



sentencing
ADVISORY
COUNCIL

SENTENCING FOR SERIOUS SEX OFFENCES AGAINST CHILDREN:

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About this Research Paper

After examining sentencing data for serious child sex offences for the period 1 January 2015 to 30 September 2018 (2015–18) in comparison with sentencing data for the period 1 January 2008 to 31 December 2014 (2008–14), it is clear that there is a decided upward trend in the sentences imposed under the *Sentencing Act 1997* (Tas). This paper builds on prior research conducted by the Tasmanian Sentencing Advisory Council that has examined sentencing for sex offences. It provides an update on sentencing for serious sex offences against children in the period 1 January 2015 to 30 September 2018 by examining decisions of the Court of Criminal Appeal and sentences imposed under the *Sentencing Act 1997* (Tas) at first instance.

Information on the Sentencing Advisory Council

The Sentencing Advisory Council was established in June 2010 by the 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 research paper was concluded, the Council members were Emeritus Professor Arie Freiberg AM (Chair), Mr Scott Tilyard, Mr Peter Dixon, Ms Kim Baumeler, Ms Rochelle Mainwaring, Ms Jill Maxwell, Professor Rob White, Associate Professor Terese Henning, Ms Kate Cuthbertson and Ms Linda Mason SC.

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Executive Summary

Background

The Tasmanian Sentencing Advisory Council has examined sentencing for sex offences on two previous occasions: *Sex Offences Sentencing: Final Report No 4* (2015) and *Mandatory Sentencing for Serious Sex Offences Against Children: Final Report No 7* (2016). This paper builds on that prior research and provides an update on sentencing for serious sex offences against children for the period 2015 to September 2018 by examining decisions of the Court of Criminal Appeal and sentences imposed under the *Sentencing Act 1997* (Tas) at first instance.

Key findings

Appeal decisions

In relation to the decisions of the Court of Criminal Appeal considering sentencing for sexual offences, the Council makes the following observations based on the views expressed by the Court:

- The court does not need to impose a sentence within the sentencing range established by sentencing statistics.
- In view of the diversity of circumstances that can exist for maintaining a sexual relationship with a young person, there is no established range, and even if such a range were established, this does not mean that the upper or lower limits of the range are correct.

- Consistency in sentencing requires consistency in the application of principle rather than numerical equivalence.
- Sentencing involves a discretionary judgment taking into account the individual circumstances of the case.
- There are indications from the Court of Criminal Appeal that signal that there is scope to impose longer sentences for serious sexual offences involving children.
- It is not an error to apply current sentencing standards to historical offending if the increased contemporary sentences reflect a better understanding of the factors relevant to the criminal conduct, that is, a *more precise* application of established standards rather than a change in sentencing law or standards.

Sentencing data

The Council's view is that sentencing for sexual offences involving children in the Supreme Court has clearly increased. Acknowledging that it is not possible to rule out the role played by the particular circumstances of a case and acknowledging the limitations of sentencing ranges, after examining sentencing data for serious child sex offences for the period 1 January 2015 to 30 September 2018 (2015–18) in comparison with sentencing data for the period 1 January 2008 to 31 December 2014 (2008–14), it is clear that there is a decided upward trend in the sentences imposed.

In particular the Council notes that:

- Sentencing for rape involving a young complainant has increased. While the minimum sentence (for all counts) remained the same, the maximum sentence imposed increased from 12 years to 15 years (an increase of 25%) and the median sentence increased from four and half years to seven years (an increase of 55.6%).
- Sentencing for maintaining a sexual relationship with a young person has increased with an increase in the use of actual imprisonment (64.2% to 72.2%). The lowest sentence imposed (for all counts) has increased from four months to 12 months (an increase of 200%), the maximum sentence imposed increased from 12 years to 14.5 years (an increase of 21%) and the median sentence has doubled from three years to six years (an increase of 100%).
- Sentencing for sexual intercourse with a young person has increased with the longest sentence imposed increasing from two years to four years (an increase of 100%), the median sentence increasing from seven months to 19.5 months (an increase of 178%) and the shortest sentence imposed increasing from two months to nine months (an increase of 350%).

1.1 Background to this paper

The Tasmanian Sentencing Advisory Council has examined sentencing for sex offences on two previous occasions: *Sex Offences Sentencing: Final Report No 4* (2015) and *Mandatory Sentencing for Serious Sex Offences Against Children: Final Report No 7* (2016). This paper builds on that prior research and provides an update on sentencing for serious sex offences against children.

In 2012, the then Attorney-General and Minister for Justice, Brian Wightman requested that the Sentencing Advisory Council provide a report on current sentencing practices for sex offences in Tasmania. The Council was also asked to consider the appropriateness of the current sentence type and length for sex offenders. 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; *Sentencing*, which had examined sentencing for the offence of rape.¹ The Council's 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.

In 2015, the Council released its report, *Sex Offences Sentencing: Final Report No 4*, which expressed the Council's view 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. The Council's view was also that 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 considered that a mechanism

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

needed to be found to provide for an incremental increase in sentencing for sex offences in appropriate cases.²

In 2015, as a consequence of a pre-election commitment to impose minimum mandatory sentences for people who commit serious sexual offences against children, the Council was requested to provide a report on the implementation of minimum mandatory sentencing for those who commit serious sexual offences against children, including advice as to which offences should be captured within the scope of the mandatory sentencing provisions and what those mandatory minimum sentences should be. In response, the Council prepared a consultation paper for stakeholders, setting out the Council's preliminary views and seeking feedback in relation to the implementation of a minimum mandatory sentencing scheme. Following this, in 2016, the Council published its report, *Mandatory Sentencing for Serious Sex Offences Against Children: Final Report No 7*. This report contained detailed information about sentencing for rape, maintaining a sexual relationship with a young person, sexual intercourse with a young person, aggravated sexual assault, and indecent assault for offenders sentenced under the *Sentencing Act 1997* (Tas). The report reiterated the Council's opposition to the introduction of a mandatory sentencing scheme. In 2017, the government unsuccessfully attempted to introduce mandatory minimum sentences for serious sexual offences committed against children.³ This Bill has again been reintroduced to Parliament.⁴

1.2 The council's previous observations in relation to the upward trend in sentencing for serious sex offences against children

In 2016, the Council reported that there were indications suggesting that the Supreme Court had increased sentencing for serious sex offences, particularly those involving children.⁵ The Council observed that, generally, not only were sentences longer than they had been, but that it may be that they had not yet plateaued.⁶ The Council noted that in *Tasmania v KR*,⁷ a penalty of 15 years imprisonment was imposed for three counts of rape and one count of maintaining a sexual relationship. The Council noted that, to date, this had been the longest sentence imposed for sexual offending against children and that there may well be a flow-on effect on future sentences for the same crimes, as well as for other sexual offences committed against children, as a result of this 'landmark' sentence. Further, the Council noted

² TSAC, *Sex Offences Sentencing: Final Report No 4*, vii.

³ Sentencing Amendment (Mandatory Sentencing for Serious Sexual Offences Against Children) Bill 2017 (Tas).

⁴ See Sentencing Amendment (Mandatory Sentencing for Serious Sexual Offences Against Children) Bill 2018 (Tas).

⁵ TSAC, *Mandatory Sentencing for Serious Sex Offences Against Children: Final Report No 7* (2016) Part B [5.2.2]–[5.2.3].

⁶ See *ibid* Part A [2.6].

⁷ 7 October 2015, Porter J (Sentence).

that in *CJP v Tasmania*,⁸ the Court of Criminal Appeal gave an indication that it may be time for sentencing for sexual crimes to be increased.

The Council also noted that there had been powerful statements from the Court about the psychological impact of sexual abuse that reflect a contemporary understanding of the harms caused by such offending. Sexual offences against children are clearly viewed as a class of offence that involves a special risk of serious consequences to the victim and the community.⁹ Broadly speaking, the Court's statements reflected the increased awareness of the significant harm caused by child sexual abuse to the victim, their families and the wider community.¹⁰ In the Council's examination of sentencing for sex offences, it noted that there was 'compelling evidence of the serious long-term effects of child sexual assault and its devastating affect [that was] reflected in the hearings of the Royal Commission into Institutional Responses to Child Sexual Abuse'.¹¹ There was also greater recognition of the violence inherent in sexual offending against children.¹² These concerns are reflected in the comments on passing sentence with clear statements being made of the Court's condemnation of such conduct with correspondingly long sentences being imposed.¹³ The Council noted that the Court had indicated that it had taken notice of informed public opinion and has adjusted sentences accordingly. This demonstrated the willingness of the Court to reflect on and change its sentencing practice and the Council's view was that the Court should be encouraged to continue to do so.

In the 2016 report, the Council also noted that the government had signalled that it intended to introduce several significant changes to the criminal law that would affect sentencing for child sex offences. The changes included the creation of new offences in the *Criminal Code (Tas)*, the amendment of the *Sentencing Act 1997 (Tas)* to include aggravating and mitigating factors for sexual offences, the removal of good character as a mitigating factor in sentencing for sex offenders and the review and replacement of the dangerous criminal provisions in the *Sentencing Act 1997 (Tas)* with preventative detention and supervision orders. All these changes were based on previous recommendations of the Council, which were intended to

⁸ [2015] TASSCCA 9.

⁹ See NSW Sentencing Council, *Standard Non-parole Period Final Report* (2013) 14.

¹⁰ Victorian Sentencing Advisory Council (VSAC), *Sentencing of Offenders: Sexual Penetration with a Child Under 12* (2016) 18–19; Kelly Richards, *Misperceptions About Child Sex Offenders*, (Trends and Issues in Criminal Justice No 249, Australian Institute of Criminology, 2011) 1; 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), 70; Australian Psychological Society, Submission 5 to the Joint Select Committee on Sentencing of Child Sexual Assault Offenders (2014) cited in VSAC, above n 10, 19 fn 70; Judith Cashmore and Rita Shackel, *The Long-Term Effects of Child Sexual Assault*, Australian Institute of Family Studies, Child Family Community Australia, Paper 11 (2013).

¹¹ TSAC, above n 2, 79.

¹² See *DPP v Dalgliesh* [2016] VSCA 148 [45]–[47] quoting VSAC, above n 10, 63. The Court of Appeal concluded that the 'significance of the violence and harm which such conduct entails cannot be overstated': at [47].

¹³ See TSAC, above n 5, Part B [5.2.3].

create mechanisms that would bring about an incremental increase in sentencing for sexual offenders. The Council noted that the legislative changes identified (once enacted) would be likely to be viewed by the court as an indication from Parliament that changes to sentencing practice were necessary and that serious sex offences (particularly those committed against children) should be treated more punitively by the courts than was previously the case.¹⁴

Accordingly, it was the Council's view that, in light of these factors, it would be prudent to provide further time for the court to adjust its own sentencing practices as well as to allow time for the proposed legislation to be introduced and incorporated into sentencing before significant additional changes were made to sentencing policy, such as the introduction of mandatory minimum sentences.

Anecdotally, the Council understands that sentences imposed by the Supreme Court for child sex offences have further increased in recent years, and that there have been strong statements from the Court that the sentence imposed must express denunciation and vindicate the victim. This view was reflected in the comments on passing sentence in the case of *J W M v State of Tasmania*,¹⁵ where Tennent J observed that:

a review of sentences imposed in more recent times for [the] crime [of maintaining a sexual relationship with a young person] would suggest that the penalties are increasing. That increase, from my perspective, has resulted from a recognition that the community expects crimes such as this which affect children should attract heavy sentences.¹⁶

An upward trend in sentencing would also reflect the observations of the Royal Commission into Institutional Child Sexual Abuse that sentencing for sexual offences against children had increased in terms of the proportion of people convicted of child sex offences who receive custodial sentences and the lengths of the sentences imposed.¹⁷

This research paper provides an update on sentencing practices for child sex offences in the Supreme Court of Tasmania for the period 1 January 2015 – 30 September 2018 (2015–18) by examining decisions of the Court of Criminal Appeal and sentences imposed under the *Sentencing Act 1997* (Tas) at first instance.¹⁸

1.3 Recent legislative changes in Tasmania

There have been two key changes to legislation in Tasmania relevant to the imposition of sentences for serious sexual offences against children.

¹⁴ *Markarian v The Queen* (2005) 228 CLR 357.

¹⁵ [2017] TASCRA 22.

¹⁶ *Ibid* [38] quoted by Brett J.

¹⁷ Royal Commission into Institutional Responses into Child Sexual Abuse, *Criminal Justice Report Parts VII–X and Appendices* (2017) 272.

¹⁸ The methodology is set out in Appendix A.

First, the Council notes that the government made changes to the *Sentencing Act 1997* (Tas) to include aggravating factors for certain sexual offences.¹⁹ The *Sentencing Act 1997* (Tas) s 11A provides that the court is to take into account any aggravating circumstances in relation to the sexual offence, which includes (but is not limited to), the following:

- (a) the victim being under the care, supervision or authority of the offender;
- (b) the victim being a person with a disability;
- (c) the victim being under the age of 13 years;
- (d) the offender committing the offence in whole or in part in the presence of any other person or persons, besides the victim;
- (e) the offender subjecting the victim to violence or the threat of violence;
- (f) the offender supplying the victim with alcohol or drugs with the intention of facilitating the commission of the offence;
- (g) the offender making forced or uninvited entry into the victim's home or other premises;
- (h) the offender doing, in the course of committing the sexual offence, an act likely to seriously and substantially degrade or humiliate the victim;
- (i) the offender causing any other person or persons to carry out an act referred to in paragraph (e), (f), (g) or (h) of this definition.

Section 11A(2)(b) has also removed good character as a mitigating factor in sentencing for sex offenders in circumstances where the court is satisfied that the offender's alleged good character or lack of previous convictions was of assistance to the offender in the commission of the sexual offence. This was in line with recommendation of the Royal Commission into Institutional Responses into Child Sexual Abuse in its *Criminal Justice Report* that good character be excluded as a mitigating factor where that good character facilitated the offending.²⁰ These provisions came into force on 7 October 2016.

Second, the definition of sexual intercourse in the *Criminal Code* was changed in 2017. This has expanded the type of sexual conduct that is included within the crimes of rape, incest and sexual intercourse with a young person. Previously, under the *Criminal Code*, sexual intercourse only included penile penetration of the vagina, genitalia, anus or mouth or the continuation of sexual intercourse after penetration.²¹ Accordingly, penetration of the vagina or anus by an inanimate object or penetration

¹⁹ This includes the crimes of sexual intercourse with a young person, maintaining a sexual relationship with a young person and rape.

²⁰ Royal Commission into Institutional Responses into Child Sexual Abuse, above n 17, 291–299, Recommendation 74.

²¹ *Criminal Code* (Tas) s 1.

of the vagina, anus or genitalia by a part of the body other than the penis gave rise to the crime of aggravated sexual assault. However, sexual intercourse is now defined to include penetration of a person's vagina, genitalia or anus by a body part of a person other than a penis or penetration by an object held or manipulated by, or attached to, another person.²² The offence of aggravated sexual assault has now been repealed.

In October 2018, the Criminal Code and Related Legislation Amendment Bill 2018 (Tas) was released for public comment, in which the government signalled further changes to the laws of sentencing that apply for child sexual offences. Amendments to the *Sentencing Act 1997* (Tas) contained in the Bill include the requirement that where an offender has been given a single sentence for multiple child sexual offences, the courts are to identify the sentence attributable to each child sexual offence. This would represent a change to the practice of global sentencing, where the Supreme Court generally imposes a single sentence in respect of multiple offences without specifying the sentence that would attach to each offence. The other amendment would require the courts, when determining a sentence for a historical child sexual offence, to not take into account the sentencing practices at the time of the offence.²³

1.4 High Court consideration of sentencing for sex offences

In 2017, in the case of *DPP (Vic) v Dalglish (Pseudonym)*,²⁴ the High Court considered the adequacy of sentences in relation to sexual offences and provided guidance about the use of current sentencing practice in the imposition of sentence in such cases. This case built on the High Court's consideration of the use of sentencing ranges in the case of *R v Kilic*,²⁵ where the Court held that an examination of other sentencing cases for the same offence may provide a 'yardstick' but that 'the requirement to have regard to the sentences imposed in those cases does not mean that the range of sentences imposed in the past fixes the boundaries within which future sentences must be passed'.²⁶

In *Dalglish*, the respondent entered a plea of guilty to the offences of incest, sexual penetration of a child under 16 and indecent assault in relation to the young daughters of his de facto partner. In relation to the incest charge, the respondent was sentenced to imprisonment for three years and six months, and the Director of

²² *Criminal Code* (Tas) s 2B as inserted by *Criminal Code Amendment (Sexual Assault) Act 2017* (Tas).

²³ Department of Justice, *Criminal Code and Related Legislation Amendment Bill 2018 – Have your Say*, <<https://www.justice.tas.gov.au/community-consultation/resources/consultations/criminal-code-and-related-legislation-amendment-bill-2018>>. Sentencing for historical offences is discussed further at [2.2.4].

²⁴ (2017) 91 ALJR 1063.

²⁵ (2016) 259 CLR 256.

²⁶ *Ibid* [22]. See discussion in Lorana Bartels, 'Sentencing Review 2016–2017' (2017) 41 *Criminal Law Journal* 338, 338–340.

Public Prosecution (DPP) appealed to the Court of Criminal Appeal Victoria on the ground that the sentence was manifestly inadequate. The DPP's argument was that the sentencing range for incest was inadequate and did not reflect the objective gravity of the offence. The Court of Criminal Appeal agreed that the range for the offence of incest was so low that it 'reveal[ed] error in principle' and was not proportionate to the objective gravity of the offence or the moral culpability of the offender, but dismissed the appeal on the basis that the sentence was within the range indicated by current sentencing practice.²⁷

On appeal, the High Court held that the approach of the Court of Criminal Appeal was incorrect and that the Court had given too much weight to current sentencing practices, and that this consideration was inappropriately exerting a downward 'gravitational pull' away from what the appropriate sentence would be, were it to reflect community expectations.²⁸ The Court stated that 'reasonable consistency in sentencing in the application of the relevant legal principles does not, however, require adherence to a range of sentences that is demonstrably contrary to principle.'²⁹ The High Court also emphasised the importance of 'individualised justice' and highlighted that '[t]he imposition of a just sentence on an offender in a particular case is an exercise of judicial discretion concerned to do justice in that case'.³⁰

By taking this approach, the High Court rejected the traditional approach in Victoria that sentences should be *incrementally* increased where sentencing practices were found to be inadequate.³¹ This also reflects the approach to the increase of sentences in Tasmania.³² As noted by the Victorian Sentencing Advisory Council (VSAC), the incremental approach has, in the past, been preferred for at least three reasons:

- The *Sentencing Act 1991* (Vic) requires courts to take current sentencing practices into account in determining an appropriate sentence, and that was previously thought to include even inadequate sentencing practices;
- There was a concern that it would seem unfair if two people in very similar cases could receive markedly different sentences despite being sentenced only a short time apart;

²⁷ *Director of Public Prosecutions (Vic) v Dalgiesh* [2016] VSCA 148 [64], [128].

²⁸ VSAC, *Court of Appeal Confirms Approach to Changing Inadequate Sentencing Practices* <<https://www.sentencingcouncil.vic.gov.au/news-media/sentencing-decisions/court-of-appeal-confirms-approach-to-changing-inadequate-sentencing-practices>>; *Dalgiesh* (2017) 91 ALJR 1063 [58] (Kiefel CJ, Bell and Keane JJ).

²⁹ *Ibid* [50].

³⁰ *Ibid* [49].

³¹ VSAC, above n 28. See also VSAC, *High Court Holds Current Sentencing Practices are Just One Factor to Take into Account, Not the Controlling Factor* <<https://www.sentencingcouncil.vic.gov.au/news-media/sentencing-decisions/high-court-holds-current-sentencing-practices-just-one-factor-not-controlling-factor>>.

³² See [2.2.3].

- Most offenders who plead guilty are informed by their lawyer about the general sentencing range they should reasonably expect to receive if they plead guilty, and some offenders may not have pleaded guilty if they had known that the sentence would be higher.³³

However, the High Court considered that where sentencing practices were inadequate, the necessary change should take place immediately and not incrementally as '[t]he only expectation that an offender can have' is that they will receive 'a just sentence according to law'.³⁴

The abolition of the practice of incremental increases in Victoria was confirmed by the Court of Criminal Appeal judgment in *Carter (A Pseudonym) v The Queen*.³⁵

³³ VSAC, above n 28.

³⁴ Ibid; *Dalgleish* (2017) 91 ALJR 1063, [64].

³⁵ [2018] VSCA 88. This was a case involving two charges of incest where a total effective sentence of eight years with a non-parole period of five years was imposed.

2

TASMANIAN COURT OF CRIMINAL APPEAL DECISIONS IN APPEALS AGAINST SENTENCE FOR SEXUAL OFFENCES 2015 TO 2018

This chapter provides an overview of Tasmanian Court of Criminal Appeal decisions in appeals against sentence for sexual offences for the period 1 January 2015 to 30 September 2018.

Previously, the Council has highlighted the importance of the Court of Criminal Appeal as a means to address concerns in relation to the inadequacy of sentencing for sexual offences against children. In the Council's report, *Mandatory Sentencing for Serious Sex Offences Against Children*, the Council noted that the Court of Criminal Appeal was the existing and effective forum for reviewing sentences in the criminal justice system in Tasmania. The Council suggested that this avenue had not been fully utilised to promote an increase in the sentences imposed for sexual crimes involving children or, more generally, serious sexual crimes such as rape.³⁶ The Council observed that unlike appeal processes in relation to other crimes (such as dangerous driving causing death and manslaughter),³⁷ there had not been arguments made in sentencing appeals in the context of sexual crimes against children that the sentencing range was generally too low. It was noted that such an argument may provide a mechanism that may lead the Court of Criminal Appeal to provide guidance to sentencing courts and also determine that heavier sentences were required than those imposed in the past.³⁸

In preparing this update, nine cases were identified in the period 2015 to 2018 where there was an appeal against sentence in relation to a sexual offence (rape, maintaining sexual intercourse with a young person, sexual intercourse with a young person and aggravated sexual assault).³⁹ There were seven appeals against sentence by defendants made on the basis that the sentence was manifestly excessive and only two of these were successful. There were two appeals against sentence by the Crown and both of these were successful. Five of these appeals involved sexual offences committed against a complainant under the age of 17. There were four appeals by the defendant, and one of these appeals against

³⁶ TSAC, above n 5, [2.6].

³⁷ See *DPP v Smithhurst* [2011] TASCRA 19; *DPP v Watson* [2004] TASSC 54; *Gallagher v Tasmania* [2009] TASSC 84.

³⁸ TSAC, above n 5, [2.6].

³⁹ Appendix B.

sentence was allowed.⁴⁰ There was one appeal by Crown on the basis that the sentence was manifestly inadequate and this was allowed.⁴¹

2.1 Themes identified in court of criminal appeal sentence decisions in the Mandatory Sentencing for Serious Sex Offences Against Children report

In the Council's 2016 report, two appeals against sentence from 2015 were identified as potentially signalling increased sentences for sexual offences — one involved rape of an adult complainant and one involved child sex offences.

2.1.1 Increased penalties for child sex offences

In *CJP v Tasmania*,⁴² the Court of Criminal Appeal dismissed an appeal by the offender against a sentence of six years' imprisonment following a plea of guilty to five counts of aggravated sexual assault, two counts of producing child exploitation material, one count of accessing child exploitation material, two counts of indecent act with a young person, one count of possession of child exploitation material and one count of assault with indecent intent. While this sentence was outside the range of sentences that had previously been imposed for aggravated sexual assault, it was held not to be manifestly excessive. In her decision, Tennent J set out the factors relevant to the sentencing of offenders for sexual crimes involving children. These included: the importance of general deterrence, particularly in cases where the offender was in a position of trust to the victim; that the sentences imposed must reflect the community's concern about offences involving the sexual abuse of children and the substantial harm that may be sustained as a consequence of the offending; the need for denunciation to reinforce society's values and the expectations of its members; and the need to reflect the vulnerability of children who are very young and their need for protection.⁴³ In his judgment, Blow CJ acknowledged that the 'sentence was certainly a heavy sentence by current Tasmanian standards' but not manifestly excessive.⁴⁴ His Honour indicated that '[i]t may be that the time has come for consideration to be given to the imposition of longer sentences in this State for serious sexual crime' and that '[a]ccording to a research paper published by the Sentencing Advisory Council in April 2013, sentencing levels in Tasmanian courts for sexual offences are lower than they are in other Australian jurisdictions'.⁴⁵ Thus, there are indications from the Court of Criminal Appeal that signal that there is scope to impose longer sentences for this offence and other sexual offences involving children.

⁴⁰ *Cleaver v Tasmania* [2018] TASCCA 11.

⁴¹ *DPP v Harington* [2017] TASCCA 4.

⁴² [2015] TASCCA 9.

⁴³ *Ibid* [20]–[21], adopting the principles set out by Wood J in *Director of Public Prosecutions v STU* [2102] TASCCA 7, [59]–[63].

⁴⁴ *CJP v Tasmania* [2015] TASCCA 9, [2].

⁴⁵ *Ibid*.

2.1.2 Sentencing outside the existing range for rape

The other sentence appeal discussed in the report did not involve a young complainant but rather the appropriate sentencing range for rape, particularly in relation to cases at the highest end of the range. *Baldock v Tasmania*⁴⁶ involved one count of rape of an 81 year old woman and one count of aggravated burglary. The crime was described by the sentencing judge and the Court of Criminal Appeal as an ‘atrocious’⁴⁷ and counsel for the appellant conceded that it should attract a sentence at the highest end of the range.⁴⁸ 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 Criminal 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’.⁴⁹ 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 so 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.⁵⁰ 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.⁵¹

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.⁵² In addition, some of the aggravating factors that would have been features of the very worst category of cases were absent: there was little violence over and above the force necessary to commit rape, no weapon was used, the offender had no previous convictions for rape or other serious offences of a violent or sexual kind, the victim was not subject to any other

⁴⁶ [2015] TASCRA 3.

⁴⁷ Ibid [24] (Pearce J).

⁴⁸ Ibid [12] (Estcourt J).

⁴⁹ Ibid [26] (Pearce J) quoting *Hili v The Queen* (2010) 242 CLR 520, [54].

⁵⁰ Ibid [13] (Estcourt J), [25] (Pearce J).

⁵¹ Ibid [16] (Estcourt J).

⁵² Ibid [29] (Pearce J).

serious form of sexual indignity or perversion, the rape was not repeated or prolonged and the crime was impulsive.⁵³

The Court of Criminal Appeal has previously accepted that a sentence of three to four years was appropriate for a single count of rape and a sentence of five years or more was appropriate for a more serious case.⁵⁴ The maximum sentence imposed in the period 2008–14 for a single count of rape involving a complainant aged 17 and older was three years and nine months and the maximum sentence imposed in this period for a single count of rape involving a complainant under 17 was four and half years. Accordingly, the Court of Criminal Appeal showed that it was willing to increase the sentence for rape appropriate at the higher end of the range. However, the Court adopted an incremental increase in sentence by imposing a sentence that was not far outside the existing range rather than considering the issue of whether the current range was inadequate and increasing the sentence accordingly.

2.2 Sentencing principles in recent appeals against sentence of the Court of Criminal Appeal

Since the Council's *Mandatory Sentencing for Serious Sex Offences Against Children* report, the Court of Criminal Appeal has made statements that have echoed the views expressed in *CJP* about the role to be played by the court in protecting children from sexual crimes by deterring perpetrators, particularly those in a position of trust and the need to reflect the community's concern about offences involving sexual abuse of children in terms of denunciation (understood as the 'appropriate vindication and to assuage informed public outrage').⁵⁵ The emphasis that should be placed on general deterrence in the sentencing process was highlighted in *JWM v State of Tasmania*,⁵⁶ where Brett J wrote that:

The rationale for the emphasis on general deterrence in cases involving maintaining a sexual relationship with a young person, particularly where the criminal conduct involves a significant breach of trust, arises not only because of the evil and highly damaging nature of such conduct, but also because of the insidious and secretive circumstances in which such abuse typically takes place. In this case, the abuse was perpetrated over a period of years by a father on his son. The appellant was, in actual fact, the person in whom was reposed the responsibility of protecting and nurturing his son. Those circumstances provided the appellant with the opportunity to commit this crime, with virtual impunity and over a lengthy period of time. Because such crimes occur in circumstances where the victim is particularly vulnerable, the crime is difficult to detect and it occurs in a premeditated way over a lengthy period and on a repeated basis, the crime

⁵³ Ibid [28] (Pearce J).

⁵⁴ *DPP v T* (2012) 21 Tas R 442, [18] (Crawford CJ) referring to *Tasmania v Farmer* (2005) 13 Tas R 418, [7] (Slicer J), [48] (Blow J).

⁵⁵ *DPP v Harington* [2017] TASCCA 4, [89] (Pearce J) quoting *DPP v STU* [2012] TASCCA 7, [63] (Wood J).

⁵⁶ [2017] TASCCA 22.

is particularly amenable to general deterrence. A person with the opportunity and inclination to make a conscious and premeditated decision to abuse his child within the family home must appreciate that the consequences of such conduct will involve severe punishment.⁵⁷

In another case there was affirmation of the harm caused by sexual abuse, particularly child sexual abuse. As Pearce J stated in *DPP v Harington*,⁵⁸ ‘child sex offences have profound and deleterious effects upon victims for many years, if not the whole of their lives’.⁵⁹ The Court has also highlighted the need to increase sentences for serious sexual offences to vindicate the dignity of the victim.⁶⁰

2.2.1 *Relevance of a sentencing range*

In previous statements of the Court of Criminal Appeal, it has been stressed that sentencing statistics have only limited utility to establish a broad sentencing range and that a sentencing judge does not need to impose a sentence within the upper and lower limits of the range.⁶¹ In particular, in cases of maintaining a sexual relationship with a young person, the Court of Criminal Appeal has rejected any notion that there is a tariff or permissible range for the offence.⁶² As stated by the Court of Criminal Appeal in, ‘[t]here are almost no limits on the potential scope of a case of maintaining a sexual relationship with a young person under 17.’⁶³ This has been confirmed in recent decisions of the Court of Criminal Appeal such as *Cleaver v Tasmania*,⁶⁴ where Pearce J stated that ‘[t]he circumstances of each case vary widely. No range is established. As counsel for the respondent correctly points out, even if a range was established, it does not mean that the upper or lower limits of the range are correct’.⁶⁵ Further, his Honour expressed the view that consistency in sentencing does not require “numerical equivalence”, but consistency in the application of the relevant legal principles’.⁶⁶

Similarly, in *TGW v Tasmania*,⁶⁷ Porter AJ summarised the principles that applied to sentencing statistics:

⁵⁷ Ibid [104] (Brett J).

⁵⁸ [2017] TASCCA 4, [21].

⁵⁹ Ibid [75] quoting *R v Gavel* [2014] NSWCCA 56 [110].

⁶⁰ *DPP v Harington* [2017] TASCCA 4, [92] (Pearce J).

⁶¹ See [2.1.2].

⁶² *TAP v Tasmania* [2014] TASCCA 5, [50] (Porter J); *Richman v Tasmania* [2011] TASCCA 18, [30] (Evans J, Blow and Porter JJ concurring).

⁶³ *Richman v Tasmania* [2011] TASCCA 18, [30] (Evans J, Blow and Porter JJ concurring).

⁶⁴ [2018] TASCCA 11.

⁶⁵ Ibid [20]. This was also expressed in *DPP v Harington* [2017] TASCCA 4, [20]–[21] (Wood J), [85]–[86] (Pearce J).

⁶⁶ Ibid [20] citing *Le v Tasmania* [2017] TASCCA 21, [5] (Wood J) after referring to *R v Kilic* (2016) 91 ALJR 131; *Hili v The Queen* (2010) 242 CLR 520, [49]; and *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1, [304]. See also *SG v Tasmania* [2017] TASCCA 12, [21] (Pearce J).

⁶⁷ [2017] TASCCA 10.

The limitations on the value of sentencing statistics have often been noted. To be of any value, the number of cases must be such as to provide a discernible established range, and the sentences must be for comparable offending. Difficulties are created when the offence can be committed in various ways, and by the wide variation in circumstances from case to case. An established range does not mean that the range is correct, nor that its lower and upper limits are correct. Where a sentence is outside the range of comparable offending, it is not determinative of the issue; that merely serves to increase the level of scrutiny. An appeal court must make its own evaluation of the gravity of the offence in light of all the facts and circumstances.⁶⁸

In *DPP v Harington*,⁶⁹ Wood J reiterated that ‘there is not a settled sentencing pattern with respect to the crime of maintaining a sexual relationship with a young person under the age of 17 years’⁷⁰ and that ‘even if a range was established and the heaviest sentence imposed in the past was less than that under contemplation, that does not mean that “the range is the correct range, or that the upper or lower limits to the range are the correct upper and lower limits”’.⁷¹ In *Sullivan v Tasmania*,⁷² Porter AJ reiterated the difficulty of establishing a range (and relied on the comments in *DPP (Acting) v CBF*⁷³) to state that even if the ‘sentence was outside any established range for comparable offending, that fact is not determinative, as a sentence outside that range simply serves to increase the level of scrutiny, in order to determine whether it is a disproportionate and unreasonable response to the circumstances of the case.’⁷⁴

2.2.2 Individualised justice

Related to observations about the limitation of sentencing ranges and the need for consistency of principle rather than numerical equivalence, the Court has also highlighted the need for individualised justice in the exercise of the sentencing discretion. In *DPP v Harington*, Wood J cited the statement of Brett J in *Daley v Tasmania*:

there is little to be gained by embarking on what is in reality a misconceived quasi-mathematical exercise of comparing individual

⁶⁸ Ibid [38]. His Honour referred to *Director of Public Prosecutions v Harris* [2013] TASCRA 5, [15] (Wood J), [51]–[52] (Estcourt J); *Director of Public Prosecutions (Acting) v Poole* [2015] TASCRA 10, [28]; *Connelly v Tasmania* [2015] TASCRA 15, [5]; *Director of Public Prosecutions (Acting) v CBF* [2016] TASCRA 1, [24], [26]. Porter AJ’s comments were, in turn, cited in *SG v Tasmania* [2017] TASCRA 12, [20] (Pearce J), [36] (Porter AJ).

⁶⁹ [2017] TASCRA 4.

⁷⁰ Ibid [23].

⁷¹ Ibid [24] citing *Hili v The Queen* (2010) 242 CLR 520, [54], quoting Simpson J in *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1, [303]–[304].

⁷² [2017] TASCRA 5.

⁷³ [2016] TASCRA 1.

⁷⁴ [2017] TASCRA 5, [38]. See also *JWM v State of Tasmania* [2017] TASCRA 22, [22] (Pearce J), [132] (Brett J).

sentences, adjusting for aggravating or mitigating factors which may or may not appear in the sentences under comparison, weighting same and then arriving at a position that a sentence was too high or too low by reference to such comparison. Such a process cannot reasonably account for the variation in the multiple individual factors and their relative significance that appear in each case, or the need and reality of an individualised approach by the sentencing judge.⁷⁵

In *Cleaver v Tasmania*, Pearce J applied the statements of the High Court in *Dalgliesh*, to highlight that ‘the discretionary nature of the judgment required by a sentencing court means that there is no single sentence that is just in all the circumstances’.⁷⁶ This statement has also been applied by the Court of Criminal Appeal in *Clark v Harvey*⁷⁷ and *DPP v Allen*.⁷⁸

2.2.3 The increase in sentences for serious sexual offences

In *DPP v Harington*,⁷⁹ Wood J made observation about the increase in the severity of sentences for the offence of maintaining a sexual relationship with a young person. Her Honour referred to *CJP v Tasmania*, where an appeal against a sentence of six years was rejected even though it was very high by reference to earlier sentences. Her Honour reflected that:

To some extent this is an inevitable consequence and a reflection of the greater community understanding of the long term effects of child sexual abuse. The hearings of the Royal Commission into Institutional Responses to Child Sexual Abuse have provided the community and the courts with valuable insight with regard to the serious impact of abuse on child victims. This can be seen in the compelling remarks of the President of the Commission, McClellan J, at the opening hearing of the Commission (see Royal Commission into Institutional Responses to Child Sexual Abuse, *Sentencing for Child Sexual Abuse in Institutional Contexts* (July 2015) at 69–70).⁸⁰

In *Director of Public Prosecutions v WLNH*,⁸¹ the accused pleaded guilty to two charges of assault and a charge of rape. The complainant was his former partner and the rape involved the accused forcing the complainant to suck his penis. The sentence imposed at first instance was imprisonment for two years and six months and the DPP appealed on the grounds that this was manifestly inadequate. The Crown’s appeal was allowed and a sentence of four and half years’ imprisonment with a non-parole period of two years and three months was imposed. In deciding that before a discount for a guilty plea, a global sentence of five years imprisonment

⁷⁵ [2016] TASCRA 10, [42].

⁷⁶ [2018] TASCRA 11, [18].

⁷⁷ [2018] TASSC 34, [18] (Pearce J).

⁷⁸ [2017] TASCRA 24, [15] (Blow CJ, Pearce and Brett JJ).

⁷⁹ [2017] TASCRA 4.

⁸⁰ *Ibid* [23].

⁸¹ [2017] TASCRA 15.

was appropriate, Brett J reiterated support the sentiments expressed in *CJP v State of Tasmania* by Blow CJ⁸² that it was time to consider the increase in sentence for serious sexual crimes. In this regard, Brett J observed that ‘an incremental change in sentencing practices can be justified by changes in community attitudes, or simply by the more precise application of existing sentencing principles. The latter can result in sentences reflecting and responding to developments in the understanding of the impact of particular offences’.⁸³

In proposing an increase in sentences, Brett J acknowledged the devastating impact of the offence of rape, and ‘that the experience of the court is that there is now a better understanding of the significant long-term impact of sexual offending on victims’.⁸⁴ His Honour stated that:

This better appreciation of impact may warrant an increase in sentencing, as a reflection of the community’s denunciation of the commission of such crimes, the need for vindication of victims and general deterrence. Because of the nature of such recognition as a sentencing factor, any general increase in sentencing is likely to occur incrementally, in accordance with the process explained in *Kilic*. A reduction in disparity with interstate sentencing standards would be an expected consequence of that evolution.⁸⁵

In light of the principles expressed by the High Court in *Dagliesh*, it may be that the court is receptive to an argument that incremental increases are no longer required and the necessary upward adjustments in sentence should be made.⁸⁶

2.2.4 Principles to be applied in relation to historical sexual offences

Sentencing for historical sexual offences was discussed in the Council’s report on *Sex Offence Sentencing*. The Council observed that 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.⁸⁷ It was noted that in the 2008–14 period, 41.5% of cases where the offender was convicted of maintaining a sexual relationship were historical cases.⁸⁸ In the period 2015–18, 64% of cases involved an offender who was convicted of maintaining a sexual relationship that involved historical offending. Historical offending 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

⁸² [2015] TASCCA 9.

⁸³ *Director of Public Prosecutions v WLNH* [2017] TASCCA 15, [29] citing with approval the statements of the High Court in *R v Kilic* [2016] HCA 48 [21].

⁸⁴ *Ibid* [31]–[32].

⁸⁵ *Ibid* [32].

⁸⁶ See [1.4].

⁸⁷ Freiberg, Donnelly and Gelb, above n 10, 97.

⁸⁸ TSAC, above n 2, [31]–[32].

the offender's advanced age and poor health are factors relevant to the sentence imposed.⁸⁹

Previously, the Council also observed that historical cases 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.⁹⁰ In New South Wales, South Australia, Queensland and Victoria, the approach has been to adopt the sentencing practices at the time of the offending.⁹¹ The Council noted that there had also been 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'.⁹² 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*'.⁹³

The approach to sentencing historical sexual offending was reconsidered by the Court of Criminal Appeal in *JMW v Tasmania*.⁹⁴ In this case, the offender entered a plea of guilty to one count of maintaining a sexual relationship with a young person. The complainant was the offender's son and the offending took place over a five-year period when the complainant was aged between 10 and 15. The majority of the offending involved pulling the complainant's pants down and fondling his penis and testicles. It did not involve penetration. The offender was sentenced to four years' imprisonment with a non-parole period of two years, and he appealed on several grounds, including that the sentence imposed was in accordance with current sentencing practice and not the sentencing patterns for similar crimes at the time of the criminal conduct.⁹⁵ These grounds of appeal raised the question of the application of the principle of consistency in sentencing in the context of sentencing for historical crimes, particularly when it is asserted that there had been a change in sentencing practices or norms since the commission of the offence.

In addressing the grounds of appeal, Brett J expressed the view that it was possible to distinguish the proposition that in sentencing for historical offences, the sentencing court should apply sentencing patterns which applied at the time from the

⁸⁹ See Freiberg, Donnelly and Gelb, above n 10, 98. See for example, *D, Blow J*, 8 February 2008; *Richman v Tasmania* [2011] TASCRA 18; *Holloway v Tasmania* [2013] TASCRA 1; *E v Tasmania* [2008] TASSC 72; *S v Tasmania (No 2)* [2007] TASSC 85.

⁹⁰ See Freiberg, Donnelly and Gelb, above n 10, 99–106.

⁹¹ *MJR* (2002) 54 NSWLR 368; *ibid* 100–101.

⁹² [2005] TASSC 14, [26] applying *MJR* (2002) 54 NSWLR 368.

⁹³ Sentencing Council, UK, *Sexual Offences Definitive Guideline* (2013), Cl 2 Annex B (emphasis in original)

<https://www.sentencingcouncil.org.uk/wpcontent/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 cases unless the court is satisfied that it would be contrary to the interest of justice to do so.

⁹⁴ [2017] TASCRA 22.

⁹⁵ *Ibid* Grounds 1 and 2.

presumption against the retrospective application of a sentencing law or standard established, for example, by announcement in a decision of an appeal court.⁹⁶ His Honour considered that there were different underlying rationales for the two propositions: (1) the rationale for the presumption against retrospective application was fairness; (2) the rationale for the sentencing in accordance with norms established by sentences in other cases was consistency in sentencing.⁹⁷ Further, his Honour noted that consistency in sentencing referred to consistency in the application of relevant legal principles and that care must be taken in the use of a range established from other sentences. In explaining the change in sentencing for child sexual offences over time, Brett J reasoned that:

If there has been a change in a sentencing range in respect of historic sexual offences, then it is probable that that has come about because of the development of 'unifying principles' by the court incrementally over time, having regard to a better understanding and experience in respect of the relevant crimes and their effect. For example, as Sulan J in *R v M, WJ* noted at [39] ..., sentencing may be influenced over time by a greater understanding and emphasis upon victim impact. This is particularly relevant to historic sexual crimes against children. It is within the experience of the courts that the potential impact of childhood sexual abuse on a victim over time is now better understood than in the past. An incremental change in sentencing norms, in such circumstances, results from a more precise application of established sentencing principles, rather than a change in those principles. The valid and appropriate evolution of sentencing norms in this way has been recently recognised and acknowledged by the High Court in *R v Kilic*.⁹⁸

In light of this, his Honour stated:

it is difficult to understand how the question of fairness arising in respect of the presumption against retrospectivity could have any real application to the formulation of sentences for such crimes. The most that could be asserted is that an offender might have a sense of grievance arising from the proposition that had he been sentenced at the time of the offending, he might have received a lesser sentence.⁹⁹

In finding that there was no error made by the sentencing judge in the approach to sentencing for historical offences, Brett J summarised the basis on which a person could establish that changes in sentencing laws or patterns operated adversely upon him or her:

A change in sentencing law or principle, in accordance with a determination or an announcement by a court of appeal, should not operate retrospectively in respect of criminal conduct committed before the

⁹⁶ Ibid [50].

⁹⁷ Ibid.

⁹⁸ Ibid [51].

⁹⁹ Ibid [53].

change or announcement, as a matter of fairness. However, in respect of an asserted change in the approach of courts by reference to an alteration in tariff, the real question for the sentencing court will be whether there has been a change in the underlying and unifying sentencing principles applicable to the conduct in question and, if so, the reason for that change. If the change has come about incrementally and based solely upon a better understanding of factors relevant to the criminal conduct in question, then it is likely that the court will place greater weight on contemporary standards.¹⁰⁰

As stated, this was a *more precise* application of established standards rather than a change in sentencing law or standards.

This broadly reflects the approach recommended by the Royal Commission that:

State and territory governments should introduce legislation to provide that sentences for child sexual abuse offences should be set in accordance with the sentencing standards at the time of sentencing instead of at the time of the offending, but the sentence must be limited to the maximum sentence available for the offence at the date when the offence was committed.¹⁰¹

The Royal Commission stated that it was ‘satisfied that, provided the maximum penalty that applied at the time of the offence continues to apply, there is no unfairness in applying contemporary sentencing standards within that maximum penalty’.¹⁰² As noted, the government has released draft legislation to this effect and has sought comment on the Criminal Code and Related Legislation Amendment Bill 2018 (Tas), which would amend the *Sentencing Act 1997* (Tas) to require the courts when determining a sentence for a historical child sexual offence to not take into account the sentencing practices at the time of the offence.

¹⁰⁰ Ibid [57].

¹⁰¹ Royal Commission into Institutional Responses into Child Sexual Abuse, above n 17, Recommendation 76.

¹⁰² Ibid 318.

3

SENTENCING FOR RAPE WHERE THE COMPLAINANT IS UNDER 17

In Tasmania, rape is sexual intercourse without consent.¹⁰³

As discussed in Chapter 5, conduct that would previously have given rise to the offence of aggravated sexual assault is not included in the offence of rape. Since the commencement of the *Criminal Code Amendment (Sexual Assault) Act 2017* (Tas) in 2017, sexual intercourse is defined as:

- (a) penile penetration, to the least degree, of the vagina, genitalia, anus or mouth;
- (b) penetration of a person's vagina, genitalia or anus by a body part of a person other than a penis; or
- (c) penetration by an object held or manipulated by, or attached to, another person.¹⁰⁴

It also includes the continuation of an act of penetration. However, all the sentences imposed in the period 1 January 2015 to 30 September 2018 were imposed on the basis of the old definition of sexual intercourse — penile penetration of the vagina, genitalia, anus or mouth.

¹⁰³ *Criminal Code* (Tas) ss 1, 185. Consent is defined in the *Criminal Code* (Tas) s 2A as follows – (1) In the Code, unless the contrary intention appears, “consent” means free agreement.

- (2) Without limiting the meaning of “free agreement”, and without limiting what may constitute “free agreement” or “not free agreement”, a person does not freely agree to an act if the person –
- (a) does not say or do anything to communicate consent; or
 - (b) agrees or submits because of force, or a reasonable fear of force, to him or her or to another person; or
 - (c) agrees or submits because of a threat of any kind against him or her or against another person; or
 - (d) agrees or submits because he or she or another person is unlawfully detained; or
 - (e) agrees or submits because he or she is overborne by the nature or position of another person; or
 - (f) agrees or submits because of the fraud of the accused; or
 - (g) is reasonably mistaken about the nature or purpose of the act or the identity of the accused; or
 - (h) is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required; or
 - (i) is unable to understand the nature of the act.
- (3) If a person, against whom a crime is alleged to have been committed under chapters XIV or XX, suffers grievous bodily harm as a result of, or in connection with, such a crime, the grievous bodily harm so suffered is evidence of the lack of consent on the part of that person unless the contrary is shown.

¹⁰⁴ *Criminal Code* (Tas) s 2B.

The maximum penalty for rape is 21 years' imprisonment.

While rape is an offence that can be committed against an adult or a young person, as the Council's focus is on sentencing for sexual offences against children, the Council's consideration of sentencing for rape relates only to cases where the complainant is under 17.

3.1 Current sentencing practice 1 January 2015–30 September 2018

Table 3-1: Rape complainant under the age of 17, Supreme Court 2015–18

Counts	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Single	n/a	42 months (3.5 years)	36 (3 years)	100	2
All	84 (7 years)	180 (15 years)	36 (3 years)	100	11

In the period 1 January 2015 to 30 September 2018, there were 11 sentences imposed under the *Sentencing Act 1997* (Tas) for rape in relation to a complainant under 17. The longest sentence for rape was 180 months (15 years), the shortest sentence imposed was 36 months (three years) and the median sentence was 84 months (seven years).

As noted, the longest sentence imposed was 15 years and this involved a case where the offender had entered a plea of guilty to two counts of maintaining a sexual relationship with a young person and two counts of rape.¹⁰⁵ This case involved historical sexual offences and the complainant was the defendant's daughter. The offending took place between 1982 and June 1994 while the complainant was aged from seven until 18 years of age. At the time of the sentencing, the defendant was nearly 78. Porter J accepted that the sentence imposed may well mean that the offender would spend the whole of his remaining life in custody. His Honour noted that this was not inappropriate where the offending was very serious, and so he afforded little, if any, weight to the defendant's age. His Honour highlighted the enormity of the breach of trust and the profound long-term consequences for the complainant. It is noted that there was also another case where the offender was sentenced for two counts of rape and two counts of maintaining a sexual relationship with a young person and received cumulative sentences totalling 15 years (three years for rape and 12 years for maintaining a sexual relationship).¹⁰⁶ This case involved four complainants (his sister, his step-daughter, daughter and daughter of father's partner) and the defendant did not enter a guilty plea. The offending occurred between 1998 and 2011. At the time of the first two counts (which were rape), the offender was about 16 or 17. However, these charges were not isolated and the two counts of maintaining a sexual relationship with a young person related

¹⁰⁵ *Tasmania v KR*, 7 October 2015, Porter J (Sentence).

¹⁰⁶ *Tasmania v DJT*, 7 June 2018, Porter AJ (Sentence).

to defendant's stepdaughter and daughter. In sentencing, Porter AJ highlighted general deterrence, denunciation and personal deterrence as paramount considerations. His Honour stated that the offences were grave breaches of trust in which the defendant took advantage of the age and vulnerability of the children.

Other strong statements from the court can be found in *Tasmania v NHJR*,¹⁰⁷ where the offender was found guilty by a jury of aggravated sexual assault, indecent assault and rape in respect of his daughter aged 14. In sentencing the offender to imprisonment for seven years, Pearce J stated:

In my view the overriding sentencing consideration is the need to mark the gravity of the crime of rape committed against the defendants own child. There could hardly be a more grave breach of trust. ... Sexual offences involving children involve the presumption of harm. The effects are continuing and are likely to be long-lasting.

Similarly, in *Tasmania v DHA*,¹⁰⁸ in sentencing the offender to nine years' imprisonment for one count of maintaining a sexual relationship with a young person, two counts of rape and one count of aggravated sexual assault, Brett J stated:

The significant and long term consequences of serious sexual abuse perpetrated on a young person are now better understood by the courts than they once were. ... These crimes are extremely serious. They involved a shocking breach of trust. That trust emanated from your position as the complainant's step-father.

In *Tasmania v G*,¹⁰⁹ the offender was sentenced to 12 years imprisonment in respect of historical offences that occurred over a period of approximately 15 years commencing in 1976. At the time of sentencing, the offender was 73. There were five complainants who were the step-grandchildren and step-niece of the offender. Brett J wrote that:

The principal sentencing considerations in this case are vindication of the complainants and general deterrence. Children are particularly vulnerable to abuse of this nature, and those adults who would perpetrate such abuse must understand that they will be punished severely.

The lowest sentence of imprisonment imposed for rape in relation to a complainant under the age of 17 was three years. This sentence was imposed in three cases. In the first, the sentence imposed was a single count of rape where the offender was 21 and the complainant was 16 years and 9 months.¹¹⁰ The defendant and the complainant had previously engaged in consensual sexual intercourse but on this occasion the complainant was heavily intoxicated and not able to consent. The defendant pleaded guilty. In the second case, the offender was sentenced for

¹⁰⁷ 25 July 2018, Pearce J (Sentence).

¹⁰⁸ 13 August 2018, Brett J (Sentence)

¹⁰⁹ 23 August 2018, Brett J (Sentence).

¹¹⁰ *Tasmania v SSE*, 16 March 2016, Porter J (Sentence).

historical sexual offending of one count of rape and one count of indecent assault in relation to his 11- or 12-year-old step daughter.¹¹¹ The offending arose out a single incident that had occurred approximately 15 years prior to the sentencing hearing. The offence of rape involved oral sexual intercourse. In mitigation, her Honour referred to the defendant’s remorse, his admission and his plea of guilty to one of the two crimes, and that the oral rape was of short duration. It was stated that ‘the sentence has been reduced to reflect the matters in mitigation, and if not for these matters, a significantly heavier sentence would have been imposed’. In the final case, the defendant was found guilty of one count of rape, one count of indecent assault and one count of assault committed over a period of months in either 2008 or 2009.¹¹² The complainant was either 13 or 14 and the defendant was 40 or 41. There was an ongoing same-sex relationship between the offender and the complainant but it was characterised as one where the offender supplied the complainant with gifts and alcohol, cigarettes and drugs with an intention of seeking repayment from the complainant in the form of sexual favours. Estcourt J stated that, in imposing the sentence, the principle of totality was a relevant factor given that the defendant was already serving a lengthy sentence of imprisonment for similar historical offending.

3.2 Comparison to sentencing practice 2008–14

Although it is not possible to rule out the role played by the particular circumstances in the cases considered by the court and acknowledging the limitations of sentencing ranges, it would appear that sentencing for rape involving a young complainant has increased from the period 2008–14 to 2015–18. As seen from Tables 3.1 and 3.2, while the minimum sentence (for all counts) remained the same, the maximum sentence imposed increased from 12 years to 15 years (an increase of 25%) and the median sentence increased from four and half years to seven years (an increase of 55.6%).

Table 3-2: Rape complainant under the age of 17, Supreme Court sentences 2008–14

Counts	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Single	46.5 (3.87 years)	54 (4.5 years)	36 (3 years)	100	4
All	54 (4.5 years)	144 (12 years)	36 (3 years)	100	12

¹¹¹ *Tasmania v LCC*, 18 February 2016, Wood J (Sentence).

¹¹² *Tasmania v LBS*, 16 August 2017, Estcourt J (Sentence).

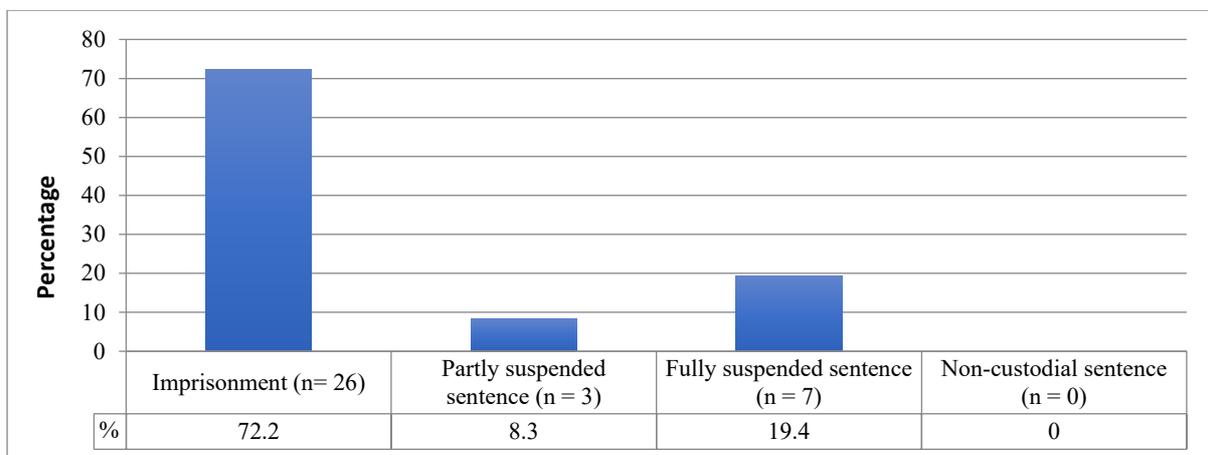
4

MAINTAINING A SEXUAL RELATIONSHIP WITH A YOUNG PERSON

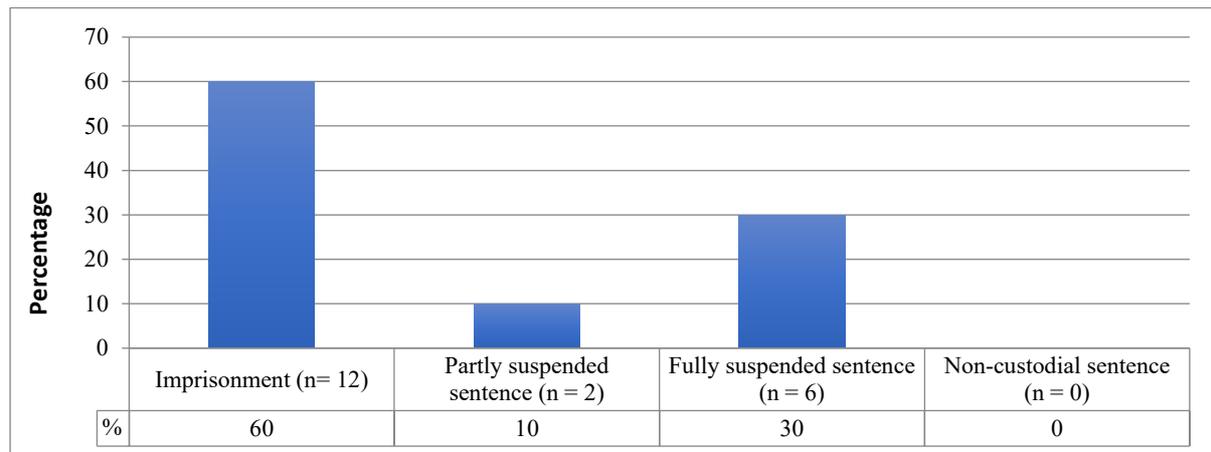
The crime of maintaining a sexual relationship with a young person is committed if a person commits an unlawful sexual act (sexual intercourse with a young person, indecent assault, aggravated sexual assault (now repealed), incest or rape) with a person under the age of 17 on at least three occasions.¹¹³ The maximum penalty for maintaining a sexual relationship with a young person is 21 years' imprisonment.

4.1 Current sentencing practice

Figure 4-1: Maintaining a sexual relationship with a young person and sentence type, Supreme Court, 2015–18 (all counts, n = 36)



¹¹³ *Criminal Code* (Tas) s 125A.

Figure 4-2: Maintaining a sexual relationship with a young person and sentence type, Supreme Court, 2005–18 (single count, n = 20)**Table 4-1: Maintaining a sexual relationship with a young person, Supreme Court sentences 2015–18**

Counts	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
All	72 (6 years)	174 (14.5 years)	12	72.2	36
Single	63 (5.25 years)	144	21	60	20

In the period 1 January 2015 to 30 September 2018, there were 36 sentences imposed for maintaining a sexual relationship with a young person. Of these, 72.2% of offenders (n = 26) were sentenced to immediate imprisonment with 8.3% of offenders (n = 3) receiving a partly suspended sentence, 19.4% of offenders (n = 7) received a fully suspended sentence and no offenders received a non-custodial sentence. The longest sentence was 174 months (14.5 years), the shortest sentence imposed was 12 months and the median sentence was 72 months (six years).

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

- (1) cases where the offender was in a family relationship;
- (2) cases where the offender was an adult acquaintance who had connected with the child in another capacity as a trusted adult;
- (3) cases where the court characterised the offender and the young person as being in a 'consensual' relationship.¹¹⁴

The Council observed that imprisonment was the most commonly used sanction for the offence of maintaining for all categories other than those cases that had the hallmarks of a 'consensual relationship'. For the purposes of the Council's analysis of sentencing for the *Mandatory Sentencing* report, the Council classified the cases

¹¹⁴ TSAC, above n 5, 30. The Council noted that the notion of consent is problematic in the context of young person, given that (other than rape) absence of consent is not an element of sexual offences involving people under 17 on the basis that they are in need of protection.

into ‘consensual relationship cases’ and other cases involving family and other adults on the basis that cases that do not come within the consensual category may well fall within the aggravated offence of maintaining a sexual relationship. This analysis was conducted on the basis of single counts of maintaining a sexual relationship. The Council has again conducted this analysis. As shown in Figure 4-3, there were 20 cases identified in the period 2015 to 2018 where the offender was convicted of a single count of maintaining a sexual relationship with a young person.

Figure 4-3: Sentence type, maintaining a sexual relationship with a young person, categories, single count, 2015–18

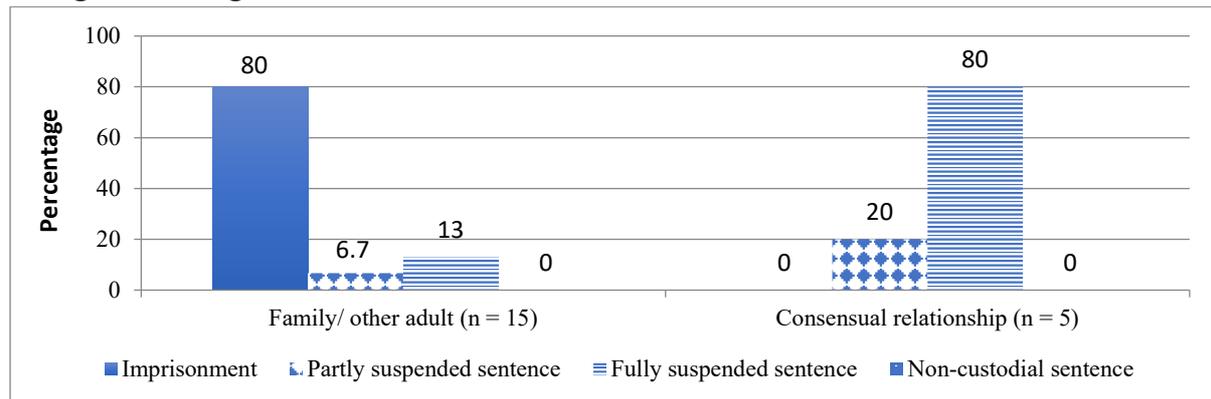


Table 4-2: Length of imprisonment (in months) for categories of maintaining a sexual relationship with a young person (single count): Supreme Court, 2015–18

Circumstances	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Family and adult acquaintance	63 (5.25 years)	144 (12 years)	21	80	15
‘Consensual’ relationship	n/a	n/a	n/a	0	5

As shown by Figure 4-3, a majority of offenders (80%) convicted of a single count of maintaining a sexual relationship with a young person outside of the context of a ‘consensual’ relationship were sentenced to immediate imprisonment. In these circumstances, the shortest sentence was twenty-one months, the longest sentence was 12 years and the median sentence was five years and three months.

In addition, in judgments of the Supreme Court, there are strongly worded statements about the seriousness of child sexual abuse and the Court’s and community’s abhorrence of such offending. In *MCW*,¹¹⁵ a case involving sexual abuse by a father of his son, daughter and three other girls for whom he was in a parental role, Pearce J sentenced the offender to 14 years’ imprisonment and stated that:

¹¹⁵ Pearce J, 13 March 2015 (Sentence).

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

This was the longest sentence imposed in the relevant period.

In *MD*,¹¹⁶ another case involving sexual abuse by a father committed on his daughter (from the ages of 4 to 12 or 14), Pearce J imposed a sentence of ten years' imprisonment. His Honour stated that,

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

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

¹¹⁶ Pearce J, 21 May 2015 (Sentence).

There is a recognition of the profound and long-term harm caused by the offending. For example in *RMW*,¹¹⁷ a case involving the sexual abuse of two children aged eight and six by their grandfather, Wood J imposed a sentence of seven years and stated that:

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

In *JWA*,¹¹⁸ Tennent J imposed a sentence of six years on an offender who sexually abused a seven-year-old boy who was the son of her nephew's partner. Her Honour stated that:

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

4.2 Comparison to sentencing practice 2001–14

Again, although it is not possible to rule out differing circumstances in the cases considered by the court and acknowledging the limitations of sentencing ranges, there is evidence to suggest that sentencing for maintaining a sexual relationship with a young person has increased from the period 2008–14 to 2015–18. As shown in Figures 4-1 and 4-4, overall for all counts, there has been an increase in the immediate imprisonment (64.2% to 72.2%). Tables 4-1 and 4-3 show that the lowest sentence imposed (for all counts) has increased from four months to 12 months (an increase of 200%), the maximum sentence imposed increased from 12 years to 14.5 years (an increase of 21%) and the median sentence has doubled from three years to six years (an increase of 100%).

In relation to offences of maintaining a sexual relationship that were outside the context of a 'consensual' relationship, the imprisonment rate decreased from 92.5% where an offender was convicted to 80% (see Figures 4-3 and 4-6). However, in these circumstances, the shortest sentence imposed increased from four months to 12 months (200% increase), the longest sentence increased from eight years to 12 years (50% increase) and the median sentence increased from three years to five years and three months (75% increase) (see Tables 4-2 and 4-3).

¹¹⁷ Wood J, 2 March 2016 (Sentence).

¹¹⁸ Tennent J, 26 February 2016 (Sentence).

Figure 4-4: Maintaining a sexual relationship with a young person and sentence type, Supreme Court, 2008–14 (all counts, n = 95)

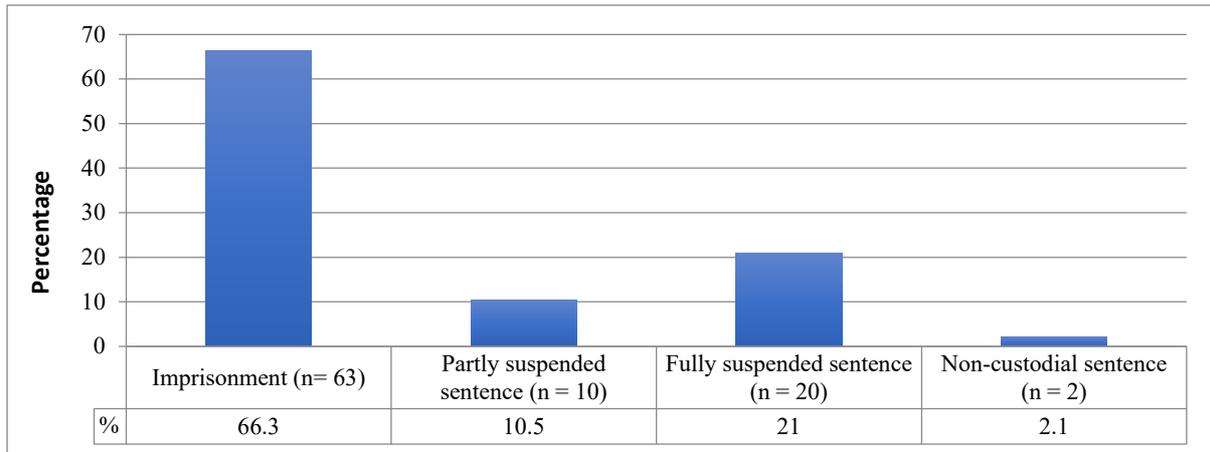


Figure 4-5: Maintaining a sexual relationship with a young person and sentence type, Supreme Court, 2008–14 (single count, n = 67)

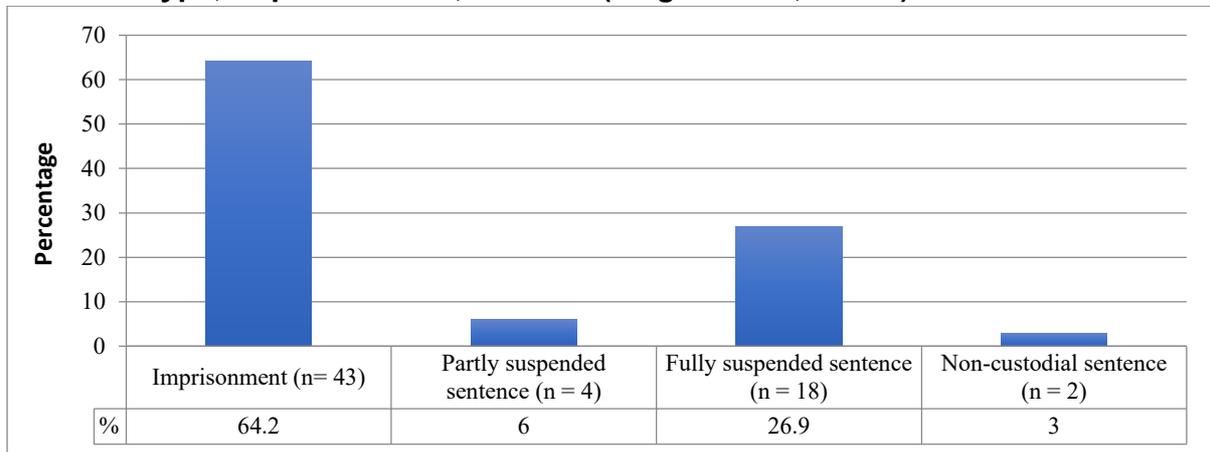


Table 4-3: Maintaining a sexual relationship with a young person, Supreme Court sentences 2008–14

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

Figure 4-6: Sentence type, maintaining a sexual relationship with a young person, categories, single count, 2008–14

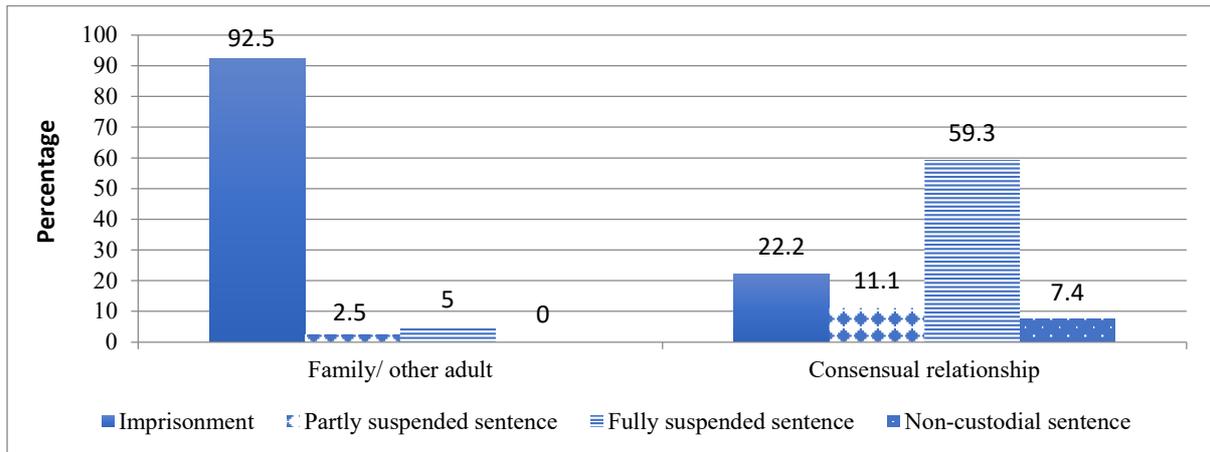


Table 4-4: Length of imprisonment (in months) for categories of maintaining a sexual relationship with a young person (single count): Supreme Court, 2008–14

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

5

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

As indicated, a separate crime of aggravated sexual assault no longer exists in Tasmania and conduct that would have fallen within the offence in s 127A of the *Criminal Code* (Tas) now falls within the expanded definition of the sexual intercourse and constitutes the crime of rape (where absence of consent is an element of the offence) or sexual intercourse with a young person (where the offence does not require proof of absence of consent).¹¹⁹ However, sentencing for aggravated sexual assault is included in this paper as all the sentences imposed in the period 1 January 2015 to 30 September 2018 were imposed on the basis of the now repealed distinction between conduct giving rise to the offence of rape and conduct giving rise to the offence of aggravated sexual assault.

The crime of aggravated sexual assault involved 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. This offence did not require proof of absence of consent in cases where the alleged victim was under the age of 17.

The maximum penalty for aggravated sexual assault was 21 years' imprisonment.

5.1 Current sentencing practice

Table 5-1: Aggravated sexual assault with a complainant under 17, Supreme Court sentences 2015–18

Counts	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Single	n/a	n/a	n/a	n/a	0
All counts	36 (3 years)	36 (3 years)	20 (1.7 years)	100	4

There are limitations in setting out any overview of current practice as there were only three sentences imposed under the *Sentencing Act 1997* (Tas) for aggravated sexual assault involving a complainant under 17. These cases all involved the imposition of global sentences. In all of these cases, a sentence of immediate

¹¹⁹ However, as noted there are circumstances where an offender is close in age to the victim and can then rely on similar age consent 'defences'. This is where victim is aged 12 years or older and the offender is not more than 3 years older, or the victim is aged 15 or older and the offender is not more than 5 years older.

imprisonment was imposed. The cases involved abuse of trust situations where the offender was the father or other trusted adult and the complainant ranged in age from 7 to 11. The conduct involved the insertion of a finger in the vagina.

The Council has also identified a case of historical sexual offending where the offender was convicted of indecent assault in relation to conduct that at the time of sentencing would have amounted to aggravated sexual assault.¹²⁰ In sentencing the defendant to two years and nine months imprisonment, Wood J observed that the 'sentence would have been significantly heavier but for the defendant's personal circumstances, particularly the conduct of his defence minimising stress to the complainants during the trial, the lack of need for personal deterrence, and the nature of his medical condition which will increase, very much, the severity of his sentence'.

5.2 Comparison with sentencing practice 2008–14

It is difficult to make a comparison of sentencing between the two reference periods given that there were only four cases where sentences were imposed in the period 2015 to 2018 as this does not provide a sufficient number of cases to ascertain any sentencing trend. Instead, the sentencing data for this period is highly dependent on the particular circumstances of the case. There were also a small number of offenders sentenced in the period 2008 to 2014 (13 offenders), as shown by Table 5-2.

Table 5-2: Aggravated sexual assault with a complainant under 17, Supreme Court sentences 2008–14

Counts	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
Single	4	4	4	50	2
All	21 (1.75 years)	72 (6 years)	4	61.5	13

¹²⁰ *Tasmania v DFP*, 13 April 2018, Wood J (Sentence).

6

SEXUAL INTERCOURSE WITH A YOUNG PERSON

The crime of sexual intercourse with a young person involves ‘sexual intercourse’ with a person under the age of 17.¹²¹ As explained, there is an expanded definition of sexual intercourse contained in s 2A of the *Criminal Code* (Tas). However, all the sentences imposed in the period 1 January 2015 to 30 September 2018 were imposed on the basis of the old definition of sexual intercourse — penile penetration of the vagina, genitalia, anus or mouth.

There is no requirement for the prosecution to establish absence of consent. However, there are circumstances where an offender is close in age to the victim and can then rely on similar age consent ‘defences’.¹²²

The maximum penalty for sexual intercourse with a young person is 21 years’ imprisonment.

6.1 Current sentencing practice

Figure 6-1: Sexual intercourse with a young person and sentence type, Supreme Court, 2015–18 (all counts, n = 12)

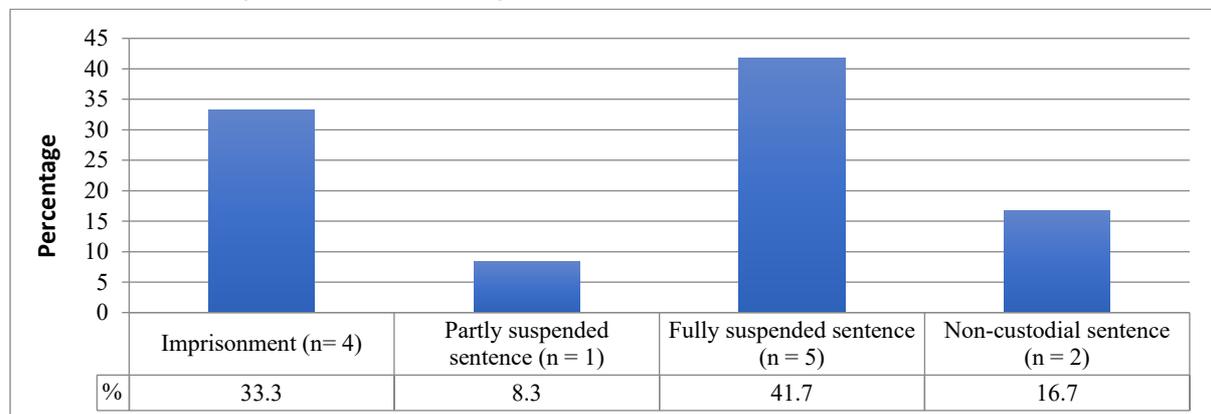


Table 6-1: Sexual intercourse with a young person, Supreme Court sentences 2015–18

Counts	Median (months)	Max (months)	Min (months)	Imprisonment (%)	Total (no)
All	19.5	48 (4 years)	9	33.3	12

¹²¹ *Criminal Code* (Tas) s 124.

¹²² The victim is aged 12 years or older and the offender is not more than 3 years older, or the victim is aged 15 or older and the offender is not more than 5 years older: *Criminal Code* (Tas) s 124(3).

As with aggravated sexual assault, there are limitations in setting out any overview of current practice as there were only 12 cases identified in the period 2015 to 2018 where an offender was sentenced for sexual intercourse with a young person. There were three cases where the defendant was sentenced in relation to one count of sexual intercourse with a young person and nine cases involving multiple counts (including at least one count of sexual intercourse with a young person). In this period, there were 33.3% of offenders (n = 4) sentenced to immediate imprisonment with 8.3% of offenders (n = 1) receiving a partly suspended sentence, 41.7% of offenders (n = 5) receiving a fully suspended sentence and 16.7% of offenders (n = 2) receiving a non-custodial sentence. The longest sentence imposed was 48 months (4 years), the shortest sentence imposed was 9 months and the median sentence was 28.5 months (2.37 years).

The longest sentence of four years imprisonment was imposed in the case of *Tasmania v RRY*,¹²³ where the defendant pleaded guilty to two counts of sexual intercourse with a young person. He was 24 years old and one of the complainants was 13 and the other was 14. He had met the complainants on a social media site and arranged to meet and sexual intercourse occurred. A further relevant factor was that the offender had previously been sentenced in 2012 for sexual offences involving a young person. In sentencing, Pearce J stated that:

These are serious instances of this crime. There is a significant disparity between the age and level of maturity of the defendant and the complainants. The defendant's conduct towards the girls was predatory and manipulative. He used a social media platform to meet and befriend them, with knowledge of their age. Both complainants were in vulnerable circumstances at the time, not just because of their age. The defendant was motivated by his own sexual gratification.

Sentences of imprisonment were imposed in other cases where men used social media to contact and engage in sexual relationships with young people. In *Cleaver v Tasmania*,¹²⁴ it was observed by Pearce J that 'social media provides an opportunity for those with improper motives to illicitly get to know and befriend young persons'.¹²⁵

As with the crime of maintaining a sexual relationship with a young person, the Council noted in its earlier analysis that a broad range of circumstances can give rise to the crime of sexual intercourse with a young person.¹²⁶ Previously, the Council analysed cases by classifying them into the categories of 'consensual relationship cases' and other cases involving family and other adults on the basis that cases that do not come within the consensual category may well fall within the more serious cases of sexual intercourse with a young person.¹²⁷ This was done in relation to

¹²³ 18 December 2017, Pearce J (Sentence).

¹²⁴ [2018] TASSCA 11.

¹²⁵ Ibid [19].

¹²⁶ TSAC, above n 2, 35; TSAC, above n 5, 77.

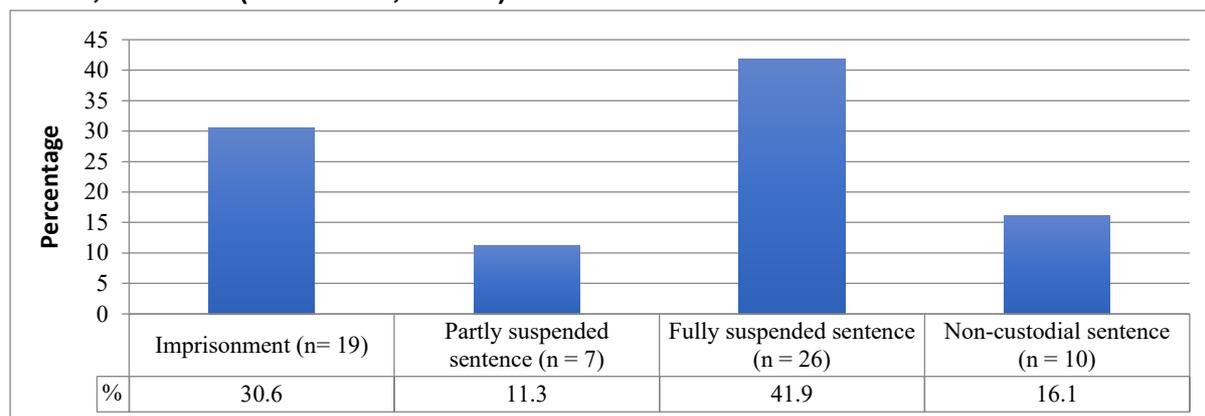
¹²⁷ See TSAC, above n 5, 77–80. In relation to sentencing for single counts of sexual intercourse with a young person, for cases that were not classified as relationship cases, 44.4% of offenders (n =

single counts of sexual intercourse with a young person. It is not appropriate to repeat this analysis here as there are only three cases involving single counts. However, the Council observes that fully suspended sentences tended to involve younger offenders in circumstances where there was not a great disparity in the respective levels of maturity between the offender and the complainant¹²⁸ or where there was a relationship between the two.¹²⁹ There were two non-custodial sentences imposed and these both involved offenders who were 18 at the time of the offending in circumstances where sexual intercourse was ‘consensual’ and there was a relationship/affection between the offender and the complainant.¹³⁰

6.2 Comparison to sentencing practice 2008–14

As with the offence of aggravated sexual assault, the small number of cases involved in the period 2015–18 means that it is problematic to make a comparison with the sentences imposed in the earlier period. The small number of cases means that the particular circumstances of the cases will be more influential than in examining sentencing practices for offences involving a larger number of cases. Acknowledging this limitation, the Council notes that there appears to be an increase in sentencing that can be observed in the longest sentence imposed (four years compared to two years), the median sentence (19.5 months compared to seven months) and the shortest sentence imposed (nine months compared to two months). This is consistent with the Council’s observations in relation to sentencing trends other sexual offences involving young people.

Figure 6-2: Sexual intercourse with a young person and sentence type, Supreme Court, 2008–14 (all counts, n = 62)



4) received a sentence of immediate imprisonment with the maximum sentence being eight months, the shortest sentence two months and the median sentence five months.

¹²⁸ *Tasmania v M*, 28 June 2018, Wood J (Sentence); *Tasmania v JDS*, 30 November 2017, Pearce J (Sentence).

¹²⁹ *Tasmania v GHM*, 13 November 2017, Brett J (Sentence); *Tasmania v Ebert*, 13 May 2015, Porter J (Sentence).

¹³⁰ See *Tasmania v Clulow*, 30 January 2017, Pearce J (Sentence); *Tasmania v DLMS*, 9 November 2017, Porter AJ (Sentence).

Table 6-2: Sexual intercourse with a young person, Supreme Court sentences 2008-14

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

7

CONCLUSION

Based on the Council's consideration of sentences imposed at first instance and appeal judgments of the Court of Criminal Appeal, the Council's view is that there has been a marked increase in the sentences imposed by the court in the period 2015 to 2018.

7.1 Appeal decisions

In relation to the decisions of the Court of Criminal Appeal considering sentencing for sexual offences, the Council makes the following observations based on the views expressed by the Court:

- The court does not need to impose a sentence within the sentencing range established by sentencing statistics.
- In view of the diversity of circumstances that can exist for maintaining a sexual relationship with a young person, there is no established range, and even if such a range were established, this does not mean that the upper or lower limits of the range are correct.
- Consistency in sentencing requires consistency in the application of principle rather than numerical equivalence.
- Sentencing involves a discretionary judgment taking into account the individual circumstances of the case.
- There are indications from the Court of Criminal Appeal that signal that there is scope to impose longer sentences for serious sexual offences involving children.
- It is not an error to apply current sentencing standards to historical offending if the increased contemporary sentences reflect a better understanding of the factors relevant to the criminal conduct, that is, a *more precise* application of established standards rather than a change in sentencing law or standards.

7.2 Sentencing data

The Council's view is that sentencing for sexual offences involving children in the Supreme Court has clearly increased. Acknowledging that it is not possible to rule out the role played by the particular circumstances of a case and acknowledging the limitations of sentencing ranges, after examining sentencing data for serious child sex offences for the period 1 January 2015 to 30 September 2018 (2015–18) in comparison with sentencing data for the period 1 January 2008 to 31 December

2014 (2008–14), it is clear that there is a decided upward trend in the sentences imposed under the *Sentencing Act 1997* (Tas).

In particular the Council notes that:

- Sentencing for rape involving a young complainant has increased. While the minimum sentence (for all counts) remained the same, the maximum sentence imposed increased from 12 years to 15 years (an increase of 25%) and the median sentence increased from four and half years to seven years (an increase of 55.6%).
- Sentencing for maintaining a sexual relationship with a young person has increased with an increase in the use of actual imprisonment (64.2% to 72.2%). The lowest sentence imposed (for all counts) has increased from four months to 12 months (an increase of 200%), the maximum sentence imposed increased from 12 years to 14.5 years (an increase of 21%) and the median sentence has doubled from three years to six years (an increase of 100%).
- Sentencing for sexual intercourse with a young person has increased with the longest sentence imposed increasing from two years to four years (an increase of 100%), the median sentence increasing from seven months to 19.5 months (an increase of 178%) and the shortest sentence imposed increased from two months to nine months (an increase of 350%).

Appendix A: Sentencing practice, selected offences, Tasmania

Methodology

The analysis conducted by the Council uses data received from the Tasmania Law Reform Institute Sentencing database, which covers the years 1 January 2001 to 30 June 2017. 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. Supplementary cases from the period 1 July 2017 to 30 September 2018 were obtained from the Supreme Court judges' Comments on Passing Sentence available online from the Andrew Inglis Clark Law Library. The supplementary cases included all sentences that were imposed to 30 September 2018 and published online by 25 October 2018.

In Tasmania, when an offender is convicted of multiple offences, a judge has the power to impose one sentence for all offences (a global sentence). Tasmanian courts also have the power to impose separate sentences for each offence, but in practice, when an offender is convicted of multiple offences, a global order is usually made. Consequently, in most cases, it is not possible to determine the proportion of the total sentence that relates to each individual count. In the database, the cases are entered based on assessment of the principal offence (most serious offence) as the 'major crime'. In relation to sexual offences where an offender has been charged with maintaining a sexual relationship with a young person and/or sexual intercourse with a young person, offences have been classified in order of seriousness as follows: maintaining a sexual relationship with a young person, sexual intercourse with a young person, aggravated sexual assault and then indecent assault, indecent act directed to young person, followed by child pornography offences. In other cases, offences are classified as rape, aggravated sexual assault, indecent assault, indecent act directed to young person, followed by child pornography offences. This is based on the classification of offences in the National Offence Index.¹³¹ It relates to sentences imposed under the *Sentencing Act 1997* (Tas).

¹³¹ See TSAC, above n 2, [3.1].

Appendix B: Appeals against sentence: Court of Criminal Appeal (Tasmania) 1 January 2015 – 30 September 2018, selected sexual offences

Case	Offence	Appellant	Ground	Outcome	Brief description
<i>Cleaver v Tasmania</i> [2018] TASCCA 11	Sexual intercourse with a young person (1 count) Aggravated sexual assault (1 count)	Defendant	Manifestly excessive	Allowed Original sentence of 2½ years imprisonment with 18 month non-parole period substituted for a sentence of imprisonment of 12 months with six month non-parole.	<ul style="list-style-type: none"> Complainant was 15 and defendant was 26 at the time of the offending. 'Boyfriend/girlfriend' relationship. Defendant had low IQ which reduced the age disparity to some extent (Pearce J). Sentencing judge took into account factors that would have amounted to an additional charge (the use of text messages to facilitate sexual intercourse) (Marshall AJ; Wood J dissenting on this point).
<i>JMW v Tasmania</i> [2017] TASCCA 22	Sexual intercourse with a young person (1 count)	Defendant	Manifestly excessive (as well as other grounds)	Dismissed (Pearce J dissenting) Original sentence of four years' imprisonment with non-parole period of 50% upheld.	<ul style="list-style-type: none"> Historical offence. Father of complainant. Complainant was in late primary school to grade 9 or 10. No acts of penetration (fondling of penis and testicles).
<i>Director of Public Prosecutions v WLNH</i> [2017] TASCCA 15	Rape (1 count) Assault (2 counts)	Crown	Manifestly inadequate	Allowed Original sentence of 2½ years with 50% non-parole increased to 4½ years imprisonment with 2 years and 3 months non-parole period.	<ul style="list-style-type: none"> Complainant was former partner. Rape (oral sex) and conduct associated with rape was 'vicious, repeated and protracted' – although rape is inherently violent, this rape was laden with actual and threatened violence. Calculated to punish and degrade the complainant and emphasises the imbalance of power. A breach of trust. Assaults occurred at a different time to the rape and rape was additional feature of criminal conduct and deserved separate punishment . Would have imposed a sentence of five years or more but for guilty pleas (Estcourt J).

Case	Offence	Appellant	Ground	Outcome	Brief description
<i>SG v Tasmania</i> [2017] TASCCA 12	Aggravated sexual assault (1 count)	Defendant	Manifestly excessive (and another ground)	Dismissed Original sentence 18 months imprisonment with non-parole period of 50% upheld.	<ul style="list-style-type: none"> Complainant was wife (wife had indicated that planned to leave). Complainant was drunk and either asleep or semi-conscious. Inserted sex toy in anus (accepted that intended to insert in vagina).
<i>TGW v Tasmania</i> [2017] TASCCA 10 ¹	Indecent assault (1 count)	Defendant	Manifestly excessive	Allowed Original sentence of 2½ years reduced to 18 months imprisonment.	<ul style="list-style-type: none"> Defendant was almost 67 and suffering from numerous medical conditions including cancer. Not read or write and limited intellectual functioning. Complainant also had intellectual disability and offence was a breach of confidence and an abuse of friendship. Outside range but that not determinative.
<i>Sullivan v Tasmania</i> [2017] TASCCA 5	Maintaining a sexual relationship (2 counts) Abduction (1 count) Exposing a young person to indecent material (1 count) Possession of a controlled plant (1 count) Possession of a controlled drug (1 count)	Defendant	Manifestly excessive	Dismissed Original sentence 18 months imprisonment upheld.	<ul style="list-style-type: none"> Oral and anal sexual intercourse. 2 complainants (W aged 15–17 and B aged 14) W in relationship with the defendant (who was 20 years older). B given money and cigarettes and relationship was one of financial gain for sexual contact.
<i>DPP v Harington</i> [2017] TASCCA 4	Maintaining a sexual relationship with a young person (2 counts) Indecent assault (8 counts) Production of child exploitation material (1 count) Possession of child exploitation material (1 count)	Crown	Manifestly inadequate	Allowed Original sentence of 7 years with non parole period of 50% increased to 12 years with a non-parole period of seven years.	<ul style="list-style-type: none"> 9 complainants in 4 discrete periods over 35 years. Conduct included oral and anal rape. Teacher and educator, mentor, manager, trainer, massage therapist or family friend to boys who were aged between 12 and 15. Exploited position of trust and vulnerability of victims. Involved grooming and pressuring victims. Predatory, determined and manipulative.

¹ In this case, the defendant had been acquitted of rape and the trial judge held that the defendant placing the complainant's penis in his mouth could not amount to rape. This was overturned on appeal: *Director of Public Prosecutions v TGW* [2017] TASCCA 1.

Case	Offence	Appellant	Ground	Outcome	Brief description
<i>Mulholland v Tasmania</i> [2017] TASCCA 2	Rape (1 count)	Defendant	Manifestly excessive Relevance of mental disorder Relevance of registration under <i>Community Protection (Offender Reporting) Act 2005</i> as extra curial punishment	Dismissed Original sentence of 3½ years with non-parole period of 50% upheld.	<ul style="list-style-type: none"> Defendant met complainant on internet dating site and agreed to meet in person. Went to the complainant's house and watched television and drinking together. Complainant told the defendant that she did not want to have sex. Unprotected sex and defendant had an STD. Complainant's child was asleep in the house.
<i>CJP v Tasmania</i> [2015] TASCCA	Aggravated sexual assault (5 counts) Producing child exploitation material (2 counts) Accessing child exploitation material (1 count) Indecent act with young person (2 counts) Possession child exploitation material (1 count)	Defendant	Manifestly excessive	Dismissed Original sentence of 6 years imprisonment with non-parole period 3 years upheld.	<ul style="list-style-type: none"> 2 complainants aged 7 and 4 (D's second cousins). Gross breach of trust while in D's sole care.
<i>Baldock v Tasmania</i> [2015] TASCCA 3	Rape (1 count) Aggravated burglary (1 count)	Defendant	Manifestly excessive	Allowed Original sentence of 9 years with non parole period of 5½ years replaced with 6 years imprisonment with non-parole period of 4 years.	<ul style="list-style-type: none"> Rape of elderly woman in her home. Serious example of the crime of rape given C was frail and vulnerable. The sentence imposed is so inconsistent with sentences that have been imposed for a single count of rape in other cases.