



SEX OFFENCE SENTENCING

FINAL REPORT

August 2015

About this Final Advice

This reference to the Sentencing Advisory Council was made by the then Attorney-General and Minister for Justice, Brian Wightman in May 2012. Advice was sought from the Sentencing Advisory Council in relation to the sentencing of sex offences in Tasmania as concerns had been raised that sentencing for sexual offences in Tasmania was out of step with sentencing for comparable offences in other Australian jurisdictions and/or community standards and expectations.

In May 2013, the Council released a research paper, *Sexual Offence Sentencing in Tasmania*, which provided preliminary advice on sentencing patterns for sex offences and considered whether current sentence types and lengths for sex offences were appropriate. The Research Paper examined sentencing practices for rape, aggravated sexual assault, indecent assault, maintaining sexual relationship with a young person and sexual intercourse with a young person. A Consultation Paper was also released in May 2013 to gauge public opinion and the opinion of key stakeholders in relation to the sentencing for sex offences. The Consultation Paper provided information about the number of custodial sentences imposed and the sentencing range for several sexual offences (rape, maintaining a sexual relationship with a young person, sexual intercourse with a young person, aggravated sexual assault and indecent assault) as well as comparator offences (armed robbery, causing grievous bodily harm, causing death by dangerous driving). It then provided sentencing vignettes based on decided cases in Tasmania and sought feedback on the appropriateness of sentencing for the various offences. As part of its consultation, the Council also conducted two forums held with representatives of the legal community, the police and victims' organisations.

Responses to the Consultation Paper were received from:

- Chief Justice of the Supreme Court, the Hon A Blow OAM
- Mr R Griggs, Director — Tasmania Director, Civil Liberties Australia
- Mr M Brown, Tasmania Director, Australian Christian Lobby
- Mr S Fisher, Beyond Abuse
- Confidential submission, community member, Tasmania
- Confidential submission, community member, Tasmania
- Dr G O'Donnell, Forensic Clinic Consulting Pty Ltd
- Ms M Dean, Laurel House North and North West Tasmania Sexual Assault Support Services
- Mr M Stoddard, Sexual Assault Support Service
- Confidential submission, community member, Tasmania
- Ms E Tucker, community member, Tasmania
- Ms M Johns, community member, Tasmania
- Ms P van Adrichem and Ms M Paterson, Women's Legal Service Tasmania Inc

This paper considers the appropriateness of current sentence type and length for sex offenders in Tasmania and makes recommendations to the Attorney-General on how inadequate sentencing could be addressed.

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, Mr Chris Gunson, Professor Rob White, Ms Terese Henning, Ms Jo Flanagan and Ms Linda Mason.

Acknowledgments

The Council would like to thank all those provided information in relation to this reference, in particular Ms Betty Evans, Policy Support and Research Officer, Department of Justice, Mr Andrew Verdouw, Team Leader, Intervention Programs Unit, Tasmania Prison Service, Dr Amy Washington, Manager, Offender Programs, Community Corrections, Ms Michelle Lowe, Senior Policy Officer, Department of Justice, Mr Daryl Coates, Acting Director of Public Prosecutions, Mr Graham Davis, Witness Assistance Service Manager, Office of the Director of Public Prosecutions. This Final Advice was written by Dr Rebecca Bradfield and Ms Lucy De Vreeze.

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Executive Summary

TERMS OF REFERENCE

This reference to the Sentencing Advisory Council was made by the then Attorney-General and Minister for Justice, Brian Wightman in May 2012. Advice was sought from the Sentencing Advisory Council in relation to the sentencing of sex offences in Tasmania as concerns had been raised that sentencing for sexual offences in Tasmania was out of step with sentencing for comparable offences in other Australian jurisdictions and/or community standards and expectations.

The following terms of reference were given to the Council:

1. A report of the type and length of sentences for sex offences by reference to sentences imposed by the Tasmanian Supreme Court in the period 1978–2010.
2. A comparison with sentencing in other jurisdictions building on the analysis in the Tasmanian Law Reform Institute's Report on Sentencing (June 2008) for the offence of rape against a comparator offence such as armed robbery or grievous bodily harm.
3. Analysis of and commentary on any published statistics on sentences for sex offences in Tasmania compared with other Australian jurisdictions.
4. Preliminary advice on whether current sentence type and length for sex offences are appropriate based on:

Selected key Tasmanian stakeholder opinions on sentencing for sex offenders;

Further analysis of the data collected for the Tasmanian Jury Sentencing Study;

Further analysis of the interviews with jurors in sex offence trials conducted as part of that study; and

Review of national and international research on public opinion in relation to sentencing for sex offences.

5. A proposal for a second stage of the Project to include but not necessarily be limited to:
 - Gauging public opinion on sentencing for sex offenders;
 - Extending previous research to include more sex offence trials to increase the reliability of findings;
 - Exploring alternative ways of gauging public opinion on sentencing for sex offences;
 - Opportunities for partnering with other funders to pursue this research; and
 - If current sentence type and length for sex offences are not considered appropriate, advice on how this should be addressed.

In May 2013, the Council released a research paper, *Sexual Offence Sentencing in Tasmania* and a Consultation Paper. The Research Paper addressed Terms of Reference One to Four. The Consultation Paper was released for the purpose of gauging key Tasmanian stakeholder opinion and public opinion on sentencing for sex offenders as required by Terms of Reference Four and Five.

The Research Paper provided preliminary advice on sentencing patterns for sex offences and considered whether current sentence types and lengths for sex offences were appropriate. The Research Paper examined sentencing practices for rape, aggravated sexual assault, indecent assault, maintaining sexual relationship with a young person and sexual intercourse with a young person. The Research Paper built on the 2008 Tasmanian Law Reform Institute (TLRI) report on Sentencing, which had examined sentencing for the offence of rape. The preliminary advice of the Council was that while sentencing for sex offences in Tasmania was lower than in other jurisdictions, this did not mean that sentencing should become harsher for these crimes. The Council indicated that higher imprisonment rates did not mean a reduction in sexual offending would

result and neither would they affect public confidence levels in the criminal justice system or sentencing. The Council's preliminary advice highlighted the need to take into account informed public opinion and to consider all the purposes of sentencing in making an assessment of the appropriateness of the sentence. It also pointed to the need to consider the ranking of seriousness and severity of offences and the relativities between sentences (ordinal proportionality). In other words, that sentences for sex offenders need to be considered in the context of other offences. These matters are addressed in this Final Report.

A Consultation Paper sought to gauge public opinion and the opinion of key stakeholders in relation to the sentencing for sex offences. The Consultation Paper provided information about the number of custodial sentences imposed and the sentencing range for several sexual offences (rape, maintaining a sexual relationship with a young person, sexual intercourse with a young person, aggravated sexual assault and indecent assault) as well as comparator offences (armed robbery, causing grievous bodily harm, causing death by dangerous driving). It then provided sentencing vignettes based on decided cases in Tasmania and sought feedback on the appropriateness of sentencing for the various offences. The Council received 11 submissions that addressed the appropriateness of sentencing with all respondents considering that sentencing practices for sex offences were too lenient (at least for some offences). In addition, as part of its consultation, the Council conducted two forums held with representatives of the legal community, the police and victims' organisations. Most participants expressed the view that no particular issues arose in relation to current sentencing practices for sexual offences in Tasmania.

ISSUES ADDRESSED IN THIS FINAL ADVICE

Based on the Terms of Reference and the consultation process undertaken by the Council, there are two key concerns addressed in this Final Advice: (1) the appropriateness of the current sentence type and length for sex offences in Tasmania; and (2) advice on how current sentencing practices may be changed if it is decided that sentencing for sex offences is not appropriate.

The appropriateness of current sentence type and length for sexual offences

A key focus of this Final Advice and the deliberations of the Council has been the assessment of the appropriateness of current sentence type and length for sex offences in Tasmania. The assessment of the appropriateness of sentencing practice is problematic, given that it is difficult to determine the criteria against which this is to be assessed. As a result, the Council has approached the assessment of the appropriateness of sentencing for sexual offences from multiple perspectives through:

- **an analysis of sentencing current trends for sexual offences.** This is addressed in Chapter Three, which sets out the current sentencing patterns for sexual offences in Tasmania. This chapter addresses Term of Reference One, summarises the data contained in the Research Paper and extends this previous research to include sentences imposed for sexual offence convictions to 2014. In understanding and assessing the sentencing practice of the courts, any assessment of appropriateness needs to consider the specific details of the cases and not focus on statistical data alone. Accordingly, this Advice examines the sentencing practice of the Supreme Court in both qualitative and quantitative terms.
- **a statistical comparison between the sentences for sexual offences imposed in Tasmania and in other states.** This addresses Term of Reference Three and is contained in Chapter Four. This chapter compares sentencing for sexual offences in Tasmania with sentencing for sexual offences in other jurisdictions. While this is one way of attempting to assess the appropriateness of current sentencing practices for sexual offences, the Council notes that inter-jurisdictional comparisons are problematic. Australian criminal law is not uniform and offence definitions vary between jurisdictions. In addition, sentencing laws are not uniform and there are differences in the sentencing options that are available, in the non-parole periods and parole eligibility provisions (difficulties that are compounded by the use of global sentencing in Tasmania). There are also differences with respect to which offences are dealt with summarily and in higher courts and jurisdictional differences exist in relation to prosecution practices.
- **an examination of the relativities of the sentences imposed for different offences — in Tasmania as well as in other jurisdictions — to understand the position of sexual offences on the penalty scale relative to other offences.** This addresses Term of Reference Two and is contained in Chapter Four.

- **an analysis the comments on passing sentencing for sex offences in Tasmania assessed according to the principles of sentencing.** This was an issue raised in the Research Paper and is addressed in Chapter Five.
- **an examination of public opinion in relation to the sentences imposed for sex offenders.** Terms of Reference Four and Five require the Council to report on public opinion in relation to sentencing for sex offenders and this is contained in Chapter Six. This chapter reports on the responses to the Consultation Paper, the research findings from the Tasmanian Jury Sentencing Study and other studies that have examined perception of sentencing for sex offenders. It also considers whether the relative ranking of offences by the judiciary (as evidenced by the sentencing data) reflects public opinion on the relative seriousness of offences. The Council notes that increasing sentencing levels is unlikely to alter public satisfaction of sentencing practices as expressed in public opinion polls. Further, research indicates that informed public opinion is more nuanced and that not all sex offenders are viewed with similar abhorrence and that the public is willing to extend leniency to some offenders. In addition, the public does not speak with one voice which means that is not possible to match sentencing practice with public opinion.

The Council acknowledges that advice as to the appropriateness of sentencing for particular offences ultimately requires an intuitive value judgement about what the particular offence is worth and what it is worth in comparison with other offences. However, based on its analysis, it is the Council's view that sentencing levels for sexual offences in some circumstances are not appropriate. This should not be interpreted to mean that the Council is recommending a blanket increase in sentences for all sex offenders. This approach would result in injustice and would not accord with public expectations. Instead, the Council's view is that legislative reform needs to recognise the diversity of circumstances that arise (given the broad offence definitions) and provide the court with discretion to allow this diversity to be taken into account. While there is a general consensus that sexual offences committed by adults against young children, particularly by adults in positions of trust or authority, are particularly serious offences and deserving of severe punishment, not all sexual offences against children fall into this category. There is a distinction 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. This distinction is recognised by the courts and it is the Council's view that this distinction needs to be maintained in sentencing practice.

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

- the sentencing range for rape may be unduly truncated;
- there is not sufficient recognition of the violence inherent in the act of rape in the sentences imposed;
- in relation to aggravated sexual assault involving adult complainants and cases involving young children or adults in a position of care, trust or authority, there needs to be a closer correspondence between sentencing for aggravated sexual assault and rape;
- there should be an incremental increase in the length of sentences 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);
- that 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 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 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 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.

Accordingly the Council's view is that a mechanism needs to be found to provide for an incremental increase in sentencing for sex offences in appropriate cases.

This recommendation does not mean that the Council is suggesting that Tasmania should seek to match more severe sentencing practices in other jurisdictions. Instead the Council is recommending a measured approach. Significantly increasing penalties is unlikely to alter the results of public opinion or victim satisfaction. It may even be counter-productive if it results in fewer pleas of guilty and more trials. In addition, sentencing for sexual offences has to be considered within the context of the sentencing approach and crime rate in each jurisdiction. Tasmania has a low crime rate and this is reflected in relatively lower sentencing for all offences (other than homicide) including sexual offences.

Reforms to address the inappropriateness of sentencing for sexual offences

The Council has identified concerns in relation to the sentencing of sex offences in some circumstances and, as requested in Term of Reference Five, this Final Advice considers options for reform in the event that sentencing for sex offences is not considered appropriate. This is addressed in Chapter Eight. Difficulties arise in relation to the appropriate mechanism to bring about changes to sentencing practice for crimes under the *Criminal Code* (Tas) as there are no graduated penalties and instead a general maximum penalty of 21 years or a fine or both is provided for all offences (other than murder and treason). Accordingly, in making its recommendations, the Council is mindful that whatever approach is adopted to allow changes to be made in the sentencing practices for sex offences is likely to provide a model for subsequent sentencing reforms in other areas under the *Criminal Code* (Tas).

As a means of addressing the appropriateness of sentencing for sex offences, the Council has identified two broad approaches: (1) to change to the penalty provisions for sex offences as a response to concerns that the sentence length and type currently imposed by the Supreme Court are inappropriate; and/or (2) to make other legislative changes that provide for a more nuanced response to sex offenders and to address specific areas of concern identified by the Council.

Possible changes to penalty provisions for sex offences in Tasmania include the introduction of: (1) graduated maximum penalties; (2) guideline judgments; (3) baseline sentencing; (4) mandatory penalties; (5) mandatory non-parole periods; and (6) presumptive non-parole periods. The Council considers that only two options are worthy of further consideration — the introduction of guideline judgments and the introduction of a presumptive non-parole period scheme. Both these models involve less restriction of the court's sentencing discretion than the other options canvassed and are consistent with the

Council's view that courts should have the necessary discretion to allow the diversity of circumstances to be taken into account. Accordingly, the Council makes recommendation that these options be further explored.

Guideline judgments involve the issue of sentencing guidelines by the courts that provide guidance to the individual sentencer. These can range from statements of general principle to more specific indication of the particular factors to be taken into account or given particular weight. Guideline judgments can be used to increase the severity of sentences and are aimed at increasing public confidence by addressing issues such as transparency and consistency. Sentencing 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 the imposition of sentence in the diverse circumstances that arise. It is the Council's view that there is merit in exploring the introduction of a guideline judgment scheme in Tasmania and considers that it is necessary for additional research to be conducted to develop a Consultation Paper containing possible models for such a scheme suitable for a relatively small jurisdiction such as Tasmania.

Presumptive non-parole period schemes involve a legislative signal to the courts in relation to the length of time that an offender should spend in prison before being eligible for release on parole. These schemes also involve a less restrictive narrowing of the court's sentencing discretion than mandatory sentencing but still place some restriction on the discretion of a court to impose sentence. These schemes can be divided in two broad categories: (1) defined term schemes (as operates with the standard non-parole period scheme in New South Wales), which sets the presumptive non-parole period as a non-parole period that an offender should serve in prison (for example, two years); and (2) a standard percentage scheme (as operates in South Australia and the Northern Territory), which defines the presumptive non-parole period as a set proportion of the sentence (for example, 70%).

Although concerns have been identified about presumptive non-parole schemes, the Council considers that, in view of the difficulties in providing a mechanism for increasing sentencing levels in Tasmania, a presumptive non-parole period scheme may be a means for Parliament to provide a distinct signal to the courts about sentencing levels and may be an acceptable compromise between mandatory sentencing and unfettered judicial discretion. Although the standard percentage scheme appears a simpler model, the Council's view is that a scheme based on the New South Wales model is preferred. This is because a defined term scheme creates a means for Parliament

to provide a distinct numerical signal to the court that sentencing levels should be increased, while at the same time allowing courts to use the prescribed presumptive non-parole period as a guidepost in the exercise of the sentencing discretion (rather than providing a starting point or a non-parole period that must be applied other than in exceptional circumstances).

The introduction of a presumptive non-parole scheme is not without difficulty and there are a number of issues to be resolved including: (1) the offences to be initially included in the scheme; (2) the procedure for including additional offences within the scheme; (3) the mechanism for setting the presumptive non-parole period; (4) a reconsideration of the relationship between the imposition of the total sentence and the non-parole period; and (5) the interaction of the presumptive non-parole scheme with global sentencing. It would also be necessary to address the implications of such a scheme on current sentencing practice (for example, top down or bottom up sentencing). This will require additional research and consultation with stakeholders.

Increased penalty provisions or mandatory sentencing are not the only responses to concerns in relation to the sentencing practice of the courts for sex offenders. There is scope to make changes to sentencing practice within the current sentencing framework in Tasmania to better address concerns in relation to the sentencing for sex offenders. These options include: (1) the introduction of statutory restrictions imposed on the principle of proportionality, (2) the introduction of civil preventive orders, and (3) amendments to the *Criminal Code* (Tas) and/or the *Sentencing Act 1997* (Tas). These amendments could include the introduction of aggravated offences, the renaming of the offence of maintaining a sexual relationship with a young person to that of 'persistent sexual abuse', the removal of good character as a mitigating factor and the listing of aggravating and mitigating factors for sex offences. In addition, more targeted responses to recidivism and concerns about community protection could be made through the use of post-sentence supervision and detention orders for serious recidivist offenders.

The Council's view is that amendments should be made to the *Criminal Code* (Tas) to create the **aggravated offence** of aggravated sexual intercourse with a young person and the offence of maintaining a sexual relationship with a young person in circumstances of aggravation. Some of the community dissatisfaction with sentencing for child sex offenders and the problems identified by courts about the reliance on statistical data to ascertain a sentencing range reflect the range of behaviours that those offences encompass. These concerns may be addressed by the creation of greater

specificity in the offence structure under the *Criminal Code* (Tas). This would allow the structure of the criminal law (and accordingly sentencing practice) to better reflect the different circumstances in which sexual offences may be committed, in terms of age of the complainant, the relationship between the offender and the child, and the surrounding circumstances of the offence such as the supply of alcohol or drugs and/or filming of the offence.

The Council's revised structure of sex offences against children would be:

- maintaining a sexual relationship with a young person (*Criminal Code* (Tas) s 125A);
- sexual intercourse with a young person (*Criminal Code* (Tas) s 124);
- maintaining a sexual relationship with a young person in circumstances of aggravation (new offence); and
- aggravated sexual intercourse with a young person (new offence).

Aggravating features should include that:

- 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 supplied the victim with alcohol and/or drugs;
- the offender filmed or recorded the offence.

The Council also recommends the **inclusion of statutory aggravating and mitigating factors** under the *Sentencing Act 1997* (Tas) for sexual offences. The Council's view is that the inclusion of a statutory list would provide more detailed information to the public about the exercise of the sentencing discretion and this may assist in informing the public and so lead to greater public understanding and confidence in the sentencing process. This should apply for all sexual offences and the models in Western Australia and England and Wales indicate the kinds of matters that could be included.

Further, the Council recommends the **removal of good character** as a mitigating factor in cases where the offender used his/her community standing to build trust and obtain access to children. While this reflects the current law, the Council considers that such a provision would serve an important declaratory purpose.

As part of its review of the sentencing of sex offenders, the Council has also examined the **provisions for preventative detention and supervision** that exist in Tasmania. Preventative detention exists under the Sentencing Act 1997 (Tas) s 19, which allows the court to make a dangerous criminal declaration and thereby detaining the offender indefinitely. The provision creates a statutory exception to the principle of proportionality as it allows an offender to be detained in prison after the expiration of the sentence imposed for a particular offence on the basis of the danger that the offender presents to the community. The order is generally made at the time of sentencing. While this is a provision of general application, five of the seven offenders currently detained in Tasmania are sex offenders. In Tasmania, there is currently no provision for preventative supervision in the community beyond the term of an offender's sentence. It is the Council's view that the dangerous criminal legislation has some limitations and should be modernised by the introduction of supervision and detention orders. These orders allow a court to make an order that requires an offender to be supervised under conditions in the community (supervision orders) or to have the period of detention extended (detention orders).

The Council acknowledges that there is a range of criticisms of post release preventative detention and supervision orders. These include that it offends against the principle of proportionality and finality in sentencing, that it amounts to double punishment and that prediction of future risk is problematic. However, the Council's view is that a preventive supervision order scheme would address the lack of supervision currently available post-discharge for dangerous criminals. It may also address community concerns in relation to a very small number of high risk serious sex offenders who, approaching the time of release, present an unacceptable risk of reoffending. It is also preferable to the current approach because the assessment of risk is likely to be more accurate being made closer to the time of release rather than at the time of sentencing (which may be many years prior to the offender's anticipated release).

Recommendations

Chapter 7: The appropriateness of current sentence types and lengths for sex offences: Conclusions

Need for legislative reform to address inappropriate sentencing for sex offenders

Recommendation 1 page 80

Legislative reform is necessary to provide for the measured increase in sentencing for sex offences in appropriate cases.

Chapter 8: Options for reform

Graduated maximum penalties

Recommendation 2 page 83

That graduated maximum penalties should not be introduced into the *Criminal Code* (Tas).

Guideline judgments

Recommendation 3 page 85

That the option of introducing guideline judgments in Tasmania be further explored.

Baseline sentencing

Recommendation 4 page 88

That baseline sentencing should not be introduced in Tasmania.

Mandatory sentencing penalties

Recommendation 5 page 90

That Tasmania should not introduce mandatory sentencing penalties under the *Criminal Code* (Tas) for sex offences.

Mandatory non-parole periods

Recommendation 6 page 91

That Tasmania should not introduce mandatory non-parole periods for sex offences.

Presumptive non-parole periods

Recommendations 7 page 97

That consideration should be given to the introduction of presumptive non-parole periods for sex offences in Tasmania.

Recommendations 8 page 97

That the model for the presumptive non-parole scheme should be based on a defined scheme rather than a standard proportion scheme.

Creation of aggravated offences of aggravated sexual intercourse with a young person and maintaining a sexual relationship with a young person in circumstances of aggravation in the *Criminal Code* (Tas)

Recommendation 9 *page 100*

That the *Criminal Code* (Tas) should be amended to provide for an offence of aggravated sexual intercourse with a young person and an offence of maintaining a sexual relationship with a young person in circumstances of aggravation.

Aggravating features should include that:

- 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 offending involved the offender supplying the victim with alcohol and/or drugs; or
- the offender filmed or recorded the offence.

Rename ‘maintaining a sexual relationship with a young person’

Recommendation 10 *page 101*

That the offence of maintaining a sexual relationship with a young person should not be renamed as persistent sexual abuse of a child.

Amendment to the *Sentencing Act 1997* (Tas) to include aggravating and mitigating factors

Recommendation 11 *page 103*

That the *Sentencing Act 1997* (Tas) should be amended to include a list of aggravating and mitigating factors that apply for sexual offences.

Remove good character as a mitigating factor

Recommendation 12 *page 104*

That a specific provision should be introduced that limits the use of an offender’s good character as a mitigatory factor where that was of assistance to the offender in the commission of the offence.

Preventive detention and supervision orders

Recommendations 13 *page 108*

That the dangerous criminal provisions contained in the *Sentencing Act 1997* (Tas) should be replaced with supervision and detention orders based on the unacceptable risk posed by the offender at the time of release.

Recommendations 14 *page 108*

Alternatively, if Recommendation 13 is not accepted and the dangerous offender provisions in the *Sentencing Act 1997* (Tas) are not replaced, the *Sentencing Act 1997* (Tas) should be amended to include an option of post-discharge supervision through the Parole Board. The legislation should also be clarified so that it is clear that an application can be made at a time other than at the time of sentencing and that there is no requirement for the order to be made by the same judge.

Statutory departure from the requirements of proportionality

Recommendation 15 *page 109*

That provisions that create a statutory departure from the requirements of proportionality at the time of sentencing should not be introduced in Tasmania.

1.

Introduction

I.1 BACKGROUND TO THIS PAPER

In May 2012, the then Attorney-General and Minister for Justice, Brian Wightman requested that the Sentencing Advisory Council provide a report on the current sentencing practices for sex offences in Tasmania and to consider the appropriateness of the current sentence type and length for sex offenders. Advice was sought from the Sentencing Advisory Council as concerns had been raised that sentencing for sexual offences in Tasmania was out of step with sentencing for comparable offences in other Australian jurisdictions and/or community standards and expectations. In May 2013, the Council released a research paper entitled *Sexual Offence Sentencing in Tasmania*, which provided preliminary advice on sentencing patterns for sex offences and considered whether current sentence types and lengths for sex offences were appropriate. The Research Paper built on the 2008 Tasmanian Law Reform Institute (TLRI) report on *Sentencing*, which had examined sentencing for the offence of rape.¹ The Research Paper examined sentencing practices for rape, aggravated sexual assault, indecent assault, maintaining sexual relationship with a young person and sexual intercourse with a young person.

A Consultation Paper was also released in May 2013 to gauge public opinion and the opinion of key stakeholders in relation to the sentencing for sex offences. As part of its consultation, the Council also conducted two forums held with representatives of the legal community, the police and victims' organisations.

I.2 TERMS OF REFERENCE

The following terms of reference were given to the Council:

1. A report of the type and length of sentences for sex offences by reference to sentences imposed by the Tasmanian Supreme Court in the period 1978–2010.
2. A comparison with sentencing in other jurisdictions building on the analysis in the Tasmanian Law Reform Institute's Report on *Sentencing* (June 2008) for the offence of rape against a comparator offence such as armed robbery or grievous bodily harm.
3. Analysis of and commentary on any published statistics on sentences for sex offences in Tasmania compared with other Australian jurisdictions.
4. Preliminary advice on whether current sentence type and length for sex offences are appropriate based on:
Selected key Tasmanian stakeholder opinions on sentencing for sex offenders;
Further analysis of the data collected for the Tasmanian Jury Sentencing Study;
Further analysis of the interviews with jurors in sex offence trials conducted as part of that study; and
Review of national and international research on public opinion in relation to sentencing for sex offences.

¹ TLRI, *Sentencing*, Final Report No 11 (2008).

5. A proposal for a second stage of the Project to include but not necessarily be limited to:
 - Gauging public opinion on sentencing for sex offenders;
 - Extending previous research to include more sex offence trials to increase the reliability of findings;
 - Exploring alternative ways of gauging public opinion on sentencing for sex offences;
 - Opportunities for partnering with other funders to pursue this research; and
 - If current sentence type and length for sex offences are not considered appropriate, advice on how this should be addressed.

The Sex Offence Sentencing Research Paper addressed points One to Four of the Terms of Reference. A *Consultation Paper* was simultaneously released for the purpose of gauging key Tasmanian stakeholder opinion and public opinion on sentencing for sex offenders under points Four and Five of the Terms of Reference.

1.3 SEXUAL OFFENCES

In Tasmania, almost all sexual offences are indictable offences contained in the *Criminal Code (Tas)*.²

The crimes of rape (s 185) and abduction (s 186) are contained in Chapter XX of the *Criminal Code (Tas)* (Rape: Abduction: Stalking). These offences can involve either adult or child victims.

All other sex offences are contained in Chapter XIV (Crimes Against Morality). These offences include child specific sexual offences such as sexual intercourse with a young person (s 124), maintaining a sexual relationship with a young person (s 125A) (called persistent child sexual abuse in some jurisdictions), indecent act with a young person (s 125B) and child pornography offences (such as production and possession of child exploitation material, ss 130–130D). Other offences, such as the offences of aggravated sexual assault (s 127A) and indecent assault (s 127), can be committed against adults and children. However, there are different offence requirements depending on whether the victim is an adult or a child. When the victim is an adult, absence of consent is an ingredient of the offences of aggravated sexual assault and indecent assault. Where the victim 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.³ The exception is where an offender is close in age to the victim and can then rely on similar age consent ‘defences’.⁴

This Report, as with the Research Paper, examines sentencing in the Supreme Court for the following offences:

- rape;
- aggravated sexual assault;
- indecent assault;
- maintaining sexual relationship with young person; and
- sexual intercourse with a young person.

2 There is a summary offence of assault with indecent intent contained in the *Police Offences Act 1935 (Tas)* s 35(3). The offence of indecent assault contained in the Code s 127 can be tried summarily if the accused elects summary proceedings, *Justices Act 1959 (Tas)* s 72(1)(a).

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

4 An offender can rely on consent if: (a) the victim is aged 15 years or older and the offender is not more than 5 years older, or (b) if the victim is aged 12 years or older and the offender is not more than 3 years older, *Criminal Code (Tas)* ss 124(3), 127(2), 127A(2). See discussion in TLRI, *Sexual Offences Against Young People*, Final Report No 18 (2012). The Council recognises that modern technology has created new ways in which victimisation can occur and an area for review of the Tasmanian criminal law could be the way in which the current framework of sexual offences has kept up with changes in technology. However, this is beyond the scope of this report. This issue has recently been considered in Victoria: see Criminal Law Review, Department of Justice, Victoria, *Review of Sexual Offences: Consultation Paper*, (2013) <<http://assets.justice.vic.gov.au/justice/resources/2b77afcd-3c35-4a89-913a-54ced67529c3/reviewofsexualoffencesconsultationpaper2013.pdf>>.

1.4 THE APPROPRIATENESS OF CURRENT SENTENCE TYPE AND LENGTH FOR SEX OFFENCES

In its review of sentencing in Tasmania, the Tasmania Law Reform Institute (TLRI) stated that:

[g]iven the public nature of sentencing it is essential that the sentencing process is a just and fair one. There are two main criteria by which the community will determine whether sentences are just and fair. First, the punishment imposed must be seen as *appropriate* ... Secondly, sentences must be *consistent*.⁵

A key focus of this Report involves an assessment of the appropriateness of current sentence type and length for sex offences. It is beyond doubt that sentencing should be appropriate; however, as observed in the Research Paper, the question of whether sentences for sex offences are appropriate, ‘begs the question, appropriate to what?’⁶ The assessment of the appropriateness of sentencing practice is problematic, given that it is difficult to determine the criteria against which this is to be assessed. The TLRI’s definition of an appropriate sentence was that the sentence was of ‘sufficient severity that it [was] possible to say that a breach of the law, when detected, [was] attended by significant consequences’.⁷ The TLRI considered the appropriateness of current sentencing practice by comparing the severity of sentences in Tasmania with other jurisdictions in terms of the maximum penalty, the proportion of offenders sentenced to imprisonment and the average sentence for rape and the comparator crime of robbery.⁸ The TLRI also considered trends over time in the range and median sentence for rape as a means of assessing appropriateness.⁹

The Council has also approached the assessment of the appropriateness of sentencing for sexual offences from multiple perspectives through:

- an analysis of sentencing trends for sexual offences;
- a statistical comparison between the sentences for sexual offences imposed in Tasmania and in other states;
- an examination of the relativities of the sentences imposed for different offences — in Tasmania as well as in other jurisdictions — to understand the position of sexual offences on the penalty scale relative to other offences;
- an analysis of the comments on passing sentencing for sex offences in Tasmania assessed according to the principles of sentencing; and
- an examination of public opinion in relation to the sentences imposed for sex offenders.

In understanding and assessing the sentencing practice of the courts, while statistical data is useful in providing information about the type and length of sentences imposed for sexual offences, any assessment of appropriateness must also consider the specific details of the cases.¹⁰ Accordingly, this Report examines the sentencing practice of the Supreme Court in both qualitative and quantitative terms.

Despite the Council’s comprehensive approach to the issue of appropriateness, the determination of an appropriate sentence remains problematic due to social context in which the question is asked and the imprecise nature of ‘appropriateness’. This is discussed further in Chapter Seven.

5 TLRI, above n 1, [1.1.2].

6 Sentencing Advisory Council, Tasmania, *Sexual Offences Sentencing in Tasmania*, Research Paper (2013) 38.

7 TLRI, above n 1, [1.12] quoting Australian Law Reform Commission, *Sentencing*, Report No 44 (1988) [26].

8 TLRI, above n 1, [6.26]–[6.2.11].

9 Ibid [6.2.1].

10 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) vii.

1.5 THE PREVALENCE OF SEXUAL ASSAULT IN TASMANIA

Statistics about levels of crime can be obtained from two sources: (1) recorded crime figures based on crimes reported to police and recorded; (2) victim surveys based on information given by the public about their experiences of crime. There are limitations with both sources making the prevalence of sexual assault in Tasmania, as elsewhere, difficult to measure. Underreporting of sexual offences is well-documented in the literature (as are the reasons why complainants may not report or may delay in reporting sexual offences), and many victims of sexual assault do not report to the police.¹¹ This means that these offences are not captured in official records of crime. Victim surveys also may not accurately reflect the prevalence of offending, given that victims may not report or may not recognise the conduct as a crime or there may be barriers to their participation in surveys.¹² Accordingly, the Council does recognise that statistics are likely to be underestimations of rates of sexual violence committed against adults and children. However, this observation is true for every jurisdiction, so recorded crime statistics can be used for comparative purposes even if the absolute levels are problematic.

Recorded crime statistics show that Tasmania has low rates of sexual assault compared to other Australian jurisdictions.

Table 1: Victims of recorded sexual assault by states and territories, 2014

Jurisdiction	Victimisation rate per 100 000	Number of recorded sexual assaults
NT	152.2	373
NSW	109	8192
SA	91.7	1545
Qld	86	4063
WA	75.5	1942
Vic	71.4	4169
ACT	47.4	183
Tas	42	216
Australia	88	20 677

Source: ABS (2014)¹³

The relatively low rate of sexual violence in Tasmania is also reflected in the victim surveys, although the difference is not as marked. The Australian Bureau of Statistics' (ABS) Personal Safety Survey asked respondents if they had experienced sexual assault in the last 12 months and the data indicated that 0.9% of the female Tasmanian population (compared to the 0.7% Victoria, 1% South Australia and Western Australia, 1.1% Northern Territory and New South Wales, 1.2% Queensland and the ACT 1.8%) had experienced sexual assault in this period.¹⁴

11 Australian Law Reform Commission, *Family Violence — A National Legal Response*, Report 114 (2010) [24.15], Chapter 26.

12 Ibid [24.19].

13 Australian Bureau of Statistics (ABS), *Recorded Crimes — Victims, Australia, 2014* (2015), Cat 4510.0.

14 ABS, *Personal Safety, Australia 2012* (2013), Cat 4906.0. It is noted that data was not provided for males in Tasmania.

There is less information about the prevalence of child sexual abuse. It is recognised that there is no conclusive research about the incidence of child sexual abuse in Australia.¹⁵ The ABS data on recorded crime does not specifically provide data on the prevalence of child sexual assault but it does show that a majority of victims of recorded sexual assault in Tasmania are young people, with 68.4% of victims aged 19 and under and, overall, just over a third of all victims of recorded sexual assault aged 14 and under (35.6%). The Personal Safety Survey indicated a 12% prevalence of sexual abuse experienced by girls before the age of 15 and 4.5% for boys.¹⁶ However, it does not provide jurisdiction specific information about sexual abuse experienced under the age of 15. In a meta-analysis of global prevalence rates for child sexual abuse, the prevalence rates for Australia were 21.5% for females and 7% for males.¹⁷ Other research has identified a prevalence rate of between 1–8% for penetrative abuse and 6–16% for non-penetrative abuse for males and a prevalence rate of between 4–12% for penetrative abuse and 14–36% for non-penetrative abuse for females.¹⁸

Contrary to the perception of the sex offender as the predatory stranger,¹⁹ more than 90% of female victims and 80% of the male victims knew the perpetrator, with more than half of sexually abused girls (52%) and approximately one-fifth (21%) of sexually abused boys being abused by fathers, step-father and other male relatives (including siblings).²⁰ In addition, 'a considerable proportion of sex offending is perpetrated by other children or adolescents, including members of the victim's family',²¹ with recorded crime data indicating that juveniles are responsible for 18% of recorded sex offending.²² In Tasmania, in the period between April 2011 and April 2012, 'problem sexual behaviour and/or sexually abusive behaviour' was the presenting issue for 88 clients of the Sexual Assault Support Service aged between three and 16.²³ International research has indicated 'that between 40 to 90% of sexual offending against children is committed by other children and young people'.²⁴ In addition, research suggests that, contrary to the perception of father-daughter sexual abuse to be the most common form of child sexual abuse occurring in familial relationships, sibling sexual abuse occurs at a similar or higher rate.²⁵

The ABS data also show that there has been a slight increase in reported incidence of sexual assault across Australia over the period 2010–14 (from 85.6 per 100 000 of population to 88 per 100 000 of population). In Tasmania, the prevalence of sexual assault (as reflected in reported crime data) has increased in this period from a rate of 34.8 per 100 000 of population to 42 per 100 000. However, this is not necessarily attributed to higher rates of offending but rather is likely to reflect increased reporting rates for sexual offending in this period. This is supported by the findings of the Personal Safety Survey, where there had been a slight decrease between 2005 and 2014 in persons in Australia who had experienced sexual assault in last 12 months.²⁶

15 Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report Vol 1* (2014) 94.

16 See summary in *ibid* 98.

17 Marije Stoltenborgh, Marinus van IJzendoorn, Eveline Euser and Marain Bakersman-Kranenburg, 'A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence Around the World (2011) 16 *Child Maltreatment* 79.

18 Rhys Price-Robertson, 'Fathers with a History of Child Sexual Abuse: New Findings for Policy and Practice' (Australian Institute of Family Studies, 2012).

19 Kate Warner and Lorana Bartels, 'Juvenile Sex Offending: Its Prevalence and the Criminal Justice Response' (2015) 38 *University of New South Wales Law Journal* 48, 48.

20 Antonia Quadara, Vicky Nagy, Daryl Higgins and Natalie Siegel, 'Conceptualising the Prevention of Child Sexual Abuse' (Australian Institute of Family Studies, Research Report No 33, 2015) [A1.1].

21 Warner and Bartels, above n 19, 48.

22 *Ibid* 73. See also Sexual Assault Support Service, *Responding to Problem Sexual Behaviour and Sexually Abusive Behaviour in Tasmania*, Position Paper (2014) 11–12.

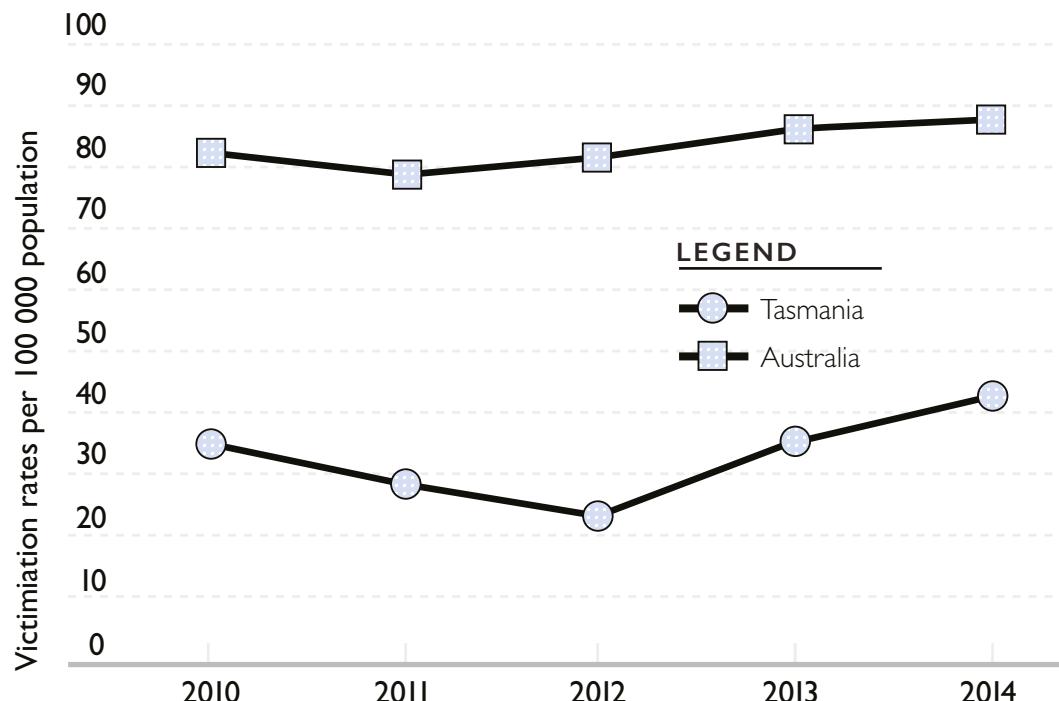
23 Sexual Assault Support Service, above n 22, 11–12.

24 *Ibid* 11 citing Jan Grant, David Indermaur, Jenny Thornton, Gillian Stevens, Christabel Chamarette and Amie Halse, 'Intrafamilial Adolescent Sex Offenders: Psychological Profile and Treatment' (Trends and Issues In Crime and Criminal Justice No 375, Australian Institute of Criminology, 2009) 1.

25 Quadara, Nagy, Higgins and Siegel, above n 20, [A2.4]. The authors note that 'some studies suggest that up to 43% of intra-familial abuse is between siblings'.

26 ABS, above n 14.

Figure 1: Victims of recorded sexual assault Tasmania and Australia 2010–14, victimisation rates per 100 000 population



Source: ABS (2014)²⁷

1.6 SEXUAL ASSAULT IN THE CRIMINAL JUSTICE SYSTEM

In seeking to address the needs of victims and broader societal concerns about sex offenders through changes to sentencing policy, a key point is that sentencing is only a small (if highly visible) component of the response of the criminal justice system to sexual violence. As noted by Freiberg, Donnelly and Gelb in relation to child sexual abuse:

[a] criminal justice response to CSA entails a long and difficult process of reporting, detection, prosecution, trial and disposition. Sentencing is one of the final stages of this process, however the number of people convicted and sentenced of CSA represents a very small proportion of those who commit such offences. Attrition rates are very high and accordingly very few offenders are held to account, and only a small number of victims can be vindicated through this process.²⁸

The inadequacy of the criminal justice system's response to victims of sexual assault has been well documented and the law has struggled to appropriately address the needs of the victim in a process designed to ensure a fair trial and just sentencing for an offender.²⁹ In recent decades, however, there have been attempts to better accommodate the interests of victims in the criminal justice system.³⁰ While there is not a formal role for victims in the prosecution or sentencing processes, there are a number of mechanisms that allow for the involvement of the victim. A Serious Crime Victim Assistance Service (offered through the Office of the Director of Public Prosecution) and a Victims Support Service have been established to provide assistance to victims and provide advice about the progress of the case. In addition, it is the policy of the Director of Public Prosecutions to take the views of the victim into account in determining whether to discontinue a prosecution or to agree to plea negotiation.³¹ At the sentencing stage, a victim impact statement can be

27 ABS, above n 13.

28 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) 1. See also, Australian Law Reform Commission, above n 11, Ch 26; Brigitte Bouhours and Kathy Daly, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' in Michael Tonry (ed), *Crime and Justice: A Review of Research*, 2010; Jacqueline Fitzgerald, 'The Attrition of Sexual Offences from the New South Wales Criminal Justice System' (*Crime and Justice Bulletin* No 92, NSW Bureau of Crime Statistics and Research, 2006); Denise Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004).

29 Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending: Pathways to Better Outcomes for Victims, Offenders and the Community*, (2014) 13.

30 TLRI, above n 1, [4.1.1].

31 Interview with Daryl Coates, Acting Director of Public Prosecutions, 24 March 2015.

used as a mechanism for the court to be informed about the effect of the crime on the victim so that this can be taken into account in the sentencing process.³² Discussion at the forums held with representatives of the legal community, victims' organisations and the police stressed the need for the victim to feel that the effect of the offending on them has been recognised and the need to ensure that victims have an understanding or at least true expectations as to what to expect from the sentencing process. It is the Council's view that effective victim services and a formal process to inform and involve the victim in decision making are crucial and considers that these steps are important initiatives to increase victim satisfaction with the criminal justice response to sexual violence.³³

1.7 SCOPE OF THIS PAPER

This Final Advice builds on the Research Paper and Consultation Paper, and includes further information and research arising from:

- submissions from selected key Tasmanian stakeholders concerning opinions on sentencing for sex offenders.
- extending previous research to include more sex offence trials to increase the reliability of findings. This has taken account of the period 2012 to 2014.
- an assessment of first instance and appeals approaches to the sentencing purposes under the Sentencing Act 1997 (Tas).
- advice and recommendations based on an assessment of the appropriateness of current sentence type and length for sex offences.

Chapter Two sets out the current sentencing framework in Tasmania, with a focus on sentencing for sexual offences. It outlines the current sentencing options in Tasmania, the purposes of sentencing, and the factors relevant to the imposition of sentences.

Chapter Three examines current sentencing patterns for sexual offences in Tasmania. It summarises the data contained in the Research Paper and extends this previous research to include sentences imposed for sexual offence convictions to 2014.

Chapter Four compares sentencing for sexual offences in Tasmania and sentencing for sexual offences in other jurisdictions and sentencing for sexual offences in Tasmania and sentencing for comparator offences in Tasmania as a means to analyse the appropriateness of sentencing for sexual offences in Tasmania.

Chapter Five uses the purposes of sentencing as a measure of the appropriateness of sentencing for sexual offences. It examines the decisions of the Supreme Court and Court of Criminal Appeal in the context of the principles of sentencing.

Chapter Six uses several methods to measure public perception of sentencing for sex offences: (1) the responses to the Consultation Paper, (2) the Tasmanian Jury Sentencing Study and (3) other studies that have examined perceptions of sentencing of sex offenders. Chapter Six also considers whether the relative ranking of offences by the judiciary (as evidenced by the sentencing data) reflects public opinion on the relative seriousness of offences.

Chapter Seven draws together the findings of the analysis in the previous chapters and contains advice on the appropriateness of sentences for sex offences in Tasmania.

32 Freiberg, Donnelly and Gelb, above n 28, 74–76.

33 It is noted that some people prefer the word 'survivor' to 'victim'. In this report, the term 'victim' is used as it reflects the nomenclature of the support services in Tasmania.

Chapter Eight identifies and discusses a number of options for reform.

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).³⁴ It also does not consider other issues associated with children and adolescents displaying problem sexual behaviour and/or sexually abusive behaviour. This issue has been considered by the Sexual Assault Support Service (Tas) in its Position Paper, *Responding to Problem Sexual Behaviour and Sexually Abusive Behaviour in Tasmania*.³⁵

34 It is noted that the response of the criminal justice system to juvenile sex offenders (including sentencing of such offenders) has not generally been addressed in the literature and is an area that requires more research: see Warner and Bartels, above n 19.

35 Sexual Assault Support Service, above n 22.

2.

Current sentencing framework in Tasmania

This chapter sets out the current sentencing framework in Tasmania, with a focus on sentencing for sexual offences. It outlines the current sentencing options in Tasmania, the purposes of sentencing, and the factors relevant to the imposition of sentences.

2.1 SENTENCING OPTIONS

In Tasmania, the sentencing options that are available for the courts in sentencing adult offenders (and young offenders sentenced as adults) are set out in the *Sentencing Act 1997 (Tas)*, s 7:

A court that finds a person guilty of an offence may, in accordance with this Act and subject to any enactment relating specifically to the offence —

- (a) record a conviction and order that the offender serve a term of imprisonment; or
- (ab) if the court is constituted by a magistrate, record a conviction and make a drug treatment order under Part 3A in respect of the offender; or
- (b) record a conviction and order that the offender serve a term of imprisonment that is wholly or partly suspended; or
- (c) record a conviction and, if the offender has attained the age of 18 years and the offence is punishable by imprisonment, make a community service order in respect of the offender; or
- (d) with or without recording a conviction, make a probation order in respect of the offender if the offender has attained the age of 18 years; or
- (e) record a conviction and order the offender to pay a fine; or
- (ea) in the case of a family violence offence, with or without recording a conviction, make a rehabilitation program order; or
- (f) with or without recording a conviction, adjourn the proceedings for a period not exceeding 60 months and, on the offender giving an undertaking with conditions attached, order the release of the offender; or
- (g) record a conviction and order the discharge of the offender; or
- (h) without recording a conviction, order the dismissal of the charge for the offence; or
- (i) impose any other sentence or make any order, or any combination of orders, that the court is authorised to impose or make by this Act or any other enactment.

In view of the seriousness of most sex offences some sentencing options, such as fines or community service orders and probation are not commonly used as the most serious sanction imposed.³⁶ Most sentences for sex offences result in custodial sentences, whether immediate imprisonment or fully or partly suspended sentences. This is discussed further at [3.2]–[3.3].

³⁶ See Figure 2. It is noted that drug treatment orders are not available for offenders found guilty of a sexual offence, *Sentencing Act 1997 (Tas)* s 27B(1)(a)(i).

2.2 PENALTIES FOR PARTICULAR OFFENCES

The *Criminal Code* (Tas) does not contain a legislative prescribed hierarchy of offences as indicated by graduated penalties (as exists in other jurisdictions). There is no statutory indication of the relative seriousness of the different offences contained in the *Criminal Code* (Tas), as the general maximum penalty that is provided for all offences (other than murder and treason) is imprisonment for 21 years, or a fine, or both.³⁷ However, this does not mean that offenders convicted for any indictable offences under the *Criminal Code* (Tas) will receive the maximum penalty as the court (rather than the legislature) has established a range of sentences for different offences:

[t]he court has for itself placed the various crimes under the Code into different categories of gravity and for itself as guided by the collected wisdom of judges here and elsewhere has set ranges of sentences appropriate to various crimes according to their gravity.³⁸

This means that 'sentencing is not arbitrary [and that] it is possible ... to identify relatively specific ranges for sentences'.³⁹ Sex offences range across a spectrum of seriousness. Rape, aggravated sexual assault and maintaining a sexual relationship with a young person are offences typically at the most serious end of the range. However, even within offences, there is a range of factors that may make an offence more serious or factors personal to the offender that mitigates the sanction imposed. The range of sentences imposed for sexual offences in Tasmania is discussed in Chapter Three.

2.3 THE SENTENCING DISCRETION

The court has a very wide discretion in imposing sentences on an offender, and this is considered essential to ensure 'justice in the individual case, so there is flexibility for the sentence to respond to the particular facts'.⁴⁰ In imposing a sentence, a number of matters may be taken into account:

- the facts of the case;
- the general aims of punishment;
- the offence (gravity of crime, the harm done, the prevalence of the offence, the degree of participation of the offender);
- the offender's personal characteristics (age, sex, character, mental health, family and employment and general social history);
- the offender's response to the charge (guilty plea, remorse, assistance to authorities);
- effect of the sanction on the offender or others;
- other factors relating to the investigatory or court processes (delay, unfair police practices, availability of correctional or treatment services); and
- whether there is room for mercy.⁴¹

The process by which courts determine an appropriate sentence is termed 'instinctive' or 'intuitive' synthesis, which means that all considerations relevant to the instant case are simultaneously unified, balanced and weighed by the sentencing judge.⁴² However, despite this flexibility, there is authority to suggest that the 'principle of proportionality prevails, providing an overall limit on the severity of the sentence'.⁴³

37 *Criminal Code* (Tas) s 389. The maximum penalty for murder and treason is life imprisonment, *Criminal Code* (Tas) ss 56, 158.

38 Lovegrove [1961] TAS SR 106 (Burbury CJ) approved by Cox CJ in Allen [1999] TASSC 112, [3].

39 Mirko Bagaric and Richard Edney, *Sentencing in Australia*, (Thomson Reuters, 2nd ed, 2014) [3.10].

40 TLRI, above n 1, [1.13].

41 This list is taken from Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson, 3rd ed, 2014) [3.05].

42 Wong (2001) 2007 CLR 584; Markarian [2005] HCA 25; Hili [2010] HCA 45.

43 Kate Warner, *Sentencing in Tasmania* (Federation Press, 2nd ed, 2002) [3.205]. Proportionality is discussed at [2.3.2].

2.3.1 Sentencing purposes

There is no explicit statement in the Sentencing Act 1997 (Tas) setting out the purposes of sentencing; however, this is 'adverted to in the purposes of the Act'.⁴⁴ The Sentencing Act 1997 (Tas), s 3(b) specifies that a purpose of the Act is 'the protection of the community as a primary consideration in sentencing offenders'. Section 3(e) states the purpose of the Act is to help prevent crime and promote respect for the law through three primary purposes of sentencing: specific and general deterrence, rehabilitation and denunciation.⁴⁵ This is consistent with the approach of the Supreme Court prior to the introduction of the Sentencing Act 1991 (Tas), where the Supreme Court considered 'deterrence, prevention, rehabilitation and retribution' as key principles in the sentencing process.⁴⁶ Other purposes specified in the Sentencing Act 1997 (Tas) include consistency in sentencing, and fairness in sentencing procedures and to recognise the interests of the victims.⁴⁷

In Chapter Five, the imposition of sentences for sex offenders in Tasmania is assessed against the sentencing purposes, as a measure of the appropriateness of sentencing for sexual offences.

2.3.2 Proportionality

A key factor in sentencing in Australia is proportionality. The common law principle of proportionality is an underlying limiting principle that restricts the penalty that the court can impose, requiring that the sentence must fit the crime.⁴⁸ Proportionality requires that judges and magistrates do not impose a sentence 'exceeding that which is commensurate to the gravity of the offence for which the offender has been convicted'.⁴⁹ The gravity of the offence is assessed in light of the 'objective circumstances' of the case, which includes the statutory penalty, the degree of harm caused, the way in which the offence was committed and the offender's culpability.⁵⁰ In the context of sexual offences, there is a presumption of harm to the victim in relation to child sex offences⁵¹ and the harm of sexual violation has been acknowledged for offences against adults.⁵² It is recognised that '[t]he violation on an individual's sexual integrity is a serious infringement. The harm often extends to long term psychological damage to the victim'.⁵³ The culpability of the offender is concerned with his or her mental state.⁵⁴ Circumstances of the offender that can influence questions of culpability include intellectual disability,⁵⁵ personal instability,⁵⁶ or the offender's own abuse as a child.⁵⁷ Youth and immaturity also bear upon culpability.⁵⁸ A psychological condition will not necessarily reduce culpability,⁵⁹ but where psychiatric or psychological illness reduces a person's moral reasoning and judgment their culpability is lessened.⁶⁰

While it is clear that a just and appropriate sentence should be a proportionate sentence, determining a proportionate sentence for any particular offence or offender can be difficult. Further, in the context of sex offenders and violent offenders, there have been statutory exceptions to the principle of proportionality. These are discussed at [8.2.3]—[8.2.4].

44 Ibid [3.202].

45 See ibid.

46 See ibid.

47 Sentencing Act 1997 (Tas) s 3; *Spaulding v Lowe* [1985] TASSC 4 (19 February 1985), [24] (Underwood J).

48 *Veen v The Queen (No 1)* (1979) 143 CLR 458; *Veen v The Queen (No 2)* (1998) 164 CLR 465; *Hoare v The Queen* (1989) 167 CLR 348.

49 Warner, above n 43, [3.303].

50 Freiberg, above n 41, [3.55].

51 *Clarkson v The Queen; EJ A v The Queen* (2011) 212 A Crim R 72; *R v CV* [2013] ACTCA 22, [24]; *R v Cunningham* [2006] NSWCCA 176, [53]; *VIM v The State of Western Australia* [2005] WASCA 233, [294]; TLRI, above n 4, [1.3.6].

52 *Farrell*, Court of Criminal Appeal, 36/1996, 5 (Wright J).

53 Mirko Bagaric and Richard Edney, *Australian Sentencing*, (Westlaw AU, n.d.) [900.1600].

54 Freiberg, above n 41, [3.55].

55 *State of Tasmania v M J C*, Wood J, 24 February 2010 (Sentence); *State of Tasmania v G*, Crawford CJ, 24 February 2010 (Sentence); *State of Tasmania v O*, Blow J, 26 May 2010 (Sentence); *State of Tasmania v Gallagher*, Porter J, 29 October 2013 (Sentence).

56 *Tasmania v B*, Porter J, 10 December 2008 (Sentence).

57 *B v Director of Public Prosecutions* [2005] TASSC 16, [28].

58 *G v R* [1986] TASSC 19 (4 April 1986), [54]; *State of Tasmania v HLR*, Evans J, 18 August 2008 (Sentence).

59 *State of Tasmania v TJB*, Wood J, 3 October 2012 (Sentence).

60 *State of Tasmania v Martin*, Porter J, 29 November 2011 (Sentence).

2.3.3 Aggravating and mitigating factors

In determining the appropriate sentence, a court will consider a number of factors that may aggravate or mitigate a sentence. Aggravating factors are those that 'increase the harm caused by the offence or the culpability of the offender'⁶¹ whereas mitigating factors have the opposite effect — decreasing the 'harm or culpability, and consequently decrease the proportionate punishment that needs to be imposed'.⁶²

In *Clarkson v The Queen; EJA v The Queen*,⁶³ a case concerning several child sex offences, the Victorian Court of Appeal, drawing upon two Western Australia cases,⁶⁴ identified the following relevant factors:

- the relative ages of the offender and the victim;
- whether the offender was in a position of trust or authority with respect to the victim which facilitated the commission of the offence;
- the situation of the victim, and the degree to which she/he was taken advantage of; and
- what the evidence shows about harm already suffered or likely to be suffered.⁶⁵

Other factors, drawn from Tasmania and other jurisdictions, include:

- the young age of the child when the abusive conduct began,⁶⁶ particularly pre-pubescent;
- the offender initiating contact with the victim and grooming the victim;
- the use of alcohol or drugs to loosen inhibition;
- penile rape;⁶⁷
- bearing a child to the offender,⁶⁸ pregnancy or abortion;
- number of acts;⁶⁹
- long term harm to the victim;⁷⁰
- the use of physical violence;⁷¹
- the type of sexual contact with the victim — penetration being the most serious;
- length of time over which the conduct occurred;
- time between offence and conviction;
- breach of trust;
- predatory as opposed to opportunistic behaviour;
- attempting to keep the complainant quiet about the incident, blackmailing, or manipulation;⁷²
- proven absence of consent in the case of child sex offences;⁷³
- the number of victims;⁷⁴
- submissiveness as opposed to willingness of the complainant;
- the degree of persuasion used by the offender; and
- the disparity in ages — the greater the more egregious as a general rule.

61 Freiberg, above n 41, [3.10].

62 Ibid [3.10].

63 *Clarkson v The Queen; EJA v The Queen* (2011) 212 A Crim R 72.

64 *Riggall v Western Australia* (2008) 37 WAR 211; *Deering v Western Australia* [2007] WASCA 212.

65 *Clarkson v The Queen; EJA v The Queen* (2011) 212 A Crim R 72, [42].

66 *R v SAG* 147 (2004) 147 A Crim R 301, [19].

67 Ibid.

68 Ibid.

69 See *Tasmania v Vercoe*, 8 September 2005 (Sentence) for an application of numerous aggravating factors in an unusual situation.

70 For example, in *R v Daniels* [1999] TASSC 62, [5], the sentencing judge considered that the rehabilitation of the victim post-offence reduced the severity of long-term harm caused by the offence. As a consequence, the sentencing judge reduced the weight given to the degree of long-term harm to the victim.

71 *R v SAG* (2004) 147 A Crim R 301, [19].

72 Ibid.

73 *Clarkson v The Queen; EJA v The Queen* (2011) 212 A Crim R 72, [4], [64]–[65].

74 *R v SAG* (2004) 147 A Crim R 301, [19].

Mitigating factors include:

- lack of harm to the victim;⁷⁵
- the willingness as opposed to the submissiveness of the complainant;
- closeness in age;⁷⁶
- the sexual experience of the complainant;⁷⁷
- a plea of guilty;
- making a confession to police;
- attempts at rehabilitation; and
- a lack of complaint and cooperation with the prosecution on the part of the victim.⁷⁸

These factors help to assess the gravity of an individual offence and to determine the appropriate sentence in each case.

Many of these features are also relevant for sexual offences not involving child complainants. Factors that aggravate include:

- violence;
- a prolonged attack;
- prior convictions for similar crimes;
- where the offence is committed in the presence of others;
- use of threats or pressure to ensure compliance with demands and to ensure subsequent silence;
- degree of harm (physical and psychological);
- offence committed after intrusion into the victim's home;
- a breach of trust;
- careful planning; and
- the victim is very old or very young.⁷⁹

Mitigating factors include:

- a plea of guilty;
- young offenders;
- good character; and
- the circumstances of the rape involving consensual penetration and then the withdrawal of consent.⁸⁰

75 *State of Tasmania v Gallagher*, Porter J, 29 October 2013 (Sentence).

76 For example, cases where the sexual acts were between younger offenders and teenage complainants: *Tasmania v WJB*, Tennent J, 1 July 2009 (Sentence) where there was a 17 year old offender and 13 year old complainant in a consensual and mutual relationship; *Tasmania v Heese*, Crawford CJ, 2 March 2010 (Sentence) where a 33 year old female offender and a 16 ½ year old complainant engaged in a mutual relationship and no offence would have existed if the relationship had been initiated 6 months later.

77 *Tasmania v Bourke*, Crawford J, 10 May 2007 (Sentence), the complainant was close to the age of consent and had 'substantial sexual experience' so that the relationship between the 53 year old offender and the complainant was not one where he had corrupted her, which the sentencing judge took into account. However, this has not always been taken to be mitigating. *State v Broderick*, Tennent J, 19 May 2005 (Sentence), where it was stated that 'your counsel has also referred to the fact the first girl had previous sexual experience. That girl admitted to one previous sexual partner. That factor does not benefit you to any significant degree.'

78 *Tasmania v Shephard*, Crawford CJ, 29 March 2012 (Sentence); *State of Tasmania v LAJ*, Tennent J, 27 June 2008 (Sentence); *State of Tasmania v Opira*, Porter J, 14 December 2011 (Sentence).

79 See Warner, above n 43, [11.403]; Bagaric and Edney, above n 53, [900.2100].

80 See Warner, above n 43, [11.407]–[11.408].

3.

Current sentencing patterns for sexual offences

This chapter sets out current sentencing patterns for sexual offences in Tasmania. It summarises the data contained in the Research Paper and extends this previous research to include sentences imposed for sexual offence convictions to 2014. It provides information on the sentence types and length of sentences imposed for the various sexual offences and considers whether there has been a trend towards more lenient or severe sentencing for sex offenders. The analysis examines sentence length, the use of non-custodial sanctions and the use of suspended sentences. In addition to providing statistical data on the use of imprisonment and the length of imprisonment, this Chapter also examines the case details to understand the use of different sentences for different types of offenders and offences with a view to assessing the appropriateness of the type and length of sentence imposed.

An assessment of the current sentencing patterns provides a measure of offence seriousness based on actual sentencing practice as it captures offence seriousness from the perspective of the judges of the Supreme Court.⁸¹ This allows judgments to be made about whether sentencing for particular offences is appropriate. However, there are limitations in relying on this approach given that ‘factors other than offence seriousness (e.g. prior criminal record) can exert a strong effect on sentence severity’.⁸² In addition, pleas of guilty may influence sentence but a reduction in sentence following a plea of guilty is not a reflection of the judicial view of the seriousness of an offence.⁸³

3.1 METHODOLOGY

The analysis conducted by the Council uses data received from the TLRI 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, where 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, where 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. In other cases, offences are classified as rape, aggravated sexual assault and then indecent assault.

81 Ian MacKinnell, Patrizia Poletti and Matthew Holmes, ‘Measuring Offence Seriousness’ (*Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* No 142, NSW Bureau of Crime Statistics and Research, 2010) 2.

82 Ibid.

83 Sentencing Advisory Council, Victoria, *Sentencing Severity for ‘Serious’ and ‘Significant’ Offences: A Statistical Report* (2011) 6.

In the Research Paper, the Council provided sentencing data for rape (1978–2011), maintaining a sexual relationship with a young person (1995–2011), sexual intercourse with a young person (1978–2011), aggravated sexual assault (1987–2011) and indecent assault (1978–2011). The analysis was typically conducted by comparing ten-year periods (1978–1989, 1990–2000, 2001–11). This Advice refers to that research and also updates that research to include cases from the period 2012–14. It compares the period 1990–2000 with the period 2001–14 and these data include suspended sentences of imprisonment (fully and partly suspended sentences) in the count of custodial sentences to allow comparability with the earlier analysis. This allows trends over time to be identified.

This chapter also presents data for the period 2008–14 to provide information about the current sentencing practices in the Supreme Court. These data allow comparability with comparator offences in Tasmania as well as sentencing practices in other jurisdictions. In relation to the 2008–14 analysis, partly and fully suspended sentences are excluded from the calculation of proportion of custodial sentences and also from sentence lengths. This is done for three reasons:

- (1) to allow comparability with the sentencing data from Victoria and New South Wales;
- (2) to create greater transparency in the sentencing data so that it is clear how many offenders were sentenced to a term of imprisonment that was served in prison; and
- (3) the inclusion of suspended sentences in the data on sentence length distorts the level of punitiveness that sentence length calculations measure.

In this Advice, the data include all sentences on the basis of the principal offence, which is the most serious offence. It includes data (unless otherwise indicated) on sentences for one count of the offence (e.g. one count of rape) as well as global sentences for multiple counts that include at least one count of the principal offence (e.g. one count of rape and one count of aggravated sexual assault). It excludes offenders dealt with under the *Youth Justice Act 1997 (Tas)*.

These data are presented subject to two important caveats:

- (1) while statistics provide a useful guide to the sentencing range, caution is needed in assessing the appropriateness of a sentence on statistics alone as the complexity of the sentencing discretion cannot be appreciated without a full analysis of the cases that make up the sample.⁸⁴
- (2) the number of cases that comprise the sample for any offence may be small and this will affect the reliability of the data.⁸⁵

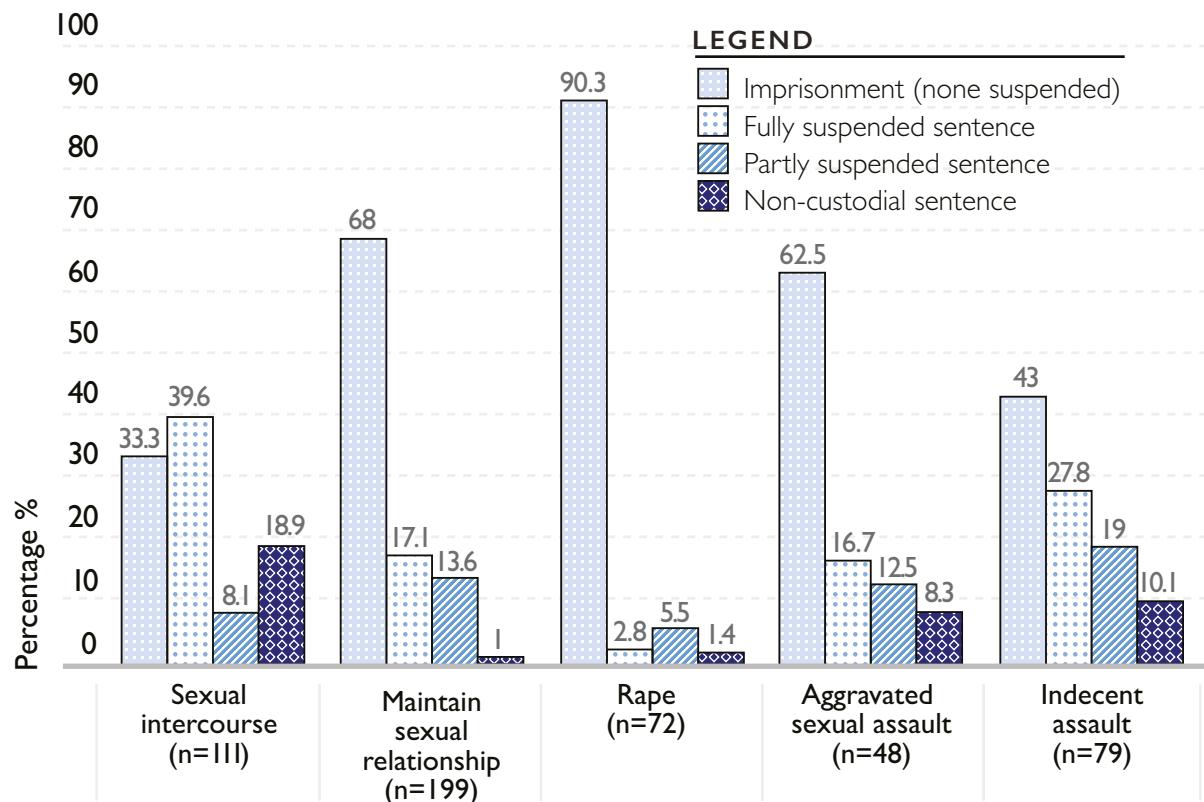
3.2 USE OF SENTENCING OPTIONS

Figure 2 sets out the use of imprisonment for offenders convicted of a sexual offence between 2001 and 2014. Overall, only 7.1% (n=36) of all offenders sentenced for a sexual offence (n = 509) did not receive a sentence of imprisonment (either an immediate custodial sentence or a suspended sentence), with offenders convicted of rape or maintaining a sexual relationship with a young person very rarely receiving a non-custodial sentence. The use of imprisonment for the different offences is discussed in more detail at [3.3].

84 Joint Select Committee on Sentencing of Child Sexual Assault Offenders, Parliament of New South Wales, above n 10, [4.7], [4.9].

85 Ibid [4.10] quoting Sentencing Council, *NSW Penalties Relating to Sexual Assault Offences in New South Wales, Vol 3 (2009)* 7. The TLRI also noted that 'assessing sentencing trends over time is not an easy task where data availability is limited and the jurisdiction is a small one. Differences in offence seriousness in different periods and differences in the definitions of crimes make any conclusions drawn from apparent trends extremely tentative', TLRI, above n 1, [1.2.1].

Figure 2: Sexual offences and sentencing disposition as a proportion of sentences imposed for the offence, Supreme Court, 2001–14



3.3 CUSTODIAL SENTENCES

A custodial sentence includes a term of imprisonment that is served in prison, as well as a sentence of imprisonment that is fully or partly suspended. A suspended sentence is a sentence of imprisonment that is not executed at the time when it is imposed by the court. A fully suspended sentence means that the whole sentence is not activated and the offender is immediately released into the community. A partly suspended sentence means that the offender spends a specified period of time in prison before being released into the community.

Imprisonment is primarily imposed for the purposes of retribution, denunciation, deterrence and community protection. It can potentially serve a rehabilitative purpose, particularly with the availability of a prison based sex offender rehabilitation program.⁸⁶ While the rehabilitative and deterrent effect of imprisonment is not clear, there is research that reports positive outcome for sex offender programs.⁸⁷ Suspension, either fully or in part, is often used as a means of reflecting the less serious instances of an offence or factors particular to the offender that warrant the suspension of the sentence. Suspension is a means of achieving rehabilitative aims⁸⁸ and the imposition of a sentence of imprisonment is said have a symbolic effect of denouncing the crime, while its suspension acts as a specific deterrent created by the threat of imprisonment (the ‘Sword of Damocles’ hanging over the offender’s head).⁸⁹

⁸⁶ See [8.2.6].

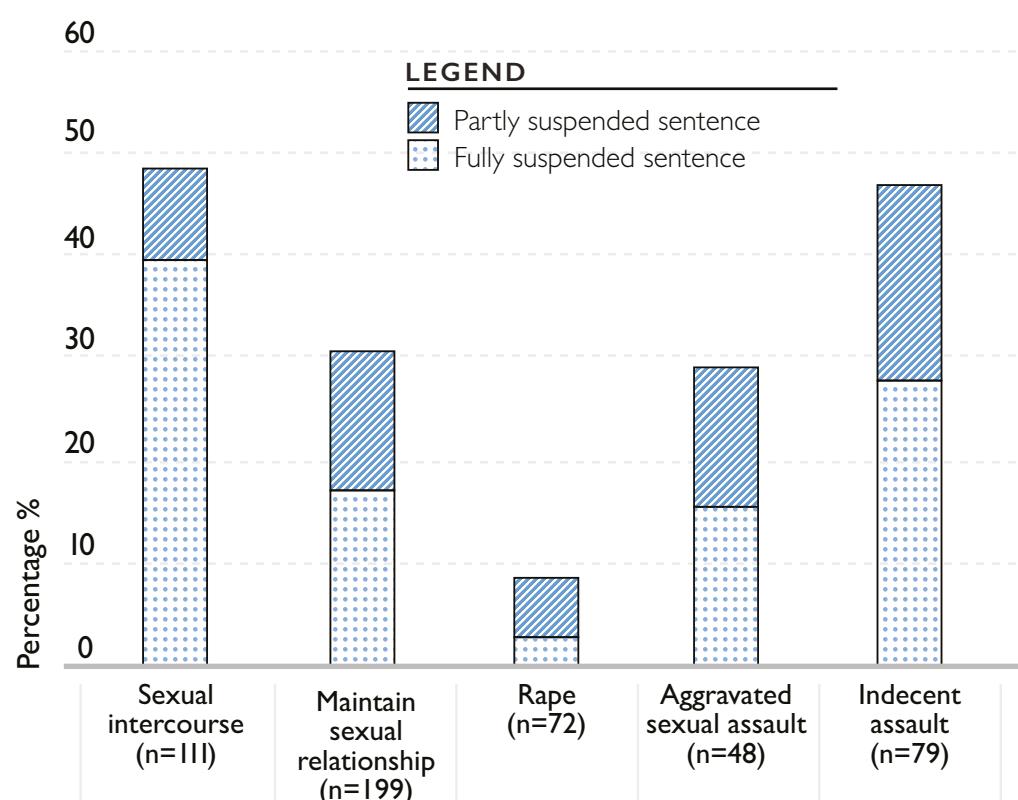
⁸⁷ See Bagaric and Edney, above n 39, [7.65], [7.75], [7.105]. See also Karen Heseltine, Andrew Day and Rick Sarre, ‘Prison-based Offender Rehabilitation Programs: The 2009 National Picture in Australia’ (Research and Public Policy Series No 112, Australian Institute of Criminology, 2011) 14; Gwenda Willis, Tony Ward and Jill Levenson (2014) 26 *Sexual Abuse: A Journal of Research and Treatment* 58, 59. See [8.2.6] for further discussion of the New Directions program, which is the sex offender program operating at Risdon Prison.

⁸⁸ For example, in *IRS v Tasmania* [2013] TASSC 61, [34], the Court considered the previous offences of the applicant and noted that an earlier charge of aggravated sexual assault was met by the Court with a suspension of half the 18 month sentence, in conjunction with supervision to aid the rehabilitation of the offender.

⁸⁹ See Lorana Bartels, *Sword or Feather? The Use and Utility of Suspended Sentences in Tasmania* (PhD thesis, University of Tasmania, 2008) [1.4.1]–[1.4.2].

Suspended sentences have been a controversial sentencing option with concerns raised that they do not amount to a 'real' punishment and are viewed by the public and offenders as a 'let-off'.⁹⁰ The Tasmanian Government has indicated its intention to abolish suspended sentences and to replace them with 'best practice sentencing options that provide an opportunity for rehabilitation and represent an appropriate response to the gravity of the crime committed'.⁹¹ The Sentencing Advisory Council is currently undertaking a reference that examines the phasing out of suspended sentences in Tasmania and the introduction of a new intermediate sentencing order(s). The abolition of suspended sentences will clearly have an effect on sentencing for sexual offences given the proportion of offenders who received either a fully suspended or partly suspended sentence for a sexual offence between 2001 and 2014 (see Figure 3) for the offences of sexual intercourse with a young person (47.7%), maintaining a sexual relationship with a young person (30.8%), aggravated sexual assault (29.2%) and indecent assault (46.8%). It may be that the new sentencing order(s) will address concerns about the use of suspended sentences for sexual offences, and improve community perception of the sentencing process.

Figure 3: Sexual offences and use of suspended sentences, Supreme Court, 2001–14

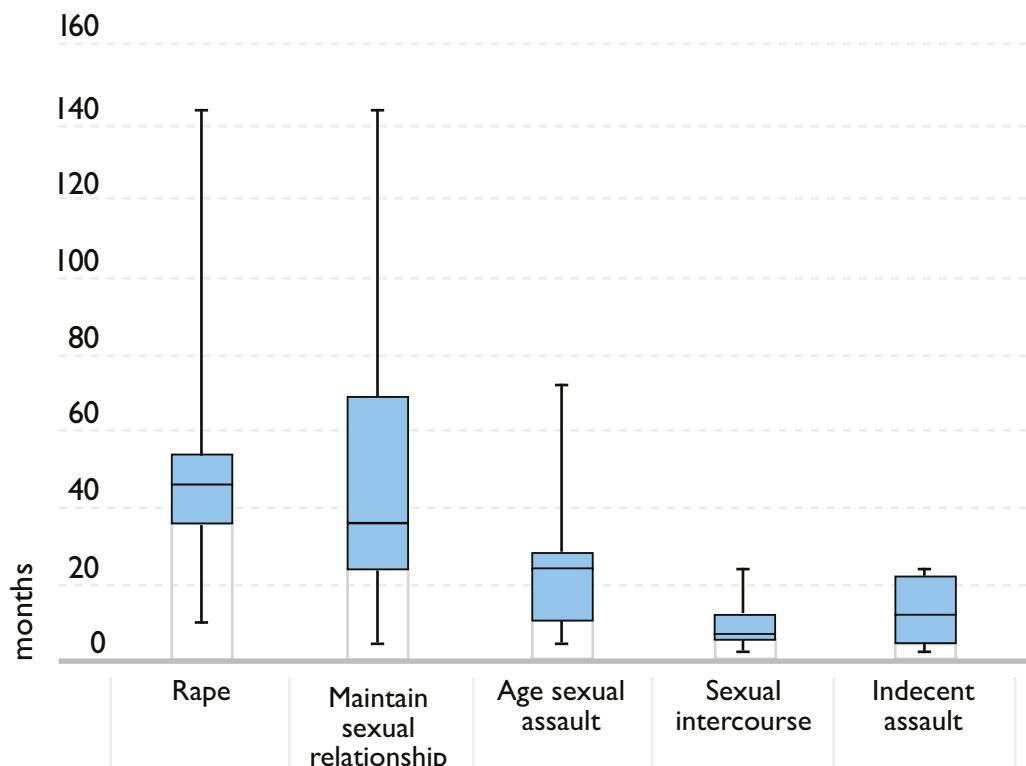


⁹⁰ See Lorana Bartels, 'An Examination of the Arguments For and Against the Use of Suspended Sentences' (2010) 12 *Flinders Law Journal* 119 for a review of critique of suspended sentences.

⁹¹ Tasmanian Liberals, *Abolishing Suspended Sentences*, 2 <<https://www.tas.liberal.org.au/sites/default/files/policy/Abolishing%20suspended%20sentences.pdf>>. The Sentencing Advisory Council, Tasmania is currently considering options to replace the suspended sentence in Tasmania: see *Phasing Out of Suspended Sentences*, Consultation Paper (2015).

Figure 4 shows the range of terms of imprisonment imposed in terms of the minimum term, the 25th percentile, median, 75th percentile and maximum term for the sexual offences under consideration in this paper (rape, maintaining a sexual relationship with a young person, aggravated sexual assault, sexual intercourse with a young person and indecent assault). It shows that the maximum penalty imposed for rape and maintaining a sexual relationship with a young person are the same. Further, it shows that while the median sentence for rape (46.5) is higher than the median sentence for maintaining a sexual relationship (36), a large proportion of offenders receive a sentence higher than the median for the offence of maintaining a sexual relationship with a young person. Figure 4 also shows that sentencing is most lenient for the offence of sexual intercourse with a young person. Sentencing for these offences is discussed in more detail below.

Figure 4: Length of imprisonment for selected sexual offences (all counts): Supreme Court, 2008–14



3.3.1 Rape

In Tasmania, rape is sexual intercourse (defined as penile penetration of the vagina, genitalia, anus or mouth) without consent.⁹² Analysis of the data show that there has been a 40% decrease in the number of rape conviction in Tasmania between the periods 2001–07 (45 offenders) and 2008–14 (27 offenders).

As with aggravated sexual assault, indecent assault and sexual intercourse with a young person, rape may constitute an unlawful act for the offence of maintaining a sexual relationship with a young person. It has been suggested that a number of the most serious rapes committed against children since the enactment of the offence of maintaining a sexual relationship have been the subject of that charge rather than rape.⁹³

92 Criminal Code (Tas) ss 1, 185. Consent is defined in the Criminal Code (Tas), s 2A.

93 For example, the following maintaining sexual relationship cases: *Tasmania v TAC*, Crawford CJ, 14 May 2008 (Sentence) involving some acts that could have been charged as rape but were instead the subject of maintaining counts; *Tasmania v DJL*, Tennent J, 4 November 2008 (Sentence), included an incident that constituted the offence of rape; *Tasmania v BC*, Crawford CJ, 18 June 2009 (Sentence), including incidents of oral rape; *State of Tasmania v MJP*, Wood J, 22 February 2010 (Sentence), several incidents of oral rape; *State of Tasmania v K*, Wood J, 20 May 2010 (Sentence), numerous incidents of vaginal rape against his three daughters.

Table 2: Rape, Supreme Court sentences, 1990–2014⁹⁴

Years	Median (months)	Max	Min	Custodial (no)	Total (no)	Custodial %
1990–2000	54*	144	6	89	89	100.00
2001–14	48	144	6	71	72	98.6 ⁹⁵

*This is an estimate based on Tables 13 and 14 of *Sentencing in Tasmania, 2001*, 287.

Table 3: Rape: Supreme Court sentences 2001–14 (all counts)⁹⁶

Years	Median (months)	Max	Min	Total (no)	Imprisonment %
2001–07	48	108	12	45	86.7
2008–14	46.5	144	9	27	96.3

Table 4: Rape: Supreme Court sentences, 2001–14 (one count).⁹⁷

Years	Median (months)	Max	Min	Total (no)	Imprisonment %
2001–07	39	60	12	17	70.6
2008–14	37.5	54	9	8	100

Use of imprisonment

The Research Paper found that in the period 1990–2000 there were no non-custodial sentences imposed for rape and in the period 2001–11, 97% of sentences were custodial.⁹⁸ As shown in Table 2, in the period 2001–14, the use of custodial sentences for rape had increased to 98.6%. This was because during this period only one offender received a non-custodial sentence.⁹⁹ It shows that non-custodial sentences are extremely rare for rape. Further, very few offenders receive a suspended sentence of imprisonment following a conviction for rape (6 offenders (8.3%)).¹⁰⁰

In the 2008–14 period, as shown by Table 3, for all counts of rape, 96.3% of offenders were sentenced to immediate imprisonment with only one offender receiving a partly suspended sentence.¹⁰¹ This represents an increase in severity in contrast with the 2001–07 period where 86.7% of offenders received a sentence of immediate imprisonment. In the 2001–07 period, two offenders received a fully suspended sentence and three received a partly suspended sentence, whereas between 2008–14 no offenders received a fully suspended sentence and one offender received a partly suspended sentence. Over these two periods, the increased use of immediate imprisonment is even more pronounced in relation to offenders convicted of one count of rape, where the use of immediate imprisonment rose from 70.6% to 100%.

94 This includes suspended sentences.

95 This included two fully suspended sentences and four partly suspended sentences.

96 This excludes suspended sentences.

97 This excludes suspended sentences.

98 Custodial sentences included wholly suspended and partly suspended sentences to allow comparison with earlier periods that had used this counting rule. See Sentencing Advisory Council, Tasmania, above n 6, 3–5.

99 *Tasmania v LM*, Cox J, 17 April 2001 (Sentence), 19 year old defendant, adjourned for 36 months, no conviction recorded with a good behaviour and probation period of 24 months.

100 See Figure 2.

101 *Tasmania v CT*, Evans J, 7 March 2011 (Sentence), 36 months imprisonment with 15 months suspended.

Sentence length

In the Research Paper, it was noted there was an observable decrease in sentence lengths for the offence of rape (taking into account all counts) with the median sentence lengths for rape decreasing from 54 months in the period 1990–2000 to 46.5 months in the period 2001–11.¹⁰² The Research Paper also found that the maximum sentence for rape had declined from 12 to 9 years.¹⁰³ Two possible causes have been suggested:

- that the creation of the maintaining a sexual relationship charge affected on the types of cases that were being charged as rape;¹⁰⁴
- that the extended definition of consent, following the 2004 amendment to section 2A of the *Criminal Code* (Tas), meant that cases at the lower end of the offence spectrum, that would otherwise not have been prosecuted had come before the courts.¹⁰⁵

This decrease does not appear to have continued as once the data from 2012–14 is included, the median sentence increases to 48 months.

The new data show a slight decrease in the median sentence from the period of 2001–07 to the period of 2008–14 (48 months compared to 46.5). This may be explained by the increased use of immediate imprisonment as the penalty for rape between these two periods, so that offenders are being sentenced to serve their sentence in prison in circumstances where they may previously have had their sentence suspended. There has also been an increase in the maximum sentence imposed for rape, which has increased back to 12 years.¹⁰⁶

Appeal decisions and comments on passing sentence

In the recent decision of *Baldock v Tasmania*,¹⁰⁷ 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 ‘atrocity’¹⁰⁸ and counsel for the appellant conceded that it should attract a sentence at the highest end of the range.¹⁰⁹ 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’.¹¹⁰ 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.¹¹¹ 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.¹¹²

102 Ibid 6.

103 Sentencing Advisory Council, Tasmania, above n 6, 4.

104 This was suggested by the Chief Justice of the Supreme Court as a reason for the decline in median sentence, letter from Chief Justice Blow to Professor Arie Freiberg, Chair Tasmanian Sentencing Advisory Council, 21 May 2013.

105 Sentencing Advisory Council, Tasmania, above n 6, 5.

106 It is noted that the current analysis of sentencing pattern for the periods of 2001–07 and 2008–14 is not comparable with the comparative data contained in the Research Paper as the new data do not include suspended sentences in the calculation of minimum, median and maximum penalty.

107 [2015] TASCCA 3.

108 Ibid [24] (Pearce J).

109 Ibid [12] (Estcourt J).

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

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

112 Ibid [16] (Estcourt J).

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.¹¹³ 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 an 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.¹¹⁴

While a reduction of three years in the head sentence seems significant and demonstrates the difficulty for sentences to be increased beyond the recognised range (even in a very serious case of rape), it is noted that the Court of Criminal Appeal increased the proportion of the sentence that the offender must serve before being eligible for parole. As originally sentenced, the offender was eligible for parole after five and a half years (61%) and on appeal, the offender was eligible for parole after four years (66.5%). The use of a longer non-parole period is a means to extend the time that an offender is required to serve in prison. Under the Sentencing Act 1997 (Tas), the court can make an order that an offender is not eligible for parole before serving the period specified in the order, which must be not less one-half of the period of the sentence.¹¹⁵ However, in 48% of rape cases where the offender was eligible for parole, the court imposed a non-parole that was longer than one-half of the sentence. Parole is discussed further at [8.1.5]–[8.1.6].

In the 2008–14 period, the longest sentence imposed for rape (12 years) involved a case where there were multiple counts arising from the prolonged sexual abuse of children by their stepfather.¹¹⁶ It is noted that cases such as these (involving multiple sexual assaults including rape) may now also be charged as maintaining a sexual relationship with a young person, as evidenced by numerous cases in the Supreme Court sentencing database.¹¹⁷ In this period, the top of the range for a single count of rape was four and a half years imposed in the case of *Rainbird*,¹¹⁸ which involved the rape of 16 year old girl by a 48 year old offender. Mitigating factors identified were that the defendant had no relevant prior convictions and a good work record. A sentence of five and a half years was imposed in *WDG*,¹¹⁹ where the offender penetrated the vagina of girl aged two years and five months and filmed it on his phone. In sentencing, the judge stressed the harm caused to the complainant and her mother, the age and complete vulnerability of the child and that the offence was an abuse of trust as the offender was in a relationship with the child's mother and the child was in his care. Other cases where the offender received a sentence above the median included *BC*,¹²⁰ where the accused was sentenced to 6 years imprisonment with a non-parole period of three years and six months. In this case, the offender pleaded guilty to two counts of sexual intercourse and one of unlawful oral sexual intercourse with the son of his daughter-in-law when the boy was aged 14 or 15. He also pleaded guilty to a count of maintaining a sexual relationship with a young person under the age of 17 committed against his granddaughter when she was aged between six and eight. He also pleaded to a count of oral rape and two counts of indecent assault against a grandson when the boy was five. The sentencing judge stated that the crimes were appalling ones and serious examples of breaches of trust towards children in his care. Mitigating factors were his offence free record, his guilty pleas and cooperation with the police. There were also no physical force or threats used.

In the 2008–14 period, for all counts, the median was 46.5 and the median for a single count of rape was 37.5 months. In relation to single counts of rape, sentences in the vicinity of three years were imposed in *Brain*,¹²¹ where an intoxicated offender (aged 23) was convicted of the rape of a sleeping and intoxicated 17 year old after a party. The complainant awoke and resisted him but he 'did not immediately desist' and in *MMP*,¹²² an intoxicated offender (aged 47) raped the 16 year old daughter of his former partner. She woke to find him having intercourse with her and he finished relatively quickly. The offender claimed it was consensual but this was rejected by the jury.

¹¹³ Ibid [29] (Pearce J). See [5.6] for a discussion of the trauma of the trial process to complainants in sexual offence cases.

¹¹⁴ Ibid [28] (Pearce J).

¹¹⁵ Sentencing Act 1997 (Tas), s 17(2)(b), (3).

¹¹⁶ T (2012) 21 Tas R 442. Between 1990 and 2000, the longest sentence was also 12 years and this was applied in a case involving prolonged abuse of children by their father: see *Bell*, Serial 35/1992.

¹¹⁷ See *Tasmania v TAC*, Crawford CJ, 14 May 2008 (Sentence); *Tasmania v DJL*, Tennent J, 4 November 2008 (Sentence); *Tasmania v BC*, Crawford CJ, 18 June 2009 (Sentence); *State of Tasmania v MJP*, Wood J, 22 February 2010 (Sentence); *State of Tasmania v K, Wood* J, 20 May 2010 (Sentence).

¹¹⁸ Evan J, 5 June 2009 (Sentence).

¹¹⁹ Wood J, 19 April 2013 (Sentence). The offender was also charged with one count of producing child exploitation material.

¹²⁰ Crawford CJ, 18 June 2009 (Sentence).

¹²¹ Evan J, 24 May 2010 (Sentence), three years imprisonment with eligibility to parole after one and half years.

¹²² Tennent J, 4 September 2009 (Sentence), three years imprisonment with eligibility to parole after one and half years.

In sentencing, the court noted that the impact on the complainant had been significant and that she had been entitled to expect she could safely be in the offender's company without fear of sexual assault. In *Fox*,¹²³ an intoxicated offender (aged 26) raped a 15 year old who he met via a mobile phone chat service. Mitigating factors were that the offender entered a plea of guilty and that there was no gratuitous violence or force used to any great extent.

In relation to all counts of rape, sentences in the vicinity of four years were imposed in *BWJK*,¹²⁴ and *KM*.¹²⁵ In *BWLK*, the offender pleaded guilty to six counts of rape, one count of aggravated assault, two counts of aggravated sexual assault and three counts of indecent assault. The offender was a 14 year old and he committed the offences against a stranger. In sentencing the offender, the court imposed a sentence of four years imprisonment with eligibility for parole after two years. The court also imposed a probation order for a period of two years from release from prison. In *KM*, the accused was found guilty of two counts of rape. He was intoxicated and forced his neighbour to have oral sex with him and then proceed to vaginal intercourse. The accused suffered from schizophrenia which was managed by medication. He arrived in Australia in 1998 as a refugee following life as a child soldier in Sudan. He had difficulty coping because of a clash between his own culture and the one in which he was now living. He had long-term problems with alcohol. Mitigating factors were that the accused did not use physical violence to the extent that the complainant suffered any physical injury.

At the bottom of the range was the case of *B H*,¹²⁶ where the offender (aged 17) was convicted of one count of rape on the basis that he continued to have sexual intercourse for several minutes after consent was withdrawn. The complainant (aged 17) was his former partner. The offender was sentenced to imprisonment for nine months. A partly suspended sentence was imposed in *CT*,¹²⁷ where the offender (aged 17) was convicted of several offences including rape (oral rape) and attempted rape (anal rape). The offences were committed in the course of violence and intimidation directed toward the complainant (a man aged 19 who had a mild intellectual disability) while the defendant and another man were stealing property. The offender was a refugee who arrived in Tasmania in 2006 after ten years in a refugee camp and had significant difficulties in his life as a result of this traumatic experience. The court accepted that the crime was impetuous but that it extended over a period of time. He was sentenced to three years imprisonment with 15 months suspended on condition that the defendant be of good behaviour and that he comply with the conditions of the probation order in relation to educational programs, alcohol and drug testing and treatment, and psychological or psychiatric assessment and treatment. A sentence at the lower end of the range was also imposed in *Dunn*, in a case involving oral intercourse where the offender was sentenced to two years imprisonment with eligibility for parole after 12 months.¹²⁸ The offender was 55 years old and the male complainant was 18 years old. A sentence of three years (with 18 months non-parole period) was imposed for one count of oral rape and one count of indecent assault that involved the oral rape of a 5 year old by her step grandfather.¹²⁹

3.3.2 Aggravated sexual assault

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. This offence was introduced in 1987, and previously this conduct would have been charged as indecent assault. In contrast, in some jurisdictions, this conduct falls within the definition of rape.¹³⁰ As with rape, sexual intercourse with a young person and indecent assault, aggravated sexual assault may constitute an unlawful act for the offence of maintaining a sexual relationship with a young person.

123 Porter J, 10 June 2010 (Sentence), three years and three months imprisonment with eligibility to parole after 20 months.

124 Tennent J, 5 September 2012 (Sentence).

125 Tennent J, 25 June 2010 (Sentence).

126 Crawford CJ, 3 May 2012 (Sentence).

127 Evans J, 7 March 2011 (Sentence).

128 Crawford CJ, 29 July 2009 (Sentence).

129 BPA, Crawford CJ, 17 April 2012 (Sentence).

130 See [4.1.2].

Table 5: Aggravated sexual assault: Supreme Court sentences 1987–2000 compared with 2001–14¹³¹

Years	Median (months)	Max	Min	Custodial (no)	Total (no)	Custodial %
1987–2000 ¹³²	— ¹³³	60	1	41	45	91
2001–14	9	72	1	45	49	91.7 ¹³⁴

Table 6: Aggravated sexual assault: Supreme Court sentences, 2001–14 (all counts)¹³⁵

Years	Median (months)	Max	Min	Total (no)	Imprisonment %
2001–2007	9	60	3	29	65.5
2008–14	24	72	4	19	57.9

Use of imprisonment

As shown in Table 5, over 90% of offenders were sentenced to custodial sentences (imprisonment, including suspended sentences) in the period 2001–14, which was consistent with the finding of the Research Paper. However, a number of offenders in this period received a suspended sentence of imprisonment following a conviction for aggravated sexual assault (6 partly suspended sentences, 8 fully suspended sentences).¹³⁶

In the 2008–14 period, as shown by Table 6, for all counts of aggravated sexual assault 57.9% of offenders ($n = 11$) were sentenced to immediate imprisonment with 15.8% of offenders ($n = 3$) receiving a partly suspended sentence, 15.8% of offenders ($n = 3$) receiving a fully suspended sentence and 10.5% ($n = 2$) receiving a non-custodial sentence. This represented a decrease in the use of an immediate custodial sanction as the penalty for aggravated sexual assault from 2001–07 (65.5% to 57.9%).¹³⁷

Sentence length

The Research Paper noted a general decline in the median sentence for aggravated sexual assault over the periods of 1987–2000 and 2001–11. The Research Paper noted, however, that aggravated sexual assault was rarely a principal offence and that the numbers were too small to draw a conclusion of a trend toward shorter sentences with confidence.¹³⁸ In this analysis, it is not possible to compare median sentences in the 1987–2000 and 2001–14 periods for all counts of aggravated sexual assault, as this information was not available in the Research Paper. However, in comparing sentencing for 2001–07 and 2008–14, for those offenders sentenced to immediate imprisonment, there has been an increase in the median sentence and also the maximum penalty imposed.¹³⁹

131 This includes suspended sentences.

132 This is the date of the introduction of the offence.

133 Note that it is not possible to compare median sentences for all counts for the period 1987–2000 based on the information presented in the Research Paper.

134 This includes 6 partly and 8 fully suspended sentences.

135 This excludes suspended sentences.

136 See Figure 2.

137 The current analysis of sentencing patterns for the 2001–07 and 2008–14 periods is not comparable with the comparative data contained in the Research Paper as the new data do not include suspended sentences.

138 Sentencing Advisory Council, Tasmania, above n 6, 9.

139 These data are not comparable with the comparative data contained in the Research Paper as the new data do not include suspended sentences in the calculation of minimum, median and maximum penalty.

Comments on passing sentence

In the 2008–13 period, a majority of convictions related to aggravated sexual assault were committed against complainants under the age of 17 (65%) and in those cases absence of consent is not an element of the offence. The longest sentence imposed in circumstances where aggravated sexual assault was the most serious offence was 72 months (6 years) in *CJP*.¹⁴⁰ In this case, the offender pleaded guilty to five counts of aggravated sexual assault, two counts of indecent act with young person, one charge of assault with indecent intent, two counts of producing child exploitation material and one count of accessing child exploitation material. The accused sexually abused two young children (aged four and seven years) he was babysitting, including inserting his fingers and tongue into the vagina of the complainants and causing the child to masturbate him. In sentencing, the court took account of the harm caused to the complainants (including the likelihood of long term emotional or psychological harm), the harm caused to the complainants' mother, the young age of the children and their vulnerability and the blatant betrayal of trust. Mitigating factors were the defendant's early plea of guilty, remorse and preparedness to engage in treatment.

Sentences in the vicinity of the median sentence (two years) were imposed in a range of circumstances. In *SMK*,¹⁴¹ the defendant pleaded guilty to four counts of assault and one count of aggravated sexual assault committed against his former partner on four instances. In one instance he made accusations about her infidelity and then grabbed her hair and pulled her to the ground. He then choked her until she lost consciousness. He then made her insert a hammer in her vagina. These offences were committed in the context of a violent relationship. In sentencing, the focus was on the seriousness of the choking with the aggravated sexual assault being described as degrading and humiliating. It was noted, however, that it was not prolonged. The defendant was sentenced to two years and four months. In *Datta*,¹⁴² a sentence of two years and four months was imposed for one count of attempted aggravated burglary, one count of aggravated burglary and one count of aggravated sexual assault. The defendant was intoxicated and broke into the home of a stranger and inserted fingers into her vagina. He also punched her and yelled at her. In sentencing, the court took into account the young age of the offender and the guilty plea but expressed the view that a 'lengthy term of imprisonment was required'. In *Wilcox*,¹⁴³ the defendant pleaded guilty to one count of indecent assault, one count of aggravated sexual assault, one count of producing child exploitation material and one count of possessing child exploitation material. The defendant rubbed the vagina and penetrated the vagina of an 18 month old girl with his fingers and recorded it on his mobile phone. The offender had a significant record but did not have any convictions for sexual offences. He was affected by drugs and alcohol at the time of the offending. In *CKT*,¹⁴⁴ the offender was a trusted family friend of the complainant's father. The conduct persisted over several hours and involved the insertion of his fingers in the complainant's vagina. The complainant was 15 and so consent was not a defence but the judge found that she did not consent or do or say anything to indicate that she was consenting.

The minimum sentence of imprisonment (four months) was imposed in *MA*,¹⁴⁵ where the defendant inserted at least one finger in the vagina of his step-daughter 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*,¹⁴⁶ where the defendant inserted his finger in the vagina of his 10 year old step-daughter 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.

140 Wood J, 13 December 2013 (Sentence).

141 Wood J, 29 May 2014 (Sentence).

142 Wood J, 5 August 2010 (Sentence).

143 Porter J, 16 August 2010 (Sentence).

144 Wood J, 30 June 2014 (Sentence).

145 Porter J, 4 July 2012 (Sentence).

146 Crawford CJ, 4 May 2009 (Sentence).

Partly suspended sentences were imposed on an 80 year old convicted of one count of aggravated sexual assault in relation to the digital penetration of his granddaughter's vagina,¹⁴⁷ a podiatrist who inserted his finger into the anus of a patient,¹⁴⁸ and an offender who performed oral sex and digitally penetrated a 17 year old who had agreed to pose in nude photos.¹⁴⁹ A fully suspended sentence was imposed in *Doherty-Peplow*, where a young offender (23 years old) was intoxicated and sexually assaulted a 16 year old who had attended the same party as the defendant. Fully suspended sentences were also imposed where there was digital penetration of a former partner where there was no assertion that it was the result of an attempt to assert power or dominate the complainant but was an attempt to reconcile¹⁵⁰ and in a case of consensual sexual activity with a young person.¹⁵¹ Non-custodial sentences were imposed on a young offender in *Dennis*,¹⁵² where the defendant (18) pleaded guilty to one count of aggravated sexual assault and four counts of indecent assault in respect of a 14 year old girl and sentenced to 84 hours community service. A non-custodial sentence was imposed in *O*,¹⁵³ in circumstances where the defendant although 32 had an intellectual age of approximately 14.

3.3.3 Indecent assault

Indecent assault involves an assault committed in circumstances of indecency. There is no requirement for the assault to be an indecent touching.¹⁵⁴ As with aggravated sexual assault, this offence does not require proof of absence of consent in cases where the alleged victim is under the age of 17. Also, as with rape, sexual intercourse with a young person and aggravated sexual assault, indecent assault may constitute an unlawful act for the offence of maintaining a sexual relationship with a young person. Indecent assault can be tried in the Supreme Court and it can also be tried in the Magistrates Court if the defendant chooses to have the matter tried summarily.¹⁵⁵

Table 7: Indecent assault: Supreme Court sentences 1987–2000 compared with 2001–14¹⁵⁶

Years	Median (months)	Max	Min	Custodial (no)	Total (no)	Custodial %
1990–2000	— ¹⁵⁷	60	1	87	94	92.6
2001–14	6	48	2	70	79	89.8 ¹⁵⁸

Table 8: Indecent assault: Supreme Court sentences, 2001–14 (all counts)¹⁵⁹

Years	Median (months)	Max	Min	Total (no)	Imprisonment %
2001–07	6	48	2	52	36.5
2008–14	12	24	2	27	55.6

147 EAB, 16 June 2010 (Sentence).

148 Glass, Evans J, 23 March 2013 (Sentence).

149 Williams, Evans J, 13 May 2013 (Sentence).

150 Withers, Porter J, 30 June 2011 (Sentence).

151 JOP, Tennent J, 1 October 2009 (Sentence).

152 Crawford CJ, 30 July 2008 (Sentence).

153 Blow J, 26 May 2010 (Sentence).

154 See John Blackwood and Kate Warner, *Tasmanian Criminal Law: Texts and Cases Vol 2* (University of Tasmania Press, 4th ed, 2015), 790.

155 Justices Act 1959 (Tas) s 72.

156 This includes suspended sentences.

157 Note that it is not possible to compare median sentences for all counts for the period 1987–2000 based on the information presented in the Research Paper.

158 This includes 15 partly and 22 fully suspended sentences.

159 This excludes suspended sentences.

Use of imprisonment

The Research Paper noted that indecent assault showed an increase in the proportion of custodial sentences from 1978–1989 to 2001–11, as observed with the offence of unlawful sexual intercourse. This was contrary to expectations that the use of custodial sentences would decline following the 1987 introduction of the aggravated sexual assault offence under s 127A of the *Criminal Code*,¹⁶⁰ with the result that more serious sexual assaults that would have previously come within the offence of indecent assault were subsequently included in the offence of aggravated sexual assault. More serious cases of indecent assault may also be included in the offence of maintaining a sexual relationship with a young person, which was introduced in 1994. In the period 2001–14, there has been a slight reduction in the proportion of custodial sentences.

In the 2008–14 period, as shown by Table 8, for all counts of indecent assault 55.6% of offenders (n = 15) were sentenced to immediate imprisonment with 14.8% of offenders (n = 4) receiving a partly suspended sentence, 18.5% of offenders (n = 5) receiving a fully suspended sentence and 11.1% (n = 3) receiving a non-custodial sentence. This was a 52.3% increase in the use of an immediate custodial sanction for indecent assault from the 2001–07 period.

There was a corresponding decrease in the use of suspended sentences between the two periods (53% compared to 33.3%) while the use of non-custodial sanctions remained relatively constant (9.6% compared to 11.1%).¹⁶¹

Sentence length

The Research Paper noted that there was general decline in median sentence from 1978–1989 to 2001–11, which was explicable by reference to the introduction of the offence of aggravated sexual assault in 1987. Between 1990–2000 and 2000–14, there was also a decrease in the maximum penalty (60 months to 48 months).

In this analysis, it is not possible to compare median sentences in the 1987–2000 and 2001–14 periods for all counts of indecent assault, as this information was not available in the Research Paper. However, in comparing sentencing for 2001–07 and 2008–14, for those offenders sentenced to immediate imprisonment, while the maximum penalty imposed has halved (48 months compared to 24 months), the median sentence has doubled (6 to 12 months). This suggests that in the later period, while the maximum has reduced, sentencing has generally become more severe for indecent assault.¹⁶²

Comments on passing sentence

In the 2008–14 period, most of the sentences for indecent assault (81%) were imposed in cases where the complainant was under the age of 17.¹⁶³ There was a range of sentences imposed that reflected the nature of the indecent assault, whether it was part of an ongoing course of conduct or an isolated event and the antecedents of the offender. The nature of the touching was varied and included touching breasts (under and over clothing), rubbing the penis over breasts, touching of the vagina (under and over clothing), lying naked on the complainant, and touching of the penis. The longest sentence of 24 months imprisonment was imposed in four cases, and the circumstances of the cases differed. Two of the cases involved a breach of a trust (by a relative or trusted adult) in respect of a children aged 14 and 8,¹⁶⁴ one case involved an offender, with a history of sexual offending, who approached children (aged 6 and 8) in a park and exposed himself and masturbated in front of children and then touched one of the children on the genitals,¹⁶⁵ and in the remaining case, the offender (with prior convictions for rape and indecent assault) was a trusted friend who physically and sexually assaulted a woman with whom he was sharing a house.

¹⁶⁰ Sentencing Advisory Council, Tasmania, above n 6, 8.

¹⁶¹ It is noted that the current analysis of sentencing patterns for the 2001–07 and 2008–14 periods is not comparable with the comparative data contained in the Research Paper as the new data does not include suspended sentences in the custodial sanctions.

¹⁶² It is noted that these data are not comparable with the comparative data contained in the Research Paper as the new data do not include suspended sentences in the calculation of minimum, median and maximum penalty.

¹⁶³ This is consistent with the finding from Warner's analysis of sentences from 1978–2000, Warner, above n 43, [11.426].

¹⁶⁴ MJK, Crawford CJ, 14 February 2011 (Sentence); M, Blow J, 2 September 2008 (Sentence).

¹⁶⁵ Wright, Pearce J, 12 February 2014 (Sentence).

At the other end of the sentencing scale for sentences of imprisonment, sentences of two months imprisonment were imposed in two cases. In *Hussey-Smith*,¹⁶⁶ the offender (a male aged 28) met the complainant (a male aged 16) over the internet and engaged on three occasions in mutual masturbation. The offender travelled from Victoria and believed that the age of consent was 16. The offender had been in custody for two months and the sentencing judge indicated that if the offender had been on bail, he may have suspended some or all of the sentence. In *W*,¹⁶⁷ the offender was convicted of two counts of indecent assault. The first count related to his stepdaughter, aged 11, where the offender touched her breasts under the clothing for a matter of seconds and the second related to touching the breasts (over and under clothing) of a 12 year old who was staying at the house for several weeks. Although this was a very severe breach of trust, it was not the worst form of indecent assault. It was made clear by the sentencing judge that, although the complainants had made other allegations of indecent assault, he was not able to sentence on the basis of those allegations. However, given that the judge was not satisfied that the events were the only incidents that had occurred, the offender was not entitled to a discount on the basis that the offences were isolated offences.

Non-custodial sentences were imposed in cases that did not involve a breach of trust. In two cases, non-custodial sentences were imposed for the indecent assault of adult complainants. In *L*,¹⁶⁸ the offender grabbed the complainant's breasts and then crotch for a brief moment. The defendant was of previous good character. He was sentenced to a fine of \$1500. In *W*,¹⁶⁹ the complainant and the defendant had been drinking with others at the defendant's house. After the complainant went to sleep, the defendant removed her pyjama pants and rubbed her vagina with his fingers. He was sentenced to 84 hours of community service. In *DPJ*, the defendant, a female aged 26, befriended a 14 year old boy and a number of his friends. Over time, the relationship developed into a sexual relationship with the defendant masturbating the complainant. The court indicated that save for the age difference, the defendant did not exploit a position of power or breach a position of trust.

3.3.4 Maintaining a sexual relationship with a young person

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. This crime was introduced in 1994 to address problems experienced in the prosecution of cases of child sexual abuse caused by difficulties in young children remembering and particularising specific acts, as there is no need to prove the dates on which the acts were committed or the exact circumstances in which they were committed.¹⁷⁰

166 Blow J, 25 June 2009 (Sentence).

167 Blow J, 6 September 2012 (Sentence).

168 Porter J, 20 June 2008 (Sentence).

169 Blow J, 1 June 2009 (Sentence).

170 Blackwood and Warner, above n 154, 803.

Table 9: Maintaining a sexual relationship with a young person: Supreme Court sentences 1995–2000 compared with 2001–14¹⁷¹

Years	Median (months)	Max	Min	Custodial (no)	Total (no)	Custodial %
1995–2000	— ¹⁷²	96	3	21	21	100
2001–14	27	150	2	197	199	99 ¹⁷³

Table 10: Maintaining a sexual relationship with a young person: Supreme Court sentences, 2001–14 (all counts)¹⁷⁴

Years	Median (months)	Max	Min	Total (no)	Imprisonment %
2001–07	36	150	5	104	72.1
2008–14	36	144	4	95	66.3

Table 11: Maintaining a sexual relationship with a young person: Supreme Court Sentences, 2001–14 (one count).¹⁷⁵

Years	Median (months)	Max	Min	Total (no)	Imprisonment %
2001–07	32	96	5	65	63.1
2008–14	32	96	4	67	64.2

Use of imprisonment

The data presented in the Research Paper showed that a custodial sentence percentage was almost consistently 100% for all counts of maintaining a sexual relationship with a young person. In the 2001–14 period, there were only two non-custodial sentences imposed out of 199 cases (99% custodial). Non-custodial sentences are very rarely used for the offence of maintaining a sexual relationship. However, not all offenders serve the whole of their sentence in prison, as a sizeable proportion of offenders receive a suspended sentence.

In the 2008–14 period, as shown by Table 10, 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 22.1% of offenders ($n = 21$) receiving a fully suspended sentence. In comparison with 2001–07, for all counts, fewer offenders were sentenced to immediate imprisonment (72.1% compared with 66.3%). However, in relation to offenders convicted of a single count of maintaining a sexual relationship, there was a slight increase in the use of immediate imprisonment (63.1% compared to 64.2%).

There was a decrease in the use of partly suspended sentences from 2001–07 to 2008–14 for offenders sentenced for all counts of maintaining a sexual relationship (15.4% compared with 10.5%) and one count (20% compared to 6%). In the 2008–14 period, there was a 77% increase in the use of fully suspended sentences for all counts (12.5% compared with 22.1%) and a 109% increase in relation to one count (20% compared to 41.8%). While the general decline in the use of imprisonment and partly suspended sentences suggests a trend to more lenient sentencing, it is important to understand the characteristics of cases where a fully suspended sentence was likely to be imposed.

¹⁷¹ This includes suspended sentences.

¹⁷² Note that it is not possible to compare median sentences for all counts for the 1987–2000 period based on the information presented in the Research Paper.

¹⁷³ This includes 27 partly and 34 fully suspended sentences.

¹⁷⁴ This excludes suspended sentences.

¹⁷⁵ This excludes suspended sentences.

Sentence length

In this analysis, it is not possible to compare median sentences in the periods 1987–2000 and 2001–14 for all counts of maintaining a sexual relationship with a young person, as this information was not available in the Research Paper. However, the Research Paper found an increase in the median sentence for one count of maintaining between 1995–2000 and 2001–11 (18 months to 21 months) and that the median for two counts of maintaining was consistent (30 months).¹⁷⁶ There was also an increase in the maximum penalty imposed over the two periods (60 months to 90 months for one count; 96 months to 150 months for two counts).¹⁷⁷

In comparing sentencing for 2001–07 and 2008–14, for those offenders convicted of all counts and one count of maintaining a sexual relationship with a young person sentenced to immediate imprisonment, the median sentence between the two periods has remained the same. There was a reduction in the maximum and minimum sentences imposed for all counts, which suggests that there has been some reduction in the sentence imposed at the top and bottom of the sentencing range. This is likely to be a function of the type of cases coming before the court rather than sentencing leniency per se.¹⁷⁸

Appeal decisions and comments on passing sentence

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 they can be identified, the offender should receive the same penalty that would have been imposed if the individual sexual acts constituting the crime of maintaining had been charged as separate crimes.¹⁷⁹ So for example, if the three unlawful sexual acts were comprised of 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 unreal 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.¹⁸⁰

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.¹⁸¹ However, the exercise of the court's sentencing discretion is moderated by the principles of proportionality and totality.¹⁸²

As noted at [1.4], it is important to understand the details of the cases that comprise the statistical data in order to assess the appropriateness of sentencing practice. 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'.¹⁸³ The court has recognised that the circumstances of the cases:

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.¹⁸⁴

Differences 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

176 Sentencing Advisory Council, Tasmania, above n 6, 7.

177 There were no convictions in the 1995–2000 period for more than 3 counts of maintaining a sexual relationship.

178 It is noted that these data are not comparable with the comparative data contained in the Research Paper as the new data do not include suspended sentences in the calculation of minimum, median and maximum penalty.

179 *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).

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

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

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

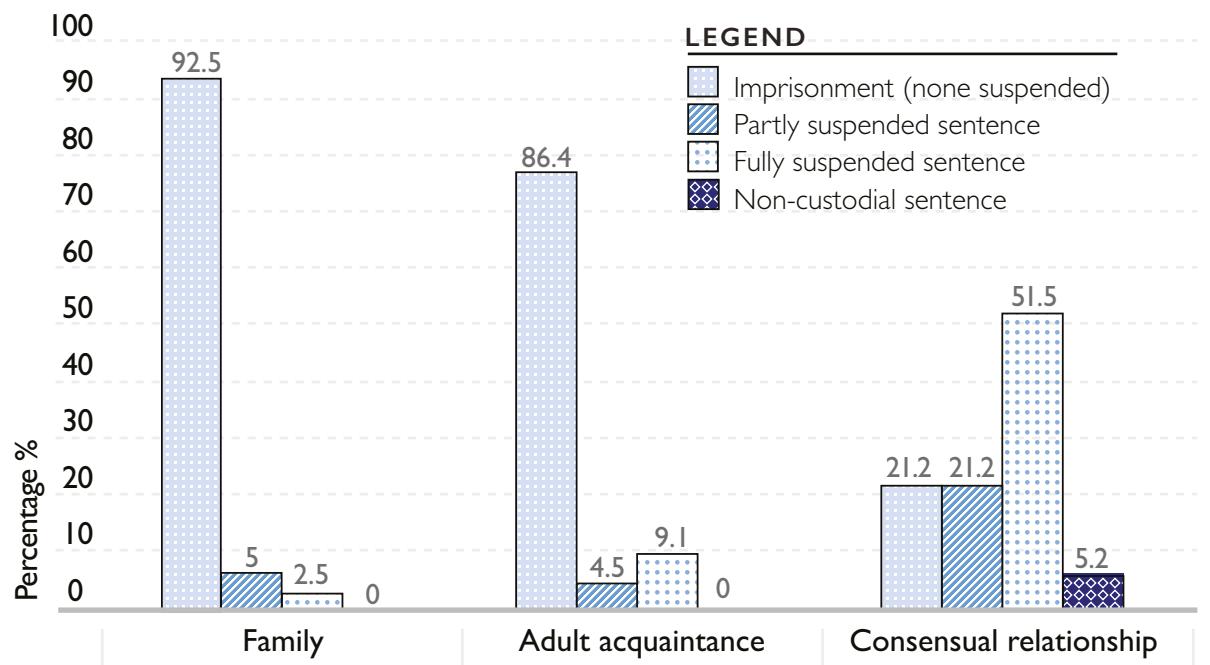
183 *Richman v Tasmania* [2011] TASSCA 18, [30] (Evans J, Blow and Porter JJ concurring).

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

with a young person and/or indecent assault. This includes a diverse range of conduct ranging from anal, vaginal or oral sexual intercourse, or rape to touching of the breast or genitalia through clothing. The relationship between the offender and the complainant is also relevant (for example, if there was a trust relationship and their relative ages). This diversity makes it difficult to compare sentences imposed with a view to determining the appropriate sentence in a particular case¹⁸⁵ and the Court has rejected any notion that there is a tariff or permissible range for the offence.¹⁸⁶ While reflecting the diversity of circumstances, the difficulty of determining the appropriate sentence for this offence is seen in the number of appeals against sentence.¹⁸⁷ It also potentially makes the use of guidelines or sentencing ranges less effective for the purposes of increasing sentencing.

In the context of child sex offences, as well sexual offences generally, not all offences are the same; child sex offences 'catch paedophiles in the true sense of the word' but they can also criminalise sexual relationships between complainants and only marginally older offenders.¹⁸⁸ In this report, sentencing comments for the 2008–14 period were analysed and a majority of the 95 cases involved offenders who were in a family relationship¹⁸⁹ (40 cases (42.1%)) or who were in contact with the child in another capacity as a trusted adult¹⁹⁰ (22 cases (23.2%)). In the remaining 33 cases (34.7%), the offender and the complainant were characterised by the court as being in a 'consensual' relationship. It is acknowledged that the notion of consent is problematic in the context of young people, given that (other than rape) absence of consent is not an element of sexual offences involving people under 17. This is to protect young people who are viewed as being unable to make appropriate decisions about what they should and should not do. However, sentencing practice does make a distinction between "the sexual exploits of a teenage Lothario" and the behaviour of a mature predator.¹⁹¹ As discussed, 66.3% of offenders convicted of maintaining a sexual relationship received a sentence of imprisonment. However, as shown in Figure 5, imprisonment is the most commonly used sanction for the offence of maintaining for all categories other than those cases that have the hallmarks of a 'consensual relationship'.

Figure 5: Sentence type by proportion of offenders, maintaining a sexual relationship, categories, 2008–14.



¹⁸⁵ Ibid.

¹⁸⁶ TAP v Tasmania [2014] TASCCA 5, [50] (Porter J).

¹⁸⁷ 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).

¹⁸⁸ TLRI, above n 4, [1.1.11]. It is noted that there is a distinction between a paedophile and a child molester or child sexual abuser. Paedophilia is a psychopathological classification (individuals who are attracted to pre-pubescent children), while child molester or child sexual abuser is a socio-legal classification: see Quadara, Nagy, Higgins and Siegel, above n 20, [A2.3].

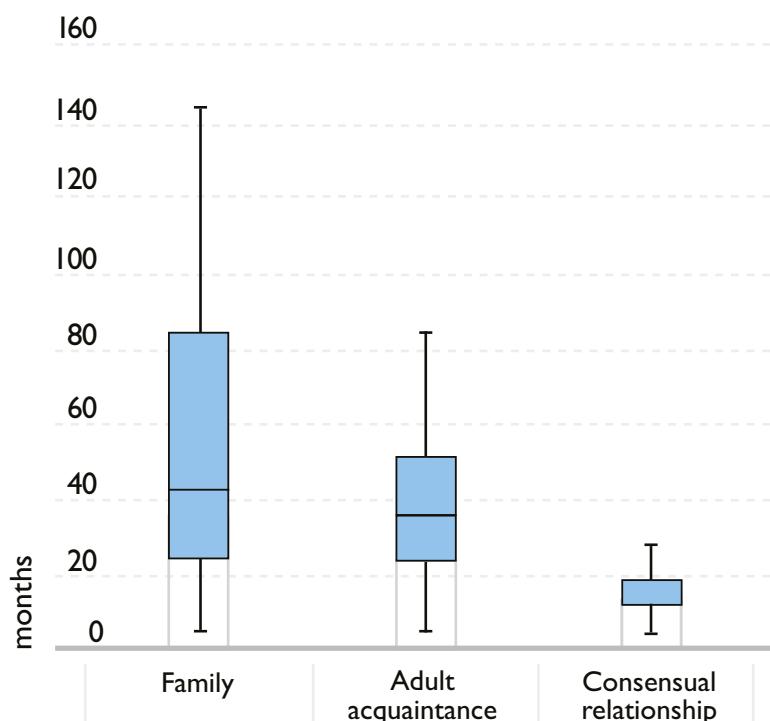
¹⁸⁹ This includes fathers, uncles, grandfathers, brothers, stepfathers, step grandfathers, stepbrothers, de facto husband or male partners, foster parents.

¹⁹⁰ This includes a teacher.

¹⁹¹ Warner, above n 43, [11.418].

In addition, as shown in Figure 6, there are differences in the length of imprisonment imposed with offenders in a family relationship receiving considerably longer sentences than those who are characterised as a 'consensual' relationship. Figure 6 shows the range of terms of imprisonment imposed in terms of the minimum term, the 25th percentile, median, 75th percentile and maximum term for the offence of maintaining a sexual relationship with a young person. It shows that sentencing in the context of a family setting is more severe relative to sexual activity that occurs in other contexts, with the median sentence being 42 months compared to 36 for other adult acquaintances and 18 months for offending in the context of a consensual relationship. The maximum penalty imposed is also longer. This reflects the increased gravity of the offence and the increased culpability that follows from the abuse of the position of trust in a family setting. It also reflects the ongoing nature (often over many years) of sexual abuse in such cases.

Figure 6: Length of imprisonment for categories of maintaining a sexual relationship with a young person (all counts): Supreme Court, 2001–14



It is also noted that there are differences in the ages of the complainant depending on the relationship between the complainant and the offender, and that this also affects the seriousness of the offence. In cases where the relationship is 'consensual', the youngest complainant was 13 at the time that the offending commenced and the median age was 15, in a family relationship context, the youngest complainant was 6 months old at the time that the offending commenced and the median age was 8, and in circumstances where the offender was an adult acquaintance, the youngest complainant was 6 at the time that the offending commenced and the median age was 12.

As shown in Figure 6, long sentences have been imposed in cases where there has been abuse in the family context. The longest sentence imposed between 2008–14 was 12 years, which was imposed in two cases that involved prolonged sexual abuse (including anal and vaginal intercourse) in respect of multiple complainants by a father¹⁹² and step father.¹⁹³ A sentence of 14 years and six months with a non-parole period of nine years and ten months was imposed in 2015 in circumstances where the offender entered a plea of guilty to five counts of maintaining a sexual relationship with a young person, one count of producing child exploitation material and one count of possessing child exploitation material. The conduct involved a sustained course of sexual abuse, including anal, vaginal and oral sexual intercourse in respect of his son, daughter and three other girls for whom he was in parental role. The defendant used methylamphetamine to facilitate some of the sexual activity and also used threats of violence to facilitate the crimes and ensure compliance and silence.

¹⁹² W, Crawford CJ, 1 March 2010 (Sentence)

¹⁹³ KGB, Crawford CJ, 14 August 2009 (Sentence).

Sentences in the mid-range of 42 months were imposed where a grandfather sexually assaulted his young granddaughters but there was no act of penetration,¹⁹⁴ a step-father had a sexual relationship with his 12 year old step daughter where there was no coercion, violence or threats,¹⁹⁵ and in relation to the sexual assault of the offender's 6 year old daughter, where the conduct involved rubbing the vagina over and under clothing and placing the penis in her mouth for short period of time.¹⁹⁶ In the family context, suspended sentences were imposed in two cases where the sexual abuse was committed by the complainants' older brother in circumstances where the abuse commenced when the offender was a child.¹⁹⁷ A three month fully suspended sentence and 140 hours community service was imposed in relation to a series of indecent assaults committed by the offender on his stepdaughter when she was 11 to 12.¹⁹⁸ In sentencing, mitigating factors were that the offender disclosed his offending to the police and that the conduct was at the less serious end of the spectrum.

Long sentences have also been imposed in cases where a trusted adult sexually abuses a child in their care. The longest sentence imposed for the ongoing sexual abuse outside of a family context was 7 years in A,¹⁹⁹ where the offender pleaded guilty to one count of maintaining a sexual relationship with a young person in respect of one complainant and six charges in respect of the other complainant that included indecent assault, aggravated sexual assault and anal rape. The offences had occurred 17 years earlier and at the time of sentencing, the offender had severe diabetes and arthritis. He was of very low intelligence and had not committed any other offences since that time. Other long sentences were imposed in cases of repeated sexual abuse involving multiple complainants.²⁰⁰ A sentence in the mid-range of 36 months imprisonment was imposed on an offender whose behaviour was described as predatory.²⁰¹ The offender was a friend of the boy's mother and used alcohol and attempted to use cannabis to integrate and disinhibit the boy. There were five identifiable occasions of sexual abuse, including oral sexual intercourse, but these were not isolated occasions. An offender (then aged 75) who used his position of trust to groom and sexually abuse a 15 year old who was working in the offender's business was also sentenced to 36 months imprisonment.²⁰² In sentencing, the court noted that the offender was now 83 years of age and that, save for the conduct in question, has been of good repute and has been held in high regard.

At the other end of the scale, a sentence of four months was imposed on an offender who had a sexual relationship with a 15 year old girl who had been placed in foster care with friends of the offender.²⁰³ The complainant became pregnant and at the time of sentencing, the offender and the complainant were still in a relationship and the offender was supporting her and their child. A fully suspended sentence was imposed in CO, where the offender (now aged 48) had committed offences against a young male neighbour when the offender was aged 15 to 18.²⁰⁴

In contrast to sexual offences committed by predatory adults, the courts have identified cases where the offence of maintaining a sexual relationship with a young person has occurred in the context of a consensual or mutual relationship. For example, in *Catlin*,²⁰⁵ the offender was aged 23 and the complainant was 15, and the sentencing judge stated that:

[t]he case is to be contrasted with many others where a sexual relationship is maintained between a young woman or girl and a man acting as a predator, and acting quite disgracefully and unlawfully. What Mr Catlin was doing was unlawful but it is more difficult to define it as disgraceful I suppose. However, it certainly was against the law. The purpose of that law is to protect young persons from themselves, if not from adults, but from themselves until they are old enough to make mature and sensible decisions in their own interests.

194 BAF, Crawford CJ, 31 May 2008 (Sentence).

195 JAR, Crawford CJ, 23 November 2009 (Sentence).

196 C, Wood J, 14 September 2011 (Sentence).

197 TAC, Crawford CJ, 14 May 2008 (Sentence) — 36 months imprisonment with 18 months suspended; M, Blow J, 20 May 2011 (Sentence), 24 month sentence fully suspended.

198 U, Blow J, 12 May 2011 (Sentence).

199 Blow J, 6 October 2009 (Sentence).

200 See E, Blow J, 4 June 2008 (Sentence) — 66 months imprisonment imposed in circumstances where the offender was 83 at the time of sentencing; MR, Evans J, 27 October 2011 (Sentence) — 66 months imprisonment imposed in circumstances where the offender was suffering a mental disability; J, Wood J, 1 September 2011 (Sentence) — 78 months imprisonment imposed on young offender.

201 L, Blow CJ, 20 August 2013 (Sentence).

202 Connolly, Evans J, 20 June 2012 (Sentence).

203 PTJR, Tennent J, 27 August 2008 (Sentence).

204 Crawford CJ, 14 February 2012 (Sentence).

205 Crawford CJ, 20 April 2012 (Sentence).

The offender was sentenced to six months imprisonment fully suspended. Similarly, in *WJB*, the offender (aged 17) commenced a sexual relationship with a 13 year old and was sentenced to a four month sentence fully suspended.²⁰⁶ The sentencing judge described the relationship as 'entirely consensual' and said there was 'no suggestion of force or predation'. Fully suspended sentences, as shown in Figure 5, are used in over 50% of consensual cases. Non-custodial sentences were rarely imposed and only used in two cases where there was a short sexual relationship and the offender and complainant were close in age and the complainant was close to an age where consent would be a defence.²⁰⁷ Longer sentences were imposed in this type of case where there was a significant age disparity and the offender had been asked by the complainant's parents to stay away and he persisted in continuing the relationship despite a restraint order²⁰⁸ or where there was a significant age disparity and the offender was in a position of trust²⁰⁹ Short prison sentences were imposed in relation to offenders who had prior convictions for a maintaining a sexual relationship with a young person.²¹⁰

An additional issue arises in relation to historical sexual offences usually committed by family members and/or adult acquaintance. Delay in reporting is common in cases of child sexual abuse for a variety of reasons including reluctance of victims to report offences due to embarrassment, fear or shame or because the offender has coerced them to remain silent.²¹¹ In the 2008–14 period, 41.5% of cases where the offender was convicted of maintaining a sexual relationship were historical cases. This may influence sentencing in a number of ways, including that the delay between the offending and the conviction may be a mitigating factor where the offender has not committed any further offences in the intervening period or where the offender's advanced age and poor health are factors relevant to the sentence imposed.²¹²

Historical cases also raise the question of the sentencing standards to be applied — are the standards to be applied those applicable at the time of the offending or contemporary sentencing standards.²¹³ This is particularly relevant where sentencing standards have become more severe. In New South Wales, South Australia, Queensland and Victoria, the approach has been to adopt the sentencing practices at the time of the offending.²¹⁴ There is also support for this approach in Tasmania, where Slicer J stated in *Director of Public Prosecutions v M* that 'it is consistent with sentencing principles that an offender is entitled to be sentenced in accordance with the approach and mores existent at the time of the occurrence of the crime'.²¹⁵ In contrast, the approach in England and Wales differs where the sentencing guideline provides that 'the offender must be sentenced in accordance with the sentencing regime applicable at the date of sentence'.²¹⁶ The application of any changes to sentencing practices for sexual offences will need to take account of their application to historical cases of sexual abuse.²¹⁷

206 Tennent J, 1 July 2009 (Sentence).

207 D, Evans J, 8 February 2008 (Sentence) — \$500 fine; BJ/P, Evans J, 28 July 2011 (Sentence) — 12 month probation order.

208 Spriggs, Crawford CJ 29 April 2009 (Sentence) — 27 months imprisonment.

209 RAS, Porter J, 26 September 2013 (Sentence) — 18 months imprisonment; M, Evans J, 26 September 2008 (Sentence) — 18 months imprisonment.

210 Gallagher, Porter J, 29 October 2013 (Sentence) — 6 months imprisonment (in this case, the offender was 20 with a mental IQ of 58 and had his affairs managed by the Public Trustee); AJ/M, Estcourt J, 19 September 2014 (Sentence) — 9 months imprisonment.

211 Frieberg, Donnelly and Gelb, above n 28, 97 referring to Royal Commission into Institutional Responses to Child Sexual Abuse, above n 15, 59.

212 See Frieberg, Donnelly and Gelb, above n 28, 98. See for example, D, Blow J, 8 February 2008; *Richman v Tasmania* [2011] TASCCA 18; *Holloway v Tasmania* [2013] TASCCA 1; *E v Tasmania* [2008] TASSC 72; *S v Tasmania* (No 2) [2007] TASSC 85.

213 See Frieberg, Donnelly and Gelb, above n 28, 99–106.

214 MJR (2002) 54 NSWLR 368; ibid 100–101.

215 [2005] TASSC 14, [26] applying MJR (2002) 54 NSWLR 368.

216 Sentencing Council, UK, *Sexual Offences Definitive Guideline* (2013), Cl 2 Annex B (emphasis in original) <https://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Sexual_Offences_Definitive_Guideline_content_web1.pdf>. The *Coroners and Justice Act 2009* (UK) s 125(1) provides that a Court is to follow a sentencing guideline that is relevant to the offender's case unless the court is satisfied that it would be contrary to the interest of justice to do so.

217 See also [8.2.2].

3.3.5 Sexual intercourse with a young person

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.

Table 12: Sexual intercourse with a young person: Supreme Court sentences 1990–2000 compared with 2001–14²¹⁸

Years	Median (months)	Max	Min	Custodial (no)	Total (no)	Custodial %
1990–2000	— ²¹⁹	54	2	34	60	53.1
2001–14	6	48	1	90	111	81 ²²⁰

Table 13: Sexual intercourse with a young person: Supreme Court sentences, 2001–14 (all counts)²²¹

Years	Median (months)	Max	Min	Total (no)	Imprisonment %
2001–07	9	48	3	49	36.7
2008–14	7	24	2	62	30.6

Table 14: Sexual intercourse with a young person: Supreme Court sentences, 2001–14 (single count)²²²

Years	Median (months)	Max	Min	Total (no)	Imprisonment %
2001–07	7	9	4	23	17.4
2008–14	4.5	8	2	20	30

Use of imprisonment

The Research Paper found that ‘the data suggest an increase in the severity of sentencing reflected in the proportion of custodial sentences.’²²³ In the Research Paper, the offence of sexual intercourse with a young person saw a substantial increase in the proportion of custodial sentences across all counts, rising from 50% in the 1978–1989 period to 57% in the 1990–2000 period, and up to 78% in the 2001–11 period. This trend has continued in recent years with the proportion of custodial sentences increasing to 81% in the 2001–14 period. However, as with maintaining a sexual intercourse with a young person, in the 2001–14 period, a sizeable proportion of offenders were sentenced to a suspended sentence.

In the 2008–14 period, as shown by Table 13, 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 and 41.9% of offenders ($n = 26$) receiving a fully suspended sentence. In comparison with 2001–07, in relation to all counts, fewer offenders were sentenced to immediate imprisonment (36.7% compared with 30.6%). In contrast, there was an increase in the use of immediate imprisonment for offenders convicted of a single count of sexual intercourse of a young person.

218 This includes suspended sentences.

219 Note that it is not possible to compare median sentences for all counts for the 1987–2000 period based on the information presented in the Research Paper.

220 This includes 9 partly and 44 fully suspended sentences.

221 This excludes suspended sentences.

222 This excludes suspended sentences.

223 Sentencing Advisory Council, Tasmania, above n 6, 11.

In the period 2008–14, there was a 175% increase in the use of partly suspended sentences for all counts (4.1% compared with 11.3%). There was also an increase in the use of fully suspended sentences for all counts (36.7% compared with 41.9%). In contrast, the use of partly and fully suspended sentences for a single count of sexual intercourse with a young person remained relatively constant.

Overall, the general decrease in the use of actual imprisonment could suggest a trend to more lenient sentencing; however, there was also a decrease in the use of non-custodial sanctions for all counts between the two periods from 22.9% to 16.1%. There was also a decrease in the use of non-custodial sentences for a single count of sexual intercourse with a young person (30.4% to 14.9%).

Sentence length

In the Research Paper, it was noted that generally the median sentence for sexual intercourse with a young person for global counts fluctuated between the three periods (1978–1989, 1990–2000 and 2001–11), while the median for one count remained stable at 3 months. Once the data for 2012–14 is added to the 2001–11 sample, the median sentence for one count increases to 4 months. In this analysis, it is not possible to compare median sentences in the periods 1987–2000 and 2001–14 for all counts of sexual intercourse with a young person, as this information was not available in the Research Paper.

In the current analysis, as shown in Table 13, there has been a decrease in the median term for single counts and all counts of sexual intercourse with a young person in the period 2001–07 to 2008–14. There has also been a decrease in the maximum and minimum term of imprisonment imposed.²²⁴

Appeal decisions and comments on passing sentence

As with the crime of maintaining a sexual relationship with a young person, a broad range of circumstances can give rise to the crime of sexual intercourse with a young person. There are, however, differences in the features of cases where convictions are obtained for sexual intercourse with a young person compared to the crime of maintaining a sexual relationship. Between 2008–14, unlike maintaining a sexual relationship, there were only three cases out of 62 cases where a conviction for sexual intercourse with a young person arose in a family context (4.8%). A majority of cases (56.5%) occurred in the context of a consensual relationship and the remaining cases (38.7%) were committed by an adult other than a family member. An additional difference was that complainants were also 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. There was only one complainant under the age of twelve (aged 6), and this arose in a family context where the jury had found the defendant not guilty of maintaining a sexual relationship with a young person but guilty of two counts of sexual intercourse with a young person.²²⁵ In contrast to maintaining a sexual relationship where the median age of complainants was 11.5, the median age of the complainant in cases where the offender was convicted of sexual intercourse with a young person was 14.5. In the context of a consensual relationship, the youngest complainant was 12 and the median age was 15. In cases of sexual abuse with a young person committed by an adult (other than a family member), not in the context of a consensual relationship, the youngest complainant was also 12 and the median age was 14.

Sentencing for sexual intercourse with a young person highlights the tension that exists as the law seeks to regulate the sexual behaviour of teenagers by protecting them from themselves as well as find an appropriate punishment for the sexual abuse and exploitation of young people by adults. As discussed at [3.3.4], the notion of consent as factor relevant to sentencing is problematic in regards to the sexual activity of young people under 17. Absence of consent is not an element of the offence of sexual intercourse with a young person. This means that a sentencing judge cannot sentence an offender on the basis that the complainant did not consent, but evidence of reluctance makes the case more serious.²²⁶ Neither can a young person consent (as the law presumes that meaningful consent cannot be given).²²⁷ 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:

224 It is noted that these data is not comparable with the comparative data contained in the Research Paper as the new data do not include suspended sentences in the calculation of minimum, median and maximum penalty.

225 B, Porter J, 10 December 2008 (Sentence).

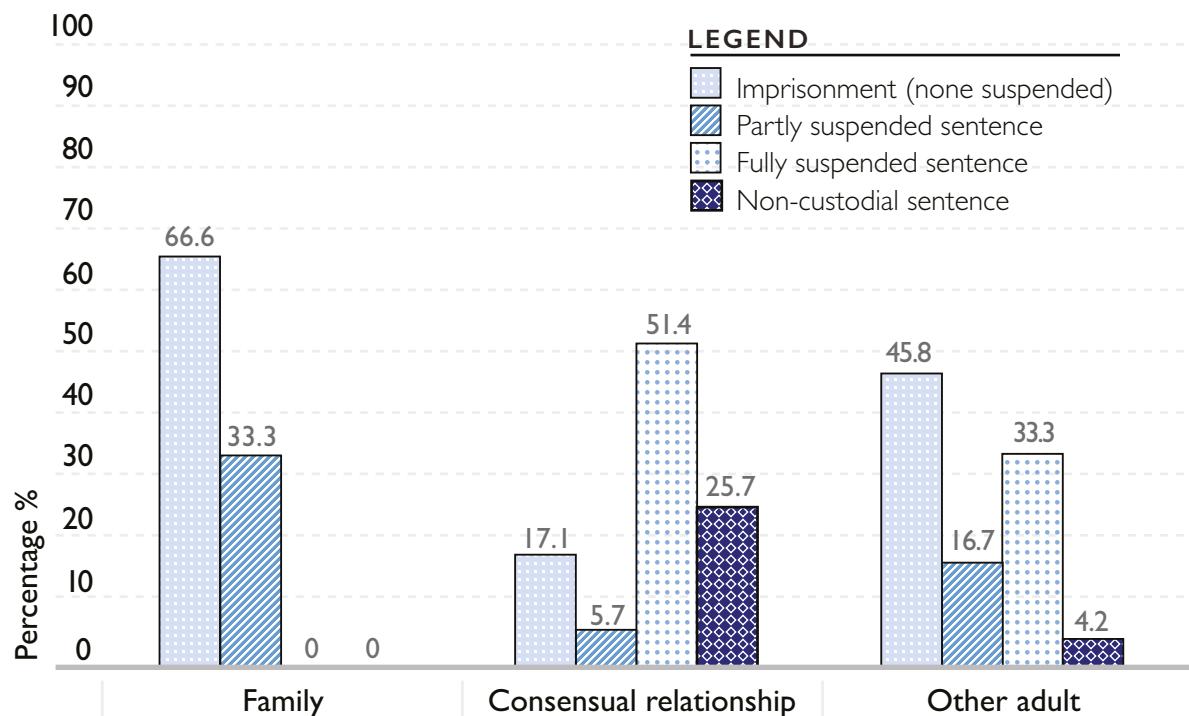
226 Latham, Porter J, 17 July 2008 (Sentence). See also Warner, above n 43, [1.1.417].

227 See Freiberg, above n 41, [4.185].

[w]hat 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.²²⁸

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 in Figure 7.

Figure 7: Sentence type, sexual intercourse with a young person, categories, 2008–14



In this context, courts have frequently expressed the view that the nature of the offending warrants a term of imprisonment to mark the seriousness of the offence, but have recognised the mitigating factors that warrant the sentence being suspended. In GRG,²²⁹ the offender pleaded guilty to one count of sexual intercourse with young person as a result of which the complainant became pregnant. This act took place in 1980 and when the complainant was 18 they married and had five children together. The relationship ended in 1995 and the complainant reported the matter to the police in 2013. He was sentenced to a seven month sentence fully suspended. In F,²³⁰ the defendant was sentenced to four months imprisonment fully suspended and 40 hours of community service. In this case, the offender was 30 and the complainant was 16 and the sentencing judge stated that this age disparity would ordinarily attract a term of immediate imprisonment. However, the judge suspended the sentence in the circumstances as the sexual relationship 'seemed to be a considered decision on her part, and that she was a willing partner. No pressure of either a physical or emotional nature seems to have been exerted'.

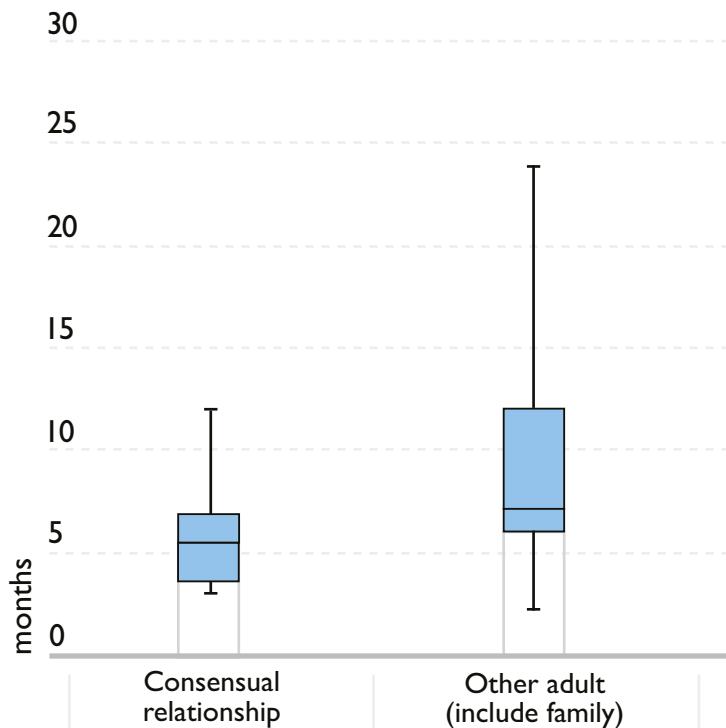
In contrast, predatory behaviour or cases where the offence was a breach of trust were viewed as more serious cases and resulted in imprisonment. As shown in Figure 8, longer sentences were also imposed in these cases.

²²⁸ Evans J, 20 June 2008 (Sentence).

²²⁹ Wood J, 19 November 2013 (Sentence).

²³⁰ Porter J, 5 December 2012 (Sentence).

Figure 8: Length of imprisonment for categories of sexual intercourse with a young person (all counts): Supreme Court, 2008–14



In the period between 2008 and 2014, the longest sentence imposed was 24 months imprisonment in *Campbell*,²³¹ where the offender pleaded guilty to seven counts of sexual intercourse with a young person, committed over several months. The offender was 39 and the complainant was 15. The complainant had Asperger's Syndrome and her mother told the offender about this condition and asked him to stay away. In sentencing, Crawford CJ stated that:

this is a classic example of one of the main purposes behind the creation of crimes against sexual acts with children, which is to protect young persons, not simply from sexual exploitation but also from their own immaturity and inability to make adequate value judgments about sexual issues.

A term of imprisonment of 24 months was also imposed in *EJR*,²³² where a 22 year old offender pleaded guilty to one count of sexual intercourse with a young person, one count of indecent act with a young person, four counts of aggravated sexual assault and three counts of indecent assault in relation to a 12 year old. The offender had known the girl since she was little as he lived next door to her grandparents. The complainant was vulnerable by virtue of her age and also her psychological state. A sentence of eight months was imposed in *MAJ*,²³³ where a step-father had sexual intercourse with his 13 year old step-daughter in circumstances where they were both extremely intoxicated. The victim, the defendant and the victim's mother had been drinking together. The victim's mother went to bed and at some point the victim was very drunk. The defendant knew this. Other aggravating features include if an offender persisting with the relationship after the offender has been warned to stay away²³⁴ or if the offender was deceitful, such as by lying about their age.²³⁵

231 Crawford CJ, 20 May 2009 (Sentence).

232 Tennent J, 8 December 2014 (Sentence).

233 Crawford CJ, 21 March 2012 (Sentence).

234 Campbell, Crawford CJ, 20 May 2009 (Sentence); G, Porter J, 27 May 2013 (Sentence); JTA, Wood J, 24 March 2011

235 James, Tennent J, 8 February 2012 (Sentence).

Other key factors relevant to the sentencing for sexual intercourse with a young person were the age and vulnerability of the complainant, and the disparity of age between the complainant and the offender.²³⁶ Longer sentences were imposed where the complainant was young²³⁷ or vulnerable by reason of a complainant's family situation or emotional vulnerability,²³⁸ intellectual disability²³⁹ or drunkenness.²⁴⁰ Conversely, there are a number of cases where the offender received a non-custodial sentence or a fully suspended sentence in circumstances where the complainant was only months from the age of consent.²⁴¹ Non-custodial or fully suspended sentences were also imposed where the sexual relationship was only short.²⁴²

3.4 PROBATION ORDERS

Probation orders are directed toward the purposes of rehabilitation, and to a certain extent specific deterrence. There are numerous conditions that can be attached to a probation order, including restrictions of travel, reporting obligations, and compliance with any special conditions attached to the order.²⁴³ Probation orders can be individualised and can include attending programs,²⁴⁴ submitting to psychological or psychiatric assessment or treatment,²⁴⁵ or other special conditions considered necessary or expedient by the court.²⁴⁶ Probation orders have a maximum period of 3 years. A probation order can be used in conjunction with sentences of imprisonment or as a sanction in its own right. The TLRI has observed that probation orders as the most serious sanction imposed are infrequently used, and as shown in Table 15, for most sexual offences cases dealt with in the Supreme Court, overwhelmingly (when used) probation order were used in combination with a sentence of imprisonment.

Table 15: Use of probation orders for principal offence, sexual offences, Supreme Court, 2001–14

Offence	Total cases	Total probation orders	With imprisonment	With partly suspended sentence	With fully suspended sentences	Non-custodial sentence only
Rape	72	7	2	2	2	1
Aggravated sexual assault	48	7	2	1	2	2
Indecent assault	79	5	2	3	1	0
Maintaining a sexual relationship with a young person	199	9	4	1	3	1
Sexual intercourse with a young person	111	8	1	0	1	6

236 See Warner, above n 43, [11.416]–[11.418].

237 Crawford CJ, 21 March 2012 (Sentence).

238 Prasad, Porter J, 7 August 2014 (Sentence); Connolly, Porter J, 24 November 2011 (Sentence).

239 Campbell, Crawford CJ, 20 May 2009 (Sentence).

240 MAJ, Crawford CJ, 21 March 2012 (Sentence).

241 Stone, Tennent J, 16 February 2012 (Sentence); BPM, Wood J, 7 February 2011 (Sentence); G, Crawford CJ, 24 February 2010 (Sentence); George, Crawford CJ, 20 May 2008 (Sentence); D, Evans J, 8 February 2008 (Sentence); KAB, Blow CJ, 3 April 2014 (Sentence); Dickenson, Crawford CJ, 3 November 2009 (Sentence); D, Evans J, 8 February 2008 (Sentence); JH, Crawford J, 13 February 2008 (Sentence).

242 WCM, Tennent J, 28 April 2008 (Sentence).

243 Sentencing Act 1997 (Tas) s 37.

244 Ibid s 37(2)(a).

245 Ibid s 37(2)(d).

246 Ibid s 37(2)(e).

As shown in Table 15, probation orders for sexual offences are not common. However, probation orders have been used as a sanction for less serious sex offences and can emphasise the rehabilitative purpose of sentencing. Probation orders have also been used where factors personal to the offender make a more severe sentence inappropriate. This is illustrated in *Tasmania v O*, where the offender was a 32 year old woman with mild to moderate intellectual disability. She was convicted of six counts of indecent assault and five counts of aggravated sexual assault, involving touching the breasts and genitalia of a 14 year old girl and given a sentence for an 18 month probation order. In sentencing, the judge stated that:

[t]he unusual thing about this case is that, because of Ms O's intellectual impairment, emotionally and intellectually she is at about the same level of maturity as many 14 year olds would be. So she is no better equipped to make decisions about sexual matters than the sorts of people that the law seeks to protect by making sexual activities with minors illegal.²⁴⁷

Nevertheless, even where a defendant has intellectual or mental vulnerabilities, very few sex offence cases result in probation orders alone.

Personal factors relating to the offender also influence the use of probation in combination with other sentencing options. In *Tasmania v B*, the defendant pleaded guilty to one charge of indecent assault against a 14 year-old complainant. He was 39 years old at the time. The sentencing judge noted two unusual characteristics about the defendant: paranoid schizophrenia and partial blindness. In addition to probation, the defendant received a 2-year good behaviour order and a sentence of three months imprisonment wholly suspended.²⁴⁸

The use of a combination sentence such the use of imprisonment with probation allows the court to address competing sentencing considerations such as denunciation (through the sentence of imprisonment) and rehabilitation (by encouraging offenders to disclose their offending and seek help). In the context of sexual offences, there is tension between these two purposes as seen in the case of *JTM*.²⁴⁹ where the offender was sentenced to two years' imprisonment for a charge of maintaining a sexual relationship, with a non-parole period of 12 months. He was subject on release to a probation order for a period of three years. In this case, the offender had disclosed his offending and had independently sought help to curb his impulses to offend against children. It was stated that the case would probably not have come before the courts if there had not been full disclosure by the defendant to his general practitioner.²⁵⁰ In this context, Evans J noted the tension between competing criminal justice considerations in his comments on passing sentence:

The sentencing of the defendant squarely raises two competing considerations. The first is that a sentence of sufficient significance to denounce the defendant's criminal conduct should be imposed. The second is that those who find themselves in a similar situation to that of the defendant should not be discouraged from disclosing their situation and seeking help. I do not pretend that I have reconciled these considerations.

247 *State of Tasmania v O*, Blow J, 26 May 2010 (Sentence).

248 *Tasmania v B*, Evans J, 25 June 2008 (Sentence).

249 Evans J, 9 December 2010 (Sentence).

250 *State of Tasmania v J T M*, Evans J, 9 December 2010 (Sentence).

3.5 COMMUNITY SERVICE

Community service orders fulfil the requirements of rehabilitation as a purpose of sentencing, and may act as a specific deterrent. Community service orders also serve to punish offenders and may serve a restorative purpose by allowing the offender to contribute to the community generally or by undertaking work for the benefit of the victim.²⁵¹

Community service orders are not generally used for serious sex offences; however, they have been used for less serious examples of sex offences, either in conjunction with a suspended sentence or as a stand-alone sanction.²⁵² As shown in Table 16, in the 2001–14 period, of all sex offences sentenced in the Supreme Court, community service orders were imposed on 22 offenders.

Table 16: Use of community service orders for principal offence, sexual offences, Supreme Court, 2001–14

Offence	Total cases	Total community service orders	With imprisonment	With partly suspended sentence	With fully suspended sentences	Non-custodial sentence only
Rape	72	0	0	0	0	0
Aggravated sexual assault	48	5	0	1	2	2
Indecent assault	79	3	0	0	0	3
Maintaining a sexual relationship with a young person	199	4	0	0	4	0
Sexual intercourse with a young person	111	10	0	0	3	7

In cases where community service orders have been imposed, factors that have been taken into account have included the low level of seriousness of the sexual conduct in the offence,²⁵³ and/or the closeness in age between the offender and the complainant in cases of child sexual abuse.²⁵⁴ In *Tasmania v U*,²⁵⁵ a community service order (140 hours) was imposed with a fully suspended sentence of 3 months imprisonment was imposed for one count of maintaining a sexual relationship, where the crimes were 'at the less serious end of the spectrum'. In *Tasmania v H*,²⁵⁶ a sentence of 9 months imprisonment fully suspended and 210 hours of community service was imposed for one count of maintaining a sexual relationship and one count of stalking, in circumstances where a 28 year old offender had a 'consensual' sexual relationship with one complainant aged 15, and stalked another complainant aged 15.

251 See Sentencing Act 1997 (Tas) s 33.

252 There were no community service orders for rape convictions.

253 *Tasmania v W*, Blow J, 1 June 2009 (Sentence), where rubbing the vagina of the sleeping complainant constituted an indecent assault for which the offender pleaded guilty, was genuinely remorseful and shocked at his drunken misbehaviour.

254 *Tasmania v Day*, Crawford J, 14 September 2006 (Sentence), an aggravated sexual assault with a complainant under 17 years old. If the age difference had been 6 weeks less no crime would have been committed.

255 Blow J, 12 May 2011 (Sentence).

256 Blow J, 19 August 2003 (Sentence).

3.6 OTHER ORDERS

Dangerous criminal declarations and orders for inclusion on the Sex Offenders Register are not sanctions imposed by the court for sexual offences but are orders that a court may make at the time of imposing sentence.

3.6.1 Dangerous criminal declarations

A dangerous criminal declaration is a sentencing option under section 19 of the *Sentencing Act 1997 (Tas)*. In addition to sentencing the offender to a term of imprisonment for the crime for which he or she is facing sentence,²⁵⁷ a court can impose a dangerous criminal declaration on an offender who is convicted of a sexual offence and who has a previous conviction for crimes involving violence or an element of violence (which includes sexual offences).²⁵⁸ A declaration can be made at the time that a sentence is imposed, similar to provisions for indefinite detention in other jurisdictions that apply on conviction.²⁵⁹ Protection of the community is an important consideration in dangerous offender legislation.²⁶⁰ Under the Tasmanian regime, rehabilitation of offenders is also a consideration, as dangerous criminal declarations are governed by the purposes of the *Sentencing Act 1997 (Tas)*, which includes rehabilitation as well as protection of the community. Dangerous criminal declaration are said to breach the fundamental sentencing principle of proportionality²⁶¹ and may be inconsistent with international human rights principles.²⁶²

Dangerous offender declarations are not common. There are currently only seven dangerous criminal declarations in force in Tasmania. Of these, five offenders had been convicted of a sex offence.²⁶³

The discretion of the Court to make a declaration

In Tasmania, a dangerous criminal declaration can be made under section 19 if —

- (1) (a) the offender has been convicted for a crime involving violence or an element of violence; and
(b) the offender has at least one previous conviction for a crime involving violence or an element of violence; and
(c) the offender has apparently attained the age of 17 years; and
(d) the judge is of the opinion that the declaration is warranted for the protection of the public.
- (2) In determining whether to declare an offender a dangerous criminal a judge may have regard to all or any of the following:
 - (a) the nature and circumstances of the crimes referred to in subsection (1);
 - (b) the offender's antecedents or character;
 - (c) any medical or other opinion;
 - (d) any other matter that the judge considers relevant.

257 *Sentencing Act 1997 (Tas)* s 19(3).

258 Evans (1999) 8 Tas R 325.

259 See [8.2.3].

260 Michelle Edgely, 'Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventative Detention of Sex Offenders in Queensland and Western Australia' (2007) 33 *University of Western Australia Law Review* 351, 352.

261 Director of Public Prosecutions v Phillips [2006] TASSC 81, [42]; Bernadette McSherry, Patrick Keyzer, Arie Freiberg, 'Preventive Detention for 'Dangerous' Offenders in Australia: A Critical Analysis and Proposals for Policy Development' (Report to the Criminology Research Council, 2006) 15.

262 McSherry, Keyzer, Freiberg, above n 261, 9.

263 Email from Michelle Lowe, Senior Policy Officer, Department of Justice, to Rebecca Bradfield, 26 March 2015.

The dangerous criminal provisions are intended to incapacitate an individual who has demonstrated that, 'by reason of his antecedents, age, health, mental condition, the nature of the offence or any special circumstances, [he is] so likely to commit further crimes of violence that he constitutes a constant danger to the community'.²⁶⁴ The assessment of risk is undertaken by the court at time of sentence. The court can refer to the risk factors outlined in the legislation, may access psychological or psychiatric assessments of the defendant,²⁶⁵ and may also take into account any other matter considered relevant. In *Mark Brandon Read v R*,²⁶⁶ the Court stated the legal test for issuing a dangerous criminal declaration as follows:

what the court is required to do is assess the risk posed to the community by the offender being at large. This in turn depends upon the likelihood of his committing further violent offences. This is something which must be judged taking into account all relevant circumstances, including the offender's propensity to commit such offences in the past. If the type of offences in contemplation are of a grave character and if there is a real likelihood that the offender will commit one or more of such offences if and when discharged from gaol, the court may make the appropriate declaration.

A further requirement is that the orders 'should be confined to very exceptional cases where the exercise of them is demonstrably necessary to protect society from physical harm where the prisoner constitutes a constant danger to the community'.²⁶⁷ Exceptionality is not a requirement of the legislation in Tasmania, as in other states, but the judiciary has indicated that the case must be exceptional for the court to override the 'fundamental sentencing principle of proportionality'.²⁶⁸

Application for discharge

Under section 20 of the Sentencing Act 1997 (Tas), an applicant seeking to discharge a dangerous criminal declaration bears the onus of establishing that the declaration is no longer needed for the protection of the public. The evidence must indicate that the offender is no longer a danger to the public and that there has been 'some alteration in the circumstances ... that [satisfies the Court] that the [declaration] is no longer warranted'.²⁶⁹ The offender can apply for a discharge at the end of the non-parole period applicable for the sentence imposed for the offence by reason of which the offender was declared a dangerous criminal.²⁷⁰ There is a right to review the declaration every two years after the first review date.²⁷¹ If an applicant for discharge of a dangerous offender declaration is successful, the discharge may lead to unconditional release, subject to any conditions imposed if an offender is released on parole.²⁷²

3.6.2 Sex offender registration

All Australian states and territories have legislation in place governing the registration of sex offenders that aims to protect the community by allowing detailed information to be kept about the offender.²⁷³ This is reflected in the long title of the *Community Protection (Offender Reporting) Act* 2005 (Tas) that states that the aim of the legislation is:

to require certain offender who commit sexual or certain other serious offences to keep police informed about their whereabouts and other personal details for a period of time (to reduce the likelihood that they will reoffend and to facilitate the investigation of any future offence that they may commit).²⁷⁴

264 *Chester v R* (1988) 165 CLR 611, 618.

265 See for example: *R v Minney* (2003) 12 Tas R 46, [10] referring to a psychiatrist's report concerning the defendant in assessing whether to make a dangerous criminal declaration.

266 *Read v R* (1994) 3 Tas R 387, [21] citing *R v McCrossen* [1991] TASSC 1. See also *Director of Public Prosecutions v Phillips* [2006] TASSC 81, [10]; *R v Minney* (2003) 12 Tas R 46, [5].

267 *R v Minney* (2003) 12 Tas R 46, [32] citing *Chester v R* (1988) 165 CLR 611, 618, 619.

268 *R v Minney* (2003) 12 Tas R 46, [34].

269 Sentencing Act 1997 (Tas) s 20(3); *Read* (1997) 94 A Crim R 539, 540; *Bell v Director of Public Prosecutions* [2011] TASSC 61, [11].

270 Sentencing Act 1997 (Tas) s 20(2).

271 *Ibid* s 20(6).

272 *IRS* [2013] TASSC 66, [4].

273 See Kate Warner, 'Sentencing Review 2005–2006' (2006) 30 *Criminal Law Journal* 373, 387; Freiberg, above n 41, [9.290]–[9.310]; Victorian Law Reform Commission, *Sex Offender Registration*, Information Paper (2011); Victorian Law Reform Commission, *Sex Offender Registration*, Final Report (2012); Law Reform Commission of Western Australia, *Community Protection (Offender Reporting) Act 2004*, Final Report (2012). See also *Crimes (Child Sex Offenders) Act 2005* (ACT); *Child Protection (Offenders Registration) Act 2000* (NSW); *Child Protection (Offender Reporting and Registration) Act 2004* (NT); *Protection (Offender Reporting) Act 2004* (Qld); *Child Sex Offenders Registration Act 2006* (SA); *Community Protection (Offender Reporting) Act 2005* (Tas); *Sex Offenders Registration Act 2004* (Vic); *Child Community Protection (Offender Reporting) Act 2004* (WA).

274 *Community Protection (Offender Reporting) Act 2005* (Tas) long title.

Offenders who are subjected to reporting obligations must provide the Registrar of the Community Protection Offender Register with a list of personal details including any names by which they have been known, their address, names of children with whom live or have regular unsupervised contact, the name and place of employment, their affiliation with any club or organisations, vehicle description, the name of internet service provider and type of internet connection, their email addresses, internet names, chat room user names and any associated passwords.²⁷⁵ The offender must also notify any changes in their details within 7 days²⁷⁶ and must notify the Registrar if he or she intends to travel interstate for 7 days or more.²⁷⁷ It is an offence for an offender to fail to comply with reporting obligations²⁷⁸ or provide misleading information.²⁷⁹

Reportable offences are divided into three classes: Class 1, Class 2 and Class 3.²⁸⁰ The offences considered in this Report all fall within Class 2 that contains offences such as making child exploitation material, maintain a sexual relationship or intercourse with a young person, incest, indecent assault, aggravated sexual assault and rape.²⁸¹ Class 1 contains offences connected with child pornography, grooming and loitering²⁸² and Class 3 contains offences against the *Criminal Code Act 1995* (Cth). There is a different maximum length of reporting period that can be ordered by the court depending on the class that the offence falls into and the number of offences involved. For an offender convicted of one Class 2 offence, the maximum reporting period is 15 years and for an offender convicted of two or more Class 2 offences or one or more Class 2 offences and one or more Class 3 offences, the reporting period can be made for life.²⁸³

Unlike most other States and Territories, where registration is mandatory, there is a limited discretion in Tasmania to not include a person convicted of a sexual offence on the Register.²⁸⁴ For registration not to occur in Tasmania, the Court must be satisfied that the person convicted of a reportable offence does not pose a risk of committing a reportable offence in the future,²⁸⁵ which has been interpreted to mean that the court must make the order unless the 'risk is non-existent'.²⁸⁶ Registration on the Sex Offender Register is an order in addition to a sentence and so is not considered to be a sentence of the court and there is no indication that registration in any way is considered to raise an issue of double jeopardy in being a second punishment for the same offence.²⁸⁷ In the 2008–14 period, in cases where the information was recorded in the TLRI database (207 out of 230 cases), 76.8% of offenders were placed on the Sex Offender Register (n= 159). In relation to the offence of sexual intercourse with a young person in the context of 'consensual cases', the offender was not placed on the Sex Offender Register in 20 out 34 cases (59%). In 12 out of 33 (36.4%) 'consensual' cases involving the offence of maintaining a sexual relationship with a young person, the offender was not placed on the Register.

275 Ibid s 17.

276 Ibid s 16.

277 Ibid s 19.

278 Ibid s 33.

279 Ibid s 34.

280 Ibid s 12.

281 Ibid s 14, sch 2.

282 Ibid s 13, sch 1.

283 Ibid s 24.

284 Law Council of Australia, *Registration and Reporting Obligations for Child Sex Offenders: Law Council Policy Principles v Current State and Territory Practice*, 2 (n.d.) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/LCAPolicyPrinciplesvStateandTerritoryPractice.pdf>>; Victorian Law Reform Commission, above n 273, [2.53]–[2.54].

285 *Community Protection (Offender Reporting) Act 2005* (Tas) s 6.

286 *DPP v STU* [2012] TASCCA 7, [33] (Evans J).

287 See TLRI, above n 1, [6.3.3] in relation to sex offender registration orders.

4.

Assessing the appropriateness of sentencing: Comparison of sentences for sexual offences with comparator offences in Tasmania and offences in other jurisdictions

In this chapter, two approaches are taken to address the appropriateness of sentencing for sex offenders in Tasmania:

(1) **a comparison is made between sentencing for sexual offences in Tasmania and sentencing for sexual offences in other jurisdictions.** While this is one way of attempting to assess the appropriateness of current sentencing practices for sexual offences, inter-jurisdictional comparison 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 differ (difficulties that are compounded by the use of global sentencing in Tasmania); there are difference with respect to which offences are dealt with summarily and in higher courts; and jurisdictional differences in relation to prosecution practices.²⁸⁸

(2) **a comparison is made between sentencing for sexual offences in Tasmania and sentencing for comparator offences.** A measure of the appropriateness of sentencing for sex offences is to compare sentencing with other comparator offences to determine the judicial view of the relative seriousness of the sentences imposed. This can then be viewed against other measures of the offence seriousness such as statistical tools developed to measure the ordinal ranking of offences (National Offence Index (NOI)²⁸⁹ and the 'Fisher Formula'²⁹⁰), the rankings in other jurisdictions and surveys of public opinion. Based on the approach of the Research Paper the crimes of armed robbery, wounding or grievous bodily harm (GBH) and causing death by dangerous driving are used. The relativities between sexual offences and these offences in other jurisdictions are also addressed.

288 See Sentencing Advisory Council, Tasmania, above n 6, 13–14.

289 See ABS, *National Offence Index*, 2009, (2009), Cat No 1234.0.55.001.

290 Sentencing Advisory Council, Victoria, above n 83, 8.

4.1 SENTENCING FOR SEXUAL OFFENCES IN TASMANIA COMPARED WITH SENTENCING FOR SEXUAL OFFENCES IN OTHER JURISDICTIONS

Sentencing for sexual offences can be assessed against sentencing in other jurisdictions in a number of ways: (1) examining maximum penalties, (2) examining the use of imprisonment, and (3) examining the length of the sentence of imprisonment imposed.

4.1.1 The maximum penalty

The maximum penalty for a particular offence can be used as a measure of the appropriateness of sentence. It is an expression of Parliament's view of the relative seriousness of particular offences.²⁹¹ In Tasmania, as discussed, given that the *Criminal Code* (Tas) does not contain graduated penalties and the general maximum penalty that is provided for all offences is imprisonment for 21 years, there is no statutory indication of the relative seriousness of offences. However, the general maximum can be compared with the maximum penalties for sexual offences in other jurisdictions.

Tasmania's maximum penalty for the offence of maintaining a sexual relationship with young person is similar to the maximum penalties for equivalent offences in New South Wales, which has a 25-year maximum penalty, as has Victoria,²⁹² and to Western Australia, which has a maximum penalty of 20 years.²⁹³ In the ACT, the Northern Territory, Queensland, and South Australia, the maximum penalty for this offence is life imprisonment.²⁹⁴

For the offence of rape, Tasmania's maximum is 21 years. For the ACT, New South Wales and Western Australia for comparable offences it is 14 years,²⁹⁵ although an aggravated offence in New South Wales and Western Australia attracts a maximum penalty of 20 years.²⁹⁶ In the Northern Territory, Queensland and South Australia, the offence of rape attracts a maximum of life imprisonment.²⁹⁷ In Victoria, the statutory maximum for rape is 25 years.²⁹⁸

4.1.2 Custodial sentence

ABS national data

Inter-jurisdictional comparison of the use of custody for sexual offences can be made using ABS data contained in the *Criminal Courts, Australia, 2012–13*.²⁹⁹ This provides figures on the numbers of offenders sentenced in higher courts for sexual assault and related offences³⁰⁰ and includes information on the number of offenders sentenced to immediate imprisonment (including partly suspended sentences), custody in the community (home detention and intensive correction orders), fully suspended sentences and non-custodial orders.³⁰¹

The data, as shown in Figure 9, does not indicate that sentencing in Tasmania as measured by the use of full-time imprisonment for sexual offences is more lenient than most other jurisdictions given that the use of immediate imprisonment in Tasmania for sexual assault and related offences is not out of step with its use in most other jurisdictions. Instead, it could be suggested that in terms of the use of custodial sanction, Tasmanian judges and magistrates sentence more severely than many jurisdictions, given that very few offenders convicted of a sexual offence receive a non-custodial sentence and that judges in Tasmania make greater use of fully suspended sentences

291 Sentencing Advisory Council, Victoria, *ibid* 1.

292 *Crimes Act 1900 (NSW)* s 66EA; *Crimes Act 1958 (Vic)* s 47A. It is noted that the maximum penalty for sexual intercourse with a young person has been increased from 25 years to life: see *Crimes Legislation Amendment (Child Sex Offences) Act 2015 (NSW)* amending the *Crimes Act 1900 (NSW)* s 66A.

293 *Criminal Code (WA)* s 321A.

294 *Crimes Act 1900 (ACT)* s 56; *Criminal Code (NT)* s 131A; *Criminal Code 1899 (Qld)* s 229B; *Criminal Law Consolidation Act 1935 (SA)* s 50.

295 *Crimes Act 1900 (ACT)* s 54; *Crimes Act 1900 (NSW)* s 61I; *Criminal Code (WA)* s 325.

296 *Crimes Act 1900 (ACT)* section 54, 14 years when in company, 12 when alone; *Crimes Act 1900 (NSW)* section 61I; *Criminal Code (WA)* s 326.

297 *Criminal Code (NT)* s 192, which provides a range of maximums between 7 years and life, depending on aggravating factors; *Criminal Code 1899 (Qld)* s 349; *Criminal Law Consolidation Act 1935 (SA)* s 48.

298 *Crimes Act 1958 (Vic)* s 38.

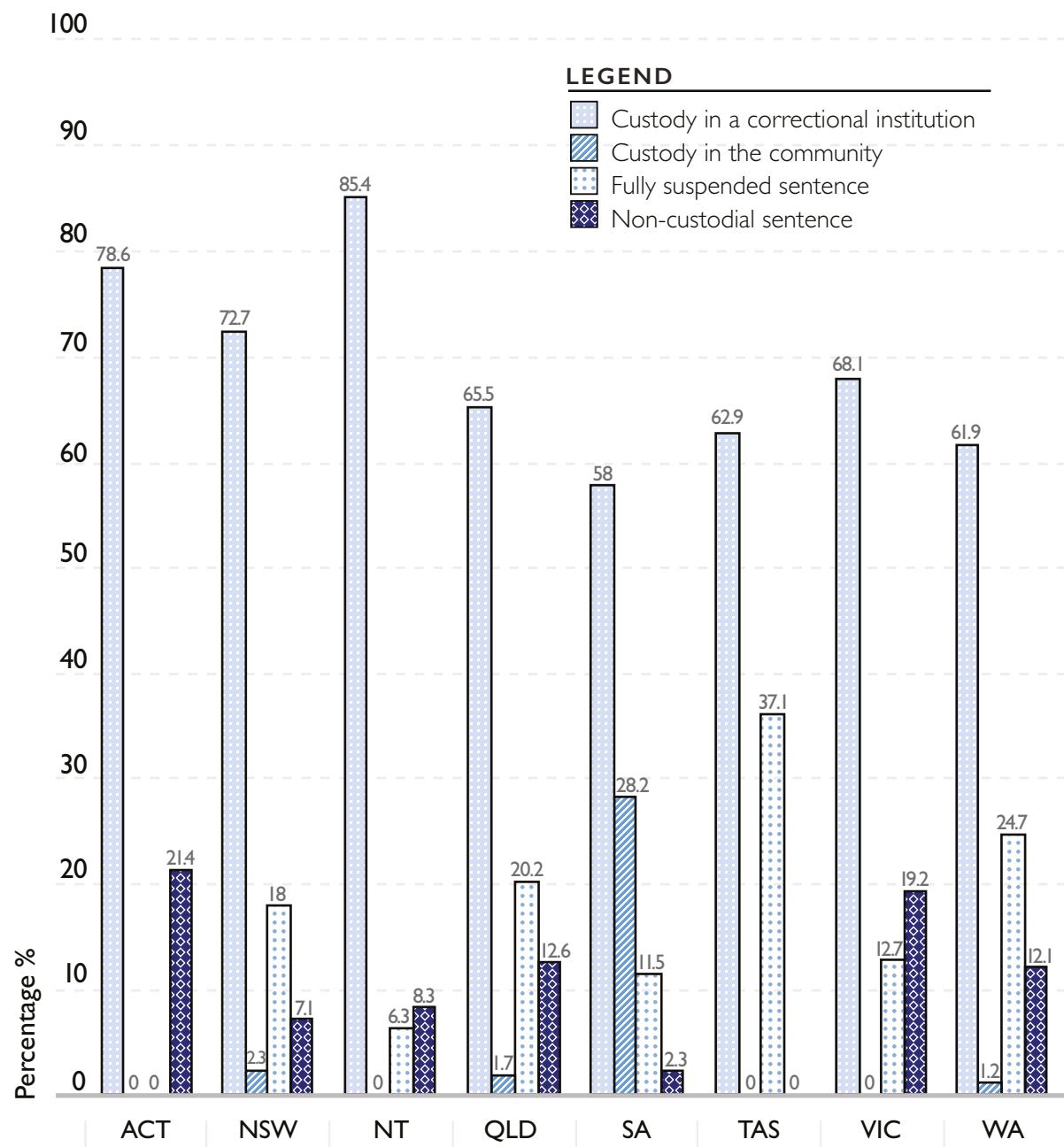
299 ABS, *Criminal Courts, Australia, 2012–13*, (2014) Cat no 4513.0. It is noted that it is not possible to use the 2013–14 release, as data for the number of non-custodial sentences imposed in Tasmania was not available.

300 The glossary defines the category as: 'Acts, or intent of acts, of a sexual nature against another person which are non-consensual or consent is proscribed': *Ibid Glossary*.

301 See *ibid Appendix 3*.

(which is a sentence of imprisonment that is held in abeyance). However, this disparity may not be an indicator of greater severity per se but a reflection of the range of non-custodial sanctions that is available in a jurisdiction.³⁰²

Figure 9: Sentencing outcomes for sexual assault and related offences in higher courts, 2012–13



³⁰² It is noted that judges and magistrates in Tasmania have expressed strong support for suspended sentences, in part given the lack of other intermediate sanctions: see Bartels, above n 89, 109–110.

Local data

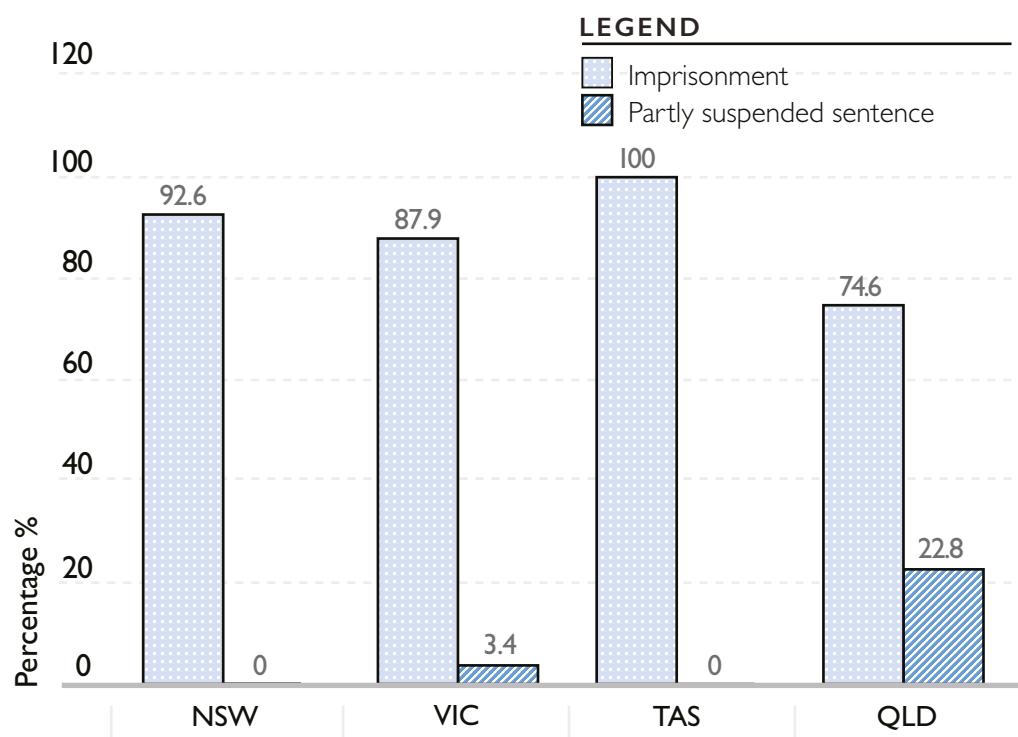
Comparison can also be made between the sentences imposed for specific sexual offences in Tasmania with those imposed in other jurisdictions. In this report, Victoria, New South Wales and Queensland (for child sex offences only) have been chosen on the basis of the accessibility of data. For reasons of offence comparability, the offences of rape and maintaining a sexual relationship with a young person are used. There is also comparative data available from Victoria in relation to the crime of sexual intercourse with a young person.

Rape

As noted, Australian criminal laws are not uniform and the definition of rape differs between jurisdictions. In Tasmania, the definition of rape is narrower than in Victoria, Queensland and New South Wales as it only includes penile penetration of the vagina, anus or mouth. In Victoria, New South Wales, and Queensland the offence also includes penetration of the vagina or anus by an inanimate object or any part of the body.³⁰³ The Tasmanian sample includes only sentences for a single count of rape where the offender was convicted of at least one count of rape and the judge imposed a separate sentence for that one count. This is to allow for a comparison to be made with sentencing patterns in other jurisdictions.

A comparison of rates of full-time imprisonment for sexual assault offences for New South Wales, Queensland and Victoria was prepared for the Judicial Commission of New South Wales. This analysis provided data for the period of 1 July 2007 – 30 June 2013 for cases involving adult complainants.³⁰⁴ This analysis is used in this Report with the addition of Tasmanian data from 2008–14. Figure 10 shows that Tasmania has the highest rate of imprisonment of all jurisdictions with all offenders receiving a sentence of imprisonment. However, it is noted that the sample size for Tasmania was very small (five offenders).³⁰⁵

Figure 10: Proportion of offenders sentenced to full-time imprisonment for rape, New South Wales, Victoria, Queensland, Tasmania.



³⁰³ See *Crimes Act 1900* (NSW) s 61H; *Crimes Act 1958* (Vic) s 35; *Criminal Code* (Qld) s 349.

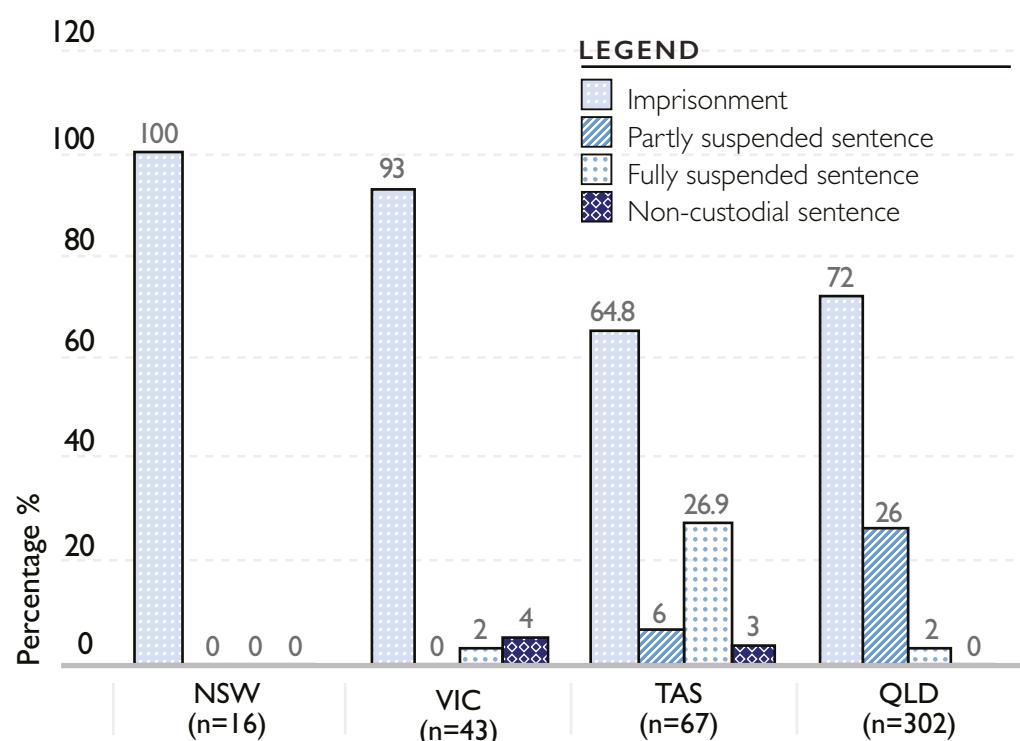
³⁰⁴ Georgia Brignell and Hugh Donnelly, 'Sentencing in NSW: A Cross-jurisdictional Comparison of Full-time Imprisonment' (Research Monograph No 39, Judicial Commission of New South Wales, 2015) [3.2.3]. The Sentencing Advisory Council, Victoria has released an updated sentencing snapshot for the period 2009–10 to 2013–14, which showed that over the five-year period, 94% of people were given a sentence of immediate imprisonment for the offence of rape in the County and Supreme Court of Victoria: see Sentencing Advisory Council, Victoria, 'Rape: Sentencing Trends in the Higher Courts in Victoria 2009–10 to 2013–14' (Sentencing Snapshot No 176, 2015) 1.

³⁰⁵ Note that this only includes cases with adult complainants. In this period, there were three offenders in Tasmania who were charged with rape in relation to children. The use of rape for sexual assault offences against children is the practice in Queensland, but not in New South Wales and Victoria: see Brignell and Donnelly, above n 304, [3.2.3].

Persistent abuse/maintaining a sexual relationship with a young person

Tasmania, New South Wales, Victoria and Queensland have an offence of maintaining a sexual relationship or persistent sexual abuse of a child.³⁰⁶ Figure 11 shows that while custodial sanctions (including suspended sentences) are used to a similar extent to other jurisdictions, imprisonment is used much less frequently in Tasmania. In contrast, fully suspended sentences are used more frequently (26.9% in Tasmania compared to 2% in Queensland and 0% in New South Wales and Victoria). There are difficulties in making comparisons of sentencing levels, as there are clear differences in prosecution charging practices between jurisdictions. The offence is rarely charged in New South Wales³⁰⁷ and it would appear to be used comparatively less frequently in Victoria than in Tasmania.³⁰⁸ This may mean that, although the conduct of an offender satisfies the definition of the offence, differences in the circumstances of the offence (and the offender's culpability) in which the offence is used in different jurisdictions have an affect on the sentencing outcomes.

Figure 11: Sentencing outcomes for persistent abuse/maintaining a sexual relationship, New South Wales,³⁰⁹ Victoria,³¹⁰ Queensland,³¹¹ Tasmania.³¹²



³⁰⁶ Crimes Act 1990 (NSW) s 66EA, Crimes Act 1958 (Vic) s 47A(1), Criminal Code (Qld) s 229B.

³⁰⁷ Freiberg, Donnelly and Gelb, above n 28, 117.

³⁰⁸ It is noted, for example, that in the period July 2008 – June 2013, there were 614 offenders convicted for incest in Victoria. This is rarely charged in Tasmania, with one offender convicted for incest between 2008–14. For discussion of the difficulties that arise in Victoria in relation to the use of the offence of persistent sexual abuse of a child see Criminal Law Review, Department of Justice, Victoria, above n 4, [11.4]. These include the degree of specificity required is too high for some complainants' evidence to meet and that evidence of multiple occasions of offending is not accepted as proof of specific acts: see [11.4.3]. To address these difficulties, legislative amendments have been made to allow the prosecution to file a 'course of conduct' charge alleging multiple incidents of sexual offending against the same complainant. Under this new approach, the prosecution is not required to prove particular incidents of abuse or identify distinctive features differentiating any of the incidents. The offence can be established by generalised evidence of multiple occasion of offending and there is no need to prove discrete offending occasions. This is based on the approach in the United Kingdom. For more details, see Victoria, Legislative Assembly, Parliamentary Debate, 21 August 2014 (Clark); Crimes Amendment (Sexual Offences and other Matters) Bill 2014 Explanatory Memorandum, 25–30; Crimes Amendment (Sexual Offences and other Matters) Act 2014 amending the Criminal Procedure Act 2009 (Vic). The need for such a reform in Tasmania is beyond the scope of this review.

³⁰⁹ Freiberg, Donnelly and Gelb, above n 28, 117 (2007–13).

³¹⁰ Sentencing Advisory Council, Victoria, 'Persistent Sexual Abuse of a Child Under 16: Sentencing Trends in the Higher Courts of Victoria 2009–10 to 2013–14' (Sentencing Snapshot No 179, 2015) 2.

³¹¹ Freiberg, Donnelly and Gelb, above n 28, 117 (2007–14).

³¹² In the period covering 2008–14.

Sexual intercourse with a young person

In Victoria, there is no direct equivalent offence of sexual intercourse with a young person. Instead, there are three offences: sexual penetration with a child aged under 12, sexual penetration with a child aged 12 to 16 under the care, supervision or authority of the offender, and sexual penetration of a child aged between 12 and 16. A further difference is that (as with rape), the definition of sexual intercourse is narrower in Tasmania and does not include penetration of the vagina or anus by an inanimate object or any part of the body.³¹³ In Tasmania, this conduct would be categorised as aggravated sexual assault. To enable some comparisons to be made with the Victorian sentencing data, the Tasmanian data has been analysed to show sentences imposed between 2008 and 2014 for the offence of sexual intercourse of a young person where the complainant aged 12 years and older.³¹⁴ The Victorian data reflects sentences imposed between July 2009 and June 2014 for the offences of sexual penetration of a child between the age of 12 and 16 and sexual penetration of a child under the care, supervision or authority of the adult, where the child is aged between 10 and 16.³¹⁵

Figure 12: Sentencing outcomes for sexual intercourse with a young person, Victoria and Tasmania

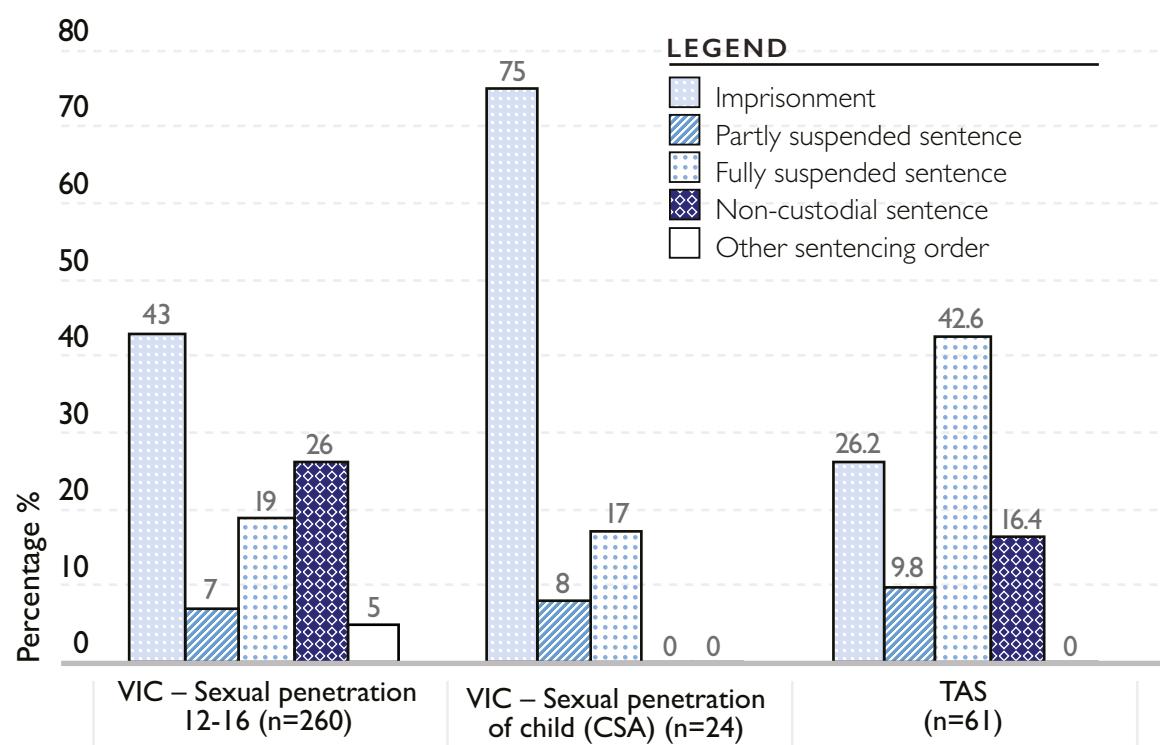


Figure 12 shows that imprisonment is used less often in Tasmania than in Victoria. However, similar factors (age of the complainant, age of the defendant and the disparity in the ages of the offender and the complainant) influence the imposition of a sentence of imprisonment in both jurisdictions.³¹⁶

³¹³ See Crimes Act 1900 (NSW) s 61H; Crimes Act 1958 (Vic) s 35; Criminal Code (Qld) s 349.

³¹⁴ As noted at [3.3.5], there was only one case in this period where the complainant was under 12: see *B, Porter J*, 10 December 2008 (Sentence). Accordingly, no comparison is made with the Victorian offence of sexual penetration with a child aged under 12: see Sentencing Advisory Council, Victoria, Sexual Penetration with a Child Aged Under 12: Sentencing Trends in the Higher Courts of Victoria 2009–10 to 2013–14' (Sentencing Snapshot No 180, 2015).

³¹⁵ Sentencing Advisory Council, Victoria, Sexual Penetration with a Child Under Care: Sentencing Trends in the Higher Courts of Victoria 2009–10 to 2013–14' (Sentencing Snapshot No 182, 2015); Sentencing Advisory Council, Victoria, Sexual Penetration with a Child Aged 12 to 16: Sentencing Trends in the Higher Courts of Victoria 2009–10 to 2013–14' (Sentencing Snapshot No 181, 2015). It is noted that in 2010, the *Crimes Act 1958* (Vic) was amended to provide that the child had to be between the ages of 12 and 16 to fall within the offence. Prior to this amendment, the child could be aged between 10 and 16. The data include both the offence of sexual penetration with a child under care aged 10 to 16 and the offence of sexual penetration with a child under care aged 12 to 16: see 6.

³¹⁶ See [3.5.5]; Sentencing Advisory Council, Victoria, Sexual Penetration with a Child Aged 12 to 16: Sentencing Trends in the Higher Courts of Victoria 2009–10 to 2013–14', above n 315, 17–24.

4.1.3 Sentence length

ABS national data

The ABS dataset Prisoners in Australia includes data on the most serious offence by sentence length for all states and territories. This is a snapshot of prisoners on a particular day and is not data that show defendants sentenced to a custodial order in a particular period (as is the Criminal Courts data). It should be noted that this has the effect of producing higher mean and median sentences because short sentences of imprisonment are under-represented in snapshot (or stock) data compared with flow data (all prisoners for a particular period).

Table 17 is produced from Prisoners in Australia data for 2014.³¹⁷ It shows that for prisoners sentenced for sexual assault and related offences, aggregate sentence lengths were lower in Tasmania than in any other jurisdiction in terms of mean and median sentence. The mean aggregate sentence was 5.7 years for Tasmanian prisoners serving sentences for sexual assault and related offences compared with 7.9 years for Australia as a whole. However, the disparity between Tasmania and Australia as a whole is not nearly so marked in the expected time to serve.

Table 17: Sentenced prisoners for sexual assault and related offences: Jurisdiction and aggregate sentence length and time expected to serve,³¹⁸ 2014

Jurisdiction	Total offenders	Aggregate sentence length		Expected time to serve	
		Mean (years)	Median (years)	Mean (years)	Median (years)
NSW	855	8.9	8.0	6.3	5.5
Vic	700	7.4	6.5	5.5	4.8
Qld	624	7.0	7.0	4.8	3.5
SA	261	9.9	9.0	6.9	5.7
WA	410	6.6	6.0	5.2	4.7
Tas	43	5.7	5.5	5.4	5.3
NT	125	8.1	7.0	6.2	5.7
ACT	30	7.7	7.5	4.4	3.8
Australia	3048	7.9	7.0	5.7	4.9

It is, however, noted that given the breadth of the classification system used in the ABS data and the differences in maximum penalties for the offences, the 'utility of any median sentence calculated [using these data] is limited.³¹⁹

317 ABS, *Prisoners in Australia 2014* (2015), Cat no 4517.0.

318 The aggregate sentence is the longest period the convicted prisoner may be detained for the current sentenced offences in the current episode. Expected time to serve means the earliest release date, ABS, *ibid* Glossary.

319 Freiberg, Donnelly and Gelb, above n 28, 106–107; Brignell and Donnelly, above n 304, 6.

Local data

An alternative method of comparing sentencing length is to use data obtained from each jurisdiction. This method, however, is limited by the availability of this data and also the comparability of the offences. In view of these restrictions, as discussed above, this Report relies on data from New South Wales, Queensland and Victoria for the offences of rape and maintaining a sexual relationship and Victoria for the offence of sexual intercourse with a young person.

Rape

The Judicial Commission of New South Wales recently provided data comparing the median sentence for rape in New South Wales, Victoria and Queensland where imprisonment was imposed and these data are used as the basis for comparison with median sentences in Tasmania in Figure 13.³²⁰ The New South Wales study excluded rape committed against children (to ensure comparability between jurisdictions) and so these cases have also been excluded from the Tasmanian sample. Further, to ensure comparability, the Tasmanian data only shows sentences for a single count of rape imposed between 2001–14 (n = 5).³²¹ Figure 13 shows that that Tasmania's median sentence is three years compared to five years in Victoria, six years in New South Wales and seven years in Queensland.³²² It is noted that there is considerable variability in the median sentence for rape between all the jurisdictions.

Figure 13: Median head sentences for rape (in months), New South Wales, Victoria, Queensland and Tasmania



³²⁰ Brignell and Donnelly, above n 304, 15. This excludes the length of partly suspended sentences, 14. It is noted that the New South Wales data were obtained from 1 July 2005 – 30 June 2013, Victoria from 1 July 2005 – 30 June 2012 and Queensland 1 July 2007 and 30 June 2013.

³²¹ It is noted that there were three cases where an offender was charged with rape in relation to a complainant aged under 17.

³²² It is noted that the median sentence for rape in Queensland for all rape cases including those where the victim was a child was 78 months, Brignell and Donnelly, above n 304, 14 fn 55. In Tasmania, the median sentence for all single counts of rape including those where the victim was a child was 40.5 months. The Sentencing Advisory Council, Victoria has released an updated sentencing snapshot for the period 2009–10 to 2013–14, which showed that over the five-year period, the median sentence for the offence of rape in the County Courts and Supreme Court of Victoria was five years: see Sentencing Advisory Council, Victoria, above n 304, 3.

Persistent abuse/maintaining a sexual relationship with a young person

In research prepared for the Royal Commission into Institutional Response to Child Sexual Abuse, data were presented in relation to sentencing for persistent sexual abuse of a child or maintaining a sexual relationship with a young person. In addition, the Sentencing Advisory Council, Victoria has recently released a sentencing snapshot for the offence of persistent sexual abuse of a child under the age of 16.³²³ In this Report, the Tasmanian data is presented on the basis of one count of maintaining a sexual relationship to allow for comparability with data from New South Wales, Queensland and Victoria.³²⁴

The data in Figure 14 show that the median sentence for maintaining a sexual relationship in Tasmania is considerably lower than for the other jurisdictions.

Figure 14: Maintaining a sexual relationship, median sentence in months, Queensland,³²⁵ New South Wales,³²⁶ Victoria³²⁷ and Tasmania³²⁸



Sexual intercourse with a young person

In Victoria, the median sentence imposed in cases where the offender was convicted of sexual penetration of child aged 12–16 was three years and nine months³²⁹ and the median sentence in cases where the offender was convicted of sexual penetration of a child under the care, supervision or authority was four years and six months.³³⁰ These sentences exceed the median sentence imposed in Tasmania, where for all counts of sexual intercourse with a young person (where the child was aged 12 or older) the median was 6.5 months.

323 Sentencing Advisory Council, Victoria, above n 310.

324 This is discussed in more detail in the Sentencing Advisory Council, Tasmania, above n 6, 21.

325 Freiberg, Donnelly and Gelb, above n 28, 117–118 (September 2007 – August 2014).

326 Ibid 117 (July 2007 – June 2013).

327 Sentencing Advisory Council, Victoria, above n 310, 3 (2009–10 to 2013–14).

328 This covers the 2008–14 period.

329 Sentencing Advisory Council, Victoria, Sexual Penetration with a Child Aged 12 to 16: Sentencing Trends in the Higher Courts of Victoria 2009–10 to 2013–14' above n 315, 4. These data are presented on the basis of the total effective sentence for the case. The total effective sentence in a case with a single charge is the principal sentence (the individual sentence imposed for the charge that is the principal offence). The total effective sentence for a case with multiple charges is the sentence that results from the court ordering individual sentences to be served concurrently or cumulatively.

330 Ibid. These data are presented on the basis of the total effective sentence for the case.

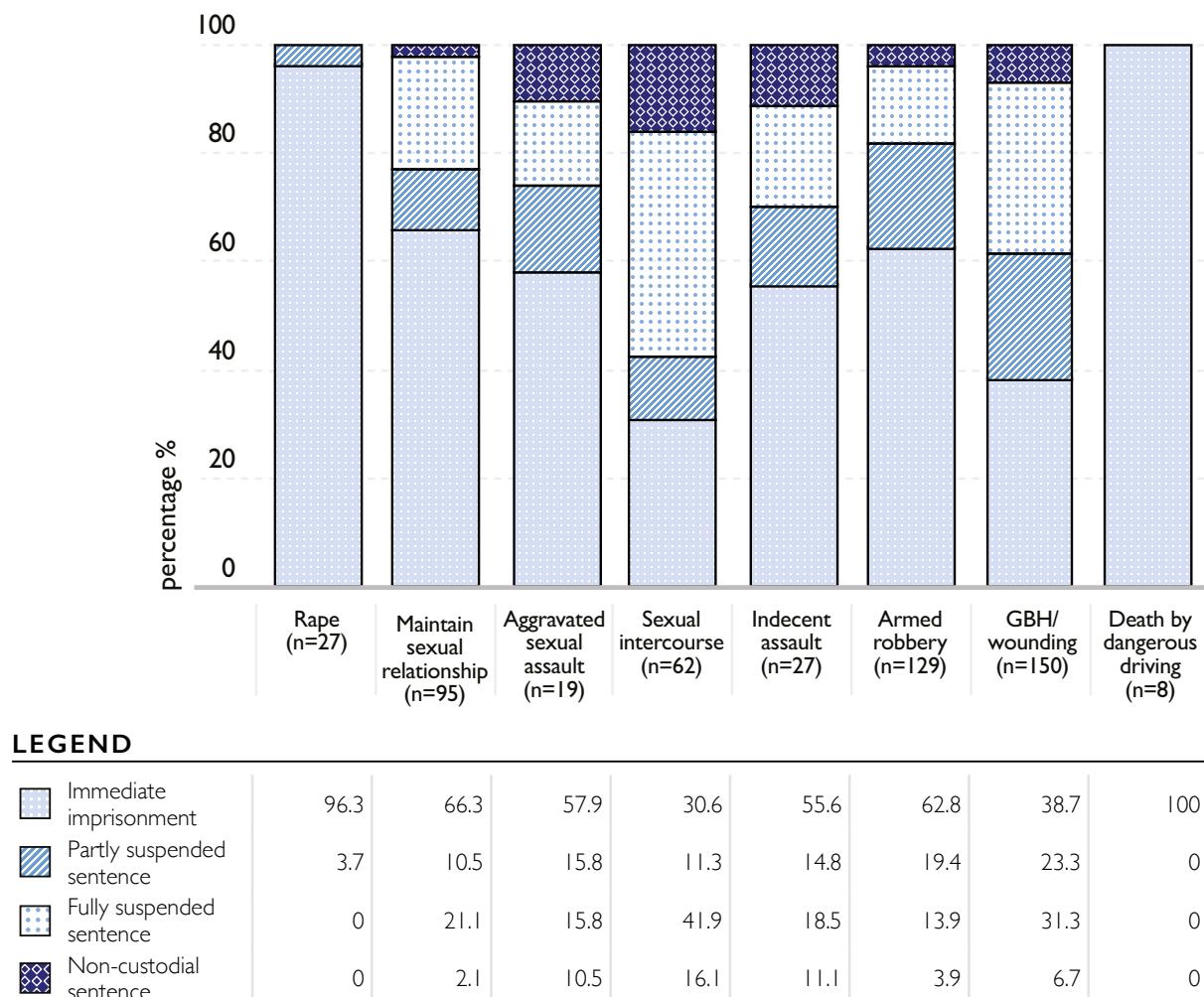
4.2 SEXUAL OFFENCES COMPARED WITH COMPARATOR OFFENCES IN TASMANIA

Another measure of the appropriateness of sentencing for sexual offences in Tasmania is to compare the sentencing for these offences with comparator offences to assess offence seriousness. Following the approach in the Research Paper, armed robbery (including aggravated armed robbery), and causing grievous bodily harm/wounding and causing death by dangerous driving are used as comparator offences. This data present sentencing outcomes for all counts from 2008–14.

4.2.1 Use of imprisonment

Figure 15 compares the use of imprisonment as a sanction for the selected offences between 2008–14 and shows that dangerous driving causing death has the highest use of imprisonment (100%) as a sanction. However, in relation to rape, it is noted that only one offender received a partly suspended sentence and all other offenders were sentenced to imprisonment. The use of imprisonment was comparable for maintaining a sexual relationship with a young person (66.3%) and armed robbery (62.8%), while offenders convicted for sexual intercourse with a young person received the lowest proportion of sentences of imprisonment (30.6%). Similarly, non-custodial sentences and fully suspended sentences were used more frequently for this offence.

Figure 15: Comparator crimes, Supreme Court sentences, 2008–14



4.2.2 Length of sentence

Figure 16 shows the median terms for charges that received imprisonment. It shows that the longest median sentence was for rape (46.5 months), maintaining a sexual relationship (36.7 months), dangerous driving causing death (27.5 months), aggravated sexual assault and armed robbery (24 months), causing grievous bodily harm/wounding (15 months), indecent assault (12 months) and sexual intercourse with a young person (7 months).

Figure 17 shows the range of terms of imprisonment imposed in terms of the minimum term, the 25th percentile, median, 75th percentile and maximum term. The longest term was imposed in relation to rape and maintaining a sexual relationship with a young person. The range of imprisonment was greater for maintaining a sexual relationship (140 months), followed by rape (135 months) and armed robbery (84 months). Offences with relatively small ranges included indecent assault and sexual intercourse with a young person (22 months).

Figure 16: Median imprisonment term for sexual offences (all counts), armed robbery, GBH/wounding and causing death by dangerous driving that received imprisonment: Supreme Court, 2008–14

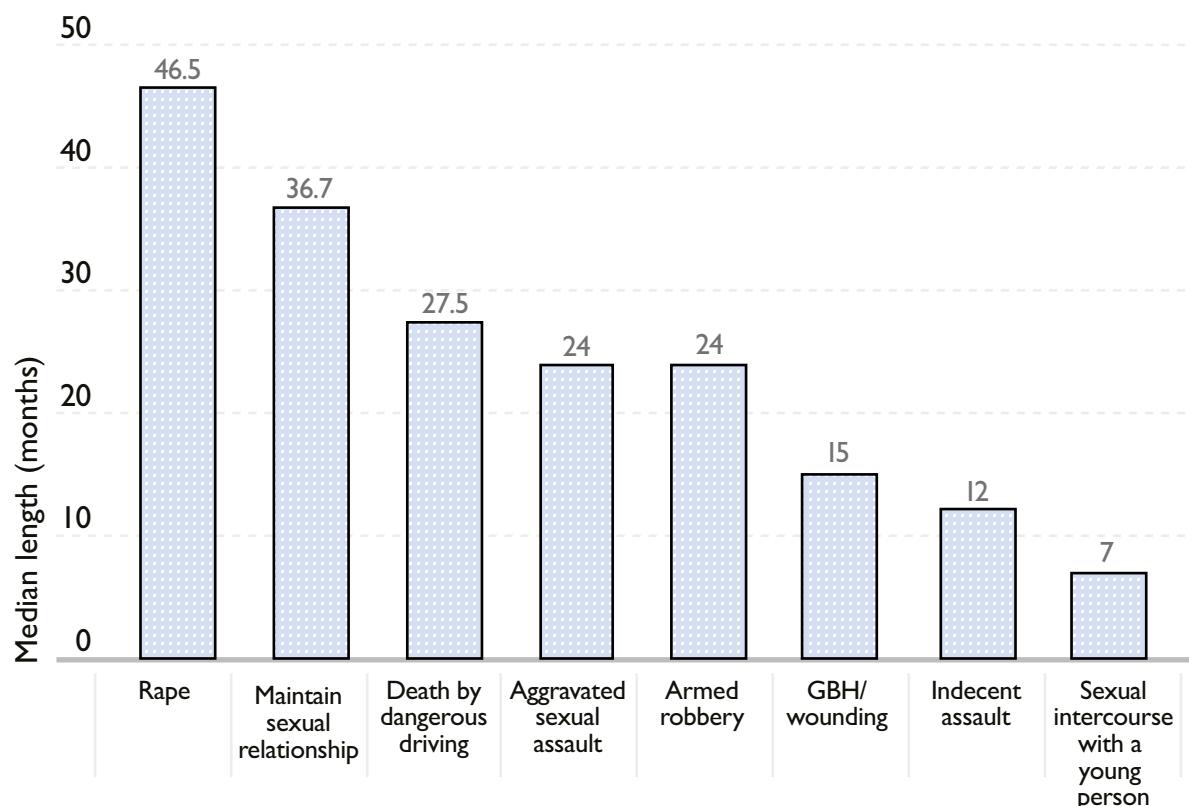
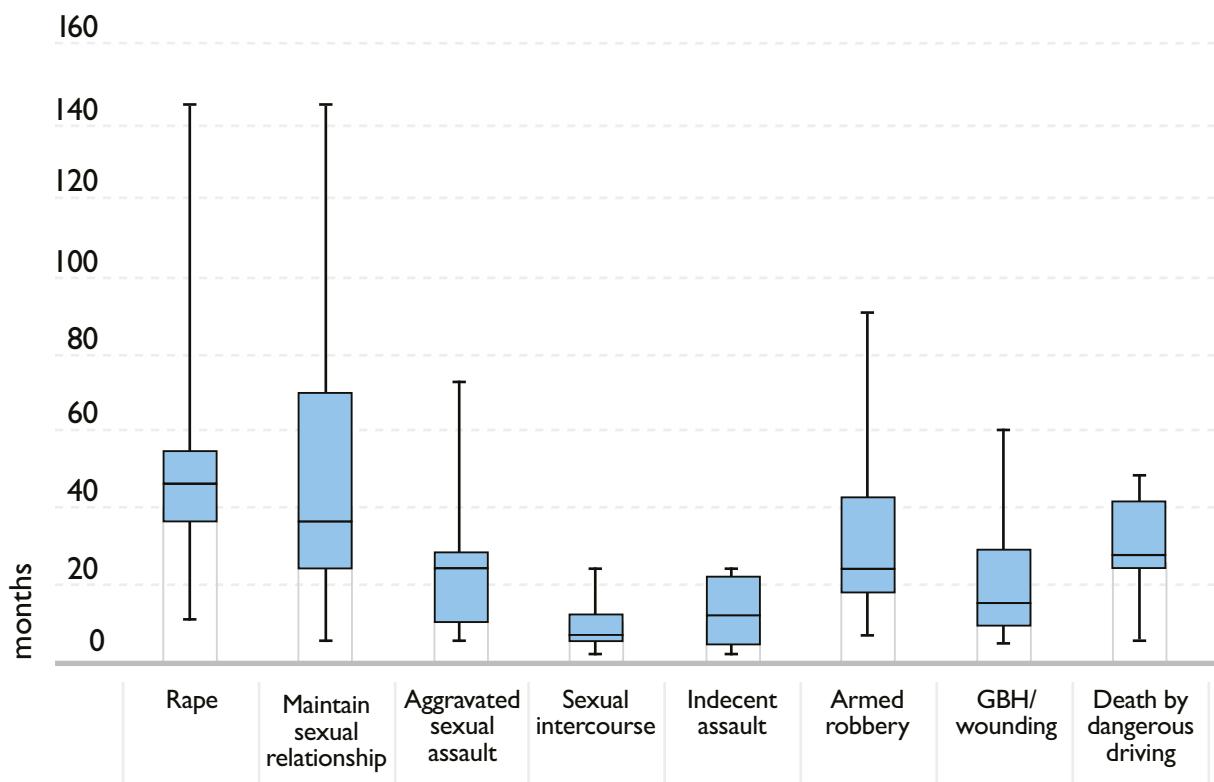


Figure 17: Range of imprisonment terms for sexual offences (all counts), armed robbery, GBH/wounding and causing death by dangerous driving: Supreme Court, 2008–14



4.2.3 Relative seriousness of the offences

Previous research has acknowledged the limitations in measuring the sentencing severity solely through length of imprisonment terms and ways of marrying this with the proportion of offenders that receive imprisonment have been suggested.³³¹ One method used to overcome this limitation has been referred to as the ‘Fisher Formula’. This method multiplies the median term of imprisonment (in years) with the imprisonment sentence rate to obtain a ‘seriousness score’.³³² This calculation excludes partly and fully suspended sentences.

Using this measure, as shown in Table 18, rape was the most serious offence followed by causing death by dangerous driving and then maintaining a sexual intercourse with a young person.

331 Sentencing Advisory Council, Victoria, above n 83, 7–8.

332 Ibid 8.

Table 18: Seriousness score and rank for selected offences, 2008–14

Offence	Seriousness score	Rank
Rape	3.7	1
Dangerous driving causing death	2.3	2
Maintain sexual relationship with a young person	2	3
Armed robbery	1.3	4
Aggravated sexual assault	1.2	5
Indecent assault	0.6	6
Grievous bodily harm/wounding	0.5	7
Sexual intercourse with a young person	0.2	8

The Tasmanian ranking differs from the ranking shown in a Victorian analysis for offence ranking for seriousness, where persistent abuse of a child under 16 ranked as more serious than rape.³³³ However, it must be noted that in Tasmania, there were several rape cases that involved child complainants. In Tasmania, sexual intercourse with a young person was ranked lowest in terms of seriousness. This also differed from the Victorian analysis where some categories of sexual intercourse with a child ranked more seriously than armed robbery. In the Victorian analysis, incest by parent or de facto of parent, sexual penetration with a child (under 12) and sexual penetration with a child (12–16) under care, supervision or authority ranked higher than armed robbery whereas sexual penetration with a child (12–16) ranked lower than armed robbery. In Tasmania, these offence classifications do not exist. It is noted that it was not possible to compare the ranking of aggravated sexual assault, dangerous driving causing death and indecent assault as these offences were not included in the Victorian analysis.

Another means of assessing the ranking of offence seriousness in Tasmania is the National Offence Index (NOI), which was developed by the Australian Bureau of Statistics to create ‘an index to determine a ‘most’ serious or principal offence where an offender is charged with or sentenced for multiple offences’.³³⁴ The NOI uses a combination of factors — statutory maxima, sentencing practices for principal offences and public and expert opinion — to provide a listing of offences by their seriousness.³³⁵ The most serious offence on the NOI index is murder (1), followed by attempted murder (2), manslaughter (3) and driving causing death (4). The NOI then ranks all other categories of offences. Aggravated sexual assault is ranked at 7. This would include the offences of rape, aggravated sexual assault, maintaining a sexual relationship with a young person and sexual intercourse with a young person. Indecent assault would rank at 11 whereas serious assault causing injury (wounding/grievous bodily harm) ranked lower than all sexual offences (23) and armed robbery ranked lower still (aggravated armed robbery at 25 and non-aggravated armed robbery at 40). This ranking differs from the Tasmanian practice, where armed robbery was more serious than aggravated sexual assault, indecent assault and sexual intercourse with a young person, while wounding and wounding/grievous bodily harm ranked more seriously than sexual intercourse with a young person as well.

³³³ Ibid 11.

³³⁴ Ibid 7. See ABS, above n 289.

³³⁵ Sentencing Advisory Council, Victoria, above n 83, 7.

5.

Assessing the appropriateness of sentencing for sexual offences: The purposes of sentencing

This Chapter uses the purposes of sentencing as a measure of the appropriateness of sentencing for sexual offences through an examination of the decisions of the Supreme Court and Court of Criminal Appeal.

Analysis of sentencing comments in Tasmania is facilitated by the publication policy of the Supreme Court. Unlike the practice in many other jurisdictions, sentencing comments are publicly available in Tasmania to allow the community to better understand the reasons for a particular sentence and to enhance the general deterrent effect of sentencing. The latest sentences are available on the Supreme Court website, usually available from the day that the sentence is imposed, and sentences from 2008 onwards are available online from the Tasmanian Sentence database.³³⁶

5.1 PROPORTIONALITY AND RETRIBUTION

Retribution is a common law purpose of sentencing³³⁷ but is not stated explicitly as a purpose in the Sentencing Act 1997 (Tas).³³⁸ In Australia, the concept of proportionality operates to set the limits of permissible retribution.³³⁹ Retribution is fundamentally about matching the punishment to the particular offence through a sentence that is proportionate to the offence — it is not about vengeance. Proportionality helps to inform legislative and judicial approaches to the relationship between offences and the level of sentences, although the single maximum penalty for most indictable offences in Tasmania limits the utility of the principle of proportionality as expressed by the legislature.³⁴⁰ When courts, or the public, state that a sentence is too lenient or too severe, they are generally making a statement that the punishment does not match the seriousness of the crime and the offender's culpability — that it is disproportionately low or high. Ultimately, this is a value judgment that must be made in respect of each offence and in the circumstances of each case.

Sentencing decisions in Tasmania rely on the concept of retribution.³⁴¹ As Underwood J noted in *Richardson*, retribution helps to promote community respect for the administration of the criminal law by expressing such urges through the legal system.³⁴² The statistical findings in Chapter Four showed that Tasmanian sentences for sex offences were lower than in other jurisdictions; however, an assessment of sentencing remarks and appeal cases indicates that retribution continues to be a primary focus for Tasmanian sentencing courts.

336 This is accessible from the Inglis Clarke Library website <<http://catalogues.lawlibrary.tas.gov.au/textbase/SentSearch.htm>>.

337 The other limiting principle at common law is parsimony: see Warner, above n 43, [3.301]–[3.302].

338 This contrast with the position in other jurisdictions, for example, see Sentencing Act 1991 (Vic) s 5(1)(a); Crimes Act 1914 (Cth) ss 7(1)(a), 16A(1); Criminal Law (Sentencing) Act 1988 (SA) s 10(1)(k); Penalties and Sentences Act 1992 (Qld) s 9(1)(a); Sentencing Act 1995 (NT) s 5(1)(a); Sentencing Act 1995 (WA) s 6(1).

339 Veen (No. 1) (1979) 143 CLR 458; Veen (No. 2) (1988) 164 CLR 465; Baumer (1988) 166 CLR 51, 57–8.

340 See [2.3.2].

341 *Re the Criminal Code Amendment (Life Prisoners and Dangerous Criminals) Act 1994 and Re Williams* [1995] TASSC 116; (1995) 5 Tas R 294; *B v DPP* [2005] TASSC 16, [31] (Slicer J); *Goldsmith v Tasmania* [2006] TASSC 86, [8] (Slicer J); *DPP v M* [2005] TASSC 14, [26]; *Farrell v R* [1996] TASSC 58 (7 June 1996), [14]; *R v Minney* (2003) 12 Tas R 46, [17] (Crawford J).

342 Richardson Serial No 5/1991, 6 cited in Warner, above n 43, 71.

5.2 DENUNCIATION

Denunciation ‘is a symbolic function of sentencing and relates to the statements by the judiciary in sentencing that are intended to reaffirm shared values and censure an offender.³⁴³ The Sentencing Act 1997 (Tas), s 3(e)(iii) provides that denunciation is a purpose of sentencing to help prevent crime and promote respect for the law. Denunciation expresses a community’s disapprobation, both in general and toward the specific offender.³⁴⁴ It also operates to vindicate the victim through an acknowledgement of the harm caused by the criminal behaviour — both its occurrence and its seriousness.³⁴⁵ The Tasmanian Court of Criminal Appeal has affirmed the role and importance of denunciation in sentencing for sexual offences.³⁴⁶ Many denunciatory statements are made in sexual offence cases with the ‘courts’ statements … intended to be educative in relation to standards of conduct or morality and as to what amounts to criminal conduct’.³⁴⁷ For example, Wood J in *DPP v STU*,³⁴⁸ considered that:

[t]he sentences that are imposed must reflect the community’s concern about offences involving the sexual abuse of children, recognising the awareness that now exists within our society of the potential for victims to sustain substantial harm as a consequence of such offending.

The sentence imposed must be ‘sufficient to provide the victim with appropriate vindication and to assuage informed public outrage’.³⁴⁹

Consultations conducted by the Council also stressed the need for the court to impose a sentence that reflects the condemnation of society for sexual offences, particularly in relation to child sexual offences. In the submission to the Council from the Laurel House and North West Tasmania Sexual Assault Support Services concern was expressed that current sentences were not adequate to express a denunciatory message for sex offences. She wrote: ‘sentencing sends a message to the community. When sentences are low for these offences it sends the message that it’s OK to seriously abuse women in our society.’ ET, a member of the public stated that current sentencing practice ‘gives a disturbing picture of what our community deems acceptable.’ In response to the Consultation Paper, Dr Georgina O’Donnell put forward the view that ‘stronger sentencing practices reinforce the societal expectation that children should not be sexually exploited’.

The Council agrees that the court has an important role in denouncing the conduct of sexual offenders and acknowledging the harm caused to victims of sexual violence, both in the sentence imposed and its explanation. However, the symbolic function of the law should not be used to impose a sanction that is disproportionate to the circumstances of the offence and the offender. As discussed in Chapter Three, not all offenders conform to the perception that sex offenders are predatory monstrous ‘others’.³⁵⁰

343 Freiberg, Donnelly and Gelb, above n 28, 39.

344 Ryan (2001) 206 CLR 267, [118]–[120] (Kirby J).

345 Freiberg, Donnelly and Gelb, above n 28, 40 referring to *DPP v NOP* [2011] TASCCA 15, [41] (Evans J).

346 *DPP v Farmer* [2005] TASSC 15, [27]; *Re the Criminal Code Amendment (Life Prisoners and Dangerous Criminals) Act 1994 and Re Williams* [1995] TASSC 116, [7]; *Crowley v R* [2003] TASSC 147, [14].

347 Freiberg, Donnelly and Gelb, above n 28, 40. See *State of Tasmania v TJV*, Wood J, 3 October 2012 (Sentence); *State of Tasmania v JTM*, Evans J, 9 December 2010 (Sentence); *State of Tasmania v HLR*, Evans J, 18 August 2008 (Sentence); *State of Tasmania v Wilcox, Porter J*, 16 August 2010 (Sentence); *Tasmania v D, Porter J*, 14 September 2011 (Sentence); *State of Tasmania v G, Porter J*, 27 May 2013 (Sentence).

348 *Director of Public Prosecutions v STU* [2012] TASCCA 7, [60].

349 *DPP v NOP* [2011] TASCCA 15, [41] (Evans J).

350 See Justin Pickett, Christina Mancini and Daniel Mears, ‘Vulnerable Victims, Monstrous Offenders, and Unmanageable Risk: Explaining Public Opinion on the Social Control of Sex Crime’ (2013) 51 *Criminology* 729, 731.

5.3 DETERRENCE

The Sentencing Act 1997 (Tas) stipulates general and specific deterrence as purposes of sentencing. General deterrence aims to discourage potential offenders: it relies on the idea of rational choice theory — that offenders balance the costs and benefits of a particular choice before acting. Specific deterrence is the application of a criminal sanction in order to dissuade the particular offender in the specific case from repeating his or her offence.

In relation to child sexual abuse, Freiberg notes:

[b]oth general and specific deterrence are considered of great importance in relation to crimes involving sexual abuse of children and the fact that the offender is a paedophile or is unlikely to be deterred from further offending by a long sentence is not a ground for moderating the sentence.³⁵¹

Similarly, in Tasmania the courts have acknowledged the need to impose a sentence reflecting specific and/or general deterrence.³⁵² Specific deterrence is considered particularly relevant where there was premeditation and/or repeat offending — in short, where the culpability of the offender is high.³⁵³ Good character and contributions to the community tend to detract from the need for a sentence of personal or specific deterrence. This may be particularly relevant where offences are historical,³⁵⁴ or where the offence was out of character, or genuine contrition expressed.³⁵⁵ However, even if the need for personal deterrence is not significant (given low risks of reoffending in the circumstances of the case), courts have stressed the need for general deterrence.³⁵⁶

In the cases of maintaining a sexual relationship with a young person, the abuse of a position of trust and the extension of the relationship over months or years are predominant characteristics of many offences, and it is these elements that particularly attract a general deterrent consideration.³⁵⁷ In relation to general deterrence, the Court of Criminal Appeal has distinguished between circumstances where general deterrence is given less weight, and those that require general deterrence to be a significant consideration.³⁵⁸ Foremost is the difference in sex offences between predatory or breach of trust offences and opportunistic crimes — the former presumably involving rational choice and the latter being more akin to crimes committed in the heat of the moment, and so not subject to the cost-benefit calculation assumed by general deterrence theory. The former category is open to the application of general deterrence theory, because the offences are assumed to involve some level of consideration of the consequences.

Responses to the Consultation Paper indicated that several respondents were of the view that more severe sentences would have a deterrent effect and that current sentencing practices are too lenient to give effect to deterrence. ET, a member of the community thought that ‘the current sentencing practices are too lenient as they clearly [do not] act as much of a deterrent.’ The Women’s Legal Service supported increasing the severity of sentences or increasing non-parole periods in order to deter offenders from committing sex offences. Michael Stoddart of the Sexual Assault Support Service was of the view that harsher prison sentences for premeditated sex crimes would have a deterrent effect while Beyond Abuse and the Australian Christian Lobby both supported stronger deterrence in sentencing, although gave no indication as to the specific changes that would deter offenders.

351 Freiberg, above n 41, [3.100] citing Ryan (2001) 206 CLR 267; DPP v QJA [2007] VSCA 129; WCB [2010] VSCA 230.

352 See *State of Tasmania v G*, Porter J, 27 May 2013 (Sentence) — unlawful sexual intercourse; *State of Tasmania v C*, Pearce J, 17 June 2013 (Sentence) — unlawful sexual intercourse; *Tasmania v TAC*, Crawford J, 14 May 2008 (Sentence) — maintaining a sexual relationship; *DPP v T* [2012] TASCCA 15, [23]; Director of Public Prosecutions v *Harris* [2013] TASCCA 5; Director of Public Prosecutions v *Church* [2006] TASSC 72, [10] (Slicer J); *Crowley v R* [2003] TASSC 147, [14] (Crawford J); *Turner v Visser* [2001] TASSC 135, [38] (Slicer J); *Stonehouse v R* [1993] TASSC 129; *Richman v Tasmania* [2011] TASCCA 18.

353 *DPP v T* [2012] TASCCA 15.

354 *Holloway v Tasmania* [2013] TASCCA 1, [6].

355 *State of Tasmania v Richman*, Tennent J, 17 May 2011 (Sentence) — maintaining sexual relationship, remorse; *State of Tasmania v Holloway*, Porter J, 7 August 2012 (Sentence) — maintaining sexual relationship, historical and uncharacteristic; *State of Tasmania v G A D*, Tennent J, 27 August 2009 (Sentence) — unlawful sexual intercourse and indecent assault, uncharacteristic.

356 Director of Public Prosecutions v *STU* [2012] TASCCA 7, [59] (Wood J) citing *R v R* [1985] TASSC 25; *R v BJW* (2000) 112 A Crim R 1.

357 See *Tasmania v Bellmore*, Crawford J, 21 February 2008 (Sentence) — breach of trust, and a lengthy relationship; *State of Tasmania v PTJR*, Tennent J, 27 August 2008 (Sentence) — foster home father, with ongoing consensual relationship and children, but a relationship that the courts ‘must condemn’; *State of Tasmania v JJR*, Tennent J, 3 October 2008 (Sentence), in which the sentencing judge noted ‘the frequency with which [intrafamilial child abuse] comes before the courts’ requires a sentence reflecting general deterrence.

358 See *Stonehouse v R* [1993] TASSC 129 cf *Richman v Tasmania* [2011] TASCCA 18.

General deterrence as a purpose of sentencing has been questioned by academics and advisory bodies,³⁵⁹ while still enjoying a high level of judicial and legislative support.³⁶⁰ General deterrence is based on theory that the imposed penalty will deter others from committing a similar offence. Related is the concept of marginal deterrence that refers to the intended increase in general deterrence of potential offenders brought about by an increase in penalties or by better enforcement of the law. Research does not support the marginal deterrent effect of increasing sentence lengths. Studies have consistently found that it is the likelihood of being caught that demonstrates a significant deterrent effect,³⁶¹ rather than the severity of the sentence.³⁶² Sentencing outcomes are not as relevant to deterrence as the likelihood of being caught and convicted.³⁶³

Specific deterrence has not received the same level of criticism as general deterrence,³⁶⁴ and, unlike assessment of general deterrence that requires measuring the decisions of unknown would-be-offenders to refrain from committing a crime, it is possible to assess specific deterrence of individual offenders by looking at recidivism data based on reconviction or rearrest data. Meta-analyses, both in Australia and internationally, have found consistently low recidivism rates among sex offenders based both on official reports of offending and self-reports of offending with variations in the rates evident for different categories of sex offenders.³⁶⁵ Research shows that 'younger offenders, offenders who have a prior sexual conviction, and extra-familial offenders who target boys represent more "high-risk" types than other kinds of sex offenders'.³⁶⁶ This demonstrates that, unlike the popular perception of the sex offender, sex offenders are less likely to reoffend than other offenders and that sex offenders are not a single, homogeneous group.³⁶⁷

There are no studies specifically on Tasmanian sex offender recidivism rates. However, some data are available from sentencing remarks that provide some insight into the recidivism rates. In the 2001–13 period there were a number of sex offence cases in Tasmania before the Supreme Court where the defendant had prior sex offence convictions. For example, of the 186 maintaining a sexual relationship cases, there were 16 offenders with prior convictions for similar offences.³⁶⁸ Overall, of 477 sex offence cases (rape, sexual intercourse with a young person, maintaining a sexual relationship with a young person, aggravated sexual assault and indecent assault) in Tasmania in the 2001–13 period, there were 57 recorded cases with previous convictions for similar offences in the Magistrates Court or Supreme Court.³⁶⁹ These data indicate a lower than 12 per cent reoffending rate in the overall Tasmanian sex offence sample group, although there are limitations. These data are based solely on reconviction and the data, provided by the Tasmania Law Reform Institute and gathered from sentencing remarks, are incomplete given that it only includes information about prior convictions when these are noted by the sentencing judge. However, it is consistent with other research that has found low recidivism rates for sex offenders.³⁷⁰

359 Mirko Bagaric and Theo Alexander, '(Marginal) General Deterrence Doesn't Work — And What it Means for Sentencing' (2011) 35 *Criminal Law Journal* 269, 270–273; Sentencing Advisory Council, Victoria, *Does Imprisonment Deter? A Review of the Evidence* (2011); Anthony Doob and Cheryl Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice* 143; Australian Law Reform Commission, above n 7, xviii, xxviii, xiv, 18, 26, 105.

360 See *Crimes (Sentencing) Act 2005* (ACT) s 7(b); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(b); *Sentencing Act* (NT) s 5(1)(b); *Penalties and Sentences Act 1992* (Qld) s 9(1)(c); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(i), *Sentencing Act 1997* (Tas) s 3(e)(i), *Sentencing Act 1991* (Vic) s 1(d)(i).

361 Sentencing Advisory Council, Victoria, above n 359, 2.

362 Ibid 23.

363 Ibid 2.

364 Warner, above n 43, 66.

365 See Freiberg, Donnelly and Gelb, above n 28, 165–170; Karl Hanson, 'Who Is Dangerous and When Are They Safe? Risk Assessment with Sex Offenders' in Bruce Winick and John La Fond (eds) *Protecting Society From Sexual Dangerous Offenders — Law, Justice and Therapy* (Washington, American Psychological Association, 2003), 63–74 cited in McSherry, Keyzer and Freiberg, above n 261; Karen Gelb, *Recidivism of Sex Offenders* Research Paper (Sentencing Advisory Council, Victoria, 2007) 22–27.

366 Freiberg, Donnelly and Gelb, above n 28, 168.

367 Ibid 170.

368 *State of Tasmania v Gallagher*, Porter J, 29 October 2013 (Sentence); *State of Tasmania v K, Blow CJ*, 20 August 2013 (Sentence); *State of Tasmania v RDA*, Crawford J, 19 October 2006 (Sentence); *State of Tasmania v J, Tennent J*, 22 June 2005 (Sentence); *State of Tasmania v Munday*, 2 December 2005, Evans J (Sentence); *State of Tasmania v Elliot*, 15 June 2004 (Sentence); *State of Tasmania v N, Crawford J*, 5 December 2003 (Sentence); *State of Tasmania v Armstrong*, Crawford J, 16 April 2003 (Sentence); *State of Tasmania v Harding, Evans J*, 30 May 2002 (Sentence); *State of Tasmania v D, Evans J*, 8 August 2002 (Sentence); *State of Tasmania v G, Crawford CJ*, 25 August 2011 (Sentence); *State of Tasmania v M, Blow J*, 10 November 2010 (Sentence); *State of Tasmania v Prasad*, Crawford CJ, 6 August 2010 (Sentence); *State of Tasmania v W, Crawford CJ*, 1 March 2010 (Sentence); *State of Tasmania v Bourke*, Crawford J, 10 May 2007 (Sentence); *State of Tasmania v Edwards*, Crawford CJ, 13 February 2009 (Sentence).

369 Rape — 10 of the 69 cases had prior similar convictions; indecent assault — 17 of the 81 cases had prior similar convictions; sexual intercourse with a young person (unlawful sexual intercourse) — 5 of the 91 cases had prior similar convictions; aggravated sexual assault — 9 of the 50 cases had prior similar convictions; maintaining sexual relationship with young person — 16 of the 186 cases had prior similar convictions.

370 Freiberg, Donnelly and Gelb, above n 28, 165–170.

The utility of increasing sentence lengths as a general deterrent for sex, and other offences has been called into question. The assumptions of general deterrence are that there is a genuine risk of detection, that the penalties are adequately known, and that offenders rationally consider their choice to commit an offence.³⁷¹ It also assumes that the public is aware of the sentencing practice of the court.³⁷² Taking into account the low rate of reporting sex offences and a lack of public knowledge of sentencing, the likelihood of general deterrence purposes being furthered by sentence length increase can be doubted. While it is clear that the threat of some punishment operates as a general deterrent, 'evidence does not support the view that this relationship operates in a linear fashion, that is, the deterrent effect of sanctions does not increase in direct proportion to the severity of the sanctions'.³⁷³ Accordingly, it would be difficult to justify an increase in penalties based on the purpose of general deterrence because not all of the factors upon which general deterrence theory relies are present in sex offence sentencing. General deterrence 'provides a justification for imposing punishment but it does not justify the imposition of penalties that exceed the objective gravity of the offence. The precise duration of penalties must be determined by other sentencing considerations, such as proportionality'.³⁷⁴ Further, an issue with the utility of specific deterrence through the use of imprisonment is the criminogenic effect of imprisonment.³⁷⁵ Where reoffending risks are low, a specific deterrent effect sought through imprisonment may be counter-productive.

5.4 INCAPACITATION/PROTECTION OF THE COMMUNITY

Community protection is specifically identified as one of the purposes of sentencing in Tasmania.³⁷⁶ This is an umbrella term that covers retribution, deterrence and rehabilitation as well as incapacitation.³⁷⁷ Incapacitation of the offender protects the community through the use of imprisonment given that for the duration of an offender's incarceration that person cannot commit offences against the general community. Imprisonment, either for a fixed term or indefinitely as a dangerous offender, are the only incapacitating sentencing orders available in Tasmania.³⁷⁸ Although, conditions attached to non-custodial options that reduce an offender's opportunity to reoffend may be aimed at incapacitation.³⁷⁹ Protection of the community also underpins the scheme of registration for sex offenders.³⁸⁰

While courts frequently refer to the offender's likelihood of re-offending in the imposition of an order that the offender be included on the Sex Offender Register, where a sentence of imprisonment is imposed, courts do not often refer to the need for community protection through incapacitation. The focus tends to be on the need to punish the offender for the current offence and deter others (and the offender) from committing similar offences. This may be because the protection of the public is usually subject to the principle of proportionality — the requirement that the sentence imposed should not be disproportionate to the gravity of the offence. In addition, the Working with Children Registration process is generally incapacitating for a person with a conviction for a sexual offence committed while an adult against a child. In this situation, the person must receive a negative risk assessment and a proposed negative notice, which means that a negative notice will be issued, unless the offender applies to have the negative risk assessment re-assessed and the Registrar is not satisfied that the person poses an unacceptable risk of harm to vulnerable persons generally.³⁸¹

371 Kate Warner, 'A Review of What Works in Sentencing' (Paper presented at 20th ANZSOC Conference, Adelaide, 23rd–26th September 2007) 5.

372 Freiberg, Donnelly and Gelb, above n 28, 44.

373 Edney and Bagaric, above n 39 [7.55].

374 Ibid [7.55].

375 Sentencing Advisory Council, Victoria, above n 359, 18.

376 Sentencing Act 1997 (Tas) s 3(b).

377 Warner, above n 43, [3.222].

378 See discussion of dangerous offender provisions at [3.6.1].

379 Warner, above n 43, [3.222].

380 See [3.6.2]. Community Protection (Offender Reporting) Act 2005 (Tas) long title.

381 See Registration to Work with Vulnerable People Act 2013 (Tas) ss 30, 32; Registration to Work with Vulnerable People (Risk-assessment for Child-Related Activities) Order 2014 (Tas) order 10.

In Tasmania, the dangerous criminal legislation specifically recognises the need for public protection and allows the court to declare a repeat violent offender a ‘dangerous criminal’ and to detain the offender indefinitely, if the court is satisfied that the declaration is necessary for the protection of the public.³⁸² It is a statutory exception to the requirement for proportionality in sentencing.

5.5 REHABILITATION

Rehabilitation is recognised as an aim of sentencing in Tasmania under the Sentencing Act 1997 (Tas), s 3(e)(ii). Rehabilitation aims ‘to reduce crime by offering forms of sentence (especially in non-custodial settings), which provide educative, counselling, drug rehabilitation, psychological, social work, retraining or other services designed to help address the factors that are thought to contribute to the offending’.³⁸³ Rehabilitative aims are generally more pronounced with young offenders.³⁸⁴ However, even for older offenders, positive steps toward rehabilitation on the part of an offender in the period between offence and conviction have been identified as mitigatory factors.³⁸⁵ This arises in cases of historical sexual abuse where there has been a lengthy period between the offending behaviour and the imposition of sentence during which time the offender has not reoffended and has demonstrated that an assessment that he or she has low risk of reoffending is appropriate.

5.6 INTERESTS OF THE VICTIM

Tasmania is only one of two jurisdictions that expressly provide that one of the purposes of the Act is to recognise the interests of victims of offences.³⁸⁶ The interests of victims may include:

- punishment, deterrence, rehabilitation and protection of the community; and
- recognition of the harm resulting from sexual assault to them and of sexual assault in general.

In Tasmania, the courts can address these interests of victims through sentencing. First, courts can recognise the harm by giving victims a voice in court through the use of victim impact statements in the sentencing process, and secondly by recognising harm through the imposition of penalty to an offender according to the purposes of sentencing.

Recognition of the interests of victims in sentencing takes account of harm, sometimes as a measure of the seriousness of the offence, but also as factors that are aggravating by reason of increased culpability of the offender. Characteristics of the victim of the offence, such as vulnerability by reason of youth or infancy, disparity in age, and the degree of exploitation are aggravating factors in sentencing.³⁸⁷ In addition, the effect of the crime on the victim is an important sentencing consideration. Judicial comment indicates that the interests of victims in punishment are intended to be adequately represented by consideration of harm with the ‘undoubted sentencing principle that harm to the victim should normally lead to an increased penalty and more so when the harm is severe’.³⁸⁸ Frequent mention of the consequences for the complainant and harm to the victims of the sex offences is made in sentencing comments,³⁸⁹ and the contents of victim impact statements are commonly referred to in sex offence sentences.

While sentencing comments reflect the consideration of the harm to victims by both reference to victim impact statements, and consideration of the harm caused to victims, the question of appropriateness of the sentences focuses on whether sentences are adequate in expressing that harm. Some of the written responses to the Consultation Paper made mention of recognition of the victim and the harm of the crime.

382 See [3.6.1].

383 Freiberg, above n 41, [3.105].

384 See DPP v Church [2006] TASSC 72, [15] (Blow J).

385 Randall v R; Farmer v R [2004] TASSC 42 (Evans J) [49]; Crowley v R [2003] TASSC 147, [13] (Crawford J, Cox CJ and Evans J concurring). See also Freiberg, Donnelly and Gelb, above n 28, 48–50 for a discussion of rehabilitation.

386 Sentencing Act 1997 (Tas) s 3(h); Frieberg, Donnelly and Gelb, above n 28, 59.

387 Warner, above n 43, [3.418].

388 Crowley v R [2003] TASSC 147, [7] (Crawford J); Attorney-General for Tasmania v KTB [2010] TASCCA 6 (10 May 2010), [56] (Crawford CJ).

389 For a range of such comments: Tasmania v BJM, Slicer J, 9 April 2008 (Sentence) — maintaining a sexual relationship with a young person; Tasmania v Fox, Porter J, 10 June 2010 (Sentence) — rape; Tasmania v C, Blow J, 5 August 2011 (Sentence) — unlawful sexual intercourse; Tasmania v Lamin, Evans J, 30 March 2012 (Sentence) — assault and indecent assault; Tasmania v WDG, Wood J, 19 April 2013 (Sentence) — rape and producing child exploitation material.

There were comments on both sentence length and on the use of victim impact statements. With one exception, the submissions discussed the need for the effect on victims to be recognised by the courts in some way, be it with harsher sentences, or a greater incorporation of the victim impact statements into the sentencing process.

It is not clear, however, that the interests of victims necessarily necessitates longer sentences for sexual offences. Research has found that victims themselves see their interest in the criminal justice system in terms of the possibility of retribution, specific deterrence, rehabilitation, protection and education of the community, and recognition of both the harm that had been done to them and the harm resulting from sexual assaults in general.³⁹⁰ Victims did not necessarily want imprisonment for offenders, as some wanted rehabilitation or just recognition that harm had been done to them.³⁹¹ Studies have recognised that validation of victims of sexual assault 'corresponds with reduced victim trauma and increased help-seeking'.³⁹² For the small percentage of sexual assault victims whose complaint reaches the sentencing stage, the inclusion of victim impact statements in sentencing comments is an important validation and vindication of the harm that has been done to them.³⁹³ In the forums conducted by the Council, participants who represented victims expressed the view that victims who witnessed their impact statement being read before the court felt more satisfied with the sentence. Mr Michael Stoddart of SASS raised a question of the adequacy of funding for professional help for sexual assault victims in victim impact statement preparation. The process for the preparation of victim impact statement is part of the role of Witness Assistance Officers with the Office of the Director of Public Prosecutions. There is support for sexual assault victims in the preparation of their impact statements from Witness Assistance Officers and the DPP's Office. Sexual assault victims also have access to counselling and compensation, as well as referral to private psychologists.³⁹⁴ As indicated at [1.6], it is Council's view that victim support is crucial and appropriate support should be provided for the preparation of victim impact statements so that the process is effective to articulate the harm of the offence to the victim.

Significant increases to the length of sentences may be contrary to the interests of victims if it discourages offenders from entering a plea of guilty. Currently, offenders charged with sexual assault are already less likely to plead guilty than for all offences other than homicide³⁹⁵ and changes to sentencing policy may further decrease the likelihood of offenders pleading guilty. This is contrary to the interests of victims for two reasons. First, it exposes the complainant to the trauma of the trial process, which is a recurrent concern in the literature examining sexual assault and the criminal law.³⁹⁶ Second, it decreases the likelihood that the offender will be convicted. Research has shown that it is relatively more difficult to obtain a conviction at trial for sexual offences than for offenders charged with other offences.³⁹⁷ Both Laurel House and North West Tasmania Sexual Assault Services and the Women's Legal Service highlighted the trauma of the trial process for complainants and the difficulty of obtaining convictions for sexual offences in their submissions to the Council. As the forum conducted by the Council with representatives of the Office of the Director of Public Prosecutions, the Tasmanian Bar, Legal Aid and the Women's Legal Service noted, the issue is not so much with the adequacy of sentencing but with the need for victims to be heard and believed. This validation will be lost if more offenders proceed to trial and are not convicted. Further, the sentencing process is only a small (if visible) component of the response of the criminal justice system to sexual violence.³⁹⁸ 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.³⁹⁹ Even if an offender is convicted, the discretion of the sentencing judge is circumscribed by the charges to which the person has been found guilty.⁴⁰⁰ In this context, changes to sentencing type and length is likely to only have a very small effect on victim satisfaction with the criminal justice process overall.

390 Haley Clark, 'What Is the Justice System Willing to Offer? Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs', (2010) 85 *Family Matters* 28, 30–31.

391 Ibid 30.

392 Ibid 32.

393 Ibid 33.

394 Email from Graham Davis, Witness Assistance Service Manager, Office of The Director of Public Prosecutions, to Lucy de Vreeze, 23 January 2014.

395 TLRI, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases With Multiple Complainants*, Final Report No 16 (2012) [3.3.17].

396 See *ibid* [3.3.17]–[3.3.23].

397 Ibid [3.3.17].

398 See Freiberg, Donnelly and Gelb, above n 28, 18.

399 See [1.6].

400 Freiberg, Donnelly and Gelb, above n 28, 20.

6.

The appropriateness of sentencing: Public opinion on sentencing for sex offences

Sentencing remarks in Tasmania contain references to the standards and concerns of the community about sexual offences. Community standards in rejecting criminal sexual behaviour have been articulated by sentencing judges through references to 'social denunciation',⁴⁰¹ 'the community's abhorrence',⁴⁰² 'the community's absolute rejection of this type of behaviour',⁴⁰³ 'the community's concern',⁴⁰⁴ 'the public's condemnation'⁴⁰⁵ and 'the community's grave concern'.⁴⁰⁶ As stated by Wood J in *Tasmania v J*,⁴⁰⁷ 'the Court shares the community's concern about sexual crimes relating to children.' The issue remains whether the sentencing practices of the judiciary are in step with community expectations.

Public confidence in sentencing has been identified as an important issue for three reasons:

- (1) the operation of the criminal justice system depends on public confidence and support;
- (2) public opinion can influence actual sentencing decisions; and
- (3) public opinion can influence the political process and drive reforms to sentencing.⁴⁰⁸

Accordingly, public perception of the sentences imposed for sexual offences provides another important measure of the appropriateness of sentencing for sex offenders.

It is clear that, in the abstract, a majority of people believe that sentences are too lenient. This is particularly the position in relation to sex offences and violent offences, where survey findings show a greater dissatisfaction with sentencing for these offences.⁴⁰⁹ Caution must be used in relying on these 'top-of-the-head' responses, as studies that have examined people's response 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.⁴¹⁰ Accordingly, the Council is mindful of the need to develop an understanding of informed public opinion.

In this Chapter, several methods are used to measure public perception on sentencing for sex offences: (1) the responses to the Consultation Paper, (2) the Tasmanian Jury Sentencing Study and (3) other studies that have examined perceptions of sentencing of sex offenders. This Chapter also considers whether the relative ranking of offences by the judiciary (as evidenced by the sentencing data) reflects public opinion on the relative seriousness of offences.

401 *State of Tasmania v HLR*, Evans J, 18 August 2008 (Sentence) — rape and indecent assault.

402 *State of Tasmania v Wilcox*, Porter J, 16 August 2010 (Sentence) — indecent assault, aggravated sexual assault, producing and possessing child exploitation material.

403 *Tasmania v DJL*, Tennent J, 4 November 2008 (Sentence) — maintaining a sexual relationship with a young person.

404 *State of Tasmania v MJC*, Wood J, 24 February 2010 (Sentence) — several charges including one count of maintaining a sexual relationship with a young person and others of communication with intent.

405 *State of Tasmania v G*, Crawford CJ, 24 February 2010 (Sentence) — one count of unlawful sexual intercourse.

406 *State of Tasmania v K*, Wood J, 20 May 2010 (Sentence); three counts of maintaining a sexual relationship.

407 *Tasmania v J*, Wood J, 11 September 2011 (Sentence).

408 Geraldine Mackenzie, Caroline Spiranovic, Kate Warner, Nigel Stobbs, Karen Gelb, David Indermaur, Lynne Roberts, Rod Broadhurst and Thierry Bouhours, 'Sentencing and Public Confidence: Results from a National Australian Survey on Public Opinions Towards Sentencing' (2012) 45 *Australian and New Zealand Journal of Criminology* 45, 46. See also Lynne Roberts, Caroline Spiranovic, David Indermaur 'A Country Not Divided: A Comparison of Public Punitiveness and Confidence in Sentencing Across Australia' (2011) *Australian and New Zealand Journal of Criminology* 370;

409 Sentencing Advisory Council, Tasmania, above n 6, 28.

410 Freiberg, Donnelly and Gelb, above n 28, 132.

6.1 THE CONSULTATION PAPER

As part of the community consultation process, the Council released a Consultation Paper in May 2013 in order to gauge public and stakeholder views on sentencing of sex offences in Tasmania. The Council also conducted forums with representatives of the legal community, police and victims' support organisations.

6.1.1 Methodology

The Consultation Paper provided information about the number of custodial sentences imposed and the sentencing range for several sexual offences (rape, maintaining a sexual relationship with a young person, sexual intercourse with a young person, aggravated sexual assault and indecent assault) as well as comparator offences (armed robbery, causing grievous bodily harm, causing death by dangerous driving). It then provided a sentencing vignette based on decided cases in Tasmania and sought feedback on the appropriateness of sentencing for the various offences. Respondents were asked whether, based on the information provided, the current sentencing practices for the offence were: much too tough, a little too tough, about right, a little too lenient, much too lenient or did not know. Respondents were also asked the type of offence they had in mind and whether they wished to express any further views.

The use of case studies or crime vignettes was designed to obtain community feedback that was informed by knowledge of the offence, the offender and the effect on the victim.⁴¹¹ It is, however, acknowledged that there are limitations to the research. As the respondents for the Consultation Paper were responding to vignettes, the respondents were not able to obtain a sense of the offender as a person.⁴¹² All of the vignettes that involved child complainants occurred in circumstances where the offender was considerably older and in a position of trust which was abused. This means not all respondents expressed a view on the appropriateness of sentencing in cases where there was only a small difference between the age of the offender and the complainant and where the complainant was a willing participant. In addition, in some of the vignettes, the sentence provided was not the sentence that was imposed on appeal.⁴¹³ In relation to the sexual offence vignettes, most of the examples involved child complainants (other than the example provided for rape, which was a rape of an adult by her former partner, and one of the two examples for indecent assault where the complainant was 17 and the offender 31). There were only 11 responses received that addressed the appropriateness of the sentencing contained in the vignettes,⁴¹⁴ and so the sample of public opinion from which the Council has drawn is very small.⁴¹⁵ Neither was the sample a representative sample as respondents were self-selected. Further, several of the responses were made by stakeholder organisations (Sexual Assault Support Service, Laurel House and North West Tasmania Sexual Assault Services, Women's Legal Service, Beyond Abuse). The Council welcomes these submissions and takes careful consideration of the views expressed, but these views do not necessarily represent public opinion more generally.

6.1.2 Responses

As shown by Figure 18, there was a range of views expressed in response to the Consultation Paper's sentencing vignettes and data about sentencing statistics. However, overall the responses indicate that all respondents thought sentencing practices for sex offences were too lenient (at least for some offences). There was significant concern about maintaining a sexual relationship with a young person, aggravated sexual assault and indecent assault and less concern with sentencing for armed robbery with most respondents saying that sentencing was about right.

411 Karen Gelb, *Myths and Misconceptions: Public Opinion Versus Public Judgment About Sentencing*, (Sentencing Advisory Council, Victoria, 2006) 30.

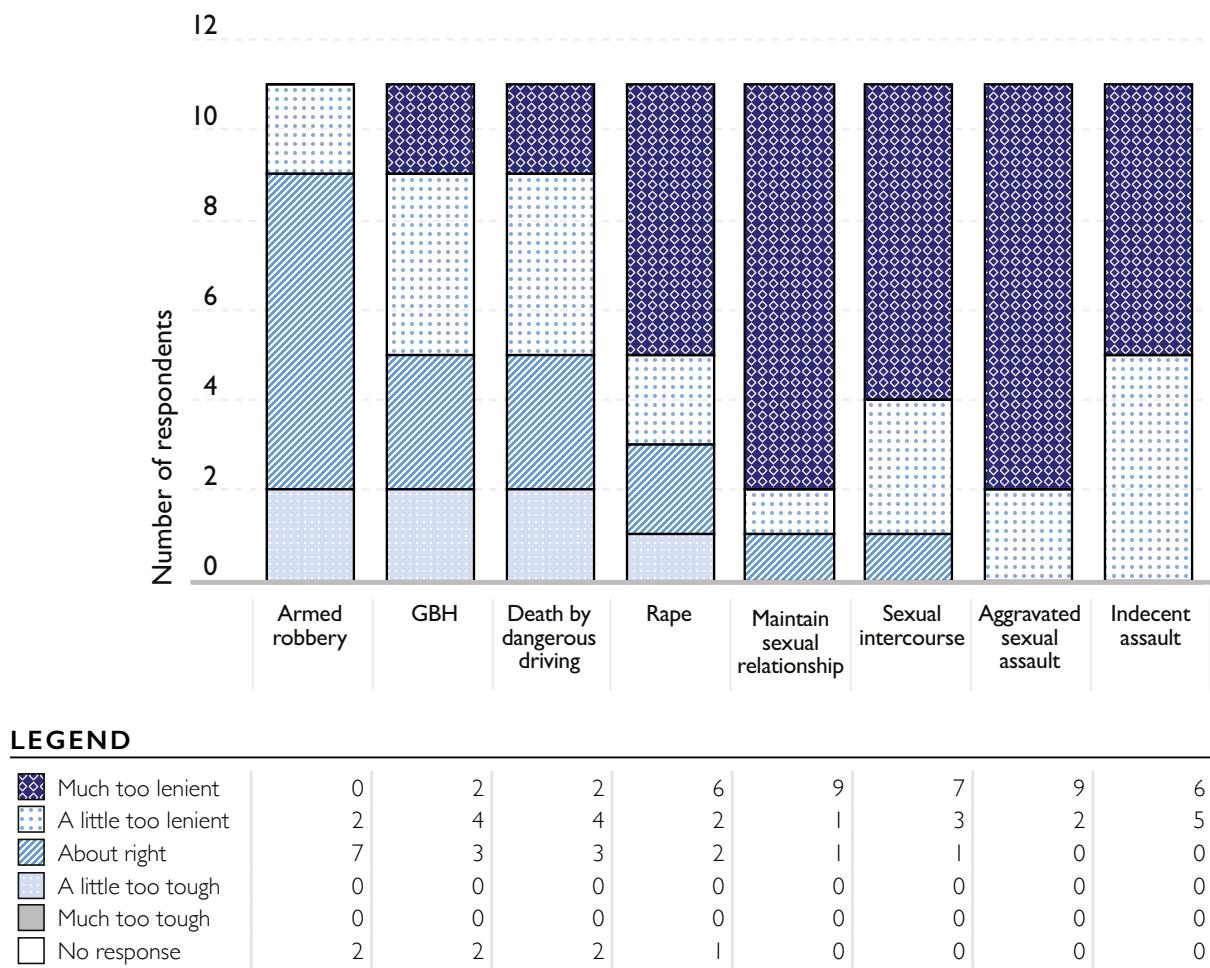
412 Kate Warner, Julia Davis, Maggie Walter, Rebecca Bradfield and Rachel Vermey, 'Gauging Public Opinion on Sentencing: Can Asking Jurors Help?' (*Trends and Issues in Criminal Justice* No 3711, Australian Institute of Criminology, 2009) 1; Austin Lovegrove, 'Putting the Offender Back into Sentencing: An Empirical Study of the Public's Understanding of Personal Mitigation' (2011) 11 *Criminology and Criminal Justice* 37, 39.

413 This was pointed out by Chief Justice Blow, above n 104.

414 It is noted that a further two responses were received (Chief Justice Blow, Supreme Court Tasmania and Civil Liberties Australia — Tasmania) that did not directly answer the sentencing vignettes.

415 A similar criticism was made of the New South Wales Parliamentary Committee inquiry into sentencing for child sexual abuse, Freiberg, Donnelly and Gelb, above n 28, 136.

Figure 18: Appropriateness of sentencing practice in Tasmania: sexual offences and comparator offences



Note that one of respondents indicated that for the offence of maintaining a sexual relationship with a young person, the sentence for one of the two examples provided was a little too lenient and the other was much too lenient. This response has been included in much too lenient.

The Australian Christian Lobby's submission expressed the view that sentencing for rape was about right and noted that the median sentence for rape was higher than that for grievous bodily harm and armed robbery and agreed that this was appropriate for a violent crime which violates women. Mike Stoddart responded that sentencing for rape and indecent assault were a little too lenient, that sentencing for sexual intercourse with a young person was about right and that sentencing for maintaining a sexual relationship (in some circumstances) and aggravated sexual assault were much too lenient. In relation to aggravated sexual assault, the view was expressed that this is rape in other jurisdictions and must receive a custodial sentence. Another submission also indicated that current sentencing practices for aggravated sexual assault were 'distressingly too lenient' and that for an adult complainant, the sentence should be many years of imprisonment and if it was a child, this was far worse.⁴¹⁶

The view that sentencing for aggravated sexual assault should be the same as rape was also expressed in Laurel House and North West Tasmania Sexual Assault Support Services' submission, where it was considered that sentencing for all sexual offences was much too lenient. In relation to rape, concern was expressed that the legal system did not recognise the use of sex as a weapon and, in the family context, it was felt that the absence of prior conviction for a sexual offence was a result of failure to report earlier incidents in the relationship rather than a lack of prior rape within relationship. This submission focused on the harm caused by rape and the message that sentencing sends to the community. Rape was seen to be a serious violation of the 'core of person's being — a violation of our most intimate connection with other humans' and in this way differed from other crimes involving loss of property or serious injury. Concern was also expressed about the difficulties of obtaining a conviction for rape.

Women's Legal Service considered that sentencing for rape and sexual intercourse with a young person was much too lenient and a little too lenient for maintaining a sexual relationship, aggravated sexual assault and indecent assault. In relation to rape, the submission argued that sentencing for rape should be higher relative to causing grievous bodily harm given the harm caused by the offence:

Rape as compared to GBH is a physical, psychological, emotionally devastating crime. In our opinion GBH or assault do not have the additional element of an intimate violation. Emotions of guilt or shame are not associated with GBH or assault. Rape can impact a person's ability to create meaningful intimate relationships, have children or be able to look at themselves without feeling disgusted or 'dirty'.

The significant harm caused by rape was described in the submission by Dr Georgina O'Donnell, where she described 'the far reaching effects for the victim in multiple aspects of their life' and that in her view 'sentencing should reflect the seriousness of the pervasive effects of rape for the victim'.⁴¹⁷ Other submissions also expressed the view that sentencing for rape should be more severe than offences relating to damage or loss of property.⁴¹⁸ A confidential submission expressed a similar point about indecent assault and thought that penetration of the vagina with fingers without consent should be rape and that aggravated sexual assault and indecent assault should be sentenced far more harshly than armed robbery given the nature of the conduct.⁴¹⁹

Similarly, in relation to maintaining a sexual relationship with a young person, the Women's Legal Service considered that sentencing should reflect the harm caused to victims where there is an abuse of power or very young complainants. This was reiterated in the submission of Dr Georgina O'Donnell, where she wrote that 'the negative effects of childhood sexual abuse on child and adolescent victims in the majority of cases are pervasive and chronic'. Other submissions also focused on the effect of sexual offences on the victim, the seriousness of offences committed against very young complainants and the gravity of the breach of trust.⁴²⁰ The Australian Christian Lobby considered that sentencing for maintaining a sexual relationship, sexual intercourse with a young person, aggravated sexual assault and indecent assault were much too lenient given that the offences involve the abuse of trust and violation of vulnerable young people. In relation to maintaining a sexual relationship, the response was written in response to a case where an older man was in a position of trust or authority and there was an ongoing relationship between him and a vulnerable young girl. Mike Stoddard's view was that custodial penalties should be the norm for sexual intercourse with a young person, but that other penalties may be relevant in cases where the parties are closer in age. In relation to the crime of maintaining a sexual relationship, his response indicated that it must attract penalties in the higher range when it involved a prolonged abuse by an authority figure on the basis that the impact is grievous and the breach of trust involved is great.

In relation to maintaining a sexual relationship with a young person and sexual intercourse with a young person, Laurel House and North West Tasmania Sexual Assault Support Services was that the penalty should be the same as rape as offenders under 17 are not able to consent. Sentencing was said to be inappropriate because of the failure to take account of the 'grooming and socialisation process that has long and devastating impacts on the survivor throughout their life'. The disparity in ages, the breach of trust and closeness of the care-giver relationship were viewed as aggravating factors.

417 Dr Georgina O'Donnell, ForensiClinic Consulting Pty Ltd.

418 Confidential 1, Confidential 2.

419 Confidential 2. MJ also observed that penetration of the vagina with a finger without consent should be rape.

420 Beyond Abuse, ET, Confidential 1, Confidential 3.

The Women's Legal Service recognised the wide variety of offending that can be covered under the offence and accepted that there was a difference between a predatory case and one where the perpetrator and the complainant are close in age and in a consensual but illegal relationship.⁴²¹ Confidential 2 wrote that there was a difference when the victim was under 13 and the offender was in a position of trust compared with a consensual relationship with an offender close in age. Different culpability arising from significant age disparity compared with close in age offences were also raised in the submissions of Confidential 3 and MJ.

Forums held with representatives of Tasmania Police, victims' organisations and the legal community raised concern about the sentences imposed for sex offences when children are victims. However, it was noted that there was not a great public outcry that justice was getting it wrong at the sentencing stage. Instead, community concerns was generally directed at a failure to prosecute.

6.2 PUBLIC OPINION AND SENTENCING FOR SEXUAL OFFENCES

In contrast to the considerable research that has examined public attitudes towards sentencing in general,⁴²² there have only been a small number of studies that have examined perceptions of sentencing for sex offenders. One of the ground-breaking studies was conducted in Tasmania, and this has been the model for a Victorian study conducted between 2013–14 and a national study that commenced in 2014. In contrast to the Tasmanian study, the national study aims specifically to gauge jurors' attitudes to the sentencing of sex offenders (rather than sentencing generally).⁴²³ This research will provide information in relation to whether informed members of the public think sentencing for sex offences 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 informed members of the public.⁴²⁴ Limited other research has been conducted in Australia and internationally.

6.2.1 Tasmania

The Tasmanian Jury Sentencing Study sought to gauge public opinion by ascertaining the perceptions of jurors in relation to sentencing.⁴²⁵ The study adopted a three stage mixed method design. The study involved 156 trials, of which 24 were sex offence trials. Of the juries in the sex offence trials, 128 jurors responded to the survey and for the Research Paper, sex offence trials were further analysed.

In Stage One, after returning a verdict of guilty, jurors were asked to specify the sentence that should be imposed on the offender. This was compared with the sentence imposed by the judge and jurors were evenly split between more lenient and more severe sentence suggestions (48%) with some jurors (4%) suggesting the same sentence.

421 This was also recognised in Confidential 2.

422 See Geraldine Mackenzie et al, above n 408, 46; Lynne Roberts et al, above n 408; Karen Gelb, *Measuring Public Confidence in Sentencing* (Sentencing Advisory Council, Victoria, 2008); Kate Warner, Julia Davis, Maggie Walter, Rebecca Bradfield and Rachel Vermey 'Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study' (*Trends and Issues in Criminal Justice* No 407, Australian Institute of Criminology, 2011); Karen Gelb, *Alternatives to Imprisonment: Community Views in Victoria* (Sentencing Advisory Council, Victoria, 2011); Karen Gelb, *More Myths and Misconceptions* (Sentencing Advisory Council, Victoria, 2008); Karen Gelb, above n 411. See also Sarah Armstrong, Gill McIvor, Fergus McNeill and Paul McGuinness, 'International Evidence Review of Conditional (Suspended) Sentences' (Final Report, The Scottish Centre for Crime and Justice Research, 2013) Ch 6 for a summary of Scottish, Netherlands, England and Wales, Canadian and Australian literature; Jean-Louis van Gelder, Pauline Aarten, Willemijn Lamet and Peter van der Laan, 'Unknown, Unloved? Public Opinion on and Knowledge of Suspended Sentences in the Netherlands, (2011) *Crime and Delinquency*, early online access, <<http://cad.sagepub.com/content/early/2011/11/16/0011128711426537.abstract>>; Willem de Koster, Peter Achterberg and Natalia Ivanova, 'Reconsidering the Impact of Informational Provision on Opinions of Suspended Sentences in the Netherlands: The Importance of Cultural Frames' (2014) *Crime and Delinquency*, early online edition.

423 See Kate Warner, 'The Australian National Jury Sex Offence Sentencing Study' (2014) 11 *TJR* 459.

424 Lorana Bartels, Kate Warner and George Zdenkowski, 'National Research with Jurors on Sentences for Sexual Offenders' (2014) 26 *Judicial Officers' Bulletin* 9, 10.

425 See Julian Roberts and Loretta Stalans, *Public Opinion, Crime and Criminal Justice* (Westview Press, 1997) 113 and other sources and theoretical explanations for the perception gap discussed in Kate Warner and Julia Davis, 'Using Jurors to Explore Public Attitudes to Sentencing' *British Journal of Criminology* (2012) 52 *British Journal of Criminology* 93.

In Stage 2, after the judge had imposed sentence, participating jurors were sent details of the sentence and asked whether it was appropriate. In response, 87.8% of jurors considered that the sentence was appropriate (35.6% very appropriate and 52.2% fairly appropriate). While jurors were least likely to say sentences for sex and drug offences were very appropriate, the views of jurors do not suggest that there was an overwhelming perception that sentencing in their case was much too lenient. Jurors who did not think the sentence was very appropriate were asked to indicate what the sentence should have been, and in response 44% would have preferred the same sentence as imposed by the judge, 46.2% would have preferred a more severe sentence and 9.9% would have preferred a more lenient sentence. This does not demonstrate overall dissatisfaction with the leniency of sentencing given that 35.6% of jurors thought the sentence was very appropriate and over half of 52.2% of jurors who thought the sentence was fairly appropriate preferring a sentence that was the same or more lenient than the judge.

Jurors were also asked about their views of sentencing severity in the abstract as well as their views in the particular case and the study found a 'perception gap' between jurors' abstract views and the views in the particular case. It found that 70% of sex offence jurors still said that sentencing for sex offence was too lenient even though only a relatively small number of sex offender jurors preferred a more severe sentence than the judge in their particular case.

In Stage 3 face-to-face interviews were conducted and these provided the opportunity to explore the juror's attitudes in more detail. Many responses resonated with the suggestion of researchers who claim that members of the public who respond in opinion polls that sentences are too lenient tend to construct stereotypical pictures of the worst kind of offenders that reflect the images in the media and popular culture of violent, ruthless pathological evil predators who are sick, mad or bad.

The Research Paper also tested if jurors' opinion in relation to sentencing differed depending on the type of case, and the trials were divided into different categories: rape and aggravated sexual assault, which included all cases of non-consensual penetration with an adult or teenager (9 trials), child sexual assault, which included all sexual offences committed against pre-pubescent children (i.e. age 13 or younger) as well as sexual offences committed against pubescent teenagers by a person in authority (such as father, uncle, carer or priest) (8 trials) and consensual sex with a teenager, which included all cases of sexual contact with a post-pubescent teenager (i.e. aged 13–16 years excluding cases where the perpetrator was in a position of authority). It found that jurors' view of the appropriate sentencing for child sexual assault differed considerably from other types of sex offences. For child sexual assault trials, 62% of 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 offenders 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.

In the in-depth interviews, jurors were interviewed in each of the three categories of sex offences and this provided some insights into the differences between the categories and the reasons for the jurors' views. Jurors in trials that involved consensual sex with a teenager were more likely to suggest a more lenient sentence than the judge and more likely to say that the sentence was very appropriate. Jurors expressed concerns about the effect of imprisonment on the offender and were reluctant to send an offender to prison in a consensual teenage sex case. Jurors in rape and aggravated sexual assault trials were also more likely to suggest a less severe sentence than in sex offences cases as a whole. In these trials, jurors were also concerned about the effect of the sentence on the offender and his family and expressed surprise at the length of the sentence imposed by the judge as it differed from their prior (and less favourable) perception of sentencing for rape. In contrast, jurors in child sexual assault trials tended to be harsher than the judge and were less likely to say that the sentence was very appropriate. One of the jurors interviewed said that a longer sentence was warranted to send a message to others in position of trust and authority.

In summary, the Research Paper concluded that sentences for child sexual assault cases may be perceived by jurors as too lenient, sentences for consensual sex with teenagers are considered to be about right and sentences for rape too harsh. While, as noted in the Research Paper, the numbers in the study were too small to test for statistical significance, the findings suggest that informed 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.

6.2.2 Other jurisdictions

A Victorian study that examined community attitudes to sentencing for rape was undertaken by Lovegrove in 2007.⁴²⁶ This study involved public workshops held by academics and four experienced County Court judges where sentences imposed by the higher courts in four cases (armed robbery, intentionally causing serious injury, rape and theft) were compared with sentences imposed by members of the public. There were 471 participants who attended two workshops held on different days. In the first session a judge gave participants information about the sentencing process, the aims of sentencing and the sanctions available. In the second session, the judge presented details about the case that he had sentenced. The rape case involved multiple rapes at knifepoint of a young woman in her home at night by her neighbour. Before the offender left he apologised and asked her for a date. The offender was a young adult male who had a drinking problem and was drunk at the time. He had a low intellectual capacity. He had prior convictions for car theft but was not regarded as antisocial and was able to do menial work. The participants then nominated the sentence that they would have imposed, and then were given information about the actual sentence imposed and were asked to rate the adequacy of the sentence.

The study found that participants imposed more lenient sentences than the sentence imposed by the court in relation to armed robbery, rape and theft. In the rape case study, the sentence imposed by the court was a non-parole period of 6 years whereas the median sentence as imposed by the participants was 4.9 years.⁴²⁷ The participants also imposed a treatment program as part of the sanction. Nearly two-thirds (63%) of participants would have imposed a sentence that was more lenient than the judge. The study found that judges are not more lenient than the community; the community does not speak with one voice on sentencing; the community does rely on offender factors favouring leniency — not only offence seriousness; and the community does not have firm views as to what is an appropriate sentence for a case.⁴²⁸ It also found that those who favoured harsher sentencing were 'apparently more certain of the correctness of their view and less prepared to tolerate the court's sentence'.⁴²⁹

In a subsequent analysis of the findings of his research, Lovegrove examined public perception of mitigating factors and sought to test whether the judiciary and the public have a shared understanding of personal mitigation.⁴³⁰ He found that, despite the seriousness of the rape, the participants identified several mitigating factors that reduced the offender's culpability, which included the offender's low intellectual capacity, his drunkenness, his young age, his immediate apology and his confession to the police.⁴³¹ Participants also identified factors that demonstrated that the offender had favourable rehabilitation prospects, including that it was a first offence, his remorse, his youth together with his shame and embarrassment over his behaviour and his need for treatment. In addition, prison was thought to be difficult for the offender in view of low intelligence and the risk posed by antisocial influences in prison.⁴³² In conclusion, Lovegrove considered that 'the public appear to mitigate offence seriousness in the interests of the offender in terms of a wide range of case factors relating to culpability, rehabilitation and mercy' and that the public's approach to mitigation was similar to that of the judiciary.⁴³³

A study of public perceptions of sex offenders was conducted in 2012 for the Sentencing Council for England and Wales, which examined the attitudes of victim and the public to sentencing sex offenders.⁴³⁴ There were two phases to the research — phase one was a literature review and phase two was qualitative research with the public and victims of sexual offences. In order to explore public perceptions of sentencing for sexual offences, 12 focus groups (involving 82 people) were arranged. The focus groups discussed vignettes of different types of sexual offences (rape, sexual assault of an adult, sexual assault of a child, online grooming of a teenager, administering a substance with intent, possession of indecent images of a child and voyeurism) In-depth interviews were used to assess victims' perceptions or those of their parents/guardians.

426 Austin Lovegrove, 'Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community' [2007] *Criminal Law Review* 769.

427 Ibid 775.

428 Ibid 776–778.

429 Ibid 769, 778.

430 Lovegrove, above n 412, 41.

431 Ibid 46–48.

432 Ibid 48–51.

433 Ibid 53.

434 Carol Nicholls, Martin Mitchell, Ian Simpson, Stephen Webster and Marianne Hester, *Attitudes to Sentencing Sexual Offences* (2012).

Victims of sexual offences stressed the long-term harm of sexual offences.⁴³⁵ They also noted that the sentence imposed by the court could not change or make up for what had occurred. However, those who felt satisfied by the sentence pointed to factors such as the length of the sentence, the comments of the judge that focused on the culpability of the offender and the harm of the offence, as well as having received support and advice during the investigation and the court case. On the other hand, those who were 'deeply dissatisfied focussed particularly on what they felt were lenient sentences even when they had obtained some support and advice'.⁴³⁶ Those most dissatisfied, were unhappy about the process and the sentence imposed. Victims thought that a life sentence was appropriate for offenders convicted of rape because rape had a life-long impact on victims.⁴³⁷

In responses from the public, custodial sentences were widely supported on the basis that they protected the public, punished the offender, and provided an acknowledgement of harm as well as the seriousness of the offence. It was thought that sentences should send a 'societal "message" about the unacceptability of these offences and act as a deterrent to sex offenders'.⁴³⁸ Participants also addressed the importance of aggravating and mitigating factors. Aggravating factors that were agreed by the public and victims were those relating to the nature of the offence (premeditation, length and number of offences, multiple offenders), repeat offending, offences against younger, elder or vulnerable victims, violence, illness and the production and/or distribution of images of the offence. It was noted that participants considered that these factors aggravated an offence, the absence of these factors did not mitigate. The only factor considered to mitigate was the mental capacity or health of the offender, and participants strongly felt that young offenders should not be sentenced differently to adults.⁴³⁹ Participants and victims were also not in favour of reducing the sentence to provide a discount for a guilty plea. Participants also thought that the character of the offender should not be taken into account when sentencing.⁴⁴⁰ These findings differed from Lovegrove's Victorian study, where participants were willing to acknowledge the relevance of mitigating factors to the imposition of sentence.

As part of the focus group, participants were asked to suggest sentences for specific sexual offences. The rape vignette consisted of the rape of an adult woman by a stranger while she was walking home. There were two scenarios provided for sexual assault — one involving an adult woman and one involving a 12 year old girl. In both cases, the scenario involved the victim going to a neighbour's house to pick up a DVD where the offender subjected the victim to an eight minute assault including trying to remove her clothes and make her touch his penis. Sentences for rape and assault by penetration (this is the equivalent of aggravated sexual assault) ranged from six years to life, from six to 10 years for sexual assault of an adult, and 10 to 20 years for sexual assault of a child.⁴⁴¹ Participants considered that rape was a serious offence and that assault by penetration was as serious as rape and warranted the same custodial sanction. Sexual assault of a child was more serious than sexual assault of an adult.⁴⁴² Rape and sexual assault were considered more serious than the comparator offences of drug dealing or GBH. However, if the GBH was a result of a random attack by a stranger that could have been potentially life threatening, it was felt to be almost as serious as rape. Participants unequivocally described 'rape or sexual assault ... as more "intimate" and therefore most violating that other forms of violence'.⁴⁴³ This assessment of the relativity of offences reflects the responses received to the Council's Consultation Paper.

As with the respondents to the Consultation Paper and in the Tasmanian Jury Sentencing Study, participants in the England and Wales study also recognised a difference between consensual relationships and other types of sexual offender. In a scenario where the offender and the victim were close in age and both consenting, it was considered that charges should not have been brought and that this was completely different to other types of sexual offences. However, as the age difference widened, it was felt to become an increasingly serious offence.⁴⁴⁴

435 Ibid 21–22.

436 Ibid 22–25.

437 Ibid iv.

438 Ibid.

439 Ibid viii, 49–56.

440 Ibid 56.

441 Ibid v–vi.

442 Ibid vi.

443 Ibid vii, 44.

444 Ibid 40.

6.3 PUBLIC OPINION AND OFFENCE SERIOUSNESS

Related to studies that have examined public opinion about sentencing of sex offenders is the research conducted by the Victorian Sentencing Advisory Council that examined public perception of offence seriousness.⁴⁴⁵ The study involved 244 participants who took part in 14 community panels in regional and metropolitan Victoria, and two quantitative methods were used to measure community judgments about offence seriousness: (1) 'paired comparisons' which involves asking participants to compare pairs of offences and indicate the offence that they think is more serious in each pair; and (2) 'category' or 'coded' rating or ranking, which asked participants to indicate how serious they think offences are by rating or ranking them using a scale of seriousness.⁴⁴⁶ The coded ranking provided participants with vignettes, which contained case scenarios. Qualitative data was also obtained through facilitated discussion sessions.

The paired comparison used 10 offences: rape, aggravated burglary, armed robbery, arson, blackmail, intentionally cause serious injury, drug trafficking (large commercial quantity), kidnapping, murder and theft.⁴⁴⁷ As discussed, murder was viewed as the most serious followed by rape, then kidnapping, and then intentionally cause serious injury. It was noted that none of the property offences were considered to be as serious as, or more serious than, any of the offences against the person.⁴⁴⁸

The coded rating used 40 offences and included fatal offences, serious injury offences against the person, sexual offences, property offences, drug offences, fraud, blackmail and incitement and attempted charges.⁴⁴⁹ In terms of the mean ranking of all participants' scores, intentional murder was again the most serious offence followed by sexual penetration of a child under 12 (2), rape (3), intentionally causing serious injury (4), reckless murder (5), manslaughter (8), indecent act with a child under 16 (11), armed robbery (17), recklessly causing serious injury (18), sexual penetration of a child aged 12–16 under care, supervision and authority (20), dangerous driving causing death (24), indecent assault (34), sexual penetration of a child aged 12–16 (38).⁴⁵⁰ It is noted that the case scenario for an indecent act with a child under 16 involved an eight year old complainant who held the offender's penis. The vignette for sexual penetration with a child aged 12–16 under care, supervision or authority involved a 35 year old teacher having sexual intercourse with a 15 year old student. The case scenario for sexual penetration with a child aged 12–16 was a 20 year old offender who was 'going out with' the complainant (aged 15). They were having consensual sexual intercourse.⁴⁵¹

Key findings of the research were that:

- offences involving harm or threats of harm to people were overall more serious than offences only involving property. In relation to offences that involved different harms, participants found it difficult to distinguish between the seriousness of offences that resulted in a person's death and sexual offences that involved violence or child victims.
- 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.⁴⁵²

445 Sentencing Advisory Council, Victoria, *Community Attitudes to Offence Seriousness Community Attitudes to Offence Seriousness* (2012).

446 Ibid 13.

447 Ibid 20.

448 Ibid 28.

449 Ibid 21.

450 Ibid Appendix 5.

451 Ibid Appendix 3.

452 Ibid 49.

The Victorian research highlighted that sexual offences against young children were of utmost concern to participants.⁴⁵³ Offences involving young children were considered to be among the most serious and these offences tended to produce strong emotive responses.⁴⁵⁴ Age was a factor associated with the participant's assessment of the offender's culpability as well as the harm caused to the child. Related 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.⁴⁵⁵ Young victims were also 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 herself. There was less agreement in relation to sexual penetration in circumstances where there was a boyfriend/girlfriend relationship between the victim aged 15 and the offender aged 20. Some participants thought this was less serious while others said that there was still a power imbalance in this scenario. In relation to young children, participants also focused on the long-lasting and severe harm caused by sexual abuse. It was viewed as being 'akin to a sort of "death"'.⁴⁵⁶ In relation to young children, participants made less distinction in relation to seriousness of the offending based on the nature of the physical behaviour and so did not distinguish offences of indecent act with a child under 16, produce child pornography and sexual penetration, where the vignettes involved victims aged eight years old.⁴⁵⁷

453 Ibid 55.

454 Ibid.

455 Ibid 56.

456 Ibid 56.

457 Ibid 57.

7.

The appropriateness of current sentence types and lengths for sex offences: Conclusions

As part of its assessment of the appropriateness of current sentence types and the length of sentences imposed for sex offences, the Council used several measures including:

- an analysis of sentencing trends in Tasmania (Chapter Three);
- a statistical comparison between sentences imposed for sexual offences in Tasmania and in other jurisdictions and an examination of the relativities of the sentences imposed for different offences to understand the position of sexual offences on the penalty scale relative to other offences (Chapter Four);
- an analysis of sentencing decisions for sex offences in Tasmania assessed according to the principles of sentencing (Chapter Five); and
- an examination of public opinion in relation to the sentences imposed for sex offences (Chapter Six).

This Chapter draws together the findings from the various measures of appropriateness used and provides the Council's advice on the appropriateness of the sentences imposed for sex offences in Tasmania.

In contemporary society, sex offenders are viewed with a particular abhorrence and recent legislative responses to sexual offending in other jurisdictions tend to be underpinned by 'penal populism', a term which describes 'the way in which politicians can tap into public concerns about crime to their political advantage'.⁴⁵⁸ However, relying on public dissatisfaction as the basis to argue that penalties should be increased ignores the research that shows that there is a general and consistent public dissatisfaction when using opinion polls with sentences across jurisdictions in Australia. There has been on-going criticism that sentencing for sexual offences is not appropriate and this is 'a criticism that tends to be constant even though sentencing standards differ considerably among Australian jurisdictions'.⁴⁵⁹ This suggests that any criticism that the sentencing practice of the courts is too lenient is unlikely to be assuaged merely by increasing the tariff for sex offences. Research shows that 'top of the head' responses to questions about the appropriateness of sentencing are difficult to shift and there is no evidence to show that the general public is more satisfied with sentencing in more punitive jurisdictions.⁴⁶⁰ As the submission from Civil Liberties Australia noted, 'trying to align sentences for sex offences with public opinion is highly problematic, and, potentially, ultimately fruitless.'

458 Freiberg, Donnelly and Gelb, above n 28, 17 referring to John Pratt, *Governing the Dangerous* (The Federation Press, 2007).

459 Ibid.

460 Mackenzie et al, above n 408, 55; Jane Sprott, Cheryl Webster and Anthony Doob 'Punishment Severity and Confidence in the Criminal Justice System' (2013) April *CJCC* 279, 280.

Further, research that has attempted to analyse informed public opinion has found a more nuanced approach to sentencing for sex offences — not all sex offenders are viewed with the same abhorrence and the public is willing to extend leniency to some offenders. The public, also, does not speak with one voice. Again the diversity of public opinion means that it is not possible to match sentencing practice with 'public opinion' as some members of the informed public support harsher sentencing and some support more lenient sentencing. The responses to the Consultation Paper would suggest that there is concern among stakeholders and some members of the public about the leniency of sentencing for sexual offences in Tasmania. However, the responses also showed that there is an awareness of the broad range of circumstances that may give rise to a conviction for a sexual offence and that not all offender's deserve a heavy penalty. It is not simply, then, a matter of making a blanket increase in sentences for all sex offenders as this would result in injustice and would not accord with public expectations. Across this research, there is a general consensus that sexual offences committed by adults against young children, particularly by adults in positions of trust or authority are particularly serious offences and deserving of severe punishment. This is also the view of the Council.

After reviewing decisions of the Supreme Court (at first instance and on appeal), it is clear that courts consider the sentences imposed to be severe (where warranted in the circumstances of the case) and frequently express condemnation of the offender's conduct. In the context of sexual offences, the courts frequently stress the need for retribution, for deterrence (specific and general) and the need to protect the community, particularly children. There is a clear awareness of the seriousness of sexual offending, in particular sexual offending against children, and the need to impose a robust sanction that is an appropriate sanction in the circumstances of the case. However, a question could still be raised as to whether sentencing practices for sex offences in Tasmania appropriately reflect the seriousness of the offence.

Measured against other jurisdictions it appears that in relation to use of imprisonment, the ABS data and local data (for some offences) suggests that the use of imprisonment as a sanction for sexual offences is not out of step with other jurisdictions. However, it does appear that Tasmanian sentence lengths for sexual offences are lower than sentences imposed for sex offences in other jurisdictions. This is consistent with the findings of the Research Paper, which found that Tasmanian sentences for sex offences generally fell below those of other Australian jurisdictions. However, as the Research Paper has shown, sentencing levels in Tasmania for all offences (except homicide) are lower than in all other jurisdictions.⁴⁶¹ This does not mean that sentencing for sex offences is necessarily inappropriate — just different. In any event, it is highly problematic to assess the appropriateness of sentencing practices by using cross-jurisdictional comparisons. There are numerous problems including the differences between jurisdictions in offence definitions, differences in the jurisdictions of higher courts, sentencing provisions including parole, differences in prosecution practices and the counting rules used in recording sentencing data. This means comparisons need to be treated with caution and should not be used alone as a basis to increase sanctions in Tasmania.

The fact that sentencing levels in Tasmanian courts for sexual offences are lower than they are in other Australian jurisdictions does not mean that sentencing should necessarily become harsher for these crimes. As the data in Chapter Four show, there are differences in the sentencing practices between all jurisdictions and it is difficult to say that one jurisdiction has 'appropriate sentencing' compared to any other jurisdiction. There is no 'correct' sentence and, as Freiberg, Donnelly and Gelb point out, 'the appropriate level of punishment for any offence ... is essentially a value judgment, one that tends to be culturally determined.'⁴⁶² This may reflect a number of factors, as acknowledged by Freiberg, Donnelly and Gelb, who stated that jurisdictional differences may:

be due to generally lower crime rate, reduced need for deterrence, or that the penal culture or climate in that jurisdiction is different to others. Penal values or cultures also change over time, reflecting population changes, crime rates, media interest in crime and punishment, and the political complexion of the government in power.⁴⁶³

461 See Sentencing Advisory Council, Tasmania, above n 6, 17–18, 37.

462 Freiberg, Donnelly and Gelb, above n 28, 37.

463 Ibid 106.

The Council's view is that the differences in sentencing levels between all jurisdictions suggests that the need for reform in Tasmania needs to be viewed in the Tasmanian context rather than necessarily following the approach of other jurisdictions. As noted at [1.5], Tasmania has a much lower sexual assault victimisation rate compared to all other states and territories of Australia. Accordingly, it is difficult to justify increases in sentences on the basis of deterrence where crime rates are lower and when higher sentences in other jurisdictions do not result in lower crime rates. There is also little evidence to suggest that increased sentence lengths operate as a deterrent to offending.⁴⁶⁴

The question of how appropriate sentencing practices are cannot be answered independently of considering what sentences are appropriate for other crimes (ordinal proportionality). How severely should sexual offences be treated compared with other crimes and how severely should specific sexual offences be treated compared with other sexual offences? It is generally agreed that punishment for crimes should be proportionate to the severity of the offence and the culpability of the offender. This means that there should be a scale of offence severity with the most serious offence (murder) at the top of the scale and the least serious at the bottom. It is the Council's view that rape and sexual offences involving young children are both very serious offences, and sentencing should appropriately reflect this. In Tasmania, according to the sentencing data, rape is the most serious offence, followed by maintaining a sexual relationship with a young person, aggravated sexual assault, indecent assault and then sexual intercourse with a young person. This differs from the approach in other jurisdictions, where the median sentence for persistent sexual abuse of a young person is higher than or equivalent to the sentence for rape. It also differs from the public perception of the relative seriousness of offences, with the Victorian research finding that the public view sexual offences against young children (under 12) to be among the most serious and more than rape.

Concerns were also raised in responses to the Consultation Paper about the relativity of sentencing for different offences in Tasmania, with some respondents suggesting that the particular nature of sexual offending and the harm that it entailed meant that it was more serious than property offences and offences that involved other injury to the person (grievous bodily harm/wounding). This differs from sentencing patterns in Tasmania, which suggest that armed robbery is viewed more seriously than aggravated sexual assault, sexual intercourse with a young person and indecent assault and that grievous bodily harm/wounding is viewed more seriously than sexual intercourse with a young person. However, Tasmanian sentencing practice is not out of step with the findings of public opinion research conducted in Victoria. This showed a more nuanced approach to the seriousness of sexual offences with some sexual offences (rape, sexual offences with young children) ranking as more serious than intentionally or recklessly causing serious injury and armed robbery, while other sexual offences (sexual penetration of a child aged 12–16 under care, supervision and care, indecent assault and sexual penetration of a child aged 12–16) ranked less seriously. Sexual intercourse with a child aged 12–16 in the context of a boyfriend/girlfriend relationship was one of the least serious offences of the 40 offences considered in the Victorian study and ranked less seriously than intentionally causing injury.

7.1 SPECIFIC OFFENCES

In providing advice on the appropriateness of sentencing for specific sexual offences, the Council recognises the diversity of circumstances that arise (given the broad offence definitions) and believes that a court should have discretion to allow this diversity to be taken into account. The Council also acknowledges that advice as to the appropriateness of sentencing for particular offences ultimately requires an intuitive value judgment about what the particular offence is worth and what it is worth in comparison with other offences.⁴⁶⁵

7.1.1 Rape

The data presented in Chapter Three showed that in the 2001–14 period over 90% of offenders convicted of rape received a sentence of imprisonment. It was very rare for an offender to receive a non-custodial sentence or a suspended sentence. The data showed that there had been an increased use of immediate imprisonment between the 2001–07 and 2008–14 periods. In Chapter Four, data showed that in comparison with other Australian jurisdictions, using data from 2007–14, Tasmania had the highest imprisonment rate for rape. There does not appear to be any criticism that can be directed at the use of imprisonment (sentence type) for rape and the Council's view is that the sentence type imposed for rape in Tasmania is appropriate.

464 See [5.3].

465 This point was made by the TLRI, above n 1, [6.2.12].

However, in relation to sentence length, the Council has some concerns. While the data showed that the maximum sentence imposed for rape was 12 years, there was a slight decrease in the median sentence imposed (46.5 months for all counts and 37.5 months for a single count). This in itself is not necessarily indicative of inappropriate sentence. However analysis of sentencing comments indicates that there is considerable leniency in sentencing rape offenders. The Council's view is that, in some cases, the sentences imposed do not appropriately reflect the seriousness of the crime and the harm caused to the victim. In imposing sentence, reference has been made on several occasions to the absence of additional physical violence. While additional violence aggravates the offence of rape, it is the Council's view that there is not enough recognition of the violence inherent in the act of rape and the harm caused to victims and that there is scope for sentencing to become more severe for rape. The *Baldock*⁴⁶⁶ case is illustrative as this was a particularly heinous crime and the court indicated that the upper end of the range for a single count of rape, even if accompanied by an additional crime, was in the vicinity of five years. It is unclear whether increasing rape sentences accords with informed public opinion about sentencing for rape, as both the jury study in Tasmania and the public opinion research conducted in Victoria suggested that the public preferred more lenient sentences than the judge in rape cases. However, it is the Council's view that the decision in *Baldock* may have truncated the range for rape and may not provide courts with sufficient range to deal with cases of serious offending.

7.1.2 Aggravated sexual assault

In the 2001–14 period, 62.5% of offenders convicted of aggravated sexual assault received a sentence of imprisonment, 29.2% received a suspended sentence and 8.3% received a non-custodial sentence. The data showed that there had been a decreased use of immediate imprisonment between the 2001–07 and 2008–14 periods. However, it does not appear to the Council that suspended sentences and non-custodial sentences are generally being used inappropriately, as some cases involved 'consensual' sexual activity between complainants who are under 17 and offenders who are close in age.⁴⁶⁷

However, in relation to sentence length, the Council has concerns in relation to non-consensual cases involving adult complainants and cases involving young children and/or adults in a position of care, supervision or authority in relation to older children. In relation to adult complainants, the Council's view is that there needs to be closer correspondence between sentencing for rape and sentencing for aggravated sexual assault. This conduct is classified as rape in many other jurisdictions and it is the view of the Council that this offence is more serious than offences that involve loss of property (such as armed robbery) and that sentencing practice should appropriately reflect this. 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 an inanimate object (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'.⁴⁶⁸ It is the Council's view that, depending on the circumstances, aggravated sexual assault should attract a similar penalty to penile/vaginal penetration (rape). An example would be the circumstances of SMK, where the offender forced his former partner to insert a hammer into her vagina.⁴⁶⁹

In relation to young children or adults in a position of care, authority or trust, there is 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 is the Council's view is 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.

466 [2015] TASCCA 3.

467 This raises the same issues as maintaining a sexual relationship with a young person and sexual intercourse with a young person.

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

469 See [3.3.2].

7.1.3 Indecent assault

In the 2001–14 period, 43% of offenders convicted of indecent assault received a sentence of imprisonment, 46.8% received a suspended sentence and 10.1% of offenders received a non-custodial sentence. There was a significant increase in the use of immediate imprisonment for indecent assault between the 2001–07 and 2008–14 periods (36.5% to 55.6%) and a decrease in the use of suspended sentences. Based on an examination of the circumstances of the offences, the Council has some concerns in relation to the use of suspended sentences and non-custodial sentences for this offence. As noted at [3.3.3], 81% of sentences for indecent assault between 2008–14 were imposed in cases where the complainant was under the age of 17 and in only one of these cases was the assault committed in the context of a ‘consensual relationship’.⁴⁷⁰ Although the Council acknowledges that this is the least serious of the sexual offences and that there is a range of behaviours that can be classified as indecent assault, the Council’s view is that conduct that involves direct contact with the genitals of a child committed by an adult in a position of care, supervision or authority should not usually receive a suspended sentence or a non-custodial sentence.⁴⁷¹ This is a different offence altogether from a case where there is brief contact through clothing of the genitals by an adult committed against another adult (which may warrant a non-custodial or suspended sentence), given the nature of the touching, the offender’s culpability as a result of the relationship of trust and the harm to the complainant. This should be reflected in the sentence type and also the sentence length. The median sentence for indecent assault in the 2007–14 period was 12 months and it is the Council’s view that there is scope to increase the length of the sentence imposed in cases where the indecent assault was committed against a child by an adult (other than in the context of a girlfriend/boyfriend relationship).

7.1.4 Maintaining a sexual relationship with a young person

In the 2001–14 period, 68% of offenders received a sentence of imprisonment, 30.7% received a suspended sentence and 1% of offenders received a non-custodial sentence. There was a slight decrease in the use of imprisonment between the 2001–07 and 2008–14 periods (72.1% compared to 66.3%), a decrease in the use of partly suspended sentences (15.4% compared to 10.5%), and an increase in the use of fully suspended sentences (12.5% compared to 22.1%). As discussed at [4.1.2], Tasmania makes much greater use of suspended sentences, particularly fully suspended sentences, than other jurisdictions. However, it was also noted that this offence appears to be more commonly used in Tasmania than in Victoria and New South Wales and this makes comparisons problematic. It is likely that difference in prosecution practice means that different types of cases are charged as maintaining a sexual relationship compared with the equivalent offences of persistent sexual abuse of a child.

In Tasmania, in the 2008–14 period, over a third of cases where an offender was convicted of maintaining a sexual relationship with a young person involved a consensual relationship. Most suspended sentences were imposed in this context where the offender and complainant were in a boyfriend/girlfriend relationship. It is also noted that these cases tended to involve older complainants. This scenario raises the problem of how to sentence an offender where the offence involves more protecting the complainant from her/himself (in making inappropriate sexual choices) than protecting the child from a predatory adult who has manipulated a child to obtain acquiescence or in circumstances where there is no consent at all. Research suggests that many young people under the age of 17 are sexually active,⁴⁷² and 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, the offender’s culpability is less and there may be less harm to the complainant.⁴⁷³ There has been increased community awareness that sexual intercourse with a young person is a criminal offence and it is likely that close-in-age offenders are more likely to be reported to the police by concerned parents/guardians/care givers than in past where the matter may have been dealt with informally. There is, however, also community opinion that such offences are not the most serious offences committed against young person and these offenders are deserving of leniency in sentencing. The Council shares this view and recognises that immediate imprisonment is not usually appropriate in this context. In contrast, in cases where there is sexual abuse in the context of a family relationship or where an adult has manipulated or coerced a young person, the Council’s

470 See Hussey-Smith, Blow J, 25 June 2009 (Sentence).

471 However, as noted at [3.3], the Tasmanian government intends to phase out suspended sentences and the sanction will be replaced by other sanctions, yet to be determined.

472 TLRI, above n 6, [1.3.3].

473 Freiberg, above n 41, [4.185].

view is that a prison sentence is usually appropriate and this accords with current sentencing practice.⁴⁷⁴ Accordingly, it is the Council's view that the sentence types for the offence of maintaining a sexual relationship with a young person are generally appropriate.

In relation to sentence length, the Council notes that long sentences have been imposed for maintaining a sexual relationship, with 8 years being the longest sentence imposed for a single count of maintaining a sexual relationship and 14 ½ years being the longest sentence imposed for multiple counts. However, the Council's view is that there is scope to increase the sentence for offences in the middle range of seriousness, with the median for maintaining in the context of family abuse being 3 ½ years and 3 years for the crime committed by an adult acquaintance. It is the Council's view that these sentences do not appropriately reflect the seriousness of the offence where the offence is a breach of trust or where an adult has manipulated and coerced a child, particularly where the child is young. In addition the sentences do not reflect the short and long term risks of harm that arise from child sexual abuse. There is compelling evidence of the serious long-term effects of child sexual abuse and its devastating affect is reflected in the hearings of the Royal Commission into Institutional Responses to Child Sexual Abuse.⁴⁷⁵ The harm caused by child sexual abuse was also stressed in the submissions of Dr Georgina O'Donnell, the Women's Legal Service and Laurel House and North West Tasmania Sexual Assault Support Services. It is the Council's view that there is scope for incremental increases to sentencing in such cases. This reflects the community's views about the seriousness of sexual offences perpetrated against children, particularly young children by trusted adults or by adults who 'groom' and manipulate children. In contrast, the Council does not believe that long sentences are appropriate in the context of a 'consensual' relationship. As discussed, public opinion also recognises this distinction.

7.1.5 Sexual intercourse with a young person

In the 2001–14 period, 33.3% of offenders convicted of sexual intercourse with a young person were sentenced to imprisonment, 47.7% received a suspended sentence and 18.9% received a non-custodial sanction. Nearly two-thirds of offenders did not spend any time in prison. There was also a slight decrease in the use of imprisonment between the 2001–2007 and 2008–14 periods (36.7% compared to 30.6%). There has also been a significant increase in the use of partly suspended sentence (4.1% compared to 11.3%) and an increase in the use of fully suspended sentences (36.7% compared to 41.9%). There was also a decrease in the use of non-custodial sanctions.

As with maintaining a sexual relationship with a young person, the Council's analysis of convictions for sexual intercourse with a young person demonstrates that the offence may be committed in a number of contexts and the Council's view is that not all offenders convicted of sexual intercourse with a young person should be sentenced to immediate imprisonment. The Council found that a majority of the sexual activity took place in the context of a consensual relationship with over 75% of these offenders not being sentenced to any time in prison (51.4% fully suspended sentence and 25.7% non-custodial sentence). As discussed above, the Council recognises 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 may also be an appropriate sentence where factors such as the youth or intellectual capacity of the offender are raised as mitigating factors. The Council does, however, 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.

474 It is noted that the Tasmanian government intends to phase out suspended sentences and the sanction will be replaced by other sanctions, yet to be determined. It may be that, depending on the nature of these sanctions, they may be an appropriate sanction in some circumstances.

475 See Freiberg, Donnelly and Gelb, above n 28, 69–73 citing Judy Cashmore and Rita Shackel, *The Long-Term Effects of Child Sexual Abuse* (2013); Judy Cashmore and Rita Shackel, 'Gender Differences in the Context and Consequences of Child Sexual Abuse' (2014) 26 *Current Issues in Criminal Justice* 75; Australian Psychological Society, *Submission to the New South Wales Joint Select Committee on Sentencing of Child Sexual Assault Offenders* (2014), Royal Commission into Institutional Responses to Child Sexual Abuse, above n 15, 7, 155ff.

The Council also notes that sentence lengths for sexual intercourse with a young person are generally short. The Council has 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 8 months. It is noted that the median sentence for all counts had decreased from 9 months in the 2001–07 period to 5 months in 2008–14. The median sentence imposed where there was not a mutual relationship between the offender and the complainant was 7 months. Again, the Council's view is that this suggests considerable leniency in sentencing offenders and the Council's view is 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.

7.2 CONCLUSION

While the Council has indicated that its view is that sentencing in some contexts should be increased, this does not mean that the Council's view is that Tasmania should seek to match punitive sentencing practices in other jurisdictions. As discussed, sentencing is only one aspect of the societal and criminal justice response to sexual violence and significantly increasing penalties is unlikely to alter the results of public opinions or victim satisfaction. It may even be counter-productive if it results in few pleas of guilty and more trials. As has been acknowledged, there are jurisdictional differences in relation to the sentences imposed and sentencing for sexual offences has to be viewed within the context of the sentencing approach in each jurisdiction.⁴⁷⁶ Tasmania has a low crime rate and this is reflected in relatively lenient sentencing for all offences (other than homicide) including sexual offences. The Council's view is that a mechanism needs to be found to provide for a measured increase sentencing for sex offences in appropriate cases.

Need for legislative reform to address inappropriate sentencing for sex offenders

Recommendation 1

Legislative reform is necessary to provide for the measured increase in sentencing for sex offences in appropriate cases.

In the next Chapter, the Council sets out possible approaches that provide a measured response to increasing penalties.

476 Freiberg, Donnelly and Gelb, above n 28, 106.

8.

Options for reform

The analysis of the Council has attempted to evaluate the appropriateness of sentencing for sex offenders in Tasmania. The Council has identified some concerns in relation to the sentencing of sex offences and, as requested in the Terms of Reference, this Chapter outlines options for reform in the event that it appears that sentencing for sex offences is not considered appropriate. The Council has identified two broad approaches: (1) to change the penalty provisions for sex offences as a response to concerns that the sentence length and type currently imposed by the Supreme Court are inappropriate; and/or (2) to make other legislative changes that provide for a more nuanced response to sex offenders and to address specific areas of concern identified by the Council.

8.1 CHANGE TO PENALTY PROVISIONS

In other jurisdictions, in response to changing community attitudes to sex offences, there have been legislative interventions that have limited judicial discretion and have sought to require the court to impose more severe sanctions for sex offenders. Based on this experience, the Council has identified several reforms that could be made to the penalty provisions for sex offences in Tasmania. These are the introduction of: (1) graduated maximum penalties; (2) guideline judgments; (3) baseline sentencing; (4) mandatory penalties; (5) mandatory non-parole periods; and (6) presumptive non-parole periods.

8.1.1 Graduated maximum penalties

An option for reform in Tasmania would be to amend the *Criminal Code* (Tas) to specify the maximum penalty for the various offences, if it is decided that sentencing standards are not appropriate for sex offences.

Maximum penalties are set by Parliament and are found in the Act creating a particular offence. Judges or magistrates may impose a sentence less than the prescribed maximum penalty. Currently, Tasmania's maximum penalty for all offences (other than murder and treason) under the *Criminal Code* (Tas) is 21 years. This differs from the approach in other jurisdictions, where Parliament has given an indication of the relative seriousness of offences by setting out the maximum penalty for different offences. It also differs from the approach in Tasmania for summary offences, where individual maximum penalties are found in the *Police Offences Act 1935* (Tas). This means that determining the appropriateness of a sentence in the Supreme Court is solely a judicial function, while all other Australian jurisdictions have legislative guidance on the maximum penalties. Courts in other jurisdictions refer to those maximum penalties in deciding sentences.⁴⁷⁷

477 See *R v PJ SCC 90 of 2012 (ACT); D 96 A Crim R 364 (SA); R v Hitanaya [2010] NTCCA 03 (NT)*.

The creation of a scale of maximum penalties for different offences under the *Criminal Code* (Tas) would allow the legislature to:

- provide 'the public and the sentences with a guide to the seriousness with which the community should view the offence in the abstract';⁴⁷⁸
- provide 'the yardstick against which all cases falling within that class of proscribed conduct are measured';⁴⁷⁹ and
- 'function as a general deterrent by warning potential offenders of the maximum punitive "price" they are liable to pay for the commission of the offence'.⁴⁸⁰

The graduation of penalties would allow the legislature to provide a clear statement about the relative seriousness of the offences and, by making the hierarchy of offences more transparent, may assist public understanding of the sentencing process.

There was very limited support in the consultation process for the introduction of maximum penalties in submissions received by the Council, with Dr Georgina O'Donnell suggesting that maximum penalties should be introduced as well as presumptive minimum sentences and Confidential 1 suggesting the introduction of separate maximum penalties for each offence combined with either mandatory minimum sentences, presumptive minimum sentencing, baseline sentencing or alternatively sentencing guidelines.

In addition, although there are rare examples of indictable offences with individually specified maximums,⁴⁸¹ it would be difficult in Tasmania under the present sentencing structure to provide guidance to courts about the appropriate penalty for sexual offences through changes in the maximum penalties without a major reform of the maximum penalty structure in the *Criminal Code* (Tas). It would be inconsistent to include graduated maximum penalties for sex offences and no other offences under the Act. To undertake a review of the maximum penalties under the *Criminal Code* (Tas) for the purposes of implementing graduated maximums would require further and more detailed research and reporting on the *Criminal Code* (Tas) offence provisions and the relative seriousness of offences. It would also be necessary to review the offence structure for sexual offences under the *Criminal Code* (Tas).

Aside from the difficulty in implementing such a scheme, there is no support within the legal community for reform to the maximum penalty provisions. In consultations conducted by the Council, there was a clear consensus that the current approach in Tasmania was working well and that there was no need for reform. The forum conducted with representative of the legal community (the Office of the Director of Public Prosecutions, Legal Aid, the Tasmanian Bar and the Women's Legal Service) expressed the view that maximum sentences are problematic as they give expression to the relativity of offences but they do not reflect the penalty that an offender is likely to receive in reality. A further advantage of the current approach was identified by Chief Justice Blow, who observed that, having a single maximum penalty means that sentencing is 'largely exempt from political discussion ... [and] the law-and-order auction that is sometimes evident at election times'.⁴⁸² This contrasts with the approach in other jurisdictions where legislative interventions mean that sentencing practices must change in accordance with 'Parliament's current views regarding the seriousness of the offence'.⁴⁸³ This is not always based on sound policy but influenced by perceptions of community concern. As Freiberg, Donnelly and Gelb observe, '[i]ncreasing statutory maximum penalty is often the first resort in response to heightened communal concern about an offence following the commission of a particularly egregious crime, or an inadequate sentence, or where there has been intense and sustained media interest in an offence'.⁴⁸⁴

478 Freiberg, above n 41, [4.10].

479 Ibid.

480 Ibid.

481 See *Animal Welfare Act 1993* (Tas) s 9; *Poisons Act 1991* (Tas).

482 David Killick, 'Top Judge Praises Tassie Law' *The Mercury* (Hobart), 16 August 2013, 17.

483 Freiberg, above n 41, [4.10].

484 Freiberg, Donnelly and Gelb, above n 28, 56.

It is also unclear whether making changes to the maximum penalties for the various offences under the *Criminal Code* (Tas) will make any significant difference to sentencing practice in Tasmania. This point was made by the Women's Legal Service who did not support the introduction of graduated maximum penalties on the basis that they did 'not see how introducing maximum penalties will change sentencing practice especially if the maximum is based on current sentencing practice'. The reality is that in Tasmania and in other jurisdictions, 'sentencing levels fall far below the statutory maxima'.⁴⁸⁵ And, the experience in other jurisdictions is that sentences rarely increase in the same proportion as any increase in maximum penalty.⁴⁸⁶ The current statutory maximum is comparable to the maxima for serious sex offences in other jurisdictions and it would appear to be more than adequate to deal with serious sex offending.

Accordingly, it is the Council's view that graduated maximum penalties should not be introduced into the *Criminal Code* (Tas).

Recommendation 2

Graduated maximum penalties

That graduated maximum penalties should not be introduced into the *Criminal Code* (Tas).

8.1.2 Guideline judgments

Tasmania does not have guideline judgments, nor has the legislature, or any law reform or sentencing advisory body released any sentencing guidelines. In contrast, legislative provision for guideline judgments exists in a majority of Australian jurisdictions.⁴⁸⁷ Guideline judgments can provide guidance to the sentencer through a variety of methods:

rang[ing] from statements of general principle, to more specific indication of particular factors to be taken into account or given particular weight, and sometimes to indications of the kind of outcome that might be expected in a certain kind of case, other than in exceptional circumstances.⁴⁸⁸

Guideline judgments were introduced in other jurisdictions with a view to 'increas[ing] the severity of sentences, provid[ing] specific and general deterrence and protect[ing] the community'⁴⁸⁹ and are intended to increase public confidence in criminal justice and sentencing processes and to address the issues of transparency and consistency.⁴⁹⁰

Guideline sentences are issued, depending on the jurisdiction, either by the judiciary (an appellate court) or a sentencing advisory body. In New South Wales, Victoria, South Australia and Western Australia, the appeal courts have power to issue guideline judgments. However, despite the availability of guideline judgments, there has traditionally been limited use of guidelines in all jurisdictions apart from New South Wales.⁴⁹¹ Even in New South Wales, there has been limited use since the High Court's rejection of sentencing guidelines where the guidelines are prescriptive or numerically based.⁴⁹² In the United Kingdom, it is the Sentencing Council that has the responsibility for writing guidelines and a court must follow these unless it is contrary to the interests of justice to do so.⁴⁹³

485 Ibid.

486 Freiberg, above n 41, [4.10].

487 Sentencing Act 1991 (Vic) s 6AB; Crimes (Sentencing Procedure) Act 1999 (NSW) ss 37 and 37A; Penalties and Sentences Act 1992 (Qld) Pt 2A; Sentencing Act 1995 (WA) s 143; Criminal Law (Sentencing Act) 1988 (SA) s 29A.

488 Wong v The Queen (2001) 207 CLR 584, [5].

489 Freiberg, Donnelly and Gelb, above n 28, 195.

490 Kate Warner, 'The Role of Guideline Judgments in the Law and Order Debate in Australia' (2003) 27(1) *Criminal Law Journal* 8, 9 citing Jurisic (1998) 45 NSWLR 209; TLRI, above n 1, [7.3.28]-[7.3.29].

491 See Bagaric and Edney, above n 39, [3.90]; TLRI, above n 1, [7.3.42]. See also Arie Freiberg, *Pathways to Justice: Sentencing Review* (2002) 192–214. Although note that the Victorian Court of Appeal delivered its first guideline judgment in relation to community correction orders: see Boulton [2014] VSCA 342.

492 Wong v The Queen (2001) 207 CLR 584, [165]. See Bagaric and Edney, above n 39, [3.105].

493 Coroners and Justice Act 2009 (UK) s 125(1). See Andrew Ashworth, *Sentencing and Criminal Justice* (Oxford University Press, 5th ed, 2010) 55–56.

The UK guidelines contain offence ranges and, within each offence, different categories reflecting varying degrees of seriousness based on the criteria of harm and culpability. The guidelines identify a starting point within each category and then identify aggravating and mitigating factors that may adjust the sentence.⁴⁹⁴ As at 5 February 2015, 28 guideline judgments were available on the Council's website, including Definitive Guidelines for Sexual Offences issued in 2013.⁴⁹⁵ There is also scope for community input through the consultation process that occurs in the development of definitive guidelines.⁴⁹⁶

An option for reform in Tasmania would be to legislate to allow for guideline judgments. In other Australian jurisdictions, there has been renewed interest in the use of guideline judgments to address concerns in relation to perceptions of the adequacy of sentencing and as a result of the 'ever increasing number of restrictions on judicial discretion imposed by legislatures'.⁴⁹⁷ Sentencing 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 an offence'.⁴⁹⁸ Guideline judgments have also been found to have a significant effect on penalty levels (particularly an increase in levels).⁴⁹⁹ Guidelines provide the opportunity for consistency in sentencing, without using mandatory sentencing. They also provide greater transparency than is currently available in relation to the relative severity of offences, as in Tasmania, guidance is not currently available from graduated maximum penalties for *Criminal Code (Tas)* offences.⁵⁰⁰ This may improve public confidence in the sentencing process, and a guideline judgment scheme may allow (depending on the model adopted) public input into the sentencing process.⁵⁰¹ Guideline judgments also allow courts to recognise the diversity of circumstances that arise and to have discretion to allow this diversity to be taken into account. For these reasons, the TLRI expressed in principle support for guidelines judgments; however, it declined to recommend legislation for a statutory scheme for guideline judgments in view of the lack of support from judges and the then Director of Public Prosecutions.⁵⁰²

Objections to the introduction of sentencing guidelines in Tasmania are based (in part) on its inappropriateness due to the small size of the judiciary. There is no separate Appeal Court in Tasmania and so the same judges sit on the Supreme Court and the Court of Criminal Appeal, and it has been argued it would be 'ridiculous for a bench of six to have a guideline judgment issued by three of their number'.⁵⁰³ However, this concern does not acknowledge that this already is the case in relation to appeal judgments decided by a court of three judges.⁵⁰⁴ In any event, it would be possible to adopt an alternative model that would allow for the Sentencing Advisory Council to play a role in the development of guideline judgments, either as the author of guidelines as occurs in the United Kingdom or, as has been recommended in New South Wales and as operates in Victoria, through the preparation of research and advisory reports.⁵⁰⁵ This was also the approach preferred by the TLRI.⁵⁰⁶

494 See Sentencing Council, UK, above n 216, 7.

495 Sentencing Council, UK <<http://www.sentencingcouncil.org.uk/publications/?type=publications&s=&cat=definitive-guideline&topic=&year=>>>.

496 See Sentencing Council, UK <<http://www.sentencingcouncil.org.uk/about-sentencing/about-guidelines/>>.

497 Freiberg, Donnelly and Gelb, above n 28, 196. See Sentencing Advisory Council, Victoria, *Maximum Penalties for Sexual Penetration with a Child under 16*, Report (2009) 69; New South Wales Law Reform Commission, *Sentencing*, Report 139 (2013) xxiii; Joint Select Committee on Sentencing of Child Sexual Assault Offenders, Parliament of New South Wales, above n 10, 83–88.

498 Andrew Ashworth, 'Techniques of Guidance on Sentencing' (1984) *Crim LR* 519, 521; Saul Holt, 'Appellate Sentencing Guidance in New Zealand' (2006) 3 *New Zealand Postgraduate Law E-journal* 2, 28.

499 NSWLRC, above n 497, [18.45] referring to research conducted by the Judicial Commission of New South Wales in relation to the impact of guideline judgments for robbery (Lynne Barnes and Patrizia Poletti, 'Sentencing Trends for Armed Robbery and Robbery in Company: The Impact of the Guideline in *R v Henry*' (Sentencing Trends and Issues No 26, Judicial Commission of New South Wales, 2003), high range PCA (Patrizia Poletti, 'Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW' (Sentencing Trends and Issues No 35, Judicial Commission of New South Wales, 2005) and dangerous driving offences (Lynne Barnes, Patrizia Poletti and Ivan Potas, 'Sentencing Dangerous Drivers in New South Wales: Impact of the *Jurisic* Guidelines on Sentencing Practice' (Monograph Series No 21, Judicial Commission of New South Wales, 2002).

500 TLRI, above n 1, [7.3.45].

501 Ibid.

502 Ibid [7.3.46]; Recommendation 95.

503 Ibid [7.3.45].

504 Ibid.

505 See New South Wales Law Reform Commission, above n 497, [18.63], Recommendation 18.2; Joint Select Committee on Sentencing of Child Sexual Assault Offenders, Parliament of New South Wales, above n 10, [5.98]–[5.99], Recommendation 18; *Sentencing Act 1991* (Vic) s 108C.

506 TLRI, above n 1, [7.3.45], [7.3.46].

Aside from general objections to the adoption of a guideline judgment scheme, specific concerns could be raised in relation to the practical difficulties of developing guidelines for sexual offences given the highly varied nature of sexual offences. For example, currently, there is no tariff for maintaining sexual relationship offences due to the highly varied nature of the circumstances that may affect the seriousness of the offence.⁵⁰⁷ While Courts have the benefit of sentencing data and comparator cases in determining the appropriate sentence, it has been recognised that 'there are almost no limits on the potential scope of a case of maintaining' and it is thus 'extremely difficult to establish a sentencing range for it'.⁵⁰⁸ On the other hand, comprehensive guidelines for sexual offences have been developed in the United Kingdom,⁵⁰⁹ which demonstrates that it is possible to deal with the widely varied nature of sexual offending by providing facts, examples, and categories of offence in addition to baseline and a tariff range for offences. In New South Wales, a recommendation has been made that a guideline judgement be sought for child sexual assault and the view was expressed that practical difficulties should not be a deterrent.⁵¹⁰

If a guideline judgment scheme were considered appropriate, it would be necessary for additional research to be conducted to develop a Consultation Paper containing possible models for such a scheme. This could be used to canvas the view of stakeholders, particularly key stakeholders such as the Chief Justice of the Supreme Court, the Chief Magistrate, the Director of Public Prosecutions, the Law Society and the Legal Aid Commission. It may be that views have shifted in relation to the utility of a guideline judgment scheme in Tasmania. There was limited support in the submissions received by the Council for the introduction of a guideline judgment scheme, with Mike Stoddard expressing a preference for the introduction of sentencing guidelines. Other responses indicated support for guideline judgments as well as other options suggested (presumptive minimum sentences or baseline sentences).⁵¹¹ However, a lack of support for guideline judgments by the judiciary and senior legal officers may mean that it would be potentially futile to introduce a legislative scheme for guideline judgments.⁵¹²

The Council's view is that guidelines judgments have merit in principle, and the Council's recommendation is that the option of introducing guidelines judgments in Tasmania be further explored.

Guideline judgments

Recommendation 3

That the option of introducing guideline judgments in Tasmania be further explored.

8.1.3 Presumptive sentences (*baseline sentencing*)

Baseline sentencing provides a numerical starting point (as determined by Parliament) from where the appropriate sentence is determined by judges in the circumstances of the individual case. The court can impose a sentence higher or lower than the baseline sentence for the offence depending on whether the sentence is more serious or less serious than a case that would receive the median sentence.⁵¹³

507 DPP v M [2005] TASSC 14, [9].

508 Richman v Tasmania [2011] TASCCA 18, [30] (Evans J); DPP v M; DPP v STU [2012] TASCCA 7, [47].

509 Sentencing Council, UK above n 216.

510 Joint Select Committee on Sentencing of Child Sexual Assault Offenders, Parliament of New South Wales, above n 10, [5.97].

511 Laurel House and North West Tasmania Sexual Assault Support Services, Confidential 1, Confidential 2, ET.

512 TLRI, above n 1, [7.3.46].

513 Sentencing Advisory Council, Victoria, *Baseline Sentencing*, Final Report (2012).

There are different methods that can be used in the legislation for calculating the appropriate starting point. Under the baseline sentencing scheme recently established in Victoria, the baseline sentence represents 'the sentence that Parliament intends to be the median sentence for sentences imposed for that offence'⁵¹⁴ and courts must consider the baseline sentence set out for baseline offences. The 'median' is the 'statistical midpoint', and in the context of sentencing, it means that half the sentences are below the median and half the sentences are above the median'.⁵¹⁵ There are seven offences for which baseline sentences are imposed, including four child sexual offences — murder, trafficking in a large commercial quantity of a drug of dependence, persistent sexual abuse of a child under 16; incest with a child, step-child or lineal descendant (under 18), incest with the child, step-child or lineal descendant of a de facto spouse, sexual penetration of a child under 12 and culpable driving causing death. This differs from the model recommended by the Sentencing Advisory Council, Victoria, where the baseline level represented 'an offence that is the middle of the range of offence seriousness (assessed by considering factors related to the offence and not the offender)'.⁵¹⁶ The Council rejected the use of the median on the basis that it is not necessarily indicative of the middle of the range of offence seriousness given that the most common example of an offence may be 'at the lower end of the range of seriousness for that offence' and '[a]s a result, the median sentence imposed for such an offence will likely also be at the lower end of seriousness'.⁵¹⁷ It was anticipated that the midpoint or middle of the range would result in a higher baseline sentence than the use of the median.⁵¹⁸

A baseline sentencing scheme would be an option that could be adopted in Tasmania as a means of requiring courts to increase penalties for specific offences.⁵¹⁹ This was the intention in Victoria where the baseline sentencing scheme was adopted to address concerns that 'sentences for a number of crimes [including child sex offences] are out of step with community expectations and out of step with what is required to deter crime effectively and protect the community'.⁵²⁰ As shown in Table 19, the baseline level for each offence is significantly higher than the existing baseline median for the offences.⁵²¹ However, it remains to be seen how sentencing patterns change following the introduction of the baseline scheme and the Sentencing Advisory Council, Victoria has shown the difficulty of predicting the sentencing distribution after the implementation of the scheme as a result of its application to cases where there are multiple baseline charges and the broader application of the scheme by the judiciary.⁵²²

Table 19: Comparison of baseline median levels under with the baseline median sentences imposed between 2008–09 to 2012–13

Offence	2008–09 to 2012–13 baseline median	Baseline median level under the Act
Sexual penetration with a child under 12	3 years	7 years
Persistent sexual abuse of a child under 16	6 years	10 years
Incest (under 18)	4 years	10 years

Source: Sentencing Advisory Council (2014), *Sentencing Amendment (Baseline Sentences) Act 2014 (Vic)*.

514 Sentencing Amendment (Baseline Sentences) Act 2014 (Vic) s 5.

515 See discussion in Sentencing Advisory Council, Victoria, above n 513, xviii. Note that under the Sentencing Amendment (Baseline Sentences) Act 2014 (Vic), the median is calculated using all relevant sentences imposed (including non-custodial sentences that have a 0 value). This differs from the counting rules used by the Sentencing Advisory Council, Victoria that only uses immediate custodial sentences: see Sentencing Advisory Council, Victoria, *Calculating the Baseline Offence Median Report* (2014) [2.30]–[2.31]. It also differs from the counting rules used in this Report.

516 Sentencing Advisory Council, Victoria, above n 513, [3.91]. Objective factors are factors relevant to the offence only (such as weapon use or the degree of violence inflicted) and do not include subjective factors such as prior convictions and family background, [3.40].

517 Ibid [10.6].

518 Ibid [10.7]–[10.11].

519 Bagaric and Edney, above n 53, [200.2170]

520 Parliament of Victoria, Legislative Assembly, *Sentencing Amendment (Baseline Sentences) Bill*, Second Reading Speech, 3 April 2014, (Clark).

521 Sentencing Advisory Council, Victoria, above n 513.

522 Sentencing Advisory Council, Victoria, above n 515, [4.1].

In consultations conducted by the Council, there was support for baseline sentencing in submissions received from Laurel House and North West Tasmania Sexual Assault Services, Confidential 1, Confidential 2 and Dr Georgia O'Donnell.

There has, however, been considerable opposition to the introduction of a baseline sentencing in other jurisdictions.⁵²³ Objections raised include that:

- it unduly restricts judicial discretion;
- it adds undue complexity to the sentencing process;
- it will not act as a deterrent;
- it will result in an increase in prison numbers;
- it will affect the number of guilty pleas; and
- it would be unlikely to alter public opinion on the adequacy of sentencing.⁵²⁴

In Tasmania, there are a number of additional specific issues that make the implementation of baseline sentencing scheme especially problematic. First, the current offence structure under the *Criminal Code (Tas)* does not contain separate offences for children of different ages, as is the case in Victoria where the penalty for the different offences reflects the relative seriousness of the offence. In Tasmania, the absence of graduated offences in terms of age of the victim or other aggravating features would make it difficult to specify a particular baseline sentence. However, this could be achieved by the creation of new offences (see [8.2.1]). More significant is the incompatibility of baseline sentencing with global sentencing, which is when an offender sentenced for multiple counts receives a single global or general sentence to cover all the relevant offending conduct.⁵²⁵ The Sentencing Advisory Council, Victoria, expressed the view that aggregate sentencing was inconsistent with baseline sentencing from both a practical and a policy perspective:

[f]rom a practical standpoint, the baseline sentencing scheme is unable to be applied to aggregate sentencing as there is no scope for the determination of an adjusted baseline by the courts. From a policy perspective, the Council considers that the original policy intention of aggregate sentencing, to prevent the court from having to specify individual sentences for each charge, is in conflict with one of the main purposes of the baseline sentencing scheme, being to provide greater transparency in sentencing practices.⁵²⁶

Accordingly, the Sentencing Advisory Council, Victoria recommended that 'aggregate sentencing should not be available when sentencing under the baseline sentencing scheme'.⁵²⁷ However, this issue would generally not arise in Victoria as aggregate sentences are infrequently imposed by the County Court or the Supreme Court and, even when they are, the legislative arrangements mean that 'it would be particularly unusual for the court to impose an aggregate sentence in relation to a baseline offence'.⁵²⁸ In contrast, in Tasmania, 'the imposition of a global sentence when dealing with multiple offence is the course that is ordinarily adopted'.⁵²⁹

In Tasmania, then, the introduction of a baseline sentencing scheme would require a fundamental change to the sentencing practice of the Supreme Court and it is the view of the Council that this would be undesirable when it is generally accepted that the sentencing system in Tasmania is working well. It would also be difficult to implement a scheme that relies on adjustments to the median sentence in a jurisdiction that only has a small number of offenders. Further, based on the experience in Victoria, it could be anticipated that there would be strong opposition from the legal community towards a baseline sentencing scheme and considerable confusion resulting from its introduction.

523 Sentencing Advisory Council, Victoria, above n 513, xii.

524 Parliament of Victoria, *Sentencing Amendment (Baseline Sentences) Bill 2014*, Research Paper (2014), 11–15 <<http://www.parliament.vic.gov.au/publications/research-papers/9028-sentencing-amendment-baseline-sentences-bill-2014>>.

525 See *Sentencing Act 1997 (Tas)* s 11; Warner, above n 43, [1.1.02].

526 Sentencing Advisory Council, Victoria, above n 513, [4.60].

527 Ibid [4.61].

528 Ibid [4.59].

529 *DPP (Tas) v Farmer* [2005] TASSC 15, [22] (Evans J).

Baseline sentencing

Recommendation 4

That baseline sentencing should not be introduced in Tasmania.

8.1.4 Mandatory penalties

Another option would be to introduce mandatory penalties for sex offences. Mandatory penalties are fixed penalties set by Parliament for committing criminal offences.⁵³⁰ Mandatory penalties can refer to the requirement to impose a particular sentencing order in response to a criminal offence (mandatory penalty types) or the requirement to impose a sentence of imprisonment of minimum a length (minimum penalty length).⁵³¹ Mandatory minimum sentences of imprisonment leave the court with a discretion to impose a more severe sentence where it considers it appropriate. Another form of mandatory sentencing relates of the non-parole period than can be imposed.⁵³²

Mandatory penalty types are one form of mandatory penalty that are a legislative directive in relation to the type of sentence that must be imposed when a criminal offence has been committed. An example is a requirement for the court to impose a sentence of imprisonment following conviction. It is not necessarily also the requirement for the imposition of a minimum period of imprisonment. A mandatory requirement that a particular penalty be imposed does not usually exist for serious offences, given the severe limits placed on judicial discretion and the potential for injustice in the circumstances of the individual case. Limited exceptions exist in Queensland and the Northern Territory for sexual offences. In Queensland, in sentencing for an offence of a sexual nature committed against a child under the age of 16, the court must order that the offender serve an actual term of imprisonment, unless there are exceptional circumstances.⁵³³ In the Northern Territory, where a court finds an offender guilty of a sexual offence, the court must record a conviction and must order that the offender serve a term of actual imprisonment or a term of imprisonment that is suspended partly but not wholly.⁵³⁴ More commonly, mandatory penalties attach to intermediate⁵³⁵ or low range offences, such as excessive speeding offences or excessive drink driving offences, which carry automatic disqualification from holding a licence as a mandatory penalty.⁵³⁶

Another form of mandatory penalty is provisions that specify the minimum penalty that must be imposed. Examples of mandatory minimum penalty schemes exist in most Australian jurisdictions, generally for relatively minor offences and for mandatory minimum penalties that do not usually involve a sentence of imprisonment (for example, a fine of a particular amount).⁵³⁷ There are exceptions where the legislature has limited the discretion of the court by specifying the minimum penalty of imprisonment that can be imposed.⁵³⁸ Mandatory minimum penalties exist for repeat child sex offenders in Queensland, where the *Penalties and Sentences Act 1992* (Qld), s 161E provides that an offender who is convicted of a repeat serious child sex offence is liable to imprisonment for life, which cannot be mitigated or varied under any law.⁵³⁹ In Tasmania, there is provision for mandatory imprisonment of 6 months for

530 Adrian Hoel and Karen Gelb, *Sentencing Matters: Mandatory Sentencing* (Sentencing Advisory Council, Victoria, 2008) 2.

531 Ibid.

532 Freiberg, Donnelly and Gelb, above n 28, 190–191.

533 *Penalties and Sentences Act 1992* (Qld) s 9(4). In deciding whether there are exceptional circumstances, the court may regard to the closeness in age between the offender and the child, *Penalties and Sentences Act 1992* (Qld) s 9(5). In sentencing, the court must have regard to the effect of the offence on the child, the age of the child, the nature of the offence, including any physical harm or the threat of physical harm to the child or another, the need to protect the child or other children from the risk of the offender reoffending, the need to deter similar behavior by other offenders to protect children, the prospect of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community, the offender's antecedents, age and character, any remorse or lack of remorse and any medical, psychiatric, prison or other report relating to the offender, s 9(6).

534 Sentencing Act (NT) s 78F. Although, the actual term of imprisonment may be as short as 'the rising of the court,' *White v Brown* (2003) 13 NTLR 50.

535 In Victoria, there are mandatory sentences of imprisonment for causing fire with intent to cause damage and for recidivist disqualified/suspended driving: *Country Fire Authority Act 1958* (Vic) s 39C; *Road Safety Act 1986* (Vic) s 30; Hoel and Gelb, above n 530, 2.

536 See for example, *Vehicle and Traffic Act 1999* (Tas) s 19A; 19C.

537 Bagaric and Edney, above n 53, [200.2040]

538 See examples provided in Nicholas Cowdrey, *Mandatory Sentencing*, Sydney Law School Distinguished Speakers Program, 15 May 2014, 3–4 <http://sydney.edu.au/law/events/2014/May/DSP_Cowdrey15052014.pdf>.

539 There have been no offenders sentenced under this provision according to information provided by the Queensland Government to Royal Commission, Freiberg, Donnelly and Gelb, above n 28, 190.

the offence of causing serious bodily harm to a police officer, unless exceptional circumstances apply.⁵⁴⁰

There is political support for mandatory minimum sentences in Tasmania for serious sexual offences against children on the basis that it is 'in line with community expectations and national standards'.⁵⁴¹ Mandatory penalties are usually justified on the basis that they are an effective deterrent and that they provide for greater consistency in sentencing.⁵⁴² Beyond Abuse supported the introduction of mandatory minimum sentences on the ground that this would deter offenders.⁵⁴³ However, the 'criminological evidence is that mandatory sentences are not effective as deterrents, do not reduce crime rates and generally operate in a discriminatory manner in relation to certain minority groups'.⁵⁴⁴ Mandatory imprisonment also incapacitates the offender and on this basis is said to protect society.⁵⁴⁵ However, while incapacitation is undoubtedly achieved by mandatory sentencing for the term of imprisonment imposed on a specific offender,⁵⁴⁶ as Gelb and Hoel argue, there is a disproportionate social cost on first time offenders, and a greater economic burden with a likely rise in prison population resulting from mandatory sentencing.⁵⁴⁷ Mandatory penalties may also operate to increase not guilty pleas for serious offences, as the offender cannot receive a sentence other than imprisonment.⁵⁴⁸ This is a particular concern in the context of sexual assault cases, given the difficulty of obtaining convictions and the trauma of the trial process.⁵⁴⁹ It also transfers the sentencing discretion from the courts to the police and prosecutors in the event that there is a mandatory penalty for one offence and a lesser charge without a mandatory penalty and so the charge pursued will dictate the sentencing outcome.⁵⁵⁰

In Tasmania, the introduction of mandatory penalties for sexual offenders, such as a requirement for the court to impose a sentence of imprisonment or a sentence of imprisonment of a particular length would have significant consequences for sentencing practice in Tasmania. Mandatory minimum terms of imprisonment for sex offenders would mean that the court's discretion would be severely curtailed and that the court could not impose a non-custodial sentence or a short term of imprisonment where that was warranted in the circumstances of the case. In its recent review of sentencing for child sexual assault offenders, a Joint Select Committee of the Parliament of New South Wales found that mandatory minimum sentences should not be introduced for these offences:

[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.⁵⁵¹

The diversity of circumstances that may give rise to a conviction for a sexual offence was also revealed in the analysis of sentencing practice conducted by the Council. For this reason, it is also the Council's view that mandatory sentencing unduly fetters the discretion of the court and creates unjustifiable unfairness by treating 'unlike cases as like'.⁵⁵² As has been noted by the Tasmanian Court of Criminal Appeal, the range of behaviours that fall within sex offence provisions is wide.⁵⁵³ To fetter judicial discretion where the diversity of the conduct requires flexibility in approach will result in injustice. It also does not accord with informed public opinion that indicates that there is community recognition of the diversity of cases that come within the category of a sexual offence. Accordingly, the Council's view is that mandatory sentencing penalties should not be introduced in Tasmania.

540 Sentencing Act 1997 (Tas) s 16A(1).

541 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>>.

542 Freiberg, Donnelly and Gelb, above n 28, 189; Hoel and Gelb, above n 530, 12.

543 Mandatory minimum penalties were also supported by Confidential 3 and ET.

544 Freiberg, Donnelly and Gelb, above n 28, 189.

545 Sentencing Advisory Council, Victoria, *Sentencing Matters: Mandatory Sentencing* (2008) 14.

546 Ibid 14–15.

547 Ibid 18–20.

548 See Joint Select Committee on Sentencing of Child Sexual Assault Offenders, Parliament of New South Wales, above n 10, [5.64].

549 See [1.6], [5.6].

550 Cowdery, above n 538, 13.

551 Joint Select Committee on Sentencing of Child Sexual Assault Offenders, Parliament of New South Wales, above n 10, [5.72].

552 Freiberg, Donnelly and Gelb, above n 28, 189.

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

Mandatory sentencing penalties

Recommendation 5

That Tasmania should not introduce mandatory sentencing penalties under the *Criminal Code Act 1924* (Tas) for sex offences.

8.1.5 Mandatory non-parole periods

A response to serious offending (including sexual offending) in some jurisdictions has to legislate to create mandatory non-parole periods. 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 (the minimum term of imprisonment).⁵⁵⁴ In Tasmania, an offender is only eligible for parole if the court has made an order that an offender is eligible⁵⁵⁵ and the non-parole period set by the court must be at least one-half of the sentence⁵⁵⁶ (although the court can impose a longer non-parole period).⁵⁵⁷ In other jurisdictions, legislation further curtails judicial discretion in relation to parole and increases the time that an offender must serve in prison for some offences. In Victoria, a mandatory non-parole period is set where a person is sentenced for an offence to which a baseline sentence has been imposed. If the sentence imposed is a prison term of 20 years or more, then the non-parole period must be least 70% of that term and if the sentence imposed is a prison term of less than 20 years, then the non-parole period must be at least 60% of the term.⁵⁵⁸ In South Australia, where an offender is sentenced for murder or a major indictable offence that results in the death (other than murder) or the total and permanent physical or mental incapacity of the victim, the court is required to fix a prescribed minimum non-parole period (20 years murder and 4/5ths of the sentence for major indictable offences) unless special circumstances exist.⁵⁵⁹ These circumstances are severely curtailed to three matters: (1) whether the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct; (2) the offender's plea of guilty and the fact and circumstances surrounding the plea and (3) the degree of cooperation in the investigation or prosecution.⁵⁶⁰

Mandatory non-parole periods can be supported on the basis that they provide a means for Parliament to increase the period of time that an offender is required to spend in prison for offences of particular concern. There are also critics of the parole system who argue that evidence does not support the claim that parole reduces re-offending.⁵⁶¹ However, as with mandatory sentencing, mandatory non-parole periods can be opposed on the basis that they unduly limit judicial discretion and create unfairness for some offenders. Further, it should be noted that entitlement to apply for parole after 50% of a sentence does not mean that an offender will be released at that time. In Tasmania, the non-parole period for offenders convicted of the sexual offences under review in this report exceeded the minimum non-parole period or no order for parole was made in 39.3% of cases between 2008–14 where the offender was sentenced to imprisonment of more than 9 months.⁵⁶² In any event, the offender is not released unconditionally but remains under 'sentence' and under supervision in the community.⁵⁶³ There are sound reasons for parole. Supporters of parole argue that parole reduces reoffending through three mechanisms: (1) by providing an incentive for offenders to address their offending behaviour, (2) by allowing reintegration and supervised release and the provision of transition between custody and unsupervised release and (3) by risk management.⁵⁶⁴ In

554 It is noted that there are different models for parole with some involving automatic release after the non-parole period and others with release a discretionary matter: see TLRI, above n 1, [5.1.3].

555 Sentencing Act 1997 (Tas) s 17(3A).

556 Sentencing Act 1997 (Tas) s 17(3); Corrections Act 1997 (Tas) s 68(1). An offender can not be released on parole before the completion of the non-parole period applicable to the offender's sentence or a period of six months imprisonment, whichever is greater, unless exceptional circumstances apply, Corrections Act 1997 (Tas) s 70.

557 Sentencing Act 1997 (Tas) s 17(2).

558 Sentencing Act 1991 (Vic) s 11A.

559 Criminal Law (Sentencing) Act 1988 (SA) s 32(5)(ab), (ba).

560 Ibid s 32A(2)(b), (3).

561 New South Wales Law Reform Commission, *Design and Objectives of the Parole System*, Question Paper 1 (2013) [1.31].

562 See further [8.1.6].

563 See TLRI, *Sentencing* [5.3.10]–[5.3.11].

564 New South Wales Law Reform Commission, above n 561, [1.15], [1.16], [1.23].

Tasmania, limits are already placed on the minimum period parole that a court can order and the court already has the power to impose a longer period or make no order for parole if it is warranted taking into account the nature and the circumstances of the offence. Accordingly, the Council's view is that further limiting the courts discretion on the basis of an increased arbitrary proportion fails to take account of the wide range of behaviours that are criminalised by sexual offences and will result in injustice.⁵⁶⁵

Mandatory non-parole periods

Recommendation 6

That Tasmania should not introduce mandatory non-parole periods for sex offences.

8.1.6 Presumptive non-parole periods

Presumptive non-parole period schemes involve less restriction on the court's sentencing discretion than mandatory sentencing but still place restriction on the discretion of a court to impose sentence.

Standard non-parole period (SNPP) schemes are an example of a presumptive non-parole period scheme that currently operates in Australia. An SNPP is a 'legislated non-parole period intended to provide guidance to the courts on the length of time an offender found guilty of an offence should spend in prison before being eligible to apply for release on parole'.⁵⁶⁶ The presumptive non-parole period only applies if the court imposes a sentence of imprisonment and it does not apply to non-custodial sentences. These schemes can be divided in two broad categories: (1) defined term schemes (as operates in New South Wales), which set the presumptive non-parole period as a non parole period that an offender should serve in prison and (2) a standard percentage scheme (as operates in South Australia and the Northern Territory), which defines the presumptive non-parole period as a set proportion of the sentence.⁵⁶⁷

Defined term schemes

This is the model of the SNPP scheme in New South Wales.⁵⁶⁸ In New South Wales, an SNPP has been set for several serious offences including several sexual offences (sexual assault; aggravated sexual assault; aggravated sexual assault in company; aggravated indecent assault; sexual intercourse — child under 10; assault with intent to have sexual intercourse with young person under 10; sexual intercourse — child 10–14; aggravated sexual intercourse child 10–14; aggravated sexual intercourse — child 14–16; procure a child under 14 for unlawful sexual activity; procure a child 14–16 for unlawful sexual activity; meet a child under 14 following grooming; meeting a child 14–16 following grooming; groom a child under 14 for unlawful sexual activity; groom a child 14–16 for unlawful sexual activity; induce a child under 14 to participate in child prostitution; obtain benefit from child prostitution, child under 14; and use a child under 14 for child abuse material purposes).⁵⁶⁹

It is noted that sexual intercourse with a child between 14 and 16 (*Crimes Act 1900 (NSW)* s 66C), persistent sexual abuse of a child (*Crimes Act 1900 (NSW)* s 66EA) and incest (*Crimes Act 1900 (NSW)* s 78A) are not included in the SNPP scheme.⁵⁷⁰ Under the *Crimes (Sentencing Procedure) Act 1999 (NSW)*, the SNPP is the non-parole period for an offence, that taking into account only the objective factors affecting the relative seriousness of that offence,

565 See TLRI, above n 1, [5.3.11].

566 Sentencing Advisory Council, Queensland, *Minimum Standard Non-parole Periods*, Report (2011) xiv.

567 Ibid 7.

568 *Crimes (Sentencing Procedure) Act 1999 (NSW)* Part 4, Division 1A.

569 See *ibid* Table, as amended by the *Crimes Legislation Amendment (Child Sex Offences) Act 2015 (NSW)*.

570 The Joint Committee examining child sexual abuse in New South Wales made recommendation for the inclusion of additional serious child sex offences in the SNPP. These included aggravated sexual intercourse with a child aged 10 to 14 (*Crimes Act 1900 (NSW)* s 66C(2)) and aggravated sexual intercourse with a child aged 14 to 16 (*Crimes Act 1900 (NSW)* s 66C(4)): see Parliament of NSW, Recommendation 8. These reflect the recommendations of the Sentencing Council, NSW, where the Council recommended the inclusion of 8 additional child sex offences in the SNPP scheme: attempt or assault with intent to have sexual intercourse with a child under 10 years, sexual intercourse with a child 10–14 years, sexual intercourse with a child 10–14, aggravated offence, sexual intercourse with a child 14–16, aggravated offence, use (or allow a child under 14 to produce child abuse material, procuring or grooming a child under 16 years for unlawful sexual activity, promoting or engaging in acts of child prostitution (for a child under 14 years only), obtaining benefit from child prostitution (for a child under 14 years only): see Joint Select Committee on Sentencing of Child Sexual Assault Offenders, Parliament of New South Wales, above n 10, Recommendation 3.1 and [3.5]. These recommendations were implemented by the *Crimes Legislation Amendment (Child Sex Offences) Act 2015 (NSW)*.

is in the middle of the range of seriousness'.⁵⁷¹ It is a matter to be taken into account by a court in determining the appropriate sentencing in the particular case without limiting the matters that are otherwise required or permitted to be taken into account in sentencing an offender (including subjective factors personal to the offender).⁵⁷²

It is not mandatory but rather provides a guidepost to sentencing (along with the maximum penalty) and not a starting point for the imposition of sentence.⁵⁷³ Accordingly, it is consistent with instinctive synthesis, which is the process where all considerations relevant to the instant case are simultaneously unified, balanced and weighed by the sentencing judge in determining the appropriate sentence.⁵⁷⁴ This means that if the court sets a non-parole period that is longer or shorter than the SNPP, the court is not required to explain the extent to which the seriousness of the case differed from the hypothetical offence in the middle of the range of seriousness.⁵⁷⁵

SNPPs were introduced in New South Wales with a view of increasing consistency and transparency in sentencing and increasing the public's understanding of sentencing. The scheme was also intended to preserve judicial discretion.⁵⁷⁶ However, as recognised by Freiberg, Donnelly and Gelb, '[i]mplicitly, one purpose was to increase the severity of sentencing for some offences'.⁵⁷⁷ This appears to be the reality with research conducted by the Judicial Commission of New South Wales finding that sentences (non-parole periods and head sentences) had generally increased after the introduction of the SNPP scheme.⁵⁷⁸ If an SNPP scheme were introduced in Tasmania, an increase in sentencing lengths would be an explicit purpose, as would the desire to increase the transparency in sentencing. In contrast, the need for greater consistency would not be an aim of the legislation, given previous analysis has found no evidence of inconsistency in sentencing between judges in the Supreme Court.⁵⁷⁹

Standard percentage schemes

In South Australia, there are presumptive non-parole provisions that limit the proportion of a sentence that can be served on parole for some offenders. This does not apply to all sex offenders — only if a person is declared to be a serious repeat offender,⁵⁸⁰ in which case the court sentencing that person is not bound by the principle of proportionality and any non-parole period fixed in relation to the sentence must be at least four-fifths the length of the sentence.⁵⁸¹ There is a limited discretion for the court to declare that this 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 in all the circumstances, it is not appropriate that the offender be sentenced as a serious repeat offender.⁵⁸²

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.⁵⁸³ 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.⁵⁸⁴ 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

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

572 Ibid s 54B(2); *Muldrick v The Queen* (2011) 244 CLR 120. Prior to the High Court decision in *Muldrick*, the approach in 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', Sentencing Council, NSW, *Standard Non-parole Period Final Report* (2013) [1.13]. This approach was rejected by the High Court.

573 *Muldrick v The Queen* (2011) 244 CLR 120.

574 See [2.3].

575 Crimes (Sentencing Procedure) Act 1999 (NSW) s 54B(6).

576 Cowdery, above n 538, 13.

577 Freiberg, Donnelly and Gelb, above n 28, 192.

578 Patrizia Poletti and Hugh Donnelly, 'The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales' (Research Monograph 33, Judicial Commission of NSW, 2010).

579 TLRI, above n 1, [1.2.12].

580 This declaration must be made if an offender has been convicted on at least three separate occasions of an offence to which the Division applies, or convicted on at least two separate occasions of a serious sexual offence against a person or person under the age of 14 years or has been convicted on at least 2 separate occasion of a category A serious offence, *Criminal Law (Sentencing) Act 1988* (SA) s 20B. Serious sexual offences are offences against the *Criminal law Consolidation Act 1935* (SA) ss 48 (rape), 48A (compelled sexual manipulation), 49 (unlawful sexual intercourse), 50 (persistent sexual exploitation of a child), 56 (indecent assault), 58 (acts of gross indecency), 59 (abduction), 60 (procuring sexual intercourse), 63 (production of child pornography), 63B (procuring a child to commit indecent act), 66 (sexual servitude), 67 (deceptive recruiting for commercial sexual services), 68 (use of children in commercial sexual services) or 72 (incest).

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

582 Ibid s 20BA(2).

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

584 Sentencing Act (NT) s 55.

of serious offences including several sexual offences (sexual intercourse of gross indecency with a child under 16, sexual intercourse of gross indecency by providers of services to 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.⁵⁸⁵ Again, the court has a discretion not to impose the fixed non-parole period if the court considers that it is inappropriate.⁵⁸⁶

Discussion

Objections to presumptive non-parole period schemes include the added complexity and the restrictions placed on judicial discretion.⁵⁸⁷ Presumptive non-parole periods have been criticised on the basis that:

there is limited evidence of the effectiveness of SNPP schemes in meeting their objectives, beyond making sentencing more punitive and the sentencing process more complex, costly and time consuming. It also risks having a disproportionate impact on vulnerable offenders, including Aboriginal and Torres Strait Islander offenders and offenders with a mental illness or intellectual impairment.⁵⁸⁸

For these reasons, the majority of the Queensland Sentencing Advisory Council did not support the introduction of a presumptive non-parole period scheme.⁵⁸⁹ In New South Wales, concerns have also been raised in relation to principles that are used to identify presumptive non-parole period offences and also the lack of transparency and inconsistency in setting the presumptive non-parole period.⁵⁹⁰

The introduction of a presumptive non-parole period has previously been considered and rejected in Tasmania. The TLRI gave consideration to the introduction of presumptive non-parole periods and recommended that a scheme not be introduced for the following reasons:

- that there was no reason to believe that specifying non-parole periods will have any impact on improving public understanding of and confidence in the sentencing system;
- they restrict judicial discretion and can lead to injustice in individual cases;
- there will be problems in determining what the SNPP period should be;
- there are difficulties with global sentences and how this would be accommodated in a SNPP table; and
- the offence of maintaining a sexual relationship with young person can cover such a wide range of offending that an SNPP would be meaningless and unhelpful given that it would require so many departures from the standard.⁵⁹¹

The Council recognises the concerns raised by the TLRI and the difficulties that arise in implementing such a scheme in Tasmania. However, the Council also considers that, in view of the difficulties in providing a mechanism for increasing sentencing levels in Tasmania, a presumptive non-parole period scheme may be a means for Parliament to provide a distinct signal to the courts about sentencing levels and may be an acceptable compromise between mandatory sentencing and unfettered judicial discretion.⁵⁹² In addition, the TLRI's evaluation of SNPPs occurred before the High Court decision in *Muldrock*⁵⁹³ that clarified the operation of the scheme in New South Wales and stressed that an SNPP was only one factor to be taken into account in the exercise of the sentencing discretion. Presumptive minimum sentences are an approach that retains considerable judicial discretion, and may provide a means of increasing the sentencing range for sexual offenders. Arguably, it may also improve transparency and public confidence in the criminal justice system.⁵⁹⁴ Other jurisdictions have created presumptive non-parole periods for specific offences of concern and this approach could be adapted to the Tasmanian context.

585 Ibid s 55A(1).

586 Ibid s 55A(2).

587 Sentencing Council, NSW, *Standard Non-parole Periods*, Report (2013) [1.30].

588 Sentencing Advisory Council, Queensland, above n 566, 20.

589 Ibid.

590 See Sentencing Council, NSW, above n 587.

591 TLRI, above n 1 [6.4.8].

592 Cowdery, above n 538, 13.

593 *Muldrock v The Queen* (2011) 244 CLR 120.

594 TLRI, above n 1, [6.4.8].

As discussed, currently in Tasmania, under the *Sentencing Act 1997* (Tas), the court can make an order that an offender is not eligible for parole before serving the period specified in the order, which must be not less one-half of the period of the sentence.⁵⁹⁵ A prisoner is not eligible for release on parole before the completion of the non-parole period applicable or a continuous period of 6 months imprisonment whichever is greatest, unless there are exceptional circumstances.⁵⁹⁶ This means that an offender sentenced to 9 months imprisonment or more is normally eligible for release on parole, unless the court does not make an order for parole (in which case the offender is ineligible for parole)⁵⁹⁷ or makes an order that the offender is ineligible for parole.⁵⁹⁸ This scheme could be amended to create a presumptive non-parole period scheme.

As indicated, there are two possible models for a presumptive non-parole period scheme: (1) a defined term scheme or (2) a standard percentage scheme.

A **defined scheme** would set out the presumptive minimum term of imprisonment for particular sexual offences and each offence under the scheme would have its own presumptive minimum term of imprisonment that an offender must serve before being eligible for parole. This is based on the New South Wales model. This approach has the advantage that it retains a wide judicial discretion as the minimum non-parole period is merely one of the factors to be taken into account in imposing sentence.⁵⁹⁹ As has been noted, Tasmania lacks graduated maximum penalties under the *Criminal Code* (Tas) and the introduction of presumptive non-parole periods (following the New South Wales model) could create a legislative guidepost to the appropriate sentencing level.

However, the difficulty remains as to the process for setting the appropriate term for the non-parole period in Tasmania. Initially in New South Wales, the level of the SNPP was set by reference to the seriousness of the offence, the maximum penalty for the offence, current sentencing trends and community expectations.⁶⁰⁰ However, the New South Wales Law Sentencing Council, observed that the 'process by which ... offences were selected and relevant SNPP were set remains somewhat opaque' and that it did not appear that there had been a consultation process for setting the periods nor any defined set of criteria being developed.⁶⁰¹ This led to concerns about the lack of transparency and also inconsistency in the non-parole periods included in the legislation.⁶⁰² Reforms have been suggested, which would set the presumptive non-parole period as a proportion of the maximum penalty for the offence.⁶⁰³ This approach will not work in Tasmania (given that all offences have the same maximum penalty). It is the Council's view is that it is not appropriate to copy the periods set in New South Wales, as the Council considers that the periods set need to reflect Tasmanian sentencing practice and Tasmania's unique status as being a low crime jurisdiction. The Council considers that an incremental increase in sentence lengths is appropriate rather than a significant increase. One method of determining the appropriate presumptive non-parole period would be to make incremental increases to the current non-parole periods. However, as shown in Table 20, these periods do not necessarily reflect the relative seriousness of the offences (for example the median non-parole period for indecent assault exceeds the median non-parole period for both maintaining a sexual relationship and aggravated sexual assault). In addition, some offences have a wide dispersal of sentences (as indicated by a larger interquartile range).⁶⁰⁴ Further, in relation to some offences, the median non-parole period is calculated using a very small number of offenders (given that few offenders receive a sentence of imprisonment of over 9 months or more for those offences).

595 *Sentencing Act 1997* (Tas) s 17(2)(b), (3); *Corrections Act 1997* (Tas) s 68(1).

596 *Corrections Act 1997* (Tas) s 70.

597 *Sentencing Act 1997* (Tas) s 17(3A). It is noted that offenders who receive a sentence of 9 months would usually receive a three month remission from their sentence and so would not apply for parole.

598 *Ibid* s 17(2)(a).

599 *Muldock v The Queen* (2011) 244 CLR 120. See Bagaric and Edney, above n 39, [200.2080].

600 New South Wales, Legislative Assembly, *Parliamentary Debate*, 23 October 2002, 5816 (Debus).

601 Sentencing Council, NSW, above n 587, [2.9].

602 *Ibid* ch 4.

603 *Ibid* Recommendation [4.1].

604 The interquartile range is the middle 50% of sentences. It is the difference between the top and bottom values of the middle 50% of sentences.

Table 20: Non-parole periods in months for offenders sentenced to over 9 months imprisonment when an order for parole made, Supreme Court of Tasmania, selected sexual offences, 2008–14

	No. of offenders	Min	Max	Median (months)	Middle 50%	Interquartile range
Rape	25	12	84	24	18–30	12
Maintaining a sexual relationship with a young person	60	6	90	20.5	12–42	30
Aggravated sexual assault	8	12	36	14.5	13.9–15.3	1.4
Indecent assault	8	12	24	22	14.3–24	9.7
Sexual intercourse with a young person	5	6	15	12	6–12	6

Another approach would be for the presumptive non-parole period to be based on an incremental increase of the current median sentences for sexual offences for such a period as decided based on the view taken about the seriousness of the offence, the appropriateness of current sentencing practice and the views of key stakeholders obtained in a consultative process and then reduced by the current minimum non-parole period.

A further difficulty with the introduction of a defined scheme based on the New South Wales model is that it appears to introduce a change to 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 New South Wales, sentences are determined using a ‘bottom up’ approach whereby the court sets the non-parole period first and then the parole period.⁶⁰⁵ A change to the ‘bottom up’ approach in New South Wales was considered necessary with the introduction of the presumptive non-parole period scheme to ensure consistency with the focus on the non-parole period under the scheme.⁶⁰⁶ However, the New South Wales Law Reform Commission has argued the interpretation of the SNPP scheme following *Mulrock* is consistent with the return to a top down approach given that the court takes into account the full range of factors in determining the appropriate sentence with the presumptive non-parole period only operating as a guidepost.⁶⁰⁷ On this basis, the current approach in Tasmania may not need to be altered.

A standard proportion scheme could be created 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. This approach gives the sentencer less discretion to depart from the presumptive non-parole period than the defined scheme model, as its imposition must be inappropriate for the court to depart from it, rather than being only a factor in the exercise of the court’s discretion. It also does not provide a guidepost for the appropriate sentence, only a requirement that the period of imprisonment should usually be longer than the minimum non-parole period that applies in other cases. It is likely that such a provision would result in some offenders convicted of sex offences being required to spend a longer period of their sentence in prison. There are, however, concerns 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.⁶⁰⁸ On the other hand, an advantage may be that it is simpler to introduce given that there is no need to define a specific period of imprisonment for each offence — just decide a particular percentage of the sentence that the court imposed. For example, 70% as is the case in the Northern Territory or 4/5ths of the sentencing following the South Australia model or some other proportion of the sentence.

605 Sentencing Procedure) Act 1999 (NSW) s 44(1).

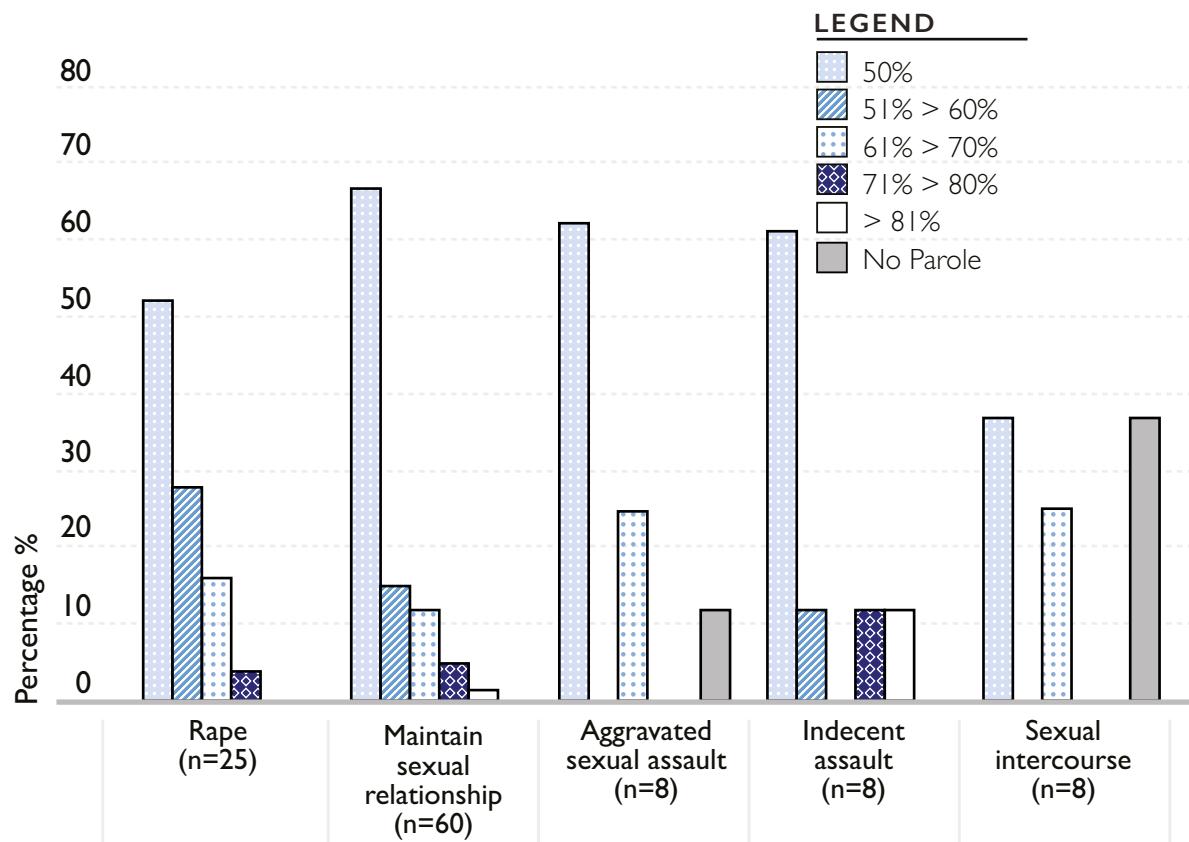
606 NSW Law Reform Commission, Sentencing, Report 139, (2013) [6.17] fn 36.

607 Ibid [6.20].

608 Wai-Yin Wan, 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. See [8.1.5] for discussion of the benefits of parole.

As shown in Figure 19, a non-parole period of 50% of the sentence of imprisonment is the most commonly used period in Tasmania for all sexual offences. However, many offenders also received a non-parole period that exceeded the minimum non-parole period or no order for parole (39.3% of offenders).

Figure 19: Non-parole period as a proportion of sentence of imprisonment for offenders sentenced to more than 9 months imprisonment, Supreme Court of Tasmania, selected sexual offences, 2008–14



Regardless of the model adopted, other issues arise in implementing a presumptive non-parole scheme. One problem is deciding on the offences to be included in the scheme: should it apply to all sexual offences or only specific sexual offences? In other jurisdictions, only selected sexual offences (typically more serious sexual offences) are included in the scheme. However, the process of selection is exacerbated in Tasmania as the current sexual offences are broadly defined and there are not (unlike the New South Wales criminal law) different offences that reflect the age of the victim and offences committed in circumstances of aggravation. This makes it difficult to limit the application of the scheme to serious offenders only. This is not an insurmountable problem, for as discussed at [8.2.1], an option for reform in Tasmania would be to create more specific sexual offences that created a more specific hierarchy of sexual offences. Another option would be specify that the scheme only applies to sexual offences committed in particular circumstances, for example sexual intercourse with a young person under the age of 12 or indecent assault committed on a young person under 17.⁶⁰⁹ Alternatively, a presumptive non-parole period could apply to all the sexual offences under consideration in this paper, with the individual circumstances of the case being relevant to the exercise of the court's discretion.

⁶⁰⁹ This has been the approach of the Sentencing Council, NSW, where it has recommended the inclusion of some offences (*Crimes Act 1900 (NSW) s 91D and 91E*) for children under 14 years only, above n 587, Recommendation 3.1.

Another difficulty in the Tasmanian context is the interaction between a presumptive non-parole period and global sentencing when an offender is sentenced for multiple offences. In Tasmania, as discussed, multiple offences are usually dealt with by means of a global sentence and concerns have been raised that it is not clear how this approach could be accommodated within a presumptive non-parole period scheme.⁶¹⁰ A standard proportion scheme would be more difficult to reconcile with global sentencing, given that the court would be required to impose a non-parole period that was a set proportion of the total sentence (unless it was unjust in the circumstances) for presumptive non-parole scheme offences. It may, however, be possible to make legislative direction as to how the standard proportion non-parole period applies in cases where an offender is sentenced for multiple sentences. However, it is the Council's view that this adds inflexibility, lacks transparency and that a defined scheme is better able to be reconciled with the use of global sentences. As discussed, in such a scheme, the presumptive non-parole period is only a guidepost and in determining sentencing for multiple offences, the presumptive non-parole period for offences within the scheme is one factor taken into account by the court in imposing sentence.

The Council's view is that there is merit in further investigating the implementation of a presumptive non-parole scheme in Tasmania. The Council's view is that the preferred model is based on the New South Wales model given its greater retention of judicial discretion and its ability to potentially influence the total sentence imposed, allowing for increased sentence lengths in appropriate cases. It may also be an effective way for the government to meet its policy commitment to introduce mandatory minimum sentences without creating injustice in individual cases. However, the adoption of a presumptive non-parole period scheme and its structure and its implementation would require further development and close consultation with stakeholders. Issues to be addressed would include: the offences to be initially included in the scheme; the procedure for including additional offences in the scheme; the mechanism for setting the presumptive non-parole period; a reconsideration of the relationship between the imposition of the total sentence and the non-parole period; and the interaction of the scheme with global sentencing. It would also be necessary to address the implications of such a scheme on current sentencing practice (for example, top down or bottom up sentencing).

Presumptive non-parole periods

Recommendation 7

That consideration should be given to the introduction of presumptive non-parole periods for sex offences in Tasmania.

Recommendation 8

That the model for the presumptive non-parole scheme should be based on a defined scheme rather than a standard proportion scheme.

⁶¹⁰ TLRI, above n 1, [6.4.8].

8.2 OTHER OPTIONS

Increased penalty provisions or mandatory sentencing are not the only responses to concerns in relation to the sentencing practice of the courts for sex offenders. There is scope to make changes to sentencing practice within the current sentencing framework in Tasmania to better address concerns in relation to the sentencing of sex offenders. These options include: the introduction of the statutory restrictions imposed on the principle of proportionality, the introduction of civil preventive orders, and amendments to the *Criminal Code (Tas)* and/or the *Sentencing Act 1997 (Tas)*. In addition, more targeted responses to recidivism and concerns about community protection could be made through the use of post-sentence supervision and detention orders for serious recidivist offenders.

8.2.1 Amendment to the *Criminal Code (Tas)*

The Council has identified a number of reforms that could be made to the *Criminal Code (Tas)* to address concerns raised in relation to the sentencing of sex offenders who have sexually abused children under their care, authority or supervision or abused young children.

Create aggravated offences

Some of the community dissatisfaction with sentencing for child sex offenders and the problems identified by courts about the reliance on statistical data to ascertain a sentencing range reflect the range of behaviours that those offences encompass.⁶¹¹ The concerns may be addressed by the creation of greater specificity in the offence structure under the *Criminal Code (Tas)*, by creating new aggravating offences that reflect the aggravating features currently recognised by Tasmanian courts in sentencing. It may be that by including these factors in legislation, there would be a more transparent framework for the imposition of sentences. On this basis, an option in Tasmania would be to create separate offences of aggravated sexual intercourse with a young person and maintaining a sexual relationship with a young person in circumstances of aggravation. This would allow the structure of the criminal law (and accordingly sentencing practice) to better reflect the different circumstances in which sexual offences may be committed, in terms of age of the complainant, the relationship between the offender and the child, and the surrounding circumstances of the offence such as the supply of alcohol or drugs or filming of the offence.

Several jurisdictions have provisions distinguishing between offences committed against children of particular ages, with a more serious offence being sexual intercourse with a child under a certain age. This reflects a particular concern to protect especially young children, on the basis of their vulnerability, the nature of the harm and the culpability of the offender given that ‘the younger, more vulnerable or less mature the victim is, the more heinous is the perpetrator’s behaviour’.⁶¹² There is, however, no consensus between jurisdictions as to the age below which the more serious offence is created and as pointed out by the New South Wales Sentencing Council:

the age brackets can operate in an arbitrary way, and ... there is little justification for regarding a sexual assault of a child aged 10 years and 1 month as less serious than one involving a child aged 9 years and 11 months. The artificiality of the age distinction is heightened when it applies to the mid adolescent years given contemporary experience with maturation rates.⁶¹³

611 See [3.3.4]–[3.3.5].

612 *R v Sulmeanov* [2007] VSCA 288. See discussion in Sentencing Advisory Council, Victoria, above n 497, [5.51]–[5.52], [5.54]–[5.56].

613 Sentencing Council, NSW, *Penalties Relating to Sexual Assault Offences in New South Wales*, Vol 1 (2008) 32–3.

The ages set in other jurisdictions include 10,⁶¹⁴ 12⁶¹⁵ or 13.⁶¹⁶ There is also no consensus in child development literature of an appropriate age.⁶¹⁷ It is the Council's view that creating a particular offence 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 13. Nevertheless, the Council does consider that the young age of a complainant should be one of the features of an aggravating offence 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 defence 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.⁶¹⁸ Twelve was also the age recommended by the Victorian Sentencing Advisory Council in its consideration of the maximum penalties for sexual penetration with a child under 16 on the basis that it reflected the sentencing practice of the court and the sexual behaviour of children in forming consensual sexual relationship with other children close in age.⁶¹⁹

Another aggravating feature could be based on the relationship between the offender and the complainant. This would reflect the distinction made in sentencing between offenders who abuse a position of trust to sexually exploit a child.⁶²⁰ It would also reflect community abhorrence towards such offenders,⁶²¹ the serious harm caused by this type of offence, the offender's higher culpability and the prevalence of the offence.⁶²² While the Council's view is that all sexual offending against children is intrinsically serious, it acknowledges that there are different circumstances that 'represent differing levels of harm and culpability'⁶²³ and this can be appropriately reflected in the offence structure. Accordingly, the Council's view is that sexual intercourse where the child was under the care, supervision or authority of the accused should be a feature of the aggravated offence.⁶²⁴ This category would include 'relationships involving teachers, family friends, foster parents, employers, health professional, counsellors and youth workers'.⁶²⁵ It would also include familial relationships — parents, step-parents, de-facto parents, grandparents and other family members. It should also include sports coaches, religious officials or spiritual leaders who provides religious care or instruction to the child.⁶²⁶

Other factors that could be included in the aggravated offence are where the offender took advantage of the victim being under the influence of alcohol or a drug in order to commit the offence,⁶²⁷ where the supply of alcohol and/or drugs by the offender to the victim formed part of the context of the offending behaviour or where the offender has filmed or recorded the offence.⁶²⁸

614 *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.

615 *Crimes Act 1958 (Vic)* s 45(1)(a)(b) and (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.

616 *Sexual Offences Act 2003 (UK)* ss 5–15.

617 See Sentencing Advisory Council, Victoria, above n 497, [7.19]–[7.21], [7.25].

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

619 Sentencing Advisory Council, Victoria, above n 497, [7.16]–[7.28].

620 See [3.3.4]–[3.3.5].

621 See Chapter 6 for a discussion of public opinion on sentencing for sex offenders.

622 See Sentencing Advisory Council, Victoria, above n 497, [5.61].

623 *Ibid* [5.79].

624 This is a separate offence in Victoria, where there is an increased penalty under the *Crimes Act 1958 (Vic)*, s 45(2)(b) where the child complainant was 'under the care, supervision or authority of the accused'. The requisite relationship depends 'upon whether, looking at the evidence as a whole, it demonstrates that the relationship was one where, as a matter of act, the complainant was under the care, supervision or authority of the applicant during the period alleged', *R v Macfie* [2000] VSCA 173, [22] (Winneke P, Brolling and Chernov JJAs).

625 Sentencing Advisory Council, Victoria, above n 497, [2.19].

626 See Criminal Law Review, Department of Justice, Victoria, above n 4, [5.6.2].

627 This is one of the features of an aggravating offence in New South Wales: see *Crimes Act 1900 (NSW)* ss 61J(2), 61M(3), 66A(3), 66C(5). It is noted that this is broader than the offence of administering a drug to facilitate the commission of an offence contained in the *Criminal Code (Tas)* s 169, which is limited to circumstances where the offender administers or causes another person to taken any drug, alcohol or other drink with an intent to stupefy or overpower the person to facilitate the commission of the offence.

It is the Council's view that such amendment to the *Criminal Code* (Tas) would acknowledge the diversity of offending and clearly indicate to the courts and to the community the relative seriousness of the different categories of offending. This may increase transparency and improve community understanding. It may also assist in the development of sentencing ranges that reflect the different categories of offending. For these reasons, it is the Council's position that the creation of aggravating offences should be introduced. This would formalise accepted sentencing practice and also accords with community concerns in relation to the sexual exploitation of young children or sexual abuse by those in a position of trust. It also addresses concerns in relation to the use of modern technology. The Council acknowledges that the creation of new offences will not necessarily result in increases in penalties; however, evidence suggests that the introduction of special provision relating to care, supervision or authority has been effective in increasing sentencing levels for abuse of trust cases.⁶²⁸

An additional issue that arises in the Tasmanian context is that the aggravated offences would need to apply to the crime of maintaining a sexual relationship with a young person. Other jurisdictions do not make a distinction in ages for the offence of maintaining or persistent sexual abuse or include other aggravating features for that offence.⁶²⁹ However, unlike other jurisdictions,⁶³⁰ this offence is often charged for child sex offences in Tasmania. Analysis conducted by the Council found that there was only one case where an offender was convicted of sexual intercourse with a young person where the complainant was under 12 (and this was initially charged as maintaining a sexual relationship with a young person). This offence was also more commonly used in cases of sexual abuse that occurred within a family context.⁶³¹ Accordingly, the Council's view is that the *Criminal Code* (Tas) should also be amended to create an aggravating offence of maintaining a sexual relationship with a young person.

The Council's revised structure of sex offences would be:

- maintaining a sexual relationship with a young person (*Criminal Code* (Tas) s 125A);
- sexual intercourse with a young person (*Criminal Code* (Tas) s 124);
- maintaining a sexual relationship with a young person in circumstances of aggravation (new offence); and
- aggravated sexual intercourse with a young person (new offence).

Creation of aggravated offences of aggravated sexual intercourse with a young person and maintaining a sexual relationship with a young person in circumstances of aggravation

Recommendation 9

That the *Criminal Code* (Tas) should be amended to provide for an offence of aggravated sexual intercourse with a young person and an offence of maintaining a sexual relationship with a young person in circumstances of aggravation.

Aggravating features should include that:

- 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 offending involved the offender supplying the victim with alcohol and/or drugs; or
- the offender filmed or recorded the offence.

⁶²⁸ Freiberg, Donnelly and Gelb, above n 28, 3.

⁶²⁹ See, for example the *Crimes Act 1900* (NSW) s 66EA, where the offence of persistent sexual abuse of a child, makes no distinction between age groups for the purposes of the provision, as the offences against children under the age of 10 and between the ages of 10 and 16 are distinct in other provisions and these constitute the offences that fall within the operation of s 66EA.

⁶³⁰ Freiberg, Donnelly and Gelb, above n 28, 189.

⁶³¹ See [3.3.4].

Rename ‘maintaining a sexual relationship with a young person’

Section 125A of the *Criminal Code* (Tas) contains the offence of maintaining a sexual relationship with a young person.⁶³² Concerns were raised in community consultation in relation to the wording of this offence, with participants preferring less euphemistic language. In other jurisdictions, the offence is called ‘persistent sexual abuse of a child’⁶³³ and it may be argued that this label more appropriately reflect the nature of the crime.

Community consultation conducted by the Council revealed concern raised by several participants in the forums and in responses to the Consultation Paper with regard to the wording of the offence of maintaining sexual relationship with young person. Although this is not a sentencing issue per se, it is a matter that directly relates to the community perception of the criminal justice system’s response to sexual violence against children. Dr Georgina O’Donnell from ForensiClinic Consulting said:

the term “maintaining a sexual relationship” is offensive in such a context. The term “relationship” suggests a consensual arrangement between two equal parties. This is clearly not the case when an adult is sexually exploiting a child. A preferable term would be “Repeated sexual exploitation of a young person”.

Laurel House and North West Tasmania Sexual Assault Support Service noted that, “[the] “Maintaining a Relationship” charge ignores the fact that a 15 year old can’t legally give consent... It should be “Maintaining an Abusive/Exploitative Relationship with negative impact on survivor.”” Confidential I wrote that ‘if a person who rapes continuously a child of less than 12 yo can be tried for “maintaining a sexual relationship with a young person”, there’s something very wrong with Tasmania’s Criminal Code’.

The TLRI has also considered this issue extensively in the paper *Sexual Offences Against Young People*,⁶³⁴ where it sought responses on the renaming of the offence. There was support from nine out of eleven respondents on the basis that the use of ‘relationship’ did not adequately reflect the seriousness of the crime. However, two respondents opposed the rename, including the then Director of Public Prosecutions who was concerned that it may encourage fewer offenders to plead guilty:

although renaming the crime might give the legislature and indeed the community a pleasant sense of having struck a blow against child abuse, if the result is fewer pleas of guilty and more children being cross-examined at trial that satisfaction would be misplaced.⁶³⁵

Although the Institute agreed that the name tended ‘to underestimate the seriousness of the crime because it fails to convey the exploitative and abusive nature of the crime and that consent was compromised or even possibly totally absent’, the Institute agreed with the former DPP’s concern and recommended that the crime not be renamed.⁶³⁶ It was the Institute’s view that ‘the laudable aims of giving the crime a label that better reflects the gravity of the offence is trumped by the concern not to discourage guilty pleas.⁶³⁷ A renamed offence may also influence the perceptions of the jury and may make convictions more difficult to obtain. The Council agrees with the view of the Institute, and also considers that given the diversity of circumstances in which the offence is charged, it is not always appropriate to label the conduct as ‘persistent sexual abuse’, for example when the sexual conduct takes place in the context of a close in age, ‘consensual’ relationship.

Rename ‘maintaining a sexual relationship with a young person’

Recommendation 10

That the offence of maintaining a sexual relationship with a young person should not be renamed as persistent sexual abuse of a child.

632 In Queensland, the ACT and the Northern Territory, the offence also refers to maintaining a sexual relationship, *Criminal Code* (Qld) s 229B; *Crimes Act 1900* (ACT) s 56; *Criminal Code Act* (NT) s 131A.

633 See *Crimes Act 1900* (NSW) s 66EA; *Crimes Act 1958* (Vic) s 47A; *Criminal Code Act 1913* (WA) s 321A; *Criminal Law Consolidation Act 1935* (SA).

634 TLRI, above n 4.

635 Ibid [4.9.12].

636 Ibid Recommendation 16.

637 Ibid [4.9.13].

8.2.2 Amendment to the Sentencing Act 1997 (Tas)

Statutory aggravating and mitigating factors under the Sentencing Act 1997 (Tas)

A possible response to the perceived inadequacy of sentencing responses to sex offences would be amendment of the Sentencing Act 1997 (Tas) to set out in legislation relevant aggravating and mitigating factors in the imposition of sentencing for sexual offences.

For child sex offences, as shown in Chapter Three, the range of conduct that is criminalised within the offences highlights the disparities in the nature of the conduct committed by adults against young people under the age of 17. As discussed, the Supreme Court has highlighted several aggravating factors such as abuse of trust, position and power, attempts to silence the victim with threats, prolonged and/or escalating sexual abuse from an early age, the use of violence or the use of sexual abuse as punishment.⁶³⁸ These factors could be set out in legislation with a view to providing greater transparency in sentencing.

A specific list of aggravating and mitigation factors that applies to sexual offences is the approach in Western Australia, where the *Criminal Code (WA)* sets out a non-exhaustive list of aggravating factors for sexual offences including the use of a weapon, the offence was committed in company, the victim is harmed, the offender does an act which is likely seriously and substantially to degrade or humiliate the victim or the offender threatens to kill the victim. In addition, it is aggravating if the victim is over 13 years and under the age of 16.⁶³⁹ In relation to child sex offences, the maximum penalty is increased if the child is under the care, supervision or authority of the offender.⁶⁴⁰ Additional aggravating and mitigating factors could also be drawn from the United Kingdom's guideline judgment on sexual offences. These mitigating factors include:

- a plea of guilty;
- cooperation with police and/or prosecution; and
- any other factor the court thinks is relevant to sentencing.

Aggravating factors include:

- if the complainant was a child, the child was particularly vulnerable due to extreme youth and/or personal circumstances;
- severe psychological or physical harm;
- pregnancy or STI as a consequence of offence;
- additional degradation/humiliation;
- abduction;
- prolonged detention/sustained incident;
- violence or threats of violence;
- forced/uninvited entry into victim's home;
- significant degree of planning;
- offender acts together with others to commit the offence;
- use of alcohol/drugs on victim to facilitate the offence;
- grooming behaviour used against victim;
- abuse of trust;
- previous violence against victim;
- offence committed in course of burglary;
- sexual images of victim recorded, retained, solicited or shared;
- deliberate isolation of victim;
- commercial exploitation and/or motivation;
- offence racially or religiously aggravated;

638 See [2.3.3], [3.3.4]–[3.3.5].

639 See *Criminal Code (WA)* s 319(1).

640 *Ibid* s 321(7)(b), 321(8)(b).

- offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation) or transgender identity (or presumed transgender identity); and
- any other factor which the Court thinks is relevant to sentencing.

Amendment to the *Sentencing Act 1997* (Tas) to include aggravating and mitigating factors

Recommendation 11

That the *Sentencing Act 1997* (Tas) should be amended to include a list of aggravating and mitigating factors that apply for sexual offences.

Remove good character as a mitigating factor

Concerns about the sentencing of child sex offenders have resulted in the removal of good character as a mitigating factor in some jurisdictions, and this approach could also be adopted in Tasmania.

An offender's character is generally relevant to sentencing and an offender's good character may operate to reduce the sentencing that would otherwise be imposed.⁶⁴¹ Good character includes an absence of prior convictions (a negative aspect) and reputation or good character as shown by previous good works and contributions to the community (a positive aspect).⁶⁴² Good character may operate as a mitigating factor 'if it shows that the instant offence is exceptional or atypical and, therefore, unlikely to need special deterrence, or that the offender can be dealt with through rehabilitative measures'.⁶⁴³ However, character may also be aggravating if the offender's ostensible good character has facilitated the offence, for example by leading the victims and their families to trust the offender and provide the offender with unsupervised access to children.⁶⁴⁴ In the context of child sexual offences, little weight is generally afforded to good character given the nature of the offence; however, Tasmanian courts have accepted that some weight is attached to an absence of prior offending and an offender's positive contribution to the community.⁶⁴⁵

The use of good character as a mitigating factor has been explicitly removed by legislation in New South Wales and South Australia in circumstances where the offender used his/her community standing to build trust and obtain access to children (grooming). In New South Wales, the *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(5A) provides that:

[i]n determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.

Similarly, in South Australia, the *Criminal Law (Sentencing) Act 1988* (SA), s 10(3)(ba) provides that:

[i]n determining a sentence for an offence a court must not have regard to the good character or lack of previous convictions of the defendant if the offence is a class 1 or class 2 offence within the meaning of the *Child Sex Offenders Registration Act 2006* (SA)⁶⁴⁶ and the court is satisfied that the defendant's alleged good character or lack of previous convictions was of assistance to the defendant in the commission of the offence.

641 Kate Warner, 'Sentencing Review 2008–2009' (2010) 34 *Criminal Law Journal* 16, 17.

642 Ibid.

643 Freiberg, Donnelly and Gelb, above n 28, 79.

644 Ibid. See *Ryan v The Queen* (2001) 206 CLR 267.

645 See *Goldsmith v Tasmania* [2006] TASSC 86, [7] (Slicer J), [16] (Tennent J); *Richman v Tasmania* [2011] TASCCA 18, [42] (Evans J); *Holloway v Tasmania* [2013] TASCCA 1, [6] (Blow, Tennent and Wood JJ); *Hawkins v The Queen* [2004] TASSC 55, [8] (Slicer J).

646 This contains various serious offences against children: see Schedule 1.

Such a provision has been supported on the basis that evidence of good character, which is often used to facilitate child sexual assault offences, should not be taken into account as a mitigating factor.⁶⁴⁷ In addition, 'the harmfulness of the offence, the ease with which persons in a position to win the confidence of parents can commit offences and the resistance of rehabilitation and the risk of recidivism of such offenders' are also cited in support of such legislation⁶⁴⁸

On the other hand, it can be argued that a special provision that excludes good character for child sexual offences is unnecessary given that the current law already recognises the minimal mitigatory weight to be attached where an offender has used good character to obtain access to children.⁶⁴⁹ In this way, as Warner has argued 'to select sex offences against children for special consideration in such a way is unnecessary and mere window-dressing'.⁶⁵⁰ It is also unlikely to make any significant difference to sentencing practice as good character is typically relied on in historical sexual abuse cases where the offender relies on the positive contribution made to the community subsequent to the offending behaviour. It is doubtful that this claim would be precluded by any legislative provision based on the New South Wales and South Australian model. Nevertheless, it may be considered appropriate to make a legislative statement (in line with the approach in New South Wales and South Australia) that restricts the use of evidence of good character to clarify the current approach to sentencing and provide a clearer test in relation to the circumstances in which good character is mitigating in cases of child sexual offences.⁶⁵¹

The Council's view is that a specific provision should be introduced that limits the use of an offender's good character as a mitigatory factor where that was of assistance to the offender in the commission of the offence. The Council recognises that this reflects the current law but considers that such a provision would serve an important declaratory purpose.

Remove good character as a mitigating factor

Recommendation 12

That a specific provision should be introduced that limits the use of an offender's good character as a mitigatory factor where that was of assistance to the offender in the commission of the offence.

8.2.3 Preventative detention

While Tasmania has the dangerous criminal declaration as a means of indefinitely detaining offenders, this is an older style of preventative detention legislation. Other jurisdictions have enacted 'modern' forms of indefinite sentences and also have provided for supervision and detention orders post sentence.⁶⁵² A legislative response to concerns about inappropriate sentences for serious sex offenders in Tasmania could be the introduction of revised indefinite detention legislation and/or the introduction of supervision and detention orders.

647 Joint Select Committee on Sentencing of Child Sexual Assault Offenders, Parliament of New South Wales, above n 10, [3.37]; Sentencing Council, NSW, above n 613, [5.43].

648 Warner, above n 641, (2010), 23 summarising the Sentencing Council, NSW, above n 613, [5.49]–[5.60]. Warner notes that the 'point about the relatively poor rates of recidivism for child sexual offenders is not borne out by the evidence', 23 fn 53. See also [5.3].

649 Warner, above n 641, 23.

650 Ibid 16. Warner instead supported limiting the use of evidence of good character as a mitigatory factor for all offences by only allowing evidence of an absence of prior convictions (and not general character) to be considered: see *ibid* 23–24.

651 *Ibid* 23.

652 Freiberg, Donnelly and Gelb, above n 28, 175–185.

Indefinite detention

An indefinite sentence is a sentence that 'allows a court to order that the person be imprisoned for a specified or "nominal" period of time after which that sentence may be reviewed and further imprisonment ordered'.⁶⁵³ It is imposed at the time of sentencing. Provisions for indefinite detention exist in Victoria,⁶⁵⁴ Queensland,⁶⁵⁵ Western Australia⁶⁵⁶ and the Northern Territory,⁶⁵⁷ where the court can sentence an offender to indefinite imprisonment if satisfied that the offender is a serious danger to the community. Although there are differences between jurisdictions, the approach in Victoria is illustrative.⁶⁵⁸

Under Sentencing Act 1991 (Vic), s 18A any person over the age of 21 convicted of a 'serious offence'⁶⁵⁹ may be sentenced to an indefinite term of imprisonment.⁶⁶⁰ The court must be satisfied that the offender is a 'serious danger to the community'⁶⁶¹ and in so deciding must take into account the person's character, past history, age, health or mental condition, the exceptional nature and gravity of the offence and any special circumstances.⁶⁶²

In imposing an indefinite sentence a court is required to impose a nominal sentence, which is equal to a non-parole period, after which a court is required to review the sentence.⁶⁶³ Reviews are thereafter required at three yearly intervals.⁶⁶⁴ An offender must be discharged if the court is satisfied to a high degree of probability that the offender is not still a serious danger to the community.⁶⁶⁵

If the court makes an order discharging the indefinite detention, there are provisions that allow for supervision of the offender upon release — either via the mechanisms of parole or a reintegration program.⁶⁶⁶

These provisions (as with the Tasmanian dangerous offender provisions) are statutory exceptions to the principle of proportionality and so should only be exercised in exceptional cases.⁶⁶⁷ However, they differ from the dangerous offender legislation in Tasmania as there is no need for the offender to be convicted of a specified number of qualifying offences before an indefinite sentence can be imposed. The gravity of one offence may be sufficient. In addition, there is formal review process that does not depend on the application of the offender as the Crown is required to make an application for review. In review applications, the Crown has the onus of proving that the offender remains a serious danger to the community regardless of whether the Crown or the offender makes the application for review.⁶⁶⁸ In addition, unlike the Tasmanian position, there are provisions for continued supervision of the offender upon release. In Tasmania, the dangerous offender legislation does not offer the possibility of post-release supervision in the event that the offender's declaration is discharged after the offender had served the sentence for the offence that gave rise to the application being made.⁶⁶⁹ This issue was recognised by the Supreme Court of Tasmania, where it declined to discharge a declaration where there was no power to order supervision upon release of the discharged offender into the community.⁶⁷⁰

653 Ibid 175.

654 Sentencing Act 1991 (Vic) s 18A.

655 Penalties and Sentences Act 1992 (Qld) s 163.

656 Sentencing Act 1995 (WA) s 98.

657 Sentencing Act (NT) s 65.

658 Freiberg, Donnelly and Gelb, above n 28, 175–180.

659 A serious offence includes rape, assault with intent to rape, sexual penetration of a child up to the age of 16, other sexual acts with children under 16.

660 Sentencing Act 1991 (Vic) s 18A(6).

661 Ibid s 18B(1).

662 Ibid s 18B(1)(a)–(c), 2(a).

663 Ibid s 18A(2) and (3).

664 Ibid s 18H(1)(b).

665 Ibid s 18M.

666 See *ibid*; Penalties and Sentences Act 1992 (Qld) ss 172–174, Sentencing Act 1995 (WA) s 101, Sentence Administration Act 2003 (WA) Pt 3, Sentencing Act (NT) s 75.

667 Moffatt [1998] 2 VR 229, 234 (Winneke P); McGarry [2001] HCA 62, [61] (Kirby J).

668 See Freiberg, above n 41, [1260].

669 It is noted that the offender is subject to the obligations under the Community Protection (Offender Reporting Act) 2005 (Tas); see [3.6.2]. Bell v Director of Public Prosecutions [2011] TASSC 61.

It is acknowledged that there are objections to indefinite detention based on the significance of its consequences for an offender (based on principles of proportionality and finality) compared to the uncertainty of predicting the degree of an offender's risk of offending at the time of sentencing.⁶⁷¹ This was recognised by the New South Wales Sentencing Council, who recommended against the introduction of indefinite detention, stating that:

[t]he problem with both indefinite sentencing and disproportionate sentencing, however, lies in the difficulty in predicting the degree of an offender's risk of offending, at the time of sentencing, and in knowing whether he or she will participate in sex offender programs, or seek release on parole. As a consequence, given their significant consequences, and the general objections to indefinite sentences based on proportionality and finality principles, it is likely that there would be some judicial reluctance for their use.⁶⁷²

In contrast, indefinite detention is justified on the basis that it protects the community from perceived danger by incarceration and also by rehabilitation of the offender.⁶⁷³ An indefinite detention scheme already exists in Tasmania and there is no suggestion that courts are using the provision other than in exceptional cases.⁶⁷⁴ However, adopting the approach of Victoria, Queensland, Western Australia and Northern Territory would modernise the Tasmanian approach by incorporating formal rights of periodic reviews into the legislation (rather than placing the responsibility on the offender to apply for discharge) and place greater onus on the Crown to justify the continuing detention of an offender. While there is merit in such amendments, the preferable course, in the Council's view, is that the dangerous offender legislation should be repealed and replaced with supervision and detention orders that allow assessments to be made of an offender's continued risk to the community at the end of the sentence rather than the beginning (as discussed below).

Supervision and detention orders

Supervision and detention orders allow a court to make an order that requires an offender to be supervised under conditions in the community (supervision orders) or to remain in custody (detention orders).⁶⁷⁵ They are:

intended to provide enhanced protection of the community by requiring offenders who have served custodial sentences for certain offences including sexual offences, and who present an unacceptable risk of harm to the community, to be closely supervised or detained in custody. Another overlooked purpose of such legislation is to facilitate the treatment and rehabilitation of such offenders.⁶⁷⁶

Such orders are 'based on what the offender might do in the future and not on what the offender has done in the past'.⁶⁷⁷ In some Australian jurisdictions, there are specific provisions for the post-sentence supervision and detention of offenders which have been introduced in response to concerns about 'how to manage the small number of high risk offenders whose term of imprisonment is about to end'.⁶⁷⁸ In Victoria,⁶⁷⁹ Western Australia,⁶⁸⁰ New South Wales⁶⁸¹ and Queensland,⁶⁸² the court has the power make an order for extended supervision or continued detention in circumstances where the offender poses an unacceptable risk of future serious offending.⁶⁸³ The test for making the order is differently expressed in each jurisdiction but reflects a finding in relation to the unacceptable nature of the risk posed by the offender. These orders have been used much more often than indefinite sentence orders, perhaps due to increased sensitivity in relation to sex offending or as a reflection of practicality and legitimacy of assessing the risk of future offending closer to the time of release.⁶⁸⁴

671 See Sentencing Council, NSW, *Sexual Assault, Vol 3* (2009), 12–16, 220.

672 Ibid 220.

673 See *ibid* 9–11.

674 See [3.6.1].

675 See Freiberg, Donnelly and Gelb, above n 28, 180–185.

676 Ibid 180.

677 TLRI, above n 1, [6.4.21].

678 Ibid [6.4.13].

679 *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic).

680 *Dangerous Sex Offenders Act 2006* (WA).

681 *Crimes (High Risk Offenders) Act 2006* (NSW).

682 *Dangerous Prisoners (Sexual Offences) Act 2003* (Qld).

683 *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ss 9(1), 35(1); *Dangerous Sexual Offenders Act 2006* (WA) s 7(1); *Crimes (High Risk Offenders) Act 2006* (NSW) s 5B(2); *Dangerous Prisoner (Sexual Offences) Act 2003* (Qld) s 13(1).

684 Freiberg, Donnelly and Gelb, above n 28, 181.

In Tasmania, there is limited power for the court to order the continued detention of an offender who is considered unsuitable for release at the end of his/her term. In Tasmania, a dangerous criminal application can (in theory) be used to ensure the post-sentence preventative detention of an offender approaching release as this application can be made during the term of imprisonment as well as at the time that the term of imprisonment is imposed.⁶⁸⁵ However, there are difficulties with using the legislation in its current form for this purpose, as the application must be made to the judge before whom an offender is convicted or brought up for sentence after being convicted.⁶⁸⁶ This creates problems if the sentencing judge no longer holds offence due to death, retirement or resignation.⁶⁸⁷ There are also concerns that the dangerous offender legislation in Tasmania does not offer the possibility of post-release supervision.

It is the Council's view that a specific preventive detention and supervision scheme should be introduced into the Tasmanian sentencing framework. The Council acknowledges that there is a range of criticisms of post release preventative detention and supervision orders. These include that it offends against the principle of proportionality and finality in sentencing, that it amounts to double punishment and that prediction of future risk is problematic.⁶⁸⁸ However, the Council's view is that a preventive supervision order scheme would supplement the lack of supervision available post-discharge for dangerous criminals. It may also address community concerns in relation to a very small number of high-risk serious sex offenders who, approaching the time of release, present an unacceptable risk of reoffending. It is also preferable because the assessment of risk is likely to be more accurate being made at the time of release rather than at the time of sentencing (which may be many years prior to the offender's anticipated release).

A detention and supervision order could be achieved by amending the dangerous offender provisions currently in place or by the adoption of a new form of preventative detention and supervision order. In its review of sentencing, the TLRI did not recommend the introduction of provisions for post-sentence detention and supervision orders as the view was taken that the dangerous offender legislation and the monitoring of offenders via registration were adequate. The creation of new and separate set of provisions for post sentence detention was considered to be unnecessary duplication and confusing.⁶⁸⁹ Instead, the TLRI recommended that the dangerous offender declaration provisions in the Sentencing Act 1997 (Tas) s 19 be amended to provide that if the sentencing judge has ceased to hold office or in other special circumstances, another judge may hear an application for a dangerous criminal declaration.⁶⁹⁰ This addressed the uncertainty in the current legislation in relation to order made after the time that the original sentence was imposed. The TLRI also recommended that consideration be given to amending the dangerous offender declaration provisions in the Sentencing Act 1997 (Tas) s 19 to allow a court to make a supervision order after the end of the offender's sentence instead of further imprisonment.⁶⁹¹ The Council agrees with the TLRI that duplication would be confusing; however, it is the Council's preliminary view that the dangerous offender legislation in Tasmania should be modernised and so the preferred approach is to introduce new preventative detention and supervision orders. Alternatively, if this view is not accepted, the Council considers that the dangerous criminal legislation should be amended to include an option of post-discharge supervision through the Parole Board. The legislation should also be clarified so that it is clear that an application can be made at a time other than the time of sentencing and that there is no requirement for the order to be made by the same judge.

685 Sentencing Act 1997 (Tas) s 19. See TLRI, above n 1, [6.4.27].

686 Sentencing Act 1997 (Tas) s 19(1).

687 TLRI, above n 1, [6.4.28].

688 These are considered in TLRI, *ibid* [6.4.20]–[6.4.24], Sentencing Council, NSW, above n 671, 12–16; McSherry, Keyzer and Freiberg, above n 261, 79–82.

689 TLRI, above n 1, Recommendation 76.

690 *Ibid* Recommendation 78.

691 *Ibid* Recommendation 77.

Preventive detention and supervision orders

Recommendation 13

That the dangerous criminal provisions contained in the *Sentencing Act 1997* (Tas) should be replaced with supervision and detention orders based on the unacceptable risk posed by the offender at the time of release.

Recommendation 14

Alternatively, if Recommendation 13 is not accepted and the dangerous offender provisions in the *Sentencing Act 1997* (Tas) are not replaced, the *Sentencing Act 1997* (Tas) should be amended to include an option of post-discharge supervision through the Parole Board. The legislation should also be clarified so that it is clear that an application can be made at a time other at the time of sentencing and that there is no requirement for the order to be made by the same judge.

8.2.4 Statutory departure from requirement of proportionality

Proportionality is a fundamental sentencing principle; however, some jurisdictions have specific statutory departures from the requirement that the sentence be proportionate to the offence in relation to serious sex offenders, in addition to the provisions relating to preventative detention.

In Victoria, the *Sentencing Act 1991* (Vic) s 6D provides that the Supreme Court or County Court when sentencing a serious offender for a relevant offence in circumstances where the court considers that a sentence of imprisonment is justified: (a) must have regard to the protection of the community from the offender as the principal purpose for which the sentence is imposed; and (b) may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances. A serious offender is defined as a 'serious sexual offender', which means a person convicted of persistent sexual abuse of a child under 16 for which he or she was sentenced to a term of imprisonment or detention or a person who has been convicted of at least one sexual offence and at least one violent offence arising out of one course of conduct for each of which he or she was sentenced to a term of imprisonment or detention.⁶⁹²

In South Australia, the *Criminal Law (Sentencing) Act 1988* (SA) s 20BA(1)(a) provides that when sentencing a person who is a serious repeat offender for an offence 'the court sentencing the person is not bound to ensure that the sentence it imposes for the offence is proportional to the offence'. A serious repeat offender is a person who has been convicted of at least two separate serious sexual offences, which includes rape and other sexual offences, child pornography and related offences and commercial sexual services and related offences.⁶⁹³ The court has a discretion not to apply the provision 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 not appropriate, in all the circumstances, that the person be sentenced as a serious repeat offender.⁶⁹⁴

While such provisions may provide a means to increase the penalties imposed on serious sex offenders where it is warranted for community protection, it is unclear whether they would be effective in reality. Courts have been generally reluctant to use such provisions and have expressed the view that the provisions should only be applied in 'very exceptional cases'.⁶⁹⁵ Further, unlike the situation with a prevention order, the court is being required to make the difficult assessment of risk at the time of sentencing rather than at the time of release.⁶⁹⁶ It is the Council's view that either the dangerous offender legislation or detention and supervision orders (if created) would allow for the court to detain a repeat offender for a disproportionate period and an additional legislative provision is

692 *Sentencing Act 1997* (Vic) s 6B(2), 6B(3)(c).

693 *Criminal Law (Sentencing) Act 1988* (SA) s 20B(1)(b)(i) and (ii).

694 *Criminal Law (Sentencing) Act 1988* (SA) s 20B.

695 *Connell* [1996] VR 436; *Barnes* [2003] VSCA 156; *DPP v OJA* [2007] VSCA 129; *Curtis (No 2)* (2009) 105 SASR 411. A study of the use of these provisions between 1994 and 2002 found that longer than proportionate sentences were imposed in only 11 of 553 eligible cases, six of which were overturned on appeal: see Elizabeth Richardson and Arie Freiberg, 'Protecting Dangerous Offenders from the Community: The Application of Protective Laws in Victoria' (2004) 4 *Criminal Justice* 81. See also Bechara [2014] SASCFC 36.

696 Freiberg, Donnelly and Gelb, above n 28, 37–39; Sentencing Council, NSW, above n 671, 196–197, 219.

not desirable. Accordingly the Council does not recommend the introduction of provisions that create a statutory departure from the requirements of proportionality at the time of sentencing.

Statutory departure from the requirements of proportionality

Recommendation 15

That provisions that create a statutory departure from the requirements of proportionality at the time of sentencing should not be introduced in Tasmania.

8.2.5 Civil preventive orders

Tasmanian law makes it an offence for a person found guilty of a sexual offence to loiter near children, without reasonable excuse.⁶⁹⁷ Similar provisions exist in other jurisdictions. However, unlike all Australian jurisdictions (except Victoria), Tasmania does not have provision for civil orders that can be made by a court with a view to restricting the activities of offenders, so as to reduce the risk to children.⁶⁹⁸ These orders supplement the restrictions made on sex offenders by registration on a Sex Offender Register and are intended to provide a means of preventing future offences by allowing civil orders to be made if an offender is engaging in concerning conduct.⁶⁹⁹ These orders can include non-association orders or restrictions on the offender's ability to be at specified locations, engage in specified behaviour or engage in employment of a specified kind.⁷⁰⁰ In some jurisdictions, the order can also prohibit the consumption of alcohol or drugs⁷⁰¹ or using the internet at all or in a specified manner or from owning a computer or device that can gain access to the internet.⁷⁰² An order is obtained by application of the Commissioner of Police to the Magistrates' Court and, if granted, a failure to comply with the order by the offender is a criminal offence. This is not an order made as part of the sentencing process for a particular offence, but an order than can be obtained if there are concerns about the offender's conduct.

Civil preventative orders are aimed to reduce the likelihood of future offending by reducing the opportunity for high-risk offenders to have contact with children. For example, an order could be made that an offender not go near a park, or a cinema, or indeed to any local facility in which it is agreed by a court there will be children who are potential victims.⁷⁰³ These orders could be introduced in Tasmania as an additional means of restricting the activities of sex offenders in circumstances where there is a risk to the lives or sexual safety of children posed by the offender and where the offender is not constrained by any sentence or order imposed by the court. While the introduction of civil preventative orders may appear useful to reduce the likelihood of reoffending, there has been no research conducted in Australia that has examined the effectiveness of the orders. However, research conducted in the United States on an analogous order (residency restrictions) has found that the orders are ineffective to reduce sexual offending and may 'have the reverse result when the isolating effect of such restrictions hampers offenders' reintegration efforts'.⁷⁰⁴ In a Queensland review of the civil prevention orders, it was found that the process of applying for the orders was complex and time-consuming and that police often used other tools in response to occurrences of concerning behaviour. The review did, however, find that the Act was being used against offenders with a high risk of re-offending (offenders with serious and extensive criminal histories).⁷⁰⁵

697 Police Offences Act 1937 (Tas) s 7A(2).

698 See Frieberg, Donnelly and Gelb, above n 28, 198–203.

699 See Crime and Corruption Commission, Queensland, *Review of the Operation of the Child Protection (Offender Prohibition Order) Act 2008*, (2014), 1–2 <<http://www.ccc.qld.gov.au/research-and-publications/browse-by-topic-1/legislation-reviews/2013-review-of-the-child-protection-offender-prohibition-order-act-2008/review-of-the-child-protection-offender-prohibition-order-act-2008>>.

700 See *Child Protection (Offender Prohibition Orders) Act 2004* (NSW), *Child Protection Offender Prohibition Order* Act 2008 (Qld), *Crimes (Child Sex Offenders) Act 2005* (ACT), *Child Protection (Offender Reporting and Registration) Act* (NT), *Community Protection (Offender Reporting) Act 2004* (WA); *Child Sex Offenders Registration Act 2006* (SA). See also *Summary Procedure Act 1921* (SA).

701 *Community Protection (Offender Reporting) Act 2004* (WA) s 93(1).

702 *Summary Procedure Act 1921* (SA) s 99AA(2).

703 Rowena Johns, 'Child Sexual Offences: An Update on Initiatives in the Criminal Justice System (Briefing Paper No 20/03, NSW Parliamentary Library Research Service, 2003) 41 quoting Attorney General, Media Release, 'Government Questions Timing of Coalition's Child Protection Announcement', 14 March 2003; and AAP news release, 'Coalition proposes overhaul of child sex abuse cases', Friday 14 March 2003, 15:21 AEDT, <<http://bulletin/prod/aap/aapwire.nsf>>.

704 Frieberg, Donnelly and Gelb, above n 28, 208.

705 See Crime and Corruption Commission, Queensland, above n 699, 19.

The Council's view is that civil preventative orders may be a useful order to supplement the current registration scheme and criminal offences that exist in Tasmania for sex offenders. However, the Council did not have a firm view as to whether or not an order should be introduced in Tasmania and makes no recommendation in relation to the introduction of civil preventative orders in Tasmania.

8.2.6 Sex offender treatment programs

In Tasmania, sex offender treatment programs are available for prisoners at Risdon Prison and more recently a model has been introduced by Community Corrections to provide for the enhanced case management of sex offenders on community based orders.

New Directions is the rehabilitation program that is offered inside Risdon. This is an open program where offenders take part in group therapy with the program length varied depending on the offender's assessed risk of reoffending. Generally, all offenders are eligible to participate (even offenders who maintain their innocence after conviction) provided that they are willing to take part and are assessed as able to participate. Some offenders may not be suitable for group sessions given their low level of intellectual functioning and these offenders receive individual sessions. Offenders with short prison sentences cannot access the program as they need a minimum of nine months to complete the program.⁷⁰⁶ Of the 134 offenders sentenced to imprisonment between 2008–14 for the sexual offences under consideration in this report, 110 offenders (82.1%) received a sentence of 9 months or longer making them eligible for participation in New Directions. As at 28 April 2015, there were 32 inmates at Risdon who had been accepted into the program, who were in the program or who had completed the program. There were 54 inmates with a conviction for a sexual offence and only nine had declined to participate in the program. Those offenders who had refused to participate will be followed up by program staff during their period of imprisonment to provide additional opportunities for participation in New Directions. Offenders with shorter sentences are not treated individually as a general rule but where possible, inmates with shorter sentences can participate in some of the shorter preparatory programs for release offered in Risdon, especially those that deal with drug/alcohol use.⁷⁰⁷

There is also a new program for community based sex offenders that has been developed by Community Corrections. As at 18 May 2015, there were approximately 58 offenders with community based orders for sexual offences. These orders ranged from parole orders to probation orders, suspended sentences and community service orders.⁷⁰⁸ The Community Based Sex Offender Case Management and Interventions is being rolled out by Community Corrections. The new model is in the final stages of completion. Extensive training has been delivered over the last 24 months to community correction staff working with sex offenders in relation to sexual offending, management of sex offenders and case management skills. This has been done thought the engagement of various consultants from different fields, including from interstate and international consultants.⁷⁰⁹ Probation officers are currently starting to develop individual case plans for sex offenders in their caseload. The case management plan takes into consideration the unique nature of the offence and characteristics of the individual and uses various risk assessment measures that determine static, dynamic and stable risk factors.⁷¹⁰ Regular peer review meeting are also being introduced for probation officers who are supervising sex offenders in the community. There is currently only limited treatment available for sex offenders in the community.

The Council acknowledges the importance of appropriately funded and accessible sex offender treatment programs and the importance of evidence-based management of offenders in the community and supports the continued efforts of Community Corrections to implement a rigorous supervision scheme delivered by appropriately trained staff.

706 Interview with Andrew Verdoux, Team Leader — Interventions Program Unit, Tasmania Prison Service, 28 April 2015.

707 Email from Andrew Verdoux, Team Leader — Interventions Program Unit, Tasmania Prison Service, to Rebecca Bradfield, 5 May 2015.

708 Email from Dr Amy Washington, Manager, Offender Programs, Community Corrections, to Rebecca Bradfield, 24 May 2015.

709 Ibid.

710 Ibid.

References

- Armstrong, Sarah, Gill McIvor, Fergus McNeill and Paul McGuinness, 'International Evidence Review of Conditional (Suspended) Sentences' (Final Report, The Scottish Centre for Crime and Justice Research, 2013).
- Ashworth, Andrew, *Sentencing and Criminal Justice* (Oxford University Press, 5th ed, 2010).
- Ashworth, Andrew, 'Techniques of Guidance on Sentencing' (1984) *Crim LR* 519.
- Australian Bureau of Statistics, *Criminal Courts, Australia, 2012–13*, (2014), Cat no 4513.0.
- Australian Bureau of Statistics, *Recorded Crimes — Victims, Australia, 2014* (2015), Cat 4510.0.
- Australian Bureau of Statistics, *Personal Safety, Australia 2012* (2013), Cat 4906.0.
- Australian Bureau of Statistics, *National Offence Index, 2009*, (2009), Cat No 1234.055.001.
- Australian Law Reform Commission, *Family Violence — A National Legal Response*, Report 114 (2010).
- Australian Law Reform Commission, *Sentencing*, Report No 44 (1988).
- Australian Psychological Society, *Submission to the New South Wales Joint Select Committee on Sentencing of Child Sexual Assault Offenders* (2014).
- Bagaric, Mirko and Theo Alexander, '(Marginal) General Deterrence Doesn't Work — And What it Means for Sentencing' (2011) 35 *Criminal Law Journal* 269.
- Bagaric, Mirko and Richard Edney, *Australian Sentencing* (Westlaw AU, n.d.).
- Bagaric, Mirko and Richard Edney, *Sentencing in Australia*, (Thomson Reuters, 2nd ed, 2014).
- Barnes, Lynne and Patrizia Poletti, 'Sentencing Trends for Armed Robbery and Robbery in Company: The Impact of the Guideline in *R v Henry*' (Sentencing Trends and Issues No 26, Judicial Commission of NSW, 2003).
- Barnes, Lynne, Patrizia Poletti and Ivan Potas, 'Sentencing Dangerous Drivers in New South Wales: Impact of the Jurisic Guidelines on Sentencing Practice' (Monograph Series No 21, Judicial Commission of NSW, 2002).
- Bartels, Lorana, *Sword or Feather? The Use and Utility of Suspended Sentences in Tasmania*, (PhD thesis, University of Tasmania, 2008).
- Bartels, Lorana, 'An Examination of the Arguments For and Against the Use of Suspended Sentences' (2010) 12 *Flinders Law Journal* 119.
- Bartels, Lorana, Kate Warner and George Zdenkowski, 'National Research with Jurors on Sentences for Sexual Offenders' (2014) 26 *Judicial Officers' Bulletin* 9.
- Blackwood, John and Kate Warner, *Tasmanian Criminal Law: Texts and Cases Volume 2* (University of Tasmania Press, 4th ed, 2015).
- Bouhours, Brigitte and Kathy Daly, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' in Michael Tonry (ed), *Crime and Justice: A Review of Research*, 2010.
- 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).
- Cashmore, Judy and Rita Shackel, *The Long-Term Effects of Child Sexual Abuse* (2013).
- Cashmore, Judy and Rita Shackel, 'Gender Differences in the Context and Consequences of Child Sexual Abuse' (2014) 26 *Current Issues in Criminal Justice* 75.
- Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending: Pathways to Better Outcomes for Victims, Offenders and the Community*, (2014).
- Clark, Haley, 'What Is the Justice System Willing to Offer? Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs', (2010) 85 *Family Matters* 28.

- Crime and Corruption Commission, Queensland, *Review of the Operation of the Child Protection (Offender Prohibition Order) Act 2008*, (2014) < <http://www.ccc.qld.gov.au/research-and-publications/browse-by-topic-1-legislation-reviews/2013-review-of-the-child-protection-offender-prohibition-order-act-2008/review-of-the-child-protection-offender-prohibition-order-act-2008>>.
- Cowdrey, Nicholas, *Mandatory Sentencing*, Sydney Law School Distinguished Speakers Program, 15 May 2014, <http://sydney.edu.au/law/events/2014/May/DSP_Cowdrey15052014.pdf>.
- Criminal Law Review, Department of Justice, Victoria, *Review of Sexual Offences: Consultation Paper* (2013) <<http://assets.justice.vic.gov.au/justice/resources/2b77afcd-3c35-4a89-913a-54ced67529c3/reviewofsexualoffencesconsultationpaper2013.pdf>>.
- de Koster, Willem, Peter Achterberg and Natalia Ivanova, 'Reconsidering the Impact of Informational Provision on Opinions of Suspended Sentences in the Netherlands: The Importance of Cultural Frames' (2014) *Crime and Delinquency*, early online edition.
- Doob, Anthony and Cheryl Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice* 143.
- Edgely, Michelle, 'Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventative Detention of Sex Offenders in Queensland and Western Australia' (2007) 33 *University of Western Australia Law Review* 351.
- Fitzgerald, Jacqueline, 'The Attrition of Sexual Offences from the New South Wales Criminal Justice System' (*Crime and Justice Bulletin* No 92, NSW Bureau of Crime Statistics and Research, 2006).
- Freiberg, Arie, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson, 3rd ed, 2014).
- Freiberg, Arie, *Pathways to Justice: Sentencing Review* (2002).
- Freiberg, Arie, 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).
- Gelb, Karen, *Myths and Misconceptions: Public Opinion Versus Public Judgment About Sentencing*, (Sentencing Advisory Council, Victoria, 2006).
- Gelb, Karen, *Measuring Public Confidence in Sentencing* (Sentencing Advisory Council, Victoria, 2008).
- Gelb, Karen, *More Myths and Misconceptions* (Sentencing Advisory Council, Victoria, 2008).
- Gelb, Karen, *Alternatives to Imprisonment: Community Views in Victoria* (Sentencing Advisory Council, Victoria, 2011).
- Grant, Jan, David Indermaur, Jenny Thornton, Gillian Stevens, Christabel Chamarette and Amie Halse, 'Intrafamilial Adolescent Sex Offenders: Psychological Profile and Treatment' (*Trends and Issues In Crime and Criminal Justice* No 375, Australian Institute of Criminology, 2009),
- Hanson, Karl, 'Who Is Dangerous and When Are They Safe? Risk Assessment with Sex Offenders' in Bruce Winick and John La Fond (eds) *Protecting Society From Sexual Dangerous Offenders — Law, Justice and Therapy* (Washington, American Psychological Association, 2003), 63.
- Heseltine, Karen, Andrew Day and Rick Sarre, 'Prison-based Offender Rehabilitation Programs: The 2009 National Picture in Australia' (Research and Public Policy Series No 112, Australian Institute of Criminology, 2011).
- Hoel, Adrian and Karen Gelb, *Sentencing Matters: Mandatory Sentencing* (Victorian Sentencing Advisory Council, 2008).
- Holt, Saul, 'Appellate Sentencing Guidance in New Zealand' (2006) 3 *New Zealand Postgraduate Law E-Journal* 2.
- Johns, Rowena, 'Child Sexual Offences: An Update on Initiatives in the Criminal Justice System' (Briefing Paper No 20/03, NSW Parliamentary Library Research Service, 2003).
- 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).
- Killick, David, 'Top Judge Praises Tassie law' *The Mercury* (Hobart), 16 August 2013, 17.
- Law Council of Australia, *Registration and Reporting Obligations for Child Sex Offenders: Law Council Policy Principles v Current State and Territory Practice* (n.d.) < <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/LCAPolicyPrinciplesvStateandTerritoryPractice.pdf>>.
- Law Reform Commission of Western Australia, *Community Protection (Offender Reporting) Act 2004*, Final Report (2012).
- Lievore, Denise, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004).

- Lovegrove, Austin, 'Putting the Offender Back into Sentencing: An Empirical Study of the Public's Understanding of Personal Mitigation' (2011) 11 *Criminology and Criminal Justice* 37.
- Lovegrove, Austin, 'Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community' [2007] *Criminal Law Review* 769.
- Mackenzie, Geraldine, Caroline Spiranovic, Kate Warner, Nigel Stobbs, Karen Gelb, David Indermaur, Lynne Roberts, Rod Broadhurst and Thierry Bouhours, 'Sentencing and Public Confidence: Results from a National Australian Survey on Public Opinions Towards Sentencing' (2012) 45 *Australian and New Zealand Journal of Criminology* 45.
- MacKinnell, Ian, Patrizia Poletti and Matthew Holmes, 'Measuring Offence Seriousness' (Crime and Justice Bulletin: Contemporary Issues in Crime and Justice No 142, NSW Bureau of Crime Statistics and Research, 2010).
- McSherry, Bernadette , Patrick Keyzer, Arie Freiberg, 'Preventive Detention for 'Dangerous' Offenders in Australia: A Critical Analysis and Proposals for Policy Development' (Report to the Criminology Research Council, 2006).
- New South Wales Law Reform Commission, *Sentencing*, Report 139 (2013).
- New South Wales Law Reform Commission, *Design and Objectives of the Parole System*, Question Paper 1 (2013).
- Nicholls, Carol, Martin Mitchell, Ian Simpson, Stephen Webster and Marianne Hester, *Attitudes to Sentencing Sexual Offences* (2012).
- New South Wales, Legislative Assembly, *Parliamentary Debate*, 23 October 2002, 5816 (Debus).
- Parliament of Victoria, *Sentencing Amendment (Baseline Sentences) Bill 2014*, Research Paper (2014) < <http://www.parliament.vic.gov.au/publications/research-papers/9028-sentencing-amendment-baseline-sentences-bill-2014> >.
- Pickett, Justin, Christina Mancini and Daniel Mears, 'Vulnerable Victims, Monstrous Offenders, and Unmanageable Risk: Explaining Public Opinion on the Social Control of Sex Crime' (2013) 51 *Criminology* 729.
- Pratt, John, *Governing the Dangerous* (The Federation Press, 2007).
- Poletti, Patrizia, 'Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW' (Sentencing Trends and Issues No 35, Judicial Commission of NSW, 2005).
- Poletti, Patrizia and Hugh Donnelly, 'The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales' (Research Monograph 33, Judicial Commission of NSW, 2010).
- Quadara, Antonia, Vicky Nagy, Daryl Higgins and Natalie Siegel, 'Conceptualising the Prevention of Child Sexual Abuse' (Australian Institute of Family Studies, Research Report No 33, 2015).
- Richardson, Elizabeth and Arie Freiberg, 'Protecting Dangerous Offenders from the Community: The Application of Protective Laws in Victoria' (2004) 4 *Criminal Justice* 81.
- Roberts, Julian and Loretta Stalans, *Public Opinion, Crime and Criminal Justice* (Westview Press, 1997).
- Roberts, Lynne, Caroline Spiranovic, David Indermaur 'A Country Not Divided: A Comparison of Public Punitiveness and Confidence in Sentencing Across Australia' (2011) *Australian and New Zealand Journal of Criminology* 370.
- Price-Robertson, Rhys, 'Fathers with a History of Child Sexual Abuse: New Findings for Policy and Practice' (Australian Institute of Family Studies, 2012).
- Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report Volume 1* (2014).
- Sentencing Advisory Council, Tasmania, *Sexual Offences Sentencing in Tasmania*, Research Paper (2013).
- Sentencing Advisory Council, Tasmania, *Phasing Out of Suspended Sentences*, Consultation Paper (2015).
- Sentencing Advisory Council, Queensland, *Minimum Standard Non-parole Periods*, Report (2011).
- Sentencing Advisory Council, Victoria, *Sentencing Severity for 'Serious' and 'Significant' Offences: A Statistical Report* (2011).
- Sentencing Advisory Council, Victoria, *Does Imprisonment Deter? A Review of the Evidence* (2011).
- Sentencing Advisory Council, Victoria, *Community Attitudes to Offence Seriousness* (2012).
- Sentencing Advisory Council, Victoria, *Maximum Penalties for Sexual Penetration with a Child under 16*, Report (2009).
- Sentencing Advisory Council, Victoria, *Sentencing Matters: Mandatory Sentencing* (2008).
- Sentencing Advisory Council, Victoria, *Baseline Sentencing*, Final Report (2012).
- Sentencing Advisory Council, Victoria, *Calculating the Baseline Offence Median*, Report (2014).

- Sentencing Advisory Council, Victoria, 'Persistent Sexual Abuse of a Child Under 16: Sentencing Trends in the Higher Courts of Victoria 2009–10 to 2013–14' (Sentencing Snapshot No 179, 2015).
- Sentencing Advisory Council, Victoria, 'Rape: Sentencing Trends in the Higher Courts in Victoria 2009–10 to 2013–14' (Sentencing Snapshot No 176, 2015).
- Sentencing Advisory Council, Victoria, Sexual Penetration with a Child Under Care: Sentencing Trends in the Higher Courts of Victoria 2009–10 to 2013–14' (Sentencing Snapshot No 182, 2015).
- Sentencing Advisory Council, Victoria, Sexual Penetration with a Child Aged 12 to 16: Sentencing Trends in the Higher Courts of Victoria 2009–10 to 2013–14' (Sentencing Snapshot No 181, 2015).
- Sentencing Advisory Council, Victoria, Sexual Penetration with a Child Aged Under 12: Sentencing Trends in the Higher Courts of Victoria 2009–10 to 2013–14' (Sentencing Snapshot No 180, 2015).
- Sentencing Council, NSW *Penalties Relating to Sexual Assault Offences in New South Wales, Volume 3* (2009).
- Sentencing Council, New South Wales, *Standard Non-parole Period, Final Report* (2013).
- Sentencing Council, NSW, *Penalties Relating to Sexual Assault Offences in New South Wales, Volume 1* (2008).
- Sentencing Council, UK *Sexual Offences Definitive Guideline* (2013), <https://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Sexual_Offences_Definitive_Guideline_content_web1.pdf>.
- Sexual Assault Support Service, *Responding to Problem Sexual Behaviour and Sexually Abusive Behaviour in Tasmania, Position Paper* (2014).
- Sprott, Jane, Cheryl Webster and Anthony Doob 'Punishment Severity and Confidence in the Criminal Justice System' (2013) April *CJCCJ* 279.
- Stoltenborgh, Marije, Marinus van IJzendoorn, Eveline Euser and Marain Bakersman-Kranenburg, 'A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence Around the World' (2011) 16 *Child Maltreatment* 79.
- Tasmania Law Reform Institute *Sentencing, Final Report No 11*, (2008).
- Tasmanian Liberals, *Abolishing Suspended Sentences*, (nd), <<https://www.tas.liberal.org.au/sites/default/files/policy/Abolishing%20suspended%20sentences.pdf>>.
- 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>>.
- van Gelder, Jean-Louis, Pauline Aarten, Willeminj Lamet and Peter van der Laan, 'Unknown, Unloved? Public Opinion on and Knowledge of Suspended Sentences in the Netherlands, (2011) *Crime and Delinquency*, early online access, <<http://cad.sagepub.com/content/early/2011/11/16/0011128711426537.abstract>>.
- Victoria, Legislative Assembly, *Parliamentary Debate*, 3 April 2014 (Clark).
- Victoria, Legislative Assembly, *Parliamentary Debate*, 21 August 2014 (Clark).
- Victorian Law Reform Commission, *Sex Offender Registration, Information Paper* (2011).
- Victorian Law Reform Commission, *Sex Offender Registration, Final Report* (2011).
- Warner, Catherine, 'Working Paper on Rape Law Reform' (Law Reform Commission of Tasmania, 1981).
- Warner, Kate, *Sentencing in Tasmania* (Federation Press, 2nd ed, 2002).
- Warner, Kate, 'Sentencing Review 2005–2006' (2006) 30 *Criminal Law Journal* 373.
- Warner, Kate, 'The Australian National Jury Sex Offence Sentencing Study' (2014) 11 *TJR* 459.
- Warner, Kate, 'The Role of Guideline Judgments in the Law and Order Debate in Australia' (2003) 27(1) *Criminal Law Journal* 8.
- Warner, Kate, 'Sentencing Review 2008–2009' (2010) 34 *Criminal Law Journal* 16.
- Warner, Kate and Lorana Bartels, 'Juvenile Sex Offending: Its Prevalence and the Criminal Justice Response' (2015) 38 *University of New South Wales Law Journal* 48.
- Warner, Kate and Julia Davis, 'Using Jurors to Explore Public Attitudes to Sentencing' (2012) 52 *British Journal of Criminology* 93.
- Warner, Kate, Julia Davis, Maggie Walter, Rebecca Bradfield and Rachel Vermey, 'Gauging Public Opinion on Sentencing: Can Asking Jurors Help?' (Trends and Issues in Criminal Justice No 3711, Australian Institute of Criminology, 2009).

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

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).

Willis, Gwenda, Tony Ward and Jill Levenson (2014) 26 *Sexual Abuse: A Journal of Research and Treatment* 58.

