Part B [5.2.4])

35. That the appropriate mandatory minimum sentencing level is two years for sexual intercourse with a young person in circumstances of aggravation unless an exception applies.

Part A

IMPLEMENTING MANDATORY SENTENCING

1.

Introduction

1.1 BACKGROUND TO THIS PAPER

The Tasmanian Liberal Party made a pre-election commitment to impose minimum mandatory sentences for those who commit serious sexual offences against children with a view to protecting children from sexual abuse.³ In October 2015, the Attorney-General and Minister for Justice, the Hon Vanessa Goodwin MLC requested that the Sentencing Advisory Council provide a report on the implementation of minimum mandatory sentencing for those who commit serious sexual offences against children, including advice as to which offences should be captured within the scope of the mandatory sentencing provisions and what those mandatory minimum sentences should be.

1.2 TERMS OF REFERENCE

The following terms of reference were given to the Council:

- (1) Investigate the implementation of minimum mandatory sentences for those who commit serious sexual offences against children.
- (2) Examine Tasmania's current legislation for sentencing sex offenders and provide preliminary advice on the legislative means required to implement mandatory sentencing for serious sex offences committed against children.
- (3) Provide a report within 6 months of the commencement of this project.

'Serious Sexual Offences' include all serious sexual crimes listed in Appendix D of the *Criminal Code Act 1924* (Tas) and include:

- Section 124: Sexual intercourse with young person under the age of 17 years;
- Section 125A: Maintaining sexual relationship with young person under the age of 17 years;
- Section 125C(2): Procuring unlawful sexual intercourse with person under the age of 17 years;
- Section 126: Sexual intercourse with person with mental impairment;
- Section 127A: Aggravated sexual assault;
- Section 130: Involving person under age of 18 years in production of child exploitation material;
- Section 130A: Producing child exploitation material;
- Section 130B: Distributing child exploitation material;
- Section 133: Incest;
- Section 178A: Performing female genital mutilation;
- Section 185: Rape.

³ Tasmanian Liberals, *Minimum Mandatory Sentencing for Serious Sex Offences Against Children*, <<https://www.tas.liberal.org.au/sites/default/files/policy/Mandatory%20minimum%20sentences%20for%20offences%20against%20children.pdf>>.

As well, these crimes under the *Criminal Code Act 1924* (Tas):

- Section 125B: Indecent act with young person;
- Section 127: Indecent assault.

As well, these offences under the *Sex Industry Offences Act 2005* (Tas):

- Section 9(1): Procuring or otherwise causing or permitting a child to provide sexual services in a sexual services business;
- Section 9(2): Receiving a fee or reward that a person knows is derived, directly or indirectly, from sexual services provided by a child in a sexual services business.

I.3 THE APPROACH OF THE SENTENCING ADVISORY COUNCIL AND OUTLINE OF PART A

The Council has previously indicated that it does not recommend the introduction of mandatory sentencing in Tasmania.⁴ In its consideration of sex offence sentencing, the Council expressed its concerns about sentencing levels for sex offences in some circumstances and the Council indicated that a mechanism needed to be found to provide for an incremental increase in sentencing for sex offences in appropriate cases. However, the Council stated that this view should not be interpreted to mean that the Council was recommending a blanket increase in sentences for all sex offenders.⁵ The Council's assessment of the appropriateness of sentencing for sex offences was examined from multiple perspectives and was based on a thorough examination of current sentencing practices. The Council made recommendations about legislative responses that addressed its concerns with a view to providing for an increase in sentencing in appropriate cases. These responses did not include a recommendation to introduce mandatory minimum sentences.

The terms of reference provided to the Council do not specifically refer to the question of whether mandatory sentencing for serious sex offenders should be implemented in Tasmania. However, in considering the government's request to provide advice about the implementation of a mandatory minimum sentencing scheme, the Council considers it necessary to identify its serious reservations regarding the implementation of mandatory minimum sentence schemes. These are that:

- (1) they provide an incomplete guidance system to the courts;
- (2) they may lead to unrealistic expectations in the community that changes to sentencing policy will deter potential offenders when there is no evidence to suggest that increased penalty levels act as a deterrent;
- (3) they may reduce the incentive to enter a plea of guilty;
- (4) they reduce transparency and consistency because discretion is transferred from judges to prosecutors;
- (5) they will result in significant financial costs; and
- (6) it may be prudent to wait until the Supreme Court has had an opportunity to respond to the significant changes in sentencing practice resulting from the government's proposed sentencing reforms. The Council also notes that an examination of recent sentencing practice reveals a change in judicial attitudes to (and an increase in the sentences imposed on) those who commit serious sexual offences against children.

These concerns are detailed in the following Chapter.

4 TSAC, above n 1. Recommendation 5 provided that Tasmania should not introduce mandatory sentencing penalties under the *Criminal Code* (Tas) for sex offences: at xi.

5 Ibid vii.

2. *Objections to a mandatory minimum sentencing scheme*

As part of its consideration of the implementation of a mandatory minimum sentencing scheme, as requested by the terms of reference, the Council has identified potential objections to the implementation of the scheme. The Council also considers that there are significant limitations that arise from the adoption of a mandatory sentencing scheme as a means of providing guidance to courts.

2.1 INCOMPLETE GUIDANCE SYSTEM

Australian jurisdictions have sought to introduce effective legislative mechanisms to provide sentencing guidance to courts.⁶ Mandatory sentencing schemes are one such means by which the legislature may provide direction to the court about the appropriate sentencing levels for particular offences. However, mandatory sentencing is problematic as a means of providing guidance as it is an incomplete guidance system. The inadequacies of mandatory minimum sentences as a means of providing guidance was taken by Victorian Sentencing Advisory Council (VSAC) to indicate that they:

are not, in effect, models of sentencing guidance. A minimum sentence does not provide guidance to, or structure, a sentencing court's exercise of discretion; rather it simply prescribes the minimum penalty that must be imposed (subject to limited exceptions).⁷

A mandatory minimum sentence rests on the provision of a single number and consequently provides guidance in an ad hoc and non-conceptual way. It indicates the sentence to be applied at the bottom of the sentencing range but does not provide any guidance to the court about how to approach sentencing for other offences, such as those that are at the top or the middle of the range. As seen in other jurisdictions, attempts to isolate a single measure (such as the median, offences in the middle of the range of objective seriousness or offences at the lower end of the range of objective seriousness) have been problematic and there has been considerable confusion about their implementation.⁸ This adds undue and unnecessary complexity into the sentencing process. A mandatory minimum sentence also provides limited assistance to the court about the relative seriousness of an offence and this problem is compounded in Tasmania given that Parliament has not provided graduated maximum sentences to indicate the penalty ceiling for offences (other than the uniform 21 years) nor the relative gravity of the offences.⁹ The Bar Association is of the view that greater transparency in the sentencing process may be achieved by the introduction of graduated maximum penalties.

Other models for sentencing guidance are available that may be more effective than mandatory sentencing in providing a holistic approach to guidance. In the Council's consideration of sentencing for sex offences, it identified guideline judgments as a possible mechanism to provide guidance to courts in relation to sentencing for sex offences in Tasmania. Guideline judgments 'are a mechanism ... to provide broad sentencing guidance beyond the specific facts of a case'.¹⁰ As the Council indicated:

6 See overview in VSAC, *Sentencing Guidance Reference: Consultation Paper* (2015) 8.

7 VSAC, *Sentencing Guidance in Victoria*, Report (2016) 231.

8 See Patrick Leader-Elliott, 'Clarifying the Incomprehensible: South Australia's Mandatory Minimum Non-parole Period Scheme' (2012) 36 *Criminal Law Journal* 216; *Director of Public Prosecutions v Walters* [2015] VSCA 303; VSAC, above n 7, 46-47; and NSW Sentencing Council, *Standard Non-parole Periods: A Report by the NSW Sentencing Council* (2013).

9 See TSAC, above n 1, [2.2].

10 VSAC, above n 6, 13.

[s]entencing guidelines have the benefit of creating a framework for sentencing decisions, consolidating principles of sentencing for a particular offence, and providing a vehicle for consideration of 'interrelationships of sentences for the different forms of the offence'.¹¹

Other benefits of guideline judgments include the potential to increase penalty levels and provide consistency and greater transparency in sentencing and improve public confidence. Guideline judgments also allow the court to recognise the diversity of circumstances that arise and to have discretion to allow this diversity to be taken into account. Guideline judgments can provide a system of guidance that addresses offences at the bottom, middle and top of range. There are indications from other jurisdictions that guideline judgments are an effective means of providing guidance to courts in relation to the imposition of sentence.¹² And, for this reason, VSAC has recommended the introduction of an enhanced guideline judgement scheme in Victoria in response to the government's request for advice on the most appropriate form of sentencing guidance.¹³ Accordingly, the Council reiterates its earlier recommendation that the option of introducing guideline judgments in Tasmania should be further explored.¹⁴

2.2 MANDATORY SENTENCING MAY LEAD TO UNREALISTIC EXPECTATIONS

Justifications for mandatory sentencing typically refer to the aim of preventing crime by deterring an offender from continuing to commit crimes once he or she is released (specific deterrence), as well as deterring other members of the community from committing crime (general deterrence).¹⁵ The expectation is that mandatory penalties will provide 'a greater deterrence than the usual discretionary sentencing process because it ensures that the cost of illegal conduct outweighs the benefits, in terms of both the *severity* of the sanction and the *certainty* that the sanction will be imposed consistently'.¹⁶ While it is certainly agreed that having a punishment structure (police, courts, and sentences) does have a deterrent effect and does reduce offending,¹⁷ 'there is simply no supporting evidence' for the deterrent claims of mandatory minimum sentences.¹⁸ In other words, there is no empirical basis for the effectiveness of mandatory sentencing as a deterrent given that research suggests that increasing sentence severity does not better deter would be offenders (marginal deterrence) or reduce crime rates.¹⁹ Evidence also suggests that increasing penalties does not work to deter the particular offender from re-offending (that is, specific deterrence).²⁰ This has been recognised by the Supreme Court of Canada, where the judges questioned whether 'in light of criminological evidence, there [was] even a rational connection between mandatory minimums and deterrence'.²¹ In contrast, there is evidence to suggest that the 'best way to reduce crime is to increase the perceptions in people's minds that they will be caught if they break the law'.²²

Although there is less research that has specifically examined the deterrent effect of mandatory minimum penalties as opposed to the specific deterrent effect of tougher sanctions more generally,²³ support for the proposition that the threat of mandatory minimum penalties do not have a deterrent effect is found in a recent study conducted by the NSW Bureau of Crime Statistics and Research. This research examined whether the threat of longer prison terms for assault reduced the incidence of assault and found '[n]o evidence that the threat of longer prison terms

11 TSAC, above n 1, 84 quoting Andrew Ashworth 'Techniques of Guidance on Sentencing' (1984) *Criminal Law Review* 519, 521.

12 VSAC, above n 7, 131-133.

13 Ibid Recommendation 3. See also Chapter 6.

14 TSAC, above n 1, Recommendation 3.

15 Adrian Hoel and Karen Gelb, *Sentencing Matters: Mandatory Sentencing* (Sentencing Advisory Council, Victoria, 2008) 13.

16 Ibid.

17 See discussion in Kate Warner, 'Theories of Sentencing: Punishment and the Deterrent Value of Sentencing' (Paper presented at Sentencing: From Theory to Practice, Canberra, 8-9 February, 2014) 5-6.

18 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th ed, 2015) 107.

19 Hoel and Gelb, above n 15, 13-14. See Michael Tonry, 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings' (2009) 38 *Crime and Justice* 65, 100; Gerry Ferguson and Benjamin Berger, 'Recent Developments in Canadian Criminal Law' (2016) 40 *Criminal Law Review* 33, 35; Mirko Bagaric and Theo Alexander, 'The Fallacy of Punishing Offenders for the Deeds of Others: An Argument for Abolishing Offence Prevalence as a Sentencing Aggravated Consideration' (2016) 16 *Sydney Law Review* 22, 39-41; Donald Ritchie, 'Does Imprisonment Deter? A Review of the Evidence' (Sentencing Advisory Council, Victoria, 2011); Warner, above n 17.

20 Bagaric and Alexander, above n 19, 45.

21 Ferguson and Berger, above n 19, 35 referring the Supreme Court of Canada decision in *R v Nur* [2015] 1 SCR 773.

22 Bagaric and Alexander, above n 19, 40.

23 Patricia Menendez and Don Weatherburn, 'Does the Threat of Longer Prison Terms Reduce the Incidence of Assault?' (2015) *Australian and New Zealand Journal of Criminology*, first online, 2.

had any effect on the incidence of assault in New South Wales.²⁴ Given that there is no evidence to suggest that an increase in penalty severity will lead to a reduction in crime, and given the underreporting of child sexual abuse (with the risk of being caught being low), it is unlikely that the introduction of mandatory minimum sentencing in Tasmania will have any deterrent effect at all and therefore will not lead to a reduction in sexual offending against children. Instead, this 'tough on crime' approach may lead to an unrealistic expectation in the community that changes in sentencing policy will deter potential offenders and result in subsequent calls for even tougher penalties. Further, as the Council has previously stated, 'there is no evidence to show that the general public is more satisfied with sentencing in more punitive jurisdictions'.²⁵

2.3 REDUCES INCENTIVE TO ENTER A PLEA OF GUILTY

Mandatory sentences may remove the incentive for offenders to enter a plea of guilty, and so increase the number of trials and result in court delays and increased costs.²⁶ Court delays in New South Wales have been reported a consequence of the mandatory sentencing provisions that apply to people smuggling, with considerable strain being placed on the resources of the courts, Legal Aid and the Office of the Commonwealth Director of Public Prosecutions.²⁷ More importantly, in the context of sexual offending, if mandatory sentencing leads to more trials, it will result in increased trauma for victims and a likely reduction in the number of convictions obtained.²⁸ These are clearly not the desired consequences of reforms to sentencing law. As previously discussed by the Council, an important aspect of the criminal justice system response to sexual offending against children (as well as sexually offending generally) is the need for victims to be heard and believed.²⁹ As has been recognised, a plea of guilty is '[a] public confession [that] enables victims to realise that they were wholly blameless'.³⁰ This validation will be lost if more offenders proceed to trial and are not convicted.

It is also possible that there will be fewer convictions because jurors may be reluctant to convict an offender in cases where the mandatory penalty potentially applies, if the jury forms the view that such a penalty would be unjust in the circumstances of the case.

Mandatory sentencing may in fact be counterproductive and have other unforeseen and unintended consequences, such as the risk that fewer people report sexual assaults to the police. In Australia, research has shown that only a small proportion of sexual offences are reported to the police, and even fewer then proceed to court and have a conviction obtained.³¹ Concerns about a reduction in reporting of offences was influential in the decision in New South Wales not to extend mandatory penalties to all assaults on the basis that this may 'reduce the number of people convicted of domestic assault because witnesses become more reluctant to provide evidence'.³² Similar concerns can be raised about sexual assault, which typically occurs in the private domain. The Victims Support Service expressed concern about the introduction of legislative changes that may decrease disclosure of sexual assault given the existing low reporting levels.

24 Ibid 1.

25 TSAC, above n 1, 74.

26 This is discussed further at Part B [4.2.2]. See VSAC, above n 7, 228.

27 Law Council of Australia, *Mandatory Sentencing Discussion Paper* (2014) 28 <https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/MS_Discussion_Paper_Final_web.pdf>.

28 See Part B [4.2.2].

29 See TSAC, above n 1, 63. The importance of having the fact of sexual offending heard and officially recognised is reflected in the overwhelming number of adults who are coming forward to recount their experiences of child sexual abuse to the Royal Commission into Institutional Responses to Child Sexual Abuse.

30 VSAC, *Sentencing of Offenders: Sexual Penetration with a Child Under 12* (2016) 49-50, citing *SJ v The Queen* [2012] VSCA 237 [64].

31 Arie Freiberg, Hugh Donnelly and Karen Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, 2015) 189, 1.

32 Nigel Stobbs, Lisa Kleinau and Shelley Kolstad, "'Structuring' Judicial Sentencing Discretion: Consistency, Guidance or Pandering to the Punitive' (2014) 39 *Alternative Law Journal* 156, 158.

2.4 DISCRETION IS TRANSFERRED FROM JUDGES TO PROSECUTORS

Proponents justify mandatory sentencing on the basis that it is transparent. In reality, while the sentence itself is transparent, mandatory sentences tend to transfer decision-making powers in relation to the sentence from the judiciary to the prosecution and the police.³³ This is because the choice of the charge will determine the sentencing outcome. If prosecution agencies wish to avoid the imposition of mandatory penalties, they will charge an offender with offences that do not carry mandatory sentences. Alternatively, if they wish the offender to receive a mandatory penalty, they will charge accordingly. The charge pursued will, in effect, dictate the sentencing outcome.³⁴ Even if mandatory penalties exist for all relevant offences, plea bargaining means that the prosecutors make the decision about which charges to pursue and which charges to withdraw.³⁵ This also has an important role to play in the sentencing outcome given that the sentencing judge is constrained by the charges of which the person has been found guilty.³⁶ Consequently, this shift from court to prosecution means that the process lacks transparency and consistency and may lead to unfairness.

2.5 SIGNIFICANT FINANCIAL COSTS

Imprisonment is an expensive sentencing option, with the net operating daily expenditure for imprisoning an offender in Tasmania in 2014-15 being \$363.34 per day.³⁷ To the extent that mandatory sentencing increases the use of imprisonment as a sentencing option and the length of sentences served by offenders, it will have (potentially significant) financial implications.³⁸ Mandatory sentencing has also been associated with greater difficulty for offenders being granted bail and this will also increase the number of offenders held in custody.³⁹ It may be questioned whether the use of a high-risk (in terms of effectiveness) and high cost strategy such as mandatory minimum sentences is the most appropriate use of scarce financial resources.⁴⁰ This is a particular concern in the current legal environment in Tasmania, with the government already committed to making several significant changes to sentencing policy with the abolition of suspended sentences for sex offenders in the near future (with the eventual abolition of suspended sentences for all offences) and the introduction of new sentencing options.⁴¹ It remains to be seen what the actual costs associated with these changes are and what their effect is on prison numbers.

There will also be costs arising from the anticipated increase in the number and length of trials. Mandatory minimum sentences will also create additional complexity in the sentencing process and it is likely that greater court time will be required to determine the factors relevant to sentence. It is also likely that the introduction of mandatory minimum sentences will be associated with increased appeals against sentence, particularly in the initial stages of the scheme, as the courts attempt to determine the scope of the legislation and implement the scheme.

2.6 THE INTRODUCTION OF MANDATORY MINIMUM SENTENCING MAY BE PREMATURE

The government has signalled that it may introduce several significant changes to the criminal law that will affect sentencing for child sex offences. These include the creation of new offences in the *Criminal Code* (Tas), the amendment of the *Sentencing Act 1997* (Tas) to include aggravating and mitigating factors for sexual offences, the removal of good character as a mitigating factor in sentencing for sex offenders and the review and replacement of the dangerous criminal provisions in the *Sentencing Act 1997* (Tas) with preventative detention and supervision orders. All these changes are based on previous recommendations of the Council, which were intended to create mechanisms that would bring about an incremental increase in sentencing for sexual offenders. In addition, it is the intention of the government to abolish suspended sentences and new sentencing options will be introduced. The legislative changes identified (once enacted) are likely to be viewed by the court as an indication from Parliament

33 Ashworth, above n 18, 107.

34 Nicholas Cowdrey, *Mandatory Sentencing*, (Sydney Law School Distinguished Speakers Program, 15 May 2014) 13.

35 Hoel and Gelb, above n 15, 17.

36 Freiberg, Donnelly and Gelb, above n 31, 20.

37 Australian Government Productivity Commission, *Report on Government Services 2015* (2015) Table 8A.59.

38 See Hoel and Gelb, above n 15, 19-20.

39 Law Council of Australia, above n 27.

40 See for example, Maggie Harris, 'The Cost of Mandatory Minimum Sentences' (2013) 14 *Florida Coastal Law Review* 419.

41 Patrick Billings, 'Suspended Jail Terms face Axe for Serious Crimes', *The Mercury* (Hobart), 30 March 2016.

that changes to sentencing practice are necessary and that serious sex offences (particularly those committed against children) are to be treated more punitively by the courts than is currently the case.⁴²

Further, there are already indications (in the current research conducted by the Council) that suggest that the Supreme Court has increased sentencing for serious sex offences, particularly those involving children.⁴³ Current sentences are not only generally heavier than they have been, but it may be that they have not plateaued yet. The decision in *Tasmania v KR*⁴⁴ is illustrative of this trend. In this case, a penalty of 15 years' imprisonment was imposed for three counts of rape and one count of maintaining a sexual relationship. This was the longest sentence imposed to date for sexual offending against children and there may be flow-on effects from a 'landmark' sentence of this kind for the same crimes as well as other sexual offences committed against children. However, flow-on effects cannot occur simultaneously. As discussed at Part B [5.2.2], in *CJP v Tasmania*,⁴⁵ the Court of Criminal Appeal gave an indication that it may be time for sentencing for serious sexual crimes to be increased. There has been insufficient time since the decision in *CJP* to clearly gauge the effect of this judicial indication.

There are also powerful statements from the court about the psychological impact of sexual abuse that reflect a contemporary understanding of the harms caused by such offending. There are clear statements of the court's condemnation of such conduct with correspondingly long sentences being imposed.⁴⁶ The court has indicated that it has taken notice of informed public opinion and has adjusted sentences accordingly. This demonstrates the willingness of the court to reflect on and change its sentencing practice and the court should be encouraged to continue to do so.

It is also noted that the existing and effective forum for reviewing sentences, the Court of Criminal Appeal, has not been fully utilised to promote an increase in the sentences imposed for sexual crimes involving children or, more generally, serious sexual crimes such as rape. Unlike appeal processes in relation to other crimes (such as dangerous driving causing death and manslaughter),⁴⁷ there have not been arguments made in sentencing appeals in the context of sexual crimes against children that the sentencing range is generally too low. Such an argument may provide a mechanism that may lead the Court of Criminal Appeal to provide guidance to sentencing courts and also determine that heavier sentences are required than in the past.⁴⁸

In light of these factors, it may well be prudent to provide further time for the court to adjust its own sentencing practices as well as to allow time for the proposed legislation to be introduced and incorporated into sentencing before significant additional changes are made to sentencing policy, such as the introduction of mandatory minimum sentences.

2.7 CONCLUSION

After a consideration of these concerns and as a result of the process of conceptualising the principles that should guide the introduction of a mandatory minimum sentencing scheme, the Council's view remains that mandatory sentencing is inherently flawed. During the Council's consultations with stakeholders, strong opposition to the introduction of mandatory sentencing was expressed by the Bar Association, the Director of Public Prosecutions, the Prisoners Legal Service and the Law Society.

Further, the Council notes the recent decision of the Supreme Court of Canada in *R v Lloyd*,⁴⁹ which held that mandatory minimum sentences for drug trafficking were unconstitutional given that such sentences cast the net too widely and caught not only serious offending but also conduct that was much less blameworthy. The majority of the Court observed:

42 *Markarian v The Queen* (2005) 228 CLR 357.

43 See Part B [5.2.2], [5.2.3].

44 7 October 2015, Porter J.

45 [2015] TASSCCA 9.

46 See Part B [5.2.3].

47 See *DPP v Smithhurst* [2011] TASSCCA 19; *DPP v Watson* [2004] TASSC 54; *Gallagher v Tasmania* [2009] TASSC 84.

48 See for example, *DPP v Dalglish* [2016] VSAC 148, where the argument advanced by the DPP was that the sentencing range for incest was inadequate and did not reflect the objective gravity of the offence and that the Court should state that current sentencing practice for the offence should gradually be increased.

49 2016 SCC 13.

the reality is this: mandatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. This is because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found to be unconstitutional.⁵⁰

Australian courts have noted similar concerns, stressing that there is a wide range of circumstances in which serious offending can occur and the importance of the need to maintain judicial discretion in the imposition of sentences in order to prevent injustice.⁵¹ In the Northern Territory decision in *Trener v Bradley*, Mildren J expressed the view that:

Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.⁵²

These views reflect the grave concern that the Council holds that mandatory minimum sentencing for sexual offences in Tasmania will create injustice by unduly fettering judicial discretion and by treating 'unlike cases as like'.⁵³

Accordingly, the Council reiterates its previous recommendation that mandatory sentencing not be introduced in Tasmania.

This recommendation should not be taken to mean that Council considers that sexual offences committed against children are not serious or that serious sex offenders ought not to receive appropriate sentences. Instead, the Council's view is that the introduction of mandatory minimum sentences will create unjustified unfairness without achieving its stated aims of deterring offenders and increasing transparency. Further, any attempt to ameliorate the injustices of a mandatory sentencing scheme by restricting its operation to more deserving cases (as the Council outlines in Part B) creates difficulties and introduces undue complexity in the sentencing process.

50 Ibid [35].

51 See *Sillery v The Queen* [1981] HCA 34, (Gibbs CJ); *Trener v Bradley* (1997) 6 NTLR 175.

52 *Trener v Bradley* (1997) 6 NTLR 175, 187.

53 Freiberg, Donnelly and Gelb, above n 31, 189.

Part B

A MODEL FOR
A MANDATORY
MINIMUM
SENTENCING
SCHEME

1.

Introduction

1.1 THE CONSULTATION PROCESS

In April 2016, the Council provided a copy of a consultation paper to key stakeholders setting out the Council's preliminary views. The Council sought the feedback of stakeholders about the views it had expressed in relation to the implementation of mandatory sentencing in Tasmania for serious child sex offences and offered to meet in person with these stakeholders and/or receive written submissions. As part of the consultation process, the Council met with the following:

- Mr Chris Gunson, President Tasmanian Bar
- Mr Daryl Coates, SC, Director of Public Prosecutions
- Mr Greg Barnes and Ms Jennifer White, Prisoners Legal Service
- Mr Luke Rheinberger, Executive Director Law Society and Jackie Hartnett and Jonathon McCarthy, members of the Criminal Law Committee
- Catherine Edwards, Julie Schade and Cassandra Dowling, Victims Support Service
- The Honourable Chief Justice Alan Blow, Supreme Court of Tasmania.

The Council also received a written submission from Tasmania Police. Tasmania Police noted that the consultation paper had been subject to only a limited review within the department due to time constraints and that meant that the feedback should be taken to provide only an indicative position.

The Council appreciates the valuable input of these people and the feedback they have provided has been taken into account in the Council's deliberations and has been incorporated in the preliminary advice set out in this report.

The Council has already noted the strong opposition to mandatory sentencing expressed by the Bar Association, the Director of Public Prosecutions, the Prisoners Legal Service and the Law Society. Tasmania Police indicated that its responses to the paper should be understood in the context of the government's stated intention to introduced mandatory sentencing. In addition, Tasmania Police stated that:

in considering sentencing, it is the overarching view of the organisation that the primary goal should be the protection of the community, as opposed to punishment that is purely punitive. Apprehension, prosecution and sentencing provide this to a degree through deterrence (general and specific). However, with regard to serious sex offenders, immediate incarceration limits the ability of an offender to commit further offences, which holds for the period of their incarceration. Additionally, it provides an opportunity for concerted targeting of individuals for rehabilitation. To this end, the organisation sees benefit in the immediate incarceration of such offenders.

The Council observes that, while there is evidence that treatment programs offered in prison can be effective in reducing recidivism, the rehabilitative potential of prison should not be overstated. This issue is addressed in detail in the Council's consideration of mandatory treatment for sex offenders.⁵⁴

54 TSAC, *Mandatory Treatment for Sex Offenders: Research Paper*, (forthcoming).

I.2 THE COUNCIL'S APPROACH AND OUTLINE OF PART B

This part of the report sets out a model for a mandatory minimum sentencing scheme in Tasmania and must be read in the light of Council's views set out in Part A.

In addressing the terms of reference, the Council's investigation of the implementation of minimum mandatory sentences for those who commit serious sexual offences against children considers the following issues:

- (1) the offences that the scheme should be limited to, which are addressed in Chapter 2;
- (2) the structure of the mandatory minimum sentencing scheme, which is addressed in Chapter 3;
- (3) exceptions to the mandatory minimum sentencing scheme, which are addressed in Chapter 4;
- (4) the levels of the mandatory minimum sentences, which are addressed in Chapter 5.

It is noted that the Council has only examined the mandatory minimum sentences in the context of the *Sentencing Act 1997* (Tas) and has not considered this issue in context of the *Youth Justice Act 1997* (Tas). This means that this paper deals with adult sex offenders and young sex offenders dealt with under the *Sentencing Act 1997* (Tas) and does not address the issue of sentencing young sex offenders under the *Youth Justice Act 1997* (Tas). Although the Council acknowledges the problem of child and adolescents displaying problem sexual behaviour and/or sexually abusive behaviour, the Council considers that mandatory sentencing would be incompatible with the provisions of the *Youth Justice Act 1997* (Tas).

2. *Serious sexual offences against children*

The Council acknowledges that all sexual offending against children is inherently serious. However, it is necessary to determine the offences that the minimum mandatory sentencing scheme should be limited to, as an initial matter in the implementation of a scheme for those who commit serious sexual offences against children.

2.1 APPROACH IN OTHER JURISDICTIONS

It is not possible to identify a uniform approach in other jurisdictions to mandatory minimum penalties, with only three other Australian jurisdictions having a mandatory minimum penalty for sexual offences committed against children that apply in some circumstances.⁵⁵

2.1.1 QUEENSLAND

Under the *Penalties and Sentences Act 1992* (Qld) s 161E, an offender who is convicted of repeat serious child sex offences is liable to mandatory life imprisonment (mandatory minimum penalty).

Under the *Penalties and Sentences Act 1992* (Qld) s 9(4), the court must order that an offender serve a term of imprisonment for an offence of a sexual nature against a child under the age of 16 (mandatory penalty type).

There is a mandatory minimum non-parole period for offenders serving terms of imprisonment for serious violent offences (which includes sexual intercourse with a young person under 16, incest, rape, maintaining a sexual relationship with a young person and sexual assault) if the offender is sentenced to 10 years or more imprisonment or if the offender is sentenced to five years or more imprisonment and the court makes a declaration that the offender is convicted of a serious violent offence.⁵⁶ If the mandatory minimum non-parole period applies, an offender is eligible for parole after serving 80% of the sentence or 15 years, whichever is the lesser (unless the court makes an order for a longer parole eligibility date).⁵⁷

2.1.2 NORTHERN TERRITORY

Under the *Sentencing Act* (NT) s 78F, where a court finds an offender guilty of a sexual offence, a court must record a conviction and must order the offender serve a term of actual imprisonment or a term of imprisonment that is suspended partly, but not wholly (mandatory penalty type).

If the court imposes a sentence of imprisonment that is not partly or wholly suspended, the court must fix a minimum non-parole period of not less than 70% of the sentence for certain offences against persons under 16 (sexual intercourse or gross indecency with child under 16, sexual intercourse or gross indecency by a provider of

55 It is noted that in a review of sentencing for child sexual assault offenders, the Joint Select Committee of the Parliament of New South Wales found that mandatory minimum sentences should not be introduced for these offences on the basis that '[t]he Committee is persuaded by the concerns raised in evidence about the consequences of introducing mandatory sentencing for child sexual assault matters. Child sexual assault cases are highly complex and, in the Committee's view, judges need sufficient discretion to tailor sentences to the circumstances of individual offenders and apply the specific circumstances to the case at hand', Joint Select Committee on Sentencing of Child Sexual Assault Offenders, Parliament of New South Wales, *Every Sentence Tells a Story – Report on Sentencing of Child Sexual Assault Offenders*, Report 1/55 (2014) [5.72].

56 *Penalties and Sentences Act 1992* (Qld) s 161B.

57 *Corrective Services Act 2006* (Qld) s 182.

services to mentally ill or handicapped person, attempt to procure, sexual relationship with a child, incest, serious harm, cause harm with intent to cause serious harm or prevent apprehension, endangering life of a child by exposure, female genital mutilation, common assault, harm, act of gross indecency) (mandatory minimum non-parole period).⁵⁸

2.1.3 SOUTH AUSTRALIA

Under the *Criminal Law (Sentencing) Act 1988 (SA)* s 20B, the court may declare an offender a serious repeat offender if the person has committed at least two separate sexual offences against children under 14. If the court makes this declaration, the court is not bound to ensure that the sentence is proportional to the offence and any non-parole period fixed must be at least four fifths of the sentence (mandatory minimum non-parole period).⁵⁹ The court has a discretion to declare that mandatory minimum non-parole does not apply if the offender's personal circumstances are so exceptional as to outweigh the primary policy of the criminal law of emphasising public safety, and it is, in all the circumstances, not appropriate that he or she be sentenced as a serious repeat offender.⁶⁰

2.2 OVERVIEW OF THE COUNCIL'S APPROACH

As a consequence of the significant changes in sentencing methodology that will follow from the introduction of mandatory minimum sentences, it is the Council's view that it does not follow that all sexual offences that can be committed against children should automatically be included in the scheme. Instead, in making this determination, the Council's approach has been to isolate sexual offences that can be committed against children and then evaluate those offences according to coherent and transparent principles. Accordingly, the Council has considered the following issues:

- (1) Is the offence a sexual offence that can be committed against children?
- (2) Are there sound reasons for the inclusion of the offence in the scheme?

In accordance with the terms of reference, the Council has considered the following offences for inclusion in the scheme:

- Section 124: Sexual intercourse with young person under the age of 17 years;
- Section 125A: Maintaining a sexual relationship with young person under the age of 17 years;
- Section 125C(2): Procuring unlawful sexual intercourse with person under the age of 17 years;
- Section 126: Sexual intercourse with person with mental impairment;
- Section 127A: Aggravated sexual assault;
- Section 130: Involving person under age of 18 years in production of child exploitation material;
- Section 130A: Producing child exploitation material;
- Section 130B: Distributing child exploitation material;
- Section 133: Incest;
- Section 178A: Performing female genital mutilation;
- Section 185: Rape.

These offences were extracted from the *Criminal Code (Tas)* Appendix D, which includes these offences in the definition of 'serious offences' for the purposes of applying the exceptions to the double jeopardy rules (the double jeopardy rule is that a person cannot be tried or punished twice for the same offence).⁶¹

In addition, the terms of reference requested the Council to consider the offences of indecent act with a young person (*Criminal Code (Tas)* s 125B), indecent assault (*Criminal Code (Tas)* s 127), procuring or otherwise causing or permitting a child to provide sexual services in a sexual services business (*Sex Industry Offences Act 2005 (Tas)* s 9(1)) and receiving a fee or reward that a person knows is derived, directly or indirectly, from sexual services provided by a child in a sexual services business (*Sex Industry Offences Act 2005 (Tas)* s 9(2)).

58 *Sentencing Act (NT)* s 55A.

59 *Criminal Law (Sentencing) Act 1988 (SA)* s 20BA(1).

60 *Ibid* s 20BA(2).

61 See *Criminal Code (Tas)* Ch XLIV.

2.2.1 SEXUAL OFFENCES AGAINST CHILDREN

In determining whether the offence is a sexual offence that can be committed against children, the Council has examined the relevant legislation to ascertain those sexual offences that specifically apply to children and those offences that have general application that can be committed against a child.

Sexual offences that specifically apply to children

The Council has relied on the age limit provided in the relevant legislation to determine when a person is a child. This means a child is either a young person under the age of 17 or a person under the age of 18 in relation to child pornography and sexual services industry offences (as noted below).

The Council has identified the following offences under the *Criminal Code* (Tas):

- Section 124: Sexual intercourse with young person under the age of 17 years;
- Section 125A: Maintaining a sexual relationship with young person under the age of 17 years;
- Section 125C(2): Procuring unlawful sexual intercourse with person under the age of 17 years;
- Section 130: Involving person under age of 18 years in production of child exploitation material;
- Section 130A: Producing child exploitation material. Child exploitation material is defined as material that describes or depicts, in a way that a reasonable person would regard as being, in all the circumstances, offensive, a person who is or who appears to be under the age of 18 years – (a) engaged in sexual activity; or (b) in a sexual context; or (c) as the subject of torture, cruelty or abuse (whether or not in a sexual context);
- Section 130B: Distributing child exploitation material;
- Section 125B: Indecent act with a young person under 17.

In addition, the offences in the *Sex Industry Offences Act 2005* (Tas) s 9(1), apply to sexual services provided by a child in a sexual services business. A child, in this context, is defined as a person under the age of 18.

It is noted that offences that involve child exploitation material are not necessarily sexual offences given that the offence can be committed in relation to material that shows a person under 18 as the subject of torture, cruelty or abuse (whether or not sexual in nature). Such offences can also be committed where the person appears to be under the age of 18 as well as where the person is under the age of 18. The Council's consideration of these offences will be limited to circumstances where the person described or depicted is under 18 and the material involves sexual activity or is in a sexual context.

General sexual offences that can be committed against children

In addition, the Council has identified the following general sexual offences under the *Criminal Code* (Tas), where the complainant can either be a child or an adult:

- Section 126: Sexual intercourse with person with mental impairment;
- Section 127A: Aggravated sexual assault;
- Section 133: Incest;
- Section 125: Indecent assault;
- Section 185: Rape.

There may be different offence requirements depending on whether the complainant is an adult or a child. When the complainant is an adult, absence of consent is an ingredient of the offences of aggravated sexual assault and indecent assault. Where the complainant is a young person under the age of 17, absence of consent is not an element and so, generally, does not have to be established by the prosecution to establish the requirements of the offence.⁶² In accordance with the terms of reference, the Council will evaluate the inclusion of these offences in the mandatory scheme only in circumstances where the complainant is under the age of 17.

⁶² *Criminal Code* (Tas) ss 127(3), 127A(3). The exception is where an offender is close in age to the victim and can then rely on similar age consent 'defences'. This arises where the victim is aged 12 years or older and the offender is not more than 3 years older, or the victim is aged 15 or more and the offender is not more than 5 years older; *Criminal Code* (Tas) ss 124(3), 127(2), 127A(2). See discussion in Tasmania Law Reform Institute, *Sexual Offences Against Young People*, Final Report No 18 (2012).

The Council notes that the crime of female genital mutilation (*Criminal Code (Tas) s 178A*) is an offence of general application. Unlike all other sexual offences (except rape),⁶³ which are contained in Chapter XIV (Crimes Against Morality), female genital mutilation is contained in the *Criminal Code (Tas) Chapter XVIII* (Crimes endangering life or health). While recognising that female genital mutilation is a serious crime, it is the Council's view that it is not inherently a sexual crime and so it has been excluded from its consideration on this basis.

2.2.2 REASONS FOR INCLUSION

As indicated, it is the Council's view that it is necessary to give specific consideration to the sexual offences that can be committed against children to which the mandatory minimum sentencing scheme should be limited.

In determining whether an offence should be included in the mandatory minimum scheme, the Council has adapted criteria from a number of sources to develop a set of principles for application in the Tasmanian context. These sources include the principles set out by VSAC in its consideration of identifying offences for inclusion in a sentencing guidance model,⁶⁴ and in the New South Wales Sentencing Council's review of standard non-parole periods.⁶⁵ The approach of the Council has been to evaluate the offences according to the following principles:

- (1) the offence is triable on indictment only;
- (2) the offence is prevalent;
- (3) the offence involves a vulnerable victim;
- (4) the offence involves elements of aggravation;
- (5) there is a special risk or better understanding of serious consequences for victims and the community, including the need to recognise the exceptional harm which the offence might cause;
- (6) the offence is subject to a pattern of inadequate sentencing.

These principles take into account offence characteristics (indictable, prevalence, vulnerable victim and aggravation) as well as whether there are problems with the current sentencing practice for the offence (risk and understanding of consequences and inadequate sentencing).

Triable on indictment only

In Tasmania, indictable offences are generally heard in the Supreme Court. Evidence of the seriousness of an offence can be seen if an offence is triable on indictment only.⁶⁶

All the offences contained in the terms of reference are triable on indictment alone, except for indecent assault contained in the *Criminal Code (Tas) s 127*, where the defendant has the option of a trial by jury or a summary trial.⁶⁷ In the period 2010-11 to 2014-15, there were 33 cases involving indecent assault sentenced in the Magistrates Court.⁶⁸

In addition, it is noted that there is a power in the *Criminal Code (Tas) s 308*, for the Supreme Court to remit criminal matters to the Magistrates Court for a summary trial in circumstances where a sentence of a fine not exceeding 20 penalty units (currently \$3800) or imprisonment for a term not exceeding one year will be adequate punishment for the offence. In October 2015, the Chief Justice published a practice direction that indicated that the judges wished to make greater use of the power to remit cases where the charges were not so serious that it would be inappropriate for a magistrate to deal with them.⁶⁹ It indicated that counsel 'may be asked to provide information as to the level of seriousness of particular cases, with a view to the making of a s 308 application being considered in the following sorts of cases' (inter alia):

63 The crime of rape (s 185) is contained in Chapter XX of the *Criminal Code (Tas)* (Rape: Abduction: Stalking).

64 VSAC, above n 7 xxvii, xxx.

65 NSW Sentencing Council, above n 8, 9-19.

66 Ibid, 11-12. This is the approach of VSAC to the standard sentencing scheme: see VSAC, above n 7, 172.

67 See *Justices Act 1959 (Tas) s 72*.

68 Sentencing Advisory Council, Tasmania, SAC Stats <<http://www.sentencingcouncil.tas.gov.au/statistics>>.

69 Blow CJ, *Remitting of Criminal Matters to the Magistrates Court* (Supreme Court of Tasmania, Practice Direction, No 2 of 2015) 1.

- charges of sexual intercourse with a young person under the age of 17 years, contrary to s 124(a) of the *Criminal Code*, where the accused is 25 years or younger, and the complainant is at least 15 years old;
- charges of indecent assault, contrary to s 127(1) of the *Criminal Code*, when the alleged assault appears to be relatively minor.⁷⁰

Since the practice direction has been issued, as at 5 February 2016, no cases have been remitted to the Magistrates Court in relation to charges for sexual offences.⁷¹ However, it is foreseeable that cases will be remitted in the future and it is the Council's view that mandatory sentencing should not be applicable in the Magistrates Court. This view was supported by Tasmania Police, who indicated that 'offences that can be dealt with summarily should not be considered serious in this context'.

Preliminary advice

Application of mandatory minimum sentences to indictable offences

1. That mandatory minimum sentencing for serious child sexual offences should only apply to indictable offences.

Application of mandatory minimum sentencing to the Magistrates Court

2. That mandatory minimum sentencing for serious child sexual offences should not be applicable in the Magistrates Court.

Offence prevalence

Offence prevalence is inherently difficult to ascertain, particularly in the context of sexual offending against children where the under-reporting of such offences is well documented.⁷² As previously observed by the Council, there is no conclusive research about the incidence of child sexual abuse in Australia.⁷³ However, the Council considers that offence prevalence is relevant to the inclusion of an offence in the mandatory minimum scheme as offences that are infrequently the subject of sentencing in the Supreme Court may be unnecessary for inclusion in the scheme. Offences with no or few sentenced cases arguably do not require a mandatory minimum sentence for the purposes of denunciation or community protection. It is also not possible to make an assessment of the appropriateness of current sentencing practice where very few cases arise. In this paper, in making an assessment of prevalence, the Council has examined the number of sentenced cases on the basis of most serious offence (as recorded in the Tasmania Law Reform Institute (TLRI) sentencing database).

⁷⁰ Ibid 2.

⁷¹ Information provided by Linda Mason, email 4 February 2016.

⁷² See TSAC, above n 1, 4.

⁷³ Ibid 5.

Table 2-1: Prevalence by cases sentenced (most serious offence) 2008-14, Supreme Court

Offence	Legislation	Prevalence by cases sentenced (most serious offence) 2008-14, Supreme Court
Rape	<i>Criminal Code</i> (Tas) s 185	27 (12 involving complainant under 17)
Maintaining a sexual relationship with a young person	<i>Criminal Code</i> (Tas) s 125A	95
Sexual intercourse with a young person	<i>Criminal Code</i> (Tas) s 124	62
Aggravated sexual assault	<i>Criminal Code</i> (Tas) s 127A	19 (13 involving complainant under 17)
Indecent assault	<i>Criminal Code</i> (Tas) s 127	27 (21 involving complainant under 17)
Indecent act with young person	<i>Criminal Code</i> (Tas) s 125B	3 ⁷⁴
Procuring unlawful sexual intercourse with person under the age of 17 years	<i>Criminal Code</i> (Tas) s 125C(2)	2
Sexual intercourse with person with mental impairment	<i>Criminal Code</i> (Tas) s 126	0
Involving person under age of 18 years in production of child exploitation material	<i>Criminal Code</i> (Tas) s 130	3 ⁷⁵
Producing child exploitation material	<i>Criminal Code</i> (Tas) s 130A	4 ⁷⁶
Distributing child exploitation material	<i>Criminal Code</i> (Tas) s 130B	4 ⁷⁷
Incest	<i>Criminal Code</i> (Tas) s 133	1 (0 involving complainant under 17)
Procuring or otherwise causing or permitting a child to provide sexual services in a sexual services business	<i>Sex Industry Offences Act 2005</i> (Tas) s 9(1)	0
Receiving a fee or reward that a person knows is derived, directly or indirectly, from sexual services provided by a child in a sexual services business	<i>Sex Industry Offences Act 2005</i> (Tas) s 9(2)	0 ⁷⁸

74 There were 13 other cases where the offender was charged with indecent act with a young person and a more serious offence (indecent assault — five cases, aggravated sexual assault — one case, maintaining a sexual relationship — two cases, and sexual intercourse with a young person — five cases).

75 The Council also identified two cases where the offender received a global sentence for involving a person under the age of 18 years in the production of child exploitation material and a more serious offence (maintaining a sexual relationship — one case, and aggravated sexual assault — one case).

76 The Council also identified eight cases where a global sentence was imposed for producing child exploitation material and a more serious offence (indecent assault — one case, maintaining a sexual relationship with a young person — one case, rape — two cases, sexual intercourse with a young person — one case, aggravated sexual assault — two cases and involving a young person under the age of 17 in the production of child exploitation material — one case).

77 The Council also identified two cases where a global sentence was imposed for distributing child exploitation material and a more serious offence (maintaining a sexual relationship with a young person — one case, produce child exploitation material — one case).

78 It is noted that there were two cases where the offenders were charged with procuring unlawful sexual intercourse with person under the age of 17 (*Criminal Code* (Tas) s 125C) and receiving a fee derived from sexual services provided by a child. In both cases, the offender received a global sentence of 10 years imprisonment.

The Council's view is that a mandatory minimum sentence is not necessary or appropriate for an offence that has no or very few cases (that is, less than five cases). In relation to offences with very few cases, while the offences may be serious, it cannot be said that there is a pattern of inadequate sentencing such as to create the need for a mandatory minimum sentence. Tasmania Police agreed with the view expressed by the Council.

Preliminary advice

Offence prevalence

3. That a mandatory minimum sentence is not necessary or appropriate for an offence that has no or very few cases.

The offence involves a vulnerable victim

All offences that specifically refer in the definition of the offence to a young person, a person who is vulnerable by reason of relationship (incest) or a person with a mental impairment are offences that involve vulnerable victims. Courts have also recognised the particular vulnerability of children who are sexually assaulted in family situations.⁷⁹ In relation to the offences of rape, aggravated sexual assault and indecent assault, these do not involve a vulnerable complainant as an objective element of the offence. This means that if these offences were included in the scheme, legislative reform would be necessary to make it clear that the offence would only come within the mandatory minimum sentencing scheme in circumstances where the complainant was under the age of 17.

The creation of mandatory minimum sentencing for certain offences against police officers (as exists in Tasmania) can be justified on the basis that the nature of police work means that police officers are exposed to a special vulnerability by reason of their employment.⁸⁰

Preliminary advice

Rape

4. That rape should be included in the mandatory minimum sentencing scheme where the complainant is under the age of 17.

Aggravated forms of the offence

In Tasmania, there are no specific offences which are aggravated forms of a basic offence such as exists in some other jurisdictions.⁸¹ In the Council's previous examination of sentencing for sex offences, it expressed the view that the current legislative framework in relation to sexual intercourse with a young person and maintaining a sexual relationship with a young person was not adequate to reflect the different circumstances in which the offences might arise. The Council's view was that a distinction ought to be drawn between the basic offence and the offence committed in circumstances of aggravation as a means of providing a legislative indication to the court that sentencing for the more serious category of offending ought to be increased. Accordingly, the Council recommended the introduction of aggravated forms of the offence of maintaining a sexual relationship with a young person and sexual intercourse with a young person. Aggravating features were identified as follows:

⁷⁹ NSW Sentencing Council, *Sentencing for Child Sexual Assault* (2015) 22.

⁸⁰ Amendments to the *Sentencing Act 1997* (Tas) contained in the *Sentencing Amendment (Assaults on Police Officers) Bill 2014* (Tas) introduced a mandatory minimum sentence of six months imprisonment for summary and indictable offences where a person is convicted of an offence against an on duty police officer that results in serious injury to the police officer. It is noted that as at 22 October 2015, no offenders had been imprisoned pursuant to the mandatory provision, see Rosemary Bolger, 'Mandatory Sentencing for Police Assaults in Tasmania Yet to be Used; Push for Legislation to be Scrapped', 22 October 2015, ABC Online, <<http://www.abc.net.au/news/2015-10-22/mandatory-sentence-for-police-assaults-yet-to-be-used/6875056>>.

⁸¹ See TSAC, above n 1, 98-99.

- the young person was aged under 12 at the time of the offending or at the time the offending commenced;
- the young person was under the care, supervision or authority of the offender;
- the offender took advantage of the victim being under the influence of alcohol or a drug in order to commit the offence, or the circumstances of the offence involved the offender supplying the victim with alcohol and/or drugs; or
- the offender filmed or recorded the offence (Preliminary advice 9).

The Council understands that the government intends to legislate to create aggravated offences, and, once introduced, these offences would be offences that could be included in any mandatory minimum scheme given that they represent particularly serious circumstances in which sexual offending against children can occur. These aggravating circumstances also reflect community abhorrence towards such offenders, the serious harm caused by this type of offence, the offender's higher culpability and the prevalence of the offence.⁸²

However, while the inclusion of an aggravated offence (once created) would be one way to provide a principled approach in making the distinction between the more serious and less serious circumstances in which maintaining a sexual relationship can arise, this is not the Council's preferred approach. In light of the intention of the government to introduce mandatory minimum sentencing and the views expressed by the Director of Public Prosecutions and Tasmania Police, the Council has reconsidered its earlier recommendation about the creation of aggravated offences. The Council's previous recommendation to create aggravated offences was premised on the existing discretionary sentencing regime and was proposed as a means of indicating to the court that sentencing practice needed to be changed for the more serious category of cases. Mandatory minimum sentences obviate the need for this signal as the court will be compelled to apply a particular sentencing response. It will also create additional difficulties in prosecuting serious sexual offences against children. Accordingly, it is now the Council's view that an aggravated offence of maintaining a sexual relationship with a young person and also an aggravated offence of sexual intercourse with a young person should not be introduced.

In forming this view, the Council has been influenced by the views expressed in the consultation process (particularly the feedback received from the Director of Public Prosecutions and Tasmania Police). The Director of Public Prosecutions strongly opposes the inclusion of the offence of maintaining a sexual relationship with a young person within the mandatory minimum scheme and also strongly opposes the creation of separate aggravating offences for maintaining a sexual relationship with a young person and sexual intercourse with a young person. The Director of Public Prosecutions considered that the offence of maintaining a sexual relationship should not be included in the mandatory sentencing scheme because of the broad range of conduct that falls within the offence and noted his concern that if the offence were to be included in the scheme, then it would be charged a lot less frequently. The Director of Public Prosecutions stressed that prosecuting sexual offence cases is very complex and that mandatory minimum sentences will make these cases even more difficult to prosecute. These concerns also informed the Director's view that aggravated offences are not desirable. Difficulties are likely to arise in obtaining pleas of guilty to an aggravated offence as well as problems of explaining the requirements of the offence to the jury by adding an extra level of complexity as well as establishing the aggravating features at trial. In addition, the Director strongly opposed the inclusion of the age of the complainant as an aggravating feature of the offence on the basis that this creates further complications. This concern was raised in relation to historical cases, where it may be difficult to establish the complainant's age at the time that the offending commenced. Tasmania Police indicated that the creation of additional aggravated versions of existing crimes adds unnecessary complexity in relation to the selection of the appropriate charge and also the prosecution of the charge. Instead, Tasmania Police considered that the features that formed the aggravated versions of the existing crimes should be included in sentencing law reform rather than the creation of new substantive offences.

The Council has much sympathy with the views of the Director that maintaining a sexual relationship with a young person is incompatible with mandatory sentencing because of the broad range of circumstances that may give rise to the charge.⁸³ In the Council's view, this offence exemplifies the difficulties that are caused by mandatory sentencing in that it fails to allow for different degrees of seriousness in the conduct and culpability of offenders to be appropriately recognised in the imposition of sentence. It is for this reason that a broad sentencing discretion is important. The difficulties inherent in including the offence of maintaining a sexual relationship with a young person were also raised in consultations with the Bar Association, the Prisoner's Legal Service and the Law Society. The Law

82 Ibid 99.

83 See Part B [5.2.3].

Society raised the possibility that the inclusion of some forms of offending in a mandatory scheme and the exclusion of other types may lead to a perception that there were classes of victims, which may be difficult for those who have been subject to sexual abuse to comprehend.

However, it is the Council's view that, if a mandatory minimum sentencing scheme is adopted, some form of this offence should be included in the scheme on the basis that it is the most common charge used for sexual offences against children. It also includes cases that typically represent the most serious examples of sexual abuse of children. The difficulty arises because it also includes cases that represent the least serious examples of sexual offending against children. This is the dilemma and presents a challenge as to how to make a distinction between those types of cases that should be included in the mandatory sentencing scheme and those that should be excluded. The resolution of this problem is complicated and will likely result in greater complexity in the sentencing process.

In implementing a mandatory minimum sentence scheme, instead of creating aggravated offences, the Council's view is that the aggravating circumstances identified should be matters relevant to sentence and should be taken into account by the judge in deciding whether a case should be subject to the mandatory minimum penalty or not. This reflects the current judicial role in making an assessment of factors that may aggravate or mitigate a sentence when determining the appropriate sentence. This approach was also supported by Tasmania Police who indicated that the scheme should be limited to the proposed aggravating features identified by Council.

For the purposes of mandatory minimum sentencing scheme, the relevant aggravating circumstances are:

- the young person was aged under 12 at the time of the offending or at the time the offending commenced; or
- the young person was under the care, supervision or authority of the offender; or
- the offender took advantage of the victim being under the influence of alcohol or a drug in order to commit the offence, or the circumstances of the offence involved the offender supplying the victim with alcohol and/or drugs; or
- the offender filmed or recorded the offence.

This would be consistent with current sentencing practice for the offence of maintaining a sexual relationship.⁸⁴ It also reflects the concerns of the Council and the community about sexual abuse of young children by adults. Further, it also recognises that there is a range of circumstances in which sexual offences against complainants under the age of 17 can be committed. In the Council's prior examination of sentencing for sex offences, the Council highlighted the diversity of circumstances that may give rise to a conviction for a sexual offence. The Council noted that while there was general consensus that sexual offences committed by adults against young children, particularly by adults in positions of trust or authority, were particularly serious offences and deserving of severe punishment, not all sexual offences against children fell into this category. The Council noted the distinction in sentencing practice and in public opinion between cases where a young complainant has willingly agreed to intercourse/sexual contact in a genuine and equal relationship and cases where the offender has engaged in predatory conduct to pressure or manipulate the young person.⁸⁵

In respect of the features identified by Council, Tasmania Police indicated that it was cautious about the inclusion of the proposed aggravating factor in regard to video-recording of the offence. It stated that '[a]lthough this will be aggravating in many circumstances, this is potentially less the case in circumstances involving parties close in age and in a consensual relationship'. The Council acknowledges this concern and stresses that it is not the Council's intention that a close in age offender in a consensual relationship with the complainant should come within the mandatory sentencing scheme. If this scenario arose, it may be an appropriate case for the sentencing judge to exercise his or her discretion and find that an exception to the mandatory sentencing scheme applies.⁸⁶ The Council also notes that these types of scenarios reflect the inherent difficulties of limiting judicial discretion by the implementation of a mandatory sentencing scheme and in attempting to isolate a category of serious offending for the purpose of the scheme. It also highlights the need for exceptions to the scheme, if one is implemented.

Although the Director of Public Prosecutions raised concerns about the use of age of the complainant as an aggravating feature, it is the Council's view that it is appropriate to specify the age of the complainant as a relevant factor. This is consistent with public opinion research that shows that community concern about offence seriousness

84 See Part B [5.2.3].

85 TSAC, above n 1, [7.1.4].

86 See Part B [4.2].

and sentencing practice particularly relates to cases involving young complainants.⁸⁷ It is also consistent with sentencing practice in other jurisdictions.⁸⁸ Age is a factor associated with an assessment of the offender's culpability as well as the harm caused to the child. Young children are considered to be particularly vulnerable and so the offender is seen to prey on that vulnerability in a situation where the child is unable to consent or defend him or herself.⁸⁹ Further, this distinction is made in other jurisdictions where there are separate offences created for sexual abuse committed against children of particular ages. In Tasmania, age will be a matter relevant to the sentencing judge's assessment of whether the mandatory minimum sentencing scheme applies but is not a separate matter of proof for the jury to consider in determining an offender's guilt.

There is, however, no consensus between jurisdictions as to an age below which the law should treat the conduct more seriously. The age set in other jurisdictions includes under 10,⁹⁰ under 12⁹¹ or under 13.⁹² The Council acknowledges that creating an aggravating sentencing factor based on a particular age is arbitrary and unsatisfactory, given there is no difference between a sexual assault on a child who is just under 12 (for example) than a sexual assault on a child who is just 12. Nevertheless, the Council does consider that the young age of a complainant should be one of the aggravating features for the purposes of sentencing (for the reasons outlined) and the Council's view is that an appropriate age would be to include sexual offences committed against a child under 12. This would be consistent with the approach in the similar age consent defences that apply to sexual intercourse with a young person and maintaining a sexual relationship with a young person, where the consent of a child under the age of 12 is never a defence.⁹³ It also reflects the views expressed by the Victims Support Service that a very strong theme in the literature is that sexual assault for children under 12 is particularly devastating.

It is important to note that the aggravating circumstances identified by Council are set out only for the purposes of determining whether the mandatory minimum sentencing scheme applies to the offence. If any of these features form part of the circumstances of the offence to which the offender has entered a plea of guilty or been found guilty, this will be relevant to the exercise of the sentencing discretion with the effect that the trial judge must sentence the offender to at least the appropriate mandatory minimum penalty. This does not, of course, prevent the trial judge from taking into account other aggravating factors that have been recognised to increase the harm caused by the offence or the culpability of the offender in imposing sentence on the offender.⁹⁴ The aggravating features are a matter relevant to the penalty imposed and are not intended to create an aggravated form of the offence, such that the Crown would need to establish these factors as independent elements of the offence.⁹⁵ For this reason, the aggravating circumstances should be included in the *Sentencing Act 1997* (Tas) and not the *Criminal Code* (Tas). Under the current procedures for the disposition of indictable offences, the police provide the offender or his or her legal counsel with the complaint, the police interview, witness statements and a summary of the material facts prior to the offender being required to plea to the charge in the Magistrates Court and then the defendant is committed to the Supreme Court for sentence or for trial.⁹⁶

The Council notes that the restriction of mandatory minimum sentencing to the more serious categories of sexual offending is consistent with the approach in Queensland, South Australia and the Northern Territory (the only jurisdictions that have mandatory minimum sentences for sexual offences), where mandatory minimum sentences do not apply to all sexual offences. In South Australia, the minimum non-parole periods only apply to repeat offenders; in Queensland, the mandatory minimum non-parole period only applies if the court imposes a sentence of 10 years or more or if the court makes a declaration that the offenders is convicted of a serious violent offence; and in the Northern Territory, the mandatory minimum non-parole period only applies if the court does not partly suspend the sentence of imprisonment.⁹⁷

87 See discussion in Chapter 5; TSAC, above n 1, [6.3]; VSAC, above n 30, 15-18.

88 See NSW Sentencing Council, above n 79, 21-22.

89 VSAC, *Community Attitudes to Offence Seriousness* (2012), 55-56.

90 *Crimes Act 1900* (NSW) s 66A-66D, where the age range for offences is under 10 years, and between 10 and 16 years. There are separate and distinct offences for the two age ranges.

91 *Crimes Act 1958* (Vic) ss 45(1)(a)-(c), where subsections distinguish the differences in age are under the age of 12, and between the ages of 12 and 16 in terms of maximum penalties for the offence.

92 *Sexual Offences Act 2003* (UK) ss 5-12, 16-19.

93 *Criminal Code* (Tas) ss 124(3), 127A(2).

94 See TSAC, above n 1, 12-13.

95 See *Kingswell v The Queen* (1985) 159 CLR 264 distinguished in *Adams v White* (2006) 15 Tas R 350.

96 *Justices Act 1959* (Tas) ss 56, 59. See Supreme Court, Tasmania, *A Guide to New Proceedings For the Disposition of Indictable Offences* <http://www.supremecourt.tas.gov.au/practice_and_procedure/criminal_rules>.

97 See Part B [2.2].

As noted above, there are still objections that could be raised to including the offence of maintaining a sexual relationship with a young person (even if it only applies to the aggravated form of the offence). This is because the offence is committed where an offender does an unlawful sexual act on at least three occasions, and there is considerably variability in the objective seriousness of the acts that may give rise to the charge. These unlawful acts may include rape, incest, aggravated sexual assault, sexual intercourse with a young person, sexual intercourse with a person with mental impairment, indecent act with a young person or indecent assault. These offences cover a range of behaviours from extremely serious sexual abuse (for example, penetration without consent) to conduct that is relatively less serious (for example, touching of genital area or breasts through clothing). However, the Council's view is that it is the course of conduct rather than the specifics of the conduct that makes the offence suitable for inclusion in the mandatory minimum scheme.

Preliminary advice

Maintaining a sexual relationship with a young person and sexual intercourse with a young person

5. That there should be some limits placed on the circumstances in which the offences of maintaining a sexual relationship with a young person and sexual intercourse with a young person are included in the mandatory minimum sentencing scheme.
6. That an aggravated offence of maintaining a sexual relationship with a young person or an aggravated offence of sexual intercourse with a young person should not be created.
7. That the offence of maintaining a sexual relationship with a young person and the offence of sexual intercourse with a young person should only be included in the mandatory minimum sentencing scheme where there are aggravating circumstances (as defined).
8. The existence of aggravating circumstances should be a matter to be determined by the sentencing judge.
9. Aggravating circumstances should be as follows:
 - the young person was aged under 12 at the time of the offending or at the time the offending commenced; or
 - the young person was under the care, supervision or authority of the offender; or
 - the offender took advantage of the victim being under the influence of alcohol or a drug in order to commit the offence, or the circumstances of the offence involved the offender supplying the victim with alcohol and/or drugs; or
 - the offender filmed or recorded the offence.

This discussion is also relevant to the inclusion of aggravated sexual assault within the mandatory minimum sentencing scheme. As noted above, this offence can be committed against adults and children and there are different offence requirements depending on whether the victim is an adult or a child. Unlike the situation that applies to adults, absence of consent is not an element that applies for complainants under 17 and so, generally, does not have to be established by the prosecution to establish the requirements of the offence.⁹⁸ In the Council's previous examination of sentencing for aggravated sexual assault the view was expressed that in cases involving young children or older children where the offender was in a position of care, trust or authority, there needed to be closer correspondence between sentencing for aggravated sexual assault and rape. However, this offence can also be committed in the context of a 'consensual' relationship between closer in age complainants and offenders. As noted at Part B [5.2.2], in the period 2008-14, there were two out of 13 cases involving complainants under 17 that occurred in a genuine 'relationship' and in those cases, the offenders received sentences other than immediate imprisonment. As with maintaining a sexual relationship with a young person and sexual intercourse

98 An offender can rely on consent in circumstances where the 'similar age' defences apply, see *Criminal Code (Tas)* ss 124(3), 127(2), 127A(2).

with a young person, it is the Council's view that the mandatory minimum sentencing scheme should be limited to the more serious forms of offending. This was also the view of Tasmania Police. In this regard, the approach to maintaining a sexual relationship with a young person should also be adopted for this offence.

Preliminary advice

Aggravated sexual assault

10. That limits should be placed on the circumstances in which aggravated sexual assault is included in the mandatory minimum sentencing scheme to exclude 'consensual' relationship cases and to only apply where the complainant is under the age of 17.
11. That aggravated sexual assault should only be included in the mandatory minimum sentencing scheme where there are aggravating circumstances (as defined). This is a matter to be determined by the sentencing judge.

The offence involves a special risk or better understanding of serious consequences to the victim or the community, including the need to recognise the exceptional harm that the offence might cause

Sexual offences against children are viewed as a class of offence that involves a special risk of serious consequences to the victim or the community.⁹⁹ There is now increased awareness of the significant harm caused by child sexual abuse to the victim, their families and the broader community.¹⁰⁰ In the Council's examination of sentencing for sex offences, it noted that there was 'compelling evidence of the serious long-term effects of child sexual assault and its devastating affect [that was] reflected in the hearings of the Royal Commission into Institutional Responses to Child Sexual Abuse'.¹⁰¹ There is also greater recognition of the violence inherent in sexual offending against children.¹⁰² Discussions with the Victims Support Service confirmed the complex and often long-term trauma and/or injury that occurs as a result of sexual abuse for victims and their families.

The offence is subject to a pattern of inadequate sentencing

The Council has previously given consideration to the adequacy of sentencing in Tasmania for the offences of rape, aggravated sexual assault, indecent assault, maintaining a sexual relationship with a young person and sexual intercourse with a young person.

As part of its assessment, the Council gave consideration to community views about the seriousness of the offences and the current sentencing practices. The Council observed that '[a]cross this research, there is general consensus that sexual offences committed by adults against young children, particularly by adults in positions of trust or authority are particular serious offences and deserving of severe punishment'.¹⁰³ This was also the view of the Council. However, the Council also observed that 'not all sex offenders are viewed with the same abhorrence and the public is willing to extend leniency to some offenders',¹⁰⁴ in particular in circumstances where the complainant is relatively close in age to the offender and consent is given in the context of a genuine and equal relationship.

99 See NSW Sentencing Council, *Standard Non-parole Period Final Report* (2013) 14.

100 VSAC, above n 30, 18-19; Kelly Richards, *Misperceptions About Child Sex Offenders*, Trends and Issues in Criminal Justice No 249, Australian Institute of Criminology, 2011) 1; Freiberg, Donnelly and Gelb, above n 31, 70; Australian Psychological Society, Submission 5 to the Joint Select Committee on Sentencing of Child Sexual Assault Offenders (2014) cited in VSAC, above n 30, 19 fn 70; Judith Cashmore and Rita Shackel, *The Long-Term Effects of Child Sexual Assault*, Australian Institute of Family Studies, Child Family Community Australia, Paper 11 (2013).

101 TSAC, above n 1, 79.

102 See *DPP v Dalgliesh* [2016] VSCA 148 [45]-[47] quoting VSAC, above n 30, 63. The Court of Appeal concluded that the 'significance of the violence and harm which such conduct entails cannot be overstated': at [47].

103 TSAC, above n 1, 75.

104 *Ibid.*

It was observed that the Tasmanian Jury Study provided evidence to suggest that sentences for child sexual assault cases may be perceived by jurors as too lenient, sentences for consensual sex with teenagers was considered to be about right and sentences for rape too harsh. The Council noted that the sample size was too small to be of statistical significance but asserted that the findings suggest that public opinion is more nuanced than opinion polls might suggest and that the public does not have the same concerns in relation to the sentencing of all sex offenders but more specifically in relation to sex offenders who are in a position of authority or trust and who sexually abuse young children.¹⁰⁵

The findings of the Tasmanian Jury Study were consistent with the findings of a VSAC study that examined public opinion about offence seriousness. The VSAC study found that sex offences involving young children were among the most serious criminal offences, with the age of the victim underpinning the question of severity of harm.¹⁰⁶ The Council noted that the Victorian study demonstrated that '[y]oung victims were ... considered to be particularly vulnerable and so the offender was seen to prey on that vulnerability in a situation where the child was unable to consent or defend himself [or herself]'. However, there was less agreement in relation to sexual penetration in circumstances where there was a boyfriend/girlfriend relationship between an older complainant and a close in age offender. This offence was ranked 38 out of 40 in terms of seriousness (with intentional murder being 1 and sexual penetration of a child being 2).¹⁰⁷

After examining sentencing patterns for specific offences, it was the Council's view that:

- the sentencing range for rape may be unduly truncated;
- there was insufficient recognition of the violence inherent in the act of rape in the sentences imposed;
- in relation to aggravated sexual assault involving young children or adults in a position of care, trust or authority, there needed to be closer correspondence between sentencing for aggravated sexual assault and rape;
- there should be an incremental increase in the length of sentence where the indecent assault is committed by an adult on a young person (other than in the context of a close in age 'girlfriend/boyfriend' type relationship);
- there should be an incremental increase in sentencing for maintaining a sexual relationship with a young person in cases involving young children, as well as cases where the offender is in a position of trust or authority or in cases where a young person has been 'groomed' and manipulated by an adult to engage in sexual activity;
- increased sentences are not appropriate for maintaining a sexual relationship with a young person in the context of a 'consensual relationship';
- suspended sentences (particularly fully suspended sentences) and non-custodial sentences are generally inappropriate for the offence of sexual intercourse with a young person, unless the offending occurs in the context of a mutual relationship involving older complainants and closer in age offenders or where the offender is a young offender or has a cognitive or intellectual impairment; and
- there should be an incremental increase in sentencing for sexual intercourse with a young person in cases where an offender is in a position of care, supervision or authority in relation to the complainant or has otherwise engaged in predatory behaviour to manipulate and coerce the complainant.¹⁰⁸

The Council reiterates its assessment of the inadequacy of current sentencing practice in some contexts and has used these findings to inform its consideration of mandatory minimum sentences.

The offences of indecent act with a young person, procuring unlawful sexual intercourse with a person under the age of 17 years, sexual intercourse with a person with mental impairment and child exploitation material offences were not analysed by the Council in its previous consideration of sentencing for sex offences. However, as noted above, there are no or very few cases where an offender has been sentenced for these offences and this makes it extremely difficult to determine the sentencing range and make any sort of assessment on the appropriateness of sentencing for these offences.

105 Ibid 69.

106 VSAC, above n 89, 49.

107 Ibid Appendix 5.

108 TSAC, above n 1, vii.

2.2.3 SUMMARY OF THE COUNCIL'S VIEWS

Based on the application of the principles discussed at Part B [2.2] and as discussed above, the summary of the Council's position is as follows.

Offences that the mandatory minimum sentencing scheme should be limited to

The Council's views are that the mandatory minimum sentencing scheme should be limited to the following offences:

- rape (where the complainant is under the age of 17);
- aggravated sexual assault in cases where there are aggravating circumstances (where the complainant is under the age of 17);
- maintaining a sexual relationship with a young person in cases where there are aggravating circumstances; and
- sexual intercourse with a young person in cases where there are aggravating circumstances.

The Council's view is that the aggravating circumstances identified should be matters relevant to sentence to be taken into account by the judge in deciding whether a case should be subject to the mandatory minimum penalty or not. These aggravating circumstances are:

- the young person was aged under 12 at the time of the offending or at the time the offending commenced;
- the young person was under the care, supervision or authority of the offender;
- the offender took advantage of the victim being under the influence of alcohol or a drug in order to commit the offence, or the circumstances of the offence involved the offender supplying the victim with alcohol and/or drugs; or
- the offender filmed or recorded the offence.

These offences are considered to be appropriate for inclusion because they are extremely serious offences, where the circumstances of the offending reflect community concerns, the serious harm caused by this type of offence, the offender's higher culpability and the prevalence of the offence.

Offences that may be included in the mandatory minimum sentencing scheme

As indicated, in relation to the offence of maintaining a sexual relationship with a young person, the Council considers that there are difficulties in including this offence in a mandatory minimum sentencing scheme. While on the face of it this is a serious offence and the government has indicated that it will change the name of the offence to 'persistent sexual abuse' in recognition of its seriousness, this offence potentially covers a wide range of offending behaviour and this creates 'significant potential differences in the degree of [its] objective seriousness'.¹⁰⁹ While this offence can be committed in circumstances where the complainant is young or the offender is in a position of trust relative to the complainant, it can also be committed in cases where the offender is relatively close in age to the complainant and consent is given. In such cases, the offender's culpability is less and there may be less harm to complainant.¹¹⁰ There is also community opinion that such offences are not the most serious offences committed against young people. Accordingly, the Council has made suggestions to limit the application of the mandatory minimum sentencing scheme to the more serious categories of offending. However, if this approach is not adopted by government and the offence of maintaining a sexual relationship with a young person is included (without any restrictions) in the mandatory minimum sentencing scheme, consideration will need to be given to ensuring that the mandatory sentencing scheme does not give rise to sentences that are contrary to community expectations and the requirements of justice though the creation of appropriate exceptions to the scheme.¹¹¹ There will also be a need to reconsider the mandatory minimum penalty for the offence set out in Chapter 5.

109 NSW Sentencing Council, above n 8, 18.

110 Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson, 3rd ed, 2014) [4.185].

111 See Chapter 4.

Offences that should not be included in the mandatory minimum sentencing scheme

The Council's view is that the following offences should not be included in the mandatory minimum sentencing scheme:

- indecent assault on the basis that this offence is also triable summarily;
- maintaining a sexual relationship with a young person without aggravating circumstances;
- sexual intercourse with a young person without aggravating circumstances;
- aggravated sexual assault without aggravating circumstances.

In addition, the Council does not consider that the following offences should be included in the scheme on the basis that there are no or few offences sentenced in the Supreme Court:

- *Criminal Code* (Tas) s 125B: Indecent act with young person;
- *Criminal Code* (Tas) s 125C: Procuring unlawful sexual intercourse with person under the age of 17 years;
- *Criminal Code* (Tas) s 126: Sexual intercourse with a person with a mental impairment;
- *Criminal Code* (Tas) s 130: Involving a person under age of 18 years in production of child exploitation material;
- *Criminal Code* (Tas) s 130A: Producing child exploitation material;
- *Criminal Code* (Tas) s 130B: Distributing child exploitation material;
- *Criminal Code* (Tas) s 133: Incest;
- *Sex Industry Offences Act 2005* (Tas) s 9(1): Procuring or otherwise causing or permitting a child to provide sexual services in a sexual services business;
- *Sex Industry Offences Act 2005* (Tas) s 9(2): Receiving a fee or reward that a person knows is derived, directly or indirectly, from sexual services provided by a child in a sexual services business.

It should be noted that the Council's assessment that these offences should not be included in the mandatory minimum scheme does not indicate that the Council considers these offences to be trivial or minor. In relation to the offence of procuring unlawful sexual intercourse with a young person, the Council notes that this is a particularly serious offence and, although extremely rare, has been dealt with by the Supreme Court with a sentence of 10 years.¹¹² It is the Council's view that the severity of this sentence combined with the rarity of the offence reduces the necessity for inclusion in the mandatory minimum scheme. In addition, the Council has previously suggested that recording or sharing of sexual images of a victim should be an aggravating factor in sentencing for sexual offences and that aggravated forms of the offences of sexual intercourse with a young person and maintaining a sexual relationship with a young person should be created and that filming or recording the offence should be an aggravating feature.¹¹³ The Council has also indicated that there is scope to increase the length of the sentence imposed for indecent assault where it was committed against a child by an adult (other than in the context of girlfriend/boyfriend relationship).¹¹⁴ Further, the Council acknowledges the significant harm that is caused by these offences and the community concern that arises in relation to sexual offending against young children.¹¹⁵

112 See Appendix B Table B-16.

113 TSAC, above n 3.2, Recommendation 9.

114 *Ibid* 78.

115 In VSAC's analysis of community views of the seriousness of a range of offences, participants were provided with several vignettes that involved sexual offences with a 35-year-old offender and an 8-year-old victim. These offences involved sexual penetration, the production of child pornography and an indecent act with a child. The analysis found that participants did not make a large differentiation based on the type of physical contact and viewed all offending against young children as serious based on the age of the victim, the abuse of trust and power and the long lasting and severe harm caused: see VSAC, above n 89.

3. Structure of the mandatory minimum sentencing scheme

Mandatory minimum penalties typically refer to the requirement to impose a sentence of imprisonment of a minimum length, either as a mandatory minimum penalty length or a mandatory minimum non-parole period.¹¹⁶ Mandatory minimum penalties can also refer to the requirement that the court impose a mandatory minimum sentence of imprisonment.¹¹⁷ Mandatory minimum penalties can be contrasted with fixed penalties that the judge must impose, such as those that apply for murder in South Australia, Queensland and Northern Territory.¹¹⁸

In implementing a mandatory minimum sentencing scheme in Tasmania, consideration needs to be given to the overall structure of the scheme, including the following issues:

- the type of mandatory minimum sentencing scheme;
- the relationship between the mandatory minimum sentence for a single count and global sentencing;
- the relationship between the mandatory minimum sentence for a single count and the need for concurrent or cumulative serving of sentences for other offences; and
- the effect of a mandatory minimum sentence on the sentencing range.

3.1 TYPE OF MANDATORY MINIMUM SENTENCING SCHEME

3.1.1 EXISTING MODELS FOR MANDATORY MINIMUM SENTENCING SCHEMES

There are several models of mandatory minimum sentencing schemes that can be identified in Australia, as shown in Table 3-1, that could be adopted in Tasmania.¹¹⁹

Table 3-1: Forms of mandatory minimum sentencing schemes, Australia

Type	Examples
Mandatory minimum head sentences with no parole	Mandatory minimum head sentence of 15 years if the offender is convicted of an indictable offence where a declared criminal organisation is involved and the statutory penalty is life. The court is not able to make a parole order for offences other than murder (<i>Sentencing Act 1995</i> (WA) s 9D, 9G).

116 See Freiberg, above n 110, [12.25].

117 Ibid.

118 See Lenny Roth, *Mandatory Sentencing Laws* (NSW Parliamentary Research Service, 2014) 2. In the Northern Territory, life imprisonment is mandatory but the court must set a non-parole period, *Criminal Code* (NT) s 156. The standard non-parole period is 20 years or 25 years for murder in circumstances of aggravation, *Sentencing Act* (NT) s 53A. In Queensland, life imprisonment is mandatory (subject to the court imposing an indefinite term), *Criminal Code* (Qld) s 305. The minimum non-parole period is 20 years except if the murder relates to a police officer (25 years) or two counts or previous convictions for murder (30 years). In South Australia, life imprisonment is mandatory, *Criminal Law Consolidation Act 1935* (SA) s 11. There is a minimum non-parole period of 20 years, *Criminal Law (Sentencing) Act 1988* (SA) s 32. See John Anderson, 'The Label of Life Imprisonment in Australia: A Principled or Populist Approach to an Ultimate Sentence' (2012) 35(3) *UNSW Law Journal* 747 for a discussion of life imprisonment in Australia. Other variations that have been adopted to limit judicial discretion in sentencing are the use of presumptive non-parole periods and baseline sentencing.

119 See also Appendix A.

Type	Examples
	Mandatory minimum sentences of 75% of the maximum penalty (for offences where the statutory penalty is not life) if the offender is convicted of an indictable offence where a declared criminal organisation is involved and the statutory penalty is life. The court is not able to make a parole order (<i>Sentencing Act 1995</i> (WA) s 9D, 9G).
Mandatory minimum head sentences with mandatory minimum non-parole period	Mandatory minimum head sentence of 8 years for assault occasioning death when intoxicated with any non-parole period to be not less than 8 years (<i>Crimes Act 1900</i> (NSW) s 25B). Mandatory minimum term of 12 months' imprisonment for dangerous driving causing death or grievous bodily harm where the offender was driving without the consent of the owner or person in charge of vehicle, exceeding the speed limit by more than 45 km per hour or driving to escape pursuit by a police officer (<i>Road Traffic Act 1974</i> (WA) s 59(4A), 49AB(1) (c)). The mandatory minimum non-parole period must be the greater of the mandatory minimum term or the non-parole period that otherwise would apply to the offender's sentence if it was not a prescribed offence (<i>Sentencing Act 1995</i> (WA) s 95A).
Mandatory minimum head sentences and discretionary parole	Mandatory minimum head sentences for certain violent and sexual offences committed in course of an aggravated home burglary (<i>Criminal Code</i> (WA) ss 281, 283, 292, 320, 321, 324, 325, 326, 327, 328, 330). The offender is eligible for parole after serving half of their sentence for sentences between 12 months and 4 years and the term of imprisonment less 2 years for sentences 4 years or more (<i>Sentencing Act 1995</i> (WA) s 93(1)).
Discretionary head sentences and mandatory minimum non-parole periods	If the court sentences an offender to imprisonment in relation to certain offences against a person under 16 and the sentence is not suspended in whole or in part, the court must fix a minimum non-parole period of not less than 70% of the sentence (<i>Sentencing Act</i> (NT) s 55A). The court must impose a term of imprisonment and fix a non-parole period of not less than 4 years for the offence of causing serious injury in circumstances of gross violence (<i>Sentencing Act 1991</i> (Vic) s 10(1)).
Mandatory minimum sentences of imprisonment term	Six months' imprisonment for a person convicted of an offence in relation to causing serious injury to a police officer (<i>Sentencing Act 1997</i> (Tas) s 16A(1)).
Mandatory imprisonment with mandatory minimum non-parole period	Mandatory imprisonment and mandatory minimum non-parole period of 19 years for manslaughter by single punch or strike (<i>Sentencing Act 1991</i> (Vic) s 9C(2)).
Mandatory imprisonment	The court must order the offender serve a term of imprisonment for an offence of a sexual nature against a child under the 16 (<i>Penalties and Sentences Act 1992</i> (Qld) s 9(4)).
Mandatory non-custodial sentences	The court must impose a community service order for affray, grievous bodily harm, wounding, assault, assault occasioning bodily harm, assaulting a police officer or public officer committed in a public place while the offender was adversely affected by an intoxicating substance (<i>Penalties and Sentences Act 1992</i> (Qld) s 108B).

3.1.2 OPTIONS FOR MANDATORY SENTENCING SCHEME IN TASMANIA

As discussed below, the approach adopted will have different consequences for offenders and the sentencing practice of the court. There will also be different resource implications arising from the model adopted.

Mandatory penalty of imprisonment (mandatory penalty type)

One option to introduce a mandatory minimum penalty for sexual offences committed against children is to require the court to impose a mandatory penalty of imprisonment. This would mean that the minimum penalty was a sentence of imprisonment. This exists in the Northern Territory and Queensland for sexual offenders.¹²⁰

A fundamental principle of sentencing is that imprisonment is the sentence of last resort to be imposed only where a non-custodial sentence is inappropriate.¹²¹ Even if imprisonment is the sole penalty specified for an offence, the *Sentencing Act 1997* (Tas) s 12, provides that a court may impose another order if the justice of the case would

¹²⁰ *Sentencing Act* (NT) s 78F (all sex offenders); *Penalties and Sentences Act 1992* (Qld) s 9(4) (in relation to children under 16).

¹²¹ *Bell v Lowe* [1988] TAS R (NC 2); *Underwood v Schiwy* [1989] Tas R 269.

be better served by a non-custodial order.¹²² A statutory requirement that the offender be sentenced to a term of imprisonment following a finding of guilt for an offence is a legislative statement that imprisonment is the only appropriate penalty for this category of case. This overrides the common law principle of imprisonment as a last resort and does not allow a court to impose a sanction other than actual imprisonment. It would also be necessary to make it clear that the *Sentencing Act 1997* (Tas) s 12, does not apply to the requirement for a mandatory penalty of imprisonment be imposed.¹²³

This approach does not specify the period of time that an offender must serve in prison and so it is open to the court to impose a very short term of imprisonment.¹²⁴ In imposing the term of imprisonment, the court would also be required to take into account any period of pre-trial custody.¹²⁵

The Council's view is that is not the preferred model in Tasmania because, although it provides a legislative requirement that a term of imprisonment be imposed, it does not provide legislative guidance as to the minimum term requirement as contemplated by the Attorney-General's request. However, this is a model that is open for the government to accept and would require a court to sentence all sex offenders to a term of imprisonment unless exceptions exist for a particular category of offender¹²⁶ or if there was a power for the court to impose a sentence of imprisonment and then fully or partly suspend it.¹²⁷ It would also seem that if such a provision were to exist in Tasmania, the court would be able to avoid the mandatory term by dismissing the charge without a conviction unless this possibility was excluded in the legislation.¹²⁸

Mandatory minimum sentence of imprisonment

An alternative approach is to require the court to impose a mandatory minimum sentence of a particular term of imprisonment. This could take a number of forms including:

- (1) a mandatory minimum non-parole period with a discretionary head sentence;
- (2) a mandatory minimum head sentence with no parole;
- (3) a mandatory minimum head sentence with a mandatory minimum non-parole period;
- (4) a mandatory minimum head sentence with discretionary parole.

Mandatory minimum non-parole period

Parole is the conditional release of an offender into the community, under supervision, once the offender has served a specified portion of their term of imprisonment. Typically, when sentencing, the court imposes a sentence (a head sentence or the total sentence) and then specifies a non-parole period that represents the minimum period of time that an offender must serve in prison before being eligible for release on parole. Unless the court makes no order for parole or orders that an offender is ineligible for parole,¹²⁹ an offender can apply for parole and the parole board makes the decision as whether the offender should be released at the expiry of the non-parole period.

A mandatory minimum non-parole scheme means that the court has no discretion in relation to the minimum time that an offender must spend in prison. Such a scheme already exists in Tasmania. The current mandatory minimum term in Tasmania for offender serving fixed term sentences is a non-parole period of six months, or one half of the sentence, whichever is greater, unless there are exceptional circumstances.¹³⁰ In responding to concerns about sentencing for serious child sex offenders, an option would be to alter the minimum non-parole period in relation to these offenders as mandatory minimum non-parole periods provide a means for Parliament to increase the period of

122 *Sentencing Act 1997* (Tas) s 12.

123 See for example, *Sentencing Act 1997* (Tas) s 16A(8).

124 In the Northern Territory, it has been accepted that the actual term of imprisonment may be as short as 'rising of the court', *White v Brown* (2003) 13 NTLR 50 noted in Freiberg, above n 110, 737 fn 79.

125 *Sentencing Act 1997* (Tas) s 16. See Kate Warner, *Sentencing in Tasmania* (Federation Press, 2nd ed, 2002) 226.

126 See Chapter 4.

127 For example, in the Northern Territory the court must impose a term of actual imprisonment, which can be partly but not fully suspended, where the court finds an offender guilty of a sexual offence: *Sentencing Act* (NT) s 78F. In Queensland, 'the offender must serve an actual term of imprisonment, unless there are exceptional circumstances' (*Penalties and Sentences Act 1992* (Qld) s 9(4)) so the court may partly but not wholly suspend the sentence unless there are exceptional circumstances.

128 See Warner, above n 125; *Sentencing Act 1997* (Tas) s 10(2)(b)(v). It is noted that a court can avoid mandatory sentencing for serious injury caused to a police officer by not recording a conviction, see *Sentencing Act 1997* (Tas) s 16A(5).

129 *Sentencing Act 1997* (Tas) ss 17(2), (3A).

130 *Sentencing Act 1997* (Tas) s 17(3); *Corrections Act 1997* (Tas) ss 68, 70.

time that an offender is required to spend in prison for offences of particular concern.

The requirement for a minimum non-parole period can be expressed as:

- (1) a specified period of time (for example, four years); or
- (2) as a proportion of the sentence imposed (70% of the sentence).

In Victoria, for certain offences, there is a requirement that the court sentence the offender to a period of imprisonment and there is a **specified number of years** provided in legislation that sets out the mandatory minimum non-parole period. There is a mandatory minimum non-parole period of 10 years for manslaughter in circumstances of gross violence and manslaughter by a single punch or strike, a mandatory minimum non-parole period of not less than four years for causing serious injury in circumstances of gross violence and varying periods for offences in relation to emergency workers on duty (ranging from six months to five years).¹³¹ There is also a requirement that if the court sentences an offender to a sentence of imprisonment one year or greater, the non-parole period must be at least six months less than the sentence.¹³²

An advantage of a defined term scheme is that it would create a legislative guidepost to the appropriate sentencing level, as it provides guidance to the court as to the appropriate mandatory minimum non-parole period in Tasmania. However, a difficulty may be that it appears to introduce a change to the way terms of imprisonment are set that is contrary to current practice. In Tasmania, currently, sentences are imposed using a 'top down' approach where the total sentence is determined and then the court makes a decision on the appropriate non-parole period in the circumstances. In contrast, a specified period for the non-parole period appears to require that sentences be determined using a 'bottom up' approach whereby the court sets the non-parole period first and then the parole period.¹³³ It is also unclear what an increased mandatory non-parole period would mean for sentencing practice for serious sexual offences against children. Would it create inflation in head sentences for those offenders who previously would have received a sentence less than the mandatory non-parole period? Would the court adjust the sentence up to the mandatory minimum non-parole period or would the court add the specified period to the sentence it would previously have imposed? Moreover, can it be assumed that sentences where the offender previously received a non-parole period longer than the mandatory minimum sentence would receive the same sentence or would there be a proportional increase in sentences across sentencing outcomes?¹³⁴ An additional difficulty remains as to the process for setting the appropriate term for the non-parole period in Tasmania.

In the Northern Territory, the mandatory minimum non-parole scheme sets out the period as a **specified proportion of the head sentence**. In the Northern Territory, the usual minimum non-parole period is not less than 50% of the period of imprisonment that the offender is to serve under the sentence.¹³⁵ Statutory modification to the minimum non-parole period has been made for some serious offences with the court being required to fix a period of not less than 70% of the period of imprisonment for an offender sentenced to imprisonment for sexual intercourse without consent (rape), unless the court considers that the fixing of a non-parole period is inappropriate.¹³⁶ Similarly, the court is required to fix a non-parole period of not less than 70% if a court sentences an offender to imprisonment for a number of serious offences including several sexual offences (sexual intercourse or gross indecency with a child under 16, sexual intercourse or gross indecency by providers of services to the mentally ill or handicapped, sexual relationship with a young person, incest, indecent dealing with a child under 16, gross indecency without consent) and the offence was committed on a person under the age of 16 years when the offender was an adult.¹³⁷ It is noted that in the Northern Territory, the non-parole periods only apply if the court sentences an offender to imprisonment and the sentence was not suspended in whole or in part.

131 See Appendix A.

132 *Sentencing Act 1991* (Vic) s 11(3).

133 This is the approach used in the context of a standard parole period scheme that exists in New South Wales.

134 These issues were addressed in VSAC's consideration of the introduction of a mandatory minimum non-parole period in Victoria for offences of gross violence. VSAC considered that there would be no change to cases where the non-parole period would previously have been over the specified non-parole period. In relation to cases where the previously imposed sentence would have been less than the minimum non-parole period it was assumed that the court could adjust up to the mandatory minimum non-parole period rather than adding four years to the sentence and proportionally increasing sentences across sentencing outcomes: VSAC, *Statutory Minimum Sentences for Gross Violence Offences*, Report (2011) 112-113.

135 *Sentencing Act* (NT) s 54. This is the same as the Tasmanian position: see *Sentencing Act 1997* (Tas) ss 17(2)(b), (3).

136 *Sentencing Act* (NT) s 55.

137 *Sentencing Act* (NT) s 55A(1).

In Tasmania, increased sentencing for serious child sex offenders could be achieved by introducing a legislative direction that the non-parole period should be increased above the usual 50% of the sentence to a higher percentage of the total sentence. This approach would be based on the South Australian and Northern Territory models where the increased non-parole period must be applied unless it is inappropriate in the case.¹³⁸ An advantage of this approach is that it accords with the current 'top down' sentencing approach in Tasmania and it is simpler to introduce given that there is no need to define a specific period of imprisonment for each offence — all that is required is to decide a particular percentage of the sentence that the court imposed. For example, the relevant period could be set at 70%, as is the case in the Northern Territory, or four fifths of the sentence following the South Australia model, or some other proportion of the sentence. However, a clear disadvantage is that this approach does not provide any legislative direction that sentences should be increased — it is merely a direction that offenders are required to serve an increased period of time in prison. There are also concerns that can be raised about limiting the potential time served under supervision in the community given that supervision on parole has been associated with lower rates of recidivism than unsupervised release.¹³⁹

As an additional matter, it is noted that a mandatory minimum non-parole period can be used with a discretionary head sentence (as exists in Victoria in relation to causing serious injury in circumstances of gross violence) or a mandatory minimum head sentence (as exists in New South Wales for assault occasioning death when intoxicated).¹⁴⁰ Mandatory minimum head sentences are discussed below.

Mandatory minimum head sentence and parole considerations

A mandatory minimum head sentence means that the court must impose the minimum period of imprisonment as the head sentence.

This can be expressed as a particular period of time (for example, six months as exists in relation to serious injury caused to a police officer in Tasmania) or it may be expressed as a proportion of the maximum penalty for the offence (at least 75% of the maximum penalty for a range of offences committed in the course of an aggravated home burglary in Western Australia).¹⁴¹

There are different ways in which the requirement for a mandatory minimum head sentence may interact with parole:

- (1) the court may have no discretion in relation to making an order to parole (as exists in Western Australia in certain circumstances where the offender is convicted of an indictable offence involving a declared criminal organisation);
- (2) there may be a mandatory minimum head sentence and a mandatory minimum non-parole period (as exists in New South Wales for assault occasioning death when intoxicated); or
- (3) there may be a mandatory minimum head sentence and discretionary parole (as exists in Western Australia for certain violent and sexual offences committed in course of an aggravated home burglary).

As discussed above, parole is a conditional release of an offender into the community that may be afforded to an offender. However, as stated by the New South Wales Law Reform Commission, it is to misconceive the nature of parole to suggest that parole is 'early release' 'as it creates the impression that an offender's sentence is finished when the offender is paroled. It is not. The parole period is an integral part of the sentence'.¹⁴² An offender released on parole is not released unconditionally but remains under 'sentence' and under supervision in the community.¹⁴³ Under the *Corrections Act 1997* (Tas) s 72(5), '[a] parole order is subject to such terms and conditions as the Board considers necessary and as are specified in the order'. There are a number of standard conditions that usually attach to a parole order and the Parole Board may also include special conditions. Conditions relate to reporting to Community Corrections, employment and residence, obeying reasonable directions of the Probation Officer, being of good behaviour, attending rehabilitation programs, not using prohibited substances and submitting to urine and/

138 See Appendix A.

139 Wan, Wai-Yin, Suzanne Poynton, Gerald van Doorn and Don Weatherburn, 'Parole Supervision and Reoffending' (Trends and Issues in Criminal Justice No 485, Australian Institute of Criminology, 2014) 6.

140 See Appendix A.

141 Ibid.

142 New South Wales Law Reform Commission, *Parole*, Report 142 (2015) [2.11].

143 See TLRI, *Sentencing* (2008) [5.3.10]-[5.3.11]; *Corrections Act 1997* (Tas) s 78.

or breath analysis, non molestation orders, and alcohol abstinence orders.¹⁴⁴ If an offender breaches the conditions of parole, parole can be revoked and the offender returned to prison.¹⁴⁵

Parole is considered to address the rehabilitation of the offender and facilitate community protection by:

- (1) providing an incentive for offenders to address their offending behaviour by participation in programs offered in prison;
- (2) by allowing reintegration and supervised release during transition from custody to unsupervised release. This allows for 'the protective effects of reintegration support, the deterrent effects of parole supervision and the threat of return to custody upon revocation';¹⁴⁶ and
- (3) the provision of risk management by identifying and targeting high risk offenders for more intensive intervention before and after release on parole.¹⁴⁷

Under the current parole scheme in Tasmania, a court may order that an offender is not eligible for parole or that the offender is not eligible for parole before the expiration of a specified period of time.¹⁴⁸ An offender cannot be released on parole before the completion of one half of the sentence or six months, whichever is greater (unless there are exceptional circumstances).¹⁴⁹ If a court does not make an order for parole, then an offender is not eligible for release on parole.¹⁵⁰ It should be noted that the mandatory minimum term of parole in Tasmania is 50% of the head sentence however, the court does not have to impose the statutory minimum period. In the Council's review of sentencing for sex offenders, it found that the non-parole period for offenders convicted of the sexual offences under review in the report exceeded the minimum non-parole period or that no order for parole was made in 39.3% of cases between 2008-14 where the offender was sentenced to imprisonment for more than nine months.

Further, eligibility to apply for parole does not mean that parole will be granted by the Parole Board. As shown by Table 3-2, since 2012-13, only a minority of sex offenders who are considered for parole are granted parole. In 2014-15, only 26.3% of sex offenders who were considered for parole were actually granted parole.

Table 3-2: Sex offenders and parole 2011-12 to 2014-15

	Year			
	2011-12	2012-13	2013-14	2014-15
Sex offenders considered for parole	28	25	34	38
Sex offenders granted parole	25	5	15	10

Source: Parole Board Annual Report 2014-15

In making a decision to release an offender, the *Corrections Act 1997* (Tas) s 72(4) directs the Parole Board to act in accordance with the statutory criteria that include:

- the likelihood of the prisoner re-offending;
- the protection of the public;
- the rehabilitation of the prisoner;
- any remarks made by the court in passing sentence;
- the likelihood of the prisoner complying with the conditions;
- the circumstances and gravity of the offence, or offences, for which the prisoner was sentenced to imprisonment;
- the behaviour of the prisoner while in prison;
- the behaviour of the prisoner during any previous release on parole;

144 For further details see Parole Board of Tasmania, *2014-2015 Annual Report* (2015) Appendix A.
 145 *Corrections Act 1997* (Tas) s 79.
 146 New South Wales Law Reform Commission, above n 142, [2.17].
 147 *Ibid* [2.12]-[2.33].
 148 *Sentencing Act 1997* (Tas) s 17(2).
 149 *Sentencing Act 1997* (Tas) s 17(3); *Corrections Act 1997* (Tas) s 70. It is noted that since 2009-10, no offenders have been released early under the 'exceptional' circumstances provision, Parole Board of Tasmania, above n 144, 22.
 150 *Sentencing Act 1997* (Tas) s 17(3B).

- the behaviour of the prisoner while subject to any order of a court;
- any reports tendered to the Board on the social background of the prisoner, the medical, psychological or psychiatric condition of the prisoner or any other matter relating to the prisoner;
- the probable circumstances of the prisoner after release from prison;
- any statement provided by a victim of the offence;
- if the prisoner is a sex offender prisoner, any notice or assessment given to the Board concerning the prisoner's participation or non-participation in appropriate treatment; and
- any other matters that the Board thinks are relevant.

In relation to sex offenders, the Board has traditionally been provided with a report from the facilitators of the Sex Offender Treatment Program¹⁵¹ and this has been taken into account in determining whether to release an offender on parole. Under recent amendments to the *Corrections Act 1997* (Tas), the relevance of participation in treatment to the granting of parole has been formalised in the statutory criteria. The Parole Board is now directed to take into account 'any notice or assessment given to the Board concerning the prisoner's participation or non-participation in appropriate treatment' when determining whether or not to release the prisoner on parole.¹⁵² The amendments require the Director of Corrective Services to prepare a written assessment of the offender's participation or non-participation in a treatment program.¹⁵³ This means that there remains a strong incentive to participate in the program for sex offenders who are eligible for parole and wish to be released on parole. However, the legislation does not go as far as to provide that failure to participate successfully in the program will mean that an offender is not to be granted parole.¹⁵⁴

Discussion

After considering the different models that exist for the introduction of a mandatory minimum sentencing scheme, the Council's preferred model is a mandatory minimum head sentence of imprisonment with the current parole system continuing to operate. There was general support for the view that this was the most appropriate model. This was also supported by Tasmania Police in its written submission. Accordingly, the Council's view is that the preferred model is a mandatory minimum head sentence of imprisonment with the current parole system continuing to operate. This is on the grounds that this approach provides a clear legislative signal to the courts as to the appropriate minimum period of sentence for offenders. It reflects the current 'top-down' practice of sentencing that operates in Tasmania; that is, determining the head sentence first and then the non-parole period. The Council considers that this model is preferred because it allows the court to retain discretion in relation to the appropriate non-parole period in a particular case and this allows the court to have regard to the nature and circumstances of the offence and the circumstances personal to the offender. In this regard, it is reiterated that a mandatory minimum non-parole of six months or one half of the sentence already exists in Tasmania. There is no entitlement to parole, and release on parole (if eligible) is at the discretion of the Parole Board. Further, the Council notes the recent reforms in relation to the requirement for sex offenders to undergo treatment in prison as a precondition to release on remission or as a matter relevant to parole. The Council also notes that it has previously recommended reforms to the dangerous criminal provisions that apply in Tasmania by the introduction of preventative detention and supervision orders¹⁵⁵ and the government has adopted this recommendation. These orders provide an additional layer of community protection by requiring offenders who present an unacceptable risk of harm to the community at the time of release to be detained in custody or released under close supervision.

As indicated at Part B [2.2.2], the changes to introduce a mandatory minimum sentencing scheme should be introduced by amendments to the *Sentencing Act 1997* (Tas).

151 Parole Board of Tasmania, above n 144.

152 *Corrections Act 1997* (Tas) s 72(4)(kb).

153 *Ibid* ss 31(6), (7).

154 It is noted that the Council is currently undertaking a reference examining mandatory treatment for sex offenders that will consider the treatment needs of sex offenders and legal mechanisms for mandating treatment, see TASC, *Mandatory Treatment for Sex Offenders*, Research Paper (forthcoming).

155 TSAC, above n 1, Recommendation 13.

In relation to setting the mandatory minimum sentence, given that there are no graduated penalties under *Criminal Code* (Tas) and that there is instead a general maximum penalty of 21 years, or a fine, or both for all offences (other than murder and treason), it is Council's view that the mandatory minimum head sentences need to be expressed as a particular period of time rather than as a proportion of the maximum penalty. This was supported by Tasmania Police. The process for setting the time period for mandatory minimum offences is discussed further in Chapter 5.

Preliminary advice

Structure of scheme

12. That the preferred model for the introduction of a mandatory minimum sentencing scheme is for a mandatory minimum head sentence of imprisonment with the current parole system continuing to operate.
13. That the mandatory minimum sentencing scheme should be created by amendments to the *Sentencing Act 1997* (Tas).
14. That the mandatory minimum head sentences need to be expressed as a particular period of time rather than as a proportion of the maximum penalty.

3.2 MANDATORY MINIMUM SENTENCING – SINGLE COUNTS AND GLOBAL SENTENCING

In developing a mandatory minimum sentencing scheme, the mandatory minimum term needs to be set by reference to a single count of the offence. However, this creates difficulty in Tasmania given the prevalence of global sentencing. In Tasmania, under the *Sentencing Act 1997* (Tas) s 11, where an offender is convicted of multiple offences, a judge has the power to impose one sentence for all offences (a general or global sentence).¹⁵⁶ Tasmanian courts also have the power to impose separate sentences for each offence, but in practice, where an offender is convicted of multiple offences in the Supreme Court, a global order is usually made. In all the sexual offence cases identified by the Council from the TLRI database for this reference, a majority of offenders were sentenced for multiple offences (54.6%) and in most of these cases, the court imposed a global sentence to cover all the relevant offending conduct. Given the prevalence of global sentencing in Tasmania, there is an issue of how to incorporate a mandatory minimum term of imprisonment within the current sentencing practice. One option would be to specify that a court must not impose a global sentence in relation to an offence to which a mandatory minimum term applies. This is the approach adopted in Victoria in relation to the imposition of aggregated sentences for baseline offences.¹⁵⁷ This was the preferred approach of the Bar Association. Alternatively, there could be legislative directions provided to the court as to how a mandatory minimum term is to relate to the imposition of a global sentence.¹⁵⁸

The Council's preferred approach is one that preserves the current Tasmanian practice of using global sentencing even in cases where a mandatory minimum penalty exists and is one that avoids complexity wherever possible. This was also supported by Tasmania Police. In the Tasmanian context, it could be made clear that the mandatory minimum applies whether a single or global sentence is imposed and that, if the court imposes a global sentence, the court should state that the mandatory minimum sentence has been imposed and then impose a global sentence that covers all the relevant offending. It would not be necessary for the court to identify the sentence for any individual count. A failure to state that the mandatory minimum term has been imposed should not invalidate the sentence (provided the sentence in fact complies with the mandatory minimum term).

156 This differs from the position in Victoria where an aggregate or general sentence can only be imposed if there are two or more offences that are founded on the same facts or form or are part of a series of offences of the same or similar character, *Sentencing Act 1991* (Vic) s 9(1).

157 *Sentencing Act 1997* (Vic) s 9(1A)(ab). It is noted that this scheme is no longer operative in Victoria as a result of the decision in *DPP v Walters* [2015] VSCA 303, where the Court of Appeal held that the scheme was inoperable.

158 For example, in New South Wales, in relation to a presumptive non-parole scheme, if a court imposes an aggregate sentence the court is directed to indicate and make a written record for those offences to which a standard non-parole period applies, the non-parole period it would have set for each such sentence had it set a separate sentence of imprisonment for that offence: see *Crimes (Sentencing Procedure) Act 1992* (NSW) s 54B. However, a failure to comply with this requirement does not invalidate the sentence: *Crimes (Sentencing Procedure) Act 1992* (NSW) s 54B.

Preliminary advice

Application to global sentencing

15. That mandatory minimum sentences should apply whether the court imposes a single or global sentence.

3.3 MANDATORY MINIMUM SENTENCING – CUMULATIVE AND CONCURRENT SENTENCING

Another issue that arises when an offender is facing sentencing for more than one offence and the court does not impose a global sentence but instead imposes more than one sentence is whether the mandatory minimum sentence should be served concurrently or cumulatively.

In Tasmania, there is a presumption that favours concurrent sentences contained in the *Sentencing Act 1997* (Tas) s 15(1), which provides that 'an offender who is sentenced to a term of imprisonment must serve the sentence concurrently with any uncompleted sentence of imprisonment that the offender is then serving or liable to serve unless the court imposing the sentence directs otherwise'. As a result of the reliance on global sentences, there has been limited consideration in Tasmania of the circumstances in which a court would order a concurrent or cumulative sentence.¹⁵⁹ However, it appears that there are two related principles that limit the power to order cumulative sentences:

- (1) the continuing episode or one transaction rule (that is, where the criminal offences arise out of substantially the same act or circumstances); and
- (2) the totality principle (that is, the requirement to have regard to whether the overall or total effect of the sentence is just and appropriate).¹⁶⁰

In other jurisdictions, there are no requirements that a mandatory minimum term be served cumulatively with other sentences. However, there are statutory exceptions for repeat offenders in some circumstances that would require the court to impose a cumulative rather than a concurrent sentence. In Victoria, the presumption that sentences will be concurrent does not apply to 'serious offenders', which includes a serious sexual offender convicted of a sexual offence or a violent offence, and there is a requirement that the sentences of imprisonment be served cumulatively unless otherwise directed by the court.¹⁶¹ This applies on a third and subsequent offence and to fall within the provisions, the person could either have been convicted in a previous trial or in the current trial.¹⁶² It is noted that '[t]hese provisions have been described by the Victorian Court of Appeal as "draconian" and as sweeping away long-established sentencing principles'.¹⁶³ In addition, the evidence in Victoria is that these provisions are rarely applied to sex offenders.¹⁶⁴ On this basis, it is the view of the Council that it is not desirable to create a statutory exception to the usual rules that apply in relation to concurrent and cumulative sentences and there should not be a statutory requirement that the mandatory minimum term should be served cumulatively with other sentences.

159 Warner, above n 125, 238.

160 Ibid 238-242. See also Freiberg, above n 110, 787-802.

161 See *Sentencing Act 1991* (Vic) s 6E. A 'serious sexual offender' is defined in the *Sentencing Act 1991* (Vic) s 6B(2) to mean an offender (other than young offender) – (a) who has been convicted of 2 or more sexual offences for each of which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre; or (ab) who has been convicted of an offence to which clause 1(a)(viii) of Schedule 1 applies for which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre; or (b) who has been convicted of at least one sexual offence and at least one violent offence arising out of the one course of conduct for each of which he or she has been sentenced to a term of imprisonment or detention in a youth justice centre.

162 Freiberg, above n 110, 783 fn 30.

163 Ibid 782 referring to *R v Cowburn* (1994) 74 A Crim R 385, 393.

164 Information provided by Arie Freiberg.

Preliminary advice

Concurrent and cumulative sentencing

16. That it is not desirable to create a statutory exception to the usual rules that apply in relation to concurrent and cumulative sentences and there should not be a statutory requirement that the mandatory minimum term should be served cumulatively with other sentences.

3.4 EFFECT OF THE MANDATORY MINIMUM SENTENCE ON SENTENCING DISCRETION

Aside from the restriction a mandatory minimum sentencing scheme places on the discretion of the sentencing judge to impose a sentence below the minimum term, there is also uncertainty as to the intended effect of the scheme on the distribution of sentences for offences with a mandatory minimum term. While it may seem relatively straightforward, there have been conflicting views expressed about the 'effect of a mandatory minimum penalty regime on the exercise of the sentencing discretion'.¹⁶⁵ There are two competing views:

- (1) that the mandatory minimum operates as a statement of the new foundation for the sentencing range and so gives rise to a new distribution model (the 'range' interpretation);
- (2) that it operates as a floor, so that sentences below the new minimum will be increased but other sentences will be unaffected (the 'floor' interpretation).

In Australia, the dominant theory is that the mandatory minimum term creates a new range that has the effect of increasing all of the sentences in the range.¹⁶⁶ However, the appropriateness of this interpretation has been recently questioned by the New South Wales Court of Criminal Appeal in *Kol v R*.¹⁶⁷

3.4.1 THE 'RANGE' INTERPRETATION

The 'range' interpretation of mandatory minimum terms of imprisonment holds that a mandatory minimum term deprives the sentencing judge of the power to sentence below that term but that general sentencing principles, including the principle of parity, still apply within the more compressed range.¹⁶⁸ On this view, the function of the mandatory minimum term 'is to mirror the role of the statutory maximum penalty. It is intended for the least serious category of offending and also for consideration of all sentencing considerations — both objective and subjective — between the two guideposts'.¹⁶⁹ This means that there will be a general upward shift of the entire sentencing range for the offence given that the minimum term is only appropriate for the least serious category of offending. For example, if the mandatory minimum term is set at 12 months, an offender in a case of low seriousness who would previously have received a two month sentence will now receive a 12 month sentence. It is also necessary for there to be a corresponding increase in the penalty imposed on an offender who previously would have received a 12 month sentence.

165 Freiberg, above n 110, 276.

166 Ibid.

167 [2015] NSWCCA 150, [5]-[16] (Adams J).

168 *Karim v The Queen* (2013) 83 NSWLR 268, [45] (Allsop P).

169 Freiberg, above n 110, 276 referring to *Bahar v The Queen* (2011) 214 A Crim R 417, [54]. See also *Karim v The Queen* (2013) 83 NSWLR 268.

3.4.2 THE 'FLOOR' INTERPRETATION

The 'floor' interpretation holds that a mandatory minimum term is a floor so that a sentencing judge is not able to impose a sentence lower than the floor but is not required to increase the sentence imposed on an offender where the court would previously have imposed a sentence above the minimum term. This approach means that 'if, after taking account of usually applicable principles of sentencing ... an otherwise appropriate sentence would be less than the mandatory minimum sentence ... the latter would apply so that what one might call the "conventional" sentence would be increased to the mandatory term'.¹⁷⁰ For example, if the mandatory minimum term is set at 12 months, an offender, in a case of low seriousness, who would previously have received a two month sentence will now receive a 12 month sentence. An offender who previously would have received 12 months will still also receive a 12 month sentence. It follows that this approach means that there will be a 'compression of sentences towards the lower end of the range'.¹⁷¹

The floor interpretation has been criticised on the basis that it distorts the parity principle, so that factors that 'may differentiate between offenders will not have their usual effect'.¹⁷² This was said to mean that the 'statute, and through it the order of the Court would be the instrument of unequal justice and, so, injustice'.¹⁷³

While the floor interpretation was the initial approach to understanding the effect of a mandatory minimum scheme on sentencing, it is no longer the authoritative view (with the range approach being the preferred view). However, the appropriateness of the range approach has recently been questioned by the NSW Court of Criminal Appeal in *Kol v R*,¹⁷⁴ where the court expressed its preference for the floor approach on the basis that it reflected the purpose of a mandatory minimum scheme (to take no account of the actual circumstances of the offence or the personal situation of the offender and to act as deterrent) and that the floor approach created less injustice.¹⁷⁵ The court considered that the parity argument was unpersuasive, as the principle of parity has never been used to justify an increase of a comparative sentence but only a decrease.¹⁷⁶ Further, it was said that:

it is ... true that the same penalty would apply to cases of differing seriousness, assessed by reference to varying individual objective and subjective circumstances, but those circumstances are precisely what the legislature has mandated should be ignored in those cases.¹⁷⁷

The court considered that increasing the whole sentencing range caused greater injustice:

[I]mposing harsher penalties in the other cases than the circumstances would (absent the mandatory minimum) warrant avoids the problem of unequal outcomes at the price of unjustly increased harshness ... To ... increase a sentence which, on usual principles, warrants a sentence greater than the minimum but must be further increased because of the distorting effect of the minimum penalty is simply to multiply the injustice.¹⁷⁸

A similar point was made by Roberts, in the Canadian context, where he considered the relationship between mandatory minimum penalties and proportionality by discussing the effect of mandatory minima on the distribution of sentences for firearms offences with a new minimum of four years' imprisonment.¹⁷⁹ Roberts observed that offender A, who previously might have received a sentence of 18 months' imprisonment, and a more serious offender, B, who might have previously received a sentence of three years would now both receive a sentence of four years. However, this did not mean that offender C, who previously would have received a sentence of four years should now receive a sentence of eight years to maintain proportionality with the less serious cases. Robert's view was that mandatory minima need to be understood as 'simply represent[ing] an attempt by Parliament to denounce and deter' a particular offence within an overall policy 'to which the sentencing provisions made a largely symbolic contribution'.¹⁸⁰ Mandatory maxima were not 'conceived and constructed with a clear consideration

170 *Kol v R* [2015] NSWCCA 150, [6] (Adams J).

171 *R v Selu; Ex parte DPP (Cth)* [2012] QCA 345, [29] (McMurdo P).

172 Freiberg, above n 110, 277 referring to *Karim v The Queen* (2013) 83 NSWLR 268, [45] (Allsop P).

173 *Karim v The Queen* (2013) 83 NSWLR 268, [45] (Allsop P).

174 *Kol v R* [2015] NSWCCA 150.

175 *Ibid*, [13] (Adams J).

176 *Ibid* [16].

177 *Ibid*.

178 *Ibid*.

179 Julian Roberts, 'Mandatory Minimum Sentences of Imprisonment: Exploring the Consequences for the Sentencing Process' (2001) 39 *Osgoode Hall Law Journal* 305, 315.

180 *Ibid* 313.

of their relationship to the codified principles of sentencing'.¹⁸¹ Accordingly, it was not appropriate to argue that proportionality dictated an upward shift in the entire range of sentences.

In addition, in the Tasmanian context, support for the floor approach can also be gained from the absence of graduated maximum penalties provided by Parliament to indicate the relative seriousness of offences at the top of the range of offending. Accepting that the mandatory minimum sentence is a floor rather than the appropriate penalty for an offence at the bottom of the range of offending also avoids the artificiality of comparison between the circumstances of a particular case and a hypothetical case.¹⁸²

3.4.3 THE COUNCIL'S VIEWS

After considering the case law (discussed above) and the structure of sentencing in Tasmania, it is the Council's view that the mandatory minimum sentence should operate as a floor rather than distorting all sentences upwards. This reflects the government's intention that a minimum sentence should be created to send a 'zero tolerance' message.¹⁸³ It also limits the potential for the mandatory minimum term to inflate sentencing above what would otherwise be considered a proportionate sentence in more cases.

Preliminary advice

The effect of mandatory minimum sentencing

17. That the mandatory minimum sentence should operate as a floor rather than increasing all sentences.

181 Ibid.

182 See Leader-Elliott, above n 8, 231 referring to comments made in *R v A* (2011) 109 SASR 197 by Doyle CJ.

183 Tasmanian Liberals, above n 3.

4.

Exceptions to mandatory minimum sentencing

Limited judicial discretion has been allowed in the mandatory sentencing schemes in some jurisdictions by the use of provisions that allow the court to depart from the mandatory penalty in particular circumstances. This Chapter considers the rationale for creating exceptions to mandatory minimum sentencing and provides an overview of exceptions that exist in other mandatory minimum sentencing schemes.

It provides preliminary advice in relation to the exceptions that should be created in Tasmania in relation to mandatory penalties that apply to offenders convicted of serious sex offences against children. However, it is noted that the extent of the exceptions that may be appropriate in the Tasmanian context depend, in part, on the offences that are included in the scheme.

4.1 RATIONALE FOR EXCEPTIONS TO MANDATORY MINIMUM SENTENCING SCHEMES

Mandatory sentencing is usually justified on the basis that it provides an effective deterrent and provides for greater consistency in sentencing.¹⁸⁴ Support for mandatory sentencing often rests on a belief that current sentencing practices are too lenient and the introduction of mandatory minimum sentences to limit judicial discretion will 'appease public concern about crime and punishment'.¹⁸⁵ Mandatory sentences, in this context, are an expression of the attempt by the legislature to 'acknowledge public anxiety and assuage victims' anger'.¹⁸⁶ However, it is acknowledged that mandatory sentencing can create unjust results by treating 'unlike cases as like'.¹⁸⁷ Given that there are 'vast differences in the degree of culpability of particular offenders who may be convicted of the same crime',¹⁸⁸ mandatory sentencing can create unjustifiable disparities. It limits the ability of a judge to impose a proportionate sentence taking into account the circumstances of the offence and the offender. The creation of exceptions to a mandatory minimum sentencing scheme seeks to mitigate the extent of this injustice and can be justified on the basis that it 'allow[s] for appropriate exceptions and residual judicial discretion, while increasing sentences for particular offences of concern'.¹⁸⁹

In its recent judgment relating to mandatory minimum sentences for some drug offences, the Supreme Court of Canada observed that one mechanism that should be considered in providing a 'safety valve' that would allow judges to exempt offenders for whom a mandatory minimum sentence would constitute cruel and unusual punishment is to provide a residual judicial discretion. The majority of the Court observed:

Residual judicial discretion for exceptional cases is a technique widely used to avoid injustice and constitutional infirmity in other countries. ... It allows the legislature to impose severe sentences for offences deemed abhorrent, while avoiding unconstitutionally disproportionate sentences in exceptional cases. The residual judicial discretion is usually confined to exceptional cases and may require the judge to give reasons justifying departing from the mandatory minimum sentence prescribed by the law. It is for the legislature to determine the parameters of the residual judicial

184 Freiberg, Donnelly and Gelb, above n 31, 189; Hoel and Gelb, above n 15, 12-13.

185 Declan Roche, *Mandatory Sentencing* (Trends and Issues in Crime and Criminal Justice no 138, Australian Institute of Criminology, 1999) 1.

186 Tonry, above n 19, 67.

187 Freiberg, Donnelly and Gelb, above n 31, 189.

188 VSAC, above n 7, 228.

189 *Ibid.*

discretion. ... There is no precise formula and only one requirement — that the residual discretion allow for a lesser sentence where application of the mandatory minimum would result in a sentence that is grossly disproportionate to what is fit and appropriate and would constitute cruel and unusual punishment.¹⁹⁰

There was strong support for exceptions to the mandatory sentencing scheme. Tasmania Police indicated that providing exceptions is problematic as it undermines the intention of mandatory minimum sentences but considered that a 'mechanism to provide a safety net in exceptional cases may be desirable'. Essentially, the Tasmania Police view is not inconsistent with the Council's view that exceptions should exist in the Tasmanian scheme to mitigate potential injustices.

Preliminary advice

Exceptions to the mandatory minimum sentencing scheme

18. That exceptions should be provided in the Tasmanian mandatory minimum sentencing scheme.

4.2 EXCEPTIONS TO MANDATORY MINIMUM SENTENCING SCHEMES

The nature of judicial discretion that is retained within the context of a mandatory minimum sentencing scheme depends on the legislative provision. There are differences in terms of the circumstances covered by the exceptions and also the broader structural question of whether the exceptions should be contained in a broad test (such as 'exceptional circumstances') or whether they should be contained in an exhaustive or non-exhaustive list of reasons.

4.2.1 STRUCTURE OF EXCEPTIONS – GENERAL TEST OR LIST OF CIRCUMSTANCES

General test

In some jurisdictions, including Tasmania, the test as to the circumstances that merit exception from the statutory minimum period is a general test of 'exceptional circumstances'. In South Australia, if the court has declared that an offender is a serious repeat offender, the court may decide that mandatory minimum non-parole of at least four fifths of the sentence does not apply if the offender's personal circumstances are so exceptional as to outweigh the primary policy of the criminal law of emphasising public safety, and it is, in all the circumstances, not appropriate that he or she be sentenced as a serious repeat offender.¹⁹¹ In Tasmania, the requirement to impose a mandatory minimum penalty of not less than six months' imprisonment for causing serious bodily harm to a police officer is subject to the court finding that there are exceptional circumstances.¹⁹² In Queensland, the requirement that the court must order that an offender serve a term of imprisonment for offences of a sexual nature against a child under the age of 16 is subject to an 'exceptional circumstances' exemption.¹⁹³ In determining if special circumstances exist, the court is directed that it may have regard to the closeness of age between the offender and the child.¹⁹⁴ In the Northern Territory, the mandatory minimum penalties for violent offences are subject to exceptional circumstances exceptions, which allow the court to avoid imposing the minimum term, although the court must still impose a term of imprisonment.¹⁹⁵ In deciding whether exceptional circumstances exist, the court may have regard to the victim

190 *R v Lloyd* [2016] SCC 13 [36] (references omitted).

191 *Criminal Law (Sentencing) Act 1988 (SA)* s 20BA(2).

192 *Sentencing Act 1997 (Tas)* s 16A(1).

193 *Penalties and Sentences Act 1992 (Qld)* s 9(4).

194 *Penalties and Sentences Act 1992 (Qld)* s 9(5). In sentencing for sexual offences against children, the court must primarily have regard to the effect of the offence on the child, the age of the child, the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another, and the need to protect the child, or other children, from the risk of the offender reoffending, as well as factors relating to the offender: *Penalties and Sentences Act 1992 (Qld)* s 9(6).

195 *Sentencing Act (NT)* s 78DI.

impact statement and any other matters the court considers relevant.¹⁹⁶ Voluntary intoxication or the fact that the other person was involved in the commission of the offence or coerced the person to commit the offence are stated by legislation not to be exceptional circumstances.¹⁹⁷

A general test can be supported on the basis that it creates a broad discretion. This allows the court to take into account unforeseen circumstances. However, it can be criticised on the basis that it does not provide sufficient guidance to the court as to the type of circumstances that are appropriate to warrant a sentence less than the mandatory minimum sentence being imposed.¹⁹⁸ The terminology of 'exceptional circumstances' can also be criticised on the basis that it suggests that the circumstances are rare or infrequent and that this does not necessarily accord with circumstances that are deserving of inclusion as an exemption.¹⁹⁹ In Queensland, 'exceptional circumstances' has been interpreted to describe:

circumstances which are such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.²⁰⁰

Subsequent decisions have confirmed that exceptional circumstances may arise where the circumstances of the offending may be of such a low level that they are exceptional or, more commonly, where factors personal to the offender are taken into account so that the overall circumstances are capable of being seen to be sufficiently exceptional.²⁰¹ This is to be applied as part of the process of 'instinctive synthesis' and requires a value judgment.²⁰²

List of circumstances

In other jurisdictions, a list of circumstances (either exhaustive or non-exhaustive) is provided in legislation to guide the exercise of the court's discretion in cases where special reasons (rather than 'exceptional circumstances') exist. VSAC recommended the use of 'special reasons' rather than 'exceptional circumstances' to avoid importing the interpretation of 'exceptional circumstances' in a different context.²⁰³

In South Australia, the court may impose a sentence less than the mandatory minimum non-parole period only if special reasons exist. However, the interpretation of these circumstances is tightly constrained by legislation that sets out an exhaustive list of special reasons. Under the *Criminal Law (Sentencing) Act 1988 (SA)* ss 32(2), (3), if a person is sentenced for a serious offence against the person that results in the death of the victim or the victim suffering total incapacity, the court may fix a non-parole period shorter than the mandatory minimum period if the court is satisfied that special reasons exist taking into account only the following matters:

- (1) the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct;
- (2) if the offender pleaded guilty to the charge of the offence — that fact and the circumstances surrounding the plea; and/or
- (3) the degree to which the offender has cooperated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequence of, any such co-operation.

A limitation of the exhaustive list approach is that the South Australian provision has been interpreted to mean that if a court finds that special reasons exist to justify a non-parole period lower than the mandatory minimum period, a court can only take into account those reasons in considering the appropriate non-parole period.²⁰⁴ This means

196 Ibid s 78DI(3).

197 Ibid s 78DI(4)(a).

198 See discussion in VSAC, above n 134, 73-74.

199 Ibid 72.

200 *R v Tootell; ex parte A-G (Q/d)* [2012] QCA 273 [18] (the Court).

201 *R v BCX* [2015] QCA 188, [29] (Burns J).

202 Ibid [33], [35] (Burns J).

203 VSAC, above n 134, 74.

204 *R v A* (2011) 109 SASR 197.

that the court cannot sentence according to accepted principles (taking into account factors such as youth, prospect of rehabilitation and good record). In other words, judicial discretion in setting a non-parole period shorter than the mandatory non-parole period is extremely restricted as it is limited to considering whether those special reasons support a shorter non-parole period.²⁰⁵

In Victoria, the discretion to impose a sentence less than the mandatory minimum non-parole period can also be exercised where special reasons exist. This applies for the offences of manslaughter in circumstances of gross violence, manslaughter by single punch or strike, causing serious injury in circumstances of gross violence and the designated offences in relation to emergency workers.²⁰⁶ The Victorian provisions differ from the South Australian approach as the legislation provides a non-exhaustive list of reasons that may support a departure from the mandatory minimum non-parole period. In Victoria, a court may find that special reasons exist if:

- (1) the offender assisted or gave assistance to law enforcement authorities in the investigation or prosecution of an offence;
- (2) the offender is 18 or older but under 21 at the time of the commission of the offence and provides on the balance of probabilities that he or she has a particular psychosocial immaturity that has resulted in a substantially diminished ability to regulate his or her own behaviour compared with the norm for persons of that age;
- (3) the offender proves on the balance of probabilities that he or she had impaired mental functioning that is causally linked to the commission of the offence and substantially reduced the offender's culpability or the offender's impaired mental functioning that would result in the offender being subject to significantly more than the ordinary burdens or risks of imprisonment;
- (4) the court proposes to make a Court Secure Treatment Order or a residential treatment order; or
- (5) there are substantial and compelling circumstances that justify doing so.²⁰⁷

In deciding whether there are substantial and compelling circumstances, the court is directed to have regard for Parliament's intention that a sentence of imprisonment should ordinarily be imposed and that the specified mandatory minimum should be applied. Further, the court should consider whether the cumulative impact of the circumstances of the case would justify a departure from that sentence and, where relevant, the minimum non-parole period.²⁰⁸

The approach in Victoria reflects the recommendations of VSAC that a non-exhaustive list of special reasons was the best means to provide guidance to the court as to the circumstances that ought to warrant exemption for the mandatory minimum scheme. VSAC rejected a general test on the basis that 'the clear intent of the policy from the terms of reference is to define more tightly the kind of circumstances that may be considered worthy of exemption from the statutory minimum'.²⁰⁹ VSAC considered that 'a list of circumstances that merit exemption would be a more effective way to achieve the policy objectives'.²¹⁰ In VSAC's view, a non-exhaustive list was preferable to an exhaustive list on the basis that circumstances that might provide the basis for special reasons were not readily anticipated and, accordingly, this needed to be accommodated in the statutory exemption.²¹¹ It was stated that the 'purpose of a non-exhaustive list is to provide guidance to the courts on the kinds of circumstances that deserve exemption (and the rationale behind the exemption) and to allow for the inclusion of deserving but unanticipated circumstances'.²¹²

205 See discussion in Leader-Elliott, above n 8.

206 See Appendix A.

207 *Sentencing Act 1991* (Vic) s 10A(2).

208 *Sentencing Act 1991* (Vic) s 10A(3).

209 VSAC, above n 134, 73.

210 It is noted in Victoria the terms of reference 'indicate that a court should only be able to sentence below the statutory minimum in tightly defined exceptional circumstances', VSAC, above n 134, vii. The Council by the terms of reference for this project is not so constrained.

211 *Ibid* 74.

212 *Ibid* 75.

The Council's view

After consideration, it is the Council's view that the exceptions to the mandatory minimum scheme should be a non-exhaustive list of 'special reasons' that reflect circumstances which significantly reduce the culpability of the offender. This was supported by Tasmania Police. There should be a catch-all exception, akin to the Victorian provision, that allows a court to find special reasons if 'there are substantial and compelling circumstances that justify doing so'.

In addition, it is the Council's view that the test for all exceptions to mandatory penalties should be consistent within the *Sentencing Act 1997* (Tas) and so the provision relating to serious injury caused to a police officer should be amended to reflect the approach adopted for sexual offences.²¹³ This was supported by Tasmania Police.

Preliminary advice

Nature of test for exceptions

19. That the exceptions to the mandatory minimum scheme should be a non-exhaustive list of 'special reasons' that reflect circumstances which significantly reduce the culpability of the offender.
20. That there should be a general provision in the legislation that allows a court to find special reasons if there are substantial and compelling circumstances that justify doing so.
21. That the test for all exceptions to mandatory penalties should be consistent within the *Sentencing Act 1997* (Tas), and so the provision relating to serious injury caused to a police officer should be amended to reflect the approach adopted for sexual offences.

4.2.2 SPECIAL REASONS FOR EXCEPTIONS

Offenders under 18

Most provisions expressly do not apply to offenders who were under the age of 18 either at the time of the commission of the offence or at the time of sentencing.²¹⁴ This is on the basis that there are sound reasons for distinguishing the culpability of adults and children due to their developmental stage and the immaturity of children relative to adults.²¹⁵ It is generally accepted that 'juveniles are less mature — less able to form moral judgments, less capable of controlling impulses, less aware of the consequences of acts, in short they are less responsible and therefore less blameworthy than adults'.²¹⁶ On this basis, young offenders 'deserve' a lesser punishment than an adult who commits the same crime.²¹⁷ This is reflected in the requirement of the *Youth Justice Act 1997* (Tas) s 46, that a court imposing sentence under the Act must disregard a requirement to impose a minimum term of imprisonment.

Case Example

M pleaded guilty to a charge of maintaining a sexual relationship with a young person under the age of 17 years. The young person was his sister. The sexual relationship continued for about three years, beginning when she was 4 or 5 years old and he was about 12. M had also previously been convicted of indecently assaulting his stepmother. M's childhood and adolescence was traumatic and featured repeated physical abuse, the death of his mother from cancer, exposure to sexualised behaviour at too early an age, and very poor parental management. At the time of the sentencing hearing M was 22. M had undertaken treatment and had not reoffended for 5 years.

213 Section 16A.

214 See Appendix A. This is also consistent with the recommendations of VSAC, above n 7, 172-173.

215 See Freiberg, above n 110, 925-926.

216 Ibid 926, citing South Australia, Children's Court Advisory Committee, *Annual Report 1983* (1983) 6-7.

217 Ibid.

The Council acknowledges that community concern can be enlivened when a young person commits a serious sexual offence but agrees that different sentencing considerations should apply to offenders under 18. There was support for this exception in the consultations. Tasmania Police agreed that offenders who were sentenced under the *Youth Justice Act 1997* (Tas) should be excluded, but said that it had not formulated a view with regard to other young offenders who may be sentenced as adults.

The view of the Council is that it is appropriate that these offenders are excluded from a mandatory minimum scheme based on the offender's age at the commission of the offence.

Preliminary advice

Offenders under 18

22. That offenders who are under 18 at the time of the commission of the offence should be excluded from the mandatory minimum sentencing scheme.

Offenders with cognitive impairment

In New South Wales and Victoria, there is an exception created for offenders with cognitive impairment. In New South Wales, the requirement to impose a minimum life sentence for murdering a police officer does not apply to those with a significant cognitive impairment.²¹⁸ In Victoria, the mandatory penalty of imprisonment and the minimum non-parole period provided for the offences of manslaughter in circumstances of gross violence, manslaughter by single punch or strike, causing serious injury in circumstances of gross violence and the designated offences in relation to emergency workers do not apply if the court finds that special reasons exist.²¹⁹ A court may find that special reasons exist if the offender proves on the balance of probabilities that he or she had impaired mental functioning that is causally linked to the commission of the offence and that substantially reduced the offender's culpability; or that the offender's impaired mental functioning would result in the offender being subject to significantly more than the ordinary burdens or risks of imprisonment. This reflects the common law rules in relation to the relevance of mental disorder and intellectual disability to sentencing and acknowledges the offender's moral culpability.²²⁰ In addition, it reflects the view that a person 'suffering from a mental disorder or intellectual disability may be considered an inappropriate vehicle for general deterrence, resulting in a reduction in sentence'.²²¹ It may also be that specific deterrence 'should be moderated or eliminated as a sentencing consideration depend[ing] upon the nature and severity of the symptoms of the conditions exhibited by the offender'.²²² In addition, an offender's condition may increase the burden of imprisonment more than it would a person of normal healthy cognitive abilities and this may result in the sentence being mitigated.²²³

Case Example

O, aged 32, was a person of very low intelligence and had a mild to moderate intellectual disability. In terms of intellectual and emotional maturity, she was assessed as being equivalent to a 14 year old. She pleaded guilty to six counts of indecent assault and five counts of aggravated sexual assault in relation to a complainant who was 14 years old.

218 *Crimes Act 1900* (NSW) s 19B.

219 *Sentencing Act 1991* (Vic) ss 9B(2), 9C(2), 10(1), 10AA(1).

220 See Freiberg, above n 110, 286-295.

221 *Ibid* 296. See *Director of Public Prosecutions (Acting) v CBF* [2016] TSCCA1, [36]-[44] (Porter J), [84]-[85] (Estcourt J) for a discussion of the applicable principles.

222 Freiberg, above n 110, 297.

223 *Ibid*.

Tasmania Police indicated that it had not formulated a clear view on the creation of an exception for offenders with impaired mental functioning. It reiterated its view that the primary goal of sentencing should be the protection of the community, rather than being applied primarily for punitive purposes. It stated that '[i]n sentencing persons with impaired mental functioning, the primary consideration should be with regard to their propensity to reoffend'. Accordingly, Tasmania Police indicated that '[i]f the scheme did not apply, any alternative sentencing options would need to achieve this outcome'.

The Council's view is that an exception should be created for offenders with impaired mental functioning that is causally linked to the offence and substantially reduces their culpability or would result in the offender being subject to significantly more than the ordinary burden or risks of imprisonment. However, the Council notes that the creation of an exception from the mandatory minimum sentencing scheme does not alter the court's application of the sentencing principles ordinarily applicable to offenders with a mental disorder, which involves the complicated balancing of 'the elements of reduced moral culpability and the protection of the community in order to produce a proportionate sentence'.²²⁴

Preliminary advice

Offenders with cognitive impairments

23. That offenders with impaired mental functioning that is causally linked to the offence and substantially reduces their culpability or would result in the offender being subject to significantly more than the ordinary burden or risks of imprisonment should be excluded from the mandatory minimum sentencing scheme.

Guilty plea

In South Australia, a guilty plea may form the basis for an exception to the mandatory sentencing provisions. As with cooperation with authorities, this is a recognised common law ground for mitigation.²²⁵ In the context of sexual assault trials, a guilty plea is significant for several reasons. First, it relieves the complainant of the distress of giving evidence. The trauma of the trial process for complainants is a recurrent concern in the literature examining sexual assault and the criminal law.²²⁶ Second, the introduction of a mandatory minimum sentencing scheme may result in fewer convictions for sexual offences. As the Council has previously observed, research shows that offenders charged with sexual assault are already less likely to plead guilty for all offences other than homicide and further, that it is relatively more difficult to obtain a conviction at trial for sexual offences than for offenders charged with other offences.²²⁷ Guilty pleas also save the expense of a trial.²²⁸ The inclusion of a guilty plea as special reason may address concerns that mandatory sentencing may discourage offenders from entering pleas of guilty.

In New South Wales, traditionally, the accepted interpretation of the standard non-parole period (SNPP) scheme was that it was mandatory for offenders who were convicted following trial (unless other factors justified a departure from it) and a yardstick for offenders who entered a plea of guilty.²²⁹ This interpretation was reflected in an increase in plea rate from 78.2% to 86.1% for offences within the SNPP scheme compared to the guilty plea rate for non-SNPP offences, which remained relatively stable.²³⁰ This was on the basis that some people pleaded guilty to obtain the statutory discount for a guilty plea and to avoid the operation of the SNPP scheme.²³¹ However, under legislative

224 Freiberg, above n 110, 289. See also Warner, above n 125, 98-101.

225 See Warner, above n 125, 105-09.

226 TSAC, above n 1, 63.

227 Ibid.

228 It is noted that a guilty plea may also be a factor relevant to the sentencing process by demonstrating remorse or a willingness to accept responsibility for the offence: see Warner, above n 125, 105-106.

229 *R v Way* (2004) 60 NSWLR 168 [68], [71]; *Davis v R* [2015] NSWCCA 90, [33] (Simpson J).

230 NSW Sentencing Advisory Council, *Standard Minimum Non-parole Periods: Questions for Discussion*, Consultation Paper (2013) 5 referring to Patrizia Poletti and Hugh Donnelly, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (Judicial Commission of NSW, 2010) 19.

231 NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-Parole Periods*, Report 134 (2012) [2.8]; NSW Sentencing Advisory Council, above n 230, 5.

changes to the SNPP scheme following the High Court decision in *Muldrock v The Queen*,²³² the distinction between a guilty plea and a conviction following a trial not longer applies.²³³

In Victoria, a guilty plea is not expressly recognised as a special reason that would warrant an exception from the mandatory sentencing provisions. In VSAC's consideration of the circumstances that should amount to specified 'special reasons', it rejected the inclusion of a plea of guilty on the basis that there was ample scope for the court to impose a reduction of sentence to acknowledge the plea above the minimum sentence threshold.²³⁴

In the context of sexual offending, it may be argued that additional reasons exist (trauma of the trial, reduced guilty pleas and fewer convictions) that justify the inclusion of a plea of guilty as a special reason. On the other hand, concerns may be raised that an accused may be exposed to undue pressure to enter a plea of guilty given the stark choice between exposure to a minimum mandatory penalty or avoiding it. This has been identified as a concern in relation to the operation of the standard non-parole period scheme in New South Wales, particularly in relation to vulnerable offenders.²³⁵ It can also be argued that it places considerable discretion in the hands of the prosecution in relation to plea-bargaining, with the 'latent effect of this [being] to give the *prosecutor rather than the judge* the power to chose the penalty'.²³⁶ This process is said to lack transparency, consistency and may have 'significant human rights implications for defendants, as those who are offered plea deals ... fare much better than those who are not'.²³⁷ There are also concerns about overcharging practices to 'support successful plea negotiations later in the process'.²³⁸

In all Australian jurisdictions, pleading guilty is a mitigating factor in sentencing.²³⁹ In Tasmania, the current position is that a plea of guilty 'should ordinarily attract a reduction in sentence, the more so if they are of "utilitarian" value'.²⁴⁰ A sentencing discount is appropriate (even if it is bowing to the inevitable) where the victim is 'spared the trauma of giving evidence'.²⁴¹ It is generally accepted that greater weight is given to a plea that is entered early in the process.²⁴² In Tasmania, the discount for a guilty plea is not recognised in the *Sentencing Act 1997* (Tas) but derives from the common law. This differs from the approach in other jurisdictions.²⁴³ In giving a discount, it is not the practice of Tasmanian courts to quantify or state the amount of the discount.²⁴⁴ This again contrasts with the position in some other jurisdictions.²⁴⁵

The Council's view is that a guilty plea should not provide a specific exception to the mandatory minimum penalty scheme. Tasmania Police agreed with the Council's views. However, other stakeholders expressed the view that there should be some distinction made between offenders who plead guilty and those who are found guilty following trial for the purposes of the mandatory minimum sentencing scheme. This reflects current sentencing practice, as well as concerns that a mandatory minimum sentencing scheme may discourage offenders from entering a guilty plea. In the context of sexual assault trials, the utilitarian benefit of a guilty plea extends beyond the saving of resources. Importantly, it relieves the complainant of the need to give evidence at trial, and an early plea saves the

232 (2011) 244 CLR 120. The *Crimes (Sentencing Procedure) Act 1999* (NSW) was amended by the *Crimes (Sentencing Procedure) Amendment (Standard Non-Parole Period) Act 2013* (NSW) to provide that the SNPP is a matter to be taken into a count by a court in determining the appropriate sentence in the particular case without limiting the matters that are otherwise required or permitted to be taken into account in sentencing an offender. Prior to the High Court's decision in *Muldrock*, the approach in the New South Wales was to 'determine whether the offence was in the midrange of objective seriousness and then, if it was, to ask whether there were reasons for not imposing the SNPP', NSW Sentencing Council, above n 99, [1.13]. This approach was rejected by the High Court.

233 Information provided by Hugh Donnelly, email 10 June 2016.

234 VSAC, above n 134, 93.

235 Sentencing Advisory Council, Queensland (QSAC), *Minimum Standard Non-parole Periods*, Report (2011) 9.

236 Hoel and Gelb, above n 15, 17.

237 Ibid.

238 QSAC, above n 235, 9.

239 Mirko Bargaric and Richard Edney, *Australian Sentencing* (Westlaw, nd) [500.3500].

240 *Ilic v Tasmania* (2009) 19 Tas R 201, [18] (Tennent J). It is noted that there are competing views about the appropriateness of a sentencing discount for a guilty plea on the basis that it imposes a penalty on a defendant who does not plead guilty and that this is contrary to general sentencing principles: see Kathy Mack and Sharyn Roach Anleu, 'Sentencing Discount for a Guilty Plea: Time for A New Look' (1997) 1 *Flinders Journal of Law Reform* 123, 141; Mirko Bagaric and Richard Edney, *Sentencing in Australia* (3rd ed, Thomson Reuters, 2015). See also discussion in Freiberg, above n 110, 381-382; Elizabeth Wren and Lorana Bartels, 'Guilty, Your Honour': Recent Legislative Developments on the Guilty Plea Discount and an Australian Capital Territory Case Study on its Operation' (2014) 35 *Adelaide Law Review* 361.

241 See Warner, above n 125, 106 referring to *McDonald* Serial No 47/1980, 4. Case authority in Tasmania indicates that no or little weight should be given to a utilitarian plea that is 'a recognition of the inevitable', see Warner, above n 125, 107-108. This differs from the position in Victoria and New South Wales, see Freiberg, above n 110, 380.

242 Freiberg, above n 110, 382-383.

243 See Appendix C.

244 See *Pavlic* (1995) 5 Tas R 186, 191 (Green CJ).

245 See Appendix C.

complainant the stress and anxiety of anticipating and preparing for the trial. This benefit was stressed by the Victims Support Service, who observed that the life experience of a victim is improved if they do not go through the trial process.

As a result of the consultation process, the Council's view is that a hybrid model should be adopted. A guilty plea should not constitute an exception per se to the mandatory sentencing scheme but if an offender pleads guilty, a sentencing discount from the specified mandatory minimum sentence should be provided.

However, the introduction of a sentencing discount to reduce the specified mandatory minimum sentence requires decisions to be made about the most appropriate model to be used. In particular, it is necessary to decide the means by which the discount is determined. There are two possible broad approaches:

(1) to specify that the court is to provide a sentencing discount if an offender enters a plea of guilty to an offence attracting a mandatory minimum penalty but not quantify the discount that is to be provided. This accords with the current approach in Tasmania where the amount of the discount is not expressed. It also complies strictly with instinctive synthesis, which requires the sentencing judge simultaneously to unify, balance and weigh all relevant considerations.²⁴⁶ It also corresponds with the use of global sentencing.²⁴⁷ This reflects the statutory approach to sentencing discounts for pleas of guilt in Queensland and the Northern Territory (for matters not heard in the Local Court), where there is no requirement for the court to state the extent of the discount provided.²⁴⁸

(2) to specify that the court is to provide a sentencing discount if an offender enters a plea of guilty to an offence attracting a mandatory minimum penalty and to quantify the discount that is provided (either by the court or in legislation). This is the approach in South Australia, Western Australia, New South Wales and Victoria and has the advantage of greater transparency. However, it potentially adds greater complexity to the sentencing process and may be difficult to reconcile with the imposition of a global sentence. In South Australia and Western Australia the legislation sets out the range of the discount that potentially applies — depending on the timing and circumstances of the plea. This ranges from 10% to 40% in South Australia and up to 25% in Western Australia. In New South Wales, a guideline judgment in *R v Thomson*²⁴⁹ has set out the relevant principles that apply when a court gives a sentencing discount for a guilty plea. The range is specified to be between 10 and 25% and the primary consideration is the time of the plea. In Victoria, the ACT and the Northern Territory (for Local Court matters) there is no indication of the amount of the appropriate discount for a guilty plea but the court is directed (if it imposes a lesser sentence on the basis of a guilty plea) to state the penalty it would have otherwise imposed.²⁵⁰

If a provision based on either model were introduced that provided for a discount for a guilty plea, it would not be necessary for the court to impose a lesser sentence if an offender entered a plea of guilty. However, it would allow the court to do so if it was appropriate in the circumstances of the case. The Council does not have a concluded view on this matter, which requires further research and feedback. A related issue is whether a statutory provision setting out the applicable principles in relation to a plea of guilty should be introduced that applies in all cases and not only to cases where the mandatory minimum sentence applies. This is also beyond the scope of this paper.

Preliminary advice

Guilty plea

24. That there should not be a specific exception based on a plea of guilty as a special reason to warrant departure from the mandatory minimum scheme.
25. That an offender who enters a plea of guilty should receive a sentencing discount from the specified mandatory minimum sentence.

246 See *Markarian* [2005] HCA 25.

247 See Part B [3.2].

248 See Appendix C.

249 (2000) 49 NSWLR 383. See also Judicial Commission of NSW, 'Guilty Plea to be Taken into Account', *Sentencing Bench Book* <http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/guilty_plea.html>.

250 See Appendix C.

Assistance by the accused to the police or an undertaking by the accused to assist the Crown

In Victoria, a special reason that may warrant the imposition of a sentence less than the mandatory minimum non-parole period is that the offender provided assistance to the police or has given an undertaking to assist the Crown. This is a ground of mitigation at common law²⁵¹ and reflects the significance of an accused providing evidence against a co-accused.²⁵² It may also be relevant where the accused volunteers a confession to offences about which the police would not otherwise have been aware.²⁵³ The exception provides an incentive to a co-accused to give assistance to authorities, without which there may be no such incentive and consequently more contested trials and less evidence from a co-accused available to prosecute those charges.²⁵⁴ There is a similar provision in South Australia that specifies that the degree that an accused has cooperated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequence of, any such cooperation provides the ground for a special reason.

This exception may be relevant in cases of sexual offending against children, where an offender makes a confession about offending that involves additional children or the offender provides information to police and agrees to give evidence about co-offenders.

Case Example

H pleaded guilty to maintaining a sexual relationship with a young person under the age of 17 years, production of child exploitation material, and possession of child exploitation material. He was the de facto partner of the child's mother and admitted to seven occasions on which he committed unlawful sexual acts with the child aged six in the context of over two dozen such occasions. This formed the basis of the charge of maintaining a sexual relationship with a young person as the complainant, when interviewed, disclosed nothing.

The Council considers this a complex issue; however, its view is that this is a matter that should not result in an automatic exception from the mandatory minimum scheme. Tasmania Police agreed with the Council's views in principle but added that, 'such an exception may have merit for those who provide substantial assistance with investigation and prosecution of other child sex offenders, especially if their successful prosecution could not otherwise be achieved'. The Council's view is that this scenario, while not the subject of a specific exception, may be accommodated by the 'catch-all' exception so that it may be appropriate, in the circumstances of an individual case, for the court to decide that there are substantial and compelling circumstances to exempt the offender from the scheme.

Preliminary advice

Cooperation with authorities

26. That there should not be a specific exception based on cooperation with authorities as a special reason to warrant departure from the mandatory minimum scheme.

251 See Warner, above n 125, 110-111; Freiberg, above n 110, 395-407.

252 VSAC, above n 134, 83.

253 Warner, above n 125, 110.

254 VSAC, above n 134, 84.

Circumstances relating to the case

As indicated, mandatory sentencing has the potential to create injustice as it does not allow the court to acknowledge the significant differences in the degrees of culpability. An approach to mitigate this unfairness would be to structure an exception that accommodated those categories of sexual offending that are viewed by the courts and the community as less serious. In the Council's prior examination of sentencing for sex offences, the Council highlighted the diversity of circumstances that may give rise to a conviction for a sexual offence. The Council noted that while there was general consensus that sexual offences committed by adults against young children, particularly by adults in positions of trust or authority, were particularly serious offences and deserving of severe punishment, not all sexual offences against children fell into this category. Accordingly, in developing exceptions, the nature of the relationship between the offender and the complainant and the relative ages of the offender and the complainant may be considered to be 'special reasons' to exempt the offender from the mandatory scheme. The relative ages of the offender and the complainant are specifically recognised as a matter relevant to the existence of 'exceptional circumstances' in Queensland.²⁵⁵ Alternatively, these factors (while not specifically recognised in legislation) may be considered to fall within a catch-all exception such as if there are 'substantial and compelling circumstances that justify doing so'.

The Council's view is that the nature of the relationship between the offender and the complainant (that is, a genuine relationship) and the relative ages of the offender and the complainant (that is, close in age) should be specifically recognised as 'special reasons' to exempt the offender from the mandatory minimum scheme. Tasmania Police agreed with the Council's views.

Preliminary advice

Circumstances relating to the case

27. That there should be a specific exception in circumstances where the complainant is relatively close in age to the offender and consent is given in the context of a genuine and equal relationship to warrant departure from the mandatory minimum scheme.

255 See Appendix A.

5.

Setting the mandatory minimum levels

As part of its advice about the implementation of mandatory minimum penalties for serious sex offences in Tasmania, the Council was asked to provide advice about what the mandatory minimum penalties should be.

5.1 THE APPROACH OF THE COUNCIL TO SETTING MANDATORY MINIMUM PENALTIES

In developing a clear conceptual framework for the selection of sentencing levels, the Council initially examined approaches used in other jurisdictions to setting mandatory minimum sentence levels and found these to be of limited assistance. As discussed at Part B [2.2], other jurisdictions have set the mandatory minimum penalty based on a specified proportion of the maximum penalty and, as indicated, this approach is not useful in Tasmania given the lack of graduated maximum penalties.²⁵⁶ In other jurisdictions where the mandatory minimum term is expressed as a defined period of time (for example, two years), there are difficulties in identifying the reasons why a particular minimum term was selected and how the minimum term related to prior sentencing practice. However, it does seem apparent that mandatory minimum penalties are typically intended to respond to offending behaviour by increasing sentencing levels.²⁵⁷ The desire to increase sentences for serious sexual offences against children underpins the Tasmanian Government's policy of mandatory minimum sentences, on the basis that this reflects the gravity of the offence and also 'express[es] the community's strong condemnation of this type of crime'.²⁵⁸

In the absence of graduated maximum penalties in Tasmania that could be used as a guidepost to set the mandatory minimum sentence, the process for setting the mandatory minimum penalties needs to be done by conducting an analysis on an offence-by-offence basis.²⁵⁹ This is a comparatively difficult and time-consuming process.²⁶⁰ It is also less transparent and potentially more arbitrary. However, in establishing a coherent and transparent approach to setting minimum penalty levels for each offence, the Council has been informed by the following factors:

(1) Current sentencing practice in the Supreme Court of Tasmania

An assessment of current sentencing patterns captures offence seriousness from the perspective of the judges of the Supreme Court and allows judgments to be made about whether sentencing (in particular, the minimum term of imprisonment imposed) for particular offences is appropriate. However, it is necessary to be cautious in reviewing the statistics, given that relatively low numbers underpin the statistics for some categories of offending. This makes it difficult to determine whether there is a settled sentencing pattern.

256 This has also been the approach recommended in New South Wales for the setting of standard non-parole periods (see NSW Sentencing Council, above n 99) and in Victoria for setting the standard sentence levels (see VSAC, above n 7). It is noted that this is not a mandatory minimum scheme.

257 See Hoel and Gelb, above n 15, 2. It is noted that Hoel and Gelb have observed that while mandatory sentencing does not necessarily mean harsher sentencing, 'many supporters of mandatory sentencing, expressly or otherwise, also advocate more severe penalties': at 2.

258 Vanessa Goodwin, 'Tougher Sentencing Required for Sex Offenders', *Media Release*, 9 September 2015 <http://www.premier.tas.gov.au/releases/tougher_sentencing_required_for_sex_offenders>.

259 These two alternatives were outlined by the NSW Sentencing Council, above n 99, 39-40.

260 Ibid 40.

(2) The Council's previous examination of the adequacy of current sentencing practice

This allows for an identification of factors that may have led to the inclusion of the offence in the mandatory minimum sentencing scheme, the need for sentencing reform and exceptions that may be appropriate.

(3) Indications from the Court of Criminal Appeal about the adequacy of sentencing for particular offences

Again, this allows for guidance to be obtained from the Court of Criminal Appeal about current sentencing ranges and whether or not there is an indication from the court that sentencing levels are too lenient for particular offences (or categories of offences).

(4) Public opinion in relation to relative offence seriousness and sentencing levels

As the Council has previously acknowledged, public perception of the sentences imposed for sexual offences provides an important measure of the appropriateness of sentencing for sex offenders.²⁶¹ While it is acknowledged that public opinion is important, there is less certainty about the most reliable means of ascertaining public opinion.²⁶² It is clear that, in the abstract, a majority of people believe that sentences are too lenient. This is reflected in the findings of polls and surveys that have sampled 'top of the head' responses.²⁶³ Public opinion research conducted world wide over many years has consistently found that between 70 and 80% of respondents believe that sentences are too lenient.²⁶⁴ It is also reflected in media reports on sentencing levels, which tend to focus on a minority of cases, creating a perception of widespread dissatisfaction with sentencing levels, and inflating community concerns about the prevalence of sexual and violence offences.²⁶⁵

Previously, the Council has indicated that caution needs to be used in relying on these responses, because studies that have examined people's responses to sentencing in more detail have found punitive attitudes are generally linked with myths and misconceptions about crime and justice and that the desire for harsher sentencing that is evident in opinion polls needs to be heavily qualified.²⁶⁶ Research has also shown that victims are no more punitive than other members of the public.²⁶⁷ For this reason, the Council has drawn on research that has sought to provide a more considered analysis of the views of some members of the public in making its assessment of the appropriate mandatory minimum sentencing level for the particular offences. Research shows that the more information that the public has, the less punitive the responses, and this has led to the use of case vignettes (case studies that provide information about the offence, the offender and the victim) as a means of determining public opinion.²⁶⁸ An extension of the case vignette approach has been to ascertain public opinion by conducting a survey of jurors. The Tasmanian Jury Sentencing Study sought to ascertain the perception of jurors in relation to the sentence imposed on the offender in their case on the basis that it revealed the views of those who had 'engaged directly with the criminal justice system in a much more meaningful way than those who form their perceptions second-hand via the mass media'.²⁶⁹ Its legitimacy as a method of assessing public opinion derives from the fact that it canvasses the views

261 Ibid 64.

262 See Kate Warner, Julia Davis, Caroline Spiranovic, Helen Cockburn and Arie Freiberg 'Using Jurors to Measure Informed Community Views on Sentencing: Results from the Second Australian Jury Sentencing Study' *Punishment and Society* (first online, 2016) 1-3.

263 See Karen Gelb, *Myths and Misconceptions; Public Opinion Versus Public Judgment About Sentencing*, (Sentencing Advisory Council, Victoria, 2006); Karen Gelb, *More Myths and Misconceptions*, (Sentencing Advisory Council, Victoria, 2008).

264 Gelb, *Myths and Misconceptions; Public Opinion Versus Public Judgment About Sentencing*, above n 264.

265 See Grant Devilly and Jacqueline Le Grand, 'Sentencing of Sex-Offenders: A Survey Study Investigating Judges' Sentences and Community Perspectives' (2015) 22 *Psychiatry, Psychology and Law* 184; Mike Berry, Greg Philo, Giuliana Tirpelli, Steve Docherty and Colin Macpherson, 'Media Coverage and Public Understanding of Sentencing Policy in Relation to Crimes Against Children' (2012) 12 *Criminology and Criminal Justice* 567.

266 TSAC, above n 1, 64. However, note the arguments of de Keijser that, 'methods encouraging a more considered response do not truly elicit mass public opinion but rather present the views of an unrepresentative, highly selected sample that has been converted by participating in the research into adopting the view of the elite': Warner et al, above n 262, citing Jan de Keijser 'Penal Theory and Popular Opinion: The Deficiencies of Direct Engagement' in Jesper Ryberg and Julian Roberts (eds) *Popular Punishment: On the Normative Significance of Public Opinion* (Oxford University Press, 2014) 101-118. While de Keijser challenges the notion that the informed sample of the public represents true public opinion, he is not suggesting that penal policy should be based on uninformed views. Instead he argues that criminal justice should be left to the experts: at 115.

267 Gelb, *More Myths and Misconceptions*, above n 263, 10.

268 See discussion in *ibid* 6-8.

269 Kate Warner, Julia Davis, Maggie Walter, Rebecca Bradfield and Rachel Vermey, 'Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study' (Australian Institute of Criminology, Trends and Issues No 407, 2011) 6.

of members of the community performing their civic duty and is therefore anchored into real-world sentencing exercises.²⁷⁰ The Tasmanian Jury Study has been expanded into a study of jurors' views in Victoria.²⁷¹

(5) Sentencing levels in other jurisdictions

As the Council noted in the *Sex Offence Sentencing* report, inter-jurisdictional comparisons are problematic for a number of reasons: Australian criminal law is not uniform and offence definitions vary between jurisdictions; sentencing laws are not uniform and there are differences in the sentencing options that are available, non-parole periods and parole eligibility provisions; there are differences to which offences are dealt with summarily and in higher courts; and there are jurisdictional differences in relation to prosecution practices.²⁷² In addition, there may be differences in the data reporting that may affect the availability and comparability of sentencing data.

There are no mandatory minimum head sentences that exist in other jurisdictions for sexual offences against children that are comparable to the offences that are being considered for inclusion in the Tasmanian scheme. As indicated at Part B [2.2], the mandatory provisions that exist for sexual offences in other jurisdictions do not dictate the imposition of any particular fixed period of imprisonment as the mandatory minimum term. Nevertheless, the Council has examined a number of different sources of information to obtain an indication of sentencing levels generally in other jurisdictions to inform its determination of the appropriate mandatory minimum term in Tasmania. These sources are as follows:

- local sentencing data;
- the levels set for other forms of sentencing guidance, such as the standard non-parole period in New South Wales, the proposed standard sentence length in Victoria and the periods set out in the guidelines for England and Wales. It is important to note that these all relate to different guideposts than the mandatory minimum that is proposed in Tasmania. For example, in New South Wales, the standard non-parole period 'represents the non-parole period that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness'.²⁷³ The model for standard sentences in Victoria sets out the head sentence for offences 'that represent the sentence for an offence that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness'.²⁷⁴ In taking into account these sources of guidance for the purposes of setting mandatory minimum sentences in Tasmania, it is important to remember that these guideposts relate to offences in the middle of the range of seriousness and are only a factor taken into account in the process of setting sentence so that a considerable degree of judicial discretion is retained. This will not be the case in Tasmania. In England and Wales, guidelines judgments provide guidance on factors that the court takes into account that may affect the sentence imposed. The guidelines set different levels of sentence based on the harm caused to the victim and the blameworthiness of the offender.²⁷⁵ In this way, these provide a full sentencing range with an indication of the appropriate starting point and sentencing range for different categories of offending behavior.

In addition, in taking into account the sentencing levels in other jurisdictions, the Council has previously recognised that when measured against others, it appears that Tasmanian sentence lengths for sexual offences are lower than sentences imposed for sex offences in other jurisdictions.²⁷⁶ However, as the Council has previously indicated, there are differences in sentencing levels between all jurisdictions and this does not mean that one jurisdiction is 'right' and other jurisdictions are all 'wrong'. There is no 'correct' sentence.²⁷⁷ Accordingly, it remains the Council's view that while sentencing levels in other jurisdictions may inform the determination of the appropriate minimum penalty, sentencing levels need to be developed in a Tasmanian context rather than necessarily following the approach

270 Warner et al, above n 262, 2.

271 See *Ibid.* A national study is also being undertaken that aims specifically to gauge juror's attitudes to the sentencing of sex offenders. This research (when available) will provide information in relation to whether or not sentencing for sex offenders is too lenient, whether there are differences in perceptions of sentencing severity depending on the type of sex offence, whether there are jurisdictional differences in perceptions of leniency for sex offences and to ascertain the facts that affect offence seriousness from the perspective of the public: Lorana Bartels, Kate Warner and George Zdenkowski, 'National Research with Jurors on Sentences for Sexual Offenders' (2014) 26 *Judicial Officers' Bulletin* 9, 10.

272 TSAC, above n 1, 44.

273 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).

274 VSAC, above n 7, 167. It is noted that standard sentence model is not the VSAC's preferred model: at 160.

275 Sentencing Council, UK, 'About Guidelines' <<https://www.sentencingcouncil.org.uk/about-sentencing/about-guidelines/>>.

276 TSAC, above n 1, 75.

277 *Ibid.*

in other jurisdictions. It will also be necessary to ensure that the mandatory minimum terms reflect the relative seriousness of the different sexual offences included in the Tasmanian scheme.

It is also important to note that the levels that the Council has tentatively set are informed by the scope of the offences that the Council considers that the mandatory sentencing scheme should be limited to and the exceptions that the Council has identified. This process has attempted to ensure that the mandatory minimum sentencing scheme only applies to the more serious categories of sexual offending against children and means that the levels are set at higher levels than they would be if less serious categories of offending were included in the mandatory sentencing scheme.

The Council acknowledges that setting the levels of the mandatory minimum terms is complex and views may differ as to the approach that should be adopted and the appropriate level of the mandatory minimum penalties. As the Council has previously stated, advice about appropriate sentencing levels ultimately requires a value judgement about what a particular offence is worth and what it is worth in comparison with other offences.²⁷⁸ Accordingly, in giving its preliminary advice on mandatory minimum sentencing levels, the Council notes that this necessarily involve a value judgment but that the levels have been arrived at as a 'result of an informed value judgement by the Council, based on the Council's collective knowledge and experience and taking into account all of these sources of information'.²⁷⁹ The Council has also taken into account the feedback from stakeholders in formulating its views about the appropriate levels to be set. In the consultations, there were no objections raised to the levels proposed by the Council, other than reservations of the Victims Support Service who expressed the view that the levels were acceptable but observed that, generally, victims think sentencing is too lenient.

5.2 MANDATORY MINIMUM PENALTY LEVELS FOR SPECIFIC OFFENCES INCLUDED WITHIN THE MANDATORY MINIMUM SCHEME

5.2.1 RAPE WHERE THE COMPLAINANT IS UNDER 17

In Tasmania, rape is sexual intercourse (defined as penile penetration of the vagina, genitalia, anus or mouth or the continuation of sexual intercourse after penetration) without consent.²⁸⁰ The maximum penalty for rape is 21 years' imprisonment. While rape is an offence that can be committed against an adult or a young person, the Council's consideration of mandatory minimum penalty levels relates only to cases where the complainant is under 17.

278 Ibid vii.

279 VSAC, *Baseline Sentencing*, Final Report (2012), xvii.

280 *Criminal Code* (Tas) ss 1, 185. Consent is defined in the *Criminal Code* (Tas) s 2A as follows – (1) In the Code, unless the contrary intention appears, "consent" means free agreement.

(2) Without limiting the meaning of "free agreement", and without limiting what may constitute "free agreement" or "not free agreement", a person does not freely agree to an act if the person –

(a) does not say or do anything to communicate consent; or

(b) agrees or submits because of force, or a reasonable fear of force, to him or her or to another person; or

(c) agrees or submits because of a threat of any kind against him or her or against another person; or

(d) agrees or submits because he or she or another person is unlawfully detained; or

(e) agrees or submits because he or she is overborne by the nature or position of another person; or

(f) agrees or submits because of the fraud of the accused; or

(g) is reasonably mistaken about the nature or purpose of the act or the identity of the accused; or

(h) is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required; or

(i) is unable to understand the nature of the act.

(3) If a person, against whom a crime is alleged to have been committed under chapters XIV or XX, suffers grievous bodily harm as a result of, or in connection with, such a crime, the grievous bodily harm so suffered is evidence of the lack of consent on the part of that person unless the contrary is shown.

Current sentencing practice

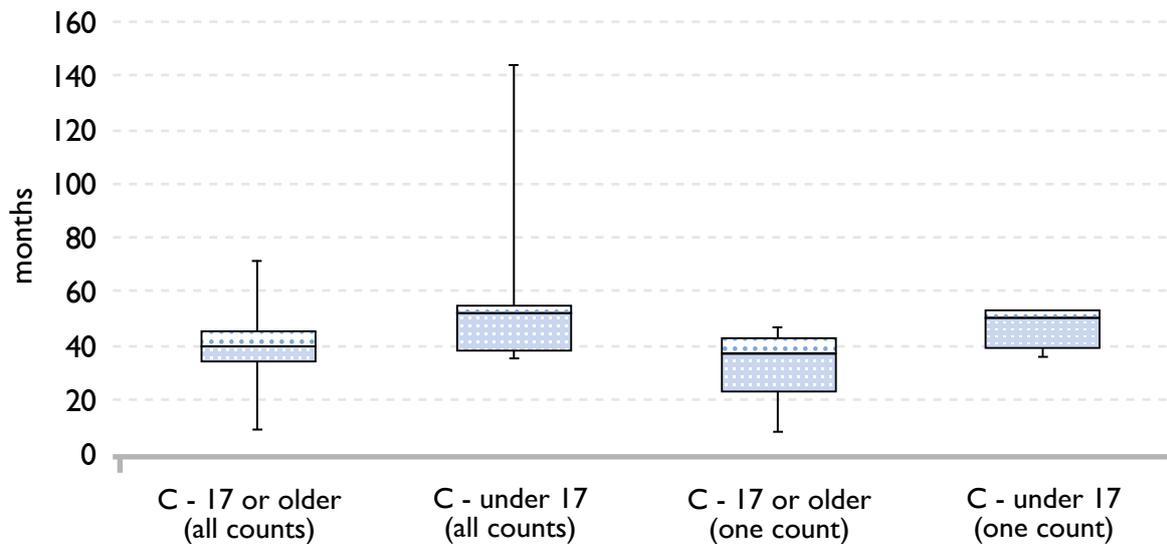
Table 5-1: Rape, Supreme Court sentences 2008-14 (all counts)

Age of complainant	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Under 17	54 (4.5 years)	144 (12 years)	36 (3 years)	100	12
17 and over	42 (3.5 years)	72 (6 years)	9	93 ²⁸¹	15
All complainants	46.5 (3.87 years)	144 (12 years)	9	96.3	27

Table 5-2: Rape, Supreme Court sentences 2008-14 (single count)

Age of complainant	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Under 17	46.5 (3.87 years)	54 (4.5 years)	36 (3 years)	100	4
17 and over	36 (3 years)	45 (3.75 years)	9	100	5
All complainants	39 (3.25 years)	54 (4.5 years)	9	100	9

Figure 5-1: Rape, Supreme Court sentencing range 2008-2014 (by counts and age of complainant)



In the period 2008-14, 44% of offenders (n=12) sentenced for rape in the Supreme Court were sentenced in relation to a complainant under the age of 17. The complainants ranged in age from two to 16 and the median age of complainants (taken from the age of the youngest victim or the age when the offending commenced) was 14.

281 There was one case where the offender received a partly suspended sentence, *Tasmania v CT, Evans J*, 7 March 2011 (Sentence), 36 months imprisonment with 15 months suspended.

All offenders sentenced for rape of a young person received a sentence of immediate imprisonment. Sentences of imprisonment for rape of a young person under 17 were also longer than sentences imposed for rape of a person aged 17 or older. The longest sentence imposed for all counts of rape of a young person was 144 months (12 years), the lowest sentence was 36 months (3 years) and the median sentence was 54 months (4.5 years). It is noted that in 2015, a 15 year sentence of imprisonment was imposed in relation to a historical case where the offender pleaded guilty to three counts of rape and one count of maintaining sexual relationship in relation to his daughter over an extended period of time (from when the complainant was seven to 18).²⁸² In imposing sentence, Porter J stressed the breach of trust, the loss of the complainant's childhood and the significant harm caused by child sexual abuse:

Mr R, attempting to properly describe the enormous gravity of your offending against your daughter is a difficult thing to do; the facts speak for themselves. It is a major understatement to say that you committed a serious breach of your parental duty to protect her. She was entitled to look to you for safety and nurturing. You breached the trust she was entitled to place in you by an horrendous ongoing, regular and persistent course of sexual abuse, sometimes in the context of other physical abuse. You deprived her of any true childhood and adolescence, and caused a profound long term emotional disability. A lengthy term of imprisonment must be imposed.

In relation to single count of rape for a complainant under the age of 17, there were only four cases decided in the reference period with sentences being 54 months (4.5 years) in two cases, 39 months (3.25 years) in one case and 36 months (3 years) in one case.

Table 5-3: Circumstances of single count of rape, Complainant under 17, Supreme Court 2008-14

	Circumstances	Sentence
Case 1	C was 14 D was 30 Stranger wearing a disguise in public place No plea of guilty Historical case	4 ½ years' imprisonment with non-parole period 50% of sentence.
Case 2	C was 16 D was 48 Known to the complainant No plea of guilty	4 ½ years' imprisonment with non-parole period 50% of sentence.
Case 3	C was 15 D was 26 Met on mobile phone chat service and arranged to meet Indifferent as to consent No gratuitous violence or force Plea of guilty	3 years and 3 months with non-parole period of 20 months.
Case 4	C was 16 D was 47 C was daughter of D's former partner C was asleep D was intoxicated No plea of guilty	3 years with non-parole period 50% of sentence.

282 *Tasmania v KR*, Porter J, 7 October 2015 (Sentence).

Council's previous research

The Council's previous research did not specifically address the issue of rape of a person under 17. However, it did indicate that there was considerable leniency in sentencing rape offenders and that, in some cases, the sentences imposed did not appropriately reflect the seriousness of the crime and the harm caused to the victim. It was the Council's view that there was not enough recognition of the violence inherent in the act of rape and the harm caused by the offence to victims and that there was scope for sentencing to become more severe for rape.²⁸³ In particular, the Council was concerned that the sentencing range for rape may be unduly truncated.²⁸⁴

Indications from Court of Criminal Appeal

There have been no criticisms in the recent decisions of the Court of Criminal Appeal about the sentencing practice for rape in Tasmania.

In the recent decision of *Baldock v Tasmania*,²⁸⁵ the Court of Criminal Appeal gave consideration to the sentencing range for rape, particularly in relation to cases at the highest end of the range. This case involved one count of rape of an 81 year old woman and one count of aggravated burglary. The crime was described by the sentencing judge and the Court of Criminal Appeal as an 'atrocious'²⁸⁶ and counsel for the appellant conceded that it should attract a sentence at the highest end of the range.²⁸⁷ The accused was sentenced to a term of nine years' imprisonment with a non-parole period of five and half years and the Court of Appeal upheld his appeal on the grounds that the sentence was manifestly excessive. The Court substituted a period of six years' imprisonment with a four year non-parole period.

In the decision, the Court of Criminal Appeal reiterated the use that could be made of sentencing data. It accepted that, while sentencing data could be used to establish a broad range that would provide guidance to sentencing judges, it was not a tariff — rather 'it was a yardstick against which to examine a proposed sentence'.²⁸⁸ The Court accepted that a sentence did not need to fall within the range to be appropriate but considered that in this case, the original sentence of nine years was so far outside the range that it was excessive. This was particularly the case as the offender had received a discount in the sentence that would otherwise have been appropriate on the basis of his plea of guilty. The Court accepted that a sentence in the vicinity of five years was at the upper end of the range for a single count of rape, even in circumstances where it was accompanied by an additional crime such as aggravated burglary.²⁸⁹ It noted that even in sentences for maintaining a sexual relationship with a young person under the age of 17, where numerous acts of rape are committed, sentences of nine years' imprisonment were not common.²⁹⁰

Further significant factors identified were that the offender was entitled to a significant discount for his plea of guilty, as the mitigatory effect of a plea of guilty was particularly relevant in cases of sexual offences given that a plea avoids the distress to the victim of giving evidence at trial.²⁹¹ In addition, some of the aggravating factors that would have been features of the very worst category of cases were absent: there was little violence over and above the force necessary to commit rape, no weapon was used, the offender had no previous convictions for rape or other serious offences of a violent or sexual kind, the victim was not subject to any other serious form of sexual indignity or perversion, the rape was not repeated or prolonged and the crime was impulsive.²⁹²

The Court of Criminal Appeal has previously accepted that a sentence of three to four years was appropriate for a single count of rape and a sentence of five years or more was appropriate for a more serious case.²⁹³ However, it is noted that comments from the Court of Criminal Appeal in relation to sentencing for sex offences generally would suggest that the Court considers that there is scope for increased sentencing for serious sexual offences against children.²⁹⁴

283 See TSAC, above n 1, [7.1.1].

284 Ibid vii.

285 [2015] TASCRA 3.

286 Ibid [24] (Pearce J).

287 Ibid [12] (Estcourt J).

288 Ibid [26] (Pearce J) quoting *Hilli v The Queen* (2010) 242 CLR 520, [54].

289 Ibid [13] (Estcourt J), [25] (Pearce J).

290 Ibid [16] (Estcourt J).

291 Ibid [29] (Pearce J).

292 Ibid [28] (Pearce J).

293 *DPP v T* (2012) 21 Tas R 442, [18] (Crawford CJ) referring to *Tasmania v Farmer* (2005) 13 Tas R 418, [7] (Slicer J), [48] (Blow J).

294 See Part B [5.2.2].

Public opinion and jurors' views

Public opinion research on sentencing for sex offences and public opinion in relation to offence seriousness was examined in the Council's previous research on sentencing for sex offences.

Relevant to sentencing for rape where the complainant is under 17, this research found that:

- sentences for child sexual assault cases may be perceived as being too lenient;
- the public is generally more lenient than the judge in sentencing for rape involving adult complainants;
- sex offences involving young children were among the most serious criminal offences, with the age of the victim underpinning the question of severity of harm.²⁹⁵

Other research published in 2015 compared sentences imposed by judges with sentences imposed by a representative sample of the Victorian population who were provided with vignettes describing recent rape cases tried in Australia or New Zealand.²⁹⁶ The four vignettes included were: a case of 'blitz rape',²⁹⁷ a case of family child sexual assault,²⁹⁸ a case of male child sexual assault,²⁹⁹ and a case of opportunity rape.³⁰⁰ The results indicated that 'respondents, on average, did not nominate harsher sentences than those handed down in the law courts. When disparity did occur, as in the male child assault case, respondents actually recommended a lighter prison term than that issued by the judge'.³⁰¹ It concluded that the results were 'inconsistent with the notion that judges are "soft on crime"'.³⁰²

Results from the Victorian Jury Sentencing Study also found that in relation to cases involving rape and aggravated sexual assault (all non-consensual contact sex offences with an adult), jurors were more likely to suggest a sentence more lenient than a judge.

Sentencing levels in other jurisdictions

Sentencing levels for rape of a child

In the context of rape, there are difficulties with obtaining data and its comparability as the definition of rape differs between jurisdictions and the use of rape for sexual assault offences against children is the practice in Queensland and Tasmania, but not in Victoria.³⁰³ This means that local data from Victoria relates to adult complainants.

There is some limited data from Queensland, which indicate that the imprisonment rate for all rape cases in Queensland was 70.7% in the period 1 July 2007 to 30 June 2013.³⁰⁴ This was lower than the imprisonment rate for rape cases involving only adult complainants (74.6%). In the same period, the median sentence for all rape cases in Queensland was 78 months and again this was lower than the median sentence for rape cases involving only adult complainants (84 months).³⁰⁵ In contrast, in Tasmania, data indicate that rape that involves complainants under 17 is sentenced more severely than rape of adult complainants. Available data does not indicate the shortest and longest sentence imposed in Queensland where the complainant is a child. In addition, it is noted that in Queensland, a child is a person under 16 rather than under 17 (as is the case in Tasmania).

In Queensland, data prepared by the Sentencing Advisory Council provided an analysis of median sentence length for offenders sentenced to imprisonment for rape by age of the victim for the period 2007-09. This is shown in Table 5-4.

295 See TSAC, above n 1, 75.

296 Devilly and Le Grand, above n 265.

297 'Blitz' rape described a rape where an offender assaulted a woman in a public place, gagged her and attempted to rape her.

298 This involved the indecent assault and rape of a nine-year-old by her father. The abuse continued over a period of time.

299 This involved the rape of an eight-year-old by a sports coach.

300 This involved the rape of a 21-year-old by a taxi driver who took her to his home while she was extremely intoxicated.

301 Devilly and Le Grand, above n 265, 194.

302 Ibid 195.

303 Georgia Brignell and Hugh Donnelly, 'Sentencing in NSW: A Cross-jurisdictional Comparison of Full-time Imprisonment' (Research Monograph No 39, Judicial Commission of New South Wales, 2015) 14.

304 Ibid 14.

305 Ibid. See also QSAC, *Sentencing of Child Sexual Offences in Queensland*, Final Report, 2012, 6. Data was not available in relation to the shortest and longest sentence.

Table 5-4: Median sentence length for offenders sentenced to imprisonment for rape by age of the victim, Queensland 2007-09³⁰⁶

Age of youngest victim	Single penile (years)	Multiple ³⁰⁷ (years)
Under 12 years	7.0 (n=11)	9.0 (n=16)
12-15 years	-	7.0 (n=11)
Under 16	7.0 (n=15)	7.5 (n=27)

For complainants under 12 years, the median sentence of single penile penetration was seven years (n=11), there were no cases where the victim was 12-15 and in relation to victims aged under 16, the median sentence for single penile penetration was seven years. In the period 1 July 2007 to 30 June 2013, there were 120 offenders sentenced for rape of a child under 10 years. The rate of immediate imprisonment was 70% and the median head sentence was six years.³⁰⁸

In New South Wales, the standard non-parole period for aggravated sexual assault (sexual intercourse without consent committed in circumstances of aggravation) is 10 years.³⁰⁹ There are several aggravating features identified in the legislation including that the complainant is under 16 or is under the authority of the offender.³¹⁰ The New South Wales Sentencing Council conducted a review of sexual intercourse without consent cases in the period 2012-13 and identified 23 cases where the circumstance of aggravation was that the victim was under 16.³¹¹ The rate of imprisonment was 91% (21 out of 23 offenders) with a median sentence of eight years. The longest sentence for the principal offence was 10 years and four months and the shortest sentence was one year and nine months.³¹²

Sentencing levels for rape generally

In Victoria, sentences of imprisonment were imposed in 94% of cases in the period 2010-11 to 2014-15. The sentences ranged from six months to 15 years with a median custodial sentence length of five years.³¹³ In VSAC's recent consideration of the provision of sentencing guidance for courts, it made recommendations in relation to the introduction of a standard sentence scheme and recommended that the standard sentence that was appropriate for rape was 10 years.³¹⁴

In New South Wales, sentences of imprisonment were imposed in 92.6% of cases (for both forms of the offence, aggravated and non-aggravated) in the period 1 July 2007 to 30 June 2013.³¹⁵ The median sentence was 72 months (six years). The median sentence for the non-aggravated form of the sexual intercourse without consent was 59.5 months (4.95 years).³¹⁶ In New South Wales, the standard non-parole scheme for rape is seven years. Again, the balance of the sentence must not exceed one third of the non-parole period unless 'special circumstances' apply.³¹⁷

In Queensland, a sentence of imprisonment was imposed in 70% of cases in the period July 2008 to June 2015. The shortest sentence was between seven to 12 months and the longest sentence was 18 years.³¹⁸

The Sentencing Council for England and Wales has set out sentencing guidelines for rape and the sentencing range it provides (based on the lowest category of harm and culpability) is four years to seven years with a starting point of five years.³¹⁹ This category would be appropriate in a case where there was no additional harm (over and above the

306 These data were extracted from Queensland Sentencing Advisory Council, *ibid*, Table 7.

307 This category included cases involving more than one act of penetration with at least one penile penetration.

308 Freiberg, Donnelly and Gelb, above n 31, 115-16.

309 *Crimes (Sentencing Procedure) Act 1999* (NSW) Div 1A Table.

310 *Crimes Act 1900* (NSW) s 61J.

311 NSW Sentencing Council, above n 79, 63. The Council did note that it was 'possible that there were cases where another aggravating circumstance was charged and the victim was also under 16 years'.

312 It is noted that in New South Wales, the sentencing judge determines the non-parole period first and then sets the head sentence, where the balance of the sentence must not exceed one third of the non-parole period unless 'special circumstances' apply: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2). However, it is noted that 'special circumstances are very frequently found' with non-parole periods often being between a half and two-thirds of the head sentence, NSW Sentencing Council, *ibid* 10.

313 VSAC, above n 7, 275. It is noted that imprisonment included combined imprisonment and community correction orders.

314 *Ibid* 189.

315 Brignell and Donnelly, above n 303, 14.

316 *Ibid* 14-15.

317 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2).

318 Data obtained from Queensland Sentencing Information Service.

319 Sentencing Council, UK, above n 275, 11.

rape) and the offender's culpability was not aggravated.³²⁰ Factors relevant to the reduction of the sentence below the starting point included the absence of previous conviction, remorse, previous good character and/or exemplary conduct, age or lack of maturity where it affects the responsibility of the offender or mental disorder or learning disability, particularly where linked to the commission of the offence.³²¹

The Council's preliminary advice

After considering these sources of information, it is the Council's view that a sentence of actual imprisonment is appropriate in cases where the offender is charged with a single count of rape where the complainant is under 17 unless an exception applies. Tasmania Police agreed with the Council's views. It is also noted that this reflects current sentencing practice.

In setting the minimum mandatory penalty to apply for a single count of rape in cases involving a complainant under the age of 17, the Council's view is that the appropriate level is four years. This reflects current sentencing practice for rape and the view taken by the Council that sentencing for rape should be increased. The Council also took into account public opinion research that indicated that sexual offences against children are viewed very seriously and that child sexual assault is more serious than rape of an adult and that murder was the only offence that was considered more serious. For this reason, and also to examine the relativity of offences, the Council has also given consideration to the sentencing range evident in sentencing practice for other serious offences as part of the process of determining the appropriate mandatory minimum sentence. In Tasmania, the sentencing range for attempted murder is three to ten years,³²² six months to four years for dangerous driving causing death, six months to seven and a half years for armed robbery and two months to five years for grievous bodily harm/wounding.³²³ It is noted that Tasmania Police indicated that it did not have a firm view on the appropriate mandatory minimum sentence length for rape suggested by the Council but indicated that the reasoning presented appears to be sound.

The Council, in expressing a view in relation to the mandatory minimum term, has concerns that the problems identified in relation to sentencing for rape will not necessarily be solved by the introduction of a mandatory minimum sentence for rape given that these concerns predominantly related to top of the range for a single count of rape.

Preliminary advice

Mandatory minimum penalty for rape

28. That a sentence of actual imprisonment is appropriate in cases where the offender is charged with a single count of rape where the complainant is under 17 unless an exception applies.
29. That the mandatory minimum sentence for rape should be four years' imprisonment unless an exception applies.

5.2.2 AGGRAVATED SEXUAL ASSAULT WHERE THERE ARE AGGRAVATING CIRCUMSTANCES AND WHERE THE COMPLAINANT IS UNDER 17

Aggravated sexual assault is the penetration of the vagina or anus by any part of the human body, other than a penis, or by penetration by an inanimate object. As explained, this offence does not require proof of absence of consent in cases where the alleged victim is under the age of 17. However, there are circumstances where an offender is close in age to the victim and can then rely on similar age consent 'defences'.³²⁴ This offence was introduced in 1987, and previously this conduct would have been charged as indecent assault. The maximum penalty for aggravated sexual assault is 21 years' imprisonment.

320 The following aggravating features are identified: planning, the use of alcohol/drugs to facilitate the offence, grooming behaviour, the abuse of trust, previous violence against the victim, the recording, retaining, soliciting or sharing sexual images, committed in course of burglary, deliberate isolation of the victim, commercial exploitation and/or motivation, offence racially or religiously aggravated, offence motivated by hostility to the victim's sexual orientation or disability; *ibid* 28-29.

321 *Ibid* 31.

322 *Acting Director of Public Prosecutions v CBF* [2016] TASCRA 1.

323 TSAC, above n 1, 55.

324 The victim is aged 12 years or older and the offender is not more than 3 years older, or the victim is aged 15 or older and the offender is not more than 5 years older: *Criminal Code* (Tas) ss 127A(2), 124(3).

While the crime of aggravated sexual assault (as with rape) can be committed against an adult and a young person, the Council's views in relation to the mandatory minimum penalty levels only relate to cases where the complainant is under the age of 17 and where there are aggravating features (as defined — see discussion at Part B [2.2.2]).

Current sentencing practice

Table 5-5: Aggravated sexual assault, Supreme Court sentences 2008-14 (all counts)

Age of complainant	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Under 17	21 (1.75 years)	72 (6 years)	4	61.5	13
17 and over	28 (2.3 years)	28 (2.3 years)	15 (1.25 years)	50	6
All complainants	24 (2 years)	72 (6 years)	4	57.9	19

Table 5-6: Aggravated sexual assault, Supreme Court sentences 2008-14 (all counts excluding consensual relationship cases)

Age of complainant ³²⁵	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Under 12	21 (1.75 years)	72 (6 years)	4	83.3	6
13 and <17	27 (2.25 years)	30 (2.5 years)	6	60	5
All complainants under 17	21 (1.75 years)	72 (6 years)	4	72.7	11

Table 5-7: Aggravated sexual assault, Supreme Court sentences 2008-14 (single count)

Age of complainant	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Under 17	4	4	4	50	2
17 and over	-	-	-	0	2

In the period 2008-14, 68.4% of offenders (n=13) were sentenced in relation to a complainant under the age of 17. The complainants ranged in age from 18 months to 16 years and the median age of complainants (taken from the age of the youngest victim or the age when the offending commenced) was 14. The conduct typically involved the insertion of a finger in the vagina and in some cases the conduct involved licking the vagina or inserting a finger in the anus.

For all counts of aggravated sexual assault 61.5% of offenders (n=8) sentenced in relation to a person under the age of 17 received a sentence of immediate imprisonment with 7.7% of offenders (n=1) receiving a partly suspended sentence, 15.4% of offenders (n=2) receiving a fully suspended sentence and 15.4% (n=2) receiving a non-custodial sentence. Cases where the offender did not receive an immediate sentence of imprisonment involved two cases where the conduct was consensual, one case where the offender was young, and one case where the offender had a very low intelligence and did not understand the reasons why the conduct was illegal. In the case where the partly suspended sentence was imposed, the offender was elderly and unwell. A period of imprisonment was imposed in cases where there was a breach of trust (family member or other trusted adult).

The maximum sentence imposed for all counts of aggravated sexual assault was 72 months (six years) and this was imposed in *CJP*,³²⁶ where the offender pleaded guilty to five counts of aggravated sexual assault, two counts of indecent assault with a young person, one charge of assault with indecent intent, two counts of producing child

325 This is the age of the youngest complainant (where multiple complainants) or the age offending started (if multiple counts in respect of the same complainant).

326 Wood J, 13 December 2013 (Sentence).

exploitation material, one count of accessing child exploitation material, one count of possession of child exploitation material and one count of assault with indecent intent. The accused sexually abused two young children (aged four and seven years) he was babysitting, including by inserting his fingers and tongue in the vaginas of the complainants and causing the children to masturbate him. The lowest sentence imposed for all counts of aggravated sexual assault of a young person was four months and the median sentence was 21 months (1.75 years). Some of these incidents were recorded by the offenders.

The minimum sentence of imprisonment (four months) was imposed in *MA*,³²⁷ where the defendant inserted at least one finger in the vagina of his stepdaughter aged 10 or 11 years. Mitigating factors were that the act was momentary and that no physical injury was caused and that the defendant was generally of good character. Six months' imprisonment was imposed in *GAM*,³²⁸ where the defendant inserted his finger in the vagina of his 10-year-old stepdaughter and rubbed her breasts. The defendant was sentenced on the basis that this act was not isolated and that he had been sexually assaulting her since she was about nine and a half years old. The defendant pleaded guilty, had been undergoing counselling and expressed remorse.

There were only two cases where the offender was sentenced in relation to a single count of aggravated sexual assault in respect of a complainant under the age of 17. In one case, the complainant was 10 or 11 and the defendant was in his late 30s. He was the complainant's stepfather and the offender inserted at least one finger in the complainant's vagina. He was sentenced to a term of imprisonment of four months. In the other case, the offender was convicted of aggravated sexual assault in respect of his 10-year-old granddaughter. The act involved the digital penetration of the complainant's vagina. The offender was 80 and suffering significant ill health. He received a sentence of six months' imprisonment with four months of the term suspended.

Council's previous research

In the Council's previous consideration of sentencing for sex offences, the Council observed that in Tasmania, there is an offence hierarchy that views penile penetration of the vagina or anus (rape) as more serious than penetration of the vagina or anus by other means (aggravated sexual assault). However, this distinction can be criticised, and, as long ago as 1981, the Law Reform Commission of Tasmania canvassed the widening of the concept of sexual intercourse for rape to include the insertion into the vagina or anus of a finger or an object on the basis that this could be 'equally if not more demeaning and degrading than vaginal penetration'.³²⁹ It is the Council's view that, depending on the circumstances, aggravated sexual assault should attract a similar penalty to penile/vaginal penetration (rape).

The Council found that in terms of relative seriousness as reflected in the sentencing practice of the court, aggravated sexual assault was ranked less seriously than armed robbery. In relation to young children or adults in a position of care, authority or trust, the Council's view was there was scope to increase sentencing to acknowledge the nature of the harm to the complainant in cases of child sexual abuse and the breach of trust in these cases. Accordingly, it was the Council's view that there should be an incremental increase in sentencing for aggravated sexual assault so that sentencing for this offence reflects the seriousness of the offence relative to property offences.

Indications from Court of Criminal Appeal

In *CJP v Tasmania*,³³⁰ the Court of Criminal Appeal dismissed an appeal by the offender against a sentence of six years' imprisonment following a plea of guilty to five counts of aggravated sexual assault, two counts of producing child exploitation material, one count of accessing child exploitation material, two counts of indecent act with a young person, one count of possession of child exploitation material and one count of assault with indecent intent. While this sentence was outside the range of sentences that had previously been imposed for aggravated sexual assault, it was held not to be manifestly excessive. In her decision, Tennent J set out the factors relevant to the sentencing of offenders for sexual crimes involving children. These included: the importance of general deterrence, particularly in cases where the offender was in a position of trust to the victim; that the sentences imposed must reflect the community's concern about offences involving the sexual abuse of children and the substantial harm that may be sustained as a consequence of the offending; the need for denunciation to reinforce society's values and the expectations of its members; and the need to reflect the vulnerability of children who are very young and their

327 Porter J, 4 July 2012 (Sentence).

328 Crawford CJ, 4 May 2009 (Sentence).

329 Catherine Warner, 'Working Paper on Rape Law Reform' (Law Reform Commission of Tasmania, 1981) 17. See also discussion at 17-24, 88.

330 [2015] TASCRA 9.

need for protection.³³¹ In his judgment, Blow CJ acknowledged that the 'sentence was certainly a heavy sentence by current Tasmanian standards' but not manifestly excessive.³³² His Honour indicated that '[i]t may be that the time has come for consideration to be given to the imposition of longer sentences in this State for serious sexual crime' and that '[a]ccording to a research paper published by the Sentencing Advisory Council in April 2013, sentencing levels in Tasmanian courts for sexual offences are lower than they are in other Australian jurisdictions'.³³³ Thus, there are indications for the Court of Criminal Appeal that signal that there is scope to impose longer sentences for this offence and other sexual offences involving children.

Jurors' views

In the Research Paper prepared by the Council, it evaluated jurors' opinions in relation to sentencing in sex offence trials according to three categories: rape and aggravated sexual assault, which included all cases on non-consensual penetration with an adult or teenager (nine trials); child sexual assault, which included all sexual offences committed against pre-pubescent children (ie age 13 or younger); and sexual offences committed against pubescent teenagers by a person in authority (eight trials) and consensual sex with a teenager, which included all cases of sexual contact with a post-pubescent teenager (ie aged 13-16 years excluding cases where the perpetrator was in a position of authority).

The Council found that jurors' views of the appropriate sentence for child sexual assault differed considerably from other types of sex offences. For child sexual assault trials, 62% of the jurors suggested a sentence more severe than the judge. For consensual sex, 44% of jurors suggested a sentence that was more severe while for rape and aggravated sexual assault, 32% of jurors preferred a more severe sentence. There were also differences in the proportion of jurors who suggested a sentence that was less severe than the judge. For child sexual assault, 39% of jurors suggested a sentence that was less severe compared with 61% of jurors in rape and aggravated sexual assault cases and 50% of jurors in consensual sex with a teenager case.³³⁴

In relation to consensual sex with a teenager, in-depth interviews with jurors revealed concerns about sentencing such a person to prison. In rape and aggravated sexual assault cases, jurors had concerns about the effect of the sentence on the offender and his family, and expressed surprise at the length of the sentence imposed. In contrast, jurors in child sexual assault trials tended to be harsher than the judge; one juror expressed concerns about the need to send a message to others in positions of trust and authority.³³⁵

These results reflect the findings of research that has examined community perceptions of offence seriousness, which has found sex offences involving young children were among the most serious criminal offences, with the age of the victim underpinning the question of the severity of harm.³³⁶ In relation to young children, participants made less distinction in relation to seriousness of the offending based on the nature of the physical behaviour. A related concern was an assessment that the offender's abuse of trust and power was influential in assessing an offender's culpability in child sex offence cases. Public opinion research also found that offences involving harm or threats of harm to people were, overall, considered to be more serious than offences only involving property.³³⁷

These findings are consistent with recent results from the Victorian Jury Study, which found that although there was a pattern of juror leniency in child sexual assault of children aged 12 and older (with a majority of jurors suggesting a sentence more lenient than the judge), the majority of jurors (almost two-thirds) considered that a more serious penalty should be imposed in cases involving children under 12.³³⁸ As Warner et al write, this 'supplements earlier research on public perceptions of offence seriousness in Victoria which found that sexual offences against young children were of utmost concern to participants'.³³⁹

331 Ibid [20]-[21], adopting the principles set out by Wood J in *Director of Public Prosecutions v STU* [2102] TASCRA 7, [59]-[63].

332 *CJP v Tasmania* [2015] TASCRA 9, [2].

333 Ibid.

334 These findings are summarised in TSAC, above n 1, 69.

335 Ibid.

336 See VSAC, above n 89.

337 Ibid summarised in TSAC, above n 1, 72.

338 Warner et al, above n 262.

339 Ibid 17.

Sentencing levels in other jurisdictions

There is limited comparative data available for this offence because this offence is included in the offence of rape in New South Wales,³⁴⁰ Victoria³⁴¹ and Queensland,³⁴² which are the jurisdictions where local data is available. In Queensland, limited data is available for single counts of digital penetration of a child for the period 2007-09. This is shown in Table 5-8 and only relates to the median sentence. There was no available data about the shortest and longest sentence imposed.

Table 5-8: Median sentence length for offenders sentenced to imprisonment for rape by single digital penetration by age of the victim, Queensland, 2007-09³⁴³

Age of the youngest victim	Median sentence (years)
Under 12 years	3.0 (n = 12)
12 – 15 years	-
Under 16 years	3.0 (n = 15)

The Sentencing Council for England and Wales has set out the following sentencing guidelines:

Offence	Range	Starting point
Assault by sexual penetration of a child under 13 (lowest degree of culpability and harm) ³⁴⁴	2-6 years	4 years
Sexual activity with a child by penetration (lowest degree of culpability) ³⁴⁵	High level community order – 2 years	1 year
Sexual activity by penetration with a child family member (lowest degree of culpability) ³⁴⁶	2 years and 6 months – 5 years	3 years and 6 months
Abuse of position of trust: sexual activity by penetration with a child (lowest degree of culpability) ³⁴⁷	26 weeks – 18 months	1 year

The Council's preliminary advice

After considering these sources of information, it is the Council's view that a sentence of actual imprisonment is appropriate in cases where the offender is charged with a single count of aggravated sexual assault where the complainant is under 17 (outside of the 'consensual' relationship context) unless an exception applies. In such cases, a court should not be able to impose a non-custodial or suspended sentence. Tasmania Police agreed with the Council's views.

In determining the appropriate mandatory minimum term of imprisonment, the Council's view is that this should be 18 months for a single count of aggravated sexual assault with aggravating features. This reflects the Council's view that there should be closer correspondence with sentencing for rape and that longer sentences are appropriate in cases involving young children and in cases involving offenders who were in a position of trust relative to the young person. This term represents a significant increase in sentencing relative to the pre-existing minimum term (four months) and reflects the view of the Court of Criminal Appeal that sentencing for serious sexual offences against children needs to be increased. It is noted that Tasmania Police indicated that it did not have a firm view on the appropriate mandatory minimum sentence length for aggravated sexual assault suggested by the Council but indicated that the reasoning presented appears to be sound.

340 *Crimes Act 1900* (NSW) ss 61H, 61I.

341 *Crimes Act 1958* (Vic) ss 37D, 38.

342 *Criminal Code* (Qld) s 349.

343 These data is taken from QSAC, above n 305, Table 7.

344 This is a similar offence to aggravated sexual assault as it applies to victims under 17 in Tasmania.

345 This includes penetration of vagina or anus (using body or object) or penile penetration of the mouth.

346 This includes penetration of vagina or anus (using body or object) or penile penetration of the mouth.

347 This includes penetration of vagina or anus (using body or object) or penile penetration of the mouth.

Preliminary advice

Mandatory minimum penalty for aggravated sexual assault

30. That a sentence of actual imprisonment is appropriate in cases where the offender is charged with a single count of aggravated sexual assault where the complainant is under 17 (outside of the 'consensual' relationship context) unless an exception applies.
31. That the mandatory minimum sentence for a single count of aggravated sexual assault in circumstances of aggravation (as a defined) should be 18 months' imprisonment unless an exception applies.

5.2.3 MAINTAINING A SEXUAL RELATIONSHIP WITH A YOUNG PERSON IF COMMITTED WHERE THERE ARE AGGRAVATING CIRCUMSTANCES

The crime of maintaining a sexual relationship with a young person is committed if a person commits an unlawful sexual act (sexual intercourse with a young person, indecent assault, aggravated sexual assault, incest or rape) with a person under the age of 17 on at least three occasions.³⁴⁸ The maximum penalty for maintaining a sexual relationship with a young person is 21 years' imprisonment.

In the Council's review of sentencing for sex offences, the Council recommended the creation of an aggravated offence of maintaining a sexual relationship with a young person in circumstances of aggravation. As discussed at Part B [2.2.2], the following aggravating features were identified:

- the young person was aged under 12 at the time the offending commenced;
- the young person was under the care, supervision or authority of the offender;
- the offender took advantage of the victim being under the influence of alcohol or a drug in order to commit the offence or the circumstances of the offence involved the offender supplying the victim with alcohol and/or drugs; or
- the offender filmed or recorded the offence.

This recommendation was made to reflect the diversity of cases where convictions were obtained for maintaining a sexual relationship (as discussed below) and to create a more serious version of the basic offence where aggravating features were present to reflect judicial and community condemnation of these cases to provide a signal to the court in relation to sentencing.

The Council now considers that an aggravated offence should not be created and instead the aggravating circumstances should be sentencing factors for the judge in making a determination of whether or not the case falls within the mandatory minimum sentencing scheme.

348 Criminal Code (Tas) s 125A.

Current sentencing practice

Figure 5-2: Maintaining a sexual relationship with a young person and sentence type, Supreme Court, 2008-14 (all counts, n=95)

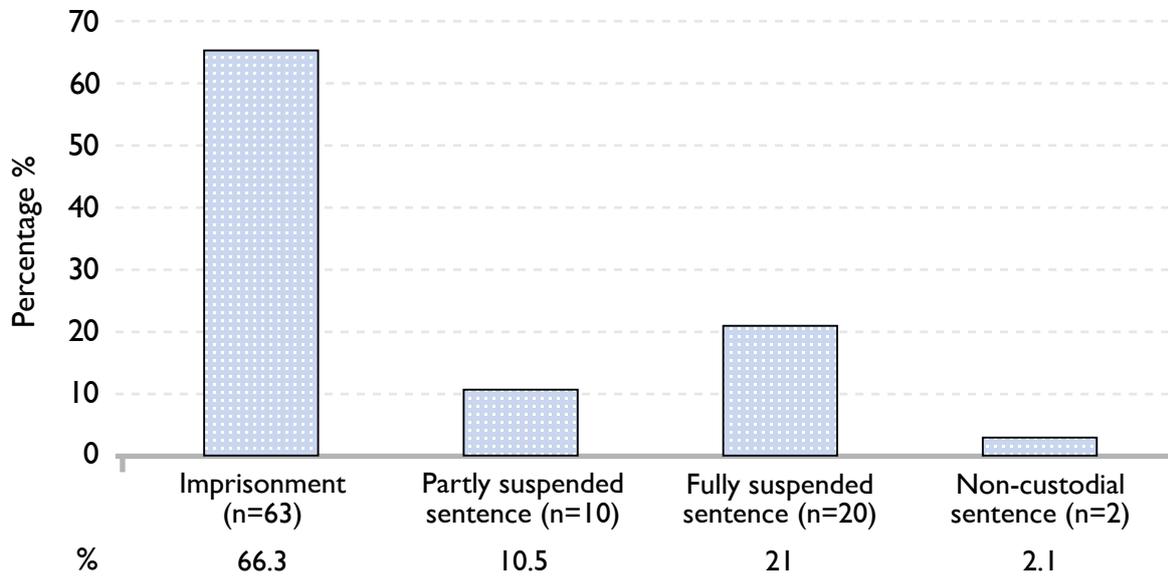


Figure 5-3: Maintaining a sexual relationship with a young person and sentence type, Supreme Court, 2008-14 (single count, n=67)

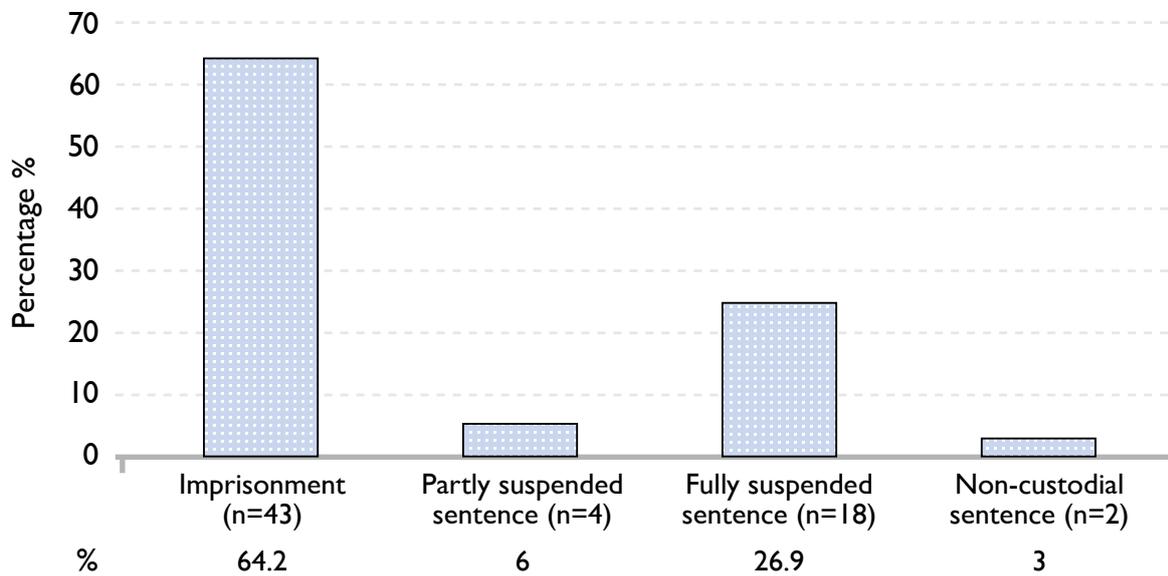


Table 5-9: Maintaining a sexual relationship with a young person, Supreme Court sentences 2008-14

Counts	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
All	36 (3 years)	144 (12 years)	4	66.3	95
Single	32 (2.6 years)	96 (8 years)	4	64.2	67

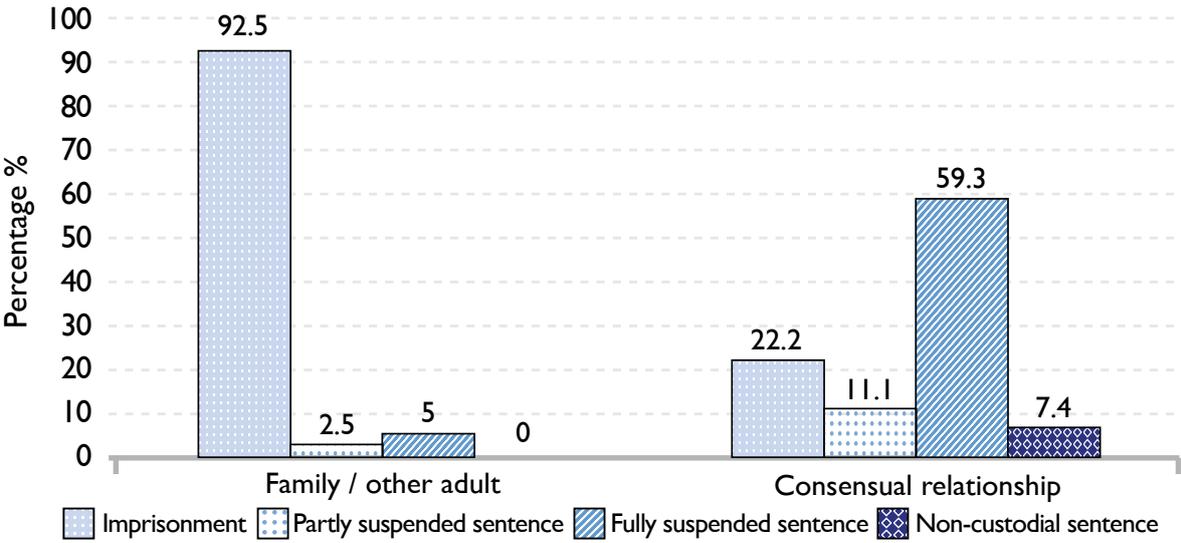
In the Council's examination of sentencing for maintaining a sexual relationship with a young person under the age of 17 in the *Sex Offence Sentencing Final Report*, it found that in the 2008-14 period, for all counts of maintaining a sexual relationship with a young person, 66.3% of offenders (n=63) were sentenced to immediate imprisonment with 10.5% of offenders (n=10) receiving a partly suspended sentence and 21.1% of offenders (n=20) receiving a fully suspended sentence. It found that in this period, the maximum sentence imposed for all counts of maintaining a sexual relationship was 144 months (12 years) with the shortest period of imprisonment being four months and the median being 36 months (three years).³⁴⁹ In relation to offenders sentenced for a single count of maintaining a sexual relationship, the longest sentence was 96 months (eight years), the shortest four months and the median sentence 32 months (2.66 years).³⁵⁰

In its analysis contained in the *Sex Offence Sentencing Final Report*, the Council observed that not all offences are the same and it identified three broad categories of cases as relevant to the sentence imposed:

- (1) cases where the offender was in a family relationship;
- (2) cases where the offender was an adult acquaintance who had connected with the child in another capacity as a trusted adult;
- (3) cases where the court characterised the offender and the young person as being in a 'consensual' relationship.³⁵¹

The Council observed that imprisonment was the most commonly used sanction for the offence of maintaining for all categories other than those cases that had the hallmarks of a 'consensual relationship'. For the purposes of this paper, the Council has classified the cases into 'consensual relationship cases' and other cases involving family and other adults on the basis that cases that do not come within the consensual category may well fall within the aggravated offence of maintaining a sexual relationship. As shown by Figure 5-4, a majority of offenders (92.5%) convicted of a single count of maintaining a sexual relationship with a young person outside of the context of a 'consensual' relationship were sentenced to immediate imprisonment. In these circumstances, the shortest sentence was four months, the longest sentence was eight years and the median sentence was three years.

Figure 5-4: Sentence type, maintaining a sexual relationship with a young person, categories, single count, 2008-14



349 TSAC, above n 1, 28.

350 Ibid.

351 Ibid 30. The Council noted that the notion of consent is problematic in the context of young person, given that (other than rape) absence of consent is not an element of sexual offences involving people under 17 on the basis that they are in need of protection.

Table 5-10: Length of imprisonment (in months) for categories of maintaining a sexual relationship with a young person (single count): Supreme Court, 2008-14

Circumstances	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Family and adult acquaintance	36 (3 years)	96 (8 years)	4	92.5	40
'Consensual' relationship	18 (1.5 years)	27 (2.25 years)	6	22.2	27

A distinction can also be made between cases where the unlawful sexual act involves penetration of the mouth, anus or vagina by a penis or penetration of the anus or vagina by another body part or an inanimate object and those cases where the act does not involve penetration. As shown in Tables 5-11 and 5-12, there are considerable differences between the shortest and longest sentence and the median sentence when the offender's conduct involves penetration in contrast to non-penetrative sexual assaults. This reflects the views of the court that penetrative sexual assault, particularly, penetration of the mouth, anus or vagina by the penis, is generally more serious than non-penetrative sexual assault.³⁵² In relation to single counts, as shown in Figure 5-5, there is also much greater variability in the sentences imposed for maintaining a sexual relationship that included penetration than those cases where the unlawful sexual act did not involve penetration.

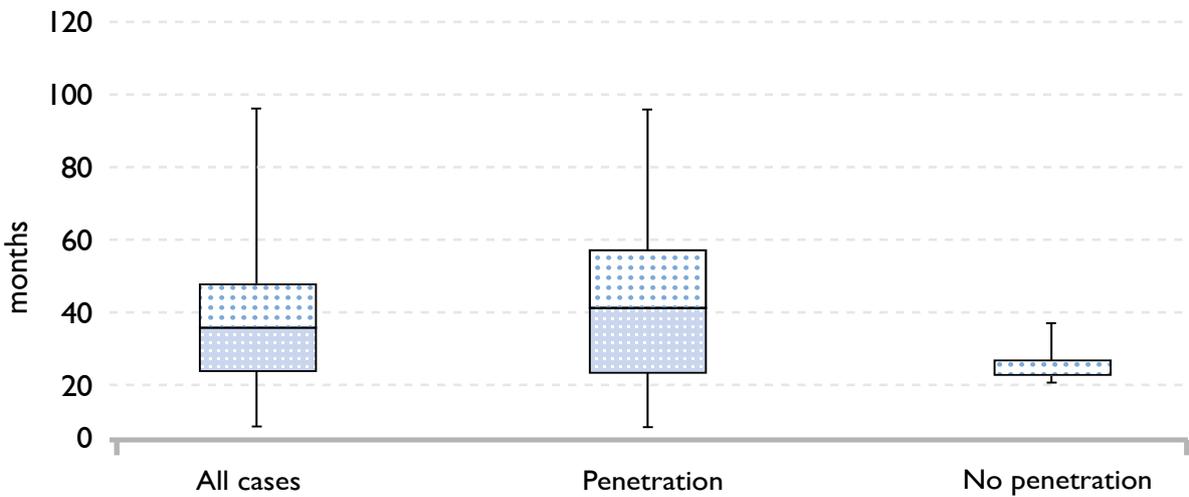
Table 5-11: Length of imprisonment (in months) for maintaining a sexual relationship with a young person excluding 'consensual' relationship by type of conduct (all counts): Supreme Court, 2008-14

Conduct	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Penetration	45 (3.75 years)	144 (12 years)	4	88.9	54
No penetration	27 (2.25 years)	48 (4 years)	21 (1.75 years)	100	8

Table 5-12: Length of imprisonment (in months) for maintaining a sexual relationship with a young person excluding 'consensual' relationship by type of conduct (single count): Supreme Court, 2008-14

Conduct	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Penetration	42 (3.5 years)	96 (8 years)	4	91.2	34
No penetration	24 (2 years)	36 (3 years)	21 (1.75 years)	100	6

Figure 5-5: Length of imprisonment (in months) for maintaining a sexual relationship with a young person excluding 'consensual' relationship by type of conduct (single count): Supreme Court, 2008-14



352 Director of Public Prosecutions v STU [2012] TASCRA 7 [49] (Evans J), [68] (Wood J).

In relation to the offence of maintaining a sexual relationship with a young person under the age of 17, the Council's analysis of recent decisions has found that there are indications that sentencing levels may be increasing. The Council identified 13 cases decided in 2015 where an offender was sentenced for maintaining a sexual relationship and it would appear that sentencing in this period has become more severe. In 2015, for all counts of maintaining a sexual relationship, 69.2% of offenders (n=9) were sentenced to immediate imprisonment with 7.7% of offenders receiving a partly suspended sentence (n=1) and 23.1% of offenders receiving a fully suspended sentence (n=3). This was in contrast to 66.3% of offenders in the earlier period of 2008-14 receiving a sentence of imprisonment. There was a marked increase from the earlier period in the maximum sentence of imprisonment imposed (increased from 12 to 14.5 years), the minimum sentence (increased from four months to 12 months) and the median (increased from three years to six years). The sentences imposed reflected the circumstances of the cases considered by the court (four cases involved a parent or quasi-parent and six cases involved other adults who were in a position of trust or otherwise took advantage of vulnerable complainant). In addition, there were also indications that the increased penalties may have reflected a view that sentencing for sexual offences against children have been too lenient, based on the research conducted by the Council.³⁵³

In addition, in a recent judgment of the Supreme Court, there are strongly worded statements about the seriousness of child sexual abuse and the Court's and community's abhorrence of such offending. There is a recognition of the profound and long term harm caused by the offending. For example in *RMW*,³⁵⁴ a case involving the sexual abuse of two children aged eight and six by their grandfather, Wood J imposed a sentence of seven years and stated that:

the sentence must reflect the young age of the children and their vulnerability, the grave harm caused to them and their family, and the blatant betrayal of trust involved. The sentence must, on behalf of the community, denounce these crimes. It must be a sentence which will be effective in deterring others from committing such crimes, in order to protect other children. A lengthy term of imprisonment is necessary.

In *JWA*,³⁵⁵ Tennent J imposed a sentence of six years on an offender who sexually abused a seven-year-old boy who was the son of her nephew's partner. Her Honour stated that:

Cases such as this are coming before the Court on a regular basis. Many children abused are abused by family members or friends who have access to children as a result of their family or friends [sic] connection and who take advantage of it. The effects on children abused can last for the rest of their lives. There must be a sentence which will act as a deterrent to those who might be minded to take advantage of such situations.

In *MCW*,³⁵⁶ a case involving sexual abuse by a father of his son, daughter and three other girls for whom he was in a parental role, Pearce J sentenced to the offender to 14 years' imprisonment and stated that:

The crimes I have described are appalling. All right thinking members of society would regard his conduct with abhorrence. He has committed a grave breach of his parental duty to protect his own children and, as members of the same household, the other children. He has breached the trust the children placed in him. The children have been robbed of the secure, safe and loving childhood they were entitled to expect. Instead, they were compelled, by threat of force and by normalisation of behaviour, to participate in repeated depraved and degrading sexual acts. The acts themselves were, on occasions, prolonged and the course of abuse extended in one case for more than six years and three cases for more than three years. The rapes are of particular seriousness and anal rape is an act of great indignity and degradation, especially for victims who are so young. It was submitted on his behalf that I should take into account that no violence over and above the force necessary to commit the crimes was used. In this case that carries little weight. Rape is of itself a crime of sexual violence. Moreover, the defendant used his position, his physical superiority, threats of violence towards the victim and others as well as the administration of a potentially addictive and harmful illicit drug to achieve his perverted sexual gratification. The degradation and humiliation to which the children were subject is compounded by the making and preservation of visual recordings of some of the sexual activity and because the sexual acts to which the victims were subjected involved other adults and children.

353 In *Tasmania v KWEF*, 14 December 2015 (Sentence), Tennent J made explicit reference to research conducted by TSAC: In *CJP v Tasmania* [2015] TASSCCA 9, 'Blow CJ referred briefly to a research paper published by the Sentencing Advisory Council of Tasmania in April 2013 in which it was said that sentences for sexual offences in Tasmanian courts were lower than in other Australian jurisdictions. The Council's final report entitled "Sex Offence Sentencing" was delivered in August 2015 and contained wide ranging recommendations. However it also suggested that across the board informed public opinion seemed to suggest sentences in sexual offending matters was too low'. In *Tasmania v Jose*, Pearce J, 7 December 2015 (Sentence), as part of the sentencing submissions, Crown Counsel submitted that the court should take into account research that showed that informed public opinion considered that sentencing for sexual offences against children was too lenient. The offender had entered a plea of guilty to two counts of maintaining a sexual relationship with a young person and received a sentence of five years' imprisonment.

354 Wood J, 2 March 2016 (Sentence).

355 Tennent J, 26 February 2016 (Sentence).

356 Pearce J, 13 March 2015 (Sentence).

In *MD*,³⁵⁷ another case involving sexual abuse by a father committed on his daughter (from the ages of 4 to 12 or 14), Pearce J imposed a sentence of ten years' imprisonment. His Honour stated that,

The crimes I have thus far described are appalling. He has committed a grave breach of his parental duty to protect his child and the trust she placed in him. She has been robbed of the secure, safe and loving childhood she was entitled to expect. Instead, she was subjected to repeated depraved and degrading sexual acts during a period so important to her emotional, psychological and intellectual development. ...

The gravity of the defendant's crimes demands a severe sentence of imprisonment. The impact on his victim is profound. She is now a young adult. She experiences anxiety and hyper-vigilance, nightmares and flashbacks. She has low self-worth and problems with self-harm and suicidal thoughts. Her education suffered. She is distrustful of authority. She is now estranged from her mother and family and finds it difficult to socialise. All of those consequences are of the type that may be expected to result from crimes of this nature. His predatory criminal conduct has destroyed the life she was entitled to look forward to. Serious sexual crimes warrant long sentences, for reasons of general and specific deterrence, punishment, denunciation and condemnation.

Council's previous research

In the Council's previous consideration of sentencing for maintaining a sexual relationship with a young person, the Council's view was that there was scope for an incremental increase in sentencing for cases where the offence was a breach of trust or where an adult had manipulated and coerced a child, particularly where the child was young. In contrast, the Council's view was that sentencing levels were appropriate in cases where there was a 'consensual relationship' and that immediate sentences of imprisonment were not usually appropriate in this context and if imprisonment was imposed, then long sentences ought not be imposed.³⁵⁸

Indications from Court of Criminal Appeal

Issues arise in relation to determining the approach to sentencing for an offence such as maintaining a sexual relationship with a young person where the offence consists of a course of conduct that falls under one charge. This has been addressed by the Court of Criminal Appeal where it has been held that the general approach is, where the separate offences can be identified, that the offender should receive the same penalty that would have been imposed if the individual sexual acts constituting the crime of maintaining a sexual relationship had been charged as separate crimes.³⁵⁹ So, for example, if the three unlawful sexual acts comprised rape, then the offender should receive the same penalty as if he had been charged with three counts of rape. However, it is not always possible or realistic to identify every unlawful act, as the Court noted in *DPP v M*:

it is unrealistic to endeavour to compare the sentence imposed on a charge of maintaining a sexual relationship with the sentence that would have been imposed had the prosecution been able to identify every one of the offender's unlawful sexual acts and obtain separate convictions for the same.³⁶⁰

Even if not identified as a specific 'unlawful sexual act', a court can take into account the commission of other sexual acts as surrounding circumstances, indicating that the crimes were committed as part of a course of conduct.³⁶¹ However, the exercise of the court's sentencing discretion is moderated by the principles of proportionality and totality.³⁶²

The diversity of circumstances that may give rise to the offence of maintaining a sexual relationship with a young person has meant that the Court of Criminal Appeal has rejected any notion that there is a tariff or a permissible range of the offence.³⁶³ As stated by the Court of Criminal Appeal in *Richman v Tasmania*, '[t]here are almost no limits on the potential scope of a case of maintaining a sexual relationship with a young person under 17'.³⁶⁴ The court has recognised that the circumstances of such cases:

357 Pearce J, 21 May 2015 (Sentence).

358 TSAC, above n 1, 78-79.

359 *DPP v B* (2009) 19 TAS R 14, [23]-[24] (Crawford CJ); *DPP v T* [2012] TASSCA 15, [19] (Crawford CJ, Evans and Tennent JJ concurring); *TAP v Tasmania* [2014] TASSCA 5, [53] (Porter J).

360 *DPP v M* [2005] TASSC 14, [38].

361 *DPP v B* (2009) 19 TAS R 14, [23]-[24] (Crawford CJ).

362 *TAP v Tasmania* [2014] TASSCA 5, [54] (Porter J).

363 *Ibid* [50].

364 *Richman v Tasmania* [2011] TASSCA 18, [30] (Evans J, Blow and Porter JJ concurring).

can vary markedly in relation to a number of factors including: the nature of the unlawful sexual acts involved; the number of those acts; the length of the period of abuse; the presence of a trust relationship; the use of force; the ages of the perpetrator and the victim; the pleas; and the perpetrator's prior conviction.³⁶⁵

This means that sentencing statistics that do not discriminate between the categories of conduct are not considered helpful in the sentencing process.³⁶⁶ The difficulties of determining the appropriate sentence for this offence can be seen in the number of appeals against sentence considered by the Court of Criminal Appeal.³⁶⁷

Differences between cases may arise in relation to the sexual offending itself. The offending may be three isolated incidents or three or more incidents that come within a course of sexual abuse over a number of years. Further, the broad range of conduct that comes within the scope of the offence includes rape, aggravated sexual assault, sexual intercourse with a young person and/or indecent assault. This includes a diverse range of conduct ranging from anal, vaginal or oral sexual intercourse rape to touching of the breast or genitalia through clothing; and the Court of Criminal Appeal has recognised that the nature of the unlawful sexual activity is reflected in the assessment of the gravity of the offender's conduct.³⁶⁸ Oral, vaginal and anal sexual intercourse are among the worst forms of conduct.³⁶⁹

In addition, as previously indicated, the relationship between the offender and the complainant is also relevant (for example, if there was a trust relationship and their relative ages) to the gravity of the offence. The Court of Criminal Appeal has acknowledged the difficulty of reconciling competing purposes of sentencing law in cases where there is a consensual relationship between the offender and the complainant. In *PKD v Tasmania*,³⁷⁰ the offender and the complainant were still in an ongoing relationship at the time that the legal proceedings took place and the complainant refused to make any statement to the police. In sentencing, the court observed the paradox that the primary aims of the case were the protection of the complainant and the subjective deterrence of the offender, but that a period of imprisonment of the offender might cause more problems for the complainant. In contrast, the Court of Criminal Appeal has recognised the gravity of conduct in cases where the offender was in a position of trust and/or the complainant was young.³⁷¹

It is noted that comments from the Court of Criminal Appeal in relation to sentencing for sex offences more generally would suggest that the court considers that there is scope for increased sentencing for serious sexual offences,³⁷² and there are indications that judges have responded by increasing sentences for maintaining a sexual relationship with a young person.

Public opinion

As indicated above, public opinion research has found that child sexual offending by adults is viewed as a particularly abhorrent offence, particularly where young children are involved, or the offender has engaged in predatory conduct to pressure or manipulate the young person to consent or has been in a position of trust. There are also indications that public opinion considers that sentencing for child sexual offences other than in the context of a 'consensual relationship' is too lenient.

Sentencing levels in other jurisdictions

The Council has previously observed that for the offence of maintaining a sexual relationship with a young person, suspended sentences, particularly fully suspended sentences, are used to a much greater degree in Tasmania than they are in Victoria, New South Wales and Queensland.³⁷³ In New South Wales, 100% of offenders received a sentence of imprisonment, 93% in Victoria, 72% in Queensland and 64.8% in Tasmania. In Tasmania, 26.9% of offenders received a fully suspended sentence compared to 2% in Victoria and 2% in Queensland.³⁷⁴

365 *DPP v M* [2005] TASSC 14, [33] (Evans J).

366 *STU* [62] (Wood J) cited in *TAP v Tasmania* [2014] TASCRA 5 [49] (Porter J).

367 In the 2001-14 period, nearly 10% of sentences imposed for maintaining a sexual relationship were appealed (19) with nearly half of those appeals being successful (9).

368 *Director of Public Prosecutions v STU* [2012] TASCRA 7, [49], [52] (Evans J).

369 *Director of Public Prosecutions v M* [2005] TASSC 14, [35] (Evans J); *ibid* [49] (Evans J).

370 [2008] TASSC 29.

371 See for example, *E v Tasmania* [2008] TASSC 72; *I v Tasmania* [2006] TASSC 59; *TAP v Tasmania* [2014] TASCRA 5; *V v Tasmania* [2006] TASSC 96; *Attorney-General for the State of Tasmania v C* [2003] TASSC 8; *Attorney-General v B* [2002] TASSC 63.

372 See Part B [5.2.2].

373 TSAC, above n 1, 48.

374 *Ibid*.

Table 5-13: Persistent sexual abuse/maintaining a sexual relationship with a child, principal offence, Queensland,³⁷⁵ New South Wales³⁷⁶ and Victoria³⁷⁷

Jurisdiction	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Queensland	-	216 (18 years)	6	71%	216
New South Wales	120 (10 years)	192 (16 years)	58 (4.8 years)	100	16
Victoria	72 (6 years)	144 (12 years)	18 (1.5 years)	89	54

In Queensland, 304 offenders were convicted of maintaining a sexual relationship with person under 16 in the period September 2007 to August 2014, and 80% of the prison sentences ranged from four to 12 years, with the median sentence being 84 months (seven years).³⁷⁸ In New South Wales, for persistent sexual abuse of a child, 80% of the sentences imposed were between five and 14 years.³⁷⁹

However, as has been noted, there appear to be differences in prosecution practices, which means that different types of cases are charged as maintaining a sexual relationship, and this may explain some of the sentence disparity.³⁸⁰ This offence appears to be much more commonly used in Tasmania than in Victoria and New South Wales and this makes comparisons problematic.

In Victoria, VSAC has recently given consideration to the provision of sentencing guidance for courts and has made recommendations in relation to the introduction of a standard sentence scheme, with a standard sentence of 10 years being considered appropriate for persistent sexual abuse of a child.³⁸¹

It is noted that in New South Wales, persistent sexual abuse of a child is not included in the standard non-parole scheme. There is no equivalent offence in England and Wales.

The Council's preliminary advice

After considering these sources of information, it is the Council's view that a sentence of actual imprisonment is appropriate in cases where the offender is charged with a single count of maintaining a sexual relationship with a young person in circumstances of aggravation (as defined) unless an exception applies. Tasmania Police agreed with the Council's view. The Council has also previously expressed the view that sentencing for this offence should be increased, outside of the consensual relationship type of case, on the basis that current sentencing practice is unduly lenient and that this also reflects community views. There are also indications from the Supreme Court that sentencing levels may be increasing (based on an assessment of cases determined in 2015). Accordingly, it is the Council's view that the mandatory minimum penalty should be increased from its current level. However, given that the offence can comprise a range of sexual behaviours, it is a complex matter to determine the appropriate minimum sentence that should apply. There are a number of options:

- **Option 1 – the mandatory minimum penalty for this offence reflects the mandatory minimum for the offence that relates to this type of conduct (that is rape, aggravated sexual assault etc).** This reflects current sentencing practice, where the offender is sentenced on the basis that he or she committed the individual offences, as constrained by totality and proportionality. However, a difficulty is that many of the unlawful sexual acts that may fulfil the requirements of the offence are not contained in the Council's suggestions about the offences that should be included in the mandatory minimum scheme.
- **Option 2 – the mandatory minimum penalty imposed should distinguish between penetrative or non-penetrative conduct.** This would reflect the views of the court that penetrative offences are generally more serious than non-penetrative offences. This was the preferred approach of the Director of Public Prosecutions

375 In Queensland, the data period is July 2008 to June 2015. It is noted that sentence length for Queensland is rounded upwards so a sentence of one month would appear as six months. Data obtained from Queensland Sentencing Information Service.

376 In New South Wales, the data period is 1 October 2008 to 30 September 2015. Data obtained from the Judicial Commission of New South Wales.

377 In Victoria, the data period is 2010-11 to 2014-15. Data obtained from VSAC, above n 7, 318.

378 Freiberg, Donnelly and Gelb, above n 31, 117-18.

379 Ibid, 117.

380 TSAC, above n 1, 78.

381 VSAC, above n 7, 193.

who considered that if maintaining a sexual relationship with a young person was to be included in the scheme (which was opposed), then it should only apply in relation to penetration offences.

- **Option 3 – there should be a single mandatory minimum term that applies to all cases included in the mandatory scheme.**
- **Option 4 – there should be a single mandatory minimum term that applies to all cases included in the mandatory scheme except where the conduct is rape.** This is a hybrid approach that recognises that non-consensual sexual activity is objectively more serious than consensual sexual activity. It also broadly accords with the current approach of the court to impose a heavier sentence in cases where rape is one of the unlawful sexual acts.

It is the Council's view that Option 4 is the preferred model, as it allows the mandatory minimum sentence to accommodate a range of conduct and has some consistency with current sentencing practice for the offence. The Council does not consider that penetration should be specified as a defining feature of a case (Option 2). Although courts have recognised that penetration is more serious than non-penetrative sexual assault, the focus only on penetration for the purposes of a mandatory sentencing scheme does not necessarily capture the objective seriousness of the conduct. In the Council's examination of the 62 cases identified between 2008-14 where an offender was convicted of maintaining a sexual relationship with a young person (outside of the context of a 'consensual relationship'), there were eight cases that did not involve an act of penetration. However, these cases typically involved repeated sexual abuse of very young children or the sexual abuse of male complainants (by male offenders) over an extended period of time, often by family members or other trusted adults. In other cases of ongoing abuse that involved an act of penetration, several cases revealed a pattern of escalation in abuse — from non-penetrative sexual acts to an act of multiple acts of penetration. On this basis, it can be argued that it is the course of conduct that makes the offence suitable for inclusion in the mandatory minimum scheme rather than the type of unlawful act.

Further, the Council's view is that the appropriate level is three years for maintaining a sexual relationship with a young person in aggravating circumstances (as defined following consultation) and four years if one or more of the unlawful sexual acts is rape. This represents an increase in sentencing levels relative to the levels imposed in the cases identified in the period 2008-14 that did not involve consensual relationships, where the median sentence was three years.

It is noted that Tasmania Police indicated that it did not have a firm view on the appropriate mandatory minimum sentence length for maintaining a sexual relationship with a young person suggested by the Council but indicated that the reasoning presented appears to be sound.

Preliminary advice

Mandatory minimum sentencing for maintaining a sexual relationship with a young person

32. That a sentence of actual imprisonment is appropriate in cases where the offender is charged with a single count of maintaining a sexual relationship with a young person in circumstances of aggravation (as defined) unless an exception applies.
33. That the appropriate mandatory minimum sentencing level is three years for maintaining a sexual relationship with a young person in aggravating circumstances (as defined) and four years if one or more of the unlawful sexual acts is rape unless an exception applies.

5.2.4 OFFENCE OF SEXUAL INTERCOURSE WITH A YOUNG PERSON IF COMMITTED WHERE THERE ARE AGGRAVATING CIRCUMSTANCES

The crime of sexual intercourse with a young person involves sexual intercourse (penile penetration of the vagina, genitalia, anus or mouth) with a person under the age of 17.³⁸² There is no requirement for the prosecution to establish absence of consent. However, there are circumstances where an offender is close in age to the victim and can then rely on similar age consent 'defences'.³⁸³ The maximum penalty for sexual intercourse with a young person is 21 years' imprisonment.

As with the offence of maintaining a sexual relationship, in the Council's review of sentencing for sex offences, the Council recommended the creation of an offence of aggravated sexual intercourse with a young person. As discussed at Part B [2.2.2], the following features were identified as aggravating features:

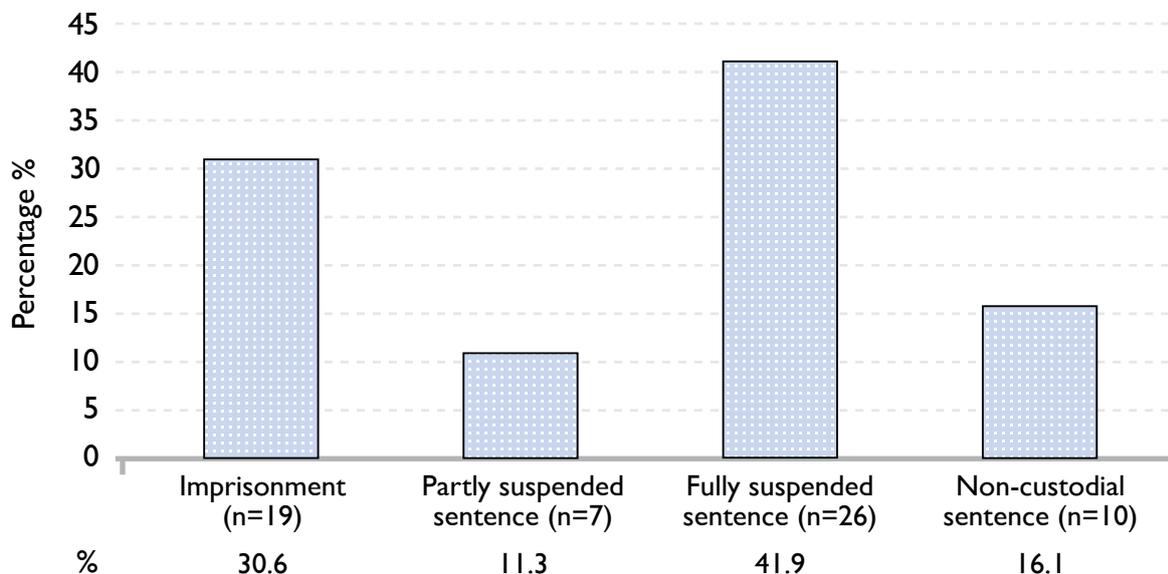
- the young person was aged under 12 at the time of the offending;
- the young person was under the care, supervision or authority of the offender;
- the offender took advantage of the victim being under the influence of alcohol or a drug in order to commit the offence or the circumstances of the offence involved the offender supplying the victim with alcohol and/or drugs; or
- the offender filmed or recorded the offence.

This recommendation was also made to reflect the diversity of cases where convictions were obtained for sexual intercourse with a young person and to create a more serious version of the basic offence where aggravating features were present to reflect judicial and community condemnation of these cases and to provide a sentencing signal to the courts.

As indicated, the Council now considers that an aggravated offence should not be created and instead the aggravating features should be sentencing factors for the judge to take into account in making a determination about whether or not the case falls within the mandatory minimum sentencing scheme.

Current sentencing practice

Figure 5-6: Sexual intercourse with a young person and sentence type, Supreme Court, 2008-14 (all counts, n=62)



382 *Criminal Code (Tas)* s 124.

383 The victim is aged 12 years or older and the offender is not more than 3 years older, or the victim is aged 15 or older and the offender is not more than 5 years older: *Criminal Code (Tas)* s 124(3).

Figure 5-7: Sexual intercourse with a young person and sentence type, Supreme Court, 2008-14 (single count, n=20)

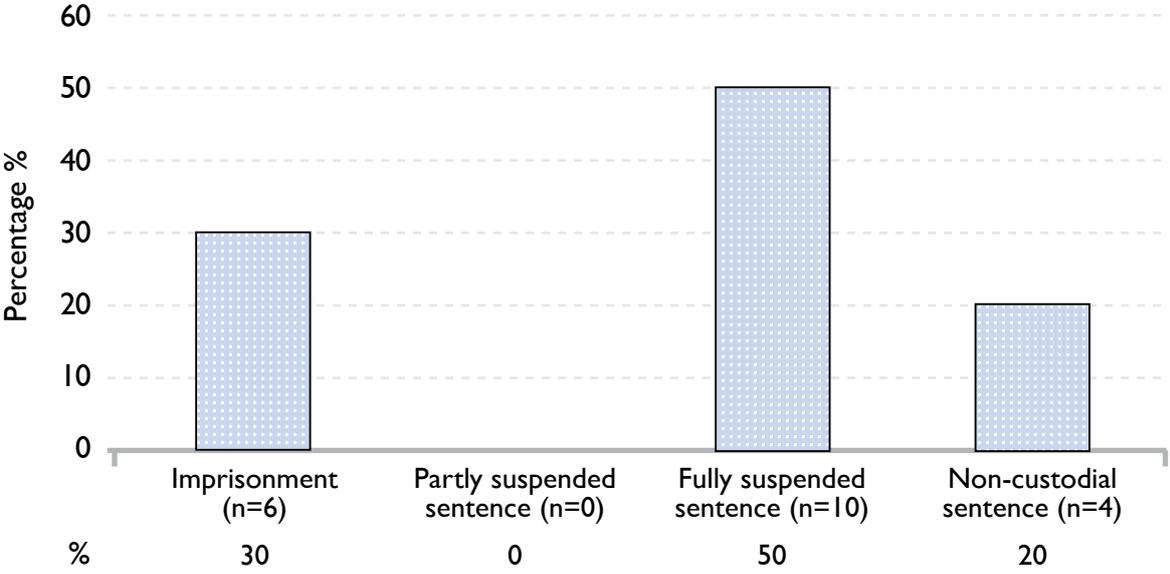


Table 5-14: Sexual intercourse with a young person, Supreme Court sentences 2008-14

Counts	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
All	7	24 (2 years)	2	30.6	62
Single	4.5	8	2	30	20

In the Council's examination of sentencing for sexual intercourse with a young person under the age of 17 in the *Sex Offence Sentencing Final Report*, it found that in the 2008-14 period, for all counts of sexual intercourse with a young person, only 30.6% of offenders (n=19) were sentenced to immediate imprisonment with 11.3% of offenders (n=7) receiving a partly suspended sentence, 41.9% of offenders (n=26) receiving a fully suspended sentence and 16.1% (n=10) receiving a non-custodial sentence. It found that in this period, the longest period of imprisonment imposed for all counts of sexual intercourse with a young person was 24 months (two years), the shortest term was two months and the median was seven months.³⁸⁴ In relation to offenders sentenced for a single count of sexual intercourse with a young person, the longest sentence was eight months, the shortest two months and the median sentence was four and half months.³⁸⁵

As with the crime of maintaining a sexual relationship with a young person, the Council noted in its earlier analysis that a broad range of circumstances can give rise to the crime of sexual intercourse with a young person.³⁸⁶ For the purposes of this paper, the Council has classified the cases into 'consensual relationship cases' and other cases involving family and other adults on the basis that cases that do not come within the consensual category may well fall within the more serious cases of sexual intercourse with a young person.

In relation to sentencing for single counts of sexual intercourse with a young person, for cases that were not classified as relationship cases, 44.4% of offenders (n=4) received a sentence of immediate imprisonment with the maximum sentence being eight months, the shortest sentence two months and the median sentence five months. As shown in Table 5-15, these cases typically involved older complainants who had agreed to have sexual intercourse with offenders who were not close in age to the complainant.

384 TSAC, above n 1, 34.
 385 Ibid.
 386 Ibid 35.

Table 5-15: Circumstances of single count of sexual intercourse with a young person where not involve ‘consensual relationship’ case, Supreme Court 2008-14

	Circumstances	Sentence
Case 1	C was 13 year old stepdaughter D was 43 Acquitted of rape and had offered to plea guilty to sexual intercourse with a young person C, D and C’s mother had been drinking Breach of position of trust Vaginal intercourse	8 months’ imprisonment.
Case 2	C was 15 and 2 months D was 42 Met C at party and continued contact over social media Arranged to meet C and provided C with alcohol Recent prior convictions for similar offence including rape Plea of guilty Vaginal intercourse	6 months’ imprisonment.
Case 3	C was 14 D was 36 Acquitted of rape Brief act of vaginal intercourse with no ejaculation	4 months’ imprisonment.
Case 4	C was 13 D was 38 No plea of guilty Vaginal intercourse	2 months’ imprisonment.
Case 5	C was 16 D was 30 Plea of guilty D friend of C’s father Relationship developed via mobile phone messages, social media and telephone calls No pressure exerted Once-off Vaginal intercourse	4 months’ fully suspended sentence with 40 hours of community service.
Case 6	C was 14 D was 20 D has psychotic illness due to cannabis and alcohol abuse Plea of guilty Single incident Vaginal intercourse	3 months’ fully suspended sentence.
Case 7	C was 15 D was 25 Vaginal intercourse C known D all her life Plea of guilty	3 months’ fully suspended sentence.

	Circumstances	Sentence
Case 8	C was 12 D was 19 Party at D's home while C was drunk Vaginal intercourse Plea of guilty	1 month fully suspended sentence with \$1500 fine.
Case 9	C was boy aged 13 D was man aged 19 D had intellectual disability Opportunistic crime No force or threats used Oral sexual intercourse on C Plea of guilty	36 months probation.

Figure 5-8: Sentence type, sexual intercourse with a young person, categories, single count 2008-14

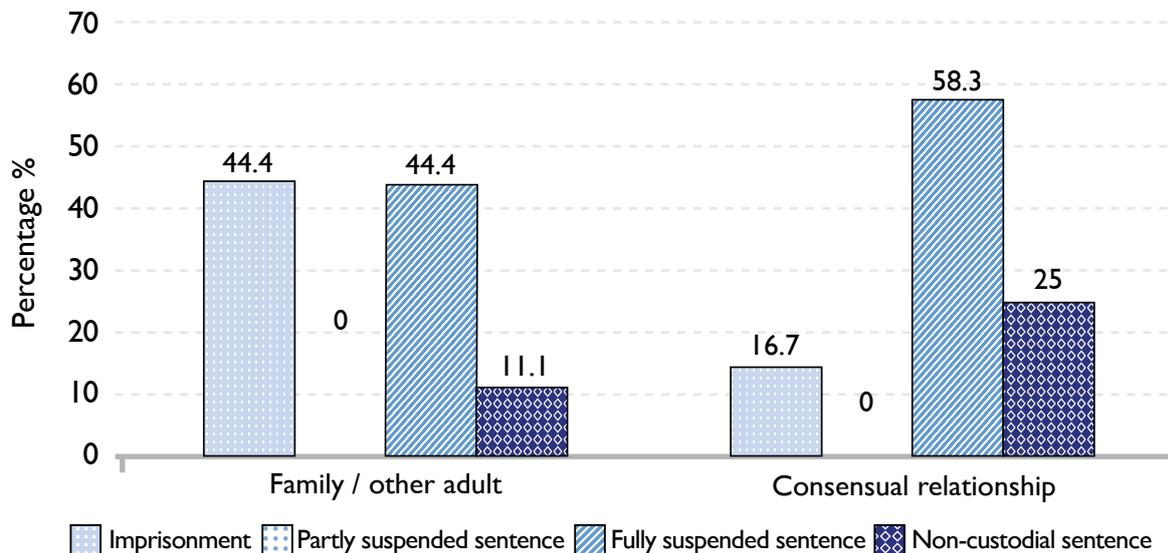


Table 5-16: Sentence type, length of imprisonment (in months) for categories of sexual intercourse with a young person (single count): Supreme Court, 2008-14

Circumstances	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Family and adult acquaintance	5	8	2	44.4	9
'Consensual' relationship	*387	5	3	16.7	12

387 There were only two cases where a custodial sentence was imposed.

Council's previous research

In the Council's previous research, the Council observed that the majority of cases where there was a conviction of sexual intercourse with a young person arose in the context of a consensual relationship (56.7% of cases) with 4.8% arising in a family context and 38.7% committed by another adult.³⁸⁸ The Council acknowledged that the notion of consent as factor relevant to sentencing for child sex offences was problematic in regards to the sexual activity of young people under 17. The Council noted that absence of consent is not an element of the offence of sexual intercourse with a young person and that this means that a sentencing judge cannot sentence an offender on the basis that the complainant did not consent. However, evidence of reluctance makes the case more serious.³⁸⁹ Neither can a young person consent (as the law presumes that meaningful consent cannot be given).³⁹⁰ However, sentencing judges have recognised that there is a distinction between cases where the complainant has willingly agreed to intercourse in a genuine and equal relationship and cases where the offender has engaged in predatory conduct to pressure or manipulate the young person to consent. For example in *C, Evans J* stated that

What occurred in this case was criminal because of the youth of the complainant and the disparity between the ages of the complainant and the defendant. Nevertheless, it was an incident of a boyfriend/girlfriend relationship, and in my view, the defendant's conduct falls far short of the sort of predatory behaviour that commonly underpins crimes of this nature.³⁹¹

As noted, a majority of convictions for sexual intercourse with a young person involve 'consensual relationships', where the offender has not coerced or manipulated the young person. This is reflected in the use of non-custodial sentences and fully suspended sentences in many of these cases as shown above.

The Council also noted that complainants were generally older in cases where an offender was convicted of sexual intercourse with a young person in contrast to maintaining a sexual relationship with a young person.³⁹² The median age of the complainant in cases where the offender was convicted of sexual intercourse with a young person was 14.5 (compared to 11.5 for maintaining a sexual relationship with a young person).

In its assessment of the appropriateness of sentencing for the offence of sexual intercourse with a young person, the Council recognised that suspended sentences and non-custodial sentences are an appropriate response to sexual intercourse in the context of a mutual relationship involving older complainants and closer in age offenders. It indicated that this may also be an appropriate sentence where factors such as the youth or intellectual capacity of the offender are raised as mitigating factors. However, the Council did have concerns about the use of suspended sentences (particularly fully suspended sentences) outside of these contexts, particularly where the offender is in a position of trust or responsibility relative to the complainant or where the offender manipulated or coerced the complainant.

The Council also noted that sentence lengths for sexual intercourse with a young person were generally short. The Council had concerns in relation to the sentence lengths imposed for this offence relative to other offences in Tasmania, particularly where it is committed in circumstances of predatory conduct by the offender or where the offender was in a position of trust. The longest sentence imposed for all counts in the 2008-14 period was 24 months and the longest sentence for a single count of sexual intercourse with a young person was eight months. It is noted that the median sentence for all counts had decreased from nine months in the 2001-07 period to five months in 2008-14. The median sentence imposed where there was not a mutual relationship between the offender and the complainant was seven months. Again, the Council's view was that this suggests considerable leniency in sentencing offenders. Accordingly, the Council's view was that there should be an incremental increase in sentencing for sexual intercourse with a young person in cases where an offender is in a position of care, supervision or authority in relation to the complainant or has otherwise engaged in predatory behaviour to manipulate and coerce the complainant.

388 TSAC, above n 1, 35.

389 *Latham*, Porter J, 17 July 2008 (Sentence). See also Warner, above n 125, [11.417].

390 See Freiberg, above n 110, [4.185].

391 *Evans J*, 20 June 2008 (Sentence).

392 TSAC, above n 1, 35.

Indications from Court of Criminal Appeal

There have been no decisions of the Court of Criminal Appeal that have specifically considered sentencing for the offence of sexual intercourse with a young person (outside of appeals that also considered the offence of maintaining a sexual relationship with a young person). However, comments from the Court of Criminal Appeal in relation to sentencing for sex offences involving children more generally would suggest that the Court considers there is scope for increased sentencing.³⁹³

Public opinion

As indicated above, public opinion research has found that child sexual offending by adults is viewed as a particularly abhorrent offence, particularly where young children are involved or the offender has engaged in predatory conduct to pressure or manipulate the young person to consent or been in a position of trust. There is also research evidence that suggests that public opinion considers that sentencing for child sexual offence where the child is under 12 is too lenient.³⁹⁴

Sentencing levels in other jurisdictions

The Council notes that there is no direct equivalent offence of sexual intercourse with a young person in Victoria and New South Wales.³⁹⁵

However, sentencing patterns in other jurisdictions for sexual offences involving young children are set out in this paper to provide information relevant to the determination of the minimum penalty for the aggravated offence of sexual intercourse with a young person.

Table 5-17: Sentences for sexual penetration of young children, Victoria³⁹⁶

Offence	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Incest with child or step-child	48 months (4 years)	96 (8 years)	9	99	370
Incest with de facto child or step-child (under 18)	42 months (3.5 years)	84 (7 years)	24 (2 years)	100	108
Sexual penetration of child under 12 (formerly under 10) ³⁹⁷	48 months (4 years)	84 (7 years)	6	83	202
Sexual penetration with a child 12 to 16 ³⁹⁸	30 (2.5 years)	60 (5 years)	1	55	858
Sexual penetration with a child under the care, supervision or authority of the offender	36 (3 years)	72 (6 years)	3	80	74

393 See Part B [5.2.2].

394 See Part B [5.2.1], [5.2.2], [5.2.3].

395 See discussion in TSAC, above n 1, 49.

396 Data obtained from Sentencing Advisory Council, Victoria for the period 2010-11 to 2014-15, see VSAC, above n 7, 189-192, Appendix 4.

397 In 2010, the age of the child increased from 10 to 12.

398 In 2010 the age of the child was reduced from 10 to 16 to 12 to 16.

Table 5-18: Sentences for sexual penetration of young children, New South Wales³⁹⁹

Offence	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Sexual intercourse with a child under 10	70.5 (5.87 years)	216 (18 years)	33 (2.75)	71.1	45
Aggravated sexual intercourse with a child under 10	108 (9 years)	240 (20 years)	24 (2 years)	96.1	51
Sexual intercourse with child between 10 and 14	30 (2.5 years)	120 (10 years)	3	67	95
Aggravated sexual intercourse with a child between 10 and 14	55.5 (4.62 years)	132 (11 years)	9	88	52
Sexual intercourse with child between 14 and 16	64 (5.3 years)	72 (6 years)	6	64	92
Aggravated sexual intercourse with child between 14 and 16	36 (3 years)	102 (8.5)	7	85	34

It is noted that the New South Wales Sentencing Council has recently released a paper that provides a detailed sentencing snapshot for these offences for the period 2012-13.⁴⁰⁰

Table 5-19: Sentences for sexual penetration of young children, Queensland⁴⁰¹

Offence	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Carnal knowledge with or of child under 16	60 (5 years)	6	4	292
Carnal knowledge with or of child under 12	-	-	0	1
Carnal knowledge with or of child under 16 as a guardian/under care	24 (2 years)	24 (2 years)	10	10

In Queensland, as observed by Brignell and Donnelly, the sentencing statistics show that the vast majority of child sexual assault offenders are charged with the general rape offence under the *Criminal Code* (Qld) s 349.⁴⁰² For the period 1 July 2007 to 30 June 2013, Brignell and Donnelly analysed rape cases and identified 120 cases where the complainant was under 10.⁴⁰³ In these cases, the imprisonment rate was 70% and the median head sentence was 72 months (six years).⁴⁰⁴ Information was not provided about the minimum and maximum sentence imposed.

399 Data for the period 1 October 2008 to 30 September 2015 obtained from Judicial Commission of New South Wales. Aggravated offences occur where the offender intentionally or recklessly inflicted actual bodily harm or threatens to inflict actual bodily harm, the offender is in the company of others, the victim had a serious physical disability, the victim had a cognitive impairment, the offender took advantage of the victim being under the influence of alcohol or drugs, the offender deprived the victim of liberty or the offender broke into a dwelling house with intention to commit indictable crime, see *Crimes Act 1900* (NSW) s 66C(5). It is noted that the data for sexual intercourse with a child under 10 is presented from 1 January 2009 (when amendments were made to the *Crimes Act 1900* (NSW) s 66A to split the offence into basic and aggravated offences) to 28 June 2015 (when the distinction between basic and aggravated offences was repealed). See also, Patrizia Poletti, Pierrette Mizzi and Hugh Donnelly, 'Sentencing for the Offence of Sexual Intercourse with a Child Under 10' (Sentencing Trends and Issues No 44, Judicial Commission of NSW, 2015); NSW Sentencing Council, above n 79.

400 See *Ibid.*

401 In Queensland, the data period is July 2008 to June 2015. It is noted that sentence length for Queensland is rounded upwards so a sentence of one month would appear as six months. Data obtained from Queensland Sentencing Information Service.

402 Brignell and Donnelly, above n 303, 17. In the period 1 July 2007 to 30 June 2013, there were 482 rape cases involving a child complainant.

403 *Ibid.* 16. This was the age used for the purposes of comparison between jurisdictions in their study. See also Part B [5.2.1].

404 *Ibid.* 21.

In VSAC's recent consideration of the provision of sentencing guidance for courts, it made recommendations in relation to the introduction of a standard sentence scheme and recommended that the following standard sentences should apply:⁴⁰⁵

Offence	Standard sentence
Incest with child or step-child	10 years
Incest with de facto child or step-child (under 18)	10 years
Sexual penetration of child under 12	10 years
Sexual penetration with a child 12 to 16	4 years
Sexual penetration with a child 12-16 under the care, supervision or authority of the offender	6 years

In New South Wales, the following standard non-parole periods apply:⁴⁰⁶

Offence	Standard sentence
Sexual intercourse with a child under 10	15 years
Sexual intercourse with child between 10 and 14	7 years
Aggravated sexual intercourse with a child between 10 and 14	9 years
Sexual intercourse with child between 14 and 16	Not included in scheme
Aggravated sexual intercourse with child between 14 and 16	5 years

It is noted that the balance of the sentence must not exceed one third of the non-parole period unless 'special circumstances' apply.⁴⁰⁷

The Sentencing Council for England and Wales has set out sentencing guidelines for the following offences:

Offence	Sentencing range	Starting point
Rape of a child under 13 (lowest category of harm and culpability) ⁴⁰⁸	6-11 years	8 years
Sexual activity with a child by penetration ⁴⁰⁹ (lowest degree of culpability)	High level community order – 2 years	1 year
Sexual activity by penetration ⁴¹⁰ with a child family member (lowest degree of culpability)	2 years and 6 months – 5 years	3 years and 6 months
Abuse of position of trust: sexual activity by penetration ⁴¹¹ with a child (lowest degree of culpability)	26 weeks – 18 months	1 year

405 VSAC, above n 7, 189-192.

406 *Crimes (Sentencing Procedure) Act 1999* (NSW) Div 1A Table.

407 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2).

408 The prosecution does not need to prove absence of consent for rape when the complainant is under 13, see *Sexual Offences Act 2003* (UK) s 5.

409 This includes penetration of vagina or anus (using body or object) or penile penetration of the mouth.

410 This includes penetration of vagina or anus (using body or object) or penile penetration of the mouth.

411 This includes penetration of vagina or anus (using body or object) or penile penetration of the mouth.

The Council's preliminary advice

After considering these sources of information, it is the Council's view that a sentence of actual imprisonment is appropriate in cases where the offender is charged with a single count of aggravated sexual intercourse with a young person unless an exception applies. Tasmania Police agreed with the Council's view. Further, to reflect the seriousness of the offence and the significant harm that can be caused to victims in cases, particularly where the complainant is young or the sexual intercourse occurs in circumstances where the complainant is particularly vulnerable as result of alcohol consumption or because of the position of the offender in relation to the child, it is the Council's view that the mandatory minimum sentence should be two years. It is noted that Tasmania Police indicated that it did not have a firm view on the appropriate mandatory minimum sentence length for sexual intercourse with a young person suggested by the Council but indicated that the reasoning presented appears to be sound.

Preliminary advice

Mandatory minimum sentence for sexual intercourse with a young person

34. That a sentence of actual imprisonment is appropriate in cases where the offender is charged with a single count of sexual intercourse with a young person in circumstances of aggravation unless an exception applies.
35. That the appropriate mandatory minimum sentencing level is two years for sexual intercourse with a young person in circumstances of aggravation unless an exception applies.

5.2.5 SUMMARY OF MANDATORY MINIMUM PENALTY LEVELS

In summary, the Council's view is that the following mandatory minimum levels are appropriate (unless an exception applies):

Offence	Mandatory minimum sentence
Rape where complainant under 17	4 years
Maintaining a sexual relationship with a young person in circumstances of aggravation	3 years unless rape is one of the unlawful sexual acts and then 4 years
Sexual intercourse with a young person in circumstances of aggravation	2 years
Aggravated sexual assault (with aggravating circumstances) where complainant under 17	18 months

The Council's views are that these mandatory minimum levels reflect the objective seriousness of the offence and provide a clear indication that this conduct is not acceptable to the community. In addition, the Council's view is that this structure also reflects the relative seriousness of the offences with rape being the most serious (given that there is no consent), followed by maintaining a sexual relationship with a young person (given that it consists of three unlawful sexual acts), then sexual intercourse with a young person in circumstances of aggravation (given that it involves penile penetration) followed by aggravated sexual assault.⁴¹² These sentences are proposed as the minimum sentences that are applicable and the court can impose longer sentences in appropriate cases.

⁴¹² However, as the Council has previously recognised, in some cases (such as where there is penetration by an object), aggravated sexual assault should attract a similar penalty to rape, see TSAC, above n 1.

Appendix A

OVERVIEW OF MANDATORY MINIMUM SENTENCE AND MANDATORY MINIMUM NON-PAROLE SCHEMES THAT EXIST IN AUSTRALIA

Jurisdiction	Legislation	Provision	Exceptions	Type of mandatory penalty
Commonwealth	<i>Migration Act 1958</i> (Cth)	Mandatory minimum sentence of imprisonment for the following offences: <ul style="list-style-type: none"> aggravated offence of people smuggling in circumstances relating to exploitation, cruel, inhuman or degrading treatment, or risk of death or serious harm – 8 years with non-parole period at least 5 years; aggravated offence of people smuggling in circumstances relating to the smuggling of a group of at least 5 people – 5 years with non-parole period at least 3 years; aggravated offence of false documents and false and misleading information in relation to 5 or more people – 5 years with non-parole period at least 3 years repeat offender – 8 years with non-parole period at least 5 years (s 236B). 		Mandatory minimum penalty and mandatory minimum non-parole period.
	<i>Criminal Code Act 1995</i> (Cth) (amendment contained in <i>Criminal Code (Firearms Trafficking) Bill 2015</i> (Cth) (proposed)	Mandatory minimum term of 5 years for: <ul style="list-style-type: none"> cross border disposal or acquisition of firearm; taking or sending a firearm across borders; trafficking prohibited firearms or firearms part into Australia; trafficking prohibited firearms or firearms parts out of Australia. 	Not apply if offender aged under 18 when the offence was committed.	Mandatory minimum penalty.
	<i>Crimes Act 1914</i> (Cth)	Mandatory minimum non-parole period of at least 3/4 of the sentence for treachery, terrorism offences or offences against the <i>Criminal Code 1995</i> (Cth), Div 80 (treason, urging violence and advocating terrorism) or 91 (espionage) (s 19AG).		Mandatory minimum non-parole period.

Jurisdiction	Legislation	Provision	Exceptions	Type of mandatory penalty
Queensland	<i>Penalties and Sentences Act 1992 (Qld)</i>	Repeat serious child sex offenders liable to mandatory life imprisonment (s 161E). ²⁰		Mandatory minimum penalty.
		Must order that offender serve a term of imprisonment for offence of sexual nature against a child under the age of 16 (s 9(4)).	Exceptional circumstances. In determining exceptional circumstances, the court may have regard to the closeness in age between the offender and the child (s 9(5)).	Mandatory penalty type.
		Must impose community service order for affray, grievous bodily harm, wounding, assault, assault occasioning bodily harm, assault a police officer or public officer committed in a public place while the offender was adversely affected by an intoxicating substance (s 108B). ⁴¹³	Does not apply, if the court is satisfied that, because of any physical, intellectual or psychiatric disability of the offender, the offender is not capable of complying with the community service order.	Mandatory penalty type but the court can impose another penalty as well.
		Must make a graffiti removal order for graffiti offences (s 110A).	Does not apply, if the court is satisfied that, because of any physical, intellectual or psychiatric disability of the offender, the offender is not capable of complying with a graffiti removal order.	Mandatory penalty type but the court can impose another penalty as well.
	<i>Corrective Services Act 2006 (Qld)</i>	An offender serving a term of imprisonment for a serious violent offence is eligible for parole after the offender has served 80% of the sentence or 15 years, whichever is the lesser (unless the court makes an order for a longer parole eligibility date) (s 182). An offender is convicted of a serious violent offence if the offence is a Schedule 1 offence and the offender is sentenced to 10 years or more imprisonment or if the offender is convicted of a Schedule 1 offence and the offender is sentenced to 5 years or more imprisonment and the court declares the offender is convicted of a serious violent offence (<i>Penalties and Sentences Act 1992 (Qld)</i> s 161B). Schedule 1 offences include sexual intercourse with a child under 16, incest, rape, maintaining a sexual relationship with a young person, sexual assaults.		Mandatory minimum non-parole period.

413 No life penalties have been imposed under this provision, Freiberg, Donnelly and Gelb, above n 31, 190. Note that the offender can apply for parole after 20 years, *Corrective Services Act 2006 (Qld)* s 181A.

Jurisdiction	Legislation	Provision	Exceptions	Type of mandatory penalty
	<i>Criminal Code</i> (Qld)	Mandatory minimum 6 month term for participants in a criminal organisation: who are knowingly present with 2 or more persons who are participants in criminal organisation (s 60A(1)); who enter or attempt to enter a prescribed place (s 60B(1)); who attempt to recruit (s 60(C)(1)); or take part in an affray (s 72).		Mandatory minimum penalty.
		Mandatory minimum 12 months imprisonment for participant in criminal organisation who: cause grievous bodily harm to police officer (s 320(2)); assault a police officer (s 340(1A)).		Mandatory minimum penalty.
	<i>Weapons Act 1990</i> (Qld)	Mandatory minimum 5 year imprisonment (in cases of category H or R weapon) and otherwise 3½ years imprisonment for unlawful trafficking in weapons where at least one is a short firearm (s 65(1)(c), (1)(d)).	Only applies to offences committed by adults.	Mandatory minimum penalty.
		Mandatory minimum 3 years (for more than 5 weapons) and otherwise 2½ years for unlawful supply of certain categories of weapons where at least 1 is short firearm, without reasonable excuse (s 50B(1)(d), (1)(e)).	Only applies to offences committed by adults.	Mandatory minimum penalty.
		Mandatory minimum 18 months (if 10 or more weapons or weapons in category C, D, E, H or R) and otherwise 9 months for unlawful possession of weapon which is used in the commission of an indictable offence (s 50(1)(d)(i), (e)(i)).	Only applies to offences committed by adults.	Mandatory minimum penalty.
		Mandatory minimum 12 months (if 10 or more weapons or weapons in category C, D, E, H or R) and otherwise 6 months for unlawful possession of weapon for purpose of committing or facilitating an indictable offence (s 50(1)(d)(ii), (e)(ii)).	Only applies to offences committed by adults.	Mandatory minimum penalty.
		Mandatory minimum 12 months for unlawful possession of short firearm in public place without a reasonable excuse (s 50(1)(d)(iii), (e)(iii)).	Only applies to offences committed by adults.	Mandatory minimum penalty.
	<i>Dangerous Prisoners (Sex Offenders) Act 2003</i> (Qld)	Mandatory minimum 12 months imprisonment for sex offender released under a supervision order who tampers with monitoring device for the purpose of preventing location to be monitored (s 43AA(2)).		Mandatory minimum penalty.

Jurisdiction	Legislation	Provision	Exceptions	Type of mandatory penalty
New South Wales	<i>Crimes Act 1900</i> (NSW)	Minimum life imprisonment for murdering a police officer (s 19B). ⁴¹⁴	Does not apply to those under 18 at the time of the offence or those with a significant cognitive impairment (that is not a temporary self-induced impairment).	Mandatory minimum penalty.
		Mandatory minimum 8 years for assault occasioning death when intoxicated with any non-parole period to be not less than 8 years (s 25B).	This offence only applies to persons who are 18 years or older (s 25A(2)).	Mandatory minimum penalty and mandatory minimum non-parole period.
Northern Territory	<i>Sentencing Act</i> (NT)	Where a court finds an offender guilty of a sexual offence, the court must record a conviction and must order the offender serve a term of actual imprisonment or a term of imprisonment that is suspended partly, but not wholly (s 78F). ⁴¹⁵	No but only applies to a youth sentenced in the Supreme Court under the <i>Sentencing Act</i> (NT).	Mandatory penalty type.
		Mandatory minimum sentences for violent offences as follows: <ul style="list-style-type: none"> level 5 offence (unlawfully cause serious harm or assault where a weapon is used and the victim suffers physical harm) – 3 months for a first offence and 12 months for a 2nd or subsequent offence (s 78D, 78DA); level 4 offence (assault on a worker or assault on a police officer and physical harm is caused (s 78(DB)) – 3 months imprisonment; level 3 offence (aggravated assault) – actual imprisonment for first offence and 3 months imprisonment for a second or subsequent offence (s 78DC); level 2 offence (unlawfully causing harm where the victim suffers a physical injury (s 78DE) – actual imprisonment; level 1 offence (other violent offences (s 78DF). 	If required to impose an actual term of imprisonment, the court can partly suspend but not wholly suspend the term of imprisonment and/or can suspend partly with offender submitting to home detention (s 78DG). If required to impose a minimum sentence, cannot suspend the sentence or impose home detention (s 78DH(1)). In relation to a youth, the court must impose an actual term of imprisonment but there is no mandatory minimum term (s 78DH(2)). There is an exceptional circumstances exception in relation to the requirement to impose a minimum sentence of a specified period of actual imprisonment, which means that the court must impose a term of imprisonment but there is no mandatory minimum term (s 78DI).	Mandatory minimum penalty/mandatory penalty type.

414 There is no eligibility for parole, see Anderson, above n 118, 751.

415 The term of imprisonment may be as short as 'the rising of the court', *White v Brown* (2003) 13 NTLR 50.

Jurisdiction	Legislation	Provision	Exceptions	Type of mandatory penalty
			In deciding whether exceptional circumstances exist, the court may have regard to the victim impact statement and any other matters the court considers relevant (s 78DI(3)). Voluntary intoxication or the fact that the other person was involved in the commission of the offence or coerced the person to commit the offence are not an exceptional circumstance (s 78DI(4)(a)).	
		Where a court sentences an offender to imprisonment for the following offences and the sentence is not suspended in whole or in part, the court must fix a minimum non-parole period of not less than 70% of the sentence: <ul style="list-style-type: none"> sexual intercourse without consent (s 55); certain offences against persons under 16 (sexual intercourse or gross indecency with child under 16, sexual intercourse or gross indecency by provider of services to mentally ill or handicapped person, attempt to procure, sexual relationship with a child, incest, serious harm, cause harm with intent to cause serious harm or prevent apprehension, endangering life of a child by exposure, female genital mutilation, common assault, harm, act of gross indecency (s 55A). 		Mandatory non-parole period.
	<i>Misuse of Drugs Act (NT)</i>	If the maximum penalty for the offence is 7 years imprisonment or more or if is less than 7 years with aggravating circumstances, the court must impose a sentence of actual imprisonment (s 37).	The court does not have to impose a sentence of actual imprisonment if the court having regard to the circumstances (including that the offender is under 21) thinks that the penalty should not be imposed (s 37).	Mandatory penalty type.
	<i>Domestic and Family Violence Act (NT)</i>	If a person has previously been found guilty of a DVO contravention offence, the court must impose a sentence of at least 7 days imprisonment (s 121).	Only applies to adult offenders. Does not apply if the court is satisfied that it is not appropriate in the circumstances of a particular case (s 121).	Mandatory minimum penalty.

Jurisdiction	Legislation	Provision	Exceptions	Type of mandatory penalty
South Australia	<i>Criminal Law (Sentencing) Act 1988 (SA)</i>	If a person is convicted of a serious firearms offence, if the penalty for the offence includes imprisonment, imprisonment must be imposed and it cannot be suspended (s 20AAC(1)).	Exceptional circumstances exemption if the person satisfies the court by giving evidence on oath that his or her personal circumstances are so exceptional as to outweigh the need for general and personal deterrence to be the paramount considerations in sentencing and it is in all the circumstances appropriate to suspend the sentence.	Mandatory penalty type.
		If a person is sentenced for a serious offence against the person (a major indictable offence, other than murder, that results in the death of the victim or the victim suffering total incapacity or conspiracy to commit such an offence, or aiding, abetting, counselling or procuring such an offence) the mandatory minimum non-parole period is 4/5 of the length of the sentence (s 32(5)(ba)).	The court may fix a shorter non-parole period if it is satisfied that special circumstances exist taking into account only the following matters: offence committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct; if the offender pleaded guilty to the charge of the offence – that fact and the circumstances surrounding the plea; the degree to which the offender has cooperated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequence of, any such co-operation (s 32(2), (3)).	Mandatory minimum non-parole period.
		The court may declare an offender a serious repeat offender if the person has committed at least 2 separate sexual offences against children under 14 (s20B(1)). If the court makes this declaration, the court is not bound to ensure that the sentence is proportional to the offence and any non-parole period fixed must be at least 4/5ths of the sentence (s 20BA(1)). ⁴¹⁶	May decide that mandatory minimum non-parole does not apply if the offender's personal circumstances are so exceptional as to outweigh the primary policy of the criminal law of emphasising public safety, and it is, in all the circumstances, not appropriate that he or she be sentenced as a serious repeat offender (s 20BA(2)).	Mandatory minimum non-parole period.
Tasmania	<i>Sentencing Act 1997 (Tas)</i>	Mandatory minimum 6 months imprisonment for a person convicted of an offence in relation to causing serious injury to a police officer (s 16A(1)).	Exceptional circumstances exception applies.	Mandatory minimum penalty.

416 Note that this provision applies to a range of serious offences and not just sexual offending against children.

Jurisdiction	Legislation	Provision	Exceptions	Type of mandatory penalty
Western Australia	<i>Criminal Code (WA)</i>	Mandatory minimum 15 years imprisonment for manslaughter, if the offence is committed in the course of an aggravated home burglary (s 280).	Applies to offences committed by adult offenders. If committed by a juvenile offender, the court must impose a term of imprisonment or a term of detention of at least 3 years.	Mandatory minimum penalty.
		Mandatory minimum term of imprisonment that is at least 75% of the maximum penalty for the following offences if the offence is committed in the course of an aggravated home burglary: <ul style="list-style-type: none"> unlawful assault causing death (s 281); act intended to cause grievous bodily harm or prevent arrest (s 294); aggravated grievous bodily harm (s 297); sexual offences against children under the age of 13 (sexual penetration, procure a child to engage in sexual activity, indecent dealing, procure child to engage in indecent act, indecently records a child) (s 320); sexual offences against children between the ages of 13 and under 16 (sexual penetration, procure a child to engage in sexual activity, indecent dealing, procure child to engage in indecent act, indecently records a child) (s 321); aggravated indecent assault (s 324); sexual penetration without consent (s 325); aggravated sexual penetration without consent (s 326); sexual coercion (s 327); aggravated sexual coercion (s 328); sexual offences against incapable persons (sexual penetration, procure to engage in sexual activity, indecent dealing, procure to engage in indecent act, indecently records) (s 330). 	Applies to offences committed by adult offenders. If committed by a juvenile offender, the court must impose a term of imprisonment or a term of detention of at least 3 years.	Mandatory minimum penalty.
		Mandatory minimum 15 years imprisonment for attempt to unlawfully kill, if the offence is committed in the course of an aggravated home burglary (s 283).	Applies to offences committed by adult offenders. If committed by a juvenile offender, the court must impose a term of imprisonment or a term of detention of at least 3 years.	Mandatory minimum penalty.

Jurisdiction	Legislation	Provision	Exceptions	Type of mandatory penalty
		<p>Mandatory minimum term of at least 12 months imprisonment if the victim of the grievous bodily harm is a police officer, a prison officer, custodial officer under <i>Young Offender Act 1994 (WA)</i>, transport security officer, court security officer or ambulance officer (s 297).</p> <p>The non-parole period must be the greater of the mandatory minimum term or the non-parole period that otherwise would apply to the offender's sentence if it was not a prescribed offence (<i>Sentencing Act 1995 (WA)</i> s 95A).</p>	<p>Applies to offences committed by adult offenders.</p> <p>If committed by a juvenile offender, in relation to offence against police officer etc, the court must impose a term of imprisonment or a term of detention of at least 3 months.</p>	Mandatory minimum penalty and mandatory minimum non-parole period.
		<p>For serious assault where the victim is a police officer, a prison officer, custodial officer under <i>Young Offender Act 1994 (WA)</i>, transport security officer, court security officer or ambulance officer and the person suffers harm, the mandatory minimum term as follows:</p> <ul style="list-style-type: none"> the offender was armed with any dangerous or offensive weapon or in company – 9 months; other cases – 6 months (s 318). <p>The non-parole period must be the greater of the mandatory minimum term or the non-parole period that otherwise would apply to the offender's sentence if it was not a prescribed offence (<i>Sentencing Act 1995 (WA)</i> s 95A).⁴¹⁷</p>	<p>Applies to offenders 18 and over at the time of the offence.</p> <p>If an offender is aged 16 or 17, then the court must impose a term of imprisonment or a term of detention of at least 3 months.</p>	Mandatory minimum penalty and mandatory minimum non-parole period
		<p>Mandatory minimum term of imprisonment for repeat home burglars with the term depending on date of current offence:</p> <ul style="list-style-type: none"> if before commencement of amendment – 12 months; if after commencement – 2 years (s 406). <p>The term of imprisonment cannot be suspended.⁴¹⁸</p>	<p>Applies to offences committed by adult offenders.</p> <p>If committed by a juvenile offender, the court must impose a term of imprisonment or a term of detention of at least 12 months.</p>	Mandatory minimum penalty/ penalty type.
	<i>Sentencing Act 1995 (WA)</i>	<p>Mandatory minimum sentences apply for indictable offences where declared criminal organisation involved:</p> <ul style="list-style-type: none"> if statutory penalty includes life – 15 years; if statutory penalty is or includes a period of imprisonment (but not life) – 75% of the maximum penalty; if statutory penalty does not include imprisonment – 2 years imprisonment. 	Does not apply to an offender under 18 years of age at the time of the commission of the offence (s 9D).	Mandatory minimum penalty/penalty type.

417 For sentences between 12 months and 4 years, an offender is eligible for parole after serving one half of their term, see *Sentencing Act 1995 (WA)* s 93(1)(a). For sentences more than 4 years, an offender is eligible for parole after serving 2 years less than the term, see *Sentencing Act 1995 (WA)* s 93(1)(ab).

418 Note that suspended sentences may be ordered where the period of imprisonment is 60 months or less, *Sentencing Act 1995 (WA)* s 76.

Jurisdiction	Legislation	Provision	Exceptions	Type of mandatory penalty
		<p>Mandatory minimum sentences apply for summary offences where declared criminal organisation involved:</p> <ul style="list-style-type: none"> • if statutory penalty is or includes a period of imprisonment – not less than 2 years (even if the maximum penalty is otherwise less than 2 years); • if statutory penalty does not include imprisonment – 2 years imprisonment (s 9D). <p>In addition, a court must not suspend the sentence of imprisonment (s 9F). The court is not able to make a parole eligibility order unless the offender is convicted of murder and sentenced to life imprisonment in which case the parole eligibility period must be at least 20 years (s 9G).</p>		
	<i>Road Traffic Act 1974</i> (WA)	<p>Mandatory minimum term of 12 months imprisonment for dangerous driving causing death or grievous bodily harm where the offender was driving without the consent of the owner or person in charge of vehicle, exceeding the speed limit by more than 45 km per hour or driving to escape pursuit by a police officer, s 59(4A), 49AB(1)(c). The court must not suspend the term.</p> <p>The non-parole period must be the greater of the mandatory minimum term or the non-parole period that otherwise would apply to the offender's sentence if it was not a prescribed offence (<i>Sentencing Act 1995 (WA)</i> s 95A).⁴¹⁹</p>		Mandatory minimum penalty and mandatory minimum non-parole period.
		<p>Mandatory minimum term of 6 months imprisonment for dangerous driving causing bodily harm where the offender was driving without the consent of the owner or person in charge of vehicle, exceeding the speed limit by more than 45 km per hour or driving to escape pursuit by a police officer, s 59A(4A), 49AB(1)(c). The court must not suspend the term.</p> <p>The non-parole period must be the greater of the mandatory minimum term or the non-parole period that otherwise would apply to the offender's sentence if it was not a prescribed offence (<i>Sentencing Act 1995 (WA)</i> s 95A).⁴²⁰</p>		Mandatory minimum penalty and mandatory minimum non-parole period.
	<i>Misuse of Drugs Act 1981</i> (WA)	Mandatory minimum penalty for sale or supply prohibited drug or plant to a child. First offence suspended sentence or imprisonment only. Subsequent offences 6 months imprisonment (ss 6, 34(3)).	Only applies to offenders who were adults when the offence was committed.	Mandatory penalty type and mandatory minimum penalty.
		Mandatory minimum penalty for manufacturing and cultivating offences that endanger a child. First offence suspended sentence or imprisonment only. Subsequent offences 6 months imprisonment (ss 6, 7, 34(4)).	Only applies to offenders who were adults when the offence was committed.	Mandatory penalty type and mandatory minimum penalty.

419 For sentences between 12 months and 4 years, an offender is eligible for parole after serving one half of their term, see *Sentencing Act 1995 (WA)* s 93(1)(a).

420 For sentences less than 12 months imprisonment, the offender is eligible for parole when he or she has served half of the term, see *Sentence Administration Act 2003 (WA)* s 23(2).

Jurisdiction	Legislation	Provision	Exceptions	Type of mandatory penalty
		Mandatory minimum penalty of 6 months imprisonment for manufacturing and cultivating offences that cause bodily harm to a child (ss 6, 7, 34(4)).	Only applies to offenders who were adults when the offence was committed.	Mandatory minimum penalty.
Victoria	<i>Sentencing Act 1991</i> (Vic)	<p>The court must impose a sentence of imprisonment and there is a mandatory minimum non-parole period of 10 years for the following offences:</p> <ul style="list-style-type: none"> manslaughter in circumstances of gross violence (s 9B(2)); manslaughter by single punch or strike (s 9C(2)). 	<p>The provisions do not apply to an offender who was under the age of 18 at the time of the commission of the offence (s 9B(4), 9C(4)).</p> <p>There are special reasons for the court not to apply the mandatory non-parole period (s 9B(2), 9C(2)):</p> <ul style="list-style-type: none"> if the offender assisted or gave assistance to law enforcement authorities in the investigation or prosecution of an offence; the offender is 18 or older but under 21 at the time of the commission of the offence and proves on the balance of probabilities that he has a particular psychosocial immaturity that has resulted in a substantially diminished ability to regulate his or her own behaviour compared with the norm for persons of that age; the offender proves on the balance of probabilities that he or she had impaired mental functioning that is causally linked to the commission of the offence and substantially reduced the offender's culpability or the offender's impaired mental functioning that would result in the offender being subject to significantly more than the ordinary burdens or risks of imprisonment; 	Mandatory penalty type and mandatory non-parole period.

Jurisdiction	Legislation	Provision	Exceptions	Type of mandatory penalty
			<ul style="list-style-type: none"> the court proposes to make a Court Secure Treatment Order or a residential treatment order; or there are substantial and compelling circumstances that justify doing so (s 10A). 	
		The court must impose a term of imprisonment and fix a non-parole period of not less than 4 years for the offence of causing serious injury in circumstances of gross violence (s 10(1)).	As above (s 10(1)1, s 10A).	Mandatory penalty type and mandatory non-parole period.
		<p>The court must impose a term of imprisonment and fix a mandatory minimum non-parole period of a specified period in relation to the following offences in relation to emergency workers on duty:</p> <ul style="list-style-type: none"> intentionally cause serious injury in circumstances of gross violence – 5 years; recklessly cause serious injury in circumstances of gross violence – 5 years; intentionally cause serious injury – 3 years; recklessly cause serious injury – 2 years; cause serious injury intentionally or recklessly – 6 months (s 10AA(1), (4)). 	<p>As above (s 10AA(1), s 10A).</p> <p>For an offender aged 18-20, the court may impose a youth centre order of a specified period instead of a term of imprisonment for the following offences:</p> <ul style="list-style-type: none"> intentionally cause serious injury – 3 years; recklessly cause serious injury – 2 years, <p>if the court does not make a finding that a special reason exists but believes that there are reasonable prospects for the rehabilitation of the young offender or that the young offender is particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison (s 10AA(2), (3)).</p>	Mandatory penalty type and mandatory non-parole period.
	<i>Country Fire Authority Act 1958 (Vic)</i>	Mandatory minimum term of 3 months imprisonment for causing fire in country area in extreme conditions of weather (s 39A).		Mandatory minimum penalty.
		Mandatory minimum term of 12 months imprisonment for causing fire in country area with intent to cause damage (s 39C).		Mandatory minimum penalty.

Jurisdiction	Legislation	Provision	Exceptions	Type of mandatory penalty
	<i>Road Safety Act 1986</i> (Vic)	Mandatory minimum term of 4 months if driver of motor vehicle fails to stop following an accident if a person is killed or seriously injured if it is a repeat offence and 14 days if not killed or seriously injured (s 61(4), (5)).		Mandatory minimum penalty.
		Mandatory minimum term of 2 months if driver of a vehicle that is not a motor vehicle fails to stop following an accident if a person is killed or seriously injured if it is a repeat offence and 14 days if not killed or seriously injured (s 61A(4), (5)).		Mandatory minimum penalty.

Appendix B

CURRENT SENTENCING PRACTICE, SELECTED OFFENCES, TASMANIA, 2008-14

METHODOLOGY

The analysis conducted by the Council uses data received from the Tasmania Law Reform Institute Sentencing database, which covers the years 2001-14. Data is entered from the Supreme Court judges' Comments on Passing Sentence, hard copies of which are held in the Law Library at the University of Tasmania.

In Tasmania, when an offender is convicted of multiple offences, a judge has the power to impose one sentence for all offences (a global sentence). Tasmanian courts also have the power to impose separate sentences for each offence, but in practice, when an offender is convicted of multiple offences, a global order is usually made. Consequently, in most cases, it is not possible to determine the proportion of the total sentence that relates to each individual count. In the database, the cases are entered based on assessment of the principal offence (most serious offence) as the 'major crime'. In relation to sexual offences where an offender has been charged with maintaining a sexual relationship with a young person and/or sexual intercourse with a young person, offences have been classified in order of seriousness as follows: maintaining a sexual relationship with a young person, sexual intercourse with a young person, aggravated sexual assault and then indecent assault, indecent act directed to young person, followed by child pornography offences. In other cases, offences are classified as rape, aggravated sexual assault, indecent assault, indecent act directed to young person, followed by child pornography offences. This is based on the classification of offences in the National Offence Index.⁴²¹

RAPE (CRIMINAL CODE (TAS) S 185)

Table B-1: Rape, Supreme Court sentences 2008-14 (all counts)

Age of complainant	Median (months)	Max	Min	Imprisonment (%)	Total (no)
Under 17	54	144	36	100	12
17 and over	42	72	9	93 ²⁸	15
All complainants	46.5	144	9	96.3	27

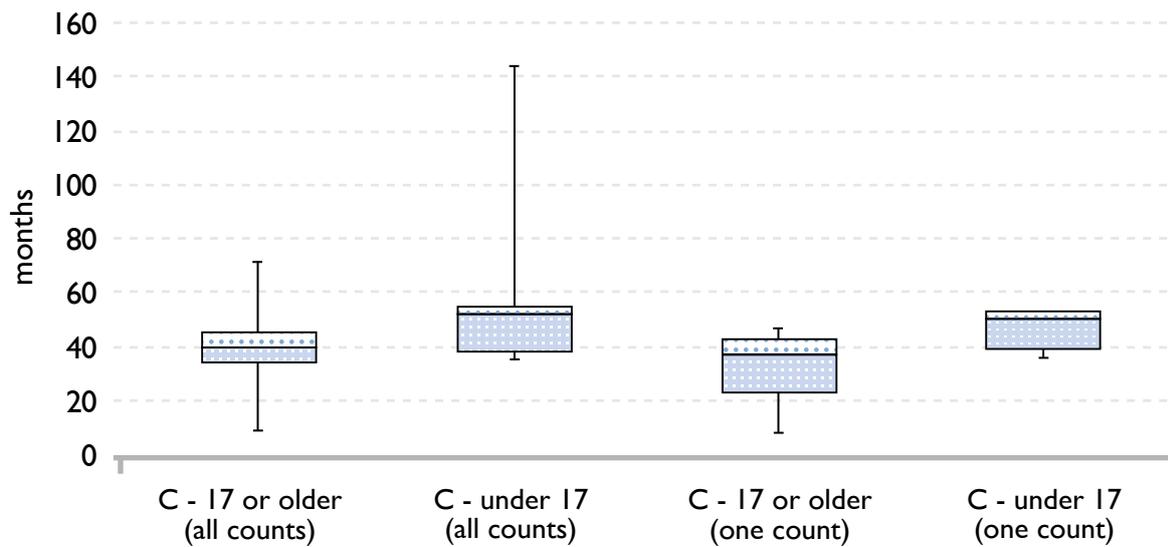
421 See TSAC, above n 1, [3.1].

422 There was one case where the offender received a partly suspended sentence, *Tasmania v CT, Evans J*, 7 March 2011 (Sentence), 36 months imprisonment with 15 months suspended.

Table B-2: Rape, Supreme Court sentences 2008-14 (single count)

Age of complainant	Median (months)	Max	Min	Imprisonment (%)	Total (no)
Under 17	46.5	54	36	100	4
17 and over	36	45	9	100	5
All complainants	39	54	9	100	9

Figure B-1: Rape, Supreme Court sentencing range 2008-14 (by counts and age of complainant)



AGGRAVATED SEXUAL ASSAULT (CRIMINAL CODE (TAS) S 127A)

Figure B-2: Aggravated sexual assault and sentence type, complainant under 17, Supreme Court, 2008-14 (all counts, n=13)

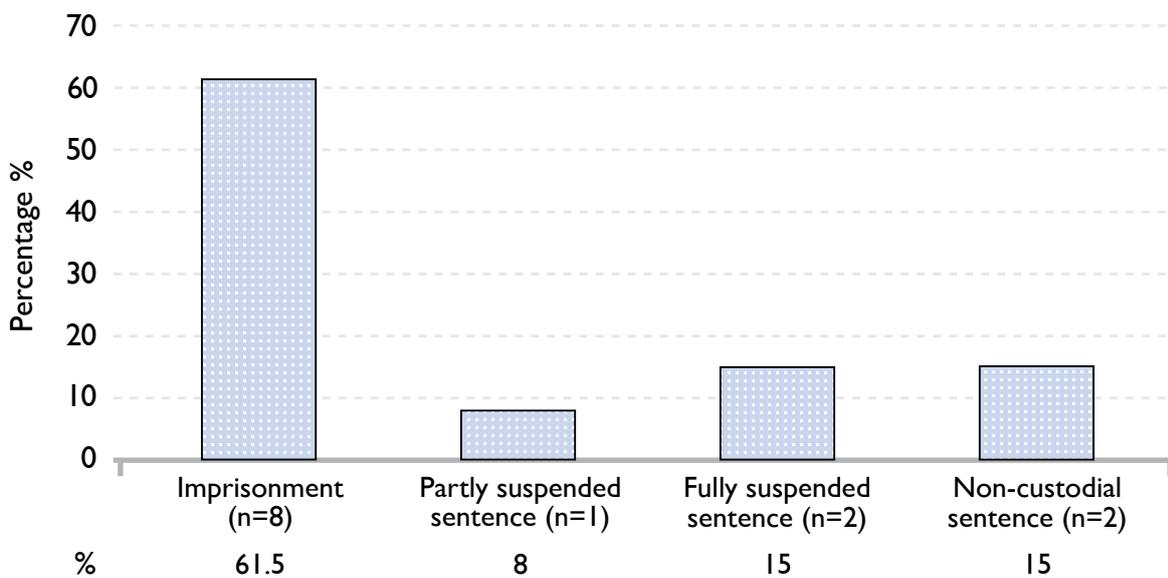


Figure B-3: Aggravated sexual assault and sentence type, complainant under 17, Supreme Court, 2008-14 (single count, n=2)

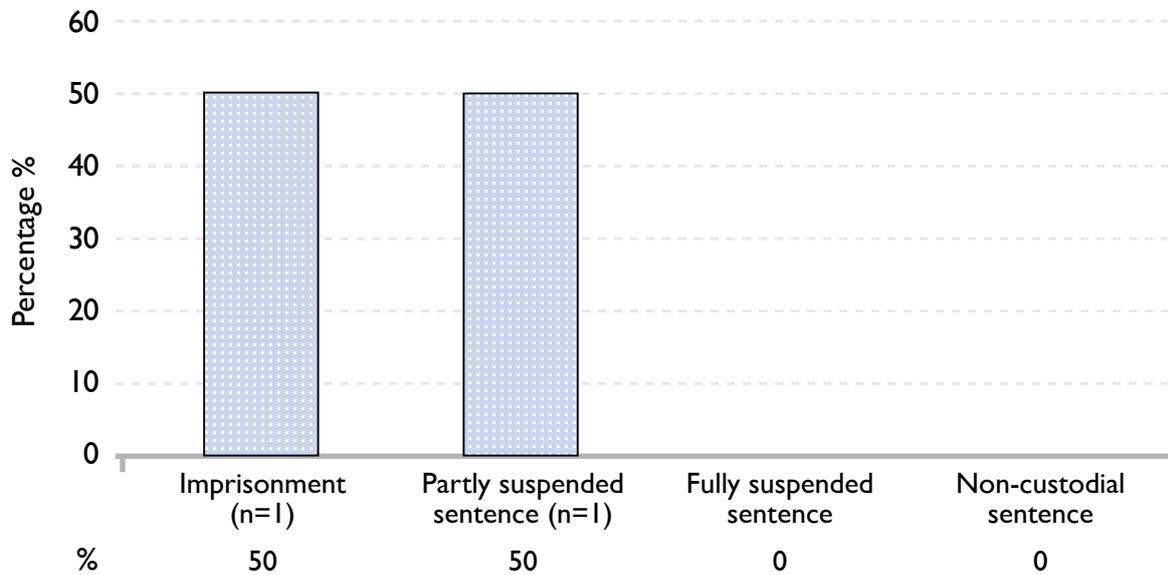


Table B-3: Aggravated sexual assault, Supreme Court sentences 2008-14 (all counts)

Age of complainant	Median (months)	Max	Min	Imprisonment (%)	Total (no)
Under 17	21	72	4	61.5	13
17 and over	28	28	15	50	6
All complainants	24	72	4	57.9	19

Table B-4: Aggravated sexual assault, Supreme Court sentences 2008-14 (all counts excluding consensual relationship cases)

Age of complainant ⁴²³	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Under 12	21 (1.75 years)	72 (6 years)	4	83.3	6
13 and <17	27 (2.25 years)	30 (2.5 years)	6	60	5
All complainants under 17	21 (1.75 years)	72 (6 years)	4	72.7	11

Table B-5: Aggravated sexual assault, Supreme Court sentences 2008-14 (single count)

Age of complainant	Median (months)	Max	Min	Imprisonment (%)	Total (no)
Under 17	4	4	4	50	2
17 and over	-	-	-	0	2

423 This is the age of the youngest complainant (where multiple complainants) or the age offending started (if multiple counts in respect of the same complainant).

INDECENT ASSAULT (CRIMINAL CODE (TAS) S 127)

Figure B-4: Indecent assault and sentence type, complainant under 17, Supreme Court, 2008-14 (all counts, n = 21)

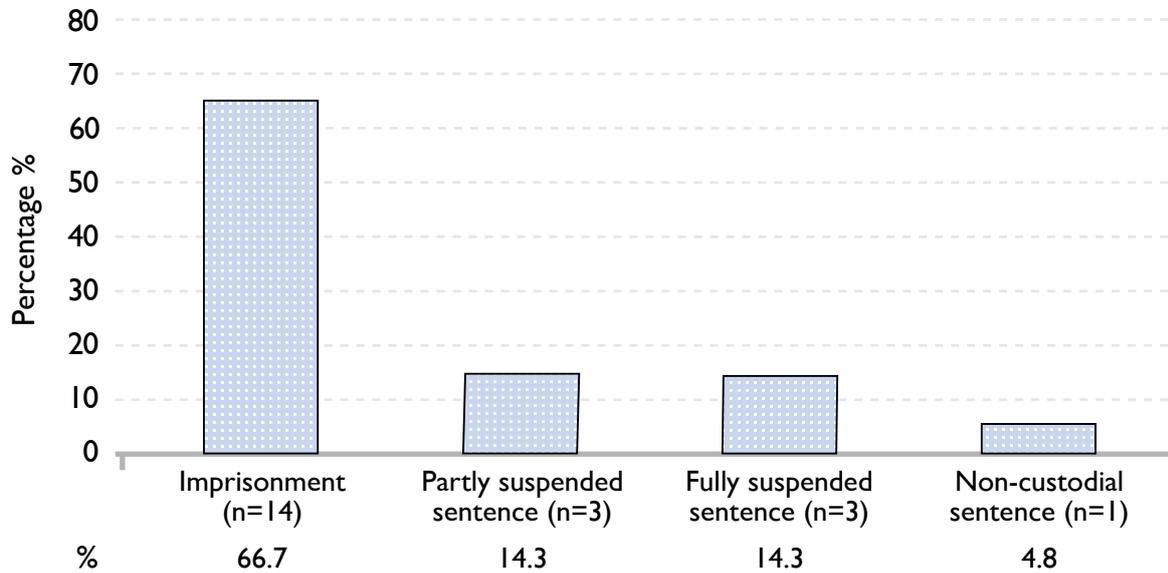


Figure B-5: Indecent assault and sentence type, complainant under 17, Supreme Court, 2008-14 (single count, n=6)

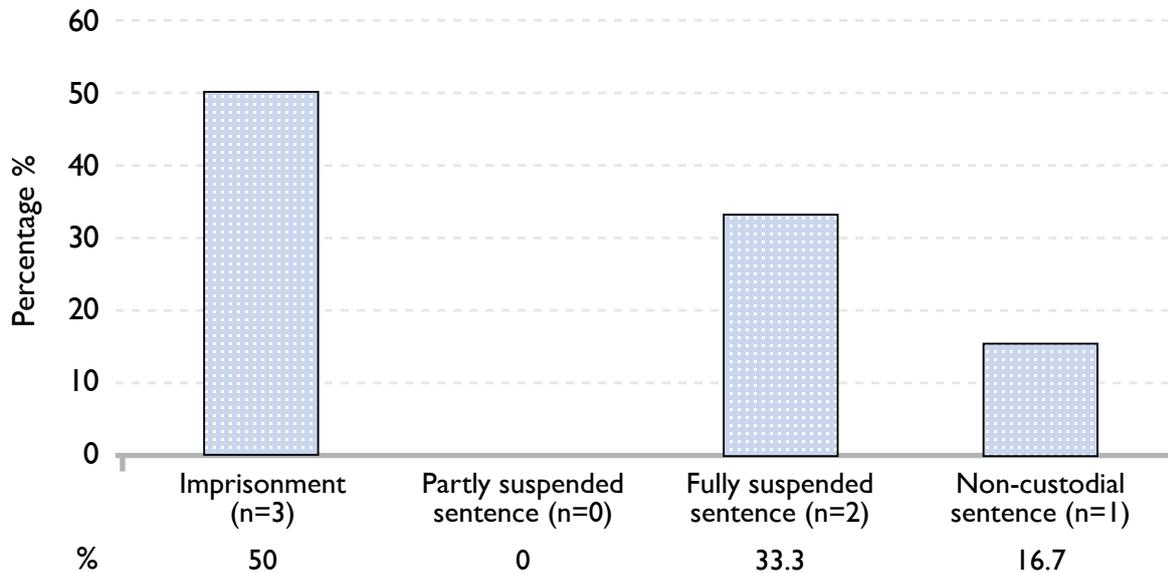


Table B-6: Indecent assault, Supreme Court sentences 2008-14 (all counts)

Age of complainant	Median (months)	Max	Min	Imprisonment (%)	Total (no)
Under 17	12	48	2	67	21
17 and over	13.5 ⁴²⁴	24	3	33.3	6
All complainants	12	48	2	59.3	27

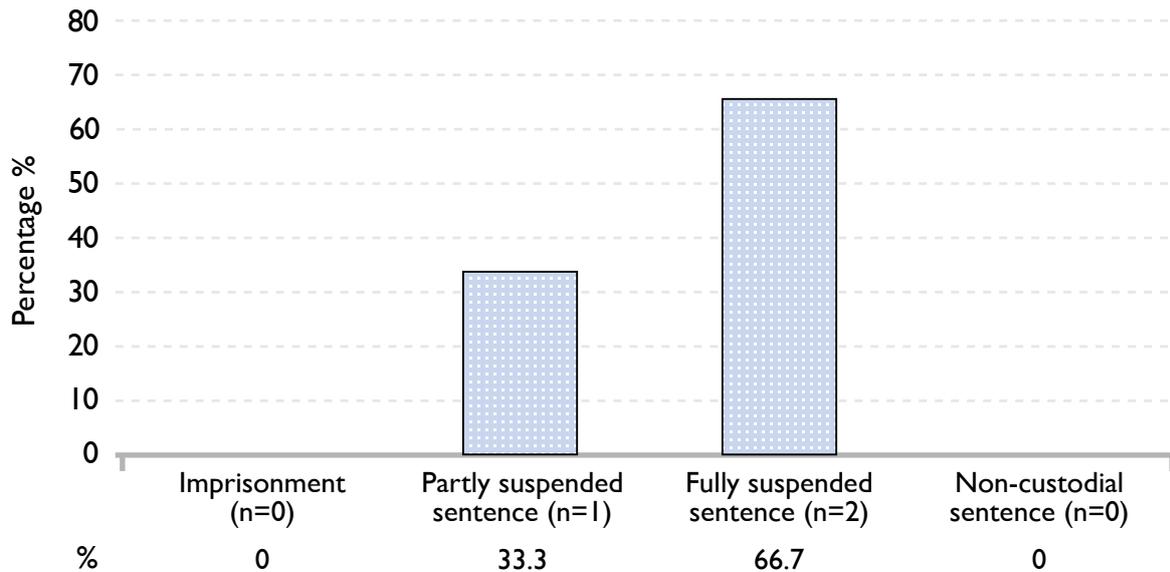
424 Note that the median is calculated in relation to only two cases.

Table B-7: Indecent assault, Supreme Court sentences 2008-14 (single count)

Age of complainant	Median (months)	Max	Min	Imprisonment (%)	Total (no)
Under 17	9	15	24	50	6
17 and over	-	-	-	0	3

INDECENT ASSAULT WITH YOUNG PERSON (CRIMINAL CODE (TAS) S 125B)

Figure B-6: Indecent assault with young person and sentence type, Supreme Court, 2008-14 (all counts, n=3)



MAINTAINING A SEXUAL RELATIONSHIP WITH A YOUNG PERSON UNDER THE AGE OF 17 (CRIMINAL CODE (TAS) S 125B)

Figure B-7: Maintaining a sexual relationship with a young person and sentence type, Supreme Court, 2008-14 (all counts, n=95)

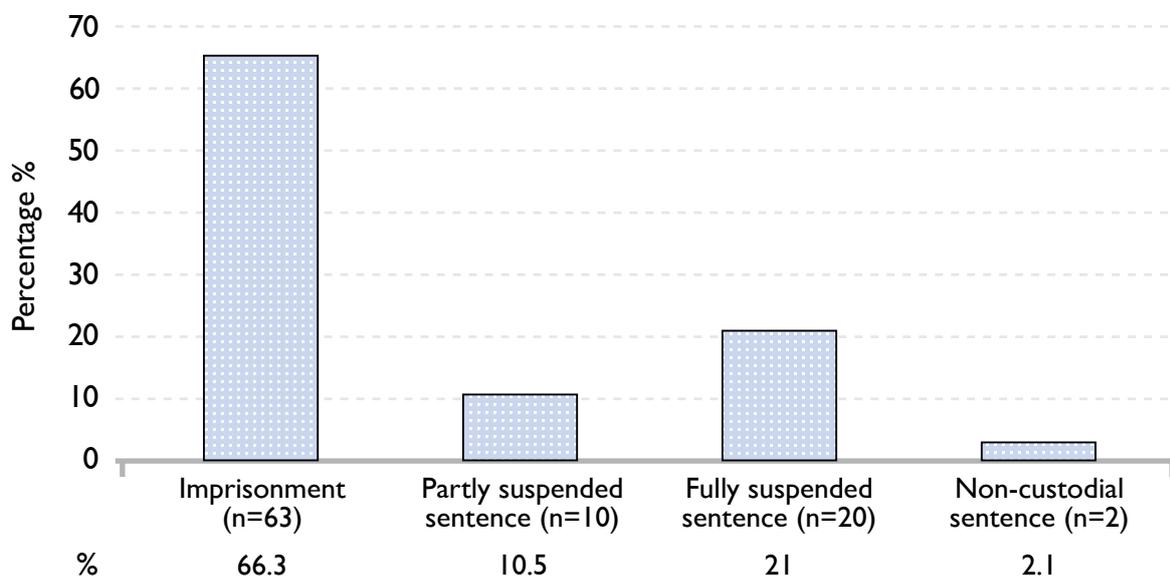


Figure B-8: Maintaining a sexual relationship with a young person and sentence type, Supreme Court, 2008-14 (single count, n=67)

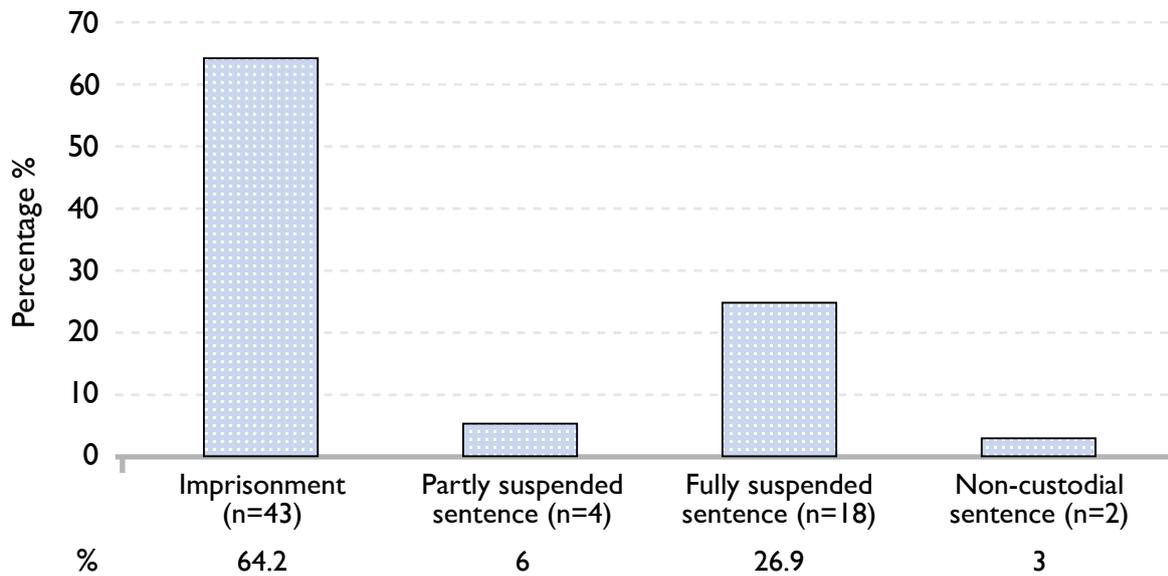


Table B-8: Maintaining a sexual relationship with a young person, Supreme Court sentences 2008-14

Counts	Median (months)	Max	Min	Imprisonment (%)	Total (no)
All	36	144	4	66.3	95
Single	32	96	4	64.2	67

Figure B-9: Sentence type, maintaining a sexual relationship with a young person, categories, all counts, 2008-14

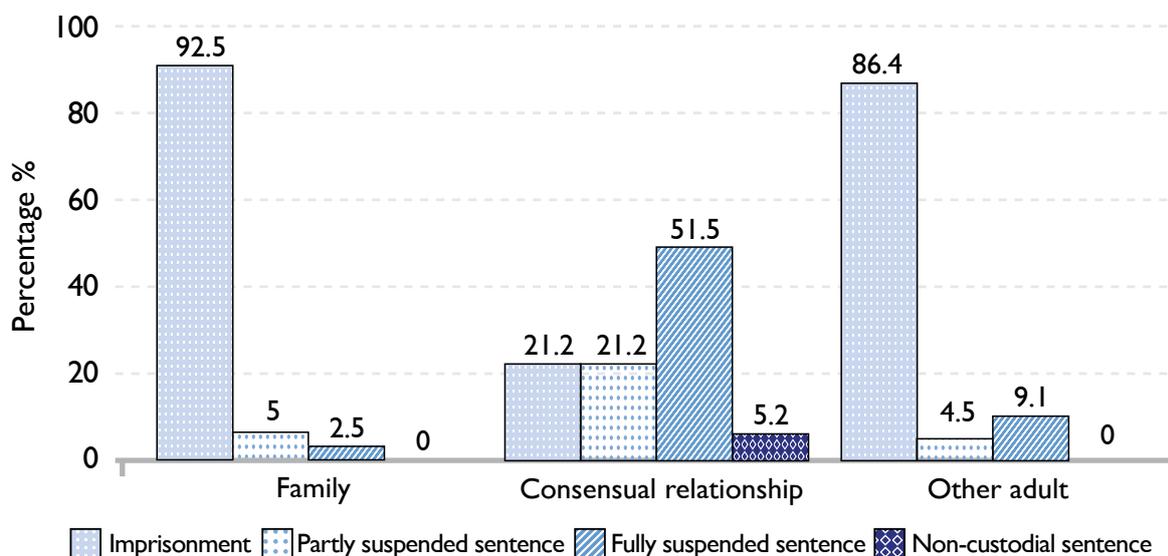


Table B-9: Length of imprisonment (in months) for categories of maintaining a sexual relationship with a young person (all counts): Supreme Court, 2008-14

Circumstances	Median	Max	Min
Family	42	144	4
Adult acquaintance	36	84	4
'Consensual' relationship	18	27	6

Figure B-10: Sentence type, maintaining a sexual relationship with a young person, categories, single, 2008–14

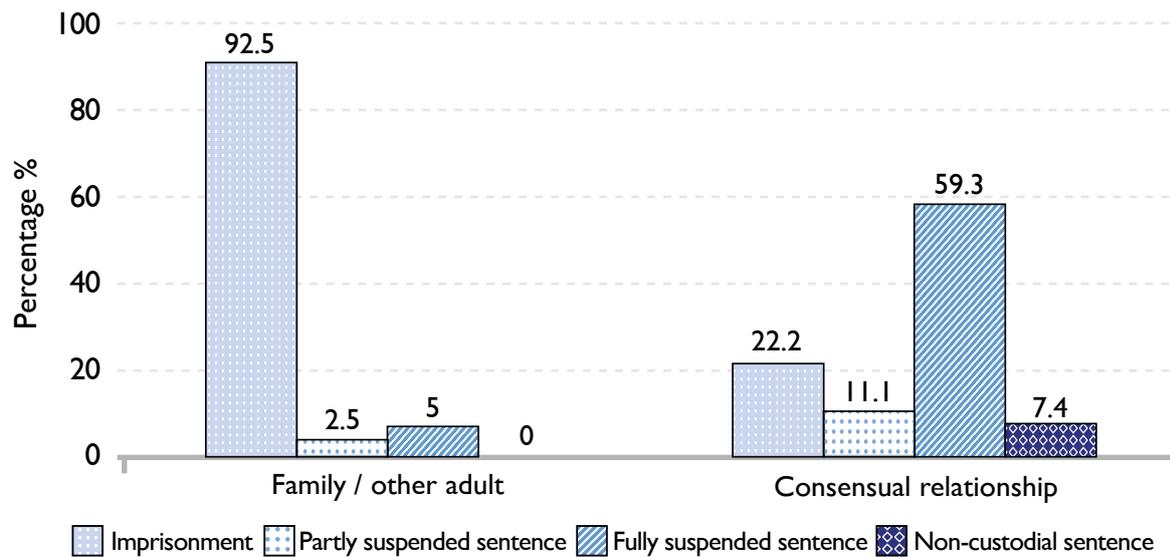


Table B-10: Length of imprisonment (in months) for categories of maintaining a sexual relationship with a young person (single count): Supreme Court, 2008-14

Circumstances	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Family and adult acquaintance	36	96	4	92.5	40
'Consensual' relationship	18	27	6	22.2	27

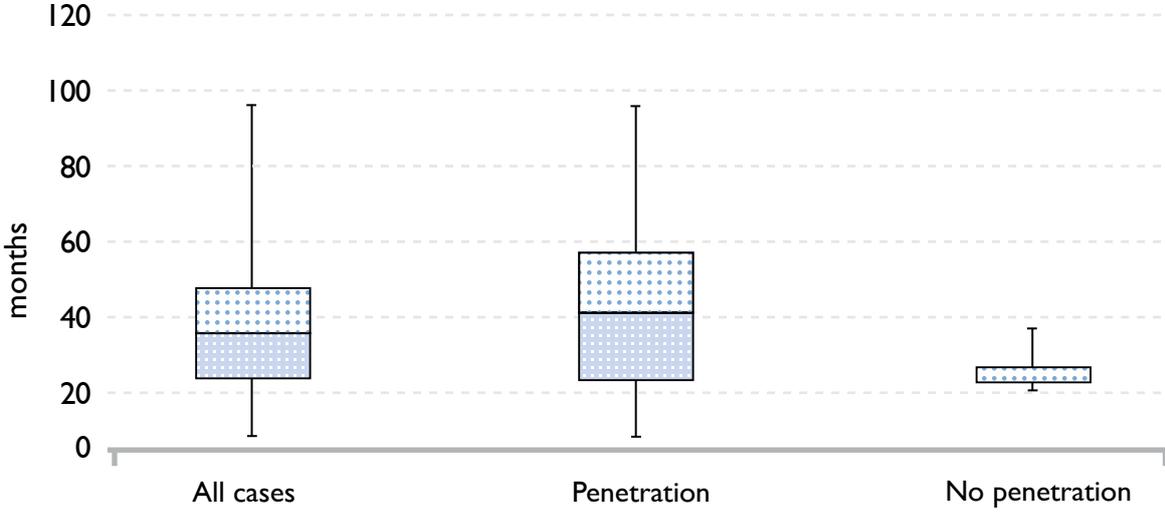
Table B-11: Length of imprisonment (in months) for maintaining a sexual relationship with a young person excluding 'consensual' relationship by type of conduct (all counts): Supreme Court, 2008-14

Conduct	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Penetration	45	144	4	88.9	54
No penetration	27	48	21	100	8

Table B-12: Length of imprisonment (in months) for maintaining a sexual relationship with a young person excluding 'consensual' relationship by type of conduct (single count): Supreme Court, 2008-14

Conduct	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Penetration	42	96	4	91.2	34
No penetration	24	36	21	100	6

Figure B-11: Length of imprisonment (in months) for maintaining a sexual relationship with a young person excluding 'consensual' relationship by type of conduct: Supreme Court, 2008-14



SEXUAL INTERCOURSE WITH A YOUNG PERSON (CRIMINAL CODE (TAS) S 124)

Figure B-12: Sexual intercourse with a young person and sentence type, Supreme Court, 2008-14 (all counts, n=62)

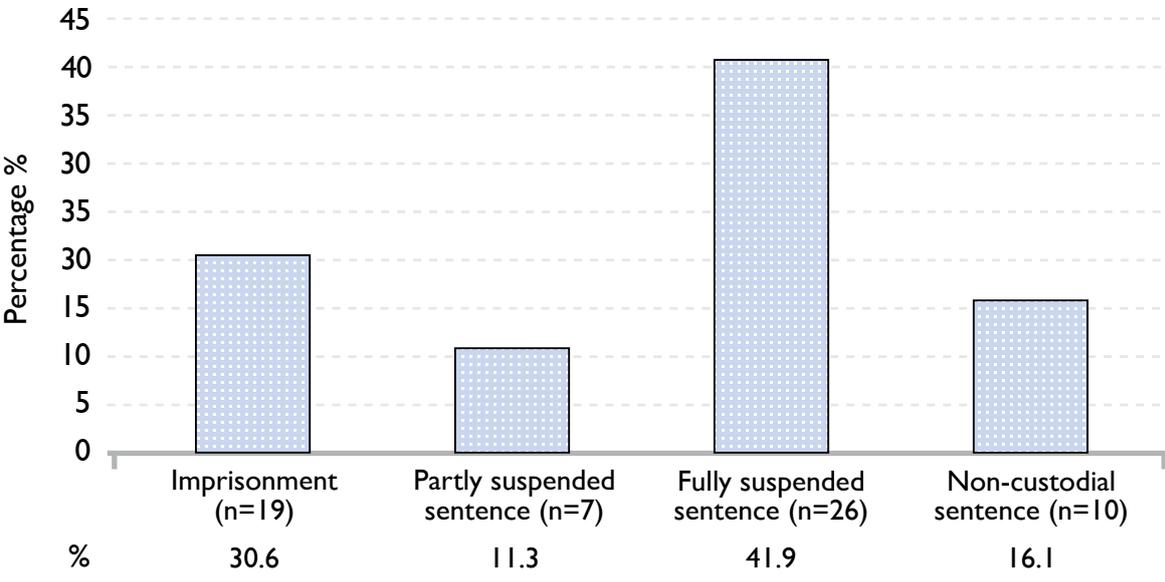


Figure B-13: Sexual intercourse with a young person and sentence type, Supreme Court, 2008-14
(single count, n=20)

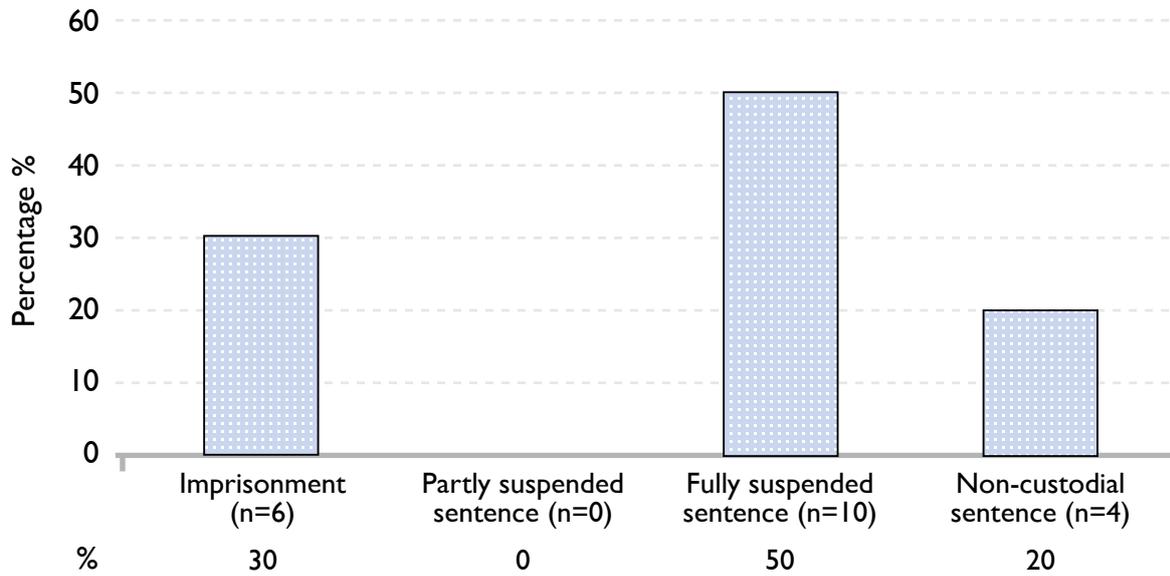


Table B-13: Sexual intercourse with a young person, Supreme Court sentences 2008-14

Counts	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
All	7	24	2	30.6	62
Single	4.5	8	2	30	20

Figure B-14: Sentence type, sexual intercourse with a young person, categories, all counts 2008-14

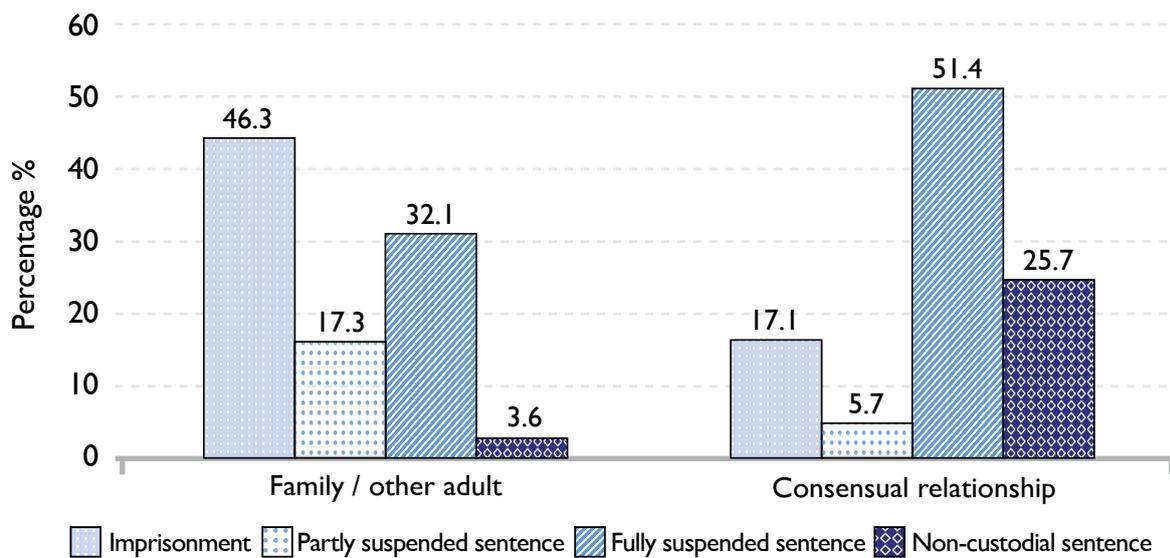


Table B-14: Sentence type, length of imprisonment (in months) for categories of sexual intercourse with a young person (all counts): Supreme Court, 2008-14

Circumstances	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Family and adult acquaintance	7	24	2	46.3	28
'Consensual' relationship	5.5	12	3	17.1	35

Figure B-15: Sentence type, sexual intercourse with a young person, categories, single count 2008–14

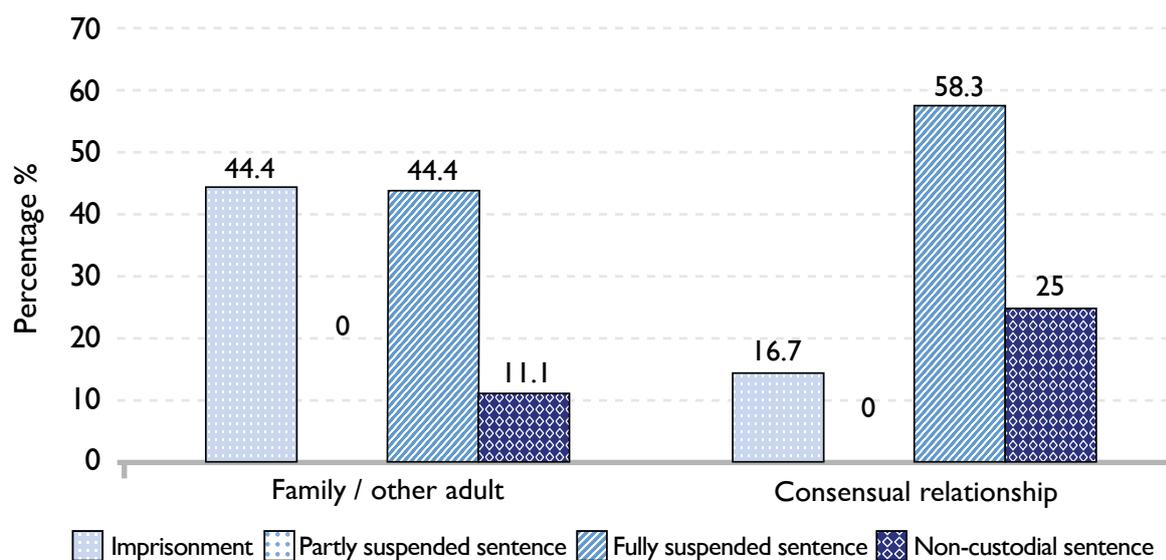


Table B-15: Sentence type, length of imprisonment (in months) for categories of sexual intercourse with a young person (single count): Supreme Court, 2008-14

Circumstances	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Family and adult acquaintance	5	8	2	44.4	9
'Consensual' relationship	⁴²⁵	5	3	16.7	12

PROCURING UNLAWFUL SEXUAL INTERCOURSE WITH PERSON UNDER THE AGE OF 17 YEARS (CRIMINAL CODE (TAS) S 125C)

Table B-16: Procuring unlawful sexual intercourse with person under the age of 17 years, Supreme Court sentences 2008-14

Counts	Median (months)	Max	Min	Imprisonment (%)	Total (no)
All	120	120	120	100	2
Single	-	-	-	-	0

425 There were only two cases where a custodial sentence was imposed.

SEXUAL INTERCOURSE WITH PERSON WITH MENTAL IMPAIRMENT (CRIMINAL CODE (TAS) S 126)

Table B-17: Sexual intercourse with person with mental impairment, Supreme Court sentences 2008-14

Counts	Median (months)	Max	Min	Imprisonment (%)	Total (no)
All	-	-	-	-	0
Single	-	-	-	-	0

INVOLVING PERSON UNDER AGE OF 18 YEARS IN PRODUCTION OF CHILD EXPLOITATION MATERIAL (CRIMINAL CODE (TAS) S 130)

Table B-18: Involving person under age of 18 in production of child exploitation material, Supreme Court sentences 2008-14

Counts	Median (months)	Max	Min	Imprisonment (%)	Total (no)
All	13.5	21	6	66.7 ⁴²⁶	3
Single	-	-	-	-	0

PRODUCING CHILD EXPLOITATION MATERIAL (CRIMINAL CODE (TAS) S 130A)

Table B-19: Producing child exploitation material, Supreme Court sentences 2008-14

Counts	Median (months)	Max	Min	Imprisonment (%)	Total (no)
All	15	42	5	100	4
Single	-	-	-	-	0

DISTRIBUTE CHILD EXPLOITATION MATERIAL (CRIMINAL CODE (TAS) S 130B)

Table B-20: Distributing child exploitation material, Supreme Court sentences 2008-14

Counts	Median (months)	Max	Min	Imprisonment (%)	Total (no)
All	30	30	30	25 ⁴²⁷	4
Single	-	-	-	-	0

INCEST (CRIMINAL CODE (TAS) S 133)

Table B-21: Incest, Supreme Court sentences 2008-14

Age of complainant	Median (months)	Max	Min	Imprisonment (%)	Total (no)
Under 17	-	-	-	-	0
17 and older	36	36	36	100	1

426 There was one case where the offender received a non-custodial sanction (84 hours community service).

427 In three cases, the offender received a fully suspended sentence.

PERFORMING FEMALE GENITAL MUTILATION (CRIMINAL CODE (TAS) S 178A)

Table B-22: Performing female genital mutilation, Supreme Court sentences 2008-14

Age of complainant	Median (months)	Max	Min	Imprisonment (%)	Total (no)
Under 17	-	-	-	-	0
17 and older	-	-	-	-	0

PROCURE A CHILD TO PROVIDE SEXUAL SERVICES (SEX INDUSTRY OFFENCES ACT 2005 (TAS) S 9(1))

Table B-23: Procure a child to provide sexual services, Supreme Court sentences 2008-14

Counts	Median (months)	Max	Min	Imprisonment (%)	Total (no)
All	-	-	-	-	0
Single	-	-	-	-	0

RECEIVE A FEE THAT THE PERSON KNOWS IS DIRECTED FOR SEXUAL SERVICES PROVIDED BY A CHILD (SEX INDUSTRY OFFENCES ACT 2005 (TAS), S 9(2))

Table B-24: Receive a fee that the person knows is directed for sexual services provided by a child, Supreme Court sentences 2008-14

Counts	Median (months)	Max	Min	Imprisonment (%)	Total (no)
All	-	-	-	-	0
Single	-	-	-	-	0

Appendix C

MODELS FOR A SENTENCING DISCOUNT FOLLOWING A GUILTY PLEA

Jurisdiction	Timing of plea	Nature of discount	Discount or range	Legislative/case law basis
Victoria	Relevant	Requires a court that imposes a less severe sentence than it otherwise would have because the offender pleaded guilty to state the sentence and non-parole period, if any, that it would have imposed by for the plea of guilt.	Average discount on head sentence around 25% (identified by analysis of VSAC). ⁴²⁸ Not set out in legislation.	<i>Sentencing Act 1991 (Vic) s 6AAA.</i>
South Australia	Relevant – a sliding scale is provided depending on the timing of the plea	There is a discretion to impose a reduced sentence for a guilty plea. In determining the percentage by which a sentence for an offence is to be reduced in respect of a guilty plea made within a particular period, a court must have regard to such of the following as may be relevant: (a) whether the reduction of the defendant’s sentence by the percentage contemplated would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of that particular defendant, that it would shock the public conscience; (b) the stage in the proceedings for the offence at which the defendant indicated his or her intention to plead guilty (including whether it would, in the opinion of the court, have been reasonable to expect the defendant to have done so at an earlier stage in the proceedings); (c) the circumstances surrounding the plea; (d) in the case where the defendant has been charged with more than 1 offence—whether the defendant pleaded guilty to all of the offences; (e) if the defendant satisfies the court that he or she could not reasonably have been expected to plead guilty at an earlier stage in the proceedings because of circumstances outside of his or her control—that fact; (f) whether or not the defendant was made aware of any relevant matter that would have enabled the defendant to plead guilty at an earlier stage in the proceedings, and may have regard to any other factor or principle the court thinks relevant.	The court sets out a sliding scale depending on the timing and circumstances of the offender’s plea of guilty ranging from up to 40% to up to 10%.	<i>Criminal Law (Sentencing) Act 1988 (SA) ss 10A, 10B.</i>

428 See VSAC, *Baseline Sentencing Report* (2012) 78; VSAC, *Sentencing Severity for Serious and Significant Offences: A Statistical Report* (2011) 10. It was noted that this varied between offences.

Jurisdiction	Timing of plea	Nature of discount	Discount or range	Legislative/case law basis
Western Australia	Relevant	If a person pleads guilty to a charge for an offence, the court may reduce the head sentence for the offence in order to recognise the benefits to the State, and to any victim of or witness to the offence, resulting from the plea. The court must state the extent of the reduction in open court.	Must not reduce the term: (a) by more than 25%; or (b) by 25% unless the offender pleaded guilty, or indicated that he or she would plead guilty, at the first reasonable opportunity.	<i>Sentencing Act 1995 (WA) s 9AA.</i>
New South Wales	Relevant	Must not impose a lesser penalty that is unreasonably disproportionate to the nature and circumstances of the offence. Sentencing judges are encouraged to quantify the effect of the plea on the sentence insofar as they believe it appropriate to do so. Primary consideration in determining where in the range a case should fall is the timing of the plea. There may be cases in which a plea does not lead to a discount. There is no presumption or entitlement to a particular discount.	10-25% (set out in guideline judgment)	<i>Crimes (Sentencing Procedure) Act 1999 (NSW) s 22.</i> <i>R v Thomson (2000) 49 NSWLR 383.</i>
Queensland	Relevant	Must state the plea of guilty is taken into account. No requirement to state extent of discount.	-	<i>Penalties and Sentencing Act 1992 (Qld) s 13.</i>
ACT	Relevant	Guilty plea is relevant if the court considers that there is a real likelihood that it will sentence the offender to imprisonment. In deciding how the offender should be sentenced (if at all) for the offence, the court must consider the following matters: (a) the fact that the offender pleaded guilty; (b) when the offender pleaded guilty, or indicated an intention to plead guilty; (c) whether the guilty plea was related to negotiations between the prosecution and defence about the charge to which the offender pleaded guilty; (d) the seriousness of the offence; (e) the effect of the offence on the victims of the offence, the victims' families and anyone else who may make a victim impact statement.		<i>Crimes (Sentencing) Act 2005 (ACT) ss 33(j), 35, 37.</i>

687 Home detention was abolished by the *Sentencing Legislation Amendment (Abolition of Home Detention Act 2011)* (Vic) from 16 January 2012.

Jurisdiction	Timing of plea	Nature of discount	Discount or range	Legislative/case law basis
		<p>A lesser penalty imposed under this section must not be unreasonably disproportionate to the nature and circumstances of the offence.</p> <p>If the court imposes a lesser penalty, then it must state the penalty it would have otherwise imposed.</p>		
Northern Territory	Relevant	<p>Plea of guilty is a relevant factor in the exercise of the sentencing discretion.</p> <p>If the matter is in the Local Court, and the court imposes a less severe sentence on the basis of a plea of guilty, then the court should record the sentence it would have imposed if not for the guilty plea.</p> <p>In the Local Court, if the offender enters a plea of guilty within 7 days before the date appointed for the trial, then the offender is not entitled to a discount for the guilty plea unless the court is satisfied that the offender could not have pleaded guilty any earlier.</p>	-	<i>Sentencing Act</i> (NT) ss 5(j), 108A, 123A.

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