

Sentencing Guidance in Victoria Report

The Sentencing Advisory Council bridges the gap between the community, the courts, and the government by informing, educating, and advising on sentencing issues.

The Sentencing Advisory Council is an independent statutory body established in 2004 under amendments to the *Sentencing Act 1991*. The functions of the Council are to:

- provide statistical information on sentencing, including information on current sentencing practices
- conduct research and disseminate information on sentencing matters
- gauge public opinion on sentencing
- consult on sentencing matters
- advise the Attorney-General on sentencing issues
- provide the Court of Appeal with the Council's written views on the giving, or review, of a guideline judgment.

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- one senior academic
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- one member of a victim of crime support or advocacy group
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- one member of the police force of the rank of senior sergeant or below who is actively engaged in criminal law enforcement duties
- the remainder must have experience in the operation of the criminal justice system.

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Sentencing Guidance in Victoria Report

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Contents

Preface xi

Warning to readers xii

Contributors xiii

Acknowledgments xiii

Glossary xiv

Summary of recommendations xvii

Executive summary xxiii

Chapter 1: Introduction to the sentencing guidance reference 1

Structure of this report 2

Background to the terms of reference 2

Terms of reference 3

Scope of the reference and the Council's approach 3

Consistency of approach in sentencing 4

Sources of evidence for inconsistency 4

Public confidence in the criminal justice system 5

Sources of evidence for public confidence 5

Considered methods of sentencing guidance 6

Human rights considerations 6

Consultation 7

Chapter 2: The current sentencing framework in Victoria 9

Overview 10

Sentencing of adults 10

Sentencing of children 11

Jurisdiction of the Children's Court 11

Children's Court sentencing principles, sanctions, and processes 12

Sentencing children in the higher courts 12

Sentencing young offenders to youth detention 13

Sentencing methodology 13

No fixed methodology 13

Instinctive synthesis 14

Other legislative schemes under the *Sentencing Act 1991* (Vic) 16

Serious offender provisions 16

Continuing criminal enterprise offenders provisions 17

Indefinite sentences 17

Statutory minimum sentences 18

Special reasons 19

Charging methods 19

Chapter 3: Sentencing guidance in Victoria 21

Overview 22

What is meant by 'sentencing guidance'? 22

Existing sources of sentencing guidance in Victoria 23

Guidance from the maximum penalty	23
Maximum penalty as a guide to seriousness	24
Limited guidance from legislative changes to the maximum penalty	24
Guidance from current sentencing practices	25
Current sentencing practices and the importance of consistency	26
Statistical analysis as part of current sentencing practices	27
Current sentencing practices provide qualified guidance on range	28
Stakeholders' views on guidance provided by current sentencing practices	29
The Council's view on guidance provided by current sentencing practices	31
Guidance from the Court of Appeal	32
Appellate review of sentences and judgments on general sentencing principles	32
Appellate review of current sentencing practices	34
Guideline judgments	36
Chapter 4: Baseline sentencing	39
History	40
Baseline reference	41
The Council's 2012 report	41
<i>Sentencing Amendment (Baseline Sentences) Act 2014 (Vic)</i>	42
Purpose of the baseline sentencing provisions	42
Second Reading Speech	42
Explanatory Memorandum	43
Commencement and operation	44
Application of the baseline sentence when sentencing baseline offences	44
Minimum non-parole period proportion	44
First baseline sentencing and ruling	45
Baseline ruling	45
<i>Director of Public Prosecutions v Walters (A Pseudonym)</i>	46
Stakeholders' views	46
The Council's view	47
Chapter 5: Offences with sentencing problems requiring guidance	49
Overview	50
Initial approach to identifying possible problem offences	51
Identifying sources of evidence	51
Stakeholders' views on possible problem offences	51
An evidence-based approach to assessing possible problem offences in order to identify sentencing problems	55
Assessing possible problem offences	55
Measures for assessing possible problem offences	55
Quantitative measures	59
Qualitative measures	59
Application of the measures	60
Offence characteristics	60
Indictable nature of the offence	61
Prevalence	62
A vulnerable victim	63
The offence is an 'aggravated' offence	63
Problem with sentencing: evidence of a lack of public confidence	63
Evidence from informed structured community consultation: jury sentencing studies	64
Evidence from informed structured community consultation: community attitudes to offence seriousness	64

Special risk of serious consequences to victims and the community and better understanding of such consequences	65
Parliament's view of offence seriousness	66
Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	66
Court of Appeal: current sentencing practices identified or viewed as inadequate but no change through current guidance mechanisms	68
Problem with sentencing: evidence of inconsistency of approach	70
Treatment of a category of offenders	72
Weight given to aggravating and mitigating factors	72
Categorisation of the objective offence seriousness of an offence	73
A global comparison of sentencing for possible problem offences	74
The Council's view: offences for which there is evidence of sentencing problems requiring guidance	77
Sexual offences	78
Offence characteristics	78
Problem with sentencing: evidence of a lack of public confidence in sentencing	79
Problem with sentencing: evidence of inconsistency in sentencing approach	86
What are the sentencing problems and what form of guidance is needed for sexual offences?	92
Serious injury offences	94
Offence characteristics	94
Problem with sentencing: evidence of a lack of public confidence in sentencing	95
Problem with sentencing: evidence of inconsistency in sentencing approach	100
What are the sentencing problems and what form of guidance is needed for serious injury offences?	103
Aggravated burglary	104
Offence characteristics	104
Problem with sentencing: evidence of a lack of public confidence in sentencing	104
Problem with sentencing: evidence of inconsistency in sentencing approach	107
What are the sentencing problems and what form of guidance is needed for the offence of aggravated burglary?	109
The Council's view: offences for which there is insufficient evidence of sentencing problems requiring guidance	110
Fatal offences	111
Offence characteristics	111
Problem with sentencing: evidence of a lack of public confidence in sentencing	111
Problem with sentencing: evidence of inconsistency in sentencing approach	113
Drug offences	115
Offence characteristics	115
Problem with sentencing: evidence of a lack of public confidence in sentencing	116
Problem with sentencing: evidence of inconsistency in sentencing approach	119
Other offences	122
Armed robbery	122
Perverting the course of justice	123
Other offences with a lack of sentencing data: road safety offences	124
What further evidence is needed?	126

Chapter 6: An enhanced guideline judgment scheme 129

Overview	130
Existing guideline judgment framework	130
Benefits of guideline judgments	131

Effect of guideline judgments on sentencing practices	134
Effect of guideline judgment on sentencing for prescribed concentration of alcohol offences	134
Effect of guideline judgment on sentencing for armed robbery	135
Benefits of an enhanced guideline judgment scheme	135
Current issues with guideline judgments	137
Limited use of guideline judgments in Australia	138
New South Wales	138
South Australia	139
Western Australia	140
Queensland	141
Victoria	142
Enhancing the Victorian guideline judgment scheme	144
Application procedures	145
Applications by the Attorney-General	145
Reforming Victorian guideline judgment application procedures	147
Applications by the Attorney-General	148
Decision to make an application	149
Role of the Attorney-General in guideline judgment proceedings	149
Reforms to procedure for submissions on a guideline judgment	151
Timing of submissions	151
Sufficient time for data analysis and public consultation	152
Numerical guidance	153
Numerical guidance and the High Court	153
Reforms to the content of a guideline judgment	155
Guidance on sentence levels and range	156
Limitations of the guideline judgment scheme	157
Chapter 7: A Victorian standard sentence scheme	159
Overview	160
Standard sentence schemes in other Australian jurisdictions	160
Standard non-parole period schemes	160
The standard non-parole period scheme in New South Wales	161
The defined term standard non-parole period scheme in the Northern Territory	162
The defined percentage standard non-parole period scheme in the Northern Territory	162
The defined percentage standard non-parole period scheme in South Australia	163
Recommended scheme in Queensland	163
Purposes of a standard sentence scheme	164
Stakeholders' views	164
Structure of a Victorian standard sentence scheme	165
Standard sentence scheme should be combined with guideline judgment reforms	165
Standard sentence, not standard non-parole period	165
Guidepost to objective offence seriousness	167
A guidepost, not a starting point	167
Applying the standard sentence	168
No minimum non-parole period	170
Criteria for including offences in the standard sentence scheme	171
Exclusions from the standard sentence scheme	172
Exclusion of summary jurisdictions	172
The Magistrates' Court	172
The Children's Court	172

Children sentenced in the higher courts	172
Young offenders	173
Current sentencing practices and the standard sentence scheme	174
Limitations of a standard sentence scheme model	175
Increased complexity	175
Limited evidence of effectiveness	176
Lack of transparency in identifying offences and levels	176
Difficulties in applying the standard sentence	176
Difficulty in applying standard sentences to 'complicity' cases	177
Difficulty in applying the standard sentences to different forms of charges	177
Aggregate sentencing and the standard sentence	178
Enhanced guideline judgment scheme in operation with a standard sentence scheme	178
Offences recommended for inclusion in the standard sentence scheme	179
Criteria for inclusion of offences in the standard sentence scheme	179
Stakeholders' views	180
The Council's view	180
Attempt, conspiracy, and incitement forms of offences	181
Applying the criteria to identify offences suitable for inclusion in the standard sentence scheme	182
Sexual offences	182
Serious injury offences and aggravated burglary	184
Methodology and recommended levels	184
Methodology for prescribing the standard sentence	184
Maximum penalty as the current guidepost to offence seriousness	184
Issues with using the maximum penalty as a starting point to prescribe a standard sentence	185
Identifying the range of objective offence seriousness with respect to the maximum penalty	186
Identifying the middle of the range	187
Community correction orders and the range of objective seriousness	187
Issues with identifying the current sentence imposed for an offence in the 'middle of the range of objective seriousness'	188
Middle of the range is not the median	189
Application of methodology for prescribing standard sentences for sexual offences	189
Rape	189
Offence characteristics	189
Standard sentence	189
Incest with child/step-child	189
Offence characteristics	189
Standard sentence	190
Incest with child/step-child (under 18) of de facto	190
Offence characteristics	190
Standard sentence	190
Sexual penetration with a child under 12	190
Offence characteristics	190
Standard sentence	190
Sexual penetration with a child 12–16 under care, supervision, or authority	191
Offence characteristics	191
Standard sentence	191
Sexual penetration with a child 12–16	191
Offence characteristics	191
Standard sentence	192

- Indecent act with a child under 16 192
 - Offence characteristics 192
 - Standard sentence 192
- Persistent sexual abuse of a child under 16 192
 - Offence characteristics 192
 - Standard sentence 193
- Standard sentence compared to current median 193
- Recommended levels for sexual offences 194
- Summary of criticisms of, and issues with, a standard sentence scheme model 194

Chapter 8: An aspirational model for a sentencing guidelines council 197

- Overview 198
- Guidance delivered by a sentencing council 198
- English model 199
 - The Sentencing Council 200
 - Previous sentencing bodies 200
 - England and Wales guidelines 201
 - Preparation and consultation 204
 - Evaluation of the English sentencing guidelines 205
 - Sentencing Council research 205
 - Academic analysis 207
 - Resourcing 208
- Scottish model 208
- New Zealand 210
- Sentencing council guidelines considered in other jurisdictions 211
- Sentencing council guidelines in Victoria 211
 - Obstacles to overcome 211
 - Stakeholders' views 212
- The Council's view: a dialogue model of sentencing guidance 213
 - Membership of a new guidelines council 213
 - Content and nature of guidelines 213
 - Initiation of guidelines 214
 - Development and consultation on guidelines 216
 - Other functions of the sentencing guidelines council 216
 - Constitutionality of sentencing council guidance 217
 - Sentencing guidelines council compatibility with separation of powers 219

Chapter 9: Other models of sentencing guidance considered by the Council 221

- Overview 222
- Changes to maximum penalties 222
 - Purposes of a maximum penalty 222
 - Reviews of maximum penalties in Victoria 222
 - Limited guidance provided by a change in maximum penalty 224
 - Stakeholders' views 224
 - The Council's view 225
- Mandatory and statutory minimum sentences 226
 - Mandatory sentencing schemes 226
 - Statutory minimum sentences 227
 - Concerns with mandatory and minimum sentencing 228
 - Stakeholders' views 229
 - The Council's view 231

Sentencing grids	231
United States federal scheme	232
United States state schemes	232
Key concerns about sentencing grids	233
Stakeholders' views	234
The Council's view	234
Guidance from juries	235
The role of the jury in sentencing	235
Recommendations for mercy or leniency	235
Special findings	236
New South Wales Law Reform Commission report on the role of juries	236
Community standards and expectations	237
Practical and procedural issues	238
Instruction on sentencing law	238
Timing of recommendation	239
Interplay when the case has a complex mix of counts	240
Compromise verdicts	240
Lack of jury consensus on the sentencing range	240
Divergence in sentencing practices	240
Jurors opposed to making sentence recommendations	241
Stakeholders' views	242
The Council's view	242

Chapter 10: Assessing and enhancing public confidence in the criminal justice system 245

Overview	246
Gauging informed public opinion on sentencing	246
Publication of sentencing remarks	247
Importance of public access to sentencing remarks	248
Publication furthers general deterrence	248
Publication of remarks and family violence	248
Use of plain language in sentencing remarks	249
Review of the Victorian sentencing framework	250
Stakeholders' views	250
The Council's view	251
Ongoing public education on sentencing	252
Education and public confidence in the criminal justice system	252
Education as a means of increasing public confidence	253
Opportunities to collaborate with criminal justice stakeholders	253

Appendices 255

Appendix 1: Consultation	256
Meetings/forums	256
Submissions	256
Appendix 2: Notes on methodology: quantitative data analysis	257
Distribution of sentences and comparison with maximum penalty	257
Immediate custodial sentence lengths over time	258
Measures of consistency	258
Appendix 3: Fatal offences data	259
Offence 1. Murder	259
Offence 2. Manslaughter	264
Offence 3. Culpable driving causing death	269

Appendix 4: Sexual offences data 274

- Offence 4. Rape 274
- Offence 5. Incest with child/step-child 280
- Offence 6. Incest with child/step-child (under 18) of de facto 286
- Offence 7. Sexual penetration with a child under 12 292
- Offence 8. Sexual penetration with a child 12–16 under care, supervision, or authority 298
- Offence 9. Sexual penetration with a child 12–16 304
- Offence 10. Indecent act with a child under 16 311
- Offence 11. Persistent sexual abuse of a child under 16 317

Appendix 5: Serious injury offences data 323

- Offence 12. Intentionally causing serious injury 323
- Offence 13. Recklessly causing serious injury 328
- Offence 14. Negligently causing serious injury 334

Appendix 6: Drug offences data 339

- Offence 15. Trafficking in a large commercial quantity of a drug of dependence 339
- Offence 16. Trafficking in a commercial quantity of a drug of dependence 344
- Offence 17. Cultivating a large commercial quantity of a narcotic plant 349
- Offence 18. Cultivating a commercial quantity of a narcotic plant 354
- Drug offences: sample case analysis 359

Appendix 7: Other offences data 363

- Offence 19. Armed robbery 363
- Offence 20. Aggravated burglary 368
- Offence 21. Perverting the course of justice 373
- Offences 22 & 23. Offences under section 61 of the *Road Safety Act 1986* (Vic) 378

Appendix 8: Magistrates' Court data 379

Appendix 9: Analysis of sentencing practices following inadequacy declaration 381

- Recklessly causing serious injury by glassing 381
- Confrontational aggravated burglary 385

References 387

Bibliography 387

Case law 395

Legislation and Bills 399

Quasi-legislative materials 400

Preface

The sentencing of criminal offenders in Victoria is a responsibility shared between parliament, the courts, and the executive government.

The framework for sentencing in Victoria is based on structured discretion: while parliament sets the limits within which judicial discretion may be exercised, the courts exercise that discretion in order to impose a just sentence that accounts for all of the particular circumstances of a given case, and is proportionate to the offender and his or her offending behaviour. This framework of structured discretion is considered essential, as often a single offence can encompass different levels of seriousness.

Sentencing guidance broadly refers to the principled considerations that a sentencing court may have regard to when exercising judicial discretion. This report sets out the Sentencing Advisory Council's ('the Council') views as to the appropriate balance that should be struck between the legislature and the courts in undertaking the difficult task of sentencing. The Council recognises parliament's central role in providing guidance to the courts, but also recognises that judicial discretion is necessary to avoid injustice. The Council's recommendations are intended to promote consistency of approach in sentencing that ensures both that like cases are treated alike and that the sentences imposed adequately reflect the objective seriousness of the offending behaviour.

The Council believes that there is no evidence to suggest that there are broad or systemic problems with the sentencing of all offences in Victoria. The vast majority of all sentences imposed are not subject to an appeal, and their imposition is both appropriate and unremarkable. However, the system is not perfect, and there are valid concerns regarding some aspects of sentencing, such as the sentencing standards for sexual offences, particularly sexual offences against children.

This report examines in detail two principal options for reform: an enhanced guideline judgment scheme and a standard sentence scheme. Neither form of guidance is intended to supplant the limits on judicial discretion determined by parliament and prescribed in legislation. Instead, these forms of guidance are intended to structure – or guide – the exercise of judicial discretion within those determined limits. The Council's preferred model is an enhanced guideline judgment scheme that will create an evolving, inclusive, evidence-based, and judge-led process that can respond to changing community attitudes and legislative reforms. If a standard sentence scheme is adopted, the Council recommends that it should be targeted at those offences for which there is evidence of significant problems that can be addressed by sentencing guidance, and that such a scheme should be combined with an enhanced guideline judgment scheme.

In responding to the terms of reference, the Council has formed its views using an evidence-based approach. The evidence to which the Council has had regard includes relevant qualitative research, quantitative analysis, and the commentary and feedback it has received in submissions and during consultations. The Council has also undertaken comprehensive analysis to identify those offences that have sentencing problems for which sentencing guidance is required. This analysis has then informed the Council's consideration of the most effective legislative mechanism to provide sentencing guidance.

The reforms to sentencing recommended in this report are intended to promote consistency of approach in sentencing, and promote public confidence in the criminal justice system. Many past changes have failed to do either. This report therefore calls for a number of other reforms that will make the Victorian sentencing system more consistent, clear, and coherent.

Warning to readers

This paper contains some subject matter that may be distressing to readers, including material concerning sexual offences.

People who have personal concerns about sexual assault can contact the Sexual Assault Crisis Line on 1800 806 292, or visit www.sacl.com.au for more information.

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Glossary

Aggregate sentence	A sentence that occurs when a judge hands down one sentence for multiple charges within a case, as opposed to individual sentences for individual charges within a case.
Baseline offence	An offence for which a baseline sentence has been prescribed under the <i>Sentencing Amendment (Baseline Sentences) Act 2014</i> (Vic).
Baseline sentence	The sentence that parliament intends as the median sentence for sentences imposed for the relevant baseline offence. The median sentence is the midpoint or middle sentence when all sentences imposed for an offence over a given period are ranked from lowest to highest – so that half of all sentences imposed are lower than the median and half are higher. See ‘median’.
Case	In this report, a collection of one or more proven charges against a person sentenced at the one hearing.
Charge	In this report, a single proven allegation of an offence.
Community-based order	A flexible, non-custodial sentence that includes community service, supervision, and personal development. This order was replaced from 16 January 2012 with the community correction order (CCO).
Community correction order (CCO)	A sentencing order available since 16 January 2012 that may require the offender to comply with a range of conditions including undertaking unpaid community work, undergoing treatment, and being supervised by a community corrections officer. A community correction order may also include curfews and restrictions on the offender's movements and whom the offender may associate with (<i>Sentencing Act 1991</i> (Vic) pt 3A).
Defendant	A person who is charged with a criminal offence.
Fine	A monetary penalty imposed by a court as a sentence.
Higher courts	In this report, the Victorian County Court and the Supreme Court of Victoria.

Indictable offence	A serious offence heard before a judge in a higher court. Some indictable offences may be triable summarily.
Interquartile range (IQR)	The middle 50% of all sentence lengths when ordered from shortest to longest, that is, all sentences greater than the shortest 25% of sentences and less than the longest 25%. The IQR is the difference between the third quartile of sentences (the value greater than 75% of sentences imposed) and the first quartile (the value greater than 25% of sentences imposed).
Jury	A group of people (usually 12) without legal experience, chosen at random from the general community. A jury is given the responsibility of determining questions of fact, based on evidence presented in criminal trials, for indictable offences in the higher courts and returning a verdict of guilty or not guilty.
Median	<p>The middle value in a set or a distribution of values. For example, in the following set of values:</p> <p>1, 2, 2, 3, 3, 4, 5, 5, 6, 6, 7</p> <p>4 is the median value. The median represents a statistical midpoint where half of the values (1, 2, 2, 3, 3) are below the median and half of the values (5, 5, 6, 6, 7) are above the median. If a set has an even number of values, the two middle values (sometimes defined as the lower median and the upper median) are averaged to find the median.</p>
Median absolute difference (MAD)	The median of all differences between sentences imposed and the overall median sentence length. The MAD range represents the middle 50% of sentences based on distance from the median. That is, 50% of sentences are within the MAD of the median sentence length, and 50% of sentences are more than the MAD from the median. Unlike the IQR, the range of sentence lengths represented by the MAD is always equal on both sides of the median.
Median total effective term of imprisonment	The middle value in a set of total effective sentences of imprisonment.
Non-parole period (NPP)	The period of imprisonment set by the court that must be served by the offender in prison before he or she is eligible for release on parole.
Offender	A person who has been found guilty of an offence.

Parole	Supervised and conditional release of an offender from prison before the end of his or her prison sentence. While on parole, the offender is still serving the sentence, and is subject to conditions designed to help him or her rehabilitate, reintegrate into the community, and reduce the risk of reoffending.
Summary offence	A less serious offence than an indictable offence. Summary offences are usually heard by a magistrate.
Suspended sentence	A term of imprisonment that is suspended (that is, not activated) wholly or in part for a specified period (the 'operational period'). If the offender reoffends during this period, they could be imprisoned for the total duration of the sentence. Suspended sentences have been abolished in the higher courts for all offences committed on or after 1 September 2013 and in the Magistrates' Court for all offences committed on or after 1 September 2014.
Total effective sentence (TES)	The product of individual sentences (and orders for cumulation or concurrency of those sentences) imposed on a person on the same occasion. In a case involving a single charge, the total effective sentence is the sentence imposed for that charge. The total effective sentence is also known as the 'head sentence'.
Triable summarily	Specific indictable offences that can be prosecuted in the Magistrates' Court of Victoria, subject to the consent of the accused and the magistrate.
Youth detention	In this report, youth justice centre orders and youth residential centre orders collectively.
Youth justice centre order (YJCO)	<p>A sentence requiring an offender aged 15–20 years at the time of sentencing to be detained in a youth justice centre.</p> <p>In the Children's Court, a youth justice centre order is the most severe sentence that may be imposed on an offender aged 15–20 years at the time of sentencing (under the <i>Children, Youth and Families Act 2005</i> (Vic)). The maximum length of detention is two years for a single offence or three years for more than one offence.</p> <p>In an adult court, offenders aged 15–20 years at the time of sentencing may be sentenced to a youth justice centre order as an alternative to imprisonment (under the <i>Sentencing Act 1991</i> (Vic) ss 7(1)(d), 32–35). A youth justice centre order may be imposed for a maximum of two years in the Magistrates' Court or three years in the County and Supreme Courts.</p>

Summary of recommendations

Recommendation 1: Repeal of the baseline sentencing provisions

The baseline sentencing provisions should be repealed in their entirety.

Recommendation 2: Offences with identified sentencing problems requiring guidance

From its analysis of quantitative and qualitative measures, the Sentencing Advisory Council has identified the following offences as having sentencing problems that require guidance:

Offence	Crimes Act 1958 (Vic)
Intentionally causing serious injury	s 16
Recklessly causing serious injury	s 17
Negligently causing serious injury	s 24
Rape	s 38
Incest with child/step-child	s 44(1)
Incest with child/step-child (under 18) of de facto	s 44(2)
Sexual penetration with a child under 12	s 45(2)(a)
Sexual penetration with a child 12–16 under care, supervision, or authority	s 45(2)(b)
Sexual penetration with a child 12–16	s 45(2)(c)
Indecent act with a child under 16	s 47
Persistent sexual abuse of a child under 16	s 47A
Aggravated burglary	s 77

Recommendation 3: An enhanced guideline judgment scheme

The existing guideline judgment scheme should be enhanced to provide the most appropriate form of sentencing guidance in order to:

- promote consistency of approach in sentencing offenders; and
- promote public confidence in the criminal justice system.

Recommendation 4: Attorney-General may apply for a guideline judgment

Part 2AA of the *Sentencing Act 1991* (Vic) should be amended to add provisions that allow the Attorney-General to apply for a guideline judgment, absent an appeal.

The procedure for an application by the Attorney-General should mirror, as far as is practicable, the existing provisions, and should provide for the following features:

- The Attorney-General may apply to the Court of Appeal for a guideline judgment if he or she considers that such an application is:
 - required in order to address a systemic issue; and
 - in the public interest.
- An application for a guideline judgment by the Attorney-General is not to be made in any proceedings before the Court of Appeal with respect to a particular offender.
- An application for a guideline judgment by the Attorney-General would enliven the existing provisions that require the Court of Appeal to notify and seek the views of the Sentencing Advisory Council and allow the Director of Public Prosecutions and Victoria Legal Aid to appear and make submissions.
- The Attorney-General may make submissions that include proposals on the form of guidelines.
- The Court of Appeal must consider an application for a guideline judgment by the Attorney-General and provide reasons if it declines the application.
- A guideline judgment delivered by the Court of Appeal in response to an application for a guideline judgment by the Attorney-General must be given separately from any proceedings before the court with respect to a particular offender.

Recommendation 5: Clarify procedure for submissions on a guideline judgment

Section 6AD of the *Sentencing Act 1991* (Vic) should be amended to clarify that the Court of Appeal must, when it is *considering* whether to give or review, or has decided to give or review, a guideline judgment (including an application for a guideline judgment from the Attorney-General):

- notify the Sentencing Advisory Council and consider its views stated in writing; and
- allow the Director of Public Prosecutions and Victoria Legal Aid an opportunity to appear and make submissions.

Such views and submissions may include proposals on the form of guidelines.

In specifying the period within which the Sentencing Advisory Council may state its views in writing, the Court of Appeal should allow such time as is reasonably required for the Council to undertake:

- research and statistical analysis; and
- consultation with stakeholders within the criminal justice system as well as the general public.

Recommendation 6: Guideline judgment may contain guidelines on sentencing level or range

Part 2AA of the *Sentencing Act 1991* (Vic) should be amended to provide that a guideline judgment may set out the appropriate level or range of sentences for a particular offence or class of offence and that it is the intention of parliament to abolish any rule of the common law to the contrary.

Recommendation 7: Legislated standard sentence scheme as part of a combined model for providing sentencing guidance

If a new legislated guidepost is to be introduced, it should be in the form of a standard sentence scheme accompanied by the enhanced guideline judgment scheme recommended by the Sentencing Advisory Council.

The standard sentence should:

- represent the sentence for an offence that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness;
- not be legislated as a starting point or a presumptive sentence, and its application should be consistent with the instinctive synthesis approach to sentencing in Victoria;
- be a matter to be taken into account by a court in determining the appropriate sentence for an offender; without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender; and
- only apply to those offences where a standard sentence is considered suitable according to the criteria recommended by the Sentencing Advisory Council.

Recommendation 8: Exclusions from the standard sentence scheme

If a standard sentence scheme is introduced, the standard sentence should not apply to the sentencing of:

- offences determined summarily;
- offenders under the age of 18 at the time of offending.

Recommendation 9: Court must disregard current sentencing practices where incompatible with standard sentence

If a standard sentence scheme is introduced, section 5(2)(b) of the *Sentencing Act 1991* (Vic) should be amended to provide that a court must have regard to current sentencing practices unless doing so would be incompatible with the standard sentence, where a standard sentence applies.

Recommendation 10: Guideline judgment may contain guidelines on any matter related to a standard sentence

If a standard sentence scheme is introduced, Part 2AA of the *Sentencing Act 1991* (Vic) should be amended to provide that a guideline judgment may set out guidelines in respect of any matter related to a standard sentence.

Recommendation 11: Criteria for inclusion of offences in the standard sentence scheme

If a standard sentence scheme is introduced, the following criteria should apply to assessing whether an offence with identified sentencing problems is suitable for inclusion in the standard sentence scheme:

1. There is evidence from structured community consultation that identifies community views on the objective seriousness of the offence.
2. The maximum penalty is not operating as a sufficient source of guidance to the community's and parliament's views of the objective seriousness of the offence (for example, the maximum penalty may have been overshadowed by current sentencing practices).
3. The offence is one where the objective offence seriousness can be readily identified for the offending behaviour represented by the offence (that is, there are not overlapping or multiple 'classes' of offending behaviour or 'typologies' of offending behaviour within the one offence).
4. A standard sentence would be effective in providing guidance on the middle of the range of objective seriousness for the particular offence.
5. The courts have identified that there is a special need for general deterrence.
6. If the above criteria are met, the following considerations may also be relevant:
 - a need to recognise the exceptional harm that the offence may cause;
 - the vulnerability of victims of the offence; and
 - any breach of trust or abuse of authority involved in the offence.

Recommendation 12: Offences with identified sentencing problems that are suitable for inclusion in the standard sentence scheme

If a standard sentence scheme is introduced, the following offences are suitable for inclusion in the scheme:

Offence	Crimes Act 1958 (Vic)
Rape	s 38
Incest with child/step-child	s 44(1)
Incest with child/step-child (under 18) of de facto	s 44(2)
Sexual penetration with a child under 12	s 45(2)(a)
Sexual penetration with a child 12–16 under care, supervision, or authority	s 45(2)(b)
Sexual penetration with a child 12–16	s 45(2)(c)
Indecent act with a child under 16	s 47
Persistent sexual abuse of a child under 16	s 47A

Recommendation 13: Methodology for prescribing standard sentence level

If a standard sentence scheme is introduced, the standard sentence level should be prescribed at 40% of the maximum penalty for the relevant offence.

Recommendation 14: Recommended standard sentence levels for offences suitable for inclusion within the standard sentence scheme

If a standard sentence scheme is introduced, the standard sentence levels should be prescribed as follows:

Offence	Maximum penalty	Standard sentence
Rape	25 years	10 years
Incest with child/step-child	25 years	10 years
Incest with child/step-child (under 18) of de facto	25 years	10 years
Sexual penetration with a child under 12	25 years	10 years
Sexual penetration with a child 12–16 under care, supervision, or authority	15 years	6 years
Sexual penetration with a child 12–16	10 years	4 years
Indecent act with a child under 16	10 years	4 years
Persistent sexual abuse of a child under 16	25 years	10 years

Recommendation 15: Recommendation against jury sentencing

Jury sentencing should not be introduced in Victoria.

Recommendation 16: Comprehensive research on informed public opinion regarding sentencing

The Attorney-General should consider commissioning comprehensive research to gauge informed public opinion regarding sentencing in Victoria with the aim of ensuring that future reform is appropriately evidence-based. The research could occur independently of the Sentencing Advisory Council, or through a sufficiently resourced reference to the Council.

Recommendation 17: Publication of sentencing remarks online

Victorian higher courts should publish online the sentencing remarks for every case, unless:

- the matter is subject to a suppression order; or
- in the opinion of the sentencing judge, publication of the sentencing remarks would be contrary to the interests of justice.

Sufficient resources should be made available to all higher courts in Victoria to enable publication of sentencing remarks to occur, including resources that would allow for the editing of sentencing remarks to comply with the requirements of the *Judicial Proceedings Reports Act 1958* (Vic).

Recommendation 18: Review of sentencing schemes within the *Sentencing Act 1991* (Vic)

The Attorney-General should consider reviewing, or requesting that the Sentencing Advisory Council review, the various sentencing schemes within the *Sentencing Act 1991* (Vic) with the aim of ensuring that there is a coherent and transparent sentencing framework in Victoria.

The review should consider whether there is evidence of the need to amend or repeal any of the sentencing schemes within the *Sentencing Act 1991* (Vic), including:

- the serious offender provisions;
- the continuing criminal enterprise offender provisions;
- statutory minimum sentences; and
- indefinite sentences.

Executive summary

Terms of reference

This report constitutes the Sentencing Advisory Council's response to a request from the Attorney-General, received by the Council on 24 November 2015, for advice on legislative mechanisms for sentencing guidance in Victoria.

The terms of reference require advice on the most effective legislative mechanism to provide sentencing guidance to courts in a way that:

- promotes consistency of approach in sentencing offenders; and
- promotes public confidence in the criminal justice system.

The Council has been invited to have regard to mechanisms in existence in other comparable jurisdictions and other sentencing advisory regimes that the Council considers appropriate.

The Council has been specifically asked to provide advice on:

- the type of sentencing guidance that should feature in a new sentencing scheme;
- the offences that should be subject to such a scheme; and
- the levels at which sentencing guidance should be set for such offences.

Context of the terms of reference

The request for advice arose in the context of the Court of Appeal's decision in *Director of Public Prosecutions v Walters (A Pseudonym)* [2015] VSCA 303 (17 November 2015), where a majority of the court held that the baseline sentencing provisions were 'incapable of being given any practical operation'.

The Council has considered the history and application of the baseline sentencing provisions. In accordance with the overwhelming majority of submissions and comments from stakeholders, the Council recommends that the baseline provisions be repealed in their entirety (**Recommendation I**).

Scope of the reference and the Council's approach

The Council has adopted a purposive approach to the terms of reference, based on answers to the following questions:

- What is the evidence for inconsistency of approach in sentencing in Victoria?
- What is the evidence for a lack of community confidence in the criminal justice system because of, or related to, sentencing in Victoria?

The Council has analysed sources of evidence for these two questions to the extent that those sources of evidence identify sentencing problems for particular offences. In examining different options for sentencing guidance, the Council has then considered the extent to which a method or mechanism addresses the problems identified.

The Council has taken a broad approach to identifying and consulting on the various methods of sentencing guidance that have been adopted or considered in a number of comparable jurisdictions.

Consultation and data analysis

The Council consulted with a number of criminal justice, governmental, and non-governmental stakeholders and held a discussion forum. The Council published a consultation paper in December 2015. It made a public call for submissions and received 16 written submissions.

The Council undertook comprehensive but targeted data analysis of sentencing practices from 1 July 2010 to 30 June 2015 for a number of offences identified as having possible sentencing problems.

Offences with sentencing problems requiring guidance

The Council has adopted a rigorous, evidence-based approach to the identification and assessment of offences that have sentencing problems that indicate a need for sentencing guidance. The evidence to which the Council has had regard includes relevant qualitative research, quantitative analysis, and feedback from submissions and consultations.

Evidence-based approach to the terms of reference

The following flowchart (p. xxv) documents the Council's evidence-based approach to examining whether there are offences with sentencing problems that demonstrate a need for sentencing guidance. It shows the Council's:

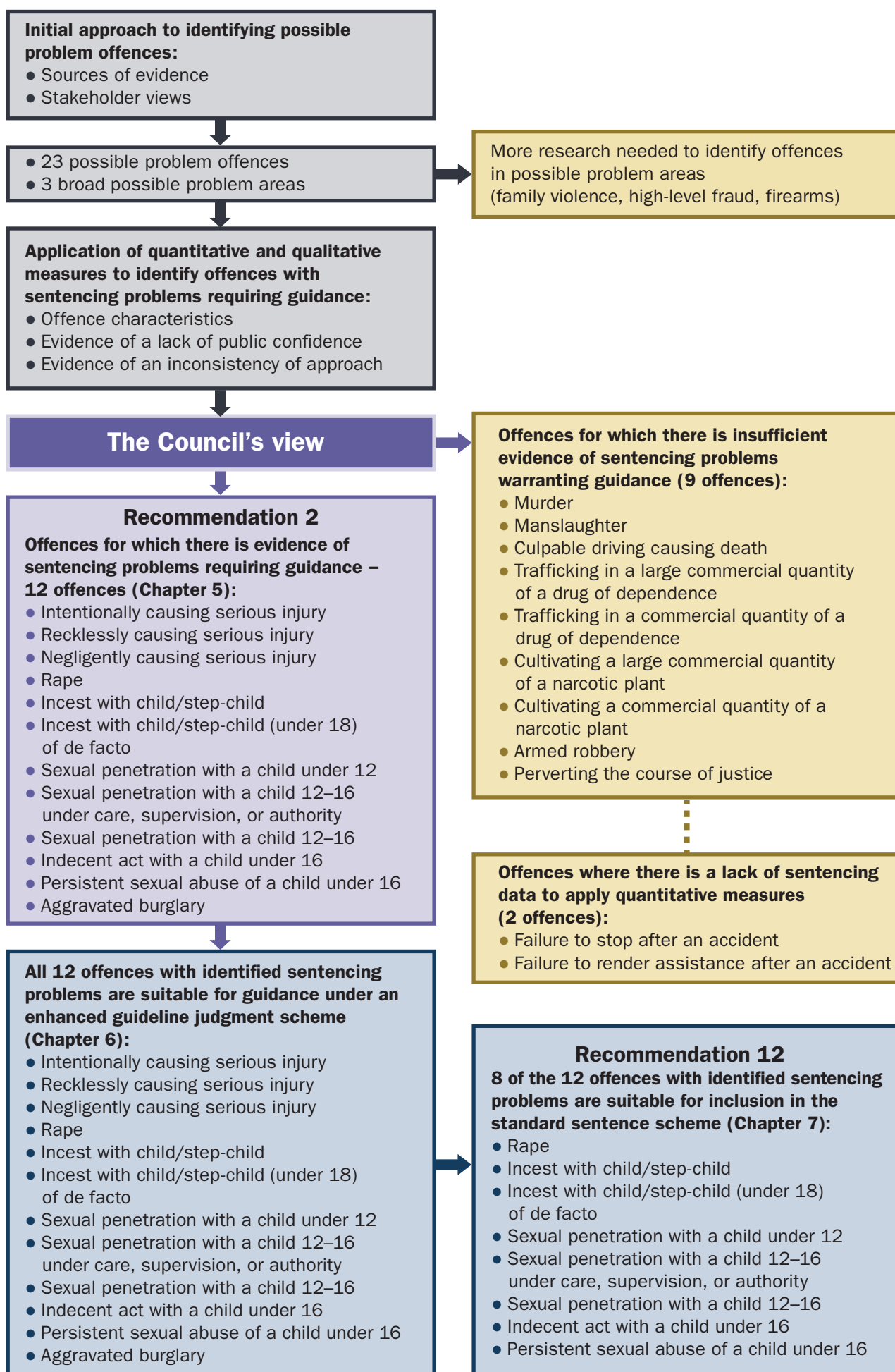
- initial approach to identifying possible problem offences;
- measures for assessing possible problem offences to identify sentencing problems;
- recommendation on the offences for which there is evidence of sentencing problems requiring guidance;
- views on offences for which there is insufficient evidence of sentencing problems requiring guidance (and offences for which there is a lack of sentencing data to apply quantitative measures); and
- views on which of the offences with identified sentencing problems are suitable for inclusion in an enhanced guideline judgment scheme (the Council's preferred model), and which offences with identified sentencing problems are suitable for inclusion in a standard sentence scheme, were it to be introduced.

Initial approach to identifying possible problem offences

The first step that the Council took was to develop a set of initial measures and sources of evidence for identifying possible problem offences. The Council identified the kind of sentencing problems that may indicate a need for guidance to achieve the objectives in the terms of reference. The Council also mapped out the sources of evidence that, if sufficient, may assist in identifying these problems and may justify the inclusion of problem offences in a legislative guidance scheme.

Further, the Council included all of the offences identified by stakeholders as having problems in sentencing, or where guidance on sentencing might be required to promote consistency of approach, or public confidence in the criminal justice system.

Application of these initial measures and considerations resulted in 23 possible problem offences, including three fatal offences, eight sexual offences, three serious injury offences, four drug offences, and five offences in another category. These initial measures also identified several problem areas, relating to more than one offence.



Application of quantitative and qualitative measures to identify problem offences

The Council developed a set of measures to assess critically each of the possible problem offences. These measures were examined under three dimensions, each involving a set of considerations as follows.

1. Offence characteristics, including whether:
 - the offence is an indictable offence and the extent to which the offence is 'prevalent';
 - the objective elements of the offence involve a vulnerable victim; and
 - the offence is an 'aggravated offence'.
2. Problem with sentencing – evidence of a lack of public confidence in sentencing, including:
 - evidence from informed and structured consultation of community views on sentencing/seriousness of the offence;
 - the offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences;
 - parliament's view of offence seriousness;
 - a disparity between current sentencing practices and the community's and parliament's views of offence seriousness;
 - the Court of Appeal's declaration that current sentencing practices for the offence are inadequate or its questioning of the adequacy of current sentencing practices; and
 - no evidence of change in current sentencing practices following the Court of Appeal's declaration of inadequacy or questions as to adequacy.
3. Problem with sentencing – evidence of an inconsistency of approach, including:
 - the treatment of a category of offenders within an offence category;
 - the weight given to aggravating and mitigating factors; and
 - the categorisation of the objective seriousness of an offence.

Offences for which there is evidence of sentencing problems requiring guidance

Using quantitative and qualitative measures, the Council's principled approach to assessing possible problem offences supports the identification of 12 offences where there is evidence of sentencing problems that warrant guidance (**Recommendation 2**):

Offence	Legislation
Intentionally causing serious injury	<i>Crimes Act 1958</i> (Vic) s 16
Recklessly causing serious injury	<i>Crimes Act 1958</i> (Vic) s 17
Negligently causing serious injury	<i>Crimes Act 1958</i> (Vic) s 24
Rape	<i>Crimes Act 1958</i> (Vic) s 38
Incest with child/step-child	<i>Crimes Act 1958</i> (Vic) s 44(1)
Incest with child/step-child (under 18) of de facto	<i>Crimes Act 1958</i> (Vic) s 44(2)
Sexual penetration with a child under 12	<i>Crimes Act 1958</i> (Vic) s 45(2)(a)
Sexual penetration with a child 12–16 under care, supervision, or authority	<i>Crimes Act 1958</i> (Vic) s 45(2)(b)
Sexual penetration with a child 12–16	<i>Crimes Act 1958</i> (Vic) s 45(2)(c)
Indecent act with a child under 16	<i>Crimes Act 1958</i> (Vic) s 47
Persistent sexual abuse of a child under 16	<i>Crimes Act 1958</i> (Vic) s 47A
Aggravated burglary	<i>Crimes Act 1958</i> (Vic) s 77

Limitations of the Council's analysis

The Council's conclusions from identifying offences for which sentencing guidance is required are based on the available data and the extent to which analysis could be conducted within the timeframe of the reference. These conclusions do not preclude further analysis that may identify other offences for which sentencing guidance may be required. The development of a broader evidence base of informed community opinion on sentencing in Victoria (see **Recommendation 16**) is likely to provide further insight into whether other offences may have sentencing problems that warrant guidance.

An enhanced guideline judgment scheme

The Council considers that sentencing guidance is best provided by the courts, and that guideline judgments are the most influential and persuasive form of sentencing guidance. The Council is of the view that guideline judgments have the best capacity to address the issues identified in its analysis of offences with sentencing problems (**Recommendation 3**). The Council also considers that guideline judgments can address sentencing concerns that are broader than concerns regarding a particular offence, such as sentencing for family violence offences. The Victorian guideline judgment scheme, however, is currently underutilised.

Drawing on lessons from other jurisdictions and examining the current provisions, the Council has identified three key areas of reform:

- facilitating more applications for guideline judgments by allowing for applications by the Attorney-General;
- clarifying how submissions are made on the decision to make a guideline judgment; and
- allowing guideline judgments to include numerical guidance.

Application for guideline judgment by the Attorney-General

The Council considers that, in addition to the existing provisions that allow a party to an appeal to apply for a guideline judgment, the Attorney-General should have the power to apply for a guideline judgment, absent a sentencing appeal. This would provide opportunities for guideline judgments to be given without the current reliance on an appropriate appellate 'vehicle' (**Recommendation 4**). Further, the Attorney-General could apply for guidance on matters that do not frequently reach the Court of Appeal, including matters commonly sentenced in the summary jurisdiction.

There is support for this proposal among a range of stakeholders.

The Council considers that an application from the Attorney-General would only be made where the Attorney-General considered that there was a systemic sentencing issue and that an application would be in the public interest. Experiences in other jurisdictions indicate that this power would be used infrequently, but appropriately, and could address those circumstances where, for example, the Court of Appeal itself identified a sentencing problem, but the Director of Public Prosecutions was not afforded the opportunity to seek guidance from the Court of Appeal given the absence of a suitable appeal.

Such applications and the associated guideline judgment would be separate from any proceedings before the Court of Appeal. The Court of Appeal would be required to consider an application by the Attorney-General, but it would not be required to give a guideline judgment. The Court of Appeal would also be required to provide reasons for any decision not to give a guideline judgment.

Clarified submissions procedure

A strict interpretation of the requirements of section 6AD of the *Sentencing Act 1991* (Vic) suggests that the Court of Appeal should seek the views of the Council and submissions from the parties only after it has decided to give or review a guideline judgment.

The Council considers that the language in that section should be amended to reflect the Court of Appeal's preferred procedure, whereby the Court of Appeal properly seeks the views and submissions of the parties when *considering* whether to give a guideline judgment, rather than after it has decided to give a guideline judgment (**Recommendation 5**).

In accordance with similar provisions in other jurisdictions, the Council believes that the parties to the proceedings should be able to make submissions on the proposed form of guidelines. This should also include submissions from the Attorney-General where guideline judgment proceedings are commenced by an application from the Attorney-General (**Recommendation 5**).

Further, the Council believes that public consultation is an important aspect of guideline judgments, and recommends that the Court of Appeal allow sufficient time for the necessary data analysis and consultation to take place when seeking the Council's views as part of guideline judgment procedures (**Recommendation 5**).

Numerical guidance

The Council believes that the current absence of an express power for the Court of Appeal to give numerical guidance on the appropriate sentencing level or range is an unnecessary restriction on the court's power to give a guideline judgment.

In practice, this restriction means that, for example, challenges to the current sentencing practices for particular offences are not conducted within the framework of a guideline judgment. As a result, the guidance provided by the Court of Appeal in such cases is necessarily confined, primarily consisting of a declaration that prior current sentencing practices are inadequate, with limited guidance on what would represent adequate sentencing practices.

The Council proposes that the provisions for guideline judgments should expressly provide for the content of a guideline judgment to include numerical guidance (**Recommendation 6**). Given the uncertainty around numerical guidance raised by the High Court, the Council recommends that parliament should also express its intention to abolish in the legislation any common law to the contrary (**Recommendation 6**).

A Victorian standard sentence scheme

A standard sentence scheme is not the Council's preferred model of sentencing guidance. Nevertheless, the Council has made contingent recommendations in relation to the model, the offences to which the scheme should apply, and the levels at which standard sentences should be prescribed, if a standard sentence scheme were to be introduced.

If the government is minded to introduce a standard sentence scheme, the Council considers that the scheme should be in the Council's recommended form and should apply only to offences that the Council considers suitable for the scheme. Further, the Council is of the view that a standard sentence scheme cannot, on its own, provide appropriate sentencing guidance for all of the offences identified as having sentencing problems.

Given the particular limitations of a standard sentence, the Council considers that its recommendations for an enhanced guideline judgment scheme are both necessary to assist in the functioning of the standard sentence scheme and in order to provide guidance on offences that are properly excluded from the scheme (**Recommendation 7**).

Model for a standard sentence

The Council considers that the standard sentence should properly relate to fixing the sentence on a charge, rather than the non-parole period for a case. This would preserve both Victoria's approach to fixing a single non-parole period that relates to a case as a whole and the purposes of the non-parole period.

The standard sentence should represent a new guidepost to objective offence seriousness, adopting the language of the New South Wales' standard non-parole period scheme. The High Court in *Muldrock v The Queen* (2011) 244 CLR 120 ('*Muldrock*') considered that this scheme preserved the instinctive synthesis approach to sentencing (**Recommendation 7**).

There was strong support in submissions for retaining the instinctive synthesis approach, which allows for a sentencing court to properly consider all of the relevant facts and circumstances in a case when exercising judicial discretion. Accordingly, the Council considers that the standard sentence should be a matter to be taken into account by a court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required or permitted to be taken into account (**Recommendation 7**).

Consistent with the common law as stated in the High Court's decision in *Muldrock*, the standard sentence should represent the sentence for an offence that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness. The Council adopts language that hews closely to the New South Wales sentencing provisions that define a standard non-parole period in order to ensure that the standard sentence represents a similar legislated guidepost to objective offence seriousness.

The Council does not consider it appropriate for the standard sentence scheme to include a minimum non-parole period, given that the operation of the scheme is premised on the preservation of judicial discretion. A recent Council report on the imposition of non-parole periods in Victoria shows no evidence of any issues with the way in which Victorian courts fix non-parole periods. Further, to require a minimum proportion non-parole period would conflate two models of sentencing guidance – namely a defined term and a defined percentage scheme.

Exclusions from the standard sentence scheme

The Council considers that the standard sentence scheme should not apply to matters heard and determined summarily in the Magistrates' Court (**Recommendation 8**).

Further, given the different approach to sentencing children in Victoria, the Council recommends that the sentencing of all offenders under the age of 18 at the time of offending should be expressly excluded from the operation of the scheme (**Recommendation 8**), regardless of whether or not those offenders are sentenced in the Children's Court or in the higher courts. The Council considers that the particular vulnerability and needs of children constitute more than just mitigating factors to be taken into account by a court when sentencing, and the distinct and different approach to sentencing children warrants their exclusion from the scheme.

The Council has not expressly excluded from the standard sentence scheme the sentencing of young offenders aged over 18 who are considered eligible for a youth justice centre order. The standard sentence represents a guidepost to objective offence seriousness only, and it does not account for any aggravating or mitigating factors that relate to the offender. As a result, the Council considers that a court's proper regard to the standard sentence, alongside all of the circumstances of the case, would not exclude the imposition of such a sentence in appropriate cases.

Standard sentence taking precedence over current sentencing practices

The Council considers that, where a standard sentence applies to an offence, the standard sentence should operate as the new guidepost to objective offence seriousness. Accordingly, the Council recommends that the standard sentence should take precedence, and a court should disregard current sentencing practices to the extent that current sentencing practices are incompatible with the standard sentence (**Recommendation 9**).

Guidance on a standard sentence scheme

The Council considers that, if a standard sentence scheme is introduced in Victoria, the guideline judgment scheme should be amended to provide the express power for the Court of Appeal to give a guideline judgment in relation to any aspect of this scheme (**Recommendation 10**).

Criteria for inclusion of offences in the standard sentence scheme

The Council is of the view that only certain offences would benefit from a further legislative guidepost. This is because not all offences have the same identified problems with regard to sentencing.

In particular, offences that include 'categories' of offence typologies, or differing forms of culpability, would not be assisted by a single legislated guidepost. Such a guidepost is unlikely to be of meaningful assistance to a court tasked with sentencing very different forms of offending that fall under a single offence.

The Council is of the view that any standard sentence scheme should only apply to those offences where a standard sentence is considered appropriate according to the Council's recommended criteria (**Recommendation 11**). Those criteria are:

1. There is evidence from structured community consultation that identifies community views on the objective seriousness of the offence.
2. The maximum penalty is not operating as a sufficient source of guidance to the community's and parliament's views of the objective seriousness of the offence (for example, the maximum penalty may have been overshadowed by current sentencing practices).
3. The offence is one where the objective offence seriousness can be readily identified for the offending behaviour represented by the offence (that is, there are not overlapping or multiple 'classes' of offending behaviour or 'typologies' of offending behaviour within the one offence).
4. A standard sentence would be effective in providing guidance on the middle of the range of objective seriousness for the particular offence.
5. The courts have identified a special need for general deterrence.
6. If the above criteria are met, the following considerations may also be relevant:
 - a need to recognise the exceptional harm that the offence may cause;
 - the vulnerability of victims of the offence; and
 - any breach of trust or abuse of authority involved in the offence.

Offences suitable for inclusion within the standard sentence scheme

In applying these criteria, the Council has concluded that, of the offences with identified sentencing problems requiring guidance, the following offences are suitable for inclusion within the standard sentence scheme (**Recommendation 12**):

- rape;
- incest with child/step-child;
- incest with child/step-child (under 18) of de facto;
- sexual penetration with a child under 12;
- sexual penetration with a child 12–16 under care, supervision, or authority;
- sexual penetration with a child 12–16;
- indecent act with a child under 16; and
- persistent sexual abuse of a child under 16.

The Council considers that the remaining offences (which it regards as unsuitable for a standard sentence) with identified sentencing problems requiring guidance are best addressed through the provision of a guideline judgment under the enhanced guideline judgment scheme. These offences are:

- intentionally causing serious injury;
- recklessly causing serious injury;
- negligently causing serious injury; and
- aggravated burglary.

Methodology for prescribing a standard sentence

The Council has developed a framework for prescribing the standard sentence drawing on the methodology adopted in New South Wales for prescribing standard non-parole periods. However, the Council's framework is intended to be a more transparent approach than that in New South Wales, based on a consistent relationship between the standard sentence and the maximum penalty.

The Council has adopted the maximum penalty as a starting point to prescribing the standard sentence, given that the maximum penalty is the current guidepost to parliament's view of the gravity of an offence. This approach necessarily assumes that the current maximum penalties, including relativities between offences, are appropriate. The scope of this reference has not allowed the Council to consider the broader question raised by this assumption.

The Council considers that the *objective* range of seriousness for an offence is represented by the first 80% of the maximum penalty. This is because a proportion of the maximum penalty (at the top end of the range) must allow for the sentencing of the worst cases involving the worst offenders, which necessarily includes both objective and subjective factors. The Council has reserved 20% of the maximum penalty for this purpose.

Having identified the range of objective offence seriousness as representing 80% of the maximum penalty, the Council concludes that the middle of that range equals 40% of the maximum penalty. The Council therefore recommends that the standard sentence should be prescribed at 40% of the maximum penalty for the relevant offence (**Recommendation 13**).

Recommended standard sentences

The Council has applied its methodology in setting a standard sentence for the offences that it has identified as:

- having sentencing problems that warrant guidance; and
- suitable for inclusion within the standard sentence scheme.

The Council recommends the following standard sentence levels (**Recommendation 14**):

Offence	Maximum penalty	Standard sentence
Rape	25 years	10 years
Incest with child/step child	25 years	10 years
Incest with child/step-child (under 18) of de facto	25 years	10 years
Sexual penetration with a child under 12	25 years	10 years
Sexual penetration with a child 12–16 under care, supervision, or authority	15 years	6 years
Sexual penetration with a child 12–16	10 years	4 years
Indecent act with a child under 16	10 years	4 years
Persistent sexual abuse of a child under 16	25 years	10 years

Limitations and criticisms of a standard sentence scheme

The Council has identified a number of limitations with legislated guidepost schemes, including the proposed standard sentence scheme. The limitations include:

- lack of transparency in identifying offences and levels;
- increased complexity of sentencing;
- limited evidence of effectiveness; and
- difficulty in applying the standard sentence in a range of circumstances.

The Council has attempted to address the first of these criticisms by articulating a principled approach to the inclusion of offences within the scheme and a clear methodology for setting the standard sentence. However, some of the limitations remain.

The Council notes, in particular, that applying a legislated guidepost in the form of a standard sentence is problematic in some circumstances, for example, when the court is considering offending by an offender other than a principal offender in the first degree (such as offending by a co-offender who is ‘involved in the commission of an offence’). Similarly, having regard to the standard sentence is problematic when sentencing charges (such as rolled-up, representative, or ‘course of conduct’ charges) that represent multiple incidences of offending, rather than a single event. Finally, a standard sentence may be of limited guidance when a court is considering the imposition of an aggregate sentence, which encompasses multiple instances of offending across different charges (although aggregate sentences are less common in the higher courts).

An aspirational model for sentencing council guidelines

Sentencing guidelines prepared by a judge-led body, separate from the legislature and the judiciary, can provide a comprehensive, methodical, and independent framework to guide sentencing courts. A well-resourced sentencing guidelines council can also undertake significant public consultation and sentence monitoring functions. The combination of these responsibilities has the effect of encouraging consistency through clearly articulated principles and a structured sentencing framework, as well as promoting public confidence in the criminal justice system through education, engagement, and transparency.

Based on comprehensive analysis of sentencing councils in other jurisdictions, the Council believes that guidelines delivered by a judge-led sentencing council could address all of the sentencing problems identified in this report. Guidelines delivered by a sentencing council could also resolve some of the issues identified with the Council's other recommended guidance options.

The Council, however, recognises that guidelines delivered by a sentencing council represent a significant departure from the current sentencing framework in Victoria and the proposal requires further development. There are significant obstacles to overcome before a sentencing guidelines council could be introduced in Victoria, including:

- the significant resources and investment required to develop systematic guidelines;
- the significant amount of time that the preparation and consultation on guidelines take – this may be particularly lengthy given the novelty and utility of this type of guidance in Australia; and
- the success of this model being reliant on judicial ownership and leadership of the process.

Nevertheless, the Council considers that a judge-led sentencing guidelines council ought to be given consideration in the future, particularly after the Council's recommended reforms have been implemented and evaluated. A 'dialogue' model of sentencing guidance, similar to that in Scotland, is the Council's preferred model on the available evidence, as it preserves the primacy of the Court of Appeal as a source of sentencing guidance, but it enables research, consultation, and resourcing issues to be dealt with externally.

Other models of guidance considered by the Council

In accordance with its broad, purposive approach, the Council has considered a number of other legislative mechanisms that may provide sentencing guidance, including:

- changes to maximum penalties;
- mandatory and statutory minimum sentences;
- sentencing grids; and
- jury sentencing.

Based on its analysis of the available data within the timeframe of the reference, the Council considers that there is not sufficient evidence to suggest that there is a need to amend the maximum penalties for any of the offences that it has identified as having sentencing problems that require sentencing guidance.

The Council considers that mandatory and statutory minimum sentences do not constitute a form of sentencing guidance and instead would simply limit the necessary exercise of judicial discretion. In accordance with both the available research and the majority of stakeholders, the Council's view is that mandatory and statutory minimum sentences are not compatible with the framework for sentencing in Victoria, which is based on structured discretion, and their introduction or expansion would result in a grave risk of injustice.

The Council also considers that sentencing grids represent a more structured form of mandatory sentencing, rather than a structured form of sentencing guidance, and that they are not appropriate in the Victorian context. This is in accordance with all of the stakeholders who made submissions addressing this form of sentencing.

Recommendation against jury sentencing

Given that a trial of jury sentencing has been proposed, the Council has given extensive consideration to jury sentencing as a model of sentencing guidance.

Jury sentencing would only affect the very small proportion of matters sentenced in the higher courts after a jury trial, given that the majority of offenders sentenced in the higher courts plead guilty.

There are a number of other compelling reasons, however, to recommend against involving jury members in the sentencing process. Research suggests:

- it gives rise to serious natural justice considerations;
- it is unlikely to produce any positive effects on sentencing or public confidence; and
- the practical and procedural difficulties in implementing jury sentencing are significant, including:
 - instruction on sentencing law;
 - the timing of the jury's recommendation on sentence;
 - the complex mix of counts;
 - compromised verdicts;
 - a lack of jury consensus;
 - divergence in sentencing practices; and
 - jury opposition to giving a recommendation on sentence.

All of the stakeholders who commented on jury sentencing recommended against its introduction. The Council agrees with both the research and stakeholders' views and recommends against the introduction of jury sentencing in Victoria (**Recommendation 15**).

Assessing and enhancing public confidence

The Council considers that gauging informed public opinion, adopting further measures to improve transparency in sentencing, and continuing public education on sentencing issues represent interrelated mechanisms that are likely to promote public confidence in the criminal justice system.

Gauging informed public opinion and confidence

The Council notes that a number of studies (including the Tasmanian Jury Sentencing Study and the Victorian Jury Sentencing Study) show that members of the public are far more likely to consider a sentence as appropriate when they:

- have been provided with all of the facts and circumstances of a particular case; and
- understand all of the considerations that have been made by the sentencing judge.

The Council considers that gauging informed public opinion on sentencing (as part of its statutory function) is an essential part of promoting public confidence in sentencing. Such research is resource intensive and requires sufficient time (often several years) to collect representative samples and analyse data. Nevertheless, the value of such work – to the courts, to government, to policy makers,

and to members of the public – cannot be overstated. The Council believes that government should consider opportunities for initiating or promoting such studies, either independently of the Council or through a reference to the Council (**Recommendation 16**).

In considering the ways in which matters related to sentencing might promote public confidence in the criminal justice system, the Council has made two additional recommendations, based on the critical need for transparency in sentencing.

Publication of sentencing remarks

The Council considers that a judge's reasons for sentence ('sentencing remarks') are one of the key, primary sources of transparency in the criminal justice system. Sentencing remarks assist in communicating sentencing considerations, processes, and judicial reasoning to all interested parties, and their free availability can encourage accurate media coverage of sentencing decisions. Given that neither a court nor a judicial officer can provide public comment on a particular case, sentencing remarks represent one of the few avenues for countering public misunderstanding and, sometimes, deliberate misinformation regarding a judge's decision in a particular case.

While acknowledging the resourcing implications, the Council recommends that, by default, the higher courts in Victoria should publish the sentencing remarks for a case, unless the matter is subject to a suppression order or the sentencing judge believes that publication would be contrary to the interests of justice (**Recommendation 17**).

Review of sentencing schemes

The scope of this reference has not afforded the Council the time to separately analyse components of the sentencing framework in Victoria and gather evidence on how each component contributes to or derogates from:

- consistency of approach in sentencing offenders; and
- public confidence in the criminal justice system.

The Council considers, however, that the layering of different schema into the *Sentencing Act 1991* (Vic) over time (and on an ad hoc basis) has had the inevitable result of increasing the complexity of the sentencing task. Any increase in the complexity of sentencing is likely to contribute to inconsistency in the approach to sentencing and a lack of community confidence in the criminal justice system, given that complexity generates a lack of transparency and clarity around the sentencing exercise.

As a consequence, the Council recommends that the Attorney-General should consider reviewing, or requesting that the Council review, the various sentencing schemes within the *Sentencing Act 1991* (Vic) with the aim of ensuring that there is a coherent and transparent sentencing framework in Victoria (**Recommendation 18**).

Ongoing sentencing education to promote public confidence

Finally, while educating the public on sentencing issues remains a key focus of the Council's work, it is necessarily limited by the Council's available resources and the competing demands for those resources in fulfilling the Council's statutory functions. To that end, the Council welcomes the participation of all key stakeholders in the criminal justice system, and their contributions to the educational work of the Council.

Chapter 1:

Introduction to the sentencing guidance reference



Structure of this report

- I.1 This report constitutes the Council's advice to the Attorney-General in response to the terms of reference received on 24 November 2015.
- I.2 In addition to this introductory chapter, the Council's advice is structured as follows:
- Chapter 2 describes the existing sentencing framework in Victoria;
 - Chapter 3 examines sentencing guidance and describes the existing sources of sentencing guidance in Victoria;
 - Chapter 4 examines the baseline sentencing scheme and contains a recommendation for its repeal;
 - Chapter 5 examines the available evidence on whether there are sentencing problems with particular offences and identifies offences that, the Council believes, require sentencing guidance;
 - Chapter 6 examines guideline judgment schemes and contains recommendations for an enhanced Victorian guideline judgment scheme;
 - Chapter 7 examines sentencing guidance schemes that take the form of a legislative guidepost and contains contingent recommendations on a new standard sentence scheme for Victoria;
 - Chapter 8 examines sentencing guidelines councils and describes why the Council believes an aspirational model for sentencing guidance, in the form of a judge-led sentencing guidelines council, should be given further consideration;
 - Chapter 9 examines other models (and other mechanisms) of sentencing guidance that have been considered by the Council and contains a recommendation against the introduction of jury sentencing in Victoria; and
 - Chapter 10 examines the ways in which public confidence in the criminal justice system in relation to sentencing may be assessed and enhanced; the chapter contains recommendations with regard to further research on gauging informed public opinion, the publication of sentencing remarks, and a review of the sentencing schemes under the *Sentencing Act 1991* (Vic).
- I.3 This report also includes a number of appendices containing data that has formed part of the Council's examination (in Chapter 5) of the evidence used to identify offences with sentencing problems.

Background to the terms of reference

- I.4 On 17 November 2015, the Court of Appeal handed down its decision in the case of *Director of Public Prosecutions v Walters (A Pseudonym)*¹ – an appeal by the Director of Public Prosecutions that concerned the first sentence imposed under the provisions introduced into the *Sentencing Act 1991* (Vic) by the *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic).
- I.5 A majority of the court held that these provisions were ‘incapable of being given any practical operation’² and that the baseline sentencing scheme was ‘incurably defective’.³

1. *Director of Public Prosecutions v Walters (A Pseudonym)* [2015] VSCA 303 (17 November 2015).

2. *Director of Public Prosecutions v Walters (A Pseudonym)* [2015] VSCA 303 (17 November 2015) [9].

3. *Director of Public Prosecutions v Walters (A Pseudonym)* [2015] VSCA 303 (17 November 2015) [10].

- I.6 In the Second Reading Speech for the Bill introducing the baseline sentencing provisions, the then Attorney-General stated that the provisions were intended to:
- give Parliament on behalf of the community a far greater say in the overall level of sentences that are imposed in our courts, while still allowing the courts to take into account the facts of individual cases in determining the sentence for each case.⁴
- I.7 Despite the Court of Appeal's decision that the scheme could not be given any practical operation, the intent behind the scheme highlights what is both a long-standing goal and a long-standing tension in sentencing law: balancing prescription with discretion.
- I.8 On the one hand, sentencing courts are bound by parliament, which, acting on behalf of the community, sets limits on the court's discretion and which, through the setting of maximum penalties, indicates the seriousness with which the community considers offences, both individually and relative to one another. On the other hand, sentencing courts require the discretion necessary to differentiate between offenders and impose sentences that are proportionate to the offending and to the offenders' personal circumstances.
- I.9 Sentencing guidance, in one form or another, is intended to assist a court in its measured application of these and other principles to the sentencing process, in order to avoid inconsistency or, similarly, inappropriate consistency and therefore injustice.

Terms of reference

- I.10 On 24 November 2015, the Attorney-General wrote to the Council asking it to advise him on the most effective legislative mechanism to provide sentencing guidance to the courts in a way that:
- promotes consistency of approach in sentencing offenders; and
 - promotes public confidence in the criminal justice system.
- I.11 The Council was asked to 'have regard to mechanisms in existence in other comparable jurisdictions and other sentencing advisory regimes the Council considers appropriate to examine'.
- I.12 In preparing its report and recommendations, the Council was also asked to advise the Attorney-General on:
- the type of sentencing guidance that should feature in a new sentencing scheme;
 - the offences that should be subject to such a scheme; and
 - the levels at which sentencing guidance should be set for such offences.
- I.13 The Council was required to report to the Attorney-General no later than 15 April 2016.

Scope of the reference and the Council's approach

- I.14 In accordance with the terms of reference, and as a foundation to developing its recommendations, the Council has examined whether there is evidence of:
- inconsistency of approach in sentencing offenders in Victoria; and/or
 - a lack of public confidence in the criminal justice system either independently of or as a result of that inconsistency.
- I.15 The results of this inquiry form the basis of the Council's identification of offences that require sentencing guidance (see Chapter 5).

4. Victoria, 'Sentencing Amendment (Baseline Sentences) Bill 2014', *Parliamentary Debates*, Legislative Assembly, 3 April 2014, 1275 (Robert Clark, Attorney-General).

Consistency of approach in sentencing

- I.16 The Council considers that 'consistency of approach' in sentencing does not simply mean consistent sentencing *outcomes*. Some stakeholders considered that there was too much unjustified or inappropriate consistency in the sentencing outcomes for some offences, based on courts' adherence to current sentencing practices above other sentencing considerations.⁵
- I.17 Consistency of approach, however, is related to the adequacy of sentencing outcomes for particular offences, on the basis that an inconsistent approach by a court to assessing offence seriousness (including relative offence seriousness) may result in inadequate sentences.⁶ This inadequacy may be evidenced by current sentencing practices that do not reflect the seriousness indicated by the maximum penalty (and where such inadequacy has been commented on by the Court of Appeal).
- I.18 A number of stakeholders questioned the premise for the terms of reference in relation to consistency of approach on the basis that stakeholders did not consider that there was sufficient evidence to demonstrate inconsistency of approach in sentencing in Victoria.⁷
- I.19 Liberty Victoria's submission stated that:
- There is no evidence provided in support of the reference that indicates that the system is failing to provide proper consistency, whether internally or by reference to other domestic or international criminal justice systems.⁸
- I.20 Victoria Legal Aid also submitted:
- Empirical evidence of systematic, unjustifiably disparity in sentencing *approach* is currently lacking in respect to particular offences or offence categories.⁹
- I.21 The Director of Public Prosecutions similarly submitted:
- There is little evidence of significant inconsistencies in judges' approaches to sentencing. On the occasions that judges do depart from the orthodox approach to sentencing, or from the acceptable range of sentencing outcomes, current appeal powers provide an effective remedy. It follows that I do not believe that inconsistency of approach is a substantial problem in Victorian sentencing.¹⁰

Sources of evidence for inconsistency

- I.22 Chapter 5 details the sources of evidence for inconsistency of approach in sentencing analysed by the Council. In summary, the evidence considered by the Council includes:
- the treatment of a category of offenders within an offence category;
 - the weight given to aggravating and mitigating factors; and
 - the categorisation of the objective seriousness of an offence.

5. For example: Submission 1 (G. Silbert); Submission 2 (Anonymous); Submission 9 (C. Politi). The Council has examined in detail the issues surrounding the consideration of current sentencing practices at [3.24]–[3.64].

6. See [5.96]–[5.118].

7. Submission 10 (Liberty Victoria); Submission 11 (Law Institute of Victoria); Submission 12 (Criminal Bar Association of Victoria); Submission 15 (Director of Public Prosecutions).

8. Submission 10 (Liberty Victoria).

9. Submission 13 (Victoria Legal Aid).

10. Submission 14 (Director of Public Prosecutions).

Public confidence in the criminal justice system

- I.23 There are few reliable and robust measures of public confidence in the criminal justice system in Victoria. Confidence is most commonly measured by surveys of public opinion on sentencing outcomes.
- I.24 Within the context of sentencing, the Council's 2011 report entitled *Predictors of Confidence: Community Views in Victoria* found that members of the Victorian public are moderately confident in the courts and in judges' ability to impose appropriate sentences. Differences in confidence were associated with how punitive those surveyed were, their age, and their income.¹¹
- I.25 As with inconsistency of approach, a number of stakeholders questioned the premise for the terms of reference in relation to public confidence on the basis that stakeholders did not consider that there was sufficient evidence to demonstrate a lack of public confidence in the criminal justice system with regards to sentencing in Victoria.¹²
- I.26 The Criminal Bar Association of Victoria noted:
- The correlation between apparent inconsistency and apparent lack of public confidence is difficult to measure beyond media reporting of public reaction to individual sentences. The vast majority of sentences given in Victoria are within range and pass without public comment.¹³
- I.27 Victoria Legal Aid pointed out the importance of drawing a distinction between measures of confidence based on informed versus uninformed opinion, noting:
- The studies to date suggest there is a gap between the views of informed and uninformed members of the community, with 'informed members of the public overwhelmingly approv[ing] of the sentences given by our judges'.¹⁴
- I.28 Similarly, Liberty Victoria submitted that:
- the research demonstrates that when informed of the facts relevant to sentencing, members of the public do not generally consider that the sentences imposed upon offenders by judicial officers are too lenient.¹⁵

Sources of evidence for public confidence

- I.29 In preparing its advice, the Council had regard to its *Community Attitudes to Offence Seriousness* report, which details a ranking of seriousness for select serious offences developed by gauging the opinions of a sample of the Victorian community.¹⁶

11. Sentencing Advisory Council, *Sentencing Matters: Predictors of Confidence: Community Views in Victoria* (2011).

12. Submission 2 (Anonymous); Submission 10 (Liberty Victoria); Submission 11 (Law Institute of Victoria); Submission 12 (Criminal Bar Association of Victoria).

13. Submission 12 (Criminal Bar Association of Victoria).

14. Submission 13 (Victoria Legal Aid), citing Kate Warner et al., *Jury Sentencing Survey: Report to the Criminology Research Council* (2010) 79, 95.

15. Submission 10 (Liberty Victoria), citing Austin Lovegrove, 'Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community' (2007) *Criminal Law Review* 769; Sentencing Advisory Council, *More Myths and Misconceptions* (2008); Kate Warner et al., *Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study*, Trends and Issues in Crime and Criminal Justice no. 407 (2011).

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

- I.30 Chapter 5 describes the sources of evidence for public confidence in the criminal justice system analysed by the Council. In summary, the evidence that the Council considered includes:
- evidence from informed and structured consultation of community views on sentencing/seriousness of the offence;
 - the offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences;
 - parliament's view of offence seriousness;
 - a disparity between current sentencing practices and the community's and parliament's views of offence seriousness;
 - the Court of Appeal's declaration that current sentencing practices for the offence are inadequate or its questioning of the adequacy of current sentencing practices; and
 - no evidence of a change in current sentencing practices following the Court of Appeal's declaration of inadequacy or questions as to adequacy.
- I.31 Further, the Council has relied on evidence of informed opinion of sentencing from:
- the Tasmanian Jury Sentencing Study;¹⁷ and
 - the Victorian Jury Sentencing Study.¹⁸

Considered methods of sentencing guidance

- I.32 The terms of reference do not ask the Council to simply reformulate a workable version of the baseline sentencing provisions. Instead, the terms of reference address the issue of sentencing guidance more broadly and invite the Council's consideration of both 'mechanisms' and 'sentencing advisory regimes'.
- I.33 Similarly, although the terms of reference ask for the Council's advice on the 'levels at which sentencing guidance should be set', the Council has not confined its consideration to those mechanisms of guidance or sentencing advisory regimes that require a 'level' to be set.
- I.34 Accordingly, the Council has taken a purposive approach to considering which method (or methods) of sentencing guidance would best address the sentencing of those offences for which a sentencing problem has been identified, with the understanding that a single method of sentencing guidance may not be appropriate or sufficient for all offences.

Human rights considerations

- I.35 As a public statutory authority, it is unlawful for the Council 'in making a decision, to fail to give proper consideration to a relevant human right'.¹⁹ To that end, in developing its advice, the Council has had regard to the human rights contained in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
- I.36 In particular, consideration of the right to equality before the law²⁰ has informed the Council's recommendations in relation to the model of sentencing guidance that would best promote consistency of approach in sentencing. Additionally, the requirement that court decisions should be public²¹ has informed the Council's recommendation in relation to the publication of sentencing remarks (see [I0.17]–[I0.29]).

17. Warner et al. (2010), above n 14, 79.

18. Kate Warner et al., 'Using Jurors to Measure Informed Community Views on Sentencing: Results from the Second Australian Jury Sentencing Study' (under review for publication).

19. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(1).

20. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(2).

21. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(3).

Consultation

- I.37 On 4 December 2015, the Council made a call for public submissions on the terms of reference. On 15 December 2015, the Council published a consultation paper that considered a broad range of mechanisms for sentencing guidance, and sought answers from stakeholders to a series of questions on each mechanism.
- I.38 In response to the call for public submissions, the Council received 16 submissions from a number of stakeholders, including victims of crime.
- I.39 The Council held a number of meetings with stakeholders including:
- Supreme Court Justices and Justices of the Court of Appeal;
 - the Chief Judge and Judges of the County Court of Victoria;
 - Magistrates of the Magistrates' Court of Victoria;
 - the Victims of Crime Commissioner;
 - Victoria Legal Aid;
 - a number of Crown Prosecutors; and
 - the Director of Public Prosecutions and the Office of Public Prosecutions.
- I.40 The Council also held a stakeholder discussion forum on 1 March 2016 to discuss its provisional recommendations.
- I.41 Appendix I sets out the consultation undertaken by the Council, including the submissions received and meetings held.

Chapter 2:

The current sentencing framework in Victoria



Overview

- 2.1 This chapter describes the framework for sentencing in Victoria, examining both the legislative provisions and the common law principles that govern the sentencing of adults, children, and young offenders. The chapter concludes with a discussion of sentencing methodology.

Sentencing of adults

- 2.2 In Victoria, sentencing is governed by a combination of statute and common law. The *Sentencing Act 1991* (Vic) sets out the purposes of sentencing, the relevant considerations to which a court must have regard when imposing a sentence, and the sentencing hierarchy.
- 2.3 The sentencing purposes listed in section 5(1) of the *Sentencing Act 1991* (Vic) – namely, just punishment, deterrence, rehabilitation, denunciation, and community protection – are the only purposes for which a sentence can be imposed. The *Sentencing Act 1991* (Vic) provides that a judicial officer can impose a sentence for a combination of more than one of these purposes.²² There is no further guidance in the legislation as to how to balance these purposes, even though '[a]ll these purposes cannot, in logic, coexist'.²³
- 2.4 There may be cases in which the purposes of sentencing point in different directions. For example, a person may commit a very serious offence that calls for punishment and denunciation, but the person may also have strong prospects of rehabilitation. A significant term of imprisonment would satisfy the first two purposes but may hinder the offender's rehabilitation. Judges are frequently required to balance competing purposes in this way.
- 2.5 The *Sentencing Act 1991* (Vic) also includes a number of considerations that the sentencer must take into account when sentencing an offender, including the maximum penalty for the offence, current sentencing practices, the nature and gravity of the offence, the offender's culpability and degree of responsibility for the offence, and the impact of the offence on any victim.²⁴
- 2.6 The considerations listed in the *Sentencing Act 1991* (Vic) are not intended to be exhaustive, and there is no legislative guidance as to the weight that should be given to each factor. This weight largely depends on the individual circumstances of the case and is left to the discretion of the sentencing judge or magistrate.
- 2.7 When imposing a sentence on an offender, the court must also have regard to the sentencing hierarchy in the *Sentencing Act 1991* (Vic). The hierarchy is the legislative expression of the principle of parsimony at common law.²⁵ The principle provides that 'a court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed'.²⁶
- 2.8 Sections 5(4)–(7) of the *Sentencing Act 1991* (Vic) give practical significance to this rule by requiring the sentencer to consider the efficacy of each sanction in fulfilling the relevant sentencing purposes, before moving up to the next, more serious sanction. For example, section 5(7) states that 'a court must not impose a fine unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by imposing a dismissal, discharge or adjournment'.

22. *Sentencing Act 1991* (Vic) s 5(1)(f).

23. Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (3rd ed., 2014) 235.

24. *Sentencing Act 1991* (Vic) s 5(2).

25. Freiberg (2014), above n 23, 186.

26. *Sentencing Act 1991* (Vic) s 5(3).

- 2.9 Similarly, a court must not impose a custodial sentence unless it considers that the purposes of the sentence cannot be achieved by a non-custodial sentence.²⁷ If a court sentences an offender to a term of imprisonment of two years or more, it must fix a non-parole period, unless it considers the fixing of such a period to be inappropriate.²⁸
- 2.10 The common law supplements these legislative provisions. A number of fundamental principles established at common law guide and limit the type or severity of sentence that should be imposed. Among these are the principles of proportionality, parity, and totality and the avoidance of double punishment.²⁹

Sentencing of children

- 2.11 The sentencing of children in Victoria is largely undertaken by the Children's Court of Victoria ('Children's Court'), which operates as a 'specialist court'³⁰ under the distinct legislative scheme set out in the *Children, Youth and Families Act 2005* (Vic).
- 2.12 Given the distinct nature of youth and youth offending, specialised responses to child crime have been developed. Children sentenced under the *Children, Youth and Families Act 2005* (Vic) are subject to different sentencing principles and sanctions from the principles and sanctions used for offenders sentenced under the *Sentencing Act 1991* (Vic). For example, the Children's Court places particular emphasis on the rehabilitation of offenders and the need to divert young people from custody and from further involvement in the criminal justice system.³¹

Jurisdiction of the Children's Court

- 2.13 The Children's Court has jurisdiction to hear and determine summarily charges for all indictable offences committed by children,³² other than death-related indictable offences that are automatically excluded.³³
- 2.14 Charges against children for indictable offences other than death-related offences may also be dealt with in the Supreme Court or the County Court if:
- the child objects to the charge being heard summarily;³⁴ or
 - the Children's Court considers the charge unsuitable to be determined summarily given the existence of 'exceptional circumstances'.³⁵

27. *Sentencing Act 1991* (Vic) s 5(4).

28. *Sentencing Act 1991* (Vic) ss 11(1)–(2).

29. *Muldrock v The Queen* (2011) 244 CLR 120, 128. See also Sentencing Advisory Council, *Sentencing, Parole Revocation and Confiscation Orders: Discussion and Options Paper* (2009) 4–7.

30. *Children, Youth and Families Act 2005* (Vic) s 1.

31. See further Peter Power, *Research Materials* (Children's Court of Victoria, 2015) <<http://www.childrenscourt.vic.gov.au/legal/research-materials/sentencing>> at 9 March 2016, [11.1.4].

32. To be a 'child', an accused must have been aged 10 or above (but under the age of 18) at the time of the offence, and must have been under the age of 19 at the time proceedings were commenced: *Children, Youth and Families Act 2005* (Vic) s 3.

33. The offences of murder, attempted murder, manslaughter, child homicide, arson causing death, and culpable driving causing death must be heard and determined in the Supreme Court or the County Court: *Children, Youth and Families Act 2005* (Vic) s 516(1)(b). The Children's Court can, however, conduct committal proceedings in respect of these excluded offences: s 516(1)(c).

34. *Children, Youth and Families Act 2005* (Vic) s 356(3)(a).

35. *Children, Youth and Families Act 2005* (Vic) s 356(3)(b).

Children's Court sentencing principles, sanctions, and processes

- 2.15 Section 362 of the *Children, Youth and Families Act 2005* (Vic) sets out the principles to be taken into account in sentencing children. Although not specifically mentioned in that section, the principle of rehabilitation underpins the first four principles set out in section 362(1), which include the preservation of family and home, the continuation of education and employment, and the minimisation of stigma.³⁶
- 2.16 The principle of parsimony and the particular emphasis on rehabilitation in the Children's Court mean that detention operates as a sanction of last resort.³⁷ The maximum period of detention that can be imposed by the Children's Court for children aged above 15 is two years in a youth justice centre where the case involves a single charge, and three years in a youth justice centre where the child is convicted of more than one charge in a case.³⁸

Sentencing children in the higher courts

- 2.17 A child may be convicted and sentenced in the County Court or the Supreme Court when:
- charged with an offence that is automatically excluded from the Children's Court jurisdiction;
 - the Children's Court has excluded its summary jurisdiction on the basis of 'exceptional circumstances'; or
 - the child (or in some cases the parent) has requested that the matter be heard in a higher court.
- 2.18 In those circumstances an offender is both a 'child' for the purposes of the *Children, Youth and Families Act 2005* (Vic)³⁹ and a 'young offender' for the purposes of the *Sentencing Act 1991* (Vic).⁴⁰
- 2.19 A higher court may sentence a child under either the *Children, Youth and Families Act 2005* (Vic) or the *Sentencing Act 1991* (Vic). However, if the court wishes to impose a sentence of detention, it must sentence the child under the *Sentencing Act 1991* (Vic).⁴¹ Youth detention can only be imposed pursuant to sections 32–35 of the *Sentencing Act 1991* (Vic). Under these sections, the maximum period of detention that may be imposed by the County Court or the Supreme Court (regardless of how many charges the child is sentenced for in the same proceeding) is three years.⁴²
- 2.20 Alternatively, in the higher courts, children may be sentenced to imprisonment under the *Sentencing Act 1991* (Vic). Depending on the particular charges, the court may impose a sentence of imprisonment up to the statutory maximum (life imprisonment).
- 2.21 As with adults, if a higher court sentences a child to a term of imprisonment of two years or more, it must fix a non-parole period, unless it considers the fixing of such a period to be inappropriate.⁴³

36. *Children, Youth and Families Act 2005* (Vic) ss 362(a)–(d).

37. *Children, Youth and Families Act 2005* (Vic) s 361.

38. *Children, Youth and Families Act 2005* (Vic) ss 413(2)–(3).

39. *Children, Youth and Families Act 2005* (Vic) s 3(1) (definition of 'child').

40. A 'young offender' is a person under the age of 21 years at the time of sentencing: *Sentencing Act 1991* (Vic) s 3(1).

41. *Children, Youth and Families Act 2005* (Vic) s 586.

42. *Sentencing Act 1991* (Vic) s 32(3).

43. *Sentencing Act 1991* (Vic) ss 11(1)–(2).

- 2.22 When a child is sentenced under section 7(1) of the *Sentencing Act 1991* (Vic), the County Court or the Supreme Court takes into account the purposes, principles, and factors set out in section 5 of the Act.⁴⁴ However, the court may also be guided by factors set out in the *Children, Youth and Families Act 2005* (Vic).⁴⁵

Sentencing young offenders to youth detention

- 2.23 The *Sentencing Act 1991* (Vic) provides the higher courts with the option of sentencing 'young offenders' (defined in section 3 of the *Sentencing Act 1991* (Vic) as offenders aged under 21) who satisfy the eligibility criteria to detention in a youth justice centre, rather than an adult prison.⁴⁶
- 2.24 This 'dual track' system is intended to prevent immature and vulnerable offenders from entering the adult prison system. To make this order, the court must receive a pre-sentence report and be satisfied that there are 'reasonable prospects for the rehabilitation of the young offender' or that the 'young offender is particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison'.⁴⁷ In determining whether to make a youth justice centre order, the court must have regard to the nature of the offence and the 'age, character and past history of the young offender'.⁴⁸
- 2.25 The maximum period of detention that a court may order a young offender to serve in a youth justice centre is two years for the Magistrates' Court and three years for the County Court or the Supreme Court.⁴⁹ These maxima apply regardless of how many charges the young offender is sentenced for in the same proceeding.⁵⁰

Sentencing methodology

No fixed methodology

- 2.26 There is no fixed methodology for sentencing in Victoria that determines the order in which a court must consider all of the prescribed factors identified in the *Sentencing Act 1991* (Vic)⁵¹ and the principles under the common law.

44. *Director of Public Prosecutions v SJK* [2002] VSCA 131 (23 August 2002) [50], [60] (Philips CJ, Chernov and Vincent JJA). See further Power (2015), above n 31, [11.1.13].

45. *R v KMW* [2002] VSC 93 (15 March 2002) [57] (Coldrey J).

46. *Sentencing Act 1991* (Vic) s 32.

47. *Sentencing Act 1991* (Vic) s 32(1).

48. *Sentencing Act 1991* (Vic) s 32(2).

49. *Sentencing Act 1991* (Vic) s 32(3).

50. *Sentencing Act 1991* (Vic) s 32(4).

51. When sentencing children, the Children's Court must consider all of the factors identified in the *Children, Youth and Families Act 2005* (Vic).

2.27 In *Markarian v The Queen* ('*Markarian*'), the majority judgment stated:

Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path that a sentencer, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies.⁵²

2.28 Consequently, although courts have some guidance as to what they are required to take into account, how these principles and factors are to be balanced against one another is largely a matter for judges in each particular case before them. The common law in Australia, however, prescribes an approach to be followed in formulating a sentence, known as instinctive synthesis.

Instinctive synthesis

2.29 The approach to sentencing under the common law and applied in Victoria is known variously as 'instinctive synthesis',⁵³ 'intuitive synthesis',⁵⁴ or 'sentencing synthesis'.⁵⁵ Under this approach to sentencing, the court is required to take into account all of the relevant factors in a case and then arrive at a sentence, including a non-parole period (where required).⁵⁶

2.30 In *Markarian*, McHugh J defined instinctive synthesis as:

the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.⁵⁷

2.31 Relevant factors include those that relate to the offence itself, such as weapon use and physical violence, and those that are personal to the offender, such as an offender's family background and prior convictions.

2.32 The sentencing synthesis approach has been viewed by the courts as different from, and has been contrasted with, a 'two-stage' approach. In the 'two-stage' approach, the court begins at a starting point (for a head sentence or non-parole period) and then makes adjustments (additions or deductions) to this sentence having regard to relevant factors.⁵⁸

52. *Markarian v The Queen* (2005) 228 CLR 357, 371 (Gleeson CJ, Gummow, Hayne, and Callinan JJ).

53. *Markarian v The Queen* (2005) 228 CLR 357, 378 (McHugh J).

54. *Director of Public Prosecutions v Terrick* (2009) 24 VR 457, 475 (Maxwell P, Redlich JA, and Robson AJA).

55. The Victorian Court of Appeal has described the 'instinctive synthesis' approach referred to in *Markarian v The Queen* (2005) 228 CLR 357 as the 'sentencing synthesis': see *Nguyen v The Queen* [2010] VSCA 284 (27 October 2010) [21] (Ashley JA).

56. *Markarian v The Queen* (2005) 228 CLR 357, 403 (Kirby J).

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

58. *Markarian v The Queen* (2005) 228 CLR 357, 373–374 (Gleeson CJ, Gummow, Hayne, and Callinan JJ), 398 (Kirby J).

- 2.33 The majority of the High Court in *Markarian* was critical of the two-stage approach because the court considered that it did not take into account the 'many conflicting and contradictory elements' relevant to an offender.⁵⁹ The High Court further added that to single out specific factors and provide them with 'numerical or proportionate value ... distorts the already difficult balancing exercise which the judge must perform'.⁶⁰
- 2.34 The approach was also confirmed by the High Court in relation to the New South Wales standard non-parole period scheme in *Muldrock v The Queen*. The High Court stated that the relevant sections of the New South Wales legislation:
- requires an approach to sentencing for [standard non-parole period] offences that is consistent with the approach to sentencing described by McHugh in *Markarian v The Queen*.⁶¹
- 2.35 Of particular relevance to the application of this approach were the High Court's comments that there was nothing in the New South Wales legislation that 'require[d] or permit[ted] the court to engage in a two-stage approach to the sentencing of offenders'.⁶² In the absence of such legislative prescription, the High Court held that the common law approach to sentencing, requiring a 'sentencing synthesis', was to be followed.
- 2.36 The Victorian Court of Appeal has affirmed that a staged approach is inconsistent with the sentencing synthesis approach described in *Markarian*. In *Trajkovski v The Queen*, Weinberg JA, delivering a judgment for the Court of Appeal, stated:
- the approach that has for many years commended itself to this court, namely, that of instinctive synthesis, remains, in my view, the only basis upon which sentencing should be carried out in this State.⁶³
- 2.37 Further, Weinberg JA contrasted the approach to sentencing in Victoria with a two-stage process, stating:
- this approach of first grading the level of actual offending, and then nominating a sentencing range for offences of that particular grade (as well as for offences of other grades), amounts in substance to two-tier sentencing. It is closely akin to nominating a 'starting point' from which the ultimate sentence will be imposed, and then moving to a consideration of aggravating and mitigating factors.⁶⁴

59. *Markarian v The Queen* (2005) 228 CLR 357, 373 (Gleeson CJ, Gummow, Hayne, and Callinan JJ); Kirby J did not share the majority's views on the instinctive synthesis approach, however, expressing concern that this approach did not encourage 'logical and rational' explanations for sentences: 404.

60. *Markarian v The Queen* (2005) 228 CLR 357, 374–375 (Gleeson CJ, Gummow, Hayne, and Callinan JJ), quoting *Wong v The Queen* (2001) 207 CLR 584, 612 (Gaudron, Gummow, and Hayne JJ).

61. *Muldrock v The Queen* (2011) 244 CLR 120, 131 (citations omitted).

62. *Muldrock v The Queen* (2011) 244 CLR 120, 132.

63. *Trajkovski v The Queen* (2011) 32 VR 587, 598.

64. *Trajkovski v The Queen* (2011) 32 VR 587, 597.

Other legislative schemes under the *Sentencing Act 1991* (Vic)

- 2.38 In addition to the provisions that apply to the sentencing of all offenders, the *Sentencing Act 1991* (Vic) also contains a number of schemes that apply to the sentencing of particular categories of offender or offenders who have committed particular offences.
- 2.39 These schemes do not provide sentencing guidance, but instead direct the court in particular circumstances to preference particular purposes of sentencing, for example, or to apply an increased maximum penalty or a minimum sentence (in the absence of special reasons).
- 2.40 Chapter 10 contains an examination of stakeholders' views and the Council's view on the operation of these schemes, including a recommendation for their review.

Serious offender provisions

- 2.41 Prior offending is considered an aggravating factor in the analysis of an offender's character.⁶⁵ In accordance with the considerations in section 5 of the *Sentencing Act 1991* (Vic), prior offending may also be relevant for the 'serious offender' provisions in Part 2A of the Act.
- 2.42 Under Part 2A of the *Sentencing Act 1991* (Vic), a serious offender is:
- a serious sexual offender for a sexual offence or a violent offence;
 - a serious violent offender for a serious violent offence;
 - a serious drug offender for a drug offence; and
 - a serious arson offender for an arson offence.⁶⁶
- 2.43 If the offender is a serious offender and the court considers that imprisonment for the relevant offence is justified, the court, in determining the length of the sentence:
- must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed; and
 - may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence considered in light of its objective circumstances.⁶⁷
- 2.44 Further, Part 2A of the *Sentencing Act 1991* (Vic) reverses the general statutory presumption that sentences are to be served concurrently.⁶⁸ Instead, every term of imprisonment imposed on a serious offender for a relevant offence must – unless otherwise directed by the court – be served cumulatively on any uncompleted sentence or other sentence imposed.⁶⁹

65. *Sentencing Act 1991* (Vic) s 6(a).

66. *Sentencing Act 1991* (Vic) s 6A.

67. *Sentencing Act 1991* (Vic) s 6D.

68. *Sentencing Act 1991* (Vic) s 16(1).

69. *Sentencing Act 1991* (Vic) ss 6E, 16(1A)(c).

Continuing criminal enterprise offenders provisions

- 2.45 Part 2B of the *Sentencing Act 1991* (Vic) contains sentencing provisions that increase the maximum penalty for specific repeat offenders who commit (primarily) property offences.
- 2.46 Where an offender has been convicted of three or more prescribed offences⁷⁰ (whether in the same hearing or at different hearings) within a period of 10 years and the amounts involved in each offence are worth more than \$50,000, the offender is liable (for that offence and, if in the same hearing, the qualifying offences⁷¹) to twice the maximum penalty that applies to that offence, or up to 25 years' imprisonment (whichever is the lesser).⁷²

Indefinite sentences

- 2.47 Subdivision 1A of the *Sentencing Act 1991* (Vic) provides that the Supreme Court or the County Court may impose an indefinite term of imprisonment on an offender convicted of a 'serious' offence.
- 2.48 The court may impose an indefinite term of imprisonment on its own initiative or after an application by the Director of Public Prosecutions,⁷³ but only if the court is satisfied that the offender is a serious danger to the community because of:
- the offender's character, past history, age, health, or mental condition;
 - the nature and gravity of the offence; and
 - any other special circumstances.⁷⁴
- 2.49 An offender serving an indefinite sentence is not eligible to be released on parole,⁷⁵ and the court must not fix a non-parole period when imposing an indefinite sentence.⁷⁶ Instead, the court must fix a 'nominal' sentence,⁷⁷ being the period that the court would have fixed as a non-parole period had the court imposed a fixed term of imprisonment.⁷⁸
- 2.50 Unlike a sentence of life imprisonment without parole, an indefinite sentence may be imposed for a serious offence that has a maximum penalty lower than life imprisonment. The indefinite sentence is also subject to judicial review at the completion of the nominal sentence.
- 2.51 In *R v Moffatt*, Hayne JA stated:
- the nominal sentence is to be fixed having regard to all those matters that would ordinarily go into the fixing of a non-parole period.⁷⁹

70. Those offences are theft, robbery, armed robbery, obtaining property by deception, obtaining financial advantage by deception, false accounting, handling stolen goods, destroying or damaging property, or the common law offence of conspiracy to defraud: *Sentencing Act 1991* (Vic) sch 1A.

71. *R v Roussety* (2008) 24 VR 253.

72. *Sentencing Act 1991* (Vic) ss 6H–6L, sch 1A.

73. *Sentencing Act 1991* (Vic) s 18A(5).

74. *Sentencing Act 1991* (Vic) s 18B(1).

75. *Sentencing Act 1991* (Vic) s 18A(4).

76. *Sentencing Act 1991* (Vic) s 18A(2).

77. The court should fix a single nominal sentence in respect of all indefinite sentences imposed. Where an offender is to be sentenced to both an indefinite sentence and additional fixed terms, then separate sentences must be fixed in respect of the additional offences. A non-parole period should not be fixed in respect of any fixed term sentences where imposed together with an indefinite sentence: Judicial College of Victoria, '12.9.8 – Issues in Formulation of an Indefinite Sentence', *Victorian Sentencing Manual* (Judicial College of Victoria, 2015) <<http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#16898.htm>> at 31 March 2016, [12.9.8.2], [12.9.8.3].

78. *Sentencing Act 1991* (Vic) ss 18A(3)–(4).

79. *R v Moffatt* [1998] 2 VR 229, 246 (Hayne JA).

- 2.52 Only very few offenders have received an indefinite sentence in Victoria. Further, the recent decision of *Carolan v The Queen*⁸⁰ suggests that the indefinite sentence is now of limited utility as a sentencing option for serious offences where the offender poses an ongoing risk of sexual or violent offending. In that case, the court discharged the last prisoner subject to an indefinite sentence and made him subject to a five-year integration period. In doing so, the Court of Appeal warned of the need to ‘guard against the “banalisation of indefinite imprisonment”’.⁸¹ The court further said:

Where the risk posed by the appellant can be managed by means other than an indefinite sentence – including, in particular, by use of the [*Serious Sex Offenders (Detention and Supervision) Act*] regime of supervision and detention – it should be.⁸²

Statutory minimum sentences

- 2.53 In Victoria, statutory minimum non-parole periods were first introduced in 2013 for the offences of intentionally causing serious injury and recklessly causing serious injury in circumstances of ‘gross violence’.⁸³ The scheme was subsequently expanded in 2014 to include manslaughter in circumstances of gross violence and manslaughter by a single punch or strike (in certain circumstances).⁸⁴
- 2.54 For the offences of causing serious injury (either intentionally or recklessly) in circumstances of gross violence, a non-parole period of not less than four years must be imposed unless a ‘special reason’ exists.⁸⁵ The minimum non-parole period for single punch or gross violence manslaughter is 10 years, unless the court similarly finds that a ‘special reason’ exists.⁸⁶
- 2.55 The scheme was further expanded by the *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) to include statutory minimum sentences for assault offences committed against persons defined as ‘emergency workers’ while those persons are on duty.⁸⁷
- 2.56 At the time of writing, the Crimes Legislation Amendment Bill 2016 (Vic), which extends the statutory minimum sentence scheme to include assault offences against prison officers and custody officers, had been passed by the Legislative Assembly of the Parliament of Victoria.
- 2.57 Further, at the time of writing, the Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Bill 2016 (Vic), which creates a new statutory minimum sentence for certain breaches of supervision orders,⁸⁸ has been introduced and second read in the Legislative Assembly of the Parliament of Victoria.

80. *Carolan v The Queen* [2015] VSCA 167 (26 June 2015).

81. *Carolan v The Queen* [2015] VSCA 167 (26 June 2015) [97], citing *Buckley v The Queen* (2006) 224 ALR 416, 426.

82. *Carolan v The Queen* [2015] VSCA 167 (26 June 2015) [97].

83. See *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic), which introduced *Crimes Act 1958* (Vic) ss 15A–15B.

84. See *Sentencing Amendment (Coward’s Punch Manslaughter and Other Matters) Act 2014* (Vic), which introduced *Sentencing Act 1991* (Vic) ss 9A–9C.

85. *Sentencing Act 1991* (Vic) s 10(1).

86. *Sentencing Act 1991* (Vic) ss 9B(2), 9C(2).

87. The *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) also introduced a baseline sentence for the murder of a person defined as an ‘emergency worker’ while that person is on duty.

88. Supervision orders imposed under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic).

Special reasons

- 2.58 A non-exhaustive list of special reasons is given in section 10A of the *Sentencing Act 1991* (Vic), which provides that a court may impose a sentence less than the statutory minimum. The court may declare that a 'special reason' exists 'if there are substantial and compelling circumstances that justify doing so', among other factors.⁸⁹ This allows for unforeseen offence or offender circumstances that may require a penalty other than the statutory minimum.
- 2.59 The Council's data analysis has found that, to date, two offenders have been sentenced for intentionally causing serious injury in circumstances of gross violence, while one offender has been sentenced for recklessly causing serious injury in circumstances of gross violence. In each case, the court concluded that there existed a special reason for not imposing a non-parole period of at least four years. To date, no offenders have been sentenced for single punch or gross violence manslaughter.⁹⁰

Charging methods

- 2.60 In addition to the legislative schemes discussed above, the way in which charges are brought on an indictment also has a bearing on the sentencing for the offences to which they relate (although the Council has not examined this). For example, charges may be brought as rolled-up or representative charges, or, in particular circumstances, as 'course of conduct' charges.⁹¹

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

90. Further, to date, no offenders have been sentenced under the statutory minimum sentence provisions introduced by the *Sentencing Amendment (Emergency Workers) Act 2014* (Vic).

91. *Criminal Procedure Act 2009* (Vic) sch 1 cl 4A.

Chapter 3:

Sentencing guidance in Victoria



Overview

- 3.1 This chapter examines sentencing guidance and describes the existing sources of sentencing guidance in Victoria, including:
- maximum penalties;
 - current sentencing practices; and
 - Court of Appeal judgments, including:
 - appellate review of sentences and judgments on general principles;
 - appellate review of current sentencing practices; and
 - guideline judgments.

What is meant by ‘sentencing guidance’?

- 3.2 In Victoria, as in other Australian jurisdictions, the governing sentencing legislation contains the purposes and aims of sentencing, lists a number of aggravating and mitigating factors that should be considered in sentencing (many of which are derived from the common law), and provides for the types of sentences that may be imposed. The *Sentencing Act 1991* (Vic) therefore provides general rather than prescriptive guidance, and a sentencing judge or magistrate retains broad sentencing discretion.
- 3.3 This discretion is considered essential, as often a single offence can encompass different levels of seriousness. In recognition of this fact, the legislation that prescribes an offence generally establishes a maximum penalty (rather than a fixed or minimum penalty), allowing a court to exercise its discretion and impose a sentence that is just and proportionate in all of the circumstances.
- 3.4 Sentencing guidance broadly refers to the principled considerations that a sentencing court may have regard to when exercising judicial discretion. Sentencing guidance can therefore range from broad, generalised guidance, such as the way a maximum penalty indicates parliament’s assessment of the seriousness of an offence, to more specific and prescriptive guidance, such as the guidelines contained in a guideline judgment.
- 3.5 In contrast to mandatory sentencing in any form, sentencing guidance is not intended to supplant the limits on discretion determined by parliament and prescribed in legislation. Instead, sentencing guidance is intended to structure – or guide – the exercise of discretion within those determined limits, in order to promote consistency and reduce unjustified disparities in sentencing.
- 3.6 In any discretionary process of decision-making there can never be one correct outcome. Nonetheless, the purpose of sentencing guidance is to address the concern that the range of outcomes within which sentencers, considering like cases, can reasonably disagree ought to be as narrow as possible to conform with the principle of legality. Krasnostein notes that consistency in sentencing evidences a commitment to the principle of legality, fundamental to the rule of law:

This obligation requires that the law be accessible, foreseeable in its consequences; and non-arbitrary in its application. These last two requirements imply a dual obligation to have and to regulate judicial discretion in order to fulfil sentencers’ ‘twin duties of imposing just sanctions and assuring fair and equal justice.’⁹²

92. Sarah Krasnostein, ‘Pursuing Consistency: The Effect of Different Reforms on Unjustified Disparity in Individualised Sentencing Frameworks’ (PhD Thesis, Monash University, 2015) 3, citing *R v Arcand*, 2010 ABCA 363 [7].

Existing sources of sentencing guidance in Victoria

Guidance from the maximum penalty

- 3.7 Maximum penalties are set by parliament and are generally found in the Act creating a particular offence. The maximum penalty for an offence is the highest sentence a court can impose on a person who has been found guilty of the offence. Judges or magistrates may impose a sentence less than the prescribed maximum penalty.
- 3.8 For example, the maximum penalty for murder is life imprisonment,⁹³ which is the highest maximum penalty that can be set in Victoria. The *Sentencing Act 1991* (Vic) contains a scale of statutory maximum penalties of imprisonment, ranging from Level 1 (life imprisonment) to Level 9 (6 months' imprisonment).⁹⁴
- 3.9 The legislative view of the gravity of an offence is primarily expressed through the maximum penalty. Section 5(2)(a) of the *Sentencing Act 1991* (Vic) states that: 'In sentencing an offender a court must have regard to ... the maximum penalty prescribed for the offence'.⁹⁵ The fact that this factor is placed first among the matters to which a court must have regard is an indication of its significance.⁹⁶ Therefore, the maximum penalty is an important consideration in determining sentence.
- 3.10 In *Director of Public Prosecutions v Aydin and Kirsch*, the Court of Appeal stated:
- It is sometimes said that a judge, in obedience to s.5(2)(a), 'steers by the maximum'. It is a helpful metaphor, but two things should be said of it. One is that there is a difference between steering by the maximum and aiming at the maximum. The penalty prescribed for the worst class of case is like a lighthouse or a beacon. The ship is not sailed towards it, but rather it is used as a navigational aid. The other is that steering by the maximum may decrease the sentence that might otherwise be imposed as well as increase it.⁹⁷
- 3.11 In fixing a maximum penalty for an offence, parliament should aim to select a maximum penalty that provides an indication of the relative gravity of the offence compared with other offences, but yet is broad enough to allow the sentencing judge sufficient scope to accommodate the worst examples of the offence that are likely to be encountered.⁹⁸ As was stated in *Markarian* by a majority of the High Court:
- It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.⁹⁹

93. *Crimes Act 1958* (Vic) s 3(1).

94. *Sentencing Act 1991* (Vic) s 109.

95. *Sentencing Act 1991* (Vic) s 5(2)(a).

96. *Director of Public Prosecutions v Aydin and Kirsch* [2005] VSCA 86 (3 May 2005) [10].

97. *Director of Public Prosecutions v Aydin and Kirsch* [2005] VSCA 86 (3 May 2005) [12].

98. Arie Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) 56.

99. *Markarian v The Queen* (2005) 228 CLR 357, 372.

Maximum penalty as a guide to seriousness

3.12 The maximum penalty is reserved for the worst class of the offence in question and is justified only for the worst examples of the offence that are likely to be encountered in practice.¹⁰⁰

3.13 The general principle of reserving the maximum penalty for the worst examples of the offence in question may be displaced if the sentencer strongly regards the maximum penalty to be too low, particularly where the maximum penalty has not been recently considered by the legislature.¹⁰¹

3.14 In *Ashdown v The Queen*,¹⁰² the Court of Appeal cited the majority in *Markarian*, stating that:

Legislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks. It is well accepted that the maximum sentence available may in some cases be a matter of great relevance. In their book *Sentencing*, Stockdale and Devlin observe that:

'A maximum sentence fixed by Parliament may have little relevance in a given case, either because it was fixed at a very high level in the last century ... or because it has more recently been set at a high catch-all level ... At other times the maximum may be highly relevant and sometimes may create real difficulties ...

A change in a maximum sentence by Parliament will sometimes be helpful [where it is thought that the Parliament regarded the previous penalties as inadequate]'.¹⁰³

Limited guidance from legislative changes to the maximum penalty

3.15 Where the legislature has recently considered the maximum penalty, a court should not seek to override the legislature's judgment.¹⁰⁴ As stated by McHugh J in *Markarian*:

a judge is sensitive to legislative trends. A change in the maximum penalty for an offence or in the elements of an offence may indicate a shift in the values to be applied when sentencing for that offence.¹⁰⁵

3.16 Consequently, a judge is bound to have regard to the maximum penalty, as it provides an indication of the relative seriousness with which the offence is to be viewed. Where there has been a change in the maximum penalty prior to the commission of the offence, the court must sentence the person in accordance with the new penalty without the benefit of a phase-in period.¹⁰⁶ Proper regard to the new maximum penalty will necessitate a change to current sentencing practices.¹⁰⁷

3.17 As was stated in *Harrison v The Queen*, there are several mechanisms by which sentencing courts may resolve any tension between current sentencing practices and an increased maximum penalty.¹⁰⁸ First, the increased maximum penalty may be gradually incorporated into the instinctive synthesis process. Second, in accordance with the approach taken by Nettle JA (sitting in the Trial Division) in *R v AB*,¹⁰⁹ the judge may decline to follow current sentencing practices 'down to a level below the sentence which a maximum ... implies it is necessary to impose'.¹¹⁰

100. *R v Mallinder* (1986) 23 A Crim R 179. See also Freiberg (2014), above n 23, 273.

101. Freiberg (2014), above n 23, 274.

102. *Ashdown v The Queen* (2011) 37 VR 341.

103. *Markarian v The Queen* (2005) 228 CLR 357, 372, cited in *Ashdown v The Queen* (2011) 37 VR 341.

104. *R v Ireland* (1987) 49 NTR 10; Freiberg (2014), above n 23, 274.

105. *Markarian v The Queen* (2005) 228 CLR 357, 389.

106. *R v Slaterry* (1996) 90 A Crim R 519. See also Freiberg (2014), above n 23, 270.

107. Freiberg (2014), above n 23, 271.

108. *Harrison v The Queen* [2015] VSCA 349 (16 December 2015) [133].

109. *R v AB* [2006] VSC 96 (10 March 2006).

110. *R v AB* [2006] VSC 96 (10 March 2006) [21].

3.18 As the Court of Appeal stated in *R v AB (No 2)*:

Whenever Parliament increases the maximum sentence for any criminal offence, that increase has potential significance for all sentences to which the new maximum applies. As the present case illustrates, the increase will have very substantial implications for any sentence for an offence that is placed within the worst category of that offence. Even where the offence to which the increase applies is nowhere near the worst category, the increase remains of relevance since, in the usual case, the increase shows that Parliament regarded the previous penalties as inadequate. Even where the new maximum may only be of general assistance, it becomes the 'yardstick' which must be balanced with all other relevant factors.¹¹¹

3.19 Some caution, however, needs to be exercised in concluding that an increase to the maximum penalty for an offence necessitates an increase in sentences. An increase to the maximum penalty for an offence demands an increase to sentences where parliament has indicated that it regards previous penalties to be inadequate.¹¹²

3.20 A sentence that is based on an incorrect view of the maximum penalty may warrant the intervention of an appellate court. However, if the difference in the maximum is small, it may not be a sufficient error in law.¹¹³

Evidence of changed sentencing practices following changes in the maximum penalty

3.21 The Council's report on current sentencing practices for major driving offences provides a recent example of changes to current sentencing practices because of increases to the maximum penalty.¹¹⁴ In that report, the Council analysed data on the median custodial sentence imposed before and after increases to the maximum penalties for the offences of dangerous driving causing death and negligently causing serious injury.

3.22 For dangerous driving causing death, a 100% increase in the maximum penalty (from 5 years' imprisonment to 10 years' imprisonment) resulted in a 20% increase in the median custodial sentence, from 2 years and 6 months to 3 years.¹¹⁵ For negligently causing serious injury, a 100% increase in the maximum penalty (also from 5 years' imprisonment to 10 years' imprisonment) resulted in a 25% increase in the median custodial sentence, from 2 years to 2 years and 6 months.¹¹⁶

3.23 These data suggest that the maximum penalty and, in particular, parliament's influence on sentencing through changes to the maximum penalty may only provide limited guidance.

Guidance from current sentencing practices

3.24 While the maximum penalty fixed for an offence provides guidance to the court as to parliament's (and therefore the community's) assessment of the gravity of the offence, it is of limited guidance. The 'lighthouse' or 'beacon' representing the worst offending by the worst offender may have limited utility when it comes to sentencing the vast majority of examples of offending that come before the courts.

111. *R v AB (No 2)* (2008) 18 VR 391, 406 (citations omitted).

112. *R v Grossi* (2010) 23 VR 500, 512.

113. *R v Beary* (2004) 11 VR 151, 158–159. See further Freiberg (2014), above n 23, 271.

114. Sentencing Advisory Council, *Major Driving Offences: Current Sentencing Practices* (2015).

115. *Ibid* 47.

116. *Ibid* 57.

- 3.25 Sentences are determined through the consideration of many factors, of which the maximum penalty for the particular offence is but one. Further, as the *Victorian Sentencing Manual* notes: 'These factors are not analysed in a vacuum, but in a context created by sentences previously imposed in similar cases'.¹¹⁷
- 3.26 Section 5(2)(b) of the *Sentencing Act 1991* (Vic) requires that a sentencing court must have regard to 'current sentencing practices', although the meaning of that term is not defined in legislation.

Current sentencing practices and the importance of consistency

- 3.27 The *Sentencing Act 1991* (Vic) has as one of its purposes the promotion of 'consistency of approach in the sentencing of offenders'.¹¹⁸ Consistency in sentencing:
- is an aspect of the concept of equal justice that requires that like cases be treated alike and unlike cases treated differently. Equal justice is an aspect of the rule of law and is a fundamental constitutional principle. Decisions that are capricious or arbitrary will not amount to a proper exercise of the judicial power.¹¹⁹
- 3.28 In *Wong v The Queen*,¹²⁰ Gleeson J recognised and accepted 'some degree of inconsistency' as unavoidable in a system that allows for discretionary decision-making.¹²¹ However, he also said that there are 'limits beyond which such inconsistency itself constitutes a form of injustice'.¹²²
- 3.29 There is a public interest in consistency in sentencing, which may be undermined by the belief that sentencing is dependent on the particular judge who hears the matter.¹²³ The Court of Appeal in *R v MacNeil-Brown* observed:
- Consistency in sentencing is of fundamental importance to public confidence in the criminal justice system and to the maintenance of the rule of law. Not surprisingly, the first of the stated objects of the Sentencing Act is 'to promote consistency of approach in the sentencing of offenders'.¹²⁴
- 3.30 The goal is not absolute consistency of outcome, as this is both unachievable and undesirable. The New South Wales Sentencing Council has drawn a distinction between consistency of approach and consistency of outcome in relation to sentencing. The New South Wales Sentencing Council has defined consistency in sentencing as 'ensuring that account is taken of the same factors and that similar weight is given to those factors'.¹²⁵
- 3.31 In *Hili v The Queen*,¹²⁶ the High Court held that consistency with current sentencing practices means consistency in the application of relevant legal principles, not mathematical or numerical equivalence, and that consistency is 'not capable of mathematical expression'.¹²⁷ In other words, there is no right sentence, but there is a right way to sentence.

117. Judicial College of Victoria, '8.3.1 – Significance of Current Sentencing Practices', *Victorian Sentencing Manual* (Judicial College of Victoria, 2013) <<http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#I5856.htm>> at 31 March 2016.

118. *Sentencing Act 1991* (Vic) s 1(a).

119. Freiberg (2014), above n 23, 436–437 (citations omitted).

120. *Wong v The Queen* (2001) 207 CLR 584.

121. *Wong v The Queen* (2001) 207 CLR 584, 591.

122. *Wong v The Queen* (2001) 207 CLR 584, 591.

123. James Spigelman, 'Consistency and Sentencing' (2008) 82 *Australian Law Journal* 450, 451.

124. *R v MacNeil-Brown* (2008) 20 VR 677, 690.

125. New South Wales Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Courts* (2004) 11.

126. *Hili v The Queen* (2010) 242 CLR 520.

127. *Hili v The Queen* (2010) 242 CLR 520, 535.

- 3.32 Further, the High Court has clarified the proper use of past sentences as part of the requirement to have regard to current sentencing practices:
- A history of sentences can establish a range of sentences that have been imposed.
 - Past sentences are of considerable significance because they result from the application of the accumulated experience and wisdom of first instance and appellate judges.
 - However, past sentences are no more than historical statements of what has happened in the past.
 - The history of sentences does not establish that the range of sentences previously imposed is the correct range, or that the upper or lower limits to the range are the correct upper or lower limits.
 - The history of sentences do not fix the boundaries within which future judges must, or even ought, to sentence.
 - Despite this, past sentences can and should provide guidance in the form of a 'yardstick' against which to examine a proposed sentence.
 - Unifying principles can only be discerned from past sentences by examining the whole of the circumstances that have given rise to the sentence.¹²⁸

Statistical analysis as part of current sentencing practices

- 3.33 In *Director of Public Prosecutions v CPD*, the Court of Appeal stated:

the phrase 'current sentencing practices' in s 5(2) means, in the context of a particular sentencing task, the approach currently adopted by sentencing judges when sentencing for the particular offence. That is, the inquiry is directed particularly, but not exclusively, at the kinds of sentences imposed in comparable cases.

The identification of current sentencing practices for an offence will usually require consideration both of relevant sentencing statistics for the offence and of sentencing decisions in comparable cases.¹²⁹

- 3.34 Current sentencing practices therefore encompass both the approach taken in applying sentencing principles and the statistical or quantitative information on the sentences imposed in comparable cases resulting from the application of those principles.¹³⁰

- 3.35 In *Director of Public Prosecutions v Maynard*, the Court of Appeal cautioned against relying on statistical information alone as evidence of current sentencing practices, stating that:

Statistics do no more than establish minimum and maximum sentences and the average and median sentences imposed over a particular, and necessarily arbitrary period. Indeed, there is a danger that undue reliance upon the average or median sentence imposed during a particular period will distract the sentencing judge from the particular circumstances of the case in hand and has the capacity to distort sentencing in particularly serious cases towards the average or median figure. The statistics cited provide guidance in only a limited way to the sentence that should have been imposed in this case. By themselves, statistics do not establish a sentencing practice.¹³¹

¹²⁸. *Hili v The Queen* (2010) 242 CLR 520, 535–538.

¹²⁹. *Director of Public Prosecutions v CPD* (2009) 22 VR 533, 552. See also *Davy v The Queen* (2011) 207 A Crim R 266, 277.

¹³⁰. See Freiberg (2014), above n 23, 452; Arie Freiberg and Sarah Krasnostein, 'Statistics, Damn Statistics and Sentencing' (2011) 21(2) *Journal of Judicial Administration* 73.

¹³¹. *Director of Public Prosecutions v Maynard* [2009] VSCA 129 (11 June 2009) [35].

Current sentencing practices provide qualified guidance on range

3.36 In *Anderson v The Queen*, the Court of Appeal stated that:

a sentencing judge must take current sentencing practices into account to the full extent that the law requires. Unless the case can be brought within a recognisable ground for departing from current sentencing practices, a sentencing judge is not at liberty to disregard such practices or qualify the degree to which they should be given effect. Current sentencing practices for a category of the offence must *guide the range* of sentences available for that category of the offence.¹³²

3.37 The statutory requirement to have regard to current sentencing practices, however, does not foreclose the possibility of an increase in the level of sentences when due regard is given to the maximum penalty and other considerations.

3.38 Where current sentencing practices are out of step with the maximum penalty fixed by parliament, there is no requirement that current sentencing practices must prevail. In *Director of Public Prosecutions v OJA*, Nettle JA elaborated on the consideration of current sentencing practices as follows:

there is no sentencing tariff as such. Apart from the maximum sentence prescribed by Parliament, the intuitive synthesis approach to sentencing implies an absence of necessary relationship between one case and another ... any notion of a mathematical norm above or below which a case might be cast according to aggravating increments and mitigating decrements is precluded by a general prohibition on the use of two part sentencing processes. At the same time ... some instances of an offence are more serious than others ... so, there is a need for at least some degree of comparison. The requirement to have regard to 'current sentencing practices' is properly to be understood in that context and the notions of manifest excessiveness and manifest inadequacy are similarly informed.

Secondly, the need to have regard to current sentencing practices does not mean that the measures of manifest excessiveness and manifest inadequacy are capped and collared by the highest and lowest sentences for similar offences hitherto imposed ... each case is different and so it is always possible that a sentence may properly rise above or fall below the greatest and lowest sentences previously imposed. At the same time, however, the nature of criminal conduct is such that there is not infrequently sufficient similarity between two cases to imply that sentences should be comparable and, if they are not, that something has gone awry.

Thirdly, and importantly, it should not be thought that the statutory requirement to have regard to current sentencing practices forecloses the possibility of an increase or decrease in the level of sentences for particular kinds of offences. Over time, views may change about the length of sentence which should be imposed in particular cases and, when that occurs, the notions of manifest excessiveness and manifest inadequacy will be affected.¹³³

3.39 Where a person has pleaded guilty to an offence, however, fairness generally requires that he or she is entitled to be sentenced in line with current sentencing practices for the offence in question at the time of pleading guilty.¹³⁴

¹³². *Anderson v The Queen* (2013) 230 A Crim R 38, 46 (emphasis added).

¹³³. *Director of Public Prosecutions v OJA* (2007) 172 A Crim R 181, 195–196.

¹³⁴. *Ashdown v The Queen* (2011) 37 VR 341, 345–346.

Stakeholders' views on guidance provided by current sentencing practices

- 3.40 During consultation with stakeholders and in submissions, concerns were expressed regarding the way in which courts in Victoria have regard to current sentencing practices. The concerns relate to how this requirement is being applied in practice.
- 3.41 As discussed, maximum penalties have been said to provide a 'yardstick'¹³⁵ by which a sentencing court may ensure consistency in sentencing and in the application of the relevant legal principles.¹³⁶
- 3.42 There can, however, be a disparity between the maximum penalty for a particular offence and the current sentencing practices with regard to that offence. As explained in *R v AB (No 2)*,¹³⁷ the guidance provided by current sentencing practices for a particular offence may conflict with the guidance provided by the statutory maximum penalty. Where this is the case, it has been said that the statutory requirement 'to have regard to current sentencing practices does not foreclose the possibility of an increase in the level of sentences' when due regard is given to the maximum penalty and other considerations.¹³⁸
- 3.43 Despite this statement, feedback from the Council's stakeholder forum on sentencing guidance suggests that there is a need for specific reform to 'legislatively deal with the constraints of current sentencing practices'¹³⁹ resulting from their current interpretation. It was argued that if this issue were not broadly addressed, the same problems with the present approach to current sentencing practices may continue under any model for sentencing guidance that may be adopted.¹⁴⁰
- 3.44 A number of submissions argued that there are issues in the way that current sentencing practices are treated at the appellate level.¹⁴¹ It was also suggested that, contrary to the decision in *Hili v The Queen*,¹⁴² there were instances of sentences being adjusted on appeal so as to be numerically consistent with current sentencing practices, even though those sentences were otherwise appropriate in all of the circumstances. Further, it was stated that this occurred despite existing disparity between the maximum penalty for the offence and current sentencing practices.¹⁴³
- 3.45 The problems raised by some stakeholders covered two general themes:
- First, it was suggested that there is an over-emphasis or primacy placed on current sentencing practices compared to other factors such as the maximum penalty, contrary to High Court guidance that both current sentencing practices and maximum penalties are to be treated as yardsticks.
 - Second, it was suggested that, in practice, the approach taken by the court to current sentencing practices has been to treat past sentences as setting limits on the range of sentences that is open, contrary to High Court guidance that consistency does not mean that sentences be consistent in terms of numerical outcome.

^{135.} *Markarian v The Queen* (2005) 228 CLR 357, 372.

^{136.} *Kilic v The Queen* [2015] VSCA 331 (8 December 2015) [48].

^{137.} *R v AB (No. 2)* (2008) 18 VR 391, 405.

^{138.} *Director of Public Prosecutions v CPD* (2009) 22 VR 533, 536.

^{139.} Sentencing Guidance Stakeholder Discussion Forum (1 March 2016).

^{140.} Sentencing Guidance Stakeholder Discussion Forum (1 March 2016).

^{141.} Submission 1 (G. Silbert); Submission 2 (Anonymous).

^{142.} *Hili v The Queen* (2010) 242 CLR 520.

^{143.} Sentencing Guidance Stakeholder Discussion Forum (1 March 2016).

- 3.46 This over-emphasis on consistency ‘under the heading of current sentencing practices’ was identified as the ‘issue that persistently hampers a natural and progressive change in sentencing standards for most offences’ rather than a lack of consistency.¹⁴⁴
- 3.47 It was argued that if these issues with current sentencing practices were addressed, this would mitigate the need to introduce guidance mechanisms to address the ‘stagnated evolution of sentencing practices’,¹⁴⁵ which has occurred despite the appellate identification of the inadequacy of current sentencing practices.
- 3.48 Further, one stakeholder noted that ‘the common law has always been able to accommodate community standards by the organic development of sentences; under current doctrine this development has been stultified’.¹⁴⁶
- 3.49 The primacy of current sentencing practices in Victorian sentencing law may be evidenced by appellate discussion of their relevance to the sentencing exercise. Discussions of, and challenges to, the adequacy of current sentencing practices have featured strongly in Victorian sentencing jurisprudence. One submission received by the Council examined the frequency of the use of the term ‘current sentencing practices’ in Court of Appeal judgments published on AustLII in order to support the assertion that current sentencing practices have become a predominant consideration in sentence appeals.¹⁴⁷
- 3.50 The Director of Public Prosecutions acknowledged the advantages and disadvantages of considering current sentencing practices, noting that they are ‘a useful servant, but a dangerous master’.¹⁴⁸ The Director submitted that:
- in the absence of more powerful legislative or judicial guidance about sentencing standards, regard to current sentencing practices is the only viable mechanism for promoting consistency. However, [current sentencing practices] does have a tendency to dominate the sentencing exercise, because it provides concrete, objective guidance, by contrast to the inchoate guidance offered by statements of principle. This becomes dangerous when [current sentencing practices] is permitted, as it currently is (at least in guilty plea cases), to define presumptive, and even binding standards.¹⁴⁹
- 3.51 The Director proposed that confirmation should be provided such that current sentencing practices are considered as ‘advisory’ rather than ‘presumptive standards’.¹⁵⁰ Current sentencing practices would therefore provide guidance on sentences without identifying ‘a binding range’ or creating ‘any legitimate expectation of a particular sentencing level that would directly sustain a sentence appeal’.¹⁵¹ The Director acknowledged that ‘[t]his reform would potentially reduce consistency and certainty in sentencing. But it would prevent the miring of sentencing standards in a zone fixed by history rather than good policy’.¹⁵²
- 3.52 Some stakeholders, however, did not consider that there was an issue with the way in which sentencing courts consider current sentencing practices such that would warrant a change in the provision.

¹⁴⁴. Submission 2 (Anonymous).

¹⁴⁵. Submission 2 (Anonymous).

¹⁴⁶. Submission 1 (G. Silbert).

¹⁴⁷. Analysis in Submission 2 (Anonymous) suggested that the number of judgments containing the term ‘current sentencing practices’ has increased from two published judgments in 1998 to 34 in 2015. These figures are indicative only, as AustLII does not contain judgments for the first half of 1998, and the overall number of sentence appeals for each year has not been calculated.

¹⁴⁸. Submission 14 (Director of Public Prosecutions).

¹⁴⁹. Submission 14 (Director of Public Prosecutions).

¹⁵⁰. Submission 14 (Director of Public Prosecutions).

¹⁵¹. Submission 14 (Director of Public Prosecutions).

¹⁵². Submission 14 (Director of Public Prosecutions).

3.53 The Law Institute of Victoria stated:

no change should be made to the way in which a court regards current sentencing practices. The Court of Appeal has shown a willingness to comment upon the adequacy of current sentencing practices in cases where the intuitive synthesis approach is believed to be inadequate. Additionally, individual judges have the capacity to sentence outside the numerical range of sentences for individual crimes where the circumstances justify it.¹⁵³

3.54 Similarly, Victoria Legal Aid noted that:

The Court of Appeal is well placed to comment on the adequacy of current sentencing practices, to determine the extent to which courts should be constrained by current sentencing practices, and to provide guidance as to the type of sentence appropriate in the circumstances.¹⁵⁴

The Council's view on guidance provided by current sentencing practices

3.55 In light of the concerns expressed by stakeholders, the Council has considered whether it would be appropriate to recommend that 'current sentencing practices' be defined in legislation, so as to codify the common law stated in such cases as *Hili v The Queen*¹⁵⁵ and *Wong v The Queen*¹⁵⁶ and to clarify the way in which a sentencing court in Victoria should have regard to comparable cases.

3.56 In particular, the Council has considered whether section 5(2)(b) of the *Sentencing Act 1991* (Vic) should be amended such that a court should be required to have regard to current sentencing practices for the purpose of ensuring consistency in the application of sentencing principles *only*, rather than consistency in sentencing outcomes.

3.57 This reform would accord with the approach of the High Court recently affirmed in *R v Pham*:

(1) Consistency in sentencing means that like cases are to be treated alike and different cases are to be treated differently.

(2) The consistency that is sought is consistency in the application of the relevant legal principles.

...

(4) Such consistency is not synonymous with numerical equivalence and it is incapable of mathematical expression or expression in tabular form.

(5) For that and other reasons, presentation in the form of numerical tables, bar charts and graphs of sentences passed on federal offenders in other cases is unhelpful and should be avoided.¹⁵⁷

3.58 As discussed at [2.26]–[2.37] and [3.6], sentencing represents a system of discretionary decision-making. However, the range of outcomes within which sentencers, considering like cases, can reasonably disagree ought to be as narrow as possible to accord with the principle of legality and the fundamental tenet of equality under the rule of law. Further, in sentencing, the exercise of discretion through the application of principles results in a quantifiable value being ascribed: namely, the sentence imposed.

153. Submission 11 (Law Institute of Victoria).

154. Submission 13 (Victoria Legal Aid).

155. *Hili v The Queen* (2010) 242 CLR 520.

156. *Wong v The Queen* (2001) 207 CLR 584.

157. *R v Pham* (2015) 90 ALJR 13, 19 (French CJ, Keane, and Nettle JJ) (citations omitted).

- 3.59 Therefore, as part of a sentencing court's consideration of current sentencing practices, it is appropriate for the court to consider *both* the outcomes imposed in comparable cases (as the tangible result of the application of relevant principles in those cases) *and* the approach taken in those cases to the application of sentencing principles.
- 3.60 As noted by the Director of Public Prosecutions,¹⁵⁸ the primacy of current sentencing practices in Victoria may be explained by the fact that, at present, there is an absence of comprehensive sentencing guidance that aligns a court's consideration of sentencing principles with its consideration of appropriate outcomes, in numerical terms of levels or ranges.
- 3.61 Ultimately, the Council considered that, in the circumstances, reforming the 'concrete, objective guidance'¹⁵⁹ provided by current sentencing practices may be an over-reaction to a confined problem. Indeed, it may create inconsistency in sentencing for offences or offence categories where currently no such problem exists.
- 3.62 Instead, this issue is one that the Council has directly addressed in Chapter 6, where it develops its recommendations in relation to an enhanced guideline judgment scheme for Victoria. Specifically, the Council recommends providing the Court of Appeal with the express power to give quantitative guidance on the appropriate level or range for an offence or offence category.¹⁶⁰
- 3.63 It is intended that the Council's recommendations in relation to an enhanced guideline judgment scheme will allow the Court of Appeal to give numerical guidance on an appropriate sentencing practice when applying a principled approach, thereby directly meeting the need for guidance that is only partially (and according to some stakeholders, improperly) satisfied through recourse to current sentencing practices.
- 3.64 Further, such guidance from the Court of Appeal – similar to the guidance provided in *Winch v The Queen*¹⁶¹ ('Winch'), *Hogarth v The Queen*¹⁶² ('Hogarth'), and *Harrison v The Queen*¹⁶³ ('Harrison') – would allow a sentencing court to disregard prior sentencing practices.¹⁶⁴

Guidance from the Court of Appeal

Appellate review of sentences and judgments on general sentencing principles

- 3.65 The Court of Appeal's criminal appeal work comprises the determination of applications for leave to appeal against sentence¹⁶⁵ and conviction,¹⁶⁶ and the determination of substantive appeals, including appeals against conviction, against sentence, and against both conviction and sentence.
- 3.66 Appeals ordinarily perform two functions:
- to correct substantial errors; and
 - to provide guidance to lower courts.

¹⁵⁸. Submission 14 (Director of Public Prosecutions).

¹⁵⁹. Submission 14 (Director of Public Prosecutions).

¹⁶⁰. See [6.138]–[6.162].

¹⁶¹. *Winch v The Queen* (2010) 27 VR 658.

¹⁶². *Hogarth v The Queen* (2012) 37 VR 658.

¹⁶³. *Harrison v The Queen* [2015] VSCA 349 (16 December 2015).

¹⁶⁴. See [3.75].

¹⁶⁵. *Criminal Procedure Act 2009* (Vic) ss 278, 280.

¹⁶⁶. *Criminal Procedure Act 2009* (Vic) s 274.

- 3.67 The first of these functions focuses on the review of a particular case so that any errors in the sentencing process may be corrected to ensure that justice is done in that case. The second function operates at a broader, more 'public' level, in giving guidance and aiming 'to clarify and develop a body of law which provides predictability, coherence, consistency, generality, equality and certainty'.¹⁶⁷
- 3.68 As suggested by Freiberg and Sallmann:
- Moving from the particular case or cases before it, an appellate court may state broadly the underlying principle that provides coherence to conflicting contentions or rules and which will settle not only the instant conflict, but provide future decision-makers with a framework within which to make a decision in a similar case.¹⁶⁸
- 3.69 In giving its reasons for judgment, the Court of Appeal frequently makes statements to provide some guidance on aspects of sentencing.
- 3.70 For example, in *R v Mills*,¹⁶⁹ the Court of Appeal made a series of propositions relevant to the sentencing of youthful offenders, and in *R v Verdins*¹⁷⁰ ('*Verdins*'), the Court of Appeal set out a series of principles relating to the sentencing of offenders suffering from mental disorders, mental abnormalities, or mental impairments.
- 3.71 In another example, *R v AB (No 2)*,¹⁷¹ the Court of Appeal considered the weight given to an increase in the maximum penalty for the offence of manslaughter. It discussed the impact of the increase in the maximum penalty on the sentencing discretion and the future sentencing of manslaughter offences subject to the increased maximum penalty. In doing so, it gave guidance on resolving the conflict between the guidance provided by current sentencing practices and the guidance provided by a maximum penalty that had been increased by parliament (see [3.18]).
- 3.72 One stakeholder noted that:
- The scope for the Court of Appeal to give guidance is not dependent on the ability to give guideline judgments. Whilst some judges in that Court do confine themselves to the precise issue raised in each case, more often than not the Court provides wide ranging advice and guidance. The scope for guidance about sentencing standards, outside the guideline judgment provisions, is demonstrated by *Ashdown*, *Hogarth* and *Harrison*.¹⁷²
- 3.73 Liberty Victoria noted in its submission that '[t]he Court of Appeal regularly provides authority and guidance for sentencing courts at the level of sentencing principle'.¹⁷³ It cited the example of *Director of Public Prosecutions v Meyers*, where the Court of Appeal stated in relation to family violence offending:
- Violence of this kind is alarmingly widespread, and extremely harmful. The statistics about the incidence of women being killed or seriously injured by vengeful former partners are truly shocking. Although the cases under consideration do not fall into that worst category, they are symptomatic of what can fairly be described as an epidemic of domestic violence ...
- General deterrence is, accordingly, a sentencing principle of great importance in cases such as these.¹⁷⁴

167. Arie Freiberg and Peter Sallmann, 'Courts of Appeal and Sentencing: Principles, Policy and Politics' (2008) 26(1) *Law in Context* 43, 46.

168. Ibid 53.

169. *R v Mills* [1998] 4 VR 235.

170. *R v Verdins* (2007) 16 VR 269.

171. *R v AB (No. 2)* (2008) 18 VR 391.

172. Submission 2 (Anonymous).

173. Submission 10 (Liberty Victoria).

174. *Director of Public Prosecutions v Meyers* (2014) 44 VR 486, 497–498 (Maxwell P, Redlich, and Osborn JJA), cited in Submission 10 (Liberty Victoria).

Appellate review of current sentencing practices

- 3.74 In several cases, the Court of Appeal has considered appeals that have addressed the broader question of the adequacy of current sentencing practices for a particular offence, or a subset of offending within an offence. In so doing, the court has considered issues that go beyond (and indeed have sometimes been unnecessary for) the resolution of particular sentence appeals.
- 3.75 The Court of Appeal found that the current sentencing practices were inadequate for the 'glassing' forms of recklessly causing serious injury (*Winch*), 'confrontational' aggravated burglary (*Hogarth*), and negligently causing serious injury (by driving) (*Harrison*). The court declared that sentencing judges should no longer regard themselves as constrained to follow earlier sentencing practice for these subcategories of offences.
- 3.76 In *Winch*, the court stated that:
- It follows, in our view, that sentencing judges should not regard themselves as constrained to follow the course disclosed by the glassing cases to which we have referred. Those advising clients in the future whether or not to plead guilty to [recklessly causing serious injury] in a glassing case should ensure that no assumption is made about the availability of a suspended sentence. For all the reasons we have given, a person who comes to be sentenced for [recklessly causing serious injury], on a plea of guilty, for a 'glassing' offence — even with all the mitigating features to which we have referred — should proceed on the assumption that he or she will be required to spend a significant period of time in actual custody.¹⁷⁵
- 3.77 In *Hogarth*, the court stated that:
- current sentencing for this form of aggravated burglary can no longer be treated as a reliable guide, and sentencing judges should no longer regard themselves as constrained by existing practice. The necessary change in sentencing practice for confrontational aggravated burglary will evolve over the course of decisions in individual cases. The director will play an important role in this process, by assisting judges through the making of submissions on sentencing range.¹⁷⁶
- 3.78 More recently, in *Harrison*, the Court of Appeal stated that:
- Sentencing courts should no longer consider themselves constrained by existing sentencing practice for offences of [negligently causing serious injury] by driving which fall within the upper range of seriousness (as exemplified by the cases under appeal). The sentences imposed in the cases to which we have referred should not be viewed as setting any limit on the sentence that may be imposed in such a case. In particular, sentencing courts should not treat four years as a ceiling for this offence. Sentences for mid-range and lower-end instances of [negligently causing serious injury] by driving will also need to increase, in order to maintain appropriate sentencing relativities.¹⁷⁷
- 3.79 The Court of Appeal went on to note that:
- In an appropriate case, an intermediate appellate court may express an opinion about the adequacy of [current sentencing practices] for a particular offence and, if it is found to be inadequate, may indicate that in the future sentences should be increased. In this way, inadequacies in sentencing can be addressed within the judicial process itself. The system is self-correcting, as it should be.¹⁷⁸

¹⁷⁵ *Winch v The Queen* (2010) 27 VR 658, 669–670.

¹⁷⁶ *Hogarth v The Queen* (2012) 37 VR 658, 674.

¹⁷⁷ *Harrison v The Queen* [2015] VSCA 349 (16 December 2015) [140] (citations omitted).

¹⁷⁸ *Harrison v The Queen* [2015] VSCA 349 (16 December 2015) [89].

- 3.80 A number of submissions received by the Council also endorsed this approach to sentencing guidance on the adequacy of current sentencing practices.¹⁷⁹ The Director of Public Prosecutions stated in his submission that ‘the Court of Appeal’s developing practice of analysing and disapproving [current sentencing practices] is a powerful mechanism for offering guidance on sentencing levels’.¹⁸⁰
- 3.81 Other stakeholders considered the court’s declaration that pre-existing sentencing practices are inadequate may be of limited assistance in the absence of guidance on what would be adequate.¹⁸¹

Is the system self-correcting?

- 3.82 It is too early to determine whether current sentencing practices have changed for the offence of negligently causing serious injury (by driving) as a result of *Harrison*. However, the Council has examined data on whether there have been changes to the current sentencing practices for aggravated burglary and for glassing-forms of recklessly causing serious injury, in light of the directives from the Court of Appeal.
- 3.83 The Council’s analysis of changes to sentencing practices for these offences is discussed in detail at [5.230]–[5.232] and [5.270]–[5.272], and in Appendix 9. In summary, sentencing outcomes for the glassing form of recklessly causing serious injury after *Winch* and aggravated burglary after *Hogarth* demonstrate the following:
- For the glassing forms of recklessly causing serious injury, there was an increase in the median custodial sentence length from 2 years to 2 years and 6 months, representing a 25% increase. There was also a 22 percentage-point increase in the proportion of charges receiving immediate imprisonment (including a youth justice centre order and immediate imprisonment combined with a community correction order).
 - For aggravated burglary, there was a similar increase in the median custodial sentence length from 2 years to 2 years and 6 months, representing a 25% increase. There was also an increase in the proportion of charges receiving a custodial sentence, from 65% before *Hogarth* to just over 73% after the decision.
- 3.84 For the glassing forms of recklessly causing serious injury, the Court of Appeal’s concern with current sentencing practices was related to the proportion of offenders who had received a wholly suspended sentence for this particularly serious offending. In this regard, the shift to a higher proportion of offenders receiving immediate imprisonment confirms the ‘self-correcting’ view, albeit this shift coincided with the abolition of suspended sentences.
- 3.85 Suspended sentences were progressively abolished in Victoria. They were abolished in the higher courts for all ‘serious’ and ‘significant’ offences, including recklessly causing serious injury, committed on or after 1 May 2011.¹⁸²
- 3.86 For aggravated burglary, the 25% increase in the median custodial sentence may be considered a significant proportion of the prior median (and further evidence of ‘self-correcting’). Alternatively, it might be considered a minor increase (6 months) when compared with the maximum penalty of 25 years for that offence, providing evidence that the Court of Appeal’s guidance is insufficient.

179. Submission 11 (Law Institute of Victoria); Submission 13 (Victoria Legal Aid).

180. Submission 14 (Director of Public Prosecutions).

181. Sentencing Guidance Stakeholder Discussion Forum (1 March 2016).

182. *Sentencing Amendment Act 2010* (Vic).

Guideline judgments

- 3.87 Currently, the most overt form of sentencing guidance in Victoria is represented by provisions in the *Sentencing Act 1991* (Vic) that allow the Court of Appeal to give a formal guideline judgment.
- 3.88 The Victorian guideline judgment scheme (along with the Council's recommended reforms to that scheme) is discussed in detail in Chapter 6.
- 3.89 In summary, the Court of Appeal can give a guideline judgment after an application by a party to a sentence appeal or on the initiative of the Court of Appeal itself.¹⁸³ Such a judgment can be given in a case even where it is not necessary for the purposes of determining the appeal.¹⁸⁴
- 3.90 In considering the giving of, or in reviewing, a guideline judgment, the Court of Appeal must have regard to the need to:
- promote consistency of approach in sentencing offenders; and
 - promote public confidence in the criminal justice system.¹⁸⁵
- 3.91 A guideline judgment may set out:
- criteria to be applied in selecting among various sentencing alternatives;
 - the weight to be given to the various purposes for which a sentence may be imposed;
 - the criteria by which a sentencing court is to determine the gravity of an offence;
 - the criteria that a sentencing court may use to reduce the sentence for an offence;
 - the weighting to be given to relevant criteria; or
 - any other matter consistent with the principles contained in the *Sentencing Act 1991* (Vic).¹⁸⁶
- 3.92 If the court decides to give a guideline judgment, it must notify the Council and seek its views.¹⁸⁷ The court must also afford the Director of Public Prosecutions¹⁸⁸ and Victoria Legal Aid¹⁸⁹ the opportunity to appear and to make submissions.
- 3.93 The guidance provided by a guideline judgment is in addition to all of the guiding principles under the *Sentencing Act 1991* (Vic)¹⁹⁰ that are required to be taken into account by a sentencing court. Such guidance does not limit or take away from those requirements.¹⁹¹
- 3.94 Although they commenced in 2004, the guideline judgment provisions have been enlivened only once. In 2014, the Court of Appeal gave a guideline judgment in the case of *Boulton v The Queen* ('*Boulton*').¹⁹²

183. *Sentencing Act 1991* (Vic) s 6AB(1).

184. *Sentencing Act 1991* (Vic) s 6AB(3).

185. *Sentencing Act 1991* (Vic) ss 6AE(a)–(b).

186. *Sentencing Act 1991* (Vic) s 6AC; this provision also provides that a guideline may set out 'guidelines for sentencing offenders for baseline offences': see [4.14]–[4.27].

187. *Sentencing Act 1991* (Vic) s 6AD(a).

188. *Sentencing Act 1991* (Vic) s 6AD(b)(i).

189. *Sentencing Act 1991* (Vic) s 6AD(b)(ii).

190. *Sentencing Act 1991* (Vic) pt 2.

191. *Sentencing Act 1991* (Vic) ss 6AG(a)–(b).

192. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014).

- 3.95 The Director of Public Prosecutions applied to the Court of Appeal in 2013 for a guideline judgment in relation to two cases (*Clements* and *Boulton*) in which the offender had applied for leave to appeal against sentence; the Court of Appeal joined a third case (*Fitzgerald*). All three appellants had received a lengthy community correction order: 10 years, 8 years, and 5 years respectively.
- 3.96 Appendix I to the guideline judgment contains guidelines for sentencing courts on the imposition of a community correction order, including:
- general principles;
 - the decision to impose imprisonment or a community correction order;
 - the length of a community correction order; and
 - the conditions to be attached to a community correction order.
- 3.97 A discussion of *Boulton* and its influence in the context of the operation of the Victorian guideline judgment scheme is presented in Chapter 6.

Chapter 4:

Baseline sentencing



History

- 4.1 Baseline sentencing was first proposed in 2010 as a means of addressing concerns regarding current sentencing practices for particular offences. These concerns had been expressed by the Director of Public Prosecutions, Members of Parliament, and the Court of Appeal, among others.
- 4.2 On 31 August 2010, the former Director of Public Prosecutions, Mr Jeremy Rapke, QC, issued a media release announcing a new policy whereby the Director would argue for higher sentences in all aggravated burglary cases, by challenging the current sentencing practices for that offence. Aggravated burglary was the first offence targeted in a policy challenging current sentencing practices that also included other offences.
- 4.3 The Director's media release stated that:

The [Director of Public Prosecutions'] challenge to current sentencing practices for aggravated burglary is the first stage of a long-term program to address inadequate sentencing practices for a number of offences, including rape, certain child abuse offences, intentionally and recklessly causing serious injury, and certain drug offences.¹⁹³
- 4.4 On 23 November 2010, in announcing baseline sentencing as part of the Liberal Nationals Coalition's election platform for the Victorian state election held that year, the then Leader of the Opposition, the Hon Ted Baillieu, MP, stated that:

Victorians are sick and tired of seeing offenders receive hopelessly inadequate sentences time and time again when they destroy the lives of young people with drugs, or commit the most horrific of murders.¹⁹⁴
- 4.5 Contemporaneously, in a number of decisions, the Court of Appeal (or individual Judges of Appeal) had questioned the adequacy of current sentencing practices for particular offences. These cases were also referred to in the then Director of Public Prosecution's *Policy Regarding Challenging Current Sentencing Practices* (now suspended).¹⁹⁵
- 4.6 For example, in the case of *Director of Public Prosecutions v CPD*,¹⁹⁶ the Court of Appeal (in a unanimous judgment) stated in respect of the current sentencing practices for sexual penetration with a child under 10 years of age:

When regard is had to the statutory maximum penalty of 25 years' imprisonment, a real question arises as to the adequacy of current sentencing for this offence.¹⁹⁷
- 4.7 Similar comments had been made by the Court of Appeal or individual Judges of Appeal regarding current sentencing practices for the offences of rape,¹⁹⁸ cultivating a commercial quantity of cannabis,¹⁹⁹ intentionally causing serious injury,²⁰⁰ persistent sexual abuse of a child under 16,²⁰¹ and recklessly causing serious injury.²⁰²

193. Office of Public Prosecutions, 'Director of Public Prosecutions Calls for Increased Sentences', Media Release (31 August 2010).

194. Victorian Liberal Nationals Coalition, 'Coalition to Set Minimum Sentence Standards for Serious Crimes', Media Release (23 November 2010) <<http://www.robertclark.com.au/feature/ideas-and-solutions/coalition-to-set-minimum-sentence-standards-for-serious-crime/>> at 7 April 2016, 1.

195. Director of Public Prosecutions, *Director's Policy Regarding Challenging Current Sentencing Practices: Policy 32* (Office of Public Prosecutions Victoria, 2011) <http://www.opp.vic.gov.au/resources/8/4/84137e00404a14a4ac1aff5f2791d4a/32_challenging_current_sentencing_practices.pdf> at 16 February 2012.

196. *Director of Public Prosecutions v CPD* (2009) 22 VR 533.

197. *Director of Public Prosecutions v CPD* (2009) 22 VR 533, 536 (Maxwell P, Redlich JA, and Robson AJA).

198. *Leeder v The Queen* [2010] VSCA 98 (23 April 2010) [37] (Maxwell P).

199. *Nguyen v The Queen* (2010) 208 A Crim R 464, 473 (Maxwell P).

200. *Kane v The Queen* [2010] VSCA 213 (23 August 2010) [29]–[30] (Harper JA).

201. *Director of Public Prosecutions v DDJ* (2009) 22 VR 444, 460–461 (Maxwell P, Vincent, and Neave JJA).

202. *Winch v The Queen* (2010) 27 VR 658, 663 (Maxwell P and Redlich JA).

Baseline reference

- 4.8 In April 2011, the then Attorney-General, the Hon Robert Clark, MP, wrote to the Council asking it to advise him on the introduction of a baseline sentencing scheme.
- 4.9 The terms of reference did not ask the Council to consider the merits of a baseline sentencing scheme. Rather, the terms of reference prescribed particular elements of the scheme, including that:
- the baseline sentence was to represent the median, or midpoint, of sentences for the relevant offence;
 - the court was to use the baseline sentence as a starting point for fixing a non-parole period; and
 - the court's consideration of the baseline sentence was to take precedence over current sentencing practices.²⁰³

The Council's 2012 report

- 4.10 In February 2012, the Council provided its advice to the government, and in May 2012, it published that advice in the form of a report entitled *Baseline Sentencing*.²⁰⁴ While acknowledging the views expressed by the majority of stakeholders consulted – including objections to the introduction of a baseline sentencing scheme – the Council confined its advice to those matters raised in the terms of reference.
- 4.11 The Council proposed a baseline sentencing model whereby the prescribed baseline 'level' for an offence represented the non-parole period to be imposed for a charge of that offence in the middle of the range of objective offence seriousness.
- 4.12 The proposed model was similar to the 'standard non-parole period statutory scheme'²⁰⁵ operating in New South Wales. At the time of the Council's advice, that scheme had been recently considered and upheld by the High Court in *Muldrock v The Queen*.²⁰⁶
- 4.13 The Council's report provided specific recommendations on the proposed baseline sentencing procedure and exclusions from the scheme. Further, the report set out the offences to be included, with recommended baseline sentence levels for each offence. The report also responded to the government's request for an estimate of the likely effects that baseline sentencing would have on sentencing levels and on the prison population.

203. Sentencing Advisory Council, *Baseline Sentencing: Report* (2012) xi.

204. Sentencing Advisory Council (2012), above n 203.

205. This scheme was introduced by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW), which amended the *Crimes (Sentencing Procedure) Act 1999* (NSW) (now further amended).

206. *Muldrock v The Queen* (2011) 244 CLR 120.

Sentencing Amendment (Baseline Sentences) Act 2014 (Vic)

- 4.14 On 2 April 2014, the Sentencing Amendment (Baseline Sentences) Bill 2014 (Vic) was introduced into parliament. The Bill was passed without amendment on 5 August 2014, and it received Royal Assent on 12 August 2014.²⁰⁷

Purpose of the baseline sentencing provisions

- 4.15 The legislated purposes in section 1 of the *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic) do not describe any intended effect on sentencing outcomes for baseline offences. The purposes, as stated, are to amend the *Sentencing Act 1991* (Vic) 'to provide for baseline sentences for indictable offences' and to fix a baseline sentence for each of the specified baseline offences.²⁰⁸

Second Reading Speech

- 4.16 In the Second Reading Speech, the then Attorney-General stated that baseline reforms would:

give Parliament on behalf of the community a far greater say in the overall level of sentences that are imposed in our courts, while still allowing the courts to take into account the facts of individual cases in determining the sentence for each case.²⁰⁹

- 4.17 With regard to current sentencing practices, the then Attorney-General said:

It is clear that sentences for a number of crimes are out of step with community expectations and out of step with what is required to deter crime effectively and protect the community. Child sex offences are considered to be amongst the worst kinds of offences and this is reflected in the maximum penalties. Sexual penetration of a child under 12 and persistent sexual abuse of a child under 16 are both punishable by a maximum penalty of 25 years.

Despite the high maximum penalties, between 2006–07 and 2009–10, the median sentence for the offence of sexual penetration of a child under 12 was three and a half years in jail. The median sentence for persistent sexual abuse of a child under 16 was six years imprisonment. These figures are unacceptable. The baseline sentencing reform changes this.²¹⁰

- 4.18 The mechanism through which the baseline reforms were intended to amend current sentencing practices for particular offences was parliament's prescription of a baseline sentence for each baseline offence.

207. Victoria, *Victoria Government Gazette*, No. S 267, 12 August 2014, 1.

208. *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic) s 1.

209. Victoria, 'Sentencing Amendment (Baseline Sentences) Bill 2014', *Parliamentary Debates*, Legislative Assembly, 3 April 2014, 1275 (Robert Clark, Attorney-General).

210. Victoria, 'Sentencing Amendment (Baseline Sentences) Bill 2014', *Parliamentary Debates*, Legislative Assembly, 3 April 2014, 1276 (Robert Clark, Attorney-General).

4.19 The baseline sentence was intended to:

serve as a guidepost for judges whenever they impose a sentence for those crimes. The baseline sentence is the figure that Parliament expects will become the median sentence for that offence. This requires sentencing practices to change so that, over time, for sentences to which baseline sentencing applies, half the sentences imposed for the offence should be less than this figure, and half should be greater.

Thus, the sorts of instance of the offence concerned that have in the past incurred a sentence of median length ... should in future receive a sentence equal to the baseline sentence. ... Sentences for cases that deserve to incur a higher or lower sentence than the median will then be set having regard to the median sentence length required by the baseline sentence.

This bill sets baseline sentences ... higher than the current median sentences. This will serve to influence the entire range of sentences imposed for each baseline offence so that most sentences imposed for baseline offences under this bill will move higher to a greater or lesser extent as a result of the change to sentencing practices that the bill requires.²¹¹

4.20 This model is different from that which was recommended by the Council in 2012.

Explanatory Memorandum

4.21 The Explanatory Memorandum confirmed that the intent of the baseline sentencing scheme was to increase most of the sentences imposed for baseline offences, stating:

It is intended that the baseline sentences introduced for each of these offences will become the median sentence for that offence. Currently, the median sentence for each offence is lower than the baseline sentence. The Bill requires courts to increase sentences so that cases that currently receive a sentence at or near the current median sentence will in future receive a sentence length at or near the baseline sentence.

Sentencing practices are thus expected to adjust so that, over time, half the sentences imposed should be less than the baseline sentence and half should be greater. It is intended to influence the entire range of sentences imposed for each baseline offence, so that most sentences imposed for baseline offences under this Bill will increase to a greater or lesser extent.²¹²

211. Victoria, 'Sentencing Amendment (Baseline Sentences) Bill 2014', *Parliamentary Debates*, Legislative Assembly, 3 April 2014, 1276 (Robert Clark, Attorney-General).

212. Explanatory Memorandum, Sentencing Amendment (Baseline Sentences) Bill 2014 (Vic) 2.

Commencement and operation

- 4.22 The Act as passed stated that the commencement date was 1 July 2015 (if not proclaimed earlier). The *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic) was subsequently proclaimed on 7 October 2014 to commence on 2 November 2014.²¹³
- 4.23 The baseline sentencing scheme commenced on 2 November 2014 and applied to the sentencing of the seven²¹⁴ baseline offences (shown in Table 1 with their respective baseline sentences) for offences committed on or after that date.
- 4.24 A detailed description of the baseline sentencing scheme is contained in the Council's 2014 report *Calculating the Baseline Offence Median*.²¹⁵

Table 1: Baseline offences and baseline sentences

Offence	Baseline sentence
Murder	25 years ^a
Trafficking in a large commercial quantity of a drug of dependence	14 years
Persistent sexual abuse of a child under 16	10 years
Sexual penetration with a child under 12	10 years
Incest with child/step-child (aged under 18) ^b	10 years
Incest with child/step-child (under 18) of de facto	10 years
Culpable driving causing death	9 years

a. The baseline sentence for the murder of an emergency worker while on duty, as defined by the *Crimes Act 1958* (Vic) s 3(2)(a), is 30 years.

b. A baseline sentence only applies to an offence under section 44(1) of the *Crimes Act 1958* (Vic) where the victim was aged under 18.

Application of the baseline sentence when sentencing baseline offences

- 4.25 Baseline sentencing required a court to sentence a charge of a baseline offence consistent with section 5A of the *Sentencing Act 1991* (Vic), which provides that:
- the period specified as the baseline sentence for the offence is the sentence that the Parliament intends to be the median sentence for sentences imposed for that offence.²¹⁶
- 4.26 The 'median' is a statistical midpoint, and in the context of sentencing, it means that half the sentences are below the median and half the sentences are above the median.

Minimum non-parole period proportion

- 4.27 The baseline sentencing provisions also required a court sentencing a case involving at least one charge of a baseline offence to fix a minimum proportion of the total effective or head sentence as the non-parole period.²¹⁷

213. Victoria, *Victoria Government Gazette*, No. S 350, 7 October 2014, 1.

214. This figure includes murder of an emergency worker while on duty.

215. Sentencing Advisory Council, *Calculating the Baseline Offence Median: Report* (2014).

216. *Sentencing Act 1991* (Vic) s 5A(1)(b).

217. *Sentencing Act 1991* (Vic) s 11A.

First baseline sentencing and ruling

- 4.28 The first matter to be sentenced under the baseline scheme was the case of *R v IRT* ('IRT').²¹⁸
- 4.29 The offender was sentenced after pleading guilty to two charges of indecent act with a child under 16²¹⁹ and four charges of incest with child/step-child.²²⁰ The victim of the offences was the offender's daughter. The two charges of indecent act with a child under 16 (charges 1 and 2) were representative charges, relating to three instances of offending and four instances of offending, respectively. The four incest charges (charges 3, 4, 5, and 6) were not representative charges.
- 4.30 Charge 6 was committed after 2 November 2014 (when the baseline scheme commenced), and the victim was aged under 18, and so this charge fell to be sentenced under the baseline sentencing scheme. The offender was sentenced to 4 years and 6 months' imprisonment on the baseline charge, and a total effective sentence of 6 years and 8 months' imprisonment. The court imposed a non-parole period of 4 years and 10 months in accordance with the minimum proportion non-parole period required under the baseline provisions (see [4.27]).

Baseline ruling

- 4.31 In addition to the reasons for sentence, the judgment in *IRT* contains 'Appendix I – Baseline Sentencing', which describes in detail how the baseline provisions were considered and applied, and whether and in what manner the provisions affected the sentence imposed on the offender.
- 4.32 The court concluded that, as the offending on the baseline charge fell below a level of seriousness that would have justified the imposition of the median sentence, the entire sentencing range (below the baseline sentence) remained open to the judge. This conclusion was made on the basis that the court was not required to 'scale' sentences. The court said:
- It must be accepted as a matter of mathematics, that so long as half of all sentences are at or above, and half of all sentences are at or below a particular figure, the distribution of sentences above and below that point do not affect the median. Therefore sentencing in a manner compatible with Parliament's intention does not require that sentences below the median are scaled in proportion to the baseline sentence.²²¹

218. *R v IRT* [2015] VSC 372 (30 July 2015).

219. Contrary to section 47(1) of the *Crimes Act 1958* (Vic).

220. Contrary to section 44(1) of the *Crimes Act 1958* (Vic).

221. *R v IRT* [2015] VSC 372 (30 July 2015) [141].

Director of Public Prosecutions v Walters (A Pseudonym)

- 4.33 The Director of Public Prosecutions lodged an appeal against the sentence in *IRT* on the ground that 'the total effective sentence and non-parole period [were] manifestly inadequate'.²²²
- 4.34 In considering the appeal in this case, the Court of Appeal also considered broader questions regarding the operation of the baseline scheme.
- 4.35 A majority of the Court of Appeal in *Director of Public Prosecutions v Walters (A Pseudonym)* found that the baseline sentencing scheme was 'incapable of being given any practical operation'.²²³
- 4.36 Their Honours held that there was a legislative gap, consisting in the failure of the provisions to supply any mechanism for the achievement of the intended future median, and that it was beyond the judicial function to fill this gap. They said:
- the defect in the legislation is incurable. Parliament did not provide any mechanism for the achievement of the intended future median, and the Court has no authority to create one, as the Director of Public Prosecutions properly conceded. To do so would be to legislate, not to interpret.²²⁴
- 4.37 A particular issue with the scheme was the difficulty for a court in determining the features of a 'median' sentence case in order to compare the case before the court with either a historical or a hypothetical future median case.

Stakeholders' views

- 4.38 In the submissions received by the Council, all of the stakeholders that addressed the question of whether to repeal the baseline sentencing scheme stated or implied that it should be repealed.²²⁵
- 4.39 Stakeholders considered that the scheme was 'cumbersome, difficult to apply and ultimately confusing',²²⁶ 'flawed, fundamentally, in concept',²²⁷ 'worse than flawed, it was fundamentally disingenuous',²²⁸ that it 'erodes judicial discretion, leads to the imposition of unjust sentences, contributes to court delay and overly-complicates sentencing',²²⁹ that it was 'a flawed guiding mechanism, operating upon a set of questionable numerical sentence reference points'²³⁰ and 'extremely difficult for lawyers and judges, let alone accused persons to navigate'.²³¹

222. Office of Public Prosecutions, 'DPP Appeals Baseline Sentence', Media Release (28 August 2015) <<http://www.opp.vic.gov.au/News-and-Media/Media-releases/DPP-appeals-baseline-sentence>> at 6 April 2016.

223. *Director of Public Prosecutions v Walters (A Pseudonym)* [2015] VSCA 303 (17 November 2015) [9] (Maxwell P, Redlich, Tate, and Priest JJA).

224. *Director of Public Prosecutions v Walters (A Pseudonym)* [2015] VSCA 303 (17 November 2015) [8] (Maxwell P, Redlich, Tate, and Priest JJA).

225. Submission 1 (G. Silbert); Submission 2 (Anonymous); Submission 4 (Youthlaw); Submission 10 (Liberty Victoria); Submission 11 (Law Institute of Victoria); Submission 12 (Criminal Bar Association of Victoria); Submission 13 (Victoria Legal Aid); Submission 14 (Director of Public Prosecutions).

226. Submission 2 (Anonymous).

227. Submission 12 (Criminal Bar Association of Victoria).

228. Submission 10 (Liberty Victoria).

229. Submission 11 (Law Institute of Victoria).

230. Submission 14 (Director of Public Prosecutions).

231. Submission 13 (Victoria Legal Aid).

The Council's view

- 4.40 In light of the decision in *Director of Public Prosecutions v Walters (A Pseudonym)*,²³² the strong and consistent views of stakeholders, and the Council's recommendations concerning proposed models of guidance, the Council considers that the baseline sentencing scheme should be repealed in its entirety.

Recommendation 1: Repeal of the baseline sentencing provisions

The baseline sentencing provisions should be repealed in their entirety.

232. *Director of Public Prosecutions v Walters (A Pseudonym)* [2015] VSCA 303 (17 November 2015).

Chapter 5:

Offences with sentencing problems requiring guidance



Overview

- 5.1 A threshold question flowing from the terms of reference is whether there are problems with the sentencing of offences in Victoria that demonstrate the need to:
 - promote consistency in the approach to sentencing; and/or
 - promote public confidence in sentencing outcomes.
- 5.2 The promotion of both of these objectives is likely to further public confidence in the criminal justice system. Further, the identification of offences where there is evidence of a sentencing problem assists with the Council's consideration of the most effective legislative mechanism to provide sentencing guidance.
- 5.3 This chapter sets out the Council's view on which offences ought to be included in its recommended schemes for legislated sentencing guidance. The Council has formed its views using an evidence-based approach. The evidence to which the Council has had regard includes relevant qualitative research, quantitative analysis, and comments and feedback from submissions and consultations.
- 5.4 This chapter provides:
 - a foundation for the Council's recommendation that an enhanced guideline judgment scheme is the most effective legislative mechanism for providing sentencing guidance (Recommendation 3); and
 - the basis for the Council's recommendation that if a standard sentence scheme were to be introduced, it should operate for certain suitable offences in combination with an enhanced guideline judgment scheme (Recommendation 7).
- 5.5 This chapter commences by setting out the Council's approach to identifying possible problem offences warranting sentencing guidance. It identifies the possible problem offences. It documents the measures developed by the Council to assess the available evidence of sentencing problems for the possible problem offences. It determines whether the evidence is sufficient to confirm the existence of any such problems for all or any of the offences.
- 5.6 The chapter then sets out the Council's findings, following application of these measures. The Council identifies:
 - the offences for which, in the Council's view, there is sufficient evidence of sentencing problems that warrant guidance; and
 - the offences for which, in the Council's view, more evidence is needed to determine whether there are sentencing problems that warrant guidance.
- 5.7 The Council's conclusions are the result of an informed value judgment, based on qualitative and quantitative sources of information and the Council's collective knowledge and experience.
- 5.8 The chapter concludes with a discussion of the limitations of this analysis and the areas where further research is needed.

- 5.9 Figure 1 presents a summary of the Council's evidence-based approach to this threshold task. It shows the Council's:
- process for identifying possible problem offences;
 - measures for assessing possible problem offences to identify sentencing problems;
 - recommendation on the offences for which there is evidence of sentencing problems requiring guidance;
 - views on offences for which there is insufficient evidence of sentencing problems requiring guidance (and offences for which there is a lack of sentencing data to apply quantitative measures); and
 - views on which offences with identified sentencing problems are suitable for inclusion in an enhanced guideline judgment scheme (the Council's preferred model), and which offences with identified sentencing problems are suitable for inclusion in a standard sentence scheme, were it to be introduced.

Initial approach to identifying possible problem offences

Identifying sources of evidence

- 5.10 The first step the Council took was to develop a set of initial measures and sources of evidence for identifying possible problem offences. The Council identified the kind of sentencing problems that may indicate a need for guidance to achieve the objectives in the terms of reference. The Council also mapped out the sources of evidence that, if sufficient, may assist in identifying these problems and may justify the inclusion of problem offences in a legislated guidance scheme. Table 2 sets out the results of this process.
- 5.11 After an initial review of the sources of evidence listed in Table 2, the Council identified a number of possible problem offences. These include serious sexual offences, fatal and serious injury offences, high-level drug offences, and aggravated burglary.²³³

Stakeholders' views on possible problem offences

- 5.12 In its call for submissions, the Council invited community and professional stakeholders to identify the offences for which guidance on sentencing might be required to promote consistency in sentencing approach or public confidence in the criminal justice system.
- 5.13 Only some of the 16 submissions received by the Council identified possible problem offences. The Council considered all of the offences identified by stakeholders.
- 5.14 A number of submissions suggested that there was insufficient evidence of inconsistency in sentencing approach or lack of public confidence in the criminal justice system for any offence to be considered problematical.²³⁴

233. This comprises the following offences: sexual penetration with a child under 12, persistent sexual abuse of a child under 16, rape, incest with child/step-child, incest with child/step-child (under 18) of de facto, indecent act with a child under 16, murder, intentionally causing serious injury, recklessly causing serious injury, negligently causing serious injury, culpable driving causing death, aggravated burglary, trafficking in a large commercial quantity of a drug of dependence, trafficking in a commercial quantity of a drug of dependence, cultivating a large commercial quantity of a narcotic plant, and cultivating a commercial quantity of a narcotic plant.

234. Submission 10 (Liberty Victoria); Submission 11 (Law Institute of Victoria); Submission 13 (Victoria Legal Aid).

Figure 1: The Council's process and recommendations – offences for which there is evidence of sentencing problems and their suitability for inclusion in guidance schemes

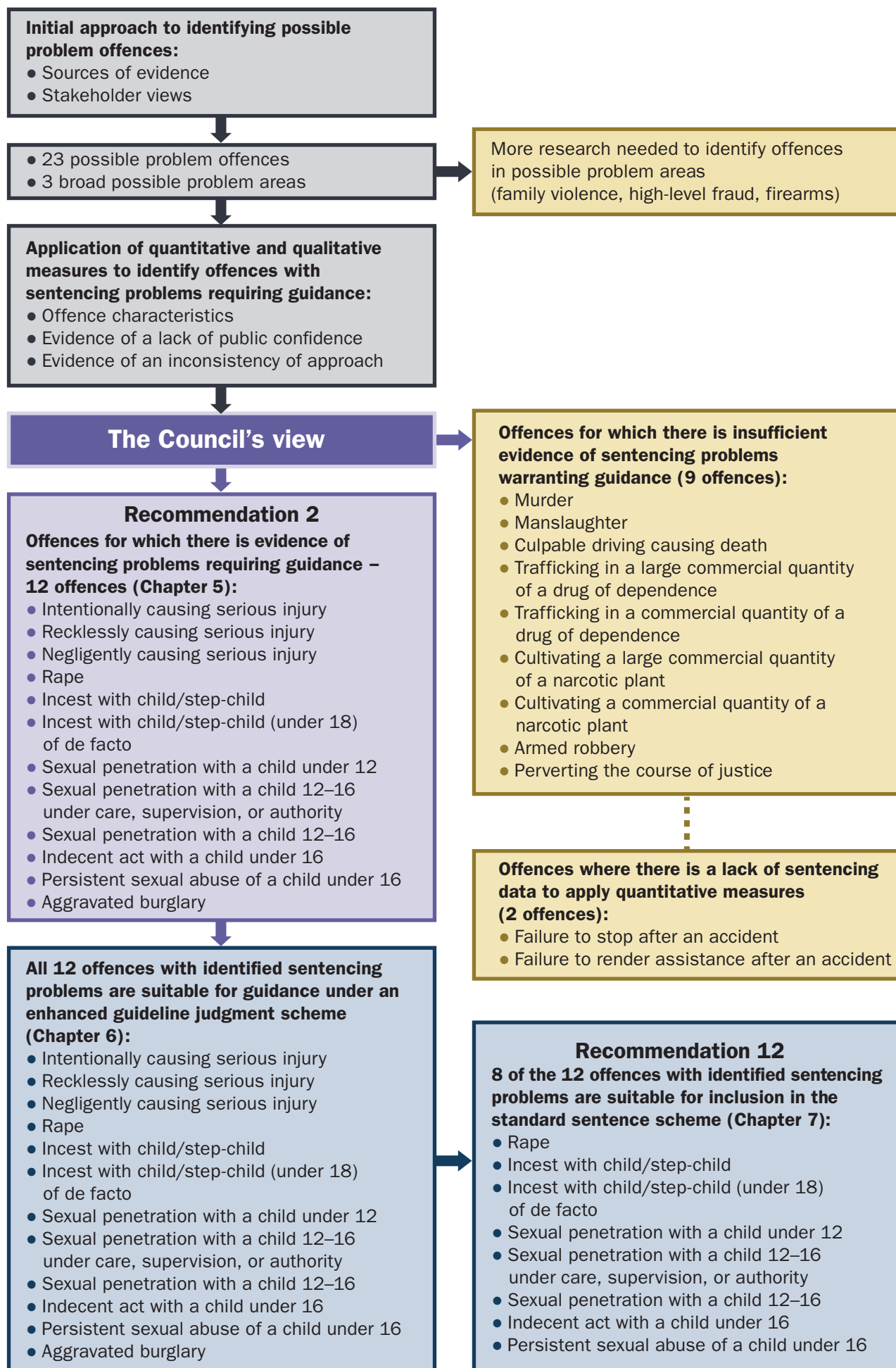


Table 2: Sources of evidence to identify possible problem offences with regard to the objectives of the terms of reference

Relevant objective in terms of reference	Problem with sentencing for offences	Source of evidence for problem
Promote public confidence in the criminal justice system.	Disparity between current sentencing practices and community views.	Jury sentencing studies (Tasmania and Victoria). Community attitudes to offence seriousness (Sentencing Advisory Council).
	Current sentencing practices are declared or considered inadequate or there is a questioning of the adequacy of current sentencing practices.	Court of Appeal commentary. Introduction of baseline sentencing regime and existence of other legislative mechanisms (such as gross violence scheme). Challenges to current sentencing practices by the Director of Public Prosecutions.
	Sentencing practices do not reflect the seriousness indicated by the maximum penalty.	Sentencing data comparing current sentencing practices with the maximum penalty for an offence.
Promote consistency of approach in sentencing.	Inconsistency of sentencing approach <i>within</i> the offence with respect to harm and culpability.	Sentencing data comparing sentencing practices with the maximum penalty and distribution of current sentencing practices for the offence. Textual analysis of sentencing remarks (some offences). Court of Appeal commentary.
	Inconsistency of sentencing approach <i>between</i> offences of similar levels of harm and culpability.	Sentencing data comparing sentencing practices to the maximum penalty and distribution of current sentencing practices between offences. Textual analysis of sentencing remarks (some offences). Court of Appeal commentary.

- 5.15 Of the submissions that did identify possible problem offences or areas,²³⁵ there was significant overlap with the possible problem offences that the Council initially identified. There was overlap in relation to the following offences:
- sexual offences (rape, both forms of parental incest, and penetrative child sexual offences);²³⁶
 - fatal and serious injury offences (murder, intentionally causing serious injury, and recklessly causing serious injury);²³⁷ and
 - drug offences (cultivating a commercial quantity of a narcotic plant).²³⁸
- 5.16 In addition, submissions identified the following possible problem offences:
- sexual penetration with a child 12–16 and sexual penetration with a child 12–16 under care, supervision, or authority;²³⁹
 - manslaughter;²⁴⁰
 - perverting the course of justice, leaving the scene of an accident, and not rendering assistance;²⁴¹ and
 - armed robbery.²⁴²
- 5.17 Stakeholders also identified some general areas (rather than individual offences) as potentially problematic.
- 5.18 In his submission, the Director of Public Prosecutions noted that high-level fraud had ‘concerning sentencing standards’ but that more complete analysis was required.²⁴³
- 5.19 In a meeting with the Council, Crown Prosecutors also flagged that firearm offences required examination.²⁴⁴
- 5.20 Another general problem area that featured in submissions and consultations was that of family violence. For example, Crown Prosecutors expressed concerns about the offence of murder when committed in circumstances of family violence.²⁴⁵ The Victims of Crime Commissioner noted that sentencing for family violence matters are a common area of complaint made by victims to his office, and that this category, along with other crimes involving serious violence, are appropriate for inclusion in sentencing reform.²⁴⁶

235. Submission 2 (Anonymous); Submission 3 (C. Murphy); Submission 5 (Whitehorse City Council); Submission 7 (Victorian Women's Trust); Submission 9 (C. Politi); Submission 12 (Criminal Bar Association of Victoria) (the Criminal Bar Association of Victoria did not raise any specific problem areas but did specify the offences that a legislated guidepost should be limited to, if one were to be introduced: murder, incest, sexual penetration with a child under 12, and persistent sexual abuse of a child under 16); Submission 15 (Victims of Crime Commissioner); Submission 16 (Local Government Professionals Inc.).

236. Submission 2 (Anonymous); Submission 7 (Victorian Women's Trust); Submission 12 (Victoria Legal Aid); Submission 13 (Director of Public Prosecutions); Submission 13 (Director of Public Prosecutions) (the Director referred to ‘mid-level’ rape as a possible offence of concern but considered that more analysis was required); Submission 15 (Victims of Crime Commissioner).

237. Submission 2 (Anonymous); Submission 9 (C. Politi); Submission 13 (Director of Public Prosecutions) (the Director referred to ‘high range’ intentionally causing serious injury as a possible offence of concern but considered that more analysis was required); Submission 15 (Victims of Crime Commissioner).

238. Submission 13 (Director of Public Prosecutions).

239. Submission 7 (Victorian Women's Trust).

240. Submission 9 (C. Politi).

241. Submission 3 (C. Murphy) (these were offences present in a fatal driving case in which Ms Murphy's father was killed after being hit by a car and the offenders (a husband and wife) fled the scene of the accident).

242. Submission 14 (Director of Public Prosecutions); Submission 15 (Victims of Crime Commissioner).

243. Submission 14 (Director of Public Prosecutions).

244. Meeting with a number of Crown Prosecutors (11 February 2016).

245. Meeting with a number of Crown Prosecutors (11 February 2016).

246. Submission 15 (Victims of Crime Commissioner) (other offences included murder, rape, armed robbery, and sexual offences against children).

The Commissioner also raised a further specific issue regarding the summary prosecution of common (or unlawful) assault in circumstances of family violence.²⁴⁷

- 5.21 The Council considered the broad possible problem areas raised in submissions, comprising high-level fraud, family violence, and firearms offences. Due to the time constraints on the reference and the scope of the advice sought, however, the Council considers that these matters require further research in order to identify particular offences within these broad categories that may have sentencing problems warranting sentencing guidance (see further [5.363]–[5.367]).
- 5.22 One submission raised a general issue about the sentencing of Aboriginal and Torres Strait Islander peoples (referred to in the submission as ‘First Peoples’). This submission suggested that there was a need for legislated sentencing guidance to ‘promote consistency in sentencing approach, and promote public confidence in the criminal justice system by alleviating the inter-generational incarceration of First Peoples’.²⁴⁸ In Chapter 6, the Council discusses how an enhanced guideline judgment scheme – as the most effective legislative mechanism for providing sentencing guidance – can address systemic issues raised by stakeholders, such as the sentencing of Aboriginal and Torres Strait Islander peoples (see [6.38]).
- 5.23 Two submissions suggested introducing mandatory minimum penalties for serious assaults when committed against authorised officers employed by Victorian councils within local government.²⁴⁹ Mandatory minimum penalties are discussed in Chapter 9 (see [9.28]–[9.63]).

An evidence-based approach to assessing possible problem offences in order to identify sentencing problems

Assessing possible problem offences

- 5.24 An initial review of the sources of evidence and consideration of the offences raised by stakeholders resulted in the identification of 23 possible problem offences, including three fatal offences, eight sexual offences, three serious injury offences, four drug offences, and five offences in a further category termed ‘other’. These offences are set out in Table 3.

Measures for assessing possible problem offences

- 5.25 The Council took an evidence-based approach to assessing the possible problem offences. This approach was supported in submissions received by the Council, typified by the following comment in the submission from Victoria Legal Aid:

[Victoria Legal Aid’s] submission prioritises the need for evidence-based decision making. If a new legislative mechanism is to be adopted, there must be a demonstrated need for it: there must be a problem to be fixed, and the solution must be fit for purpose.²⁵⁰

247. Submission 15 (Victims of Crime Commissioner).

248. Submission 6 (Anonymous).

249. Submission 5 (Whitehorse City Council); Submission 16 (Local Government Professionals Inc.).

250. Submission 13 (Victoria Legal Aid).

Table 3: Possible problem offences identified for review by the Council²⁵¹

Category	Number of discrete offences	Offences
Fatal offences	3	Murder
		Manslaughter
		Culpable driving causing death
Sexual offences	8	Rape
		Incest with child/step-child
		Incest with child/step-child (under 18) of de facto
		Sexual penetration with a child under 12 ^a
		Sexual penetration with a child 12–16 under care, supervision, or authority ^b
		Sexual penetration with a child 12–16 ^c
		Indecent act with a child under 16
Serious injury offences	3	Persistent sexual abuse of a child under 16
		Intentionally causing serious injury
		Recklessly causing serious injury
Drug offences	4	Negligently causing serious injury
		Trafficking in a large commercial quantity of a drug of dependence
		Trafficking in a commercial quantity of a drug of dependence
		Cultivating a large commercial quantity of a narcotic plant
Other offences	5	Cultivating a commercial quantity of a narcotic plant
		Armed robbery
		Aggravated burglary
		Perverting the course of justice
		Failure to stop after an accident
		Failure to render assistance after an accident

a. In 2010, the scope of this offence was increased to include victims aged 10 and 11.

b. In 2010, the scope of this offence was reduced from victims aged 10–16 to victims aged 12–16.

c. In 2010, the scope of this offence was reduced from victims aged 10–16 to victims aged 12–16.

251. Offences are listed within each category in order of statutory reference.

- 5.26 The Council developed a set of measures to assess each of the possible problem offences, including:
- the basic characteristics of each offence;
 - the sufficiency of the identified sources of evidence to confirm a sentencing problem, and the nature of that problem; and
 - the type of guidance needed to effectively address any of the established sentencing problems.
- 5.27 The Council has drawn from a number of sources to develop these measures (Table 4). These reflect both quantitative and qualitative measures.
- 5.28 In developing these measures, the Council has had specific regard to principles reflected in Victorian case law and, in particular, the Court of Appeal's decision in *Ashdown v The Queen*. In that case, Redlich JA set out the circumstances in which an intermediate appellate court may propose to uplift current sentencing practices:
- (1) Where there has been an increase in the statutory maximum penalty and [current sentencing practices] has failed to reflect that increase.
 - (2) Where there is evidence that an offence has become more prevalent.
 - (3) Where community expectations have altered.
 - (4) Where there has been increased community disquiet over the offence.
 - (5) Where there has emerged a better understanding of the consequences for the victim of the offending conduct.
 - (6) Where there has been a persistent error in the manner in which a category of offenders has been treated.
 - (7) Where the objective seriousness of particular conduct has been wrongly categorised or a particular type of sentencing disposition is not ordinarily appropriate.²⁵²
- 5.29 The Council has also had regard to the principles enunciated by the New South Wales Sentencing Council in its review of standard non-parole periods.²⁵³ In that review, the New South Wales Sentencing Council recommended eight principles for the inclusion of offences in the standard non-parole period scheme, being whether the offence:
- (a) has a significant maximum penalty
 - (b) is triable on indictment only²⁵⁴
 - (c) involves elements of aggravation
 - (d) involves a vulnerable victim
 - (e) involves special risk of serious consequences to the victim and the community
 - (f) is prevalent
 - (g) is subject to a pattern of inadequate sentencing, and
 - (h) is subject to a pattern of inconsistent sentences.²⁵⁵

252. *Ashdown v The Queen* (2011) 37 VR 341, 403.

253. New South Wales Sentencing Council, *Standard Non-Parole Periods: Final Report* (2013) 9–19.

254. The New South Wales Sentencing Council qualified this principle to the effect that 'the fact that an indictable offence can be tried summarily should not of itself determine whether it should or should not be included in the [standard non-parole period] scheme': New South Wales Sentencing Council, above n 253, 12.

255. *Ibid* 9–10.

5.30 The New South Wales Sentencing Council also recommended that:

The fact that an offence potentially encompasses a wide range of offending behaviour should be a factor that can be considered in deciding whether to exclude an offence from the [standard non-parole period] scheme.²⁵⁶

5.31 This factor has been included in the Council's criteria for assessing whether an offence is suitable for inclusion in the standard sentence scheme (see Chapter 7).

5.32 The measures for assessing the possible problem offences are presented according to whether they relate to a lack of public confidence or a lack of consistency. However, these considerations are interrelated. The terms of reference list the promotion of consistency of sentencing approach first, followed by public confidence. However, the Council has considered the measures under public confidence first, as they are also relevant to the promotion of consistency. For example, the measures that assist in identifying offences for which there is concern regarding the adequacy of current sentencing practices may also indicate a need for greater consistency in the approach to sentencing. It is arguable that consistency in the *approach* to sentencing also includes consistent consideration of the appropriate relativity of seriousness between different types of offences, and that this consideration should be reflected in sentencing *outcomes*.

Table 4: Measures used by the Council to assess possible problem offences for evidence of sentencing problems

Subject headings	Measures
Offence characteristics	<p>The offence is an indictable offence.</p> <p>The extent to which the offence is 'prevalent'.</p> <p>The objective elements of the offence involve a vulnerable victim.</p> <p>The offence is an 'aggravated offence'.</p>
Problem with sentencing: evidence of a lack of public confidence in sentencing	<p>Evidence from informed and structured consultation of community views on sentencing/seriousness of the offence.</p> <p>Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences.</p> <p>Parliament's view of offence seriousness.</p> <p>Disparity between current sentencing practices and the community's and parliament's views of offence seriousness.</p> <p>Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices.</p> <p>No evidence of change in current sentencing practices following the Court of Appeal's declaration or questioning.</p>
Problem with sentencing: evidence of inconsistency of approach	<p>Treatment of a category of offenders within an offence category.</p> <p>Weight given to aggravating and mitigating factors.</p> <p>Categorisation of the objective seriousness of an offence.</p>

²⁵⁶ Ibid 9, Recommendation 2.1.

Quantitative measures

- 5.33 The Council's main quantitative measure is sentencing data from its higher courts and Magistrates' Court sentencing databases, comprising sentences imposed for the possible problem offences over a five-year period from 1 July 2010 to 30 June 2015. The methodology for the Council's quantitative data analysis is set out in Appendix 2.
- 5.34 Basic descriptive statistics were analysed for Magistrates' Court sentences imposed for indictable offences that are triable summarily (see Appendix 8).
- 5.35 The Council analysed the following higher courts sentencing data:
- descriptive statistics on the number of charges sentenced by sentence type;
 - descriptive statistics on immediate custodial sentences;²⁵⁷
 - quantitative measures of consistency;
 - comparison of sentencing practices with the maximum penalty for the offence; and
 - length of immediate custodial sentences over time.
- 5.36 There were sufficient sentencing data for this analysis for 21 of the 23 possible problem offences in Table 3. For the remaining two possible problem offences – the two road safety offences of failure to stop following an accident and failure to render assistance following an accident – there were insufficient data on sentencing outcomes in the higher courts or the Magistrates' Court. Charges of these offences were not recorded in a way that allowed a proper analysis of sentencing practices with respect to the maximum penalties for the different forms of the two offences. This is explained further at [5.360]–[5.362].

Qualitative measures

- 5.37 The main qualitative measures were:
- findings from informed and structured consultation on community views on offence seriousness and sentencing for criminal offences;
 - key Court of Appeal judgments;
 - findings from the Council's examination of sentencing practices for sexual penetration with a child under 12;²⁵⁸
 - textual analysis of sentencing remarks for other possible problem offences, including sexual offences, drug offences, serious injury offences, and other offences; and
 - recent developments in the law, research and activity in relation to particular offences or issues, such as Royal Commissions, changes to legislation and policy, and other sources of community discussion.

257. For the purposes of this report, the following sentences were categorised as 'custodial sentences': imprisonment (including partially suspended sentences), intensive correction orders, residential treatment orders, youth justice centre orders and youth training centre orders, and any mixed sentences including these sentence types. Imprisonment sentences imposed for charges of an offence are considered suspended if the total effective sentence is either wholly or partially suspended. Partially suspended sentences for charges were included in the analysis according to the length of sentence imposed on the charge, without any adjustment for the case level suspended period. Wholly suspended sentences were not considered to be custodial sentences. Aggregate forms of custodial sentences were excluded from sentence length analysis as the sentence length is imposed with regard to multiple charges in a case.

258. Sentencing Advisory Council, *Sentencing of Offenders: Sexual Penetration with a Child under 12* (forthcoming 2016).

Application of the measures

- 5.38 The measures are designed to operate flexibly and allow a careful and informed value judgment of the available evidence in relation to each of the possible problem offences. A combined assessment across all of the measures and the presence of evidence across some, but not all, of the measures are required.
- 5.39 Satisfying one measure by itself is not sufficient to draw the conclusion that there is a sentencing problem warranting guidance.
- 5.40 On the other hand, it is not necessary for there to be evidence across all of the measures. For example, it may be tempting to conclude that there is a sentencing problem if there has been a significant disparity between the sentencing practices for an offence over a five-year period and its maximum penalty. However, textual examination of the sentencing remarks for cases involving that offence may not support that conclusion. For instance, it may reveal that in all of these cases, the behaviour encompassing the particular sentenced charges is at the lower end of the scale of seriousness for that offence. This would provide evidence that the objective seriousness of the offence has been correctly categorised and accordingly would not support a finding of inconsistency of approach in sentencing.
- 5.41 Some of the identified measures are consistently present in some offences. For example, sexual offences against children always comprise a special risk of serious consequences to the victim and the community because such offences always involve vulnerable victims and significant and long lasting harm.²⁵⁹
- 5.42 Appendices 3–7 document the application of the measures to each of the possible problem offences and provide details of the qualitative and quantitative measures. Offences are grouped in categories as follows:
- Appendix 3 – fatal offences;
 - Appendix 4 – sexual offences;
 - Appendix 5 – serious injury offences;
 - Appendix 6 – drug offences; and
 - Appendix 7 – other offences.

Offence characteristics

- 5.43 The measures relating to offence characteristics provide an indication of the objective seriousness of the offence and the consequences of the offending for the community, including individual victims of crime.

259. Submission 7 (Victorian Women's Trust). See also *Clarkson v The Queen* (2011) 32 VR 361, 364; *Franklin v The Queen* [2013] NSWCCA 122 (24 May 2013) [21]; Arie Freiberg, Hugh Donnelly, and Karen Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts* (2015) (Royal Commission into Institutional Responses to Child Sexual Abuse) 69–70.

Indictable nature of the offence

- 5.44 The categorisation of an offence as indictable, indictable triable summarily, or triable summarily is an indication of parliament's view of the seriousness of the offence.²⁶⁰ If an offence is categorised as indictable only, this indicates that all forms of the offence are very serious and it is not appropriate for the offence to be sentenced in the Magistrates' Court. If an offence is categorised as indictable but triable summarily, this indicates that some forms of the offending are less serious, as parliament considers that some forms of the offence may be appropriately sentenced in the Magistrates' Court.²⁶¹
- 5.45 The New South Wales Sentencing Council considered that the categorisation of an offence as 'triable on indictment only' is a relevant factor in determining whether to include an offence in the standard non-parole period scheme. This factor was included in the principles that the New South Wales Sentencing Council recommended should apply in deciding whether to include an offence in the scheme.²⁶² However, the New South Wales Sentencing Council was of the view that 'the fact that an indictable offence can be tried summarily should not of itself determine whether it should or should not be included in the [standard non-parole period] scheme'.²⁶³
- 5.46 The Council has taken a similarly flexible approach, and has included the indictable nature of an offence as a relevant factor in assessing possible problem offences. However, the Council does not consider it a strict requirement; the fact that the offence is indictable but triable summarily would not prevent the offence from being considered an appropriate subject for guidance if there were sufficient evidence of sentencing problems following consideration of other measures.
- 5.47 Whether an offence is triable on indictment or triable summarily (or both), however, remains relevant in considering which form of guidance will be the most effective in addressing the established sentencing problems for particular offences. Guideline judgments can provide effective guidance to courts in sentencing offences in all courts.²⁶⁴ The Council's guiding principles for sentencing contraventions of family violence intervention orders provide another example of how guidance can be given in the summary jurisdiction.²⁶⁵ Guidance provided by a legislative mechanism in the form of a standard sentence, however, is of less utility for offences sentenced summarily, particularly if the standard sentence is beyond the jurisdictional limit for sentencing in the Magistrates' Court.²⁶⁶

260. Indictable offences must be determined and sentenced in a higher court (either the County Court or the Supreme Court), in accordance with Part 5 of the *Criminal Procedure Act 2009* (Vic). Summary offences are determined and sentenced in the Magistrates' Court in accordance with Part 3 of the *Criminal Procedure Act 2009* (Vic). Some indictable offences are triable summarily. This means that the offences may be heard and determined in the Magistrates' Court if the court considers it appropriate and the accused consents to a summary hearing: *Criminal Procedure Act 2009* (Vic) ss 28(1)(b), 29.

261. When an offence is prosecuted and sentenced in the Magistrates' Court, it is subject to a jurisdictional limit on the sentence that may be imposed, being 2 years' imprisonment for a single charge and 5 years' imprisonment as a total effective sentence for multiple charges: *Sentencing Act 1991* (Vic) ss 113A–113B.

262. New South Wales Sentencing Council (2013), above n 253, 9, 11.

263. Ibid 12.

264. See Chapter 6 at [6.119] for a discussion of how guidance through an enhanced guideline judgment scheme can apply to offences determined summarily. See, for example, the comprehensive guidelines provided for Magistrates' Courts by the Sentencing Council for England and Wales, *Magistrates' Court Sentencing Guidelines* (Sentencing Council for England and Wales, 2016) <<https://www.sentencingcouncil.org.uk/publications/item/magistrates-court-sentencing-guidelines/>> at 31 March 2016.

265. Sentencing Advisory Council, *Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders* (2009).

266. The Council has recommended excluding offences determined summarily from the standard sentence scheme: Chapter 7, Recommendation 8.

Prevalence

- 5.48 The prevalence of an offence is inherently difficult to assess. There are different methods for assessing prevalence, each of which may be influenced by unknown external factors (such as charging practices, procedural changes, policing practices, improvements in technology that increase detection rates, and rates of reporting).
- 5.49 In recognition of these limitations, the prevalence of an offence, like the indictable nature of an offence, is not by itself a determinative factor in assessing the possible problem offences. As the New South Wales Sentencing Council recognised:
- prevalence (whether high or low and however measured) is not necessarily a measure of the potential harm caused by an offence; or of the extent of community concern about its commission; or of the adequacy or consistency of the sentences imposed.²⁶⁷
- 5.50 The Council, however, considers prevalence a relevant factor in assessing possible problem offences. This is because a higher prevalence of an offence may lead to public concerns and may prompt public scrutiny of the way in which the criminal justice system responds to such behaviour. A higher prevalence of an offence may also prompt the courts to consider that there is a greater need to impose a particular sentence for an offence to achieve specific or general deterrence.²⁶⁸
- 5.51 The Council has had regard to prevalence in terms of both the prevalence of a particular offence and the prevalence of an offence category (for example, sexual offending against children). The measure used to assess the prevalence of particular offences is the number of sentenced charges in the five-year period from 1 July 2010 to 30 June 2015. For some offences, prevalence has also been considered in terms of a particular class/typology of offending within an offence (for example, negligently causing serious injury by driving).
- 5.52 There are considerable limitations on any assessment of the prevalence of sexual offences, particularly those offences committed against children.
- 5.53 The actual prevalence of sexual offences is not reflected in most measures due to the well-recognised under-reporting of such offences, which can be due to a number of factors.²⁶⁹ Non-disclosure may particularly occur when the offending takes place in an intra-familial setting, or in other circumstances in which there is continued contact between the offender and the victim, for example, in educational or social settings. The victim or the offender's partner may also be concerned about the consequences of reporting an offence, for example, the imprisonment of the offender or the removal of the victim from the family.²⁷⁰
- 5.54 There is a high attrition rate of reported sexual offences compared with offences that actually result in prosecution and sentence.²⁷¹
- 5.55 Additionally, in many cases involving particular sexual offences, the offending behaviour may satisfy the elements of a number of different offences. Charging practices and the nature of the evidence in each case influence the type of offence with which an offender is ultimately charged.²⁷²

267. New South Wales Sentencing Council (2013), above n 253, 16.

268. Ibid 15.

269. For the factors underlying the low reporting rate, see VicHealth, *Two Steps Forward, One Step Back: Community Attitudes to Violence Against Women* (2006) 60–61.

270. New South Wales Sentencing Council (2013), above n 253, 16.

271. Sentencing Advisory Council, *Recidivism of Sex Offenders: Research Paper* (2007) 3–7.

272. The Council's limited analysis of sexual offence cases identified a number of cases that involved victims aged under 12 or under 16 where the offender was charged with the offence of rape, rather than an offence of sexual penetration with a child. Further, an offender may be charged with sexual penetration with a child aged 12–16 instead of incest with child/step-child (under 18) of de facto, where it may be difficult to prove the existence of a de facto relationship at the time of the offending.

A vulnerable victim

- 5.56 Any criminal offence could be committed against a victim who may be vulnerable for a range of reasons. However, this vulnerability measure is designed to flag those offences where the vulnerability of the victim forms part of the objective elements of the offence. This is an important factor of the objective seriousness of the offence.
- 5.57 The New South Wales Sentencing Council identified vulnerable victims as follows:
- children or people under authority or care, or those with a cognitive impairment or a serious physical disability; or more generally those whose employment exposes them to a special vulnerability, for example, police and emergency service workers, and [specified] other workers[.]²⁷³
- 5.58 In New South Wales, there are separate standard non-parole periods for offences committed against certain classes of 'vulnerable' victims related to the victim's employment. In Victoria, for the majority of offences,²⁷⁴ the vulnerability of a victim is an aggravating factor in sentencing under the common law, and it is not specified in legislation as part of the elements of the offence.

The offence is an 'aggravated' offence

- 5.59 This principle also reflects the extent to which the circumstances of aggravation are included in the legislative elements of the offence, that is, where an offence includes elements that may make the offence objectively more serious than a 'basic' (or 'simpliciter') version of the offence. This is a measure of offence seriousness because the offence is accompanied by a higher maximum penalty, which 'expresses parliament's intention that the courts should treat the aggravated form of the offence more seriously'.²⁷⁵

Problem with sentencing: evidence of a lack of public confidence

- 5.60 The New South Wales Sentencing Council included 'a pattern of inadequate sentences' as a factor for determining whether an offence should be included in the standard non-parole period scheme. It considered that possible indications of this could include 'reference to public opinion, views formed by the government or ... the number of successful Crown appeals against sentences imposed for the offence'.²⁷⁶
- 5.61 In considering which measures might provide a measure of public confidence, the Council notes at [1.23], that there are few reliable and robust measures of public confidence in the criminal justice system. Stakeholders expressed concern in relation to the difficulties in defining and measuring public confidence.²⁷⁷ For example, Victoria Legal Aid submitted:
- The concept of 'public confidence' is inherently ambiguous and subject to wide and varied interpretation. To be used to justify more restrictive sentencing regimes, a perceived lack of confidence reflected in the tabloid media cannot be sufficient. There must be *actual* and *informed* lack of confidence.²⁷⁸

273. New South Wales Sentencing Council (2013), above n 253, 13.

274. An exception to this are the statutory minimum non-parole periods that apply to certain offences against emergency services workers in the performance of their duties: *Sentencing Act 1991* (Vic) s 10AA.

275. New South Wales Sentencing Council (2013), above n 253, 12.

276. *Ibid* 16.

277. For example, Submission 13 (Victoria Legal Aid); Submission 14 (Director of Public Prosecutions).

278. Submission 13 (Victoria Legal Aid) (citations omitted; emphasis added).

- 5.62 Victoria Legal Aid also submitted that harsher sentencing will not necessarily lead to greater confidence in the criminal justice system.²⁷⁹
- 5.63 For the purposes of assessing the possible problem offences, the Council has identified a number of measures for providing current evidence that may be used to inform such an assessment of public confidence. Each measure is discussed in turn.

Evidence from informed structured community consultation: jury sentencing studies

- 5.64 The 2011 Tasmanian Jury Sentencing Study surveyed jurors about the sentences that were imposed for the particular cases on which they deliberated. When asked to rate the appropriateness of the judge's sentence on a four-point scale ('very appropriate', 'fairly appropriate', 'fairly inappropriate', or 'very inappropriate'), 90% of jurors said that the sentence was appropriate. The study also found that:
- most jurors (52%) chose a more lenient sentence than the judge;
 - 4% chose the same sentence as the judge; and
 - 44% chose a more severe sentence than the judge.²⁸⁰
- 5.65 Using a similar methodology to the Tasmanian study, the Victorian Jury Sentencing Study surveyed jurors about the sentences that were imposed for the particular cases on which they deliberated. The Victorian study found strikingly similar results. When asked to rate the appropriateness of the judge's sentence on the same four-point scale used in the Tasmanian study ('very appropriate', 'fairly appropriate', 'fairly inappropriate', or 'very inappropriate'), overall, 87% of jurors in the Victorian study said that the sentence was either 'appropriate' or 'fairly appropriate'. The study found that:
- most jurors (61.7%) chose a more lenient sentence than the judge;
 - 2.4% chose the same sentence as the judge; and
 - 35.9% chose a more severe sentence than the judge.²⁸¹
- 5.66 In both the Tasmanian and the Victorian studies, however, analysis by offence type revealed some differences in juror agreement with judges' sentences. In both studies, jurors had greater concerns with the sentencing of sexual offences, compared with other offence categories, and in particular with the sentencing of sexual offences against young children. The offence-specific findings are discussed later in this chapter in relation to the relevant possible problem offences.

Evidence from informed structured community consultation: community attitudes to offence seriousness

- 5.67 In 2012, the Council released the findings of its research using an original methodology to gauge community attitudes to offence seriousness.²⁸² The Council's consultation comprised 14 community panels with 244 Victorians²⁸³ using quantitative and qualitative measures that allowed for a structured and deliberative process. The Council developed its methodology after a review of the literature on the measurement and analysis of individual judgments of relative offence seriousness.

279. Submission 13 (Victoria Legal Aid) (citations omitted).

280. Warner et al. (2011), above n 15.

281. Warner et al. (under review for publication), above n 18.

282. Sentencing Advisory Council (2012), above n 16.

283. The sample was not random, but it was representative of the Victorian population on many demographic variables, including age, gender, and residential location.

- 5.68 The primary²⁸⁴ quantitative method used in the panel sessions was 'coded ranking',²⁸⁵ asking participants to indicate how serious they thought offences were by rating or ranking offences using a scale or categories of seriousness.
- 5.69 Participants' rankings of 40 offences on a scale of 1 to 10 (10 being the most serious) produced a 'horizontal and vertical' scale of offence seriousness. Analysis of these rankings led to the following key findings, which are relevant to this reference:
- There was consensus that offences involving the intentional infliction of death and serious injury and sexual offences against young children are among the most serious.²⁸⁶
 - The category of 'sexual offences' showed the highest level of agreement generally among participants as to the seriousness of the offences.²⁸⁷
 - Sexual offences generally were equated in seriousness with offences involving death, serious injury, and other acts of physical violence.
 - Most strikingly, sexual penetration with a child under 12 (25-year maximum penalty) was ranked at level 10 along with intentional murder (maximum penalty of life imprisonment), while rape and intentionally causing serious injury (both of which have 25-year maximum penalties) were ranked as equally serious, at level 9.²⁸⁸
 - In contrast to the consensus in relation to the seriousness of sexual offences, there were lower levels of consensus on the seriousness of drug offences and fatal and serious injury offences with reduced levels of culpability.
- 5.70 The findings of the Council's research suggest that harm and culpability characteristics have the most significant influence on the judgment of offence seriousness.²⁸⁹ The influence of harm and culpability, however, differed according to the type of offence. The most pronounced difference in how such characteristics influenced judgments of offence seriousness was between fatal and serious injury offences and sexual offences. The Council discusses these differences in more detail below in applying measures to possible problem offences.

Special risk of serious consequences to victims and the community and better understanding of such consequences

- 5.71 The New South Wales Sentencing Council included the special risk of serious consequences to the victim or to the community as a relevant factor for including offences in a standard non-parole period scheme. It determined that the presence of this factor 'will obviously depend on the nature of the offence and the context within which it is likely to be committed'.²⁹⁰

284. The other quantitative method was 'paired comparisons', in which participants were asked to compare pairs of offences and nominate the offence that they thought was the more serious in each pair. For more detail on the relevant literature and the Council's methodology, see Sentencing Advisory Council (2012), above n 16, 13, 20–21.

285. Coded offence ranking is a direct scaling method as it involves the comparison of many offences directly compared at one time. It requires participants to quantitatively rank or rate how serious each offence is compared with all other offences using a scale of seriousness with particular levels (for example, 1 to 0) or categories (for example, 'very serious' to 'not very serious').

286. The highest degree of consensus was recorded for the five offences ranked at 9 and 10 (intentional murder; sexual penetration with a child under 12; rape, reckless murder; and intentionally causing serious injury): Sentencing Advisory Council (2012), above n 16, 40–41.

287. The average correlation (extent of agreement of individual rankings with the sample average) was 0.89: Sentencing Advisory Council (2012), above n 16, 40.

288. Other sexual offences were also ranked high in the scale of offence seriousness.

289. Sentencing Advisory Council (2012), above n 16, 70.

290. New South Wales Sentencing Council (2013), above n 253, 14.

- 5.72 The Council has identified a related factor from Victorian case law. In *Ashdown v The Queen*, Redlich JA set out the circumstances in which an appellate court may propose to uplift current sentencing practices.²⁹¹ One such circumstance is where ‘there has emerged a better understanding of the consequences for the victim of the offending conduct’.²⁹²
- 5.73 The Council has combined these two factors into one measure relating to the consequences of the offending for individual victims and for the community as a whole, and how well these consequences are understood within society (for example, by members of the community, parliament, or the court). This measure includes an assessment of the special nature and significance of the harm inherent in the offending. This measure also includes an assessment of whether there has been any changes or developments in knowledge and understanding about the harms of such offending. This measure is of significant weight in identifying offences that ‘destroy lives and tear at the fabric of our community’.²⁹³

Parliament’s view of offence seriousness

- 5.74 As discussed at [3.9]–[3.11], the maximum penalty is an expression of parliament’s view of the seriousness of an offence.
- 5.75 Parliament should aim to select a maximum penalty that provides an indication of the relative gravity of the offence compared with other offences, but yet is broad enough to allow the sentencing judge sufficient scope to accommodate the worst examples of the offence that are likely to be encountered.²⁹⁴
- 5.76 Therefore, an offence with a high maximum penalty tends to show parliament’s view that a court in an appropriate case will impose an imprisonment term that reflects the significance of the maximum penalty having regard to the objective seriousness of the offence and the subjective features individual to the offence and the offender. While a high maximum penalty is an indication of the level of seriousness of the offence, it is not a determinative principle, such that there may be evidence of sentencing problems with an offence with a maximum penalty at the lower end of the scale, for example, negligently causing serious injury (10-year maximum penalty).
- 5.77 Another relevant consideration under this measure is whether the offence has been subject to any other legislative regimes, such as the baseline sentencing scheme discussed in Chapter 4 and the statutory minimum sentences scheme discussed in Chapter 9. The Victims of Crime Commissioner noted this as a relevant consideration in his submission.²⁹⁵

Disparity between current sentencing practices and the community’s and parliament’s views of offence seriousness

- 5.78 Flowing from these key sources of information on offence seriousness is the question of whether there is evidence of a disparity between current sentencing practices for an offence and the seriousness of that offence (as viewed by the community and parliament). Such a disparity may be indicative of a sentencing problem for the offence.

291. *Ashdown v The Queen* (2011) 37 VR 341.

292. *Ashdown v The Queen* (2011) 37 VR 341, 403.

293. New South Wales Sentencing Council (2013), above n 253, 14, citing New South Wales, ‘Crimes (Sentencing Procedure) Amendment Bill 2007’, *Parliamentary Debates*, Legislative Council, 17 October 2007, 2668 (John Hatzistergos, Attorney General and Minister for Justice).

294. Freiberg (2002), above n 98, 56.

295. Submission 15 (Victims of Crime Commissioner).

5.79 In applying this disparity measure, the Council has had regard to the evidence available from structured and informed community consultation (see [5.64]–[5.70]) as well as stakeholder views conveyed in submissions.²⁹⁶ The Victims of Crime Commissioner noted in his submission that his office had received numerous grievances and complaints from victims of crime regarding the 'inadequacy of sentencing practices'. The Commissioner submitted:

Victims of crime do not always want an offender locked away forever, although it is fair to say that some victims do seek that outcome.

The main areas of complaint from victims are based on two factors:

- i. Their genuine desire that no-one else be subjected to the suffering they have endured as a result of the crime(s) committed against them or their loved one(s) and,
- ii. That convicted criminals face higher consequences for their actions than they currently face, both as a punishment (as without acceptance of responsibility for their actions they cannot be truly rehabilitated) and as a deterrent to others.²⁹⁷

5.80 The Council has had regard to the maximum penalty in two key ways:

- a direct indication of the seriousness of the offence as viewed by parliament; and
- a guidepost against which to measure current sentencing practices²⁹⁸ to assess whether there is a disparity between current sentencing practices and the maximum penalty (in accordance with appellate statements about the relevance of the maximum penalty).

5.81 The inclusion of this measure is supported by other stakeholders' views.²⁹⁹ The Director of Public Prosecutions' submission captures what the Council considers the appropriate approach to using the maximum penalty as a measure of assessing possible problems in sentencing offences that may require attention in the form of guidance. The Director submitted:

It is a matter of concern, that excepting murder, that no commonly prosecuted serious offence produces a 'spread of sentences across the range' ... Except for manslaughter, all other commonly prosecuted serious offences receive sentences below, or well below 50% of the available maximum in 90% or more of cases. If the maximum penalty is to be given significant weight as a direct (rather than proportional) guide to expected sentence, then all these offences give cause for concern. However, while it is proper to give some weight to this disjunction, I consider that sentencing standards cannot be finally evaluated in this way. Neither parliament nor the courts have yet fixed any proper or binding general relationship between the maximum penalty and the sentence distribution. In order to evaluate the adequacy of sentencing standards it is necessary to have regard to the circumstances of offences and the offenders that actually come before the courts.³⁰⁰

296. Submission 2 (Anonymous); Submission 3 (C. Murphy); Submission 5 (Whitehorse City Council); Submission 7 (Victorian Women's Trust); Submission 9 (C. Politi); Submission 10 (Liberty Victoria); Submission 11 (Law Institute of Victoria); Submission 12 (Criminal Bar Association of Victoria); Submission 13 (Victoria Legal Aid); Submission 15 (Victims of Crime Commissioner); Submission 16 (Local Government Professionals Inc.).

297. Submission 15 (Victims of Crime Commissioner).

298. The Council examined sentences for charges of the 23 possible problem offences imposed in the higher courts (and in the summary jurisdiction) over a five-year period, from 1 July 2010 to 30 June 2015.

299. Some participants at the Council's stakeholder discussion forum questioned whether maximum penalties were an indicator of parliament's view of seriousness, or genuinely reflective of community views. Stakeholders considered that other factors (separate from offence seriousness) might have influenced parliament to increase the maximum penalty for an offence (for example, as a reaction to public 'outcry' or media commentary on a particular case): Sentencing Guidance Stakeholder Discussion Forum (1 March 2016).

300. Submission 14 (Director of Public Prosecutions).

- 5.82 This reflects the Council's approach to the weight given to the quantitative comparisons of sentencing practices against the maximum penalty for each possible problem offence. Accordingly, it may be expected that the sentences imposed in individual cases will, over a certain period, collectively produce a spread of sentences within the available range under the maximum penalty, rather than a skewed distribution at the bottom of that range. However, 'a demonstrable disjunction between maximum penalties and the sentences imposed for an offence is not sufficient to establish inadequacy of sentencing practices'.³⁰¹
- 5.83 Importantly, it is not possible to determine whether such a skewed distribution is indicative of inadequacy or inconsistency without having regard to the circumstances of each particular case and how the circumstances compare between cases. In other words, an observation that the majority of sentences imposed in a particular period fall within the bottom 25% of the maximum penalty may simply reflect that only offences at the lower end of objective and subjective seriousness have been sentenced in that period.

Court of Appeal: current sentencing practices identified or viewed as inadequate but no change through current guidance mechanisms

- 5.84 Section 5(2)(b) of the *Sentencing Act 1991* (Vic) requires a sentencing court to have regard to 'current sentencing practices'. The relevance of current sentencing practices as a source of sentencing guidance and the issues with the current approach raised by stakeholders are discussed at [3.24]–[3.54].
- 5.85 As discussed at [5.28], the Victorian Court of Appeal has set out the circumstances in which an intermediate appellate court may propose to uplift current sentencing practices.³⁰² The Court of Appeal has done this in relation to a number of offences or sub-categories of offences in recent years.
- 5.86 The Court of Appeal has found that current sentencing practices are inadequate for 'confrontational' aggravated burglary,³⁰³ 'glassing' forms of recklessly causing serious injury,³⁰⁴ and negligently causing serious injury by 'driving'.³⁰⁵ The court also declared that sentencing judges should no longer regard themselves as constrained to follow earlier sentencing practice.
- 5.87 Judges of the Court of Appeal have also made comments as to the adequacy of current sentencing practices, or they have indicated that there may be an issue regarding adequacy, for a number of other offences. These are discussed in the analysis under each respective offence category.
- 5.88 The Court of Appeal has also indicated that an increase in current sentencing practices may follow if there is a change in views about the appropriate sentence length for particular behaviour: importantly, it should not be thought that the statutory requirement to have regard to current sentencing practices forecloses the possibility of an increase or decrease in the level of sentences for particular kinds of offences. Over time, views may change about the length of sentence which should be imposed in particular cases and, when that occurs, the notions of manifest excessiveness and manifest inadequacy will be affected. Accordingly, to say of an individual sentence of six years, or a total effective sentence of 15 years, that it is near as large as any before imposed for offending of this kind, is not necessarily an answer to the question of whether it is manifestly inadequate. One must allow for the possibility that sentences to this point have simply been too low.³⁰⁶

301. Submission 14 (Director of Public Prosecutions), citing *R v Mallinder* (1986) 23 A Crim R 179, 180, 187.

302. *Ashdown v The Queen* (2011) 37 VR 341, 403.

303. *Hogarth v The Queen* (2012) 37 VR 658.

304. *Winch v The Queen* (2010) 27 VR 658.

305. *Harrison v The Queen* [2015] VSCA 349 (16 December 2015).

306. *Director of Public Prosecutions v OJA* (2007) 172 A Crim R 181, 196.

- 5.89 This practice of identifying a possible issue as to the adequacy of current sentencing practices has emerged over time. This involves awaiting an appropriate case to be the subject of an appeal and the Court of Appeal considering whether to make a declaration of the inadequacy of current sentencing practices. It may be seen to be an appropriate method of guidance, but if this practice is not having the intended or required effect in changing current sentencing practices, this could lead to a reduction in public confidence in the criminal justice system. This could occur, for example, if the Court of Appeal:
- raises a question as to the adequacy of current sentencing practices, but it does not prompt the Director of Public Prosecutions to appeal against a sentence, or there is no appropriate sentence appeal to act as a 'vehicle' for this to occur; or
 - declares that current sentencing practices are inadequate for an offence and that a sentencing court should not be constrained by such practices, but this does not result in a commensurate change in current sentencing practices.
- 5.90 This measure is therefore an important indicator of the extent to which the current system is 'self-correcting', and that when the Court of Appeal identifies a problem with sentencing for a particular offence or a sub-category of offence, the guidance provided is effective in addressing that problem.
- 5.91 The weight to be given to this as a source of evidence is supported by stakeholder feedback. Victoria Legal Aid submitted that the:
- Court of Appeal is well placed to comment on the adequacy of current sentencing practices, to determine the extent to which courts should be constrained by current sentencing practices, and to provide guidance as to the type of sentence appropriate in the circumstances.³⁰⁷
- 5.92 Victoria Legal Aid also noted the importance of the role of the Director of Public Prosecutions in this space, citing the Court of Appeal's statement that:
- the prosecution operates as 'the custodian of sentencing standards in this State ... If current sentencing practices need to change, that is the place to start'.³⁰⁸
- 5.93 The Victims of Crime Commissioner's submission referred to the former Director of Public Prosecutions' statement that '[i]t is beyond argument that current sentencing practices for some criminal offences are in need of urgent review'.³⁰⁹
- 5.94 The Council has had regard to these Court of Appeal judgments, and where possible has undertaken detailed data analysis in an attempt to determine the effect on current sentencing practices of such declarations and commentary as a source of guidance.³¹⁰ For each of the possible problem offences, the Council also examined the following over the five-year reference period:
- the 'yearly distribution median', being the median sentence for immediate custodial sentences imposed in each year over the reference period;³¹¹ and
 - the 'cumulative median'³¹² sentence length for immediate custodial sentences.

307. Submission 13 (Victoria Legal Aid).

308. Submission 13 (Victoria Legal Aid).

309. Submission 15 (Victims of Crime Commissioner).

310. The Council has analysed data for the offence of aggravated burglary and for the glassing form of recklessly causing serious injury: see [5.271]–[5.272], [5.231]–[5.233], and Appendix 9.

311. Yearly distributions and medians are of limited value for assessing the consistency of sentencing where there has only been a small number of charges sentenced in a year.

312. The cumulative median sentence length is the measure of the median of an increasing number of sentences imposed. For the offences analysed, the sentences imposed in each consecutive year were added to the sample from which a 'cumulative median' was calculated. These graphs show that distributions may not be consistent in consecutive years and the effect on the median resulting from an increase in sentence lengths in one year may be masked by a decrease in sentence lengths in a subsequent year.

- 5.95 The Council compared these analyses in order to consider whether there had been any movement in sentencing practices that may be attributable to appellate guidance on the adequacy of current sentencing practices.

Problem with sentencing: evidence of inconsistency of approach

- 5.96 The Council's view of 'consistency of approach' is that it does not mean consistency of sentencing *outcome*, but it does include consistency in the application of the relevant principles and factors in the exercise of the sentencing discretion.
- 5.97 Adequacy of outcome, however, is relevant to consistency of approach on the basis that an inadequate sentence may result if a court takes an inconsistent approach to assessing offence seriousness. The outcome is not the only relevant factor in assessing consistency of approach. Further, there may be instances when disparity in outcome is expected, for example, when the offence covers a wide range of behaviour or when it is not a prevalent offence. Therefore, the 'appearance of disparity'³¹³ may not necessarily evidence a sentencing problem.
- 5.98 The Council has looked to the New South Wales Sentencing Council's approach, as follows:
- While disparity should remain a factor, care must be taken in using it. Comparison between sentences is only meaningful where there is like offending, which means that attention needs to be given to the facts of each relevant case. We also note that care needs to be taken to ensure that too much weight is not given to mathematical disparity in sentencing statistics alone.³¹⁴
- 5.99 Stakeholders' opinions reflected this view, that consistency of sentencing approach extends beyond an assessment of numerical equivalence.³¹⁵ Victoria Legal Aid submitted that there is currently a lack of empirical evidence of 'systemic, unjustifiable disparity in sentencing approach'.³¹⁶ The Director of Public Prosecutions' submission (and some other submissions)³¹⁷ echoed this response, stating:
- There is little evidence of significant inconsistencies in judges' approaches to sentencing. On the occasions that judges do depart from the orthodox approach to sentencing, or from the acceptable range of sentencing outcomes, current appeal powers provide an effective remedy. It follows that I do not believe that inconsistency of approach is a substantial problem in Victorian sentencing.³¹⁸
- 5.100 The Law Institute of Victoria similarly submitted that:
- there is no clear evidence of inconsistency of approach in sentencing offenders. The Court of Appeal has over the past decade placed significant emphasis on the role of current sentencing practices when arriving at an appropriate individual sentence. This has led to numerically similar sentences by and large across the range of criminal offences, with like cases being treated alike and different cases being treated differently ... the supposed lack of public confidence in the criminal justice system is by no means confined to a particular category of offence and often is a result of individual reporting on individual cases.³¹⁹

313. New South Wales Sentencing Council (2013), above n 253, 17.

314. Ibid 17–18.

315. Sentencing Guidance Stakeholder Discussion Forum (1 March 2016); Submission 2 (Anonymous); Submission 10 (Liberty Victoria); Submission 11 (Law Institute of Victoria); Submission 12 (Criminal Bar Association of Victoria); Submission 13 (Victoria Legal Aid); Submission 14 (Director of Public Prosecutions).

316. Submission 13 (Victoria Legal Aid).

317. Submission 2 (Anonymous) stated there was 'rather too much consistency, under the heading of current sentencing practices'; Submission 10 (Liberty Victoria); Submission 11 (Law Institute of Victoria); Submission 13 (Victoria Legal Aid); Submission 14 (Director of Public Prosecutions).

318. Submission 14 (Director of Public Prosecutions).

319. Submission 11 (Law Institute of Victoria).

- 5.101 Then again, some submissions did argue that there were inconsistencies in approach to sentencing and cited examples to demonstrate this. For example, a submission by C. Murphy pointed to inconsistencies in the approach of two different judges to the separate sentencing of two offenders arising from the same incident (one was the driver and one was the passenger). Ms Murphy expressed the view that the different approaches taken by the judges were contrary to the requirement of 'consistency between co-offenders in the same incident and charged with the same offence' and resulted in the 'gravity of the offending' being 'discounted' for one of the offenders. She noted that this is despite the following:

The outcome of discretionary decision making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case.³²⁰

- 5.102 The issue of inconsistency of outcome can also arise when a particular judge, over time, adopts an inconsistent approach to sentencing equally culpable offenders.³²¹ Further, sentencing disparity can arise when judges in the same jurisdiction give effect to differing perceptions of sentencing purposes and legal principles, or overt or subconscious biases.³²² It has not been possible for the Council to examine whether this is a sentencing problem for any of the possible problem offences or in Victorian courts generally.
- 5.103 For the purposes of reviewing the possible problem offences, the Council has identified three measures that inform an assessment of consistency of approach in sentencing. Each is discussed briefly in turn. The measures draw significantly on the circumstances identified by the Court of Appeal in which an appellate court may propose to uplift current sentencing practices; Court of Appeal decisions are the primary source of evidence under each measure.
- 5.104 Statistical measures of consistency have also been examined in order to establish whether there is evidence of an inconsistent approach in the weight given to particular factors in sentencing. Such an inconsistent approach may result in a narrow distribution of sentences that do not accurately reflect the range of objective seriousness or subjective circumstances. If there is a narrow range of sentences, this could indicate a greater consistency in sentencing (if the gravity of the offence and the circumstances of the case are similar). Alternatively, a narrow range of sentences could be demonstrative of an issue in approach to aggravating and mitigating factors, if similar sentences are imposed on charges of varying seriousness and circumstances. These measures are the interquartile range (IQR) and the median absolute difference (MAD). Both have been used by the Judicial Commission of New South Wales to measure the 'variability, or spread, of the distribution'.³²³ They are as follows:
- The IQR is the 'interquartile range' or the middle 50% of sentences surrounding the median sentence (25% above the median and 25% below the median). The IQR measures the degree of variation of the values near the centre.
 - The MAD is the 'median absolute difference' or the median difference between any sentence and the overall median sentence length. It means that 50% of the sentence lengths imposed are closer to the median than the MAD and 50% of the sentence lengths imposed are further away from the median than the MAD.

320. Submission 3 (C. Murphy), citing Gleeson CJ in *Wong v The Queen* (2001) 207 CLR 584, 591.

321. This has been described as 'intra-judge disparity'. See Cassia Spohn, *How Do Judges Decide? The Search for Fairness and Justice in Punishment* (Sage, 2009) 136; Kevin Clancy et al., 'Sentence Decision-Making: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity' (1981) 72 *Journal of Criminal Law and Criminology* 524, 526.

322. Shai Danziger, Jonathan Levav, and Liora Avnaim-Pesso, 'Extraneous Factors in Judicial Decisions' (2011) 108 *Proceedings of the National Academy of Sciences* 6889.

323. Judicial Commission of New South Wales, *The Impact of the Standard Non-Parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010) 17.

- 5.105 The smaller the IQR and the MAD values, the closer sentences are clustered around the median sentence length. Greater values indicate a wider spread of sentences around the median.
- 5.106 These measures do not present a complete indicator of consistency of approach without an accompanying textual analysis of the factors present in the particular sentences in sentencing remarks, as such factors determine whether any observed variation or uniformity in sentencing outcome appropriately reflects the circumstances of the case.

Treatment of a category of offenders

- 5.107 This measure seeks to ascertain evidence that may indicate that there has been an inappropriate approach in the court's treatment of a particular category or class of offender in sentencing.
- 5.108 Recent Court of Appeal decisions declaring the inadequacy of current sentencing practices for particular sub-categories of offences provide examples of when the Court of Appeal has identified specific errors in this regard (see [5.86]).
- 5.109 Other potential areas where there may be an inappropriate approach include the legislative schemes in the *Sentencing Act 1991* (Vic) that apply to particular categories of offenders or to offenders who have committed particular offences, such as the serious sexual offender provisions.³²⁴

Weight given to aggravating and mitigating factors

- 5.110 The *Sentencing Act 1991* (Vic) includes a non-exhaustive list of considerations that the sentencer must take into account when sentencing an offender.³²⁵ One such consideration is the 'presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances'.³²⁶ There is no legislated guidance as to the weight that should be given to each factor. This largely depends on the individual circumstances of the case and is left to the discretion of the sentencing judge or magistrate.
- 5.111 Under the instinctive synthesis approach to sentencing in Victoria (see [2.29]–[2.37]), a court is not required, or permitted, to identify or prescribe the precise weight that has been given to a particular aggravating or mitigating factor in determining sentence.³²⁷ A court may state the factors that it has taken into account; however, as has been said by the Court of Appeal, 'quantitative significance is not to be assigned to individual considerations'.³²⁸
- 5.112 The only limited exceptions to this relate to discounts for undertakings to assist the authorities and the Crown in the prosecution of co-offenders and discounts for guilty pleas.³²⁹ However, even in these cases, Victorian courts have been reluctant to quantify the effect on sentences of such discounts. In cases of assistance to the authorities, the question of whether or not to state the discount depends on the circumstances of the

324. See Chapter 2 at [2.38]–[2.46] for details of these schemes.

325. *Sentencing Act 1991* (Vic) s 5(2).

326. *Sentencing Act 1991* (Vic) s 5(2)(g).

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

328. *Director of Public Prosecutions v Terrick* (2009) 24 VR 457, 459.

329. The Court of Appeal has provided guidance as to which purpose of sentencing should take precedence in particular circumstances, for example, youthful (*R v Mills* [1998] 4 VR 235) or mentally ill offenders (*R v Verdins* (2007) 16 VR 269), but the differing factual circumstances of each case mean that this guidance may be limited in its application.

particular case.³³⁰ In relation to discounts for guilty pleas, section 6AAA of the *Sentencing Act 1991* (Vic) requires a sentencing judge to state the sentence that would have been imposed but for the plea of guilty.³³¹

- 5.113 Despite the general prohibitions on assigning 'quantitative significance', the relevant case law clearly establishes that a primary source of error includes a court giving excessive or insufficient weight to the matters that are required to be taken into account.³³²

Categorisation of the objective offence seriousness of an offence

- 5.114 The nature and gravity of an offence is another consideration that is required to be taken into account by a court under section 5(2) of the *Sentencing Act 1991* (Vic). The provision requires a court to assess the harm and culpability that inherently exist in the offence and are encapsulated in the objective elements of the offence (see [2.5]–[2.6]).
- 5.115 Objective offence seriousness is also linked to the concepts of manifest excess or manifest inadequacy in sentence appeals. These grounds exist under the concept of 'non-specific' error at common law,³³³ whereby a flaw in the exercise of the discretion is inferred from the manifest excess or the manifest inadequacy of the sentence, even if it is not possible to identify the precise source of the error.³³⁴ For a sentence to be manifestly excessive, it is not enough for an appeal court to have itself imposed a different sentence or to think the sentence is too severe,³³⁵ having regard to the permissible sentencing range. Rather, the question is whether the sentence 'falls within the range of sentences that are appropriate to the objective gravity of the offence and to the matters personal to the offender'.³³⁶
- 5.116 The court's assessment and categorisation of an offence in terms of its objective seriousness are therefore integral parts of the sentencing process. Accordingly, the Council has identified the categorisation of objective offence seriousness as a relevant measure of assessing inconsistency of sentencing approach.
- 5.117 This measure is linked to the extent to which there is consistency when the court assesses the harm and culpability between different examples of the same offence. If a court has categorised offending as at the upper end of the range of seriousness, one would expect to see a sentence in the higher range of permissible sentences, having regard to the maximum penalty, current sentencing practices, and aggravating and mitigating factors. If there is incongruity between the court's assessment of harm and culpability and the ultimate sentence that is pronounced, this could provide evidence of inconsistency.
- 5.118 This measure is also linked to the extent to which there is consistency when assessing the objective seriousness of an offence in comparison with another offence with similar levels of harm and culpability. If there is incongruity in the sentencing outcomes for such offences, this could provide evidence of an inconsistent approach to the categorisation of objective offence seriousness for one or both of the offences.

330. *R v Johnston* (2008) 186 A Crim R 345, 349.

331. For a discussion of the value of the guilty plea in sentencing, see Sentencing Advisory Council, *Guilty Pleas in the Higher Courts: Rates, Timing, and Discounts* (2015). In that report, the Council found that for just under half of the imprisonment cases that received a discount for a plea of guilty, the discount was in the range of 20%–30% (44.9% of cases), with the next largest group receiving a discount in the range of 30%–40% (26.8% of cases). See also Sentencing Advisory Council, *Sentence Indication and Specified Sentencing Discounts: Final Report* (2007).

332. *R v Taylor and O'Meally* [1958] VR 285, 289 (Lowe and Gavan Duffy JJ); *R v Johansen (No 2)* [1917] VLR 677, 679; *Griffiths v The Queen* (1977) 137 CLR 293, 308–309.

333. See, for example, *Everett and Phillips v The Queen* (1994) 181 CLR 295; *Harris v The Queen* (1954) 90 CLR 652.

334. *Skinner v The King* (1913) 16 CLR 336, 339–340; *House v The King* (1936) 55 CLR 499, 505; *Dinsdale v The Queen* (2000) 202 CLR 321.

335. *Harris v The Queen* (1954) 90 CLR 652.

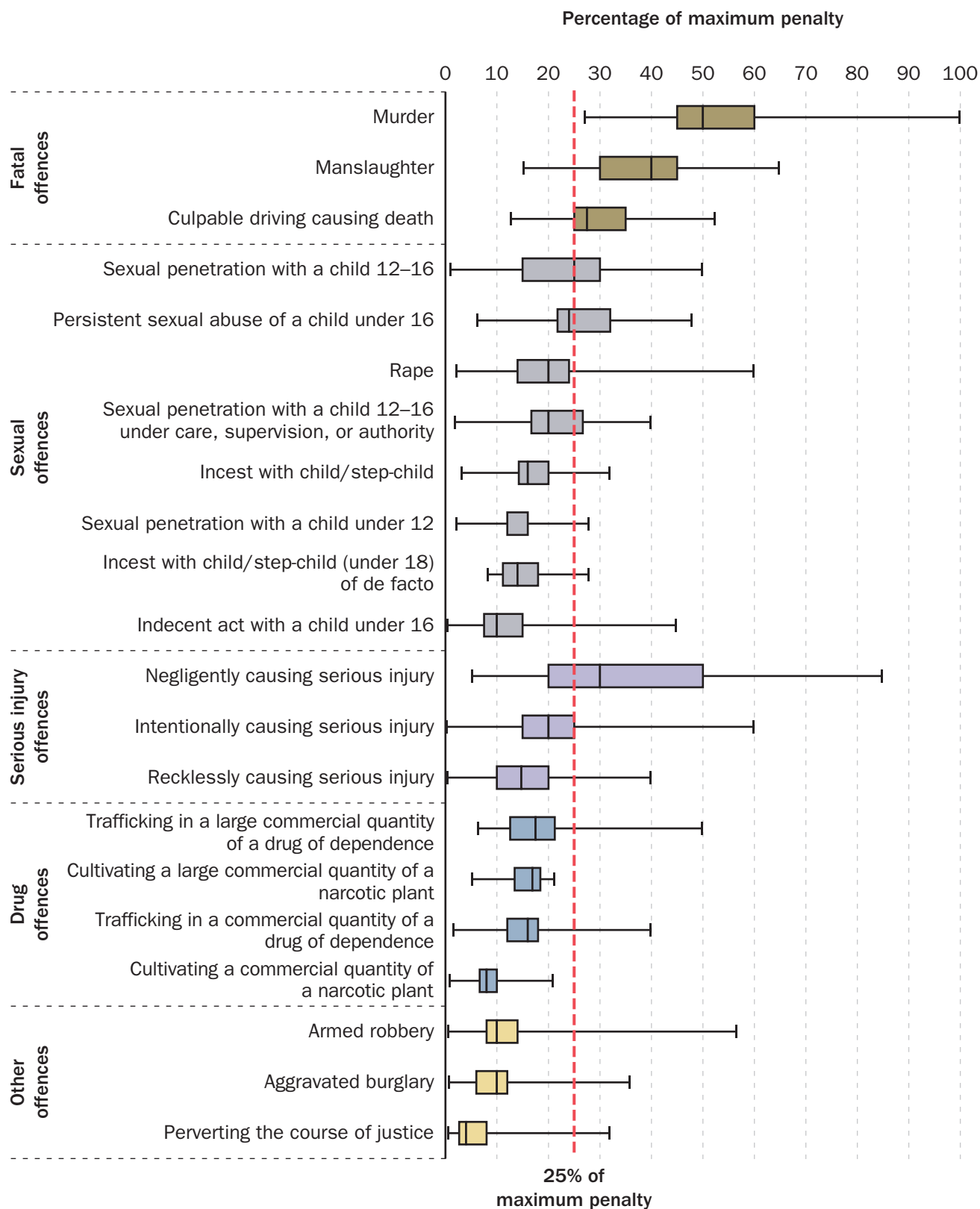
336. *Hudson v The Queen* (2010) 30 VR 610, 618.

A global comparison of sentencing for possible problem offences

- 5.119 In addition to assessing possible problem offences (where there are sufficient data) against the above measures, the Council has undertaken a broad quantitative analysis of the sentencing practices for each offence over the reference period.
- 5.120 Figure 2 shows the distribution of immediate custodial sentence lengths, as a percentage of the maximum penalty, imposed on charges of possible problem offences.³³⁷ The data are displayed as boxplots that show the following:
- the highest and lowest sentence – indicated by the right and left of the horizontal line;
 - the inter-quartile range (IQR) or the middle 50% of sentences based on length ordered from shortest to longest – indicated by the box; and
 - the median sentence – indicated by the line inside the box.
- 5.121 The data are presented in terms of the percentage of the maximum penalty that the sentence lengths represent for each offence (see Appendix 2). This means that an offence with a maximum penalty of 10 years, such as indecent act with a child under 16, is presented on the same scale as an offence with a maximum penalty of 25 years, such as sexual penetration with a child under 12. A dashed line indicates the level at which sentences represent 25% of the respective maximum penalties.
- 5.122 Figure 2 allows a comparison of offences on some of the quantitative measures incorporated into the Council's approach to assessing possible problem offences.
- 5.123 One such measure is whether there is evidence of a disparity between current sentencing practices for an offence and the seriousness of that offence (as viewed by the community and parliament). From a quantitative perspective, Figure 2 shows that immediate custodial sentences are distributed in the bottom half of the range as a proportion of the maximum penalty for almost all of the offences identified as possible problem offences. Indeed, for many of these offences, the majority of sentence lengths are 25% or less as a proportion of the maximum penalty.
- 5.124 There are four offences with a more 'even' spread of sentences across the range. These are:
- murder;
 - manslaughter;
 - culpable driving causing death; and
 - negligently causing serious injury.
- 5.125 Murder is the only offence for which sentences are distributed entirely above the 25% line.

337. The Council has previously used a similar 'box and whiskers' analysis to compare the differences between sentencing practices and the maximum penalties for 19 of the 'serious' and 'significant' offences in the *Sentencing Act 1991* (Vic): see Sentencing Advisory Council, *Sentencing Severity for 'Serious' and 'Significant' Offences: A Statistical Report* (2011) 15, Figure 4.

Figure 2: Distribution of immediate custodial sentence lengths imposed as a percentage of the maximum penalty for each possible problem offence, 2010–11 to 2014–15³³⁸



338. Offences appear within each category in order of the proportion that the median sentence represents of the maximum penalty, from highest to lowest.

5.126 Figure 2 also allows comparisons between sentencing outcomes for offences with similar levels of harm and culpability as a means of examining how objective offence seriousness has been given expression by the courts through sentences of imprisonment. It allows for the following comparisons:

- Sentences imposed for offences in different categories with the same maximum penalty – for example, there are clear differences in the distribution of sentences for offences that have a maximum penalty of life (murder compared with trafficking in a large commercial quantity of a drug of dependence).³³⁹
- Sentences imposed for two categories of offences that are considered to have similarly high levels of harm and culpability – for example, fatal offences receive sentences that represent significant percentages of the maximum penalty compared with sexual offences against adults and children.
- Sentences imposed for offences within the same category with the same maximum penalty – for example, there are clear differences in the distribution of sentences for the offence of rape compared with the offence of sexual penetration with a child under 12 (both have a 25-year maximum penalty).

5.127 Under the Council's approach set out at [5.78]–[5.83], however, an analysis of sentencing outcomes using only statistics is not a sufficient source of evidence on its own to establish the existence of sentencing problems requiring legislated guidance. As cautioned by the Director of Public Prosecutions, while 'aggregate statistics raise alarm bells in respect of a number of offences, I am reluctant to identify sentencing practices as inadequate for any offence without the benefit of a substantial review of cases'.³⁴⁰ Therefore, this analysis must be supplemented with the additional qualitative measures included in the Council's evidence-based approach, such as textual analysis of sentencing remarks describing the circumstances of individual cases sentenced in the reference period. The Council has done this to the extent possible within the timeframe for this reference.

5.128 Accordingly, the conclusions that may be drawn in this regard from quantitative data alone are also limited without analysis of qualitative measures, including the circumstances of sentenced cases. The Council has been mindful of not relying solely on quantitative measures when assessing whether there are sentencing problems with all or any of the possible problem offences.

339. The offence of cultivating a large commercial quantity of a narcotic plant also has a maximum penalty of life imprisonment, but there were only 4 charges of this offence sentenced in the reference period.

340. Submission 14 (Director of Public Prosecutions).

The Council's view: offences for which there is evidence of sentencing problems requiring guidance

5.129 The Council applied its measures from Table 4 to the 23 possible problem offences outlined in Table 3 to identify 12 offences for which there is evidence of sentencing problems that warrant guidance.

Recommendation 2: Offences with identified sentencing problems requiring guidance

From its analysis of quantitative and qualitative measures, the Sentencing Advisory Council has identified the following offences as having sentencing problems that require guidance:

Offence	<i>Crimes Act 1958</i> (Vic)
Intentionally causing serious injury	s 16
Recklessly causing serious injury	s 17
Negligently causing serious injury	s 24
Rape	s 38
Incest with child/step-child	s 44(1)
Incest with child/step-child (under 18) of de facto	s 44(2)
Sexual penetration with a child under 12	s 45(2)(a)
Sexual penetration with a child 12–16 under care, supervision, or authority	s 45(2)(b)
Sexual penetration with a child 12–16	s 45(2)(c)
Indecent act with a child under 16	s 47
Persistent sexual abuse of a child under 16	s 47A
Aggravated burglary	s 77

5.130 The results of the Council's analysis in support of its findings and Recommendation 2 are presented below under the following categories:

- sexual offences;
- serious injury offences; and
- aggravated burglary.

Sexual offences

- 5.131 The Council has identified eight sexual offences as possible problem offences (see Table 5). The Council recommends that these eight offences be identified as having sentencing problems, based on the available evidence.

Offence characteristics

- 5.132 Appendix 4 presents information on the offence characteristics for sexual offences, including the statutory reference and whether the offence is indictable or indictable triable summarily. This information is summarised for each offence in order of statutory reference in Table 5.
- 5.133 The prevalence of each offence varies, noting the limitations of the prevalence measure discussed at [5.48]–[5.55]. The least prevalent offence is persistent sexual abuse of a child under 16, with 54 charges sentenced in the reference period. This offence is a course of conduct offence comprising specified acts³⁴¹ on at least three occasions against a child who is aged under 16 years. Therefore, each of the 54 sentenced charges represents at least three incidents of serious sexual offending constituting the offence. The most prevalent offence is indecent act with a child under 16 (this is also the only offence that is indictable triable summarily). There were 1,589 charges sentenced in the higher courts and 871 charges sentenced in the Magistrates' Court in the reference period.³⁴²
- 5.134 A holistic assessment of prevalence, across all eight offences, clearly shows that offending that involves the rape or serious sexual assault of adults and children is prevalent: 3,731 charges of such offending were sentenced in the higher courts in the five-year period. The actual prevalence is likely to be even greater given the known rates of non-disclosure and attrition (see [5.52]–[5.55]).
- 5.135 The prevalence of such offences evidences the significant effect of such offending on the community, in terms of how many people are likely to be affected either as primary or as secondary victims of sexual offending. This is relevant to considerations of community concern about the extent to which this behaviour occurs and the adequacy of sentences imposed as a response, particularly when courts consider general deterrence as an important purpose in sentencing sexual offenders.

Table 5: Offence characteristics for sexual offences that have been identified as possible problem offences

Offence	Crimes Act 1958 (Vic)	Indictable only	Prevalence by charges sentenced
Rape	s 38	Yes	476
Incest with child/step-child	s 44(1)	Yes	370
Incest with child/step-child (under 18) of de facto	s 44(2)	Yes	108
Sexual penetration with a child under 12	s 45(2)(a)	Yes	202
Sexual penetration with a child 12–16 under care, supervision, or authority	s 45(2)(b)	Yes	74
Sexual penetration with a child 12–16	s 45(2)(c)	Yes	858
Indecent act with a child under 16	s 47	No	1,589
Persistent sexual abuse of a child under 16	s 47A	Yes	54

341. Prior to 1 July 2015, these acts were rape, compelling sexual penetration, indecent assault, assault with intent to rape, and incest. Since 1 July 2015, these acts are rape, rape by compelling sexual penetration, sexual assault, sexual assault by compelling sexual touching, sexual assault with intent to commit a sexual offence, threat to commit a sexual offence, and incest.

342. See Appendix 8.

- 5.136 Appendix 4 also shows that all of the offences except rape involve a vulnerable victim in the objective elements of the offence. A victim can be vulnerable due to age (under 12 or under 16 years), or the relationship between the victim and the offender (child of lineal, step, or de facto parent, or under care, supervision, or authority). While the offence of rape certainly can involve a vulnerable victim – for example, a child, a person with a cognitive or physical impairment, or a person in a relationship marked by an inherent power imbalance (such as where the victim is an employee of the offender) – the fact of vulnerability does not form part of the objective elements of rape. Some, but not all, of the identified sexual offences are aggravated forms of basic offences.

Problem with sentencing: evidence of a lack of public confidence in sentencing

Community views on offence seriousness and sentencing

- 5.137 The Council considers there to be strong evidence from structured informed community consultation that the community views sexual offending as being of the utmost seriousness, and the community is less likely to agree with sentences imposed for such offences, especially when committed against children.
- 5.138 The Council's assessment of each of the eight sexual offences (Appendix 4) demonstrates that there is strong evidence from structured informed community consultation on the community's views on the seriousness of sexual offences and sentencing practices for such offences. Overall, the evidence supports the contention that the public consider high levels of harm and culpability to be inherent in the objective elements of these offences (separate from the consideration of aggravating and mitigating factors), but are less likely to agree with sentences imposed for such serious offences.
- 5.139 The Council's research into community attitudes to offence seriousness found that participants generally equated sexual offences, including rape and a range of child sexual offences, with the seriousness of offences involving death, serious injury, and other acts of physical violence. Rather than a sliding scale that differentiated discrete levels of culpability and harm (observed in the ranking of fatal and serious injury offences), there was a clustering of sexual offences in the upper half of the scale around factors representing high levels of both harm and culpability (separate from the consideration of aggravating and mitigating factors).³⁴³ In particular, sexual offending against young children (under the age of 12 years) was viewed as being of the utmost seriousness. This is supported by the following rankings:
- Sexual offences involving eight year old victims³⁴⁴ were ranked 8 or higher on the scale of offence seriousness.
 - Sexual penetration with a child under 12 (25-year maximum penalty) was ranked 10 (at the same level as murder). There was a high level of agreement on this ranking.
 - Indecent act with a child aged under 16 years (10-year maximum penalty) was ranked 8, at the same level as a range of other serious offences.³⁴⁵

343. See further Sentencing Advisory Council (2012), above n 16, 35.

344. The vignettes representing sexual penetration with a child under 12 and indecent act with a child under 16 involved a victim aged 8 years.

345. The following offences were also ranked at level 8: manslaughter; culpable driving causing death, negligently causing serious injury (permanent incapacitation), false imprisonment, kidnapping and aggravated burglary (all sexually motivated), trafficking in a large commercial quantity of a drug of dependence, producing child pornography, attempted rape, and assault with attempt to rape.

- 5.140 Participants did not necessarily make the same distinctions in seriousness that are reflected in the maximum penalties for sexual offences. The young age of the victim was a clear factor influencing seriousness.³⁴⁶ Participants did not judge there to be a large differentiation in seriousness based on the type of physical contact, for example, sexual penetration compared with sexual touching. The key factors that influenced judgments of seriousness of child sexual offences were:
- breach of trust/abuse of power;
 - vulnerability of the victim due to age; and
 - wide-reaching and long-lasting psychological harms of sexual invasion or abuse of children.
- 5.141 Incest offences and persistent sexual abuse of a child under 16 were not included in the Council's offence ranking exercise. Nonetheless, the above key factors are common across these offences. Accordingly, the Council considers that the findings of its research can be applied across all sexual offences involving a child victim to demonstrate evidence of how seriously the community views these offences.
- 5.142 The findings in relation to other serious sexual offences and other serious offences committed with the intention to rape³⁴⁷ provide clear evidence of how seriously community members view sexual violence generally. In particular, sexual motivation and personal invasion reflected in the objective elements of these offences were judged to be in the upper range of severity. Rape (25-year maximum penalty) was ranked 9, with a high level of agreement.³⁴⁸ The offender's intention to rape was highly influential in participants' rankings as both a harm and a culpability factor.
- 5.143 The findings from the Tasmanian and Victorian jury sentencing studies provide further evidence of a disparity between current sentencing practices and community views of the seriousness of sexual offences. In both studies, jurors had greater concerns with the sentencing for sexual offences and, in particular, with the sentencing for sexual offences against young children:
- In the Tasmanian study, fewer jurors agreed with the judge's sentencing disposition for sexual offences compared with other offences; 46% of jurors preferred more severe sentences for sexual offences than the sentence imposed by the judge. Jurors were less likely to say that the judge's sentence in a sexual offence case was 'very appropriate' and more likely to say that it was 'inappropriate' when compared with jurors in cases involving other offence categories (violence, property, culpable driving, and 'other').³⁴⁹
 - In the Victorian study, half (50%) of jurors in sexual offence trials chose a more lenient sentence than the judge (compared with 71% in violent offence trials). A higher proportion of jurors chose a more severe sentence for sexual assault of a child under 12 (63.2%), compared with sexual assault of a child aged 12 and older (44.1%) and for rape (37.1%). A higher proportion of jurors thought the judge's sentence was very appropriate in violent and other offence trials combined (61.3%), compared with all sexual offence trials (45.7%). A lower proportion of jurors in trials involving the sexual assault of children aged under 12 years (35.7%) thought the judge's sentence was very appropriate, compared with jurors in cases involving either rape or the sexual assault of children aged 12 and older (52.8%).³⁵⁰

346. The influence of the victim's age was also evident in the lower rankings of the two sexual penetration offences involving 15 year old children (sexual penetration with a child 12–16 under care, supervision, or authority was ranked at 7 and sexual penetration with a child 12–16 was ranked at 3). However, there was not a high level of consensus on the mean rankings for these offences.

347. Those offences were aggravated burglary, kidnapping, false imprisonment, and assault with intent to rape.

348. Attempted rape (20-year maximum penalty) and assault with intent to rape (10-year maximum penalty) were also ranked at level 8.

349. Warner et al. (2011), above n 15.

350. Warner et al. (under review for publication), above n 18.

Special risk of serious consequences to victims and the community and better understanding of such consequences

- 5.144 The Council has assessed each of the sexual offences in terms of whether the offence involves a special risk of serious consequences to victims and the community, and whether there is a better understanding of such consequences (see Appendix 4).
- 5.145 Sexual offences against children, in particular, score highly on this measure.
- 5.146 Broadly, there is now public acknowledgment of the prevalence of child sexual assault and the low rates of reporting of such offending in both familial³⁵¹ and institutional contexts.³⁵² This follows successive years of reform and advocacy, media scrutiny, and open acknowledgment of the prevalence of this harmful behaviour.
- 5.147 The trauma caused by serious sexual offending against children has only recently been accepted as fact.³⁵³ There is a growing, and now strong, evidence base to demonstrate the long-term harms (psychological and physical) caused to victims, as well as the broader harms caused to family members of victims and the community as a whole (trauma, disruption in education and development, loss of productivity, and possible criminogenic effects).³⁵⁴ The Victorian Women's Trust submitted that a sexual offence committed against a child constitutes:
- the greatest violation of trust between the victim and the perpetrator;
 - a violation of the victim's psychological and physical integrity during a pivotal life stage and transformative period of development;
 - deep psychological harm which can last a lifetime, affecting the victim's cultural, social and emotional life as well as their ability to participate successfully in work and civic life.³⁵⁵
- 5.148 Reforms to sexual assault laws and procedure also demonstrate a growing understanding of the impact of court processes on sexual assault complainants and a recognition of the need to reduce re-traumatisation.³⁵⁶
- 5.149 The Council also notes the family violence context within which sexual assault, particularly child sexual assault, frequently occurs.³⁵⁷ This is inherent for incest offences, which involve sexual offending against a person that is related to the offender due to a parental, step-parent, or de facto relationship.
- 5.150 The majority of childhood sexual assault involves offenders who are known to the victim,³⁵⁸ although it is difficult to ascertain precisely what proportion also constitutes family violence (for example, a parent offending against a child or a sibling offending against another sibling). A conservative estimate suggests a proportion of 15% of the general population with rates

351. See *Reid (A Pseudonym) v The Queen* (2014) 42 VR 295, 311, which discusses the increases in sentences for the offence of incest in Victoria from the mid-1980s, that occurred as a result of a change in attitude towards the offence and realisation of the incidence of familial child abuse.

352. This acknowledgment has emerged, in part, due to inquiries such as the Royal Commission into Institutional Responses to Child Sexual Abuse.

353. *Franklin v The Queen* [2013] NSWCCA 122 (24 May 2013) [21]; Freiberg, Donnelly, and Gelb (2015), above n 259, 69–70.

354. For a review of the evidence on the effects of child sexual assault on primary and secondary victims, see Georgina Fuller, *Non-Offending Parents as Secondary Victims of Child Sexual Assault*, Trends and Issues in Crime and Criminal Justice no. 500 (2016) 1–3.

355. Submission 7 (Victorian Women's Trust).

356. See, for example, Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004); Criminal Law Review – Department of Justice, *Review of Sexual Offences: Consultation Paper* (2013), which led to reforms to Victoria's sexual offence laws from 1 July 2015 with the passing of the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic). Changes have also been made to jury directions in sexual offence cases: *Jury Directions Act 2015* (Vic).

357. Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016); Australian Bureau of Statistics, *Personal Safety Survey*, cat. no. 4906.0 (2012); Willow Bryant and Tracy Cussen, *Homicide in Australia: 2010–11 to 2011–12 National Homicide Monitoring Report*, Monitoring Report no. 23 (2015) 1, 7.

358. Philippa Chapman, *Restructuring Dorian Gray: A New Portrait of Sexual Abuse*, Criminology Research Unit Briefing Paper no. 5 (2004) 3.

as high as 20% for female victims.³⁵⁹ There is evidence³⁶⁰ that different types of violence may occur simultaneously within a family; intimate partner violence has been found to be 'a factor in a sizeable proportion of both child sexual and physical abuse cases'.³⁶¹

Parliament's view of offence seriousness

- 5.151 Parliament views sexual offending as particularly serious and gives expression to this view through various legislative mechanisms.
- 5.152 This is clear from the stated objectives in relation to subdivisions 8A–8G of the *Crimes Act 1958* (Vic), which set out sexual offences and their maximum penalties. The objectives are:
- (a) to uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity;
 - (b) to protect children and persons with a cognitive impairment from sexual exploitation.³⁶²
- 5.153 The *Crimes Act 1958* (Vic) also sets out the following guiding principles when dealing with a case involving allegations of sexual offences. These principles require the court to have regard to the fact that:
- (a) there is a high incidence of sexual violence within society; and
 - (b) sexual offences are significantly underreported; and
 - (c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment; and
 - (d) sexual offenders are commonly known to their victims; and
 - (e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.³⁶³
- 5.154 Consistent with these guiding principles, the maximum penalties for five of the eight sexual offences identified as possible problem offences is 25 years. Table 6 shows the offences in descending order of maximum penalty. The maximum penalties for sexual penetration with a child 12–16 and sexual penetration with a child 12–16 under care, supervision, or authority are lower, as is the maximum penalty for indecent act with a child under 16.
- 5.155 In the past 15 years, increases to the maximum penalty for sexual penetration with a child reflect the changes observed above in relation to community views of offence seriousness.³⁶⁴ The maximum penalties for the two incest offences were increased from 20 years in 1997.³⁶⁵
- 5.156 Also indicative of parliament's views of the seriousness of these offences is that three of these offences were introduced as baseline offences (each with 10-year baseline levels): persistent sexual abuse of a child under 16, incest with child/step-child, and incest with child/step-child (under 18) of de facto.

359. Jane Goodman-Delahunty, *Profiling Parental Child Sex Abuse*, Trends and Issues in Crime and Criminal Justice no. 465 (2014) 1–2.

360. Peter Hiller and Christopher R. Goddard, 'Child Sexual Abuse: Assault in a Violent Context' (1993) 28(1) *Australian Journal of Social Issues* 20; Adam M. Tomison, *An Evaluation of Child Abuse Decision Making in the Barwon Region: A Report for the Victorian Health Promotion Foundation* (1994).

361. Adam M. Tomison, *Update on Child Sexual Abuse*, NCPC Issues no. 5 (1995).

362. *Crimes Act 1958* (Vic) s 37A.

363. *Crimes Act 1958* (Vic) s 37B.

364. In 2000, parliament increased the maximum penalty for sexual penetration with a child under 12 (under 10, as it then was) from 20 years to 25 years. In 2009, parliament changed the age range of the victim for the offence, from under 10 to under 12 years, following a recommendation made by the Council in a 2009 review of the maximum penalty for offences of sexual penetration with children under 16.

365. *Crimes (Amendment) Act 2000* (Vic) s 5, substituting section 45 of the *Crimes Act 1958* (Vic). *Crimes Legislation Amendment Act 2010* (Vic) s 3, amending section 45 of the *Crimes Act 1958* (Vic). Sentencing Advisory Council, *Maximum Penalties for Sexual Penetration with a Child under 16: Report* (2009). The incest offences were amended by the *Sentencing and Other Acts (Amendment) Act 1997* (Vic) sch 1.

Table 6: Maximum penalties for sexual offences identified as possible problem offences

Offence	Maximum penalty
Rape	25 years
Incest with child/step-child	25 years
Incest with child/step-child (under 18) of de facto	25 years
Sexual penetration with a child under 12	25 years
Persistent sexual abuse of a child under 16	25 years
Sexual penetration with a child aged 12–16 under care, supervision, or authority	15 years
Sexual penetration with a child 12–16	10 years
Indecent act with a child under 16	10 years

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness

- 5.157 The seriousness with which the community and parliament view such serious sexual offences against adults and children is in contrast to the sentencing practices for these offences, which are comparatively low, providing clear evidence of a disparity.³⁶⁶
- 5.158 Table 7 compares sentencing practices with the maximum penalty on two key indicators relating to the maximum penalty. Offences are presented in descending order according to the proportion of immediate custodial sentences that represent 25% or less of the maximum penalty.

Table 7: Comparison of median sentences imposed for charges of sexual offences identified as possible problem offences, ordered by proportion of sentences equal to or less than 25% of relevant maximum penalty, 2010–11 to 2014–15

Offence	Maximum penalty	% of immediate custodial sentences imposed on charges equal to or less than 25% of maximum penalty	Median (% of maximum penalty)
Incest with child/step-child (under 18) of de facto	25 years	99%	3 years and 6 months (14%)
Sexual penetration with a child under 12	25 years	98%	4 years (16%)
Indecent act with a child under 16 ^a	10 years	96%	1 year (10%)
Incest with child/step-child	25 years	95%	4 years (16%)
Rape	25 years	79%	5 years (20%)
Sexual penetration with a child 12–16 under care, supervision, or authority	15 years	73%	3 years (20%)
Sexual penetration with a child 12–16	10 years	62%	2 years and 6 months (25%)
Persistent sexual abuse of a child under 16	25 years	56%	6 years (24%)

- a. As the offence of indecent act with a child under 16 is an indictable offence triable summarily, basic statistics were also analysed for cases sentenced in the Magistrates' Court (see Appendix 8). In the five-year reference period, there were 871 charges of indecent act with a child under 16 sentenced in the Magistrates' Court – the most common sentence was a community correction order (30.7%), followed by imprisonment (26.2%) (including non-aggregate and aggregate sentences).

366. Victoria Legal Aid noted that there may be some basis to 'suggest there is a disparity between current sentences for sexual penetration [with] a child under 12 and community views': Submission 13 (Victoria Legal Aid).

- 5.159 A comparison of the sentencing practices for each offence and the maximum penalty indicates that there is a skewed distribution of sentences towards the bottom quartile as a proportion of the maximum penalty for sexual offences. This is demonstrated by the following:
- For all eight offences, the median sentence imposed over the five-year period was at most 25% of the maximum penalty. This ranged from 10% for indecent act with a child under 16 to 25% for sexual penetration with a child 12–16.
 - For all eight offences, the majority of sentences were equal to or less than 25% of the maximum penalty. This ranged from 56% for persistent sexual abuse of a child under 16 to 99% for incest with child/step-child (under 18) of de facto.
- 5.160 The Council provides further evidence that sentencing practices for such offending is inadequate in its forthcoming report on sentencing practices for offences of sexual penetration with a child under 12.³⁶⁷ The Council uses a number of approaches in this report. These include detailed textual analysis of sentencing remarks to examine the differing facts and circumstances of sentenced cases and the extent to which they have been given expression in sentencing outcomes, having regard to the relevant legal framework. The Council's sample case analysis suggests that – despite sentencing remarks that were highly condemnatory of sexual offending against children – current sentencing practices in the majority of analysed cases showed evidence of inadequacy.³⁶⁸
- 5.161 As discussed at [3.24]–[3.39], section 5(2)(b) of the *Sentencing Act 1991* (Vic) requires a court to have regard to current sentencing practices when imposing a sentence. Further, a number of stakeholders were of the view that this requirement to have regard to current sentencing practices unduly constrains sentencing courts. Consequently, the sentencing practices for particular offences (which may be considered inadequate) persist (see [3.60]) in the absence of appellate review that declares such practices to be inadequate.
- 5.162 The Council's examination of the sentencing practices for sexual penetration with a child under 12 strongly suggests that current sentencing practices for that offence are inadequate. As is discussed below, the Court of Appeal has also commented on current sentencing practices for this offence and raised a question as to their adequacy, but (in the absence of an appropriate appeal) has not declared current sentencing practices to be inadequate. At the time of writing, there has not been any substantial change in sentencing practices to address this problem with sentencing.³⁶⁹
- 5.163 The Council is of the view that the significance of the evidence of sentencing problems for the offence of sexual penetration with a child under 12 establishes cause for concern. The Council considers that such problems apply broadly across sentencing for other sexual offences that have been identified as possible problem offences for which guidance is warranted.

367. Sentencing Advisory Council (forthcoming 2016), above n 258.

368. This conclusion is based on a sample of cases involving the offence of sexual penetration with a child under 12 and an assessment of total effective sentences, individual sentences for multiple charges (both before and after cumulation), and non-parole periods in light of the following: the maximum penalty, the legislative intention of the serious sexual offender scheme, particular measures of objective offence seriousness, and applicable authorities regarding the effect of relevant aggravating and mitigating considerations.

369. Sample case analysis prepared for Sentencing Advisory Council (forthcoming 2016), above n 258; see also Appendix 4.

Court of Appeal's approach to addressing inadequacy of current sentencing practices and the effect of any such guidance

- 5.164 A detailed assessment of whether the Court of Appeal has made a declaration of inadequacy of current sentencing practices, or otherwise questioned the adequacy of current sentencing practices, is set out in Appendix 4 for each of the eight offences. In summary, the question of the adequacy of current sentencing practices has been raised in relation to sentencing for the following offences:
- sexual penetration with a child under 10 (as the offence was then known);³⁷⁰
 - rape;³⁷¹
 - persistent sexual abuse of a child under 16;³⁷² and
 - incest (with child/step-child and with child/step-child (under 18) of de facto).³⁷³
- 5.165 In the case concerning the offence of sexual penetration with a child under 10 (as it was then known), the inadequacy of current sentencing practices was not argued on appeal, so the case was not considered to be an appropriate 'vehicle'. However, the Court of Appeal raised inadequacy of sentencing as a question to be addressed if an appropriate 'vehicle' arose.³⁷⁴ The Council's analysis of published sentence appeals since then suggests that the Director of Public Prosecutions has not lodged an appeal against a sentence for this offence since the decision in this case (in 2009).³⁷⁵
- 5.166 In the case concerning the offence of persistent sexual abuse of a child under 16, the Court of Appeal raised the question of inadequacy, but it rejected the sentencing range submitted by the Crown for the offence as it was not supported by current sentencing practices.³⁷⁶
- 5.167 In relation to the offence of incest, the Director of Public Prosecutions has appealed against a sentence and flagged the issue of adequacy of current sentencing practices as recently as this year. The Court of Appeal has indicated this to be an appropriate case in which to consider whether current sentencing practices are adequate.³⁷⁷
- 5.168 In relation to the offence of rape, the Court of Appeal has made conflicting comments about the adequacy of current sentencing practices. In one judgment, the Court of Appeal indicated that a question of inadequacy arose regarding the sentencing practices for rape (in response to the median sentence of five years).³⁷⁸ However, an attempt by the Director of Public Prosecutions

370. *Director of Public Prosecutions v CPD* (2009) 22 VR 533.

371. *Director of Public Prosecutions v Werry* (2012) 37 VR 524; *Leeder v The Queen* [2010] VSCA 98 (23 April 2010) (note: *Leeder v The Queen* was an appeal against a sentence imposed for assault with intent to rape in which the Court of Appeal, in comparing the sentencing practices for assault with intent to rape with the sentencing practices for rape, raised a question as to the adequacy of current sentencing practices for rape).

372. *Director of Public Prosecutions v DDJ* (2009) 22 VR 444.

373. *R v Bellerby* [2009] VSCA 59 (28 April 2009); *Director of Public Prosecutions v DJ* (2011) 211 A Crim R 367; *Director of Public Prosecutions v CJA* [2013] VSCA 18 (15 February 2013); *Reid (A Pseudonym) v The Queen* (2014) 42 VR 295; *Director of Public Prosecutions v BDJ* [2009] VSCA 298 (1 December 2009).

374. *Director of Public Prosecutions v CPD* (2009) 22 VR 533.

375. Since then, the Court of Appeal has heard one Director's appeal against the sentence imposed on the offence. The case was originally sentenced on 13 May 2009 (before *CPD* was handed down); however, the appeal was heard on 10 March 2011 after the decision in *CPD*. The broader question of the adequacy of current sentencing practices was not addressed at all. The Court of Appeal held that the sentences imposed for the offence were manifestly inadequate, 'having regard to current sentencing practice, the maximum penalty, the objective seriousness of the offending and the respondent's personal circumstances'. The court exercised its residual discretion not to intervene for a range of reasons: *Director of Public Prosecutions v Husar* [2011] VSCA 70 (16 March 2011) [16]–[19].

376. *Director of Public Prosecutions v DDJ* (2009) 22 VR 444.

377. *Director of Public Prosecutions v Dalgliesh (A Pseudonym)* S APCR 2015 0190.

378. *Leeder v The Queen* [2010] VSCA 98 (23 April 2010) (an appeal against a sentence imposed for the offence of assault with intent to rape).

to argue this on an appeal against sentence in a subsequent case was not successful,³⁷⁹ and the court did not make a statement that current sentencing practices were inadequate.³⁸⁰

- 5.169 In relation to the offence of indecent act with a child under 16, the Court of Appeal has not directly raised the issue of inadequacy of current sentencing practices. However, it commented that current sentencing practices do not in themselves provide an answer to the question of whether a sentence is manifestly inadequate and that there is a possibility that 'sentences [for this offence] to this point have simply been too low'.³⁸¹
- 5.170 Despite the Court of Appeal repeatedly raising questions over the inadequacy of current sentencing practices for over half of the offences in this category (particularly child sexual offences), this appears to have had little effect in terms of a change in sentencing practices. The cumulative median sentence lengths for custodial sentences for these offences overall have remained constant in the five-year reference period. Over this time, the Court of Appeal has been using this approach to provide guidance on the adequacy of current sentencing practices (see Appendix 4). While cumulative medians do not provide a complete measure of changes in current sentencing practices, examination of the median sentences for each offence in each discrete year also suggests that current sentencing practices overall have been static over the five-year reference period. Further textual analysis of sentencing remarks is necessary to provide a full explanation for these patterns.

Problem with sentencing: evidence of inconsistency in sentencing approach

- 5.171 There is evidence of inconsistency of approach across the three qualitative measures, supported by quantitative measures.
- 5.172 Figure 3 shows a comparison of the distribution of immediate custodial sentences according to the percentage of the respective maximum penalties as follows:
- the highest and lowest sentence – indicated by the top and bottom of the vertical line;
 - the inter-quartile range (IQR) or the middle 50% of sentences based on length ordered from shortest to longest – indicated by the box;
 - the median sentence – indicated by the line inside the box; and
 - each individual sentence – indicated by a dot.
- 5.173 Figure 3 provides an indication of the extent to which there is consistency in approach in sentencing sexual offences that objectively comprise similarly high levels of harm.
- 5.174 The seriousness scale reflected by current sentencing practices places sexual penetration with a child 12–16 and persistent sexual abuse of a child under 16 as the two most serious offences (with medians of 25% and 24% of the maximum penalty respectively; these are the two highest median percentages of the maximum penalty for the eight sexual offences). Rape has the highest percentage of the maximum penalty represented by the longest sentence imposed (60%).

379. The Court of Appeal criticised the Director for bringing an appeal on the grounds of inadequacy of sentencing practice generally in the absence of a ground that the sentence in the instant case was inadequate.

380. *Director of Public Prosecutions v Werry* (2012) VR 524. The Court of Appeal referred to the Sentencing Council for England and Wales' sentencing guideline for sexual offences, which at that time had a starting point of five years for the offence of rape. The court said that this 'strongly suggests that [the Sentencing Council for England and Wales] would not regard the sentence of seven years' imprisonment ... as so low as to bring the administration of justice into disrepute' and 'suggests that the English body would regard the median sentence of five years for rape in this State as perfectly acceptable'.

381. *Director of Public Prosecutions v OJA* (2007) 172 A Crim R 181.

- 5.175 These can be compared with incest (with child/step-child, and with child/step-child (under 18) of de facto) and sexual penetration with a child under 12³⁸² with maximum sentences reaching only around 30% of the maximum penalty and medians reaching around 15%. While indecent act with a child under 16 (which has a maximum penalty of 10 years) has a lower median as a proportion of its maximum penalty (10%), the maximum sentence comprises 45% of the 10 years.
- 5.176 The distribution of sentences for sexual offences compared with other serious offences (analysed above in Figure 2) also indicates a significant disparity between the sentence levels and range across the maximum penalty for sexual offences and offences with similarly high levels of harm and culpability, for example, murder and manslaughter. Participants in the Council's community attitudes research ranked rape and sexual penetration with a child under 12 at the same level as these fatal offences, in terms of harm and culpability, yet the fatal offences receive consistently higher sentences of imprisonment.
- 5.177 The additional statistical measures of consistency – median absolute difference (MAD) and inter-quartile range (IQR) (see [5.104]–[5.106]) – also provide an indication of the relatively narrow distribution of sentences and a clustering of sentences around the median for sexual offences. Detailed analysis is documented in Appendix 4. The MADs for the eight sexual offences were small. They ranged from six months (for sexual penetration with a child 12–16, indecent act with a child under 16, and sexual penetration with a child 12–16 under care, supervision, or authority) to one year (incest with child/step-child, rape, persistent sexual abuse of a child under 16, and sexual penetration with a child under 12). Narrow IQRs were observed across the offences, in particular indecent act with a child under 16, sexual penetration with a child under 12, and incest with child/step-child.
- 5.178 The small MADs and narrow IQRs indicate that there is a clustering of immediate custodial sentences around the median sentence length for sexual offences. If detailed examination of the circumstances in these cases was undertaken, one would expect to observe similarities in the level of seriousness and circumstances. If such similarities are not observed, this could provide evidence of an inconsistency in sentencing approach between offences of similar levels of harm and culpability.
- 5.179 The Council has done such an analysis for sentences imposed for sexual penetration with a child under 12, compared with rape, for its forthcoming report on sentencing practices for the offence of sexual penetration with a child under 12. The analysis shows that, consistent with the distribution of sentences for each offence shown in Figure 3, there was a tighter clustering around the median for sentences imposed on sexual penetration charges than for sentences imposed on rape charges.³⁸³

Treatment of a category of offenders within an offence category

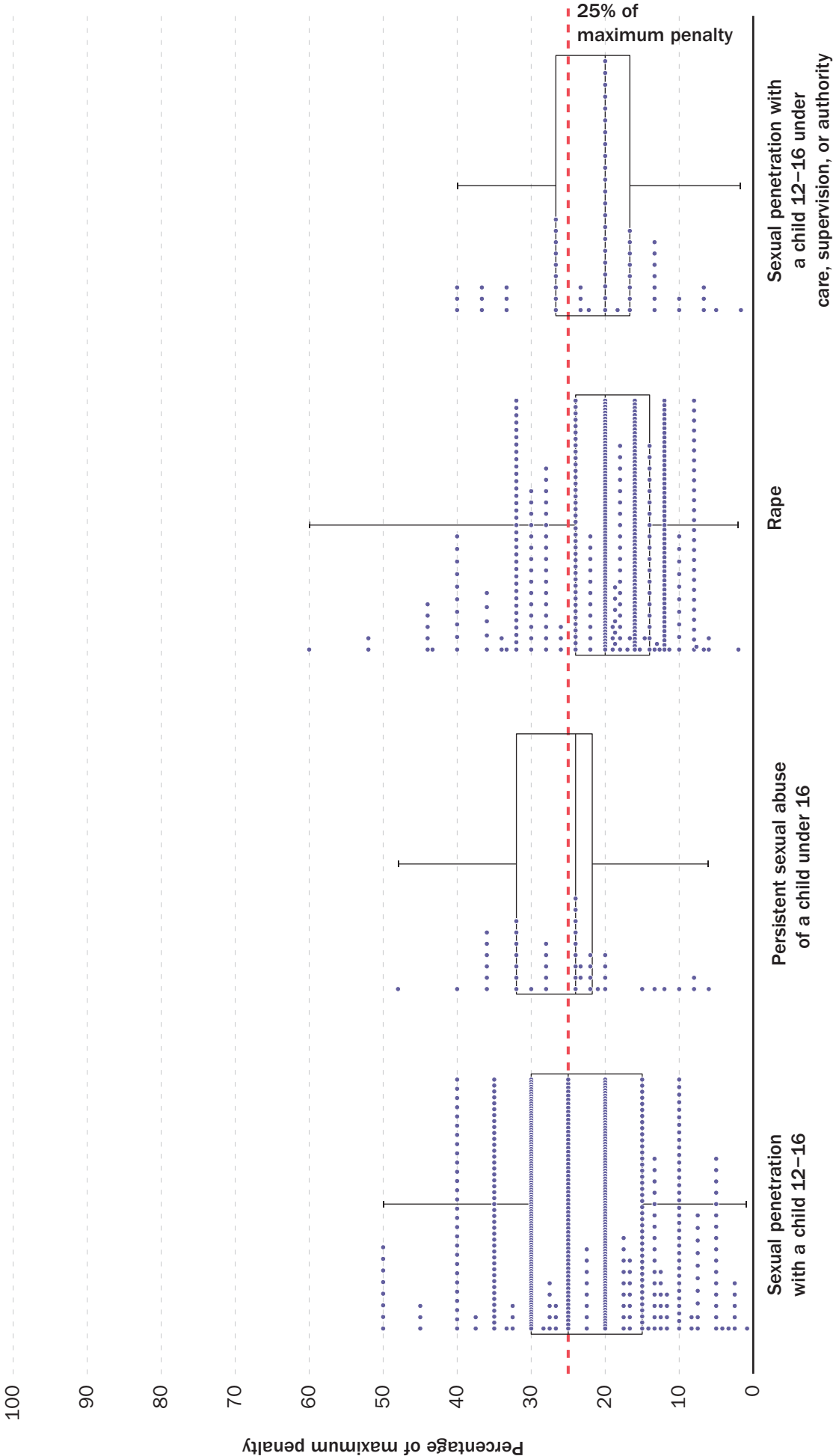
- 5.180 The Council's analysis of sentencing practices for the offence of sexual penetration with a child under 12 compared with the offence of rape suggests that sentences – both singly and in the aggregate – do not sufficiently reflect the objective criminality of the offence in light of all relevant considerations. Sentences also appear to give insufficient effect to the serious sexual offender provisions; the Council's analysis suggests that the serious sexual offender provisions, though enlivened, were not found to require a disproportionate sentence or additional cumulation.³⁸⁴

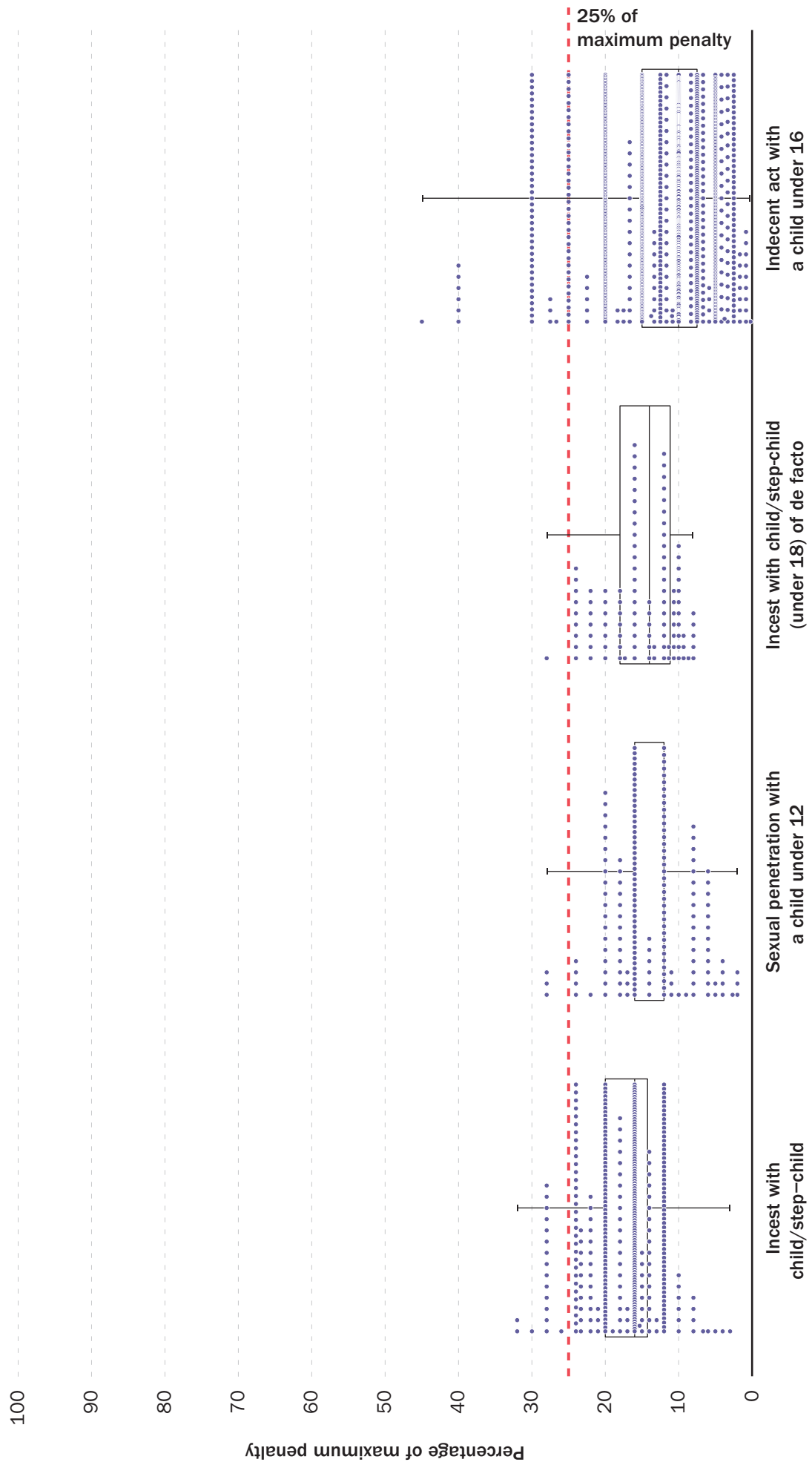
382. For the offence of sexual penetration with a child under 12, the third quartile is equal to the median (4 years, or 16% of the maximum penalty), so that a median line does not display in Figure 3 or in the global comparison in Figure 2.

383. Sample case analysis prepared for Sentencing Advisory Council (forthcoming 2016), above n 258.

384. Ibid.

Figure 3: Distribution of immediate custodial sentence lengths imposed on charges of sexual offences as a percentage of the respective maximum penalty, by offence, 2010–11 to 2014–15





5.181 It has not been possible to undertake the same detailed textual analysis of sentencing remarks for all of the sexual offences in this category. There is evidence, however, that the approach taken to applying the serious sexual offender provisions may also be a problem in the sentencing of the two most serious incest offences. In a successful sentence appeal by the Director of Public Prosecutions,³⁸⁵ the Court of Appeal identified an issue regarding the approach taken to the presumption of cumulation under the serious sexual offender provisions for the offence of incest with child/step-child. The same issue will also be considered by the Court of Appeal in an upcoming appeal by the Director of Public Prosecutions against a sentence for incest with child/step-child (under 18) of de facto.³⁸⁶ By extension, the Council considers that the evidence in relation to the four offences discussed above indicates that there are likely to be similar issues with the approach taken to applying the serious sexual offender provisions in the sentencing of other sexual offences involving children under 16.

Weight given to aggravating and mitigating factors

- 5.182 The statistical measures discussed above provide possible evidence of inadequate weight being given to particular sentencing factors in sentencing for sexual offences.
- 5.183 The Council's analysis of sentencing for sexual penetration with a child under 12 compared with rape provides evidence of differences in approach to the identification and weighing of aggravating and mitigating factors relevant to accurate assessments of objective seriousness, offender culpability, and harm caused. This was evidenced, for example, by the failure to discuss or identify a number of other aggravating features in the sexual penetration sample of cases, including offending against a victim in the safety or sanctity of their home, offending against a sleeping victim or one woken from sleep, and use of a sex toy.³⁸⁷
- 5.184 It has not been possible to replicate detailed textual analysis of sentencing remarks for the other sexual offences. However, the case analysis that the Council was able to undertake, documented in Appendix 4, suggests there may be additional problems in sentencing for the two incest offences, in particular, inconsistency of approach to:
- representative counts;
 - identification of and weight given to aggravating factors, such as use of threats, coercion, or actual force;³⁸⁸
 - offending over a long period;
 - whether offending results in pregnancy; and
 - the age of the victim.
- 5.185 The Council also undertook a limited textual analysis of sentencing remarks for appeals against sentences imposed on charges of sexual penetration with a child 12–16 at three points on the spectrum of sentences imposed. A summary is included after the offence data in Appendix 4.
- 5.186 The analysis suggested that the distribution of sentences for this offence observed in Figure 3 may be appropriate with respect to their objective seriousness. The custodial sentences imposed for the offence represent a wider distribution as a proportion of the maximum

385. *Director of Public Prosecutions v BDJ* [2009] VSCA 298 (1 December 2009); see also Appendix 4.

386. *Director of Public Prosecutions v Dalglish (A Pseudonym)* S APCR 2015 0190; see also Appendix 4.

387. Sample case analysis prepared for Sentencing Advisory Council (forthcoming 2016), above n 258.

388. *Director of Public Prosecutions v DJ* (2011) 211 A Crim R 367.

penalty, and the median represents the highest proportion of the maximum penalty compared with the medians for other sexual offences.³⁸⁹

- 5.187 The analysis, however, also revealed a number of cases in which the offenders were noted to have been in a position of care or supervision over the victim/victims.³⁹⁰ In such cases, the relationship of care, supervision, or authority was treated as an aggravating factor in sentencing rather than the offender being charged with the aggravated form of the offence (sexual penetration with a child 12–16 under care, supervision, or authority). The Council notes this as a possible source of inconsistency of approach for the two offences.

Categorisation of the objective seriousness of an offence

- 5.188 The Council's analysis of sentencing practices in sentencing remarks for sexual penetration with a child under 12 compared with rape reveals evidence of differences in approach to the treatment of harm and culpability and the categorisation of objective offence seriousness in the sexual penetration offence compared with rape. These appeared to be due to:

- the characterisation of the violence involved in the physical element of the offence of sexual penetration with a child under 12, suggesting that the inherently violent offending is less serious, despite recognising, at the level of principle, the seriousness of child sexual assault;
- the fact that rape cases were far more likely to include proven charges of non-sexual violence, such as assault, false imprisonment, and intentionally causing injury, which appeared to influence sentencing practices for the charge of rape;
- a tendency for sexual penetration cases to be characterised as being less 'violent' than rape cases, due to a focus on identifying physical violence over and above that inherent in the basic physical element of the offending;³⁹¹
- an emphasis on traditionally understood notions of violence in sentencing for the rape sample, represented by stranger attacks and signifiers, such as weapons, disguises, injuries, and overt force; and
- characterisation of the offender's behaviour that diminished the offender's agency and degree of force used.³⁹²

- 5.189 Figure 3 shows that sentences are higher for persistent sexual abuse of a child under 16, compared with single incident offences of sexual penetration with a child under 12 and indecent act with a child under 16. However, the Council's case analysis, documented in Appendix 4, suggests additional discrete issues in the categorisation of the seriousness of this offence as follows:

- the degree to which the persistence of the sexual relationship is reflected in sentencing;
- differences in the nature of the relationship; and
- categorisation of the nature and intensity of the sexual abuse.

389. The Council notes that there is a particular form of this offence that might be considered to be at the lower end of seriousness. This form has been characterised by the court as 'consensual' relationships between people of a similar age, but where the offender is more than two years older than the victim, thereby precluding the defence contained in the *Crimes Act 1958* (Vic) s 45(4). The Council examined this issue in its 2009 review of the maximum penalty for sexual penetration with a child under 16. The Council found that 25.7% of charges of the offence (then called sexual penetration with a child 10–16) from 2006–07 to 2007–08 occurred in the context of a 'boyfriend/girlfriend' relationship (as described by the court). In general, offenders convicted of this form of the offence were more likely to be younger and closer in age to the victim. However, in 68.9% of the cases where there was such a relationship, there was an age difference of 5 or more years (up to a 20-year age difference). See Sentencing Advisory Council, *Maximum Penalties for Sexual Penetration with a Child under 16: Report* (2009) 56–60.

390. For example, *SJ v The Queen* [2012] VSCA 237 (28 September 2012).

391. See *Director of Public Prosecutions v DJ* (2011) 211 A Crim R 367, 372: 'in a case where the victim's consent is not defence, it will be an aggravating feature of the offending if the offender proceeds in the knowledge that the victim is not consenting or, worse still, uses force to achieve his/her sexual purpose'. See also *Clarkson v The Queen* (2011) 32 VR 361, 382.

392. Sample case analysis prepared for Sentencing Advisory Council (forthcoming 2016), above n 258.

- 5.190 The Council's analysis of cases involving sexual penetration and rape charges has also revealed possible additional problems in the categorisation of the seriousness of other sexual offences.
- 5.191 The offence of indecent act with a child under 12 can encompass a wide range of offending behaviour. However, the range of harm and culpability may not be reflected in assessments of offence seriousness, particularly when the act falls only slightly short of penetration, or when an indecent act (of any kind) is equally traumatising and frightening for the victim as an act of sexual penetration.
- 5.192 Another possible issue is the assessment of harm in sexual penetration cases involving children 12–16 and 12–16 under care, supervision, or authority where the victim is at the older end of the age spectrum. There have been cases where offenders have sought to minimise the harm to the victim or otherwise suggest that the victim was 'complicit' in the offending in some way. For example, in one case examined by the Council, the defence submitted that the 14–15 year old victims were willingly engaging in the sexual activity for money.³⁹³
- 5.193 In *Clarkson v The Queen* ('*Clarkson*'), the Court of Appeal specifically addressed the question of whether a victim's consent (meaning agreement or willing cooperation) to sexual activity can be a mitigating factor in sentencing for child sexual offences.³⁹⁴ In that case, two offenders who had appealed against sentence sought to rely on the victim's consent to the sexual activity to mitigate the sentence in each of their respective cases. The Court of Appeal held that 'a child's consent can never, of itself, be a mitigating factor'.³⁹⁵
- 5.194 The maximum penalties for the two forms of the sexual penetration offence involving children 12–16 are far lower than the maximum penalty for the offence of sexual penetration with a child under 12,³⁹⁶ suggesting that parliament has assessed these offences as being lower in the offence hierarchy in terms of seriousness.³⁹⁷ However, it is well established that significant harm flows from these offences, no matter whether the child is younger or older than 12,³⁹⁸ and no matter whether the child has 'consented' to the sexual activity. This is evident from the following statement from the Court of Appeal in *Clarkson*:

The absolute prohibition on sexual activity with a child is founded on a presumption of harm. The prohibition is intended to protect children from the harm presumed to be caused by premature sexual activity, that is, activity before the age when a child can give meaningful consent.³⁹⁹

What are the sentencing problems and what form of guidance is needed for sexual offences?

- 5.195 The application of the Council's measures to sexual offences provides strong evidence of sentencing problems with regard to public confidence in sentencing and consistency of approach. The evidence is particularly strong for:
- sexual penetration with a child under 12;
 - persistent sexual abuse of a child under 16; and
 - incest (with child/step-child and with child/step-child (under 18) of de facto).

393. *R v LCC* [2006] VSCA 33 (16 February 2006).

394. *Clarkson v The Queen* (2011) 32 VR 361.

395. *Clarkson v The Queen* (2011) 32 VR 361, 364.

396. The relevant maximum penalties are 25 years' imprisonment for sexual penetration with a child under 12, 15 years' imprisonment for sexual penetration with a child 12–16 under care, supervision, or authority, and 10 years' imprisonment for sexual penetration with a child 12–16.

397. The Victorian Women's Trust submitted that a consistent maximum penalty of 25 years should apply to all sexual offences involving children under 16, including sexual penetration with a child 12–16 under care, supervision, or authority, sexual penetration with a child 12–16, and indecent act with a child under 16: Submission 7 (Victorian Women's Trust).

398. Judy Cashmore and Rita Shackel, *The Long-Term Effects of Child Sexual Abuse*, Child Family Community Australia, Issues Paper no. 11 (2013).

399. *Clarkson v The Queen* (2011) 32 VR 361, 364.

- 5.196 To a large degree, the evidence in relation to one serious sexual offence applies to other serious sexual offences, due to the similar features reflected in the objective seriousness of the offences. Such features include a lack of consent, vulnerable victims, breach of trust, and the significant physical and psychological harms caused by the offending behaviour.
- 5.197 Further, there is a significant degree of overlap between different sexual offences as a result of charging practices, meaning that not all cases involving the rape⁴⁰⁰ of a child under 12 will be charged as a sexual penetration offence. For example, in some instances, it may be charged as rape or incest. Therefore, it is important to include a number of offences to ensure a consistent approach to providing guidance to address the identified sentencing problems.
- 5.198 The Council has therefore considered it appropriate to take a holistic approach to the identification of sentencing problems with sexual offences. The Council is of the view that community views, advances in the understanding of the devastating effects of such offending, and parliamentary views on the seriousness of such offending are not reflected in the sentencing practices for such offences. The Court of Appeal has continued to comment on the inadequacy of sentencing, particularly for child sexual offences, but this has not resulted in the provision of judicial-led guidance or changes in current sentencing practices. There is evidence suggesting an inconsistency of approach on a number of measures in relation to the conceptualisation of sexual violence against adult and child victims and how different aggravating and mitigating factors are treated across the range of sexual offences.
- 5.199 For these reasons, the Council is of the view that the evidence of sentencing problems for the eight identified sexual offences is sufficient to warrant a need for sentencing guidance.
- 5.200 The Council is conscious that there are other serious sexual offences in the *Crimes Act 1958* (Vic) that may warrant examination;⁴⁰¹ however, it has not been possible to examine all of these within the scope of the reference. It would be necessary to undertake a complete review of sentencing for sexual offences and possible textual analysis of sentencing remarks prior to a wholesale setting of levels for all sexual offences.
- 5.201 Having established the existence of sentencing problems for sexual offences, the Council has formed a view as to the type of guidance that is necessary to address these problems.
- 5.202 The Council's view is that there is a need for guidance on the:
- adequacy/level of sentences for sexual offences with respect to objective offence seriousness (described as a 'thermostat' issue); and
 - approach to sentencing to ensure the distribution of sentences appropriately reflects the factors and principles applicable in the exercise of sentencing discretion (described as a 'synthesis' issue).

400. A child under 12 cannot, by law, consent to sexual penetration. Similarly, a child aged 12–16 cannot consent to sexual penetration, save for in the limited circumstances constituting a defence to a charge under section 45, provided for in section 45(4) of the *Crimes Act 1958* (Vic).

401. For example, possession of child pornography was another sexual offence raised as an offence of concern by stakeholders: Meeting with a number of Crown Prosecutors (11 February 2016).

5.203 The Council makes the following observations about the thermostat issues in the sentencing of sexual offences:

- the approach to current sentencing practices has constrained sentencing practices for some offences where it has been identified that such sentencing practices are inadequate;
- the maximum penalty has little effect as a guide to the seriousness of the offence;
- collectively, sentences do not reflect the seriousness with which the community and parliament view the offences; and
- there is a disparity between sentences for sexual offences and sentences imposed for offences of similar levels of harm and culpability.

5.204 The Council makes the following observations about the synthesis issues in the sentencing of sexual offences:

- there is a need to ensure that harm and culpability are assessed consistently across sexual offences as part of the categorisation of offence seriousness;
- there is a question around whether mitigating and aggravating factors are weighted consistently;
- general guidance may assist in a more consistent application of serious sexual offender provisions; and
- inconsistencies in approach to non-offence specific factors may have broader application across other offences and may indicate a need for general guidance.⁴⁰²

Serious injury offences

5.205 The Council has identified three serious injury offences (see Table 8) as possible problem offences. The Council recommends that these three offences be identified as having sentencing problems, based on the evidence available.

Offence characteristics

5.206 Appendix 5 presents information on the offence characteristics of the three serious injury offences in this category, including the statutory reference and whether the offence is indictable or indictable triable summarily. This information is summarised for each offence in order of statutory reference in Table 8.

Table 8: Offence characteristics of serious injury offences identified as possible problem offences

Offence	<i>Crimes Act 1958</i> (Vic)	Indictable only	Prevalence by charges sentenced
Intentionally causing serious injury	s 16	Yes	504
Recklessly causing serious injury	s 17	No	646
Negligently causing serious injury	s 24	No	197

402. For example, this may be the case where broader sentencing issues apply to the sentencing of all offences, such as the way a court should approach making orders for cumulation or concurrency when applying the principle of totality.

- 5.207 Intentionally causing serious injury is indictable only, with the reckless and negligent forms of the offence being indictable offences triable summarily.⁴⁰³
- 5.208 Despite the limitations on assessing prevalence, it is clear that these offences are prevalent, the most prevalent being recklessly causing serious injury (which is often charged and convicted as an alternative to intentionally causing serious injury).

Problem with sentencing: evidence of a lack of public confidence in sentencing

Community views on offence seriousness and sentencing

- 5.209 Structured and informed community consultation provides some evidence of community views on the seriousness of serious injury offences.
- 5.210 The Council's research into community attitudes to offence seriousness indicates that there is a high level of agreement on the seriousness of intentionally causing serious injury. The offence was ranked 9 in the scale of offence seriousness based on participants' rankings with a high level of agreement (the same as rape and reckless murder). There was less agreement on the ranking of the negligent form of the offence (ranked 8) and the reckless form of the offence (ranked 7).
- 5.211 The ranking of these offences shows that participants tended to make differentiations in seriousness based on distinct levels of harm and culpability in judging the seriousness of offences that involve the causation or risk of intentional or unintentional death or serious injury. The gradation in the ranking of serious injury offences indicates a descending level of culpability from intention as the highest to negligence and recklessness, with a corresponding increase in disagreement as culpability reduces from intentional infliction of harm. However, unlike for the fatal offences, negligence was positioned higher on the culpability scale than recklessness. This is inconsistent with the traditional positioning in criminal law of recklessness as higher than negligence, which is reflected in the maximum penalties for these offences.
- 5.212 The high ranking of negligently causing serious injury over recklessly causing serious injury can be explained by the case example used to represent negligently causing serious injury. It involved the commission of negligently causing serious injury by driving (with the same mental element as for the culpable driving causing death case example) and resulted in the highest level of harm as the serious injury (a permanent vegetative state). These factors had a strong influence on participants' judgments that this example of the offence was at the highest level of seriousness.⁴⁰⁴
- 5.213 Some caution is to be exercised in relying on this as strong evidence of the community's view of the seriousness of such offending, due to the high level of disagreement between participants on the ranking of negligently causing serious injury (and the reckless form of the offence).
- 5.214 Findings from the Tasmanian and Victorian Jury Sentencing Studies show that there was less disparity between jurors' and judges' sentencing for violent offences than observed for sexual offences. In the Tasmanian study, 62% of jurors from violence cases thought sentencing for violent offences was too lenient, even though only 49% indicated a more severe sentence than the judge.⁴⁰⁵ The Victorian study also indicated that the majority of jurors were more lenient than judges when recommending a sentence for violent and other offences.⁴⁰⁶

403. There were 1,828 charges of recklessly causing serious injury and 99 charges of negligently causing serious injury sentenced in the Magistrates' Court over the reference period.

404. Sentencing Advisory Council (2012), above n 16, 30–31, 33–35.

405. Warner et al. (2011), above n 15, 4.

406. Warner et al. (under review for publication), above n 18.

Special risk of serious consequences to victims and the community and better understanding of such consequences

5.215 The Council considers there to be some evidence of a change in the level of community understanding of the consequences of serious injury offences, and increasing concern around special risks in some forms of this offending. The Council particularly notes that this is the case in the area of family violence where serious injury is inflicted against partners and children of offenders⁴⁰⁷ and in the case of alcohol-fuelled violence.⁴⁰⁸ Road trauma – and its effects on victims, offenders, and the community at large – is a major social problem.⁴⁰⁹ There have been a number of community education and policing campaigns to increase community awareness regarding harms caused by the road toll and the factors associated with driving fatalities and injuries (see Appendix 5).

Parliament's view of offence seriousness

5.216 Parliament's view of the seriousness of serious injury offences is indicated by their maximum penalties (Table 9). The maximum penalties reflect a sliding scale of seriousness according to the culpability of the offender (as reflected in the offender's level of intention). A maximum penalty of 20 years for intentionally causing serious injury indicates the seriousness with which parliament views the intentional infliction of serious harm against victims. The maximum penalties for these offences can be contrasted with the maximum penalties for other more serious possible problem offences, such as the most serious sexual offences (with maximum penalties of 25 years' imprisonment) and murder (with a maximum penalty of life imprisonment).

Table 9: Maximum penalties for charges of serious injury offences identified as possible problem offences

Offence	Maximum penalty
Intentionally causing serious injury	20 years
Recklessly causing serious injury	15 years
Negligently causing serious injury	10 years

5.217 Some forms of intentionally causing serious injury and recklessly causing serious injury have minimum non-parole periods where such offences are committed in circumstances of 'gross violence'.⁴¹⁰ This indicates parliamentary concern about a particular class of behaviour captured within these offences. None of the three offences was included as a baseline offence.

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness

5.218 Table 10 shows a summary comparison between sentencing practices and the maximum penalty on two key measures across the three offences (Appendix 5 contains a detailed analysis). Offences are presented in descending order according to the proportion of immediate custodial sentences that represent 25% or less of the maximum penalty.

407. This is reflected in the recently released report of the Royal Commission into Family Violence: Victoria, Royal Commission into Family Violence (2016), above n 357. See also *Kilic v The Queen* [2015] VSCA 331 (8 December 2015).

408. For example, serious injury offences committed by 'glassing' or by 'one-punch'.

409. See, for example, Victoria State Government, *Road Safety* (Transport Accident Commission, 2016) <<https://www.tac.vic.gov.au/road-safety>> at 31 March 2016; Sentencing Advisory Council (2015), above n 114, 9.

410. See Chapter 2 at [2.53]–[2.59].

Table 10: Comparison of sentences imposed for serious injury offences identified as possible problem offences with maximum penalties, 2010–11 to 2014–15

Offence	Maximum penalty	% of immediate custodial sentences imposed on charges equal to or less than 25% of maximum penalty	Median (% of maximum penalty)
Recklessly causing serious injury	15 years	86%	2 years and 3 months (15%)
Intentionally causing serious injury	20 years	77%	4 years (20%)
Negligently causing serious injury	10 years	42%	3 years (30%)

5.219 The median sentences represent relatively low proportions of the maximum penalty (similar to some of the sexual offences). However, there are lower proportions of sentences equal to, or less than, 25% of the maximum penalty; that is, there is a more even distribution across the bottom 50% of the maximum penalty rather than almost all sentences being in the bottom 25%, as was observed for the sexual offences.

5.220 Therefore, there is some evidence of disparity between the community's and parliament's views and the sentencing practices for serious injury offences; however, the level of disparity may vary between different offences.

5.221 The greatest disparity with the maximum penalty is evident in the sentencing for recklessly causing serious injury. However, there was not a consensus view in the Council's community attitudes research on the seriousness of this offence. In *R v Tran*, the Court of Appeal commented on what the community might expect in terms of the distribution of sentences for recklessly causing serious injury under the maximum penalty:

If it is correct that six years is the top end of the statistical range, then it would seem to me that there is a real question to be investigated, probably on a Director's appeal, about whether current sentencing practices can be reconciled with the maximum of 15 years. It seems to me that both Parliament – having set the maximum at 15 – and members of the community who were fully apprised of the seriousness of this recidivist offending would be entitled to ask why the top end of the range, statistically speaking, was below 50 per cent of the maximum. They might well ask – in my view, quite reasonably – why very serious offending of this kind does not attract sentences more towards eight, nine or 10 years. They might wonder for what kinds of offending the upper end of the statistical range was reserved if not for a repeat offender who had seriously injured innocent people.⁴¹¹

5.222 On the other hand, participants in the Council's community attitudes research agreed that the offence of intentionally causing serious injury was particularly serious. A particularly serious form of that offence was ranked 9 – the same level as reckless murder and rape. This view of offence seriousness may not be reflected in sentencing practices for the offence (see Figure 4), particularly for the most serious forms of this offending.

5.223 One such example is demonstrated by the recent case of *Kilic v The Queen* ('*Kilic*'),⁴¹² in which the offender intentionally set alight his pregnant ex-partner, resulting in the infliction of permanent injuries, including the consequential termination of her pregnancy. This case prompted significant community reaction to the reduction in sentence on appeal for such a serious act of violence in such circumstances. This is also in light of the sustained and

411. *R v Tran* [2009] VSCA 252 (12 October 2009) [47] (citations omitted).

412. *Kilic v The Queen* [2015] VSCA 331 (8 December 2015).

significant concerns being expressed across the community about the prevalence and impact of family violence. Concerns have also been expressed about the effect that particular legal decisions or practices can have on reinforcing certain community attitudes, for example, violence towards women.⁴¹³ Such concerns were also expressed by the Victorian Women's Trust in relation to sexual offences in its submission to the Council.⁴¹⁴

Court of Appeal's approach to addressing inadequacy of current sentencing practices and the effect of any such guidance

5.224 The Court of Appeal has made two declarations in relation to the inadequacy of sentences for particular forms of serious injury offending (detailed in Appendix 5):

- 'glassing' forms of recklessly causing serious injury;⁴¹⁵ and
- negligently causing serious injury by 'driving'.⁴¹⁶

5.225 Additionally, the court has raised the adequacy of current sentencing practices as a possible issue for intentionally causing serious injury⁴¹⁷ and recklessly causing serious injury.⁴¹⁸

5.226 In relation to the offence of negligently causing serious injury, the Court of Appeal in *Harrison v The Queen* ('*Harrison*')⁴¹⁹ held that:

- an offence of negligently causing serious injury that is committed by driving and involves permanent and serious harm is at the upper end of seriousness;
- current sentencing practices for the offence 'have remained clustered at and under an upper limit of four years' imprisonment',⁴²⁰ rendering them inconsistent with parliament's intention reflected in an increase in the maximum penalty from 5 to 10 years, and disparate to community expectations of the seriousness of this form of the offence;⁴²¹
- accordingly, current sentencing practices are inadequate and sentencing courts should not regard themselves as constrained to follow earlier sentencing practices for that offence (when committed by driving); and
- sentences of 6 to 7 years within the 10-year maximum penalty would be well within the upper range of seriousness.⁴²²

5.227 In the previous case of *Gorladenchearau v The Queen*, which involved an appeal against sentence for negligently causing serious injury, Maxwell P indicated that sentences 'well above 50 per cent of the maximum were not uncommon before the maximum was increased'.⁴²³

413. Graham Hryce, 'Reducing Offenders' Sentences Sends Wrong Message on Crimes We Shouldn't Tolerate', *The Age* (Melbourne) 11 January 2016 <<http://www.theage.com.au/comment/reducing-offenders-sentences-sends-wrong-message-on-crimes-we-shouldnt-tolerate-20160111-gm3bml.html>> at 31 March 2016; see also Victoria, Royal Commission into Family Violence (2016), above n 357, vol. III, 189.

414. Submission 7 (Victorian Women's Trust).

415. *Winch v The Queen* (2010) 27 VR 658. See also *Director of Public Prosecutions v Barnes and Barnes* [2015] VSCA 293 (12 November 2015), in which the Court of Appeal characterised sentences for recklessly causing serious injury as lenient but not manifestly inadequate.

416. *Harrison v The Queen* [2015] VSCA 349 (16 December 2015).

417. *Kane v The Queen* [2010] VSCA 199 (23 August 2010).

418. *R v Tran* [2009] VSCA 252 (12 October 2009).

419. *Harrison v The Queen* [2015] VSCA 349 (16 December 2015).

420. *Harrison v The Queen* [2015] VSCA 349 (16 December 2015) [105].

421. The court's observations regarding disparity of community attitudes are consistent with the high ranking of negligently causing serious injury (by driving) in the Council's community attitudes research, albeit the Council found slightly lower levels of participant agreement for that offence than for sexual offences.

422. *Harrison v The Queen* [2015] VSCA 349 (16 December 2015).

423. *Gorladenchearau v The Queen* (2011) 34 VR 149, 161.

- 5.228 In relation to the offence of intentionally causing serious injury, the recent case of *Kilic* (see [5.223]) includes an example of the offence in the upper range of seriousness. In this case, the Court of Appeal reduced the sentence of 14 years' imprisonment to 10 years and 6 months, on the ground that the sentence imposed was 'unjustifiably disparate from other sentences imposed for worst category offending by offenders in comparable circumstances'. In making this decision, the court had specific regard to current sentencing practices, saying:
- Notwithstanding the latitude that must therefore be extended to sentencing judges, particularly when sentencing for an offence falling within the worst category, there is such a disparity between the sentence imposed and current sentencing practice as illustrated by the authorities relied upon by the parties, that we are satisfied that there has been a breach of the underlying sentencing principle of equal justice.⁴²⁴
- 5.229 The court did not make specific comment on the adequacy of current sentencing practices for the offence. However, the case raises issues regarding the adequacy of current sentencing practices for this form of offending and the way in which current sentencing practices constrained the sentence ultimately imposed. The Director of Public Prosecutions has applied to the High Court for special leave to appeal this decision.⁴²⁵
- 5.230 Given the extent of the issues that have been raised by the Court of Appeal regarding the inadequacy of current sentencing practices for particular forms of serious injury offending, one might expect to see some commensurate changes in current sentencing practices.
- 5.231 Sufficient time has elapsed following the declaration of inadequacy of current sentencing practices for the glassing form of recklessly causing serious injury in *Winch v The Queen* ('*Winch*').⁴²⁶ The Council has analysed data (Appendix 9) in order to determine whether *Winch* has had an effect on sentencing practices, but it is not clear whether this has occurred. In relation to the declaration of inadequacy for the driving form of negligently causing serious injury, insufficient time has elapsed to determine the influence of *Harrison* on sentencing practices.
- 5.232 In summary, the analysis shows that, post-*Winch*, there has been a 25% (6-month) increase in the median imprisonment term imposed for charges of the glassing form of recklessly causing serious injury, and a 22 percentage-point increase in the proportion of charges for this offence receiving immediate imprisonment (including a youth justice centre order and immediate imprisonment combined with a community correction order).
- 5.233 This may be seen as evidence of a shift to a higher proportion of offenders receiving immediate imprisonment for the glassing form of recklessly causing serious injury, thus addressing the Court of Appeal's concern with current sentencing practices that saw a high proportion of offenders receiving a wholly suspended sentence for this particularly serious offending. However, this evidence is limited as this shift coincided with the abolition of suspended sentences.⁴²⁷
- 5.234 Appendix 5 shows that the cumulative median for intentionally causing serious injury has been constant over the reference period, while the cumulative median for recklessly causing serious injury has declined. The cumulative median for negligently causing serious injury has fluctuated.

424. *Kilic v The Queen* [2015] VSCA 331 (8 December 2016) [67].

425. Office of Public Prosecutions, 'DPP Applies to High Court for Special Leave to Appeal Decision', Media Release (13 January 2016) <<http://www.opp.vic.gov.au/News-and-Media/Media-releases/DPP-applies-to-High-Court-for-special-leave-to-app>> at 31 March 2016.

426. *Winch v The Queen* (2010) 27 VR 658.

427. Suspended sentences were progressively abolished in Victoria; they were abolished in the higher courts for all 'serious' and 'significant' offences – which includes recklessly causing serious injury – committed on or after 1 May 2011: *Sentencing Amendment Act 2010* (Vic) s 12.

Problem with sentencing: evidence of inconsistency in sentencing approach

- 5.235 There is evidence of inconsistency of approach across the three qualitative measures, supported by quantitative measures.
- 5.236 Figure 4 provides an indication of the extent to which there is consistency in approach in the sentencing of serious injury offences that objectively comprise similarly high levels of harm. It shows a comparison of the distribution of immediate custodial sentences for the three serious injury offences according to the percentage of the respective maximum penalties, as follows:
- the highest and lowest sentence – indicated by the top and bottom of the vertical line;
 - middle inter-quartile range – indicated by the box;
 - the median sentence – indicated by the line inside the box; and
 - each individual sentence – indicated by a dot.
- 5.237 The seriousness scale reflected by current sentencing practices places negligently causing serious injury as the most serious of the injury offences (with the highest sentences at 85% of the maximum penalty and the median at 30% of the maximum penalty). The middle 50% of sentences are distributed evenly across the range of sentences under the maximum penalty (between 20% and 50%). In contrast, the median and middle 50% of sentences for intentionally causing serious injury and negligently causing serious injury sit at 25% or less than the maximum penalty. The highest sentence for the intentional form of the offence is 60% of the maximum penalty, and the highest sentence for the reckless form of the offence is 40% of the maximum penalty.
- 5.238 The additional statistical measures of consistency – median absolute difference (MAD) and inter-quartile range (IQR) (see [5.104]–[5.106]) – provide an indication of the level of consistency in sentencing approach. Detailed analysis is included in Appendix 5.
- 5.239 There was a relatively narrow distribution of sentences and a clustering of sentences around the median sentence for the intentional and reckless forms of the serious injury offences. Recklessly causing serious injury had a MAD of 10 months and the lowest IQR of 1 year and 6 months. However, overall, wider IQRs and MADs were observed for serious injury offences compared with those observed for sexual offences. This indicates that there is less clustering of immediate custodial sentences around the median sentence length for serious injury offences compared with the clustering observed for sexual offences. This could reflect that sentences are being imposed commensurate with the wider range of objective offence seriousness within the serious injury offences.

Treatment of a category of offenders within an offence category

- 5.240 As Appendix 5 indicates, there is evidence of an inappropriate approach to the treatment of a category of serious injury offenders reflected in the errors identified by the Court of Appeal in the approach to sentencing such offenders. However, this evidence only applies to particular forms of offending: 'glassing' forms of recklessly causing serious injury and upper-range examples of negligently causing serious injury by driving. There is the possibility of an inappropriate approach for a particular form of intentionally causing serious injury; however, the Court of Appeal has not established an error in this regard.

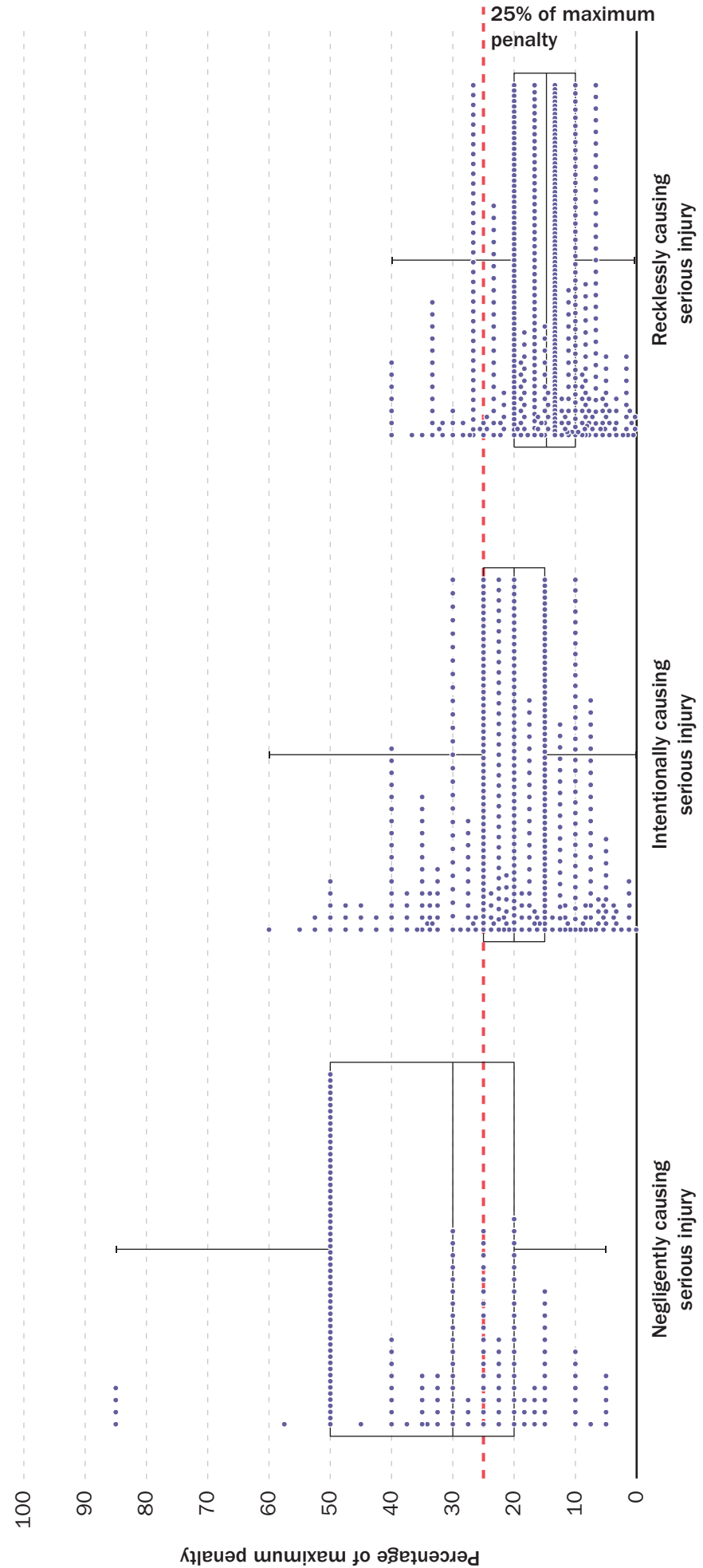
Weight given to aggravating and mitigating factors

- 5.241 Statistical measures of consistency suggest the possibility of inconsistency of approach in relation to the weight given to aggravating and mitigating factors for causing serious injury offences, particularly:
- within the offences of intentionally causing serious injury and recklessly causing serious injury demonstrated by a clustering of sentences around median sentences; and
 - for the negligent form of the offence (which has a lower maximum penalty of 10 years' imprisonment) demonstrated by the significantly higher distribution of sentences for this offence compared with the distribution of sentences for the intentional and reckless forms.
- 5.242 The Council's case analysis in Appendix 5 provides evidence of the possible issues that may be underlying these statistical observations, which are applicable to all three serious injury offences. These issues include the assessment of and weight given to:
- premeditation;
 - relationship of trust; and
 - seriousness and permanency of the serious injury.
- 5.243 Detailed textual analysis of sentencing remarks may reveal evidence of further areas of inconsistency of approach to serious injury offences; however, it has not been possible to undertake such analysis within the scope of the reference.

Categorisation of the objective seriousness of an offence

- 5.244 A comparison of the sentencing practices for these serious injury offences does not suggest inappropriate differences in approach to the categorisation of the objective seriousness of intentionally causing serious injury compared with offences such as rape or murder. However, recent case law provides evidence of errors that have been identified by the Court of Appeal in the categorisation of particular forms of serious injury offences, for example:
- *Winch* provides evidence of an established error regarding the categorisation of the seriousness of particular forms of recklessly causing serious injury;
 - *Harrison* provides evidence of an established error regarding the categorisation of the seriousness of negligently causing serious injury by driving at the high end of objective seriousness; and
 - *Kilic* provides evidence of a possible error regarding the categorisation of the seriousness of intentionally causing serious injury at the high end of objective seriousness and in a family violence context.
- 5.245 There is some evidence that the hierarchy of culpability is not appropriately reflected in the current sentencing practices for recklessly causing serious injury and negligently causing serious injury. However, due to the particular seriousness of driving forms of the latter offence, it is difficult to compare these two offences.
- 5.246 An important factor in comparing the categorisation of seriousness for intentionally causing serious injury and recklessly causing serious injury is the overlap between the two offences in terms of charging practices. An offender may be charged with the intentional form of the offence and with the reckless form as an alternative, or an offender may be charged with the intentional form of the offence and (where it is accepted by the prosecution) plead guilty to the reckless form of the offence.

Figure 4: Distribution of immediate custodial sentence lengths imposed on serious injury offences as a percentage of respective maximum penalties, by offence, 2010–11 to 2014–15



What are the sentencing problems and what form of guidance is needed for serious injury offences?

- 5.247 The application of the Council's measures provides evidence of sentencing problems with regard to public confidence in sentencing and consistency of approach for all three serious injury offences, as follows:
- There is some evidence of a disparity between offence seriousness reflected in sentencing practices for, and the community's and parliament's views of, all forms of offending. There have been particular problems with the adequacy of sentencing for the most serious forms or a particular class of such offending.
 - The Court of Appeal has made declarations of inadequacy of current sentencing practices for particular forms of serious injury offences (recklessly causing serious injury by glassing and negligently causing serious injury by driving). It is not possible to separate the effect of this guidance from the abolition of suspended sentences on current sentencing practices for recklessly causing serious injury.
 - The evidence stemming from the Court of Appeal's identification of a persistent error being made in the treatment of a category of offenders relates only to particular forms of offending for such offences.
 - There is evidence of a possible inconsistency in the approach to aggravating and mitigating factors that apply across all offences, such as assessment of and weight given to premeditation, relationship of trust, and the seriousness and permanency of injury.
- 5.248 Therefore, for serious injury offences, the identified sentencing problems largely relate to particular classes or forms of such offending or serious violence identified to be at the upper range of objective seriousness. Having established the existence of sentencing problems for serious injury offences, the Council has formed a view as to the type of guidance that is necessary to address these problems.
- 5.249 In relation to the serious injury offences, the 'thermostat' issues primarily relate to specific forms of the offence rather than to the objective seriousness of all forms of the offence. The key problem to be addressed is the need to amplify the effect of the guidance that the court has already provided on the inadequacy of current sentencing practices for particular forms of offending.
- 5.250 The primary need for guidance in relation to serious injury offences relates to ensuring the distribution of sentences appropriately reflects the factors and principles applicable in the exercise of the sentencing discretion (described as a 'synthesis' issue). In relation to the synthesis issues in the sentencing of serious injury offences:
- there is a need to capture the guidance already provided by the court in relation to the approach to treating a particular category of offenders; and
 - there is a need to address inconsistency of approach to the assessment of, and weight given to, factors that apply across all three offences, including premeditation, relationship of trust, and seriousness/permanence of injury.

Aggravated burglary

5.251 The Council has identified aggravated burglary as a possible problem offence. The Council recommends that it be identified as having sentencing problems, based on the available evidence.

Offence characteristics

5.252 Appendix 7 details the offence characteristics for aggravated burglary. Aggravated burglary is an indictable offence that is triable summarily, and it is a prevalent offence: 1,172 charges of aggravated burglary were sentenced in the higher courts in the reference period and a further 1,271 charges were sentenced in the Magistrates' Court.⁴²⁸

5.253 Aggravated burglary does not involve a vulnerable victim in the objective elements of the offence. However, it is an aggravated form of burglary, in recognition of the objectively higher culpability and harm inherent in the commission of a burglary in certain circumstances: when the offender intentionally enters a premises as a trespasser and intends to commit a serious offence⁴²⁹ involving an assault (including a sexual assault), property damage, or theft, with one of the two following statutory aggravating factors:

- being armed with a firearm, weapon, or explosive (or imitation); or
- knowing that another person was present or being reckless as to whether or not another person was present.⁴³⁰

5.254 It is evident from these elements that the offence encompasses a broad range of intentions, behaviour, and circumstances of aggravation. For example, it can cover conduct ranging from a person reaching into an open window of a warehouse in order to steal a packet of cigarettes despite seeing an employee at the far end of the premises, to an armed intruder breaking into a woman's house intending to sexually assault her at gunpoint.

Problem with sentencing: evidence of a lack of public confidence in sentencing

Community views on offence seriousness and sentencing

5.255 The Council's community attitudes research included the offence of a sexually motivated aggravated burglary (with an intention to commit the offence of rape armed with a knife and knowing a person was present). This offence was ranked by participants at level 8 (at the same level as serious offences such as manslaughter, culpable driving causing death, and negligently causing serious injury). The intention to rape and the personal invasion were highly influential factors in participants' rankings; demonstrating the seriousness with which the community views such behaviour, in terms of the high culpability of the offender and the high degree of harm that would be caused to the victim (both immediately and in the long term).⁴³¹

428. See Appendix 8.

429. Where that offence is punishable by five years' imprisonment or more.

430. *Crimes Act 1958* (Vic) s 77.

431. Sentencing Advisory Council (2012), above n 16, 46, 59–62. The Tasmanian and Victorian Jury Sentencing Studies did not make any specific findings in relation to the offence of aggravated burglary.

5.256 There is less available evidence on how seriously the community may view different forms of aggravated burglary, for example:⁴³²

- 'intimate relationship' – the offender enters the home of an intimate partner or a former intimate partner knowing the person is present and with the intention of assaulting the person;
- 'robbery or theft related' – the offender enters the premises with the intention of damaging or stealing property while the offender is reckless to a person's presence; and
- 'confrontational' – the offender enters the premises in the context of a dispute with or grievance against someone in the premises knowing the person is present and having the intention of stealing property or assaulting the person as part of the confrontation.

Special risk of serious consequences to victims and the community and better understanding of such consequences

5.257 There has been particular recognition in case law of the vulnerability of some victims of aggravated burglaries where the offence is confrontational, is sexually motivated, or is committed in the context of an intimate relationship.⁴³³

5.258 The inclusion of the statutory aggravating factors reflects a recognition of the special risk that such factors present in terms of increasing or aggravating the harms to individuals through such behaviour and to society as a whole. The use of a weapon increases the risk of very serious injury or death to the victim. The presence of a person on the premises increases the risks of physical harm to the victim, as well as potentially causing significant immediate and long-term psychological harm as a result of a home invasion. This sentiment was perfectly captured in one of the comments made by a participant in the Council's research on community attitudes to offence seriousness in relation to the sexually motivated aggravated burglary offence:

The harm's in the violation of what is assumed to be safe space for the person to sleep in ... that's harm to the community that relies on its homes and its locks and its windows to keep out offenders. And so a harm is done to the general community, the fabric of society, if you will, by these offences.⁴³⁴

Parliament's view of offence seriousness

5.259 The maximum penalty for aggravated burglary (which is not a baseline offence) is 25 years, reflecting parliament's view that the statutory elements of aggravation render the offence as significantly more serious than the basic offence of burglary (which has a 10-year maximum penalty). The maximum penalty was increased from 15 years to 25 years in 1997, reflecting a change in parliament's view of the seriousness of the offence. In introducing the amending legislation, the then Attorney-General, Jan Wade, MP, stated:

These crimes undermine the sense of security that people feel in their homes and workplaces. The government wishes to send a message to offenders that these crimes will not be tolerated ... Aggravated burglary will carry a new maximum penalty of 25 years imprisonment. The higher penalty recognises that burglary offences are particularly heinous where the safety and liberty of individuals are threatened.⁴³⁵

432. For more discussion of these typologies and an analysis of sentencing practices under each typology, see Sentencing Advisory Council, *Aggravated Burglary: Current Sentencing Practices* (2011) 27–43.

433. See, for example, *Director of Public Prosecutions v El Hajje* [2009] VSCA 160 (26 June 2009).

434. Sentencing Advisory Council (2012), above n 16, 61 (participant M2–19).

435. Victoria, 'Sentencing and Other Acts (Amendment) Bill', *Parliamentary Debates*, Legislative Assembly, 24 April 1997, 871 (Jan Wade, Attorney-General).

- 5.260 Within this high maximum penalty, however, there is allowance for a range of sentences to be imposed commensurate to the different levels of objective seriousness inherent in the varying forms of the offence. This is also reflected in parliament's determination of the offence as being triable summarily, an indication that there will be forms of the offence at the very low end of seriousness that may be sentenced in the summary jurisdiction of the Magistrates' Court. Appendix 8 shows the sentencing outcomes at a summary level and reveals that aggravated burglary charges were equally prevalent in the Magistrates' Court as in the higher courts. In the Magistrates' Court, the majority of charges received a custodial sentence (non-aggregate and aggregate), while 30% of cases received a non-custodial sentence.
- 5.261 The Council notes that the Director of Public Prosecutions' submission raised an issue about the maximum penalty for this offence, saying 'at 25 years the maximum penalty for aggravated burglary is difficult to justify'.⁴³⁶ Maximum penalties are discussed in this report at [3.7]–[3.23].

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness

- 5.262 Figure 2 and Appendix 7 show the results of the Council's quantitative analysis of sentencing practices for the offence of aggravated burglary in the reference period. By way of summary:
- immediate custodial sentences comprised 65% of all sentences imposed, ranging from 1 month to 9 years;
 - the median sentence was 2 years and 6 months, which comprises 10% of the maximum penalty; and
 - the distribution of sentences was skewed towards the lower end of the sentencing range under the maximum penalty, with almost all immediate custodial sentences (99%) representing 25% or less of the maximum penalty.
- 5.263 These measures alone suggest disparity between the current sentencing practices for aggravated burglary and parliament's view of the seriousness of this offence, as reflected in the high maximum penalty. There is strong evidence from the Council's research on community attitudes that the community views sexually motivated aggravated burglaries as particularly serious.
- 5.264 The Council examined the two County Court cases that received the highest sentence of 9 years and found that these cases involved serious examples of the offence: both were committed with the intention to rape.
- 5.265 These cases may provide a counter to the suggestion that current sentencing practices for this particular form of the offence are disparate to the seriousness with which the offence is viewed by parliament and the community. That is, the more serious forms of the offence may be less common, but when they are sentenced, courts impose significant sentences of imprisonment.
- 5.266 Accordingly, the fact that the majority of sentences are low compared to the maximum penalty may be explained by the prevalence of less serious forms of the offence.
- 5.267 The Council's report on current sentencing practices for aggravated burglary, however, found that confrontational aggravated burglary accounted for over half (57.3%) of the aggravated burglary cases in the period examined. There is strong evidence of a disparity

436. Submission 14 (Director of Public Prosecutions).

between current sentencing practices and other measures of seriousness in relation to the confrontational form of aggravated burglary. This has been the subject of a Court of Appeal declaration of inadequacy of current sentencing practices⁴³⁷ (discussed below).

- 5.268 There may also be other forms of this offence that parliament and the community consider to be very serious, for example, intimate partner aggravated burglary, where the seriousness of the offence is not adequately reflected in the observed sentencing practices. Further analysis of the circumstances of such cases is necessary to determine whether current sentencing practices for other serious examples of the offence are disparate to, or appropriately reflect, their objective seriousness. Further, more research is required on community attitudes to different forms of the offence.

Court of Appeal's approach to addressing inadequacy of current sentencing practices and the effect of any such guidance

- 5.269 Since 2009, the Court of Appeal has questioned the adequacy of current sentencing practices for this offence in a number of cases.⁴³⁸
- 5.270 In its 2012 decision in *Hogarth v The Queen* ('*Hogarth*'),⁴³⁹ the Court of Appeal declared that current sentencing practices were inadequate for cases of confrontational aggravated burglary. This decision was followed by *Director of Public Prosecutions v Meyers*,⁴⁴⁰ in which the court suggested that the constraints of current sentencing practices have been removed for all serious forms of the offence.
- 5.271 Sufficient time has elapsed following the declaration for confrontational aggravated burglary in *Hogarth*. The Council has analysed data (Appendix 9) to determine whether *Hogarth* has had an effect on current sentencing practices, but it is not clear whether this has occurred. By way of summary, there was an increase in the median custodial sentence length, measured in six-month intervals, from 2 years to 2 years and 6 months, representing a 25% increase. There was also an increase in the proportion of offenders receiving a custodial sentence, from 65% before *Hogarth* to just over 73% after the decision.
- 5.272 The 25% increase in the median custodial sentence may be considered a significant proportion of the prior median (and further evidence of 'self-correcting'). Alternatively, it might be considered a minor increase (6 months) when compared to the maximum penalty of 25 years for that offence, providing evidence that more guidance from the Court of Appeal is required than is currently provided.

Problem with sentencing: evidence of inconsistency in sentencing approach

- 5.273 The Council considers there to be evidence of a number of sentencing problems relevant to inconsistency of approach to aggravated burglary that warrant a need for sentencing guidance for this offence.
- 5.274 The statistical measures of consistency suggest possible inconsistencies in sentencing approach. Figure 2 shows that sentences for aggravated burglary tend to cluster in the bottom 25th percentile of the range under the maximum penalty and around the median sentence, which represents 10% of the maximum penalty.

437. *Hogarth v The Queen* (2012) 37 VR 658.

438. *Director of Public Prosecutions v El Hajje* [2009] VSCA 160 (26 June 2009); *Le v The Queen* [2010] VSCA 199 (20 July 2010).

439. *Hogarth v The Queen* (2012) 37 VR 658.

440. *Director of Public Prosecutions v Meyers* (2014) 44 VR 486.

- 5.275 The additional statistical measures of consistency – median absolute difference (MAD) and inter-quartile range (IQR) (see [5.104]–[5.106]) – also provide an indication of the level of consistency in sentencing approach for aggravated burglary. Detailed analysis is documented in Appendix 7.
- 5.276 The MAD is relatively narrow at 10 months, and the IQR is 1 year and 6 months. These are similar outcomes to the other offences determined as having sentencing problems.
- 5.277 The observation that sentences imposed for aggravated burglary are reasonably consistent conflicts with the notion that the offence encompasses a wide range of offending circumstances and objective seriousness. It might be expected that there would be a wider range of sentences resulting in a more even distribution of sentences over the range under the maximum penalty to reflect the differences in objective seriousness of the different forms of the offence.

Treatment of a category of offenders within an offence category

- 5.278 Appendix 7 indicates that there is evidence of an inappropriate approach to the treatment of the category of 'confrontational' aggravated burglary and other serious forms of the offence, demonstrated by the Court of Appeal's declaration of inadequacy of current sentencing practices for that form of the offence. The Council's research on current sentencing practices for aggravated burglary found that confrontational aggravated burglaries were less likely to receive immediate custodial sentences than other types of aggravated burglaries.⁴⁴¹

Weight given to aggravating and mitigating factors

- 5.279 The statistical measures of consistency suggest the possibility of inconsistency of approach. However, it is not clear whether this is related to an inconsistent approach to the weight given to aggravating and mitigating factors or some other inconsistency of approach. The Council's analysis of current sentencing practices for aggravated burglary found that a number of factors had a statistically significant effect on sentencing outcomes, specifically increasing the likelihood of the offender receiving an immediate custodial sentence,⁴⁴² or decreasing the likelihood of the offender receiving an immediate custodial sentence.⁴⁴³
- 5.280 There were a number of factors that were found not to have a significant effect. This may suggest possible issues with the weight given to such factors in light of their stated importance in the sentencing exercise. These factors were the weight given to a plea of guilty, the presence of co-offenders, and mental illness.⁴⁴⁴
- 5.281 Detailed textual analysis of sentencing remarks may reveal evidence of further areas of inconsistency of approach to aggravated burglary; however, it has not been possible to undertake such analysis within the scope of the reference.

Categorisation of the objective seriousness of an offence

- 5.282 The Court of Appeal's declaration of the inadequacy of current sentencing practices reflects its determination that there has been an error in the categorisation of the seriousness of particular forms of this offence, including confrontational aggravated burglary. The Council considers this to be sufficient evidence of the need for guidance to address this sentencing

441. Sentencing Advisory Council (2011), above n 432, 29.

442. These factors were a co-sentenced offence of causing serious injury, where the offender was serving an existing order; previous imprisonment, the age of offender, and where the offender had substance abuse problems.

443. These factors were confrontational aggravated burglary and the offender's significant health problems or trauma in adulthood.

444. Sentencing Advisory Council (2011), above n 432, 58–61.

problem, in particular how different forms and sub-categories of the offence with varying and overlapping levels of objective seriousness ought to be assessed by sentencing courts, with regard to the high maximum penalty. Guidance is especially warranted given the unusual nature of the offence: it is preparatory, it is often co-sentenced with accompanying offences committed in conjunction with the aggravated burglary, and it encompasses such a wide range of offending behaviour, victim types, and offender circumstances.

What are the sentencing problems and what form of guidance is needed for the offence of aggravated burglary?

- 5.283 Accordingly, the application of the Council's measures to the offence of aggravated burglary indicates strong evidence of sentencing problems with regard to public confidence in sentencing and consistency of approach, as follows:
- Aggravated burglary is a serious offence, which, although indictable triable summarily, is an aggravated offence that is highly prevalent and generates significant community concern.
 - There is evidence of a disparity between the seriousness reflected in current sentencing practices and the community's and parliament's views on offence seriousness for the more serious forms of this offence, in particular confrontational aggravated burglary and other serious forms such as sexually motivated and intimate partner aggravated burglary.
 - The Court of Appeal has made a declaration of inadequacy of current sentencing practices for confrontational aggravated burglary – the minimal effect that this guidance has had on current sentencing practices for this offence does not reflect favourably on a guidance approach to addressing sentencing problems for this offence.
 - This declaration provides evidence of inconsistencies in sentencing approach, demonstrated by the error identified by the Court of Appeal in the treatment of a category of aggravated burglary offenders and the assessment of the objective seriousness of that class of offending as particularly serious.
 - The offence is an anomalous offence given that it is preparatory and encompasses a wide range of offending behaviour, providing further support for a need for guidance on sentencing for such offending, via an appropriate mechanism.
- 5.284 Therefore, as the Council has concluded for serious injury offences, the sentencing problems identified for aggravated burglary largely relate to particular classes or forms of the offence at the upper range of objective seriousness. Having established the existence of sentencing problems for this offence, the Council has formed a view as to the type of guidance that is necessary to address these problems.
- 5.285 In relation to aggravated burglary, the 'thermostat' issues primarily relate to specific forms of the offence rather than to the objective seriousness of all forms of the offence. The key problem to be addressed is the need to amplify the effect of the guidance that the court has already provided on the inadequacy of current sentencing practices for particular forms of offending.
- 5.286 The primary need for guidance in relation to aggravated burglary relates to ensuring the distribution of sentences appropriately reflects the factors and principles applicable in the exercise of the sentencing discretion (described as a 'synthesis' issue). In relation to the synthesis issues in the sentencing of aggravated burglary offences:
- there is a need to capture the guidance already provided by the court in relation to the approach to treating a particular category of offenders; and
 - there is a need to address inconsistency of approach in the assessment of, and weight given to, factors that apply across different yet overlapping forms of the offence.

The Council's view: offences for which there is insufficient evidence of sentencing problems requiring guidance

- 5.287 Application of the Council's principled approach to assessing possible problem offences reveals that there are nine offences (see Table 11) for which there is currently insufficient evidence of sentencing problems requiring guidance. Further, for two offences (also in Table 11) there was a lack of quantitative sentencing data to apply the Council's measures for assessing offences.
- 5.288 The Council's findings and views on these possible problem offences are presented below in order of statutory reference under three categories: fatal offences, drug offences, and other offences.

Table 11: Possible problem offences for which there is insufficient evidence of sentencing problems or a lack of data to apply measures

Offence	Legislation
Insufficient evidence of sentencing problems after applying measures for assessing possible problem offences	
Murder	<i>Crimes Act 1958</i> (Vic) s 3 (and common law)
Manslaughter	<i>Crimes Act 1958</i> (Vic) s 5 (and common law)
Culpable driving causing death	<i>Crimes Act 1958</i> (Vic) s 318
Trafficking in a large commercial quantity of a drug of dependence	<i>Drugs, Poisons and Controlled Substances Act 1981</i> (Vic) s 71
Trafficking in a commercial quantity of a drug of dependence	<i>Drugs, Poisons and Controlled Substances Act 1981</i> (Vic) s 71AA
Cultivating a large commercial quantity of a narcotic plant	<i>Drugs, Poisons and Controlled Substances Act 1981</i> (Vic) s 72
Cultivating a commercial quantity of a narcotic plant	<i>Drugs, Poisons and Controlled Substances Act 1981</i> (Vic) s 72A
Armed robbery	<i>Crimes Act 1958</i> (Vic) s 75A
Perverting the course of justice	<i>Crimes Act 1958</i> (Vic) s 320 (and common law)
Lack of quantitative data to apply measures for assessing possible problem offences	
Failure to stop after an accident	<i>Road Safety Act 1986</i> (Vic) s 61
Failure to render assistance after an accident	<i>Road Safety Act 1986</i> (Vic) s 61

Fatal offences

5.289 The Council has assessed the fatal offences, applying its methodology to all the possible problem offences, and has not found clear evidence to show the existence of sentencing problems. Accordingly, the Council is of the view that fatal offences should not currently be considered problem offences warranting inclusion in a guidance scheme.

Offence characteristics

5.290 Appendix 3 presents information on the basic characteristics of each of the three offences included in this category, including the statutory reference and whether the offence is indictable or indictable triable summarily. This information is summarised for each offence in order of statutory reference in Table 12.

Table 12: Offence characteristics for fatal offences identified as possible problem offences

Offence	<i>Crimes Act 1958 (Vic)</i>	Indictable only	Prevalence by charges sentenced
Murder	s 3 (and common law)	Yes	112
Manslaughter	s 5 (and common law)	Yes	83
Culpable driving causing death	s 318	Yes	66

Problem with sentencing: evidence of a lack of public confidence in sentencing

Community views on offence seriousness and sentencing

5.291 Evidence from structured and informed community consultation indicates that the community views these fatal offences as very serious and that this is reflected in the current sentencing practices for these offences.

5.292 The Tasmanian Jury Sentencing Study found that:

- the offence of culpable driving causing death had the highest rates of satisfaction with sentencing (83% of jurors agreed with the sentence given by the judge, with 17% preferring a more lenient sentence); and
- jurors were more likely to be more lenient than the judge in cases involving property or culpable driving offences (but the number of jurors surveyed following trials involving culpable driving was small).⁴⁴⁵

5.293 The Council's research on community attitudes to offence seriousness found that:

- murder was ranked 10 (the same level as sexual penetration with a child under 12), with high culpability and high physical harm;
- manslaughter was ranked 8 – a differentiation in seriousness was made on the basis of a lower level of culpability (although there was less agreement on this);
- there were differentiations in seriousness that reflected a sliding scale of harm and culpability from intention to recklessness to negligence and dangerousness; and
- culpable driving causing death was ranked 8, with medium to low levels of culpability and high physical harm.⁴⁴⁶

⁴⁴⁵ Warner et al. (2011), above n 15, 2–3.

⁴⁴⁶ Sentencing Advisory Council (2012), above n 16, 30–31, 33–34.

Special risk of serious consequences to victims and the community and better understanding of such consequences

5.294 It is clear that these fatal offences comprise a special risk of harm of the most serious kind and significant consequences for the community, in terms of the devastating effect on primary and secondary victims and the community more broadly. There have been significant changes in the community's awareness of family violence, and there is significant concern over unlawful killings that occur in the context of family violence or within families. This has included increased public discussion and media commentary on cases involving family violence, for example, intimate partner murders and the murder of children, often in conjunction with suicide by the offender.⁴⁴⁷ In addition, the seriousness of deaths caused by culpable driving causing death is well recognised and there continues to be a focus on community education and policing campaigns to reduce the road toll.⁴⁴⁸

Parliament's view of offence seriousness

- 5.295 All three fatal offences have high maximum penalties, reflecting parliament's view of their gravity. Murder has the highest possible maximum penalty of life imprisonment, reflecting parliament's view that unlawfully and intentionally taking a person's life is among the most serious offending behaviour.
- 5.296 Parliament has also conveyed its view on the seriousness of murder and culpable driving causing death by including them as baseline offences, setting the baseline sentence for murder at 25 years and the baseline sentence for culpable driving causing death at 9 years. Manslaughter was not included as a baseline offence.
- 5.297 Reflecting growing community concern over the offence of culpable driving causing death, the maximum penalty for the offence was raised from 10 to 15 years in 1992, and then to 20 years in 1997.⁴⁴⁹

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness

- 5.298 The Council's review of current sentencing practices for the three fatal offences in the reference period does not provide evidence of a disparity between current sentencing practices and the community's and parliament's views of offence seriousness. This is demonstrated by the following:
- Murder – the median sentence was 20 years, equating to 50% of the maximum penalty.⁴⁵⁰ No sentences were imposed at 25% or less of the maximum penalty. The shortest sentence imposed was 10 years and 9 months, and the longest sentences imposed were life imprisonment.

447. See, for example, Destroy the Joint, 'Counting Dead Women', Facebook (19 May 2014) <<https://www.facebook.com/DestroyTheJoint/photos/a.419017344812682.83661.418382174876199/692198254161255/>> at 31 March 2016 (a social media campaign to record the deaths of Australian women as a result of violence); Luke Batty Foundation, *Never Alone* (Never Alone Luke Batty Foundation, 2015) <<http://www.neveralone.com.au/>> at 31 March 2016. See also Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol. IV, 227–238.

448. Victoria State Government, Transport Accident Commission (2016), above n 409; Sentencing Advisory Council (2015), above n 114, 9.

449. For an overview of the current and previous maximum penalties, see Judicial College of Victoria, '28.2.1 – Current and Historic Penalties for Fatal and Injurious Driving Offences', *Victorian Sentencing Manual* (Judicial College of Victoria, 2014) <<http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#I8588.htm>> at 31 March 2016.

450. This is based on a value of 40 years being ascribed to life imprisonment in the Council's analysis; see Appendix 2.

- Manslaughter – the median sentence was 8 years, which amounts to 40% of the maximum penalty. The shortest sentence imposed was 3 years, and the longest sentence imposed was 13 years. Overall, 17% of sentences received 25% of the maximum penalty or less.
- Culpable driving causing death – the median sentence was 5 years and 6 months, which amounts to 28% of the maximum penalty. The shortest sentence imposed was 2 years and 6 months, and the longest sentence imposed was 10 years and 6 months. Overall, 44% of sentences received 25% of the maximum penalty or less.

Court of Appeal's approach to addressing inadequacy of current sentencing practices and the effect of any such guidance

5.299 At the time of writing, the Court of Appeal had not made any declaration that current sentencing practices are inadequate, or raised a general question regarding the adequacy of current sentencing practices, for murder, manslaughter, or culpable driving causing death. However, in the very recent case of *Director of Public Prosecutions v Daing*, the Court of Appeal has raised a possible issue regarding the adequacy of sentencing practices for fatal offences in circumstances of family violence. The court commented that some sentences imposed for:

murder of domestic partners raise an important question as to whether current sentencing practices adequately reflect the seriousness with which such cases generally ought to be viewed ... it might be queried whether, generally speaking the 'tariff' for such killings is not too low.⁴⁵¹

5.300 In Chapter 6, the Council discusses how an enhanced guideline judgment scheme could provide guidance on how considerations of family violence are to be incorporated into the sentencing exercise (see [6.39]).

Problem with sentencing: evidence of inconsistency in sentencing approach

5.301 The Council's statistical measures of consistency do not reveal any red flags in terms of possible inconsistencies in sentencing approach for these offences, for example, a skewed distribution across the range under the maximum penalty or a clustering of sentences around the median and middle 50% of cases. This is demonstrated by the global comparison in Figure 2 and the data on the MAD and IQR (see [5.104]–[5.106]) for each offence (Appendix 3).

5.302 There is little evidence of inconsistency of approach to sentencing for murder judging from qualitative measures. The Council examined the cases in which offenders were sentenced to a head sentence of life imprisonment for murder⁴⁵² within the reference period (regardless of whether or not a non-parole period was fixed). This indicated that offences and offenders who are assessed as being in the worst category of offence seriousness are sentenced consistent with parliament's view of the seriousness of the offence, as signalled by the maximum penalty.

451. *Director of Public Prosecutions v Daing* [2016] VSCA 58 (31 March 2016) [47].

452. Between 1 July 2010 and 30 June 2015, 12 offenders were sentenced to life imprisonment for the offence of murder. Three of these cases involved the murder of the offender's child (or children) with the motivation of punishing the children's mother, which was considered particularly aggravating. The imposition of a sentence of life imprisonment was intended to denounce the offender's conduct in the strongest possible terms. Further, in three cases the court did not fix a non-parole period, as no prospects of rehabilitation were identified.

- 5.303 The Court of Appeal has noted the difficulty in distinguishing between levels of culpability in the four different forms of the offence of culpable driving causing death.⁴⁵³ This suggests that sentencing outcomes for this offence are a product of a wide range of offending and offender circumstances inherent in the offence. Textual analysis of sentencing remarks from the Council's current sentencing practices report on serious driving offences indicates that such factors can include:
- early pleas of guilty;
 - no previous criminal record;
 - youth;
 - good prospects of rehabilitation; and
 - the death involves the offenders' friend or family member.⁴⁵⁴
- 5.304 In its submission, the Criminal Bar Association of Victoria also noted that culpable driving causing death was a difficult offence on which to provide guidance, 'given the infinite variety of circumstances capable of comprising the offence and the irrelevance, generally, of the antecedents of the offender in the commission of the offence'.⁴⁵⁵ The Criminal Bar Association of Victoria submitted that this rendered the offence the least suitable to legislated guidance (in the form of a standard non-parole period).⁴⁵⁶
- 5.305 Manslaughter also comprises a very wide range of offending behaviour. The offence can take a variety of forms, as follows:
- voluntary or 'suicide pact' manslaughter;⁴⁵⁷
 - involuntary manslaughter by an 'unlawful and dangerous act';⁴⁵⁸ and
 - involuntary manslaughter by 'negligence'.⁴⁵⁹
- 5.306 The gravity of the offence of manslaughter therefore varies significantly.⁴⁶⁰ Consequently, it may be expected that there would be a wide range of sentences imposed under the broad offence of manslaughter, as is demonstrated by the distribution of immediate custodial sentences for manslaughter in Figure 2.

453. *Pasznyk v The Queen* (2014) 43 VR 169.

454. Sentencing Advisory Council (2015), above n 114, 27–32.

455. Submission 12 (Criminal Bar Association of Victoria).

456. Submission 12 (Criminal Bar Association of Victoria).

457. This offence involves the offender killing a person by an act that is intended to kill or really seriously injure that person, or with knowledge that someone would probably die or suffer really serious injury, where there was the presence of a suicide pact; see *Crimes Act 1958* (Vic) s 6B(1).

458. This offence involves the offender killing a person by an act that is *not* intended to kill or really seriously injure someone, where the act causing death was unlawful and dangerous and there was an appreciable risk of serious injury being caused.

459. This offence involves the offender killing a person by an act that is *not* intended to kill or really seriously injure someone, where the act causing death was a breach of the duty of care owed to the deceased that was of such magnitude that it amounted to 'gross negligence'. The offending behaviour encompassed in the offence of manslaughter may be even wider, and involve circumstances of family violence, since the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) came into force (which abolished defensive homicide and inserted a provision on family violence and self-defence).

460. *Sherina v The Queen* (2011) 32 VR 668.

Drug offences

- 5.307 The Council has assessed the serious drug offences, applying its methodology to all the possible problem offences, and it has not found clear evidence to show the existence of sentencing problems. Accordingly, the Council is of the view that these offences should not currently be considered problem offences warranting inclusion in a guidance scheme.

Offence characteristics

- 5.308 Appendix 6 presents information on the basic characteristics of each of the four offences in this category, including the statutory reference and whether the offence is indictable or indictable triable summarily. This information is summarised for each offence in order of statutory reference in Table 13.
- 5.309 The commercial quantity forms of both offences were most prevalent (although some of these cases involved large commercial quantities).⁴⁶¹ The two offences relating to cultivation of narcotic plants encompass a wide range of offending conduct and offender roles, from 'house-sitters' to 'principals' of large cultivation enterprises.⁴⁶² 'Cultivate' is defined broadly.⁴⁶³ Similarly, the two offences of trafficking in a drug of dependence apply to offenders sentenced at varying levels of the offender hierarchy, from 'mere couriers' to principals of large drug enterprises.⁴⁶⁴ The very limited prevalence of cultivating a large commercial quantity of narcotic plants limits the findings that can be made on this offence.
- 5.310 The *Drugs, Poisons and Controlled Substances Act 1981* (Vic) codifies the amount of the drug trafficked or cultivated as a circumstance of aggravation in different forms of the offence, accompanied by an increased maximum penalty. Trafficking in a commercial quantity of a drug of dependence attracts a maximum penalty of 25 years' imprisonment, whereas trafficking in a large commercial quantity attracts a maximum sentence of life imprisonment.⁴⁶⁵

Table 13: Offence characteristics of drug offences identified as possible problem offences

Offence	<i>Drugs, Poisons and Controlled Substances Act 1981</i> (Vic)	Indictable	Prevalence by charges sentenced
Trafficking in a large commercial quantity of a drug of dependence	s 71	Yes	75
Trafficking in a commercial quantity of a drug of dependence	s 71AA	Yes	186
Cultivating a large commercial quantity of a narcotic plant	s 72	Yes	4
Cultivating a commercial quantity of a narcotic plant	s 72A	Yes	447

461. This may be the case if, for example, an offender has pleaded guilty for the commercial form of the offence rather than the large commercial form. In sentencing, the judge must not aggravate the sentence on the basis that the quantity of drugs would constitute a more serious form of the offence.

462. For further discussion of offender roles in these offences, see Sentencing Advisory Council, *Major Drug Offences: Current Sentencing Practices* (2015).

463. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 70; see also *Grozdanov v The Queen* (2012) 34 VR 426.

464. The offences of trafficking in a drug of dependence include attempting to traffick a drug of dependence within the same offence.

465. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ss 71–71AA.

Problem with sentencing: evidence of a lack of public confidence in sentencing

Community views on offence seriousness and sentencing

- 5.311 The Tasmanian Jury Sentencing Study sought jurors' opinions on the sentencing for drug offences. The study found that when jurors were asked to impose a sentence following a trial involving a drug offence, the results were evenly split: 49% of jurors in trials involving drug offences imposed a sentence that was less severe than the judge's, and 50% of jurors imposed a more severe sentence than the judge's. However, as was observed in relation to sentences imposed for sexual offences, jurors were less satisfied with the sentences actually imposed by judges for drug offences. Jurors were less likely to say that the sentences for drug offences were 'very appropriate' and more likely to say that sentences were 'inappropriate' when compared with other offence categories (violence, property, culpable driving, and other offences).⁴⁶⁶
- 5.312 Due to low numbers, the Victorian study did not draw any conclusions in relation to drug offences.⁴⁶⁷
- 5.313 Participants in the Council's research on community attitudes to offence seriousness expressed disparate views on the seriousness of drug offences:
- trafficking in a large commercial quantity of a drug of dependence was ranked 8, the same level as a number of other offences that attract lower maximum penalties than the maximum penalty of life for this offence; and
 - trafficking in a commercial quantity of a drug of dependence was ranked 7, the same level as a number of other offences that attract lower maximum penalties than the maximum penalty of 25 years for this offence.
- 5.314 A consensus on the seriousness of drug offences did not emerge from the findings. The mean rankings for drug offences tended to be lower than for offences that involved direct harm or the risk of harm to a person. However, there were clear differences of opinion among participants. Key factors that affected some participants' judgments of seriousness were the drug amount and the drug type as these were relevant to participants' assessments of the potential and severity of broader societal harms flowing from the offence. For other participants, these factors were irrelevant and the intention to traffick drugs was the key factor influencing offence seriousness.⁴⁶⁸
- 5.315 The report found that, while the mean rankings for drug offences tended to be lower overall than for offences that involved direct harms being caused or risked to a person, there was a high level of disagreement on the mean rankings of almost all offences in this category, suggesting differences in opinion on their seriousness.
- 5.316 Therefore, the Council is of the view that there is no clear evidence of community views on the seriousness of drug offences from structured and informed community consultation, and no clear evidence of whether these views are reflected in sentencing practices for these offences. More research is needed in this area.

466. Warner et al. (2011), above n 15.

467. Warner et al. (under review for publication), above n 18.

468. The influence of intention was reduced in the judgment of seriousness for an attempted offence of trafficking in a large commercial quantity compared with the completed offence: Sentencing Advisory Council (2012), above n 16, 30–31, 36.

Special risk of serious consequences to victims and the community and better understanding of such consequences

- 5.317 Large-scale commercial trafficking and cultivation of illegal drugs have a wide-ranging impact on the community. For example, there are community and government concerns, at a state and national level, about the effects of 'epidemic' use of the drug known as 'ice'. Crimes of this nature have the potential to cause widespread harm to the community beyond the harms caused to individuals who may consume such a drug.

Parliament's view of offence seriousness

- 5.318 The lack of clear evidence around community views can be compared with the clear evidence of parliament's view that drug offences are of the utmost seriousness. In 2002, the Victorian Parliament introduced the offences of trafficking in a large commercial quantity of a drug of dependence and cultivating a large commercial quantity of a narcotic plant, which both carry a maximum penalty of life imprisonment. Prior to 2002, the offences of trafficking in a commercial quantity of a drug of dependence and cultivating a commercial quantity of a narcotic plant applied to all quantities above the proscribed commercial quantity of the drug or narcotic, and both carried a maximum penalty of 25 years' imprisonment.
- 5.319 Trafficking in a large commercial quantity of a drug of dependence was included in the baseline scheme, with a baseline sentence of 14 years. None of the other three drug offences are baseline offences.
- 5.320 In early 2016, the Victorian Parliament passed the *Drugs, Poisons and Controlled Substances Amendment Act 2016* (Vic), which inserts new offences in sections 71AB, 71AC, and 71B of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). The new offences sit alongside the existing offences in those sections that deal with trafficking in drugs of dependence to children, trafficking in drugs of dependence, and supplying drugs of dependence to children, respectively. By way of summary:
- Each new offence imposes a higher penalty for the particular offence when it occurs at or in a public place within 500 metres of a school, with a maximum term of imprisonment that is higher by five years than the penalty for the existing offence.
 - The offence of trafficking in a drug of dependence to a child at or near a school carries a penalty of up to 25 years' imprisonment, and the offence of trafficking in a drug of dependence at or near a school carries a penalty of up to 20 years' imprisonment.
 - The Act also establishes a new offence of supplying a drug of dependence to a child at or near a school for the purpose of the child either supplying the drug to someone else or using the drug. The penalty is a maximum term of imprisonment of 20 years or a fine of up to 1,600 penalty units, or both. The Act will come into operation on 20 October 2016 (if not proclaimed earlier).⁴⁶⁹
- 5.321 These offences are targeted at ice trafficking, following the release of the Victorian Government's Ice Action Plan in March 2015. This reflects parliament's strong view of the seriousness of the offence of ice trafficking and its impact on the community.

469. *Drugs, Poisons and Controlled Substances Amendment Act 2016* (Vic).

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness

5.322 Using statistical measures alone, there is the possibility of disparities between the sentences imposed and the maximum penalty. Appendix 6 documents the sentencing practices for the four drug offences over the reference period and indicates the following:

- Cultivating a commercial quantity of a narcotic plant – the median sentence for the offence was 2 years, which amounts to 8% of the maximum penalty. The lowest sentence was 2 months, and the highest sentence was 5 years and 3 months. These are all less than 25% of the 25-year maximum penalty.
- Cultivating a large commercial quantity of a narcotic plant – it is difficult to draw conclusions on disparity between the seriousness of the offence (as signaled by the maximum penalty of life imprisonment) and current sentencing practices for this offence, due to the very limited sample size (only four charges within the reference period). Nevertheless, the median sentence for the offence was 6 years and 9 months, which amounts to 17% of the maximum penalty.⁴⁷⁰ The lowest sentence imposed was 2 years, and the highest sentence imposed was 8 years and 6 months. These are all less than 25% of the maximum penalty.
- Trafficking in a commercial quantity of a drug of dependence – the median sentence for the offence was 4 years, which amounts to 16% of the maximum penalty. The lowest sentence imposed was 4 months, and the highest sentence imposed was 10 years. These are all equal to or less than 40% of the 25-year maximum penalty.
- Trafficking in a large commercial quantity of a drug of dependence – the median sentence for the offence was 7 years, which amounts to 18% of the maximum penalty. The lowest sentence imposed was 2 years and 6 months, and the highest sentence imposed was 20 years. These are all less than or equal to 50% of the maximum penalty of life imprisonment.

5.323 In the absence of strong evidence of community views on the seriousness of drug offences and sentencing of drug offences from structured and informed community consultation, it is not possible to conclude whether current sentencing practices are out of step with community views. Thus, there is a lack of qualitative evidence to support the existence of a sentencing problem under this measure of public confidence.

Court of Appeal's approach to addressing inadequacy of current sentencing practices and the effect of any such guidance

5.324 The Court of Appeal has questioned the adequacy of current sentencing practices in relation to the two cultivation offences, as follows:

- cultivating a commercial quantity of a narcotic plant;⁴⁷¹ and
- cultivating a large commercial quantity of a narcotic plant.⁴⁷²

470. This figure is calculated based on a value of 40 years being ascribed to life imprisonment in the Council's analysis; see Appendix 2.

471. *Nguyen v The Queen* (2010) 208 A Crim R 464.

472. *Spiteri v The Queen* (2011) 206 A Crim R 528.

- 5.325 In relation to cultivating a large commercial quantity of a narcotic plant, in *Spiteri v The Queen*, Kyrou AJA considered an appeal against sentence from an offender sentenced for the offence. Under the heading 'Adequacy of Current Sentencing Practices', the court stated:

The maximum penalty of life imprisonment and 5,000 penalty units for the offence of cultivating a large commercial quantity of drugs and the offence of trafficking a large commercial quantity of drugs clearly reflects the Parliament's view that these are serious crimes and that those who commit them should receive a substantial term of imprisonment. As in this case, these offences usually involve highly organised, well resourced and sophisticated operations. While recognising that the circumstances of each offender are unique and that sentencing considerations must be applied in the light of the facts of each case, it seems to me that a median term of imprisonment in the vicinity of six years and six months for cultivating or trafficking a large commercial quantity of drugs does not adequately reflect the seriousness of these offences.⁴⁷³

- 5.326 The court drew the median sentence of 6 years and 6 months from the Council's Sentencing Snapshot for the offence of trafficking in a large commercial quantity of drugs between 2004–05 and 2008–09.
- 5.327 At the time of writing, the Court of Appeal has been invited to consider the adequacy of current sentencing practices for the offence of cultivating a commercial quantity of a narcotic plant pursuant to the appeal of *Nam Son Nguyen v The Queen*.⁴⁷⁴

Problem with sentencing: evidence of inconsistency in sentencing approach

- 5.328 There is a possibility of sentencing problems for the four drug offences related to consistency of approach, based on the distribution of sentences in the global comparison in Figure 2 and the statistical measures of consistency documented in Appendix 6. However, upon review of the evidence from qualitative measures, the Council is of the view that the evidence is insufficient to confirm the existence of such problems.
- 5.329 In order to examine whether there was an inconsistency of approach to sentencing under the three relevant inconsistency measures, the Council analysed a sample of sentencing remarks on each of the four drug offences from five points along the sentencing range. As a general rule, a minimum sample of five cases were examined for each offence as follows:⁴⁷⁵
- lowest sentence level – one case for each offence;
 - first quartile – one case for each offence;
 - second quartile (the median) – one case for each offence;
 - third quartile – one case for each offence; and
 - highest sentence level – one case for each offence.
- 5.330 The purpose of the exercise was to go behind the data to assess whether the objective offence seriousness was being consistently reflected in the sentences handed down, and whether there was consistency in the treatment of different categories of offenders and in the weight given to aggravating and mitigating circumstances.

473. *Spiteri v The Queen* (2011) 206 A Crim R 528, 540.

474. *Nam Son Nguyen v The Queen* S APCR 2015 0199.

475. For some offences, two cases were examined at each data point. As there were only four charges of cultivating a large commercial quantity of a narcotic plant during the reference period, the Council examined all four of those cases. See Appendix 6, Tables A38–A41.

- 5.331 The Council drew the following factors from the cases: plea, place in offender hierarchy, quantity of drug, type of drug, period over which offending occurred, presence of mitigating factors (such as the applicability of *Verdins* principles,⁴⁷⁶ the presence of drug addiction, or illness), cooperation with authorities, prior offences, and the court's assessment of the offender's prospects of rehabilitation.
- 5.332 The detailed results of this analysis is contained in Appendix 6, along with offence specific data. The Council has drawn a number of conclusions from its analysis:
- The treatment of offenders across the two 'commercial quantity' offences (cultivating a commercial quantity of a narcotic plant and trafficking in a commercial quantity of a drug of dependence) appears appropriate, despite the disparity in the median sentence for each offence. The offenders sentenced at the median for cultivating a commercial quantity of a narcotic plant were either in the role of 'crop-sitter' or at a higher role in the offender hierarchy but had mitigating factors of note present in the case. By contrast, those sentenced on the median for trafficking in a commercial quantity of a drug of dependence were more likely to have a commercial interest in the trafficking enterprise. Therefore, it appears appropriate that there is a difference in the median sentences across these two offences.
 - The low number of sentenced charges of cultivating a large commercial quantity of a narcotic plant makes it difficult to draw any conclusions about the distribution of sentences for this offence. However, analysis of the sentencing remarks suggests that the offenders' roles in this offence correlate with the roles and sentences for trafficking in a large commercial quantity of a drug of dependence. That is to say, the offender sentenced to 8 years and 6 months for trafficking in a large commercial quantity of a drug of dependence (described as a 'wholesaler')⁴⁷⁷ was roughly at the same level as the offender sentenced to 8 years and 6 months for cultivating a large commercial quantity of a narcotic plant (described as 'an overseer' or 'manager').⁴⁷⁸
 - The textual analysis of sentencing remarks for the sample of cases for each of the four drug offences suggests that the low median sentences for each offence result from a large proportion of people detected and charged with these offences being at a lower level on the offender hierarchy. Those who could be categorised as having more substantial roles in the trafficking scheme are sentenced to lengthier sentences; for example, a principal of a large drug enterprise received a sentence of 20 years.
 - Many of the offenders sentenced for the cultivation offences were facing deportation upon completion of their sentence. The likelihood of deportation upon completion of sentence is not a relevant consideration for a court in fixing sentence.⁴⁷⁹ However, the factors that often coincide with the lack of resident status (such as a lack of family support in Australia, limited English skills, and consequential isolation in prison) did seem to be present in a number of the cases examined. Further, many of these offenders had extremely impoverished backgrounds, which acted to mitigate sentence.⁴⁸⁰ The inevitability of deportation was also noted in some cases to moderate the need for specific deterrence.⁴⁸¹

476. *R v Verdins* (2007) 16 VR 269.

477. Appendix 6, Table A41, case identifier D20.

478. Appendix 6, Table A39, case identifier D11.

479. *Nguyen v The Queen* [2010] VSCA 244 (16 September 2010) [4].

480. Appendix 6, Table A38, case identifiers D2, D3, D5, and D6.

481. Appendix 6, Table A38, case identifiers D5 and D6; Appendix 6, Table A39, case identifier D8.

- 5.333 Appendix 6 demonstrates how the sentencing for the four drug offences compares with offences of similarly high levels of harm and culpability as reflected in the maximum penalties:
- The median lengths of immediate custodial sentences for trafficking in a large commercial quantity of a drug of dependence (7 years) and cultivating a large commercial quantity of a narcotic plant (6 years and 9 months) are higher than those for intentionally causing serious injury (4 years) and rape (5 years), but lower than murder (20 years).
 - The median lengths of immediate custodial sentences for trafficking in a commercial quantity of a drug of dependence (4 years) and cultivating a commercial quantity of a narcotic plant (2 years) are lower than the medians for large commercial quantity offences (7 years for trafficking and 6 years and 9 months for cultivation), intentionally causing serious injury (4 years), and rape (5 years), but higher than the median for aggravated burglary (2 years and 6 months).
- 5.334 A higher percentage of offenders charged with cultivating a large commercial quantity of a narcotic plant received an immediate custodial sentence than those charged with trafficking in a large commercial quantity of a drug of dependence (100% compared with 97%).
- 5.335 There is some evidence that there have been differences in approach to the assessment of the seriousness of these offences in comparison with other offences attracting the same maximum penalties. In particular, in the appeal in *Nam Son Nguyen v The Queen*⁴⁸² – expected to be heard in 2016 – an issue has been raised regarding the assessment of objective offence seriousness for offenders at higher levels of the offender hierarchy (above the level of ‘crop sitter’) and current sentencing practices.
- 5.336 Analysis of the cases (albeit of a limited sample),⁴⁸³ however, suggests that, broadly speaking, the median sentences are influenced by the categories of offenders within the offence categories. That is to say, the (relatively) low median sentences for these offences appear to be a product of larger numbers of offenders who have an offence at the lower end of objective seriousness in relation to culpability (due to the offenders’ lower role in the drug operation) and who present with significant mitigating factors.

482. *Nam Son Nguyen v The Queen* S APCR 2015 0199.

483. Further, more detailed, analysis of a larger sample of cases is required to confirm this finding in relation to consistency of approach in the sentencing of drug offences.

Other offences

5.337 This section presents a brief analysis of other offences for which there is currently insufficient evidence of sentencing problems that warrant guidance.

Armed robbery

5.338 Armed robbery is an indictable offence that is not triable summarily. It is a prevalent offence, with 1,937 charges sentenced in the higher courts in the reference period. It is an aggravated form of the basic offence of robbery, with the statutory aggravating factor that the offender commits a robbery while carrying a weapon or an imitation weapon.

5.339 This statutory aggravating factor and its high maximum penalty reflect the seriousness with which parliament views the seriousness of this offending, inherent in the higher risk of harm and culpability from the offender's use of a weapon to threaten the victim and enforce a demand for money or property.

5.340 The Council's research on community attitudes to offence seriousness provides some evidence of how the community views this offence. It was considered to be relatively serious, ranked 7, but it was not at the upper end of the scale of offence seriousness. Further, there was a low level of agreement on the seriousness of this offence, although participants who thought this offence was higher in seriousness did cite the high culpability and harms inherent in the offence of armed robbery.⁴⁸⁴ The Council is of the view that more research is required on community views on this offence and its sentencing.

5.341 Figure 2 and Appendix 7 reveal the following from application of the quantitative measures:

- sentences for armed robbery extend up to almost 60% of the maximum penalty;
- there is a clustering of sentences towards the lower end of the range under the 25-year maximum penalty, with 98% of sentences representing 25% or less of the maximum penalty;
- the majority of sentences imposed are immediate custodial sentences (82%), ranging from 1 month to 14 years and 2 months;
- the median sentence is 2 years and 6 months, which comprises 10% of the maximum penalty; and
- the median absolute difference (MAD) is relatively narrow at 8 months, and the interquartile range (IQR) (see [5.104]–[5.106]) is 1 year and 6 months.

5.342 This may provide evidence of a disparity between sentencing outcomes and the maximum penalty or an unreasonable consistency from a quantitative perspective. However, this evidence is equivocal and the Council does not consider there to be sufficient evidence of sentencing problems that would suggest a lack of public confidence or inconsistency of approach based on the absence of structured and informed community views and Court of Appeal commentary or identification of the inadequacy of sentence or any other sentencing problems.

484. Sentencing Advisory Council (2012), above n 16, 30–31, 46–47.

Perverting the course of justice

- 5.343 Perverting the course of justice is a common law offence with a maximum penalty of 25 years' imprisonment.⁴⁸⁵ Both perverting the course of justice and attempting to pervert the course of justice carry the same maximum penalty of 25 years and are treated as the same (that is, attempting to pervert the course of justice is a substantive offence, not an inchoate offence).
- 5.344 Specifically, the offence includes the following elements:
- the accused commits an act that is capable of perverting, and has a tendency to pervert, the course of justice;
 - the accused commits the act with the intention of perverting the course of justice; and
 - the acts represent an actual or potential interference with the course of public justice.⁴⁸⁶
- 5.345 In this regard, the High Court has held:
- the offence of an attempt to pervert the course of justice is an interference with the due exercise of jurisdiction by courts and other competent judicial authorities. As the courts exercise their necessary and salutary jurisdiction to hear and determine charges of offences against the criminal law only when their jurisdiction is invoked, an act which has a tendency to deflect the police from invoking that jurisdiction when it is their duty to do so is an act which tends to pervert the course of justice.⁴⁸⁷
- 5.346 There are a range of circumstances in which this offence can be committed, which may involve a wide range of seriousness. For example, perverting the course of justice by way of concocting a false story varies in severity depending on the persistence of the falsity, including how long the falsity is maintained and the lengths the offender goes to in order to maintain the fabrication. Culpability may be higher or lower depending on the degree of premeditation and planning that goes into the perversion.
- 5.347 Offences in this category, however, generally sit within the lower end of objective seriousness, and there is a high frequency of non-custodial sentences for this type of offending; only 44% of sentences involved a term of imprisonment. Nonetheless, certain forms of this offence, such as assisting an offender or witness to abscond, may be considered more serious. Other forms of this offence include making a false accusation of a crime, concocting a false alibi, concealing or falsifying evidence or exhibits, attempts to secure the withdrawal of charges, interfering with bail processes, and attempts to compromise the judiciary.
- 5.348 In reference to the high maximum penalty for perverting the course of justice, the Court of Appeal warned in 2005 that 'in some cases, the maximum is of less utility than might otherwise be the case'⁴⁸⁸ and that in that case 'rather than assisting the sentencing task a very high maximum sentence provides little guidance to the sentencing judge'.⁴⁸⁹
- 5.349 An analysis of sentencing remarks from 18 cases involving imprisonment in the higher courts clearly identified high- and low-range offences, with low-end offences receiving 1 to 12 months' imprisonment, and cases identified as serious receiving 2 to 8 years' imprisonment on the charge of perverting the course of justice. With the exclusion of the two sentences of 8 years, which both involved participants in the high profile smuggling of an offender to avoid his incarceration, all terms of imprisonment ranged from 1 month to 3 years.

485. *Crimes Act 1958* (Vic) s 320.

486. Victorian Parliament, Law Reform Committee, *Administration of Justice Offences: Final Report* (2004) 45.

487. *R v Rogerson* (1992) 174 CLR 268, 284.

488. *Director of Public Prosecutions v Aydin and Kirsch* [2005] VSCA 86 (3 May 2005) [11] (Callaway JA).

489. *Director of Public Prosecutions v Aydin and Kirsch* [2005] VSCA 86 (3 May 2005) [28] (Eames JA).

- 5.350 Given the wide range of offending behaviour encompassed by this offence and the lack of evidence of a problem in sentencing, its inclusion in a legislated guidance scheme is not warranted (in addition, it would be unsuitable for a standard sentence).
- 5.351 The Council is of the view, however, that further consideration could be given to the recommendations of the Victorian Parliament Law Reform Committee's report entitled *Administration of Justice Offences*, which, among other things, recommended new offences for the misuse of evidence, and deceiving, corrupting, or threatening witnesses.⁴⁹⁰ This would narrow the scope of perverting the course of justice and bring Victoria in line with other jurisdictions and the Model Criminal Code.
- 5.352 In addition, the Victorian Parliament Law Reform Committee recommended codifying the common law offence of perverting the course of justice and reducing the maximum penalty from 25 years to 15 years to:
- more accurately reflect the seriousness of the offence compared to serious offences against the person (including rape, armed robbery, and trafficking in a commercial quantity of a drug of dependence);
 - bring the maximum penalty in line with that for perjury; and
 - move towards a harmonisation of the laws in this area nationally.⁴⁹¹
- 5.353 Even with this reduction in the maximum penalty, Victoria would continue to have the highest maximum penalty for perverting the course of justice in Australia.⁴⁹²

Other offences with a lack of sentencing data: road safety offences

- 5.354 Failure to stop after an accident and failure to render assistance after an accident both attract a maximum penalty of 10 years' imprisonment or a fine of 1,200 penalty units.⁴⁹³ They are indictable offences triable summarily.
- 5.355 The offences and the associated maximum penalties apply where:
- a person is killed or suffers serious injury as a result of an accident involving a motor vehicle;
 - the driver of the motor vehicle knows or ought to reasonably have known that the accident had occurred; and
 - the driver of the motor vehicle knows or ought to reasonably have known that the accident resulted in a person being killed or suffering serious injury; and
 - the driver failed to immediately stop the vehicle; or
 - the driver failed to immediately render assistance.
- 5.356 The two offences are often charged as companion offences, unless as part of the accident the car has stopped, in which case only failure to render assistance applies.

490. Victorian Parliament, Law Reform Committee (2004), above n 486, xiv–xvii.

491. Victorian Parliament, Law Reform Committee (2004), above n 486, 74.

492. Attempting to pervert the course of justice attracts a maximum penalty of 15 years in the Northern Territory, 14 years in New South Wales, 10 years under Commonwealth legislation, 7 years in Queensland, Western Australia, and the Australian Capital Territory, and 4 years in South Australia. See *Criminal Code Act (NT)* sch 1 cl 109; *Crimes Act 1900 (NSW)* s 319; *Crimes Act 1914 (Cth)* s 143; *Criminal Code Act 1899 (Qld)* s 140; *Criminal Code Act Compilation Act 1913 (WA)* app B cl 143; *Criminal Code 2002 (ACT)* s 713; *Criminal Law Consolidation Act 1935 (SA)* s 256.

493. *Road Safety Act 1986 (Vic)* s 61.

- 5.357 Other offences within section 61 of the *Road Safety Act 1986* (Vic) include failure to give details to affected persons, failure to give details to police, and failure to report an accident to the police. Different maximum penalties apply according to the circumstances of the accident, in particular, whether a person has been killed or injured, as follows:
- Where these three offences occur as a result of an accident in which a person is killed or seriously injured, the penalty is no more than 80 penalty units or 8 months' imprisonment for a first offence, or 240 penalty units or a term of imprisonment between 4 months and 2 years for a subsequent offence.
 - Where no person is injured or killed (that is, the accident only results in property damage), all of the circumstances in section 61 attract a penalty of no more than 5 penalty units or 14 days imprisonment for a first offence, or 10 penalty units or a term of imprisonment of between 14 days and 1 month for subsequent offences.
- 5.358 Therefore, section 61 includes three different groups of offences in terms of maximum penalty. The first form of offending – failure to stop after an accident and failure to render assistance after an accident when a person is killed or injured – was the offence raised as a possible problem offence in a submission.⁴⁹⁴
- 5.359 The Council examined sentencing data for charges under section 61 of the *Road Safety Act 1986* (Vic) in the higher courts and the Magistrates' Court. Appendix 7 provides an overview of the total number of offences charged under section 61 in both jurisdictions. It clearly indicates the overall prevalence of these offences, particularly in the Magistrates' Court. There is a lower prevalence of the more serious forms of the offence that would be sentenced in the higher courts:
- higher courts – 104 charges; and
 - Magistrates' Court – 12,488 charges.
- 5.360 An initial examination of the data revealed that it is impossible to distinguish between different forms of the categories of offence due to the way in which the offences had been charged and inconsistencies in that approach. An analysis of the available sentencing remarks for charges sentenced in the higher courts as failure to stop and failure to render assistance found a mix of offences charged under the 10-year maximum penalty and the 14-day maximum penalty. There were only sentencing remarks for half (55) of the charges sentenced, meaning that this process could not be completed for all higher court charges.
- 5.361 The analysis also demonstrated a wide range of offending behaviour, including leaving the scene of an accident in panic after losing control of a vehicle and killing a passenger (2-year community-based order) through to an elaborate escape plan involving setting fire to the car in which the offender hit and killed a cyclist in a bicycle lane (3 years and 6 months' imprisonment).
- 5.362 The lack of data means that it has not been possible for the Council to properly analyse current sentencing practices for these offences and to undertake its principled approach to assessing the evidence of sentencing problems. The Council acknowledges that there are concerns about the sentencing of these offences, as expressed in the submission about a particular case involving these offences.⁴⁹⁵ The Council is of the view that work needs to be done to improve the consistency of practices for the charging of, and recording outcomes for, these offences.

494. Submission 3 (C. Murphy).

495. Submission 3 (C. Murphy).

What further evidence is needed?

- 5.363 The Council's review and assessment of the possible problem offences rely on the availability of evidence to demonstrate the existence of sentencing problems that require attention in order to promote public confidence in the criminal justice system or promote consistency of sentencing approach.
- 5.364 The Council's views and conclusions about the offences identified as problem offences are therefore predicated on sufficient evidence being currently available. This is not to devalue the concerns that have been raised by stakeholders in submissions in relation to these offences or by members of the community through other forums, such as the media. However, it is to say that, currently, the evidence available to the Council does not support the existence of the type of sentencing problems that would suggest a need for sentencing guidance.
- 5.365 Accordingly, where the Council has concluded that the current evidence is not sufficient to confirm the existence of sentencing problems warranting guidance, this does not conclusively exclude these offences from being considered under the guidance schemes recommended in later chapters of this report. The Council's conclusions in this chapter do not prevent an application being made under the enhanced guideline judgment provisions for any of the possible problem offences, nor does it prevent the Court of Appeal from delivering a guideline judgment following such an application or on the court's own initiation. Further, it does not prevent the government from deciding to include additional offences in a standard sentence scheme (if introduced) beyond those recommended by the Council in Chapter 7. However, the Council strongly reiterates its view that there is currently insufficient evidence of the existence of sentencing problems for the offences that have not been categorised as problem offences (fatal, drug, and other offences).
- 5.366 The Council is of the view that more research is required to establish evidence of sentencing problems, in particular, structured and informed community consultation and detailed analysis of current sentencing practices through qualitative examination of reasons for sentence and quantitative examination of sentencing outcomes. Such detailed analysis may confirm the existence of possible sentencing problems with some offences or may reveal additional problems not yet identified by the Council. Further, it is important that any offence being considered for inclusion in a standard sentence scheme meets the criteria for inclusion set out in Chapter 7 to ensure that the scheme operates as an effective method of sentencing guidance by providing a guidepost to objective offence seriousness.
- 5.367 Finally, the Council acknowledges the broad problem areas raised by stakeholders (family violence matters, high-level fraud, and firearm offences). Consultation and research are also needed to identify the precise issues and offences that may be contemplated within these offence groups. The Council has not had sufficient time to research this within the scope of this reference. However, it supports the work being done in the future, particularly in light of prospective developments and reforms that may occur.

- 5.368 In particular, the Council strongly supports further work in relation to family violence matters, in light of the reforms that will be made following the release of the report⁴⁹⁶ of the Royal Commission into Family Violence on 30 March 2016. The Commission makes 227 recommendations for long-term reforms in all aspects of family violence. Of particular significance is the Commission's recommendation that '[t]he Director of Public Prosecutions consider identifying a suitable case in which to seek a guideline judgment from the Court of Appeal on sentencing for family violence offences [within two years]'.⁴⁹⁷
- 5.369 This recommendation is consistent with the Council's view that family violence as a factor within offending and sentencing ought to be considered holistically, by being the subject of court-led guidance under the Council's recommended enhanced guideline judgment scheme (see Chapter 6). This will allow for structured and informed community consultation and detailed analysis such as is required for giving appropriate guidance on sentencing in a way that promotes public confidence in the criminal justice system and promotes consistency of approach in sentencing.

496. Victoria, Royal Commission into Family Violence (2016), above n 357. The Victorian Government has indicated its intention to implement all 227 recommendations: Premier of Victoria, 'Government Receives Report of the Royal Commission into Family Violence', Media Release (29 March 2016) <<http://www.premier.vic.gov.au/government-receives-report-of-the-royal-commission-into-family-violence/>> at 31 March 2016.

497. Victoria, Royal Commission into Family Violence (2016), above n 357, vol. III, 232–233, Recommendation 84.

Chapter 6:

An enhanced guideline judgment scheme



Overview

- 6.1 This chapter presents the Council's preferred model of legislated guidance to address the sentencing problems identified in this report: an enhanced guideline judgment scheme. The chapter examines the purposes of the existing guideline judgment framework and the benefits of enhancing the operation of this scheme. Drawing on lessons from other jurisdictions and issues with the current mechanism, the chapter identifies three key areas of reform:
- facilitating more applications for guideline judgments;
 - clarifying how submissions are made on the decision to make a guideline judgment; and
 - providing more scope for the content of guideline judgments.
- 6.2 Guideline judgments remain one of the most influential and persuasive forms of guidance available to the courts. The Council is of the view that guideline judgments have the best capacity to address the issues identified in its analysis of offences with sentencing problems.
- 6.3 The Council also considers that its proposed reforms to guideline judgments are desirable regardless of whether other forms of sentencing guidance are introduced. Under the enhanced guideline judgment scheme, guideline judgments have the capacity to set out both ranges and principle-based guidance to address all offences with sentencing problems identified by the Council in Recommendation 2.
- 6.4 If the government is minded to introduce a legislated guidepost in the form of a standard sentence scheme, the Council considers that an enhanced guideline judgment scheme would also be required. This would allow for guidance on the application of the standard sentence scheme, as well as guidance on other offences for which a standard sentence is not appropriate.

Existing guideline judgment framework

- 6.5 Guideline judgments are a mechanism for the courts to provide broad sentencing guidance beyond the facts of a particular case. The Court of Appeal has had the explicit power to deliver guideline judgments since 2004, under Part 2AA of the *Sentencing Act 1991* (Vic).⁴⁹⁸ Guideline judgments provide for 'guidelines to be taken into account by courts in sentencing offenders'.⁴⁹⁹ They can apply generally, to a particular or class of court, offence or penalty, or to a particular class of offender.
- 6.6 Guideline judgments were introduced in Victoria as a 'mechanism to promote greater consistency of approach in sentencing'.⁵⁰⁰ They were intended to 'provide an opportunity for appeal judges to share their collective experience with primary judges and articulate unifying principles to guide the exercise of judicial discretion'.⁵⁰¹ Importantly, guideline judgments were envisioned as allowing 'an appropriate balance to be struck between the broad discretion of the judiciary to take the individual circumstances of each case into account and the desirability of consistency in sentencing'.⁵⁰²

498. Inserted by *Sentencing (Amendment) Act 2003* (Vic) pt 2.

499. *Sentencing Act 1991* (Vic) s 6AA.

500. Victoria, 'Sentencing (Amendment) Bill', *Parliamentary Debates*, Legislative Assembly, 20 March 2003, 479 (Rob Hulls, Attorney-General).

501. Victoria, 'Sentencing (Amendment) Bill', *Parliamentary Debates*, Legislative Assembly, 20 March 2003, 479 (Rob Hulls, Attorney-General).

502. Victoria, 'Sentencing (Amendment) Bill', *Parliamentary Debates*, Legislative Assembly, 20 March 2003, 480 (Rob Hulls, Attorney-General).

- 6.7 This intention reflects the reasoning handed down in the first guideline judgment delivered by an Australian court. Drawing on the New South Wales Court of Criminal Appeal's practice of stating principles of general application, and the English Court of Appeal's practice of delivering guideline judgments, Spigelman CJ held in *R v Jurisic* ('*Jurisic*') that:
- guideline judgments should now be recognised in New South Wales as having a useful role to play in ensuring that an appropriate balance exists between the broad discretion that must be retained to ensure that justice is done in each individual case, on the one hand, and the desirability of consistency in sentencing and the maintenance of public confidence in sentences actually imposed, and in the judiciary as a whole, on the other.⁵⁰³
- 6.8 Spigelman CJ highlighted that guideline judgments should be treated as 'a relevant indicator, much as trial judges have always regarded statutory maximum penalties as an indicator'.⁵⁰⁴ Spigelman CJ went on to comment that sentencing guidelines are preferable to statutory guidelines because of their flexibility in relation to individual cases. Further, he stated that '[g]uideline judgments are a mechanism for structuring discretion, rather than restricting discretion'.⁵⁰⁵
- 6.9 In subsequent interpretation of guideline judgments in New South Wales, there has been a focus on the guidelines operating as a 'guide' or 'check', involving broad discretion.⁵⁰⁶ They do not operate as a 'tramline'⁵⁰⁷ or 'straight jacket'⁵⁰⁸ to impermissibly confine discretion, and they should operate as a reference point rather than a starting point.⁵⁰⁹ Further, the characteristics of a typical case set out in guidelines do not represent a checklist of factors, 'the presence or absence of characteristics having some mathematical relationship with the sentence to be imposed',⁵¹⁰ but rather they operate as illustrative factors.⁵¹¹

Benefits of guideline judgments

- 6.10 In *Pathways to Justice*, the precursor report to the introduction of guideline judgments in Victoria, a number of benefits of guideline judgments were highlighted, including that they:
- provide clear and authoritative articulation of principles and penalties that assist judges in exercising discretion;
 - allow for the incremental development of the law;
 - are protected from short-term political pressures but can take into account public policy concerns;
 - can reduce appeals against sentence; and
 - may improve deterrence as the transparency of sentencing is increased.⁵¹²
- 6.11 The report noted, however, that these benefits only accrue if the court can find a balance between sentencing ranges that are too broad to be useful and sentencing ranges that are too narrow to be applicable to the majority of cases. The inability to provide any guidance on range therefore significantly reduces these benefits.

503. *R v Jurisic* (1998) 45 NSWLR 209, 220.

504. *R v Jurisic* (1998) 45 NSWLR 209, 221.

505. *R v Jurisic* (1998) 45 NSWLR 209, 221.

506. *Money v The Queen* (2007) 49 MVR 159, 162.

507. *Legge v The Queen* [2007] NSWCCA 244 (27 July 2007) [59]; *Dolan v The Queen* [2010] NSWCCA 10 (11 February 2010) [33].

508. *Frahm v The Queen* [2009] NSWCCA 249 (24 September 2009) [17].

509. *R v Errington* (2005) 157 A Crim R 553, 562.

510. *R v Berg* (2004) 41 MVR 399, 403.

511. *R v Errington* (2005) 157 A Crim R 553, 561.

512. Freiberg (2002), above n 98, 208.

- 6.12 Guideline judgments are also an important avenue to engage with public opinion and demonstrate 'a willingness to be accountable, open and responsive'.⁵¹³ To this end, the development of guideline judgments by the courts in Australia has been described as 'the most spectacularly proactive approach to promoting public understanding of sentencing and improving public confidence in criminal justice'.⁵¹⁴
- 6.13 As noted by Spigelman CJ, '[t]he courts must show that they are responsive to public criticism of the outcome of sentencing processes'.⁵¹⁵ This does not mean that sentences themselves need to be reactive, but rather guideline judgments provide a useful avenue for addressing public criticism and can serve an educative role that may also assist in building community confidence in the criminal justice system. Similarly, the Law Institute of Victoria noted in its submission that guideline judgments have been praised 'not for redressing an actual consistency problem, but for redressing the public's impression of one'.⁵¹⁶
- 6.14 For example, the guideline judgment in *Boulton v The Queen*⁵¹⁷ ('*Boulton*') enabled the Court of Appeal to articulate the punitive nature of community correction orders (CCOs) as a sentencing option, which assisted both those considering whether to sentence a person to a CCO and the general public in understanding the purpose of CCOs. There is significant room for this educative function to be extended to the offences identified as having sentencing problems, including articulation of the sentencing options and ranges appropriate in representative cases and the approach that should be taken towards aggravating and mitigating factors in certain offence categories.
- 6.15 This transparency is superior in a guideline judgment in a number of ways compared with other forms of guidance. First, guideline judgments allow the court to recognise and communicate opportunities to self-correct, and the subsequent guidance on how to structure judicial discretion comes from within the judiciary. Second, the processes employed in the delivery of the guideline judgment allow the court to directly address public confidence in the system through the hearing of submissions by the Council, the Director of Public Prosecutions, and Victoria Legal Aid. Third, the clear articulation of principles and factors to take into consideration when sentencing can provide more definitive guidance to sentencers, enabling those sentencers to more clearly articulate their reasoning processes to the public.
- 6.16 Krasnostein has highlighted the benefits of guideline judgments compared with other forms of guidance, including that:
- appellate judges have an intimate knowledge of sentencing practice in the lower courts and are best placed to resolve issues around appropriate sentencing considerations and ranges;
 - guidance that has been drafted by appeal courts is more likely to be accepted by sentencing judges;
 - guideline judgments can be modified and evolve with changing needs; and
 - guideline judgments can articulate 'highly influential normative statements' and provide practical assistance to the lower courts because they can be delivered outside of the facts of a specific case.⁵¹⁸

513. Kate Warner, 'The Role of Guideline Judgments in the Law and Order Debate in Australia' (2003) 27 *Criminal Law Journal* 8, 10.

514. *Ibid* 9.

515. *R v Jurisic* (1998) 45 NSWLR 209, 221 (Spigelman CJ).

516. Submission 11 (Law Institute of Victoria).

517. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014).

518. Sarah Krasnostein, '*Boulton v The Queen*: The Resurrection of Guideline Judgments in Australia?' (2015) 27(1) *Current Issues in Criminal Justice* 41, 53.

- 6.17 Guideline judgments may also be superior to other statements of principle by the Court of Appeal in that guideline judgments are a more authoritative source of principle and can have an immediate influence on sentencing in relevant cases. Further, this guidance can incorporate formal submissions from the parties who can better inform best practice.
- 6.18 In submissions, Victoria Legal Aid was particularly supportive of the role of guideline judgments in promoting consistency and public confidence, stating:
- By *structuring* rather than limiting discretion, guideline judgments strike an appropriate balance between consistency in sentencing and the need to have regard to the individual circumstances of a case.
- ...
- By enhancing transparency, consistency and clarity in sentencing approach, guidelines can promote understanding and community confidence, which can serve to benefit the interests of the community.⁵¹⁹
- 6.19 Youthlaw noted in its submission that it was supportive of 'guidance options that assist judges in exercising their discretion' and that it endorsed Victoria Legal Aid's submission in support of guideline judgments.⁵²⁰ Similarly, the Law Institute of Victoria recognised that 'guideline judgments have the ability to promote consistency and public confidence in the sentencing process and also facilitate the development of coherent sentencing practices'.⁵²¹
- 6.20 As noted in *Fox and Freiberg's Sentencing*, consistency of approach supports public confidence in the criminal justice system by counteracting concerns that 'sentencing is determined by idiosyncratic judging'.⁵²² Guideline judgments can also assist judges in other ways that promote public confidence, including:
- by [providing] clarity regarding how judges come to their decisions, by [providing] greater specificity regarding the specific weight given to particular factors, by giving reasons for their decisions, and by [providing] transparency and honesty generally in the decision-making process.⁵²³
- 6.21 Given these features, the Council is of the view that the best legislative mechanism to provide guidance that will promote consistency of approach and promote public confidence in the criminal justice system is through an enhanced guideline judgment scheme.

Recommendation 3: An enhanced guideline judgment scheme

The existing guideline judgment scheme should be enhanced to provide the most appropriate form of sentencing guidance in order to:

- promote consistency of approach in sentencing offenders; and
- promote public confidence in the criminal justice system.

519. Submission 13 (Victoria Legal Aid) (emphasis in original).

520. Submission 4 (Youthlaw).

521. Submission 11 (Law Institute of Victoria).

522. Freiberg (2014), above n 23, 39–40.

523. Ibid 40.

Effect of guideline judgments on sentencing practices

- 6.22 Since the delivery of Victoria's only guideline judgment, which provided guidance on the sentencing option of CCOs, judges have embraced the option of combining a CCO with a short term of imprisonment, and have clearly tended to prefer this option over imprisonment with a non-parole period.⁵²⁴ This is most likely due to a combination of factors, including the legislative expansion of this option, the abolition of suspended sentences, and changes in the operation of the parole system, as well as the clear articulation of the punitive aspects of CCOs in the guideline judgment. It has been cited extensively, with over 170 cases citing *Boulton* in the 15 months since its delivery.
- 6.23 There are significantly more data available to evaluate the influence of guideline judgments in New South Wales. This analysis indicates that guidelines tend to have a significant effect on the severity of sentences where the guideline is aimed at addressing inadequacy. Reductions in sentencing disparity in relation to particular sentencing options, with associated flow-on effects to other offences, have also been identified as a result of the guideline judgments.

Effect of guideline judgment on sentencing for prescribed concentration of alcohol offences

- 6.24 Two studies on the effect of the guideline judgment on sentences for high-range prescribed concentration of alcohol (PCA) driving offences have found that the guideline judgment delivered on application by the New South Wales Attorney General⁵²⁵ increased the severity of sentences and consistency of the use of sentencing options between courts.
- 6.25 The 2005 Judicial Commission of New South Wales study (based on December 2004 data) found that there had been a 'dramatic reduction' in the use of section 10 orders,⁵²⁶ from 10.3% of high-range PCA offences in 2003 to 2.2% of offences after the guideline judgment.⁵²⁷ Additionally, the proportion of drivers that were disqualified from driving and the periods that drivers were disqualified increased accordingly. This increase in severity had flow-on effects to other PCA offences. The study also found that there was more uniformity in the use of section 10 orders and the length of disqualification periods across courts. However, there was a slight increase in the number of appeals on severity of sentence and the success rate of these appeals increased where full-time imprisonment had been imposed at first instance.
- 6.26 A 2008 study by the New South Wales Bureau of Crime Statistics and Research (based on September 2006 data) found similar results, with the reduction in section 10 orders corresponding with an increase in the use of bonds, community service orders, suspended prison sentences, home detention, and prison sentences.⁵²⁸ Importantly, it found that the disparity in the use of section 10 orders across all courts reduced significantly.⁵²⁹
- 6.27 The most recent sentencing snapshot of drink driving sentences indicates that section 10 orders were used in 2.1% of high-range PCA offences in 2009 and 2010.⁵³⁰

524. Sentencing Advisory Council, *Parole and Sentencing: Research Report* (2016) 27, 31.

525. See *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305, 340–341.

526. These orders provide for dismissals and conditional discharges and are known as section 10 orders due to their provision in section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

527. Patrizia Poletti, *Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW*, Sentencing Trends and Issues no. 35 (2005) 18.

528. Stephanie d'Apice, *The Impact of the High Range PCA Guideline Judgment on Sentencing for PCA Offences in NSW*, Crime and Justice Bulletin no. 123 (2008) 8–9.

529. The use of section 10 orders declined from a standard deviation of 7.7 to a standard deviation of 2.6 (a reduction of 5.1 percentage points); *ibid* 5.

530. Lily Trimboli, *Sentencing Snapshot: Drink-Driving*, Crime and Justice Statistics: Issue Paper no. 70 (2012) 3–4.

Effect of guideline judgment on sentencing for armed robbery

- 6.28 The Judicial Commission of New South Wales has also published research on sentencing for armed robbery since the guideline judgment in *R v Henry* ('Henry'). This guideline was handed down due to statistical evidence that suggested 'both inconsistency in sentencing practice and systematic excessive leniency in the level of sentences' for armed robbery and robbery in the company of another person.⁵³¹
- 6.29 According to a 2003 analysis of sentencing trends before and after *Henry*, the use of full-time custodial sentences increased from 81% of cases to 85.2% of cases, while the use of community service orders reduced from 7.2% to 2.8%. The use of bonds dropped from 4.3% to 2.1%.⁵³² In addition, the distribution of sentence length for full-time custodial sentences pre- and post-*Henry* indicated an increase in the severity of penalties. However, there was no significant change recorded in regard to the relationship between sentences and the statutory maximum penalty.
- 6.30 A 2007 study on the use of the robbery guideline judgment by the higher courts in New South Wales from May 1999 to May 2005 found that 83.9% of armed robbery or robbery in company cases received full-time custodial sentences.⁵³³ Between the two studies, the use of suspended sentences (reintroduced in 2001 after *Henry*) increased from 4.2% to 7.1%.⁵³⁴

Benefits of an enhanced guideline judgment scheme

- 6.31 An enhanced guideline judgment scheme is the Council's preferred form of legislated guidance for several reasons. Providing for applications outside an appellate 'vehicle', clarifying submissions processes, and allowing for guidance on numerical ranges will enable the Court of Appeal to deliver authoritative guidance that addresses the problems with sentencing for all of the offences with sentencing problems identified in Recommendation 2. This guidance would have an immediate and persuasive impact that could address sentencing problems in a far more flexible and adaptable way than other legislative mechanisms.
- 6.32 Unlike a standard sentence, guideline judgments are suitable for all of the offences set out in Recommendation 2. For example, guideline judgments have the flexibility to address the issues identified for specific forms or typologies of the serious injury offences and for aggravated burglary. A guideline judgment could also be used to clarify issues around the assessment and weight given to premeditation, relationships of trust, and seriousness and permanency of injury across the serious injury offences (see [5.205]–[5.250]).
- 6.33 In addition, guideline judgments may assist in the operation of any standard sentences that may be introduced for those offences for which a standard sentence is suitable (see [7.144]–[7.176] and Recommendation 11). Under the enhanced guideline judgment scheme, the Court of Appeal would be able to provide guidance on issues such as how certain aggravating and mitigating factors would work in conjunction with the scheme, or broader guidance on principles such as the concept of objective offence seriousness.
- 6.34 Guideline judgments are also superior to other mechanisms as this form of guidance can be applied by the lower courts. Therefore, guideline judgments can address the sentencing

531. *R v Henry* (1999) 46 NSWLR 346, 371.

532. Lynne A. Barnes and Patrizia Poletti, *Sentencing Trends for Armed Robbery and Robbery in Company: The Impact of the Guideline in R v Henry*, *Sentencing Trends and Issues* no. 26 (2003).

533. *Ibid* 49.

534. *Ibid*; Lynne A Barnes and Patrizia Poletti, *Sentencing Robbery Offenders Since the Henry Guideline Judgment*, *Research Monograph* 30 (2007) 49.

problems identified in this report, even where offences are tried summarily. Further, the enhanced guideline judgment scheme will make it easier for sentencing issues experienced in the lower courts to be raised as part of an application for a guideline judgment.

- 6.35 An enhanced scheme would enable the Court of Appeal to give guidance on appropriate sentence levels and the weight to be given to aggravating and mitigating factors for individual offence types and categories of offence. This form of guidance has the capacity to address all of the offence-specific sentencing problems highlighted in this report. In particular, guideline judgments may be able to address the inadequacy of current sentencing practices identified by the Council for some sexual offences, without requiring the introduction of a standard sentence scheme.
- 6.36 A guideline judgment on a category of offence, such as major driving offences, for example, would allow the Court of Appeal to provide guidance on what may be considered appropriate sentencing practices for a number of offences that are inter-related and form a hierarchy. Such holistic guidance would overcome the current problem whereby a declaration from the Court of Appeal that current sentencing practices are inadequate for one offence (such as negligently causing serious injury by driving)⁵³⁵ does not provide any specific guidance on the adequacy or inadequacy of sentencing practices for associated offences (such as dangerous driving causing serious injury).
- 6.37 Guideline judgments also have the capability to provide principled guidance on broader sentencing problems, such as how sentencing courts should approach the task of considering current sentencing practices. Principled guidance of this nature would enable the court to counteract any issues with the way current sentencing practices are considered for offences other than those identified by the Council. Authoritative guidance may also be useful in relation to other sentencing principles such as totality, cumulation, and proportionality.
- 6.38 Significantly, guideline judgments have the capacity to address more systemic issues. For example, one submission⁵³⁶ received by the Council highlighted a need for guidance on the sentencing of Aboriginal and Torres Strait Islander peoples (referred to in the submission as 'First Peoples'), in response to the High Court's decision in *Bugmy v The Queen*.⁵³⁷ Others raised concerns about the sentencing of high-level fraud,⁵³⁸ firearms offences,⁵³⁹ and assaults against council workers.⁵⁴⁰ Further evidence of systemic problems in relation to these concerns may properly form the basis of an application for a guideline judgment.
- 6.39 Similarly, following significant developments in the criminal justice system directed at recognising the harm caused by family violence, it may be considered appropriate for the Court of Appeal to provide guidance on how considerations of family violence are to be incorporated into the sentencing exercise.⁵⁴¹ This may be particularly useful in relation to decisions in the Magistrates' Court, where family violence matters are frequently sentenced and where the scope for unjustified disparity is wide. Such guidance could be similar to the guiding principles on sentencing range and the appropriateness of particular sanctions prepared by the Council in 2009.⁵⁴²

535. *Harrison v The Queen* [2015] VSCA 349 (16 December 2015).

536. Submission 6 (Anonymous).

537. *Bugmy v The Queen* (2013) 249 CLR 571.

538. Submission 14 (Director of Public Prosecutions).

539. Meeting with a number of Crown Prosecutors (11 February 2016).

540. Submission 5 (Whitehorse City Council); Submission 16 (Local Government Professionals Inc.).

541. Submission 15 (Victims of Crime Commissioner).

542. Sentencing Advisory Council (2009), above n 265, 7.

- 6.40 The need for a guideline judgment on sentencing for family violence was recently recognised by the Royal Commission into Family Violence, which recommended that the Director of Public Prosecutions seek a guideline judgment on sentencing for family violence within the next two years. The Royal Commission noted that this may be difficult since an appropriate matter would need to come before the Court of Appeal, but preferred a guideline judgment over other sentencing reforms:
- both because of the potential need for sentencing practices to more uniformly reflect recent learnings and best practice in family violence jurisprudence, and because a guideline judgment has the capacity to effect change without placing undue limitations on judicial discretion.⁵⁴³
- 6.41 An enhanced guideline judgment scheme would address current difficulties in delivering such guidance, including that:
- family violence offences heard in the summary jurisdiction rarely reach the Court of Appeal; and
 - applications for a guideline judgment necessarily require an appropriate appellate 'vehicle'.
- 6.42 In summary, an enhanced guideline judgment scheme has the potential to provide authoritative guidance on a very broad range of sentencing concerns, including those identified for all of the offences listed in Recommendation 2.

Current issues with guideline judgments

- 6.43 Despite the above features, there are a number of issues that have limited the incorporation of guideline judgments into common sentencing practice in Victoria. These include:
- limited uptake of the provisions and guidance being delivered through less authoritative mechanisms;
 - limited opportunities to deliver guidance due to the need to wait for an appropriate appellate 'vehicle'; and
 - uncertainty as to whether the court can provide guidance on appropriate sentence levels or ranges.
- 6.44 Most Australian jurisdictions have been resistant to the delivery of guideline judgments. This is for a number of reasons, but primarily due to concerns that guidelines would not be able to accommodate the wide variety of individual factors in a case and that sentencing discretion would be 'unduly restricted'.⁵⁴⁴ This reluctance has also been reinforced by the High Court's criticisms of overly prescriptive guideline judgments.⁵⁴⁵
- 6.45 This resistance has meant that court-made guidance in Australia has been limited. The nature of guideline judgments and their reliance on an appropriate case or application have led to the situation where, in practice, guideline judgments are not providing comprehensive guidance.⁵⁴⁶

⁵⁴³. Victoria, Royal Commission into Family Violence (2016), above n 357, vol. III, 233.

⁵⁴⁴. Freiberg (2002), above n 98, 211.

⁵⁴⁵. *Wong v The Queen* (2001) 207 CLR 584.

⁵⁴⁶. Freiberg and Sallmann (2008), above n 167, 68.

Limited use of guideline judgments in Australia

- 6.46 Most Australian jurisdictions have legislatively provided the power to give guideline judgments to their courts of appeal (including Victoria, New South Wales, Queensland, South Australia, and Western Australia),⁵⁴⁷ although only New South Wales and Victoria have exercised this power in a formal capacity.

New South Wales

- 6.47 In New South Wales, the Court of Criminal Appeal has given eight guideline judgments, including:
- dangerous driving in 1998;⁵⁴⁸
 - armed robbery in 1999;⁵⁴⁹
 - break, enter, and steal in 1999;⁵⁵⁰
 - drug importation in 1999 (later overruled by the High Court);⁵⁵¹
 - guilty pleas in 2000;⁵⁵²
 - a reformulation of the dangerous driving guideline,⁵⁵³ and a guideline on taking into account further offences, both in 2002;⁵⁵⁴ and
 - high-range drink-driving in 2004.⁵⁵⁵
- 6.48 Four of these were initiated after submissions from the New South Wales Director of Public Prosecutions, two were on application from the New South Wales Attorney General, and two were on the court's own motion.⁵⁵⁶
- 6.49 One of these submissions from the New South Wales Director of Public Prosecutions was combined with an Attorney General application for a guideline judgment and was heard with four appeals.⁵⁵⁷ A further Attorney General application was made for a guideline judgment for sexual assault in 2001, but the application was withdrawn in 2002, and general legislation prescribing the factors a court must take into account was introduced instead.⁵⁵⁸
- 6.50 Many commentators associate the decline in guideline judgments with uncertainty caused by the High Court's ruling in *Wong v The Queen* ('Wong')⁵⁵⁹ in 2001 and the introduction of a standard non-parole period scheme for most serious offences in New South Wales in 2003.⁵⁶⁰ This decline in guideline judgments has occurred even though the then Attorney

547. See *Sentencing Act 1991* (Vic) pt 2AA; *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 4; *Penalties and Sentences Act 1992* (Qld) pt 2A; *Criminal Law (Sentencing) Act 1988* (SA) pt 2 div 4; *Sentencing Act 1995* (WA) s 143.

548. *R v Jurisic* (1998) 45 NSWLR 209.

549. *R v Henry* (1999) 46 NSWLR 346.

550. *Re Attorney General's Application No 1 under s 26 of the Criminal Procedure Act* (1999) 48 NSWLR 327.

551. *R v Wong* (1999) 48 NSWLR 340; overruled by *Wong v The Queen* (2001) 207 CLR 584.

552. *R v Thomson* (2000) 49 NSWLR 383.

553. *R v Whyte* (2002) 55 NSWLR 252.

554. *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146.

555. *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305.

556. Judicial Commission of New South Wales, 'Guideline Judgments Promulgated', *Sentencing Bench Book* (Judicial Commission of New South Wales, 2014) <http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/sentencing_guidelines.html#p13-620> at 29 March 2016, [13-620].

557. *Re Attorney-General's Application No 1 under s 26 of the Criminal Procedure Act* (1999) 48 NSWLR 327.

558. See Kate Warner (2003) above n 513, 11–12.

559. *Wong v The Queen* (2001) 207 CLR 584.

560. See, for example, John Anderson, 'Standard Minimum Sentencing and Guideline Judgments: An Uneasy Alliance in the Way of the Future' (2006) 30(4) *Criminal Law Journal* 203; Krasnostein (2015), above n 518, 46.

General intended the standard non-parole period scheme to operate alongside guideline judgments. In the Second Reading Speech for the new scheme, the then Attorney General stated that the New South Wales Government would 'continue to support the use of guideline judgments given by the Court of Criminal Appeal' and that '[g]uideline judgments are another extremely useful tool in achieving consistency in sentencing and in taking into account community expectations as to the appropriate penalty to be imposed'.⁵⁶¹

South Australia

- 6.51 The South Australian Court of Criminal Appeal has expressed a preference for guidance in the form of sentencing 'standards'. The introduction of statutory powers to deliver guideline judgments was treated by the South Australian Court as 'endorsing the Court's existing practice', as well as clearing up any doubts cast on those practices by the High Court's decision in *Wong*.⁵⁶²
- 6.52 Sentencing standards are not binding, and they do not require 'a mechanical approach or an approach inappropriately fettered by the standard'.⁵⁶³ Rather, 'the guidance given is in terms of sentencing principles to be applied, and the sentencing range that can be expected for certain types of case'.⁵⁶⁴ Sentencing standards operate as 'general guides to those who have to sentence in the future, with certain tolerances built into or implied by the range to cater for particular cases'.⁵⁶⁵
- 6.53 At their core, sentencing standards aim to achieve consistency within an individualised system. In *Police v Cadd* it was recognised that it was the responsibility of the court to ensure that errors of principle were not made, and that excessive or inadequate sentences were not handed down.⁵⁶⁶ However, consistency could be achieved 'by establishing standards of sentencing for particular offences' including 'indicating an appropriate sentence range for a particular offence or offences of a particular type'.⁵⁶⁷
- Establishing appropriate standards also tends to ensure that there is such consistency of approach as is achievable in a system in which the appropriate sentence depends upon, in part, the circumstances of the individual case and of the individual offender, and a system in which sentencing is as individualised as it is in our system.⁵⁶⁸
- 6.54 The South Australian Court of Criminal Appeal has declined to provide sentencing standards for certain offences, such as manslaughter and assault, but has considered standards appropriate for other offences including some drug offences and armed robbery.⁵⁶⁹
- 6.55 These sentencing standards have also been recognised by the South Australian Parliament. For example, a starting point and associated sentencing standards were handed down in *R v D*⁵⁷⁰ for unlawful sexual intercourse with a child under 12. Reference to this case was

561. New South Wales, 'Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill', *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5815 (Bob Debus, Attorney-General).

562. *R v Payne* (2004) 89 SASR 49, 59.

563. *R v Place* (2002) 81 SASR 395, 408.

564. *R v Payne* (2004) 89 SASR 49, 55–56.

565. *R v King* (1988) 48 SASR 555, 557 (Cox J).

566. *Police v Cadd* (1997) 69 SASR 150, 165.

567. *Police v Cadd* (1997) 69 SASR 150, 165.

568. *Police v Cadd* (1997) 69 SASR 150, 166. This approach to 'authoritative guidance' was also approved by the High Court in *Wong v The Queen* (2001) 207 CLR 584, 606–607 (Gaudron, Gummow, and Hayne JJ).

569. *R v Place* (2002) 81 SASR 395, 404–405.

570. *R v D* (1997) 69 SASR 413.

inserted into the *Criminal Law (Sentencing Act) 1988* (SA) to codify the consideration of the new standard and extend its application retrospectively.⁵⁷¹

- 6.56 The first application for a guideline judgment in South Australia came in 2004 from the South Australian Director of Public Prosecutions, for the offence of causing death by dangerous driving.⁵⁷² However, the South Australian Court of Criminal Appeal held that no case had been made that a guideline was required to increase the level of punishment for that offence, or that there was unacceptable variation in the sentences being delivered.⁵⁷³ The court also did not consider that it should:

emphasise the appropriate level of penalty for an ordinary or typical case, and should identify the factors of aggravation that might lead to a higher penalty, and matters of mitigation that might lead to a lesser penalty, with a view to improving community understanding of the process.⁵⁷⁴

- 6.57 The South Australian Court of Criminal Appeal has maintained the practice of providing sentencing standards but has not yet exercised the power to hand down a guideline judgment. As a result, while that court continues to deliver guidance, the formal mechanisms for consultation and review (which form part of the formal guideline judgment process) are not utilised.

Western Australia

- 6.58 In Western Australia, some cases have been reported as guideline judgments in the headnote to the case, although without discussion of this in the body of the judgment.⁵⁷⁵ With a lack of substantive legislative provision for guideline judgments in Western Australia, they are more akin to the sentencing standards employed in South Australia than the formal application and submission mechanisms utilised in New South Wales and Victoria.⁵⁷⁶
- 6.59 Nonetheless, there are many examples of the Western Australian Court of Appeal considering a guideline judgment and choosing not to deliver one.
- 6.60 In 1997, the Western Australian Court of Appeal was requested to issue a guideline judgment on the use of suspended sentences for the offence of maintaining a sexual relationship with a child. The Crown submitted that:
- the guidelines should say that a sentencing court should not suspend a sentence of imprisonment except in an exceptional case where the need for punishment and general deterrence by way of immediate service of a sentence of imprisonment was overridden.⁵⁷⁷
- 6.61 Murray J, however, did not ‘think it to be correct for the court to issue a guideline judgment in such terms’.⁵⁷⁸ Similarly, Malcolm CJ did not think the court ‘had sufficient experience’ with the offence in question.⁵⁷⁹

571. Section 29D concerning sentencing standards for offences involving paedophilia was inserted into the *Criminal Law (Sentencing Act) 1988* (SA) by section 8 of the *Statutes Amendment (Sentencing of Sex Offenders) Act 2005* (SA) after the commencement of the guideline judgment provisions. See also South Australia, ‘Statutes Amendment (Sentencing of Sex Offenders) Bill’, *Parliamentary Debates*, House of Assembly, 11 April 2005, 2276 (Michael Atkinson, Attorney-General); sentencing standards and the *R v D* (1997) 69 SASR 413 provisions are considered in *R v Marien* [2011] SASCFC 116 (26 October 2011).

572. *R v Payne* (2004) 89 SASR 49.

573. *R v Payne* (2004) 89 SASR 49, 64–65.

574. *R v Payne* (2004) 89 SASR 49, 66.

575. See, for example, *R v Tognini* (2000) 22 WAR 291.

576. Guideline judgments are provided for in one section of the Western Australian legislation: *Sentencing Act 1995* (WA) s 143.

577. *R v GP* (1997) 18 WAR 196, 235.

578. *R v GP* (1997) 18 WAR 196, 235.

579. *R v GP* (1997) 18 WAR 196, 221.

- 6.62 This case went on to set out the approach to issuing a guideline judgment that appears to have been adopted by the Western Australian Court of Appeal in subsequent cases. Particularly, since guideline judgments were introduced to give the effect of the power of precedent to certain sentences, 'the court should use its power to give a guideline judgment sparingly'.⁵⁸⁰ Further, 'a guideline judgment should be one which deals with considerations relevant to sentence in a particular type of case, or the proper application of a particular form of sentencing disposition provided by the law'.⁵⁸¹
- 6.63 Also in 1997, the Western Australian Court of Appeal refused to give a guideline judgment in regard to domestic violence, stating that the range of offending behaviour that encompassed domestic violence was too broad and '[e]ach sentence must be appropriate to the particular circumstances of the case'.⁵⁸²
- 6.64 In 1998, the court noted that it had received frequent requests for a guideline judgment in relation to indefinite sentences:
- On a number of occasions in the past this Court has declined such an invitation, particularly having regard to the entrenched nature of a guideline judgment, and the court has been concerned that no such judgment should be given unless the particular case before it appears to point up a clear need for a judgment of that character and the utility for the decision of future cases of the guidance which may be given by such a judgment.⁵⁸³
- 6.65 In *Herbert v The Queen*, the Western Australian Court of Appeal considered that a case concerning the application of the principle of totality (in the context of multiple armed robbery offences) was 'not an appropriate occasion to deliver a guideline judgment'.⁵⁸⁴
- 6.66 Further, in the 2008 case of *Yates v The State of Western Australia*, the court held that since that case was only the second occasion on which the offence in question had been sentenced, it was 'inappropriate to give a guideline judgment', and that it was 'preferable that the relevant sentencing and legal issues emerge on a case by case basis before a guideline judgment is given'.⁵⁸⁵
- 6.67 Guideline judgments have been treated with extreme caution in Western Australia. This has perhaps been exacerbated by the lack of detail as to the process and content of a guideline judgment in the relevant legislative provision.

Queensland

- 6.68 Queensland has the most comprehensive, and newest, guideline judgment framework.⁵⁸⁶ It has not, as yet, utilised its guideline judgment provisions.
- 6.69 In a case referred to the District Court in 2014, it was noted that the offender's assault and drug offences 'will allow a higher Court the opportunity to consider making a guideline judgment regarding how strongly this type of offending is to be condemned', and that a decision not to do so would also constitute guidance.⁵⁸⁷

580. *R v GP* (1997) 18 WAR 196, 235.

581. *R v GP* (1997) 18 WAR 196, 235.

582. *R v Kerr* (Unreported, Supreme Court of Western Australia Court of Criminal Appeal, Kennedy, Franklyn, and Walsh JJ, 15 August 1997) 4.

583. *Jones v The Queen* [1998] WASCA 123 (8 May 1998).

584. *Herbert v The Queen* (2003) 27 WAR 330, 354.

585. *Yates v The State of Western Australia* [2008] WASCA 144 (10 July 2008).

586. *Penalties and Sentences Act 1992* (Qld) pt 2A, inserted by section 6 of the *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld).

587. *Police v Bond* [2014] QMC 29 (23 October 2014) [14].

Victoria

- 6.70 Despite having the power to give guideline judgments since 2004, the Court of Appeal has only delivered one guideline judgment. *Boulton* was handed down in December 2014 and was concerned with community correction orders (CCOs) as a sentencing option.⁵⁸⁸
- 6.71 In handing down its judgment, the Court of Appeal noted the important role guideline judgments can play:
- The provision of a guideline judgment can promote consistency and public confidence in the sentencing process by articulating elements that must be taken into account in a particular sentencing context, and by giving guidance as to a unified approach. It can also facilitate the development of coherent sentencing practice by way of unified application of principle and, in turn, assist the identification of relevant similarities and differences between cases.⁵⁸⁹
- 6.72 The guideline judgment set out broad principles to guide consideration of the CCO as a sentencing option, including the conditions attached to a CCO and its potential combination with a term of imprisonment. As noted by Krasnostein:
- Because of the High Court's prohibitions on sequential reasoning and numerical starting points, the guidelines do not set out a decision-making process nor do they give numerical boundaries for duration. Instead, they contain narrative or discursive policy statements concerning the use of the CCO sanction and its conditions.⁵⁹⁰
- 6.73 It has been argued that the Court of Appeal's first guideline judgment could signal:
- the beginning of a more nuanced jurisprudence that recognises that fair sentencing outcomes are not just a question of the *amount* of discretion, they are also the product of practical appellate regulation of the decision-making process aimed at promoting sentences that are both individualised and equal between similar offenders.⁵⁹¹
- 6.74 Nonetheless, the unique nature of CCOs and the many variables that influence their issuance and conditions provided a clear example of 'the chances [being high] for variation based more on the judge who happened to decide the case than on the case facts'.⁵⁹² In *Boulton*, it was recognised that:
- Without practical policy guidance across a range of issues, differences between sentencers were resulting in unacceptable unwarranted disparity in the imposition, duration and structure of punishment for similarly situated offenders.⁵⁹³
- 6.75 It has been noted that the novelty of CCOs as a sentencing option may have prompted the Court of Appeal's willingness to issue a guideline judgment, and that *Boulton* may not evidence a new willingness to issue guidelines more generally:
- Assertions that a guideline was necessary predominately because of the novelty of CCOs may mitigate the disapproval of an individualist High Court but, disappointingly, they also reduce the possibility of guideline judgments being issued in relation to these other sanctions or to offences, in the case of offence-based guideline judgments, or to general issues, like the impact of a guilty plea or totality, in the case of generic guideline judgments that apply to a range of offences.⁵⁹⁴

588. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014).

589. *Boulton v The Queen* [2014] VSCA 342 (22 December 2014) [40].

590. Krasnostein (2015), above n 518, 51.

591. *Ibid* 41.

592. *Ibid* 49.

593. *Ibid* 51.

594. *Ibid* 52.

- 6.76 In *Ashdown*, the court identified circumstances where a guideline judgment may serve a purpose:

A guideline judgment may serve to strike an appropriate balance between the individual justice achieved through the sentencing discretion and the objectives of consistency of sentencing and maintenance of public confidence in sentencing and the courts who administer criminal justice. Hence one of its functions would be to address a pattern of inconsistency or leniency in sentencing for an offence.⁵⁹⁵

- 6.77 The ability for the court to identify such trends has been limited, however. While willing to comment on inadequacies of current sentencing practices for particular offences, the court has been reluctant to exercise its discretion to give any associated guideline judgments.

- 6.78 The Court of Appeal has long demonstrated a reluctance to issue guideline judgments. Prior to their introduction in Victoria, the court expressed its disinclination, in an oft-cited passage:

Experience in other areas of the law has shown that judicially expressed guidelines can have a tendency, with the passage of time, to fetter judicial discretion by assuming the status of rules of universal application which they were never intended to have. It would, in my opinion, be unfortunate if such a trend were to emerge in the sentencing process where the exercise of the judge's discretion, within established principles, to fix a just sentence according to the individual circumstances of the case before him or her is fundamental to our system of criminal justice.⁵⁹⁶

- 6.79 In *Nash v The Queen*,⁵⁹⁷ Maxwell P identified a variation in sentences for cases of intentionally causing serious injury, and listed factors that could assist in assessing the gravity of that offence. He noted that '[t]he development of such a list of indicia should be conducive to consistency in sentencing and – hence – to public confidence in the criminal justice system', and that these were goals compatible with parliament's intention when providing for guideline judgments.⁵⁹⁸ However, the court did not take the opportunity to prepare a guideline judgment, with Maxwell P stating:

The time has come, in my view, for the Director of Public Prosecutions to consider inviting this Court, in an appropriate case, to deliver such a guideline judgment. Failing such an invitation, this is a course which the Court itself may need to consider taking when an appropriate occasion arises.⁵⁹⁹

- 6.80 This call for an application for a guideline judgment on intentionally causing serious injury was repeated a few weeks later in *Kumar v The Queen*:

I suggested in *Nash*, and I reiterate, that the wide variation in sentencing for [intentionally causing serious injury] may make it appropriate for application to be made to this Court for a guideline judgment under s 6AC(c) of the *Sentencing Act 1991* (Vic). Such a guideline would set out the criteria by which the sentencing court would assess the seriousness of a particular instance of [intentionally causing serious injury]. A guideline of that kind should facilitate the assessment of seriousness in the case at hand, and enable meaningful comparisons to be made between one case and another. Further, reference to a standard set of criteria should make it more readily apparent, both to the person being sentenced and to other courts examining the decision, how the sentence was arrived at.⁶⁰⁰

595. *Ashdown v The Queen* (2011) 37 VR 341, 401 (Redlich JA).

596. *R v Ngui* (2000) 1 VR 579, 584 (Winneke P) quoted in *Wong v The Queen* (2001) 207 CLR 584, 616.

597. *Nash v The Queen* (2013) 40 VR 134.

598. *Nash v The Queen* (2013) 40 VR 134, 137.

599. *Nash v The Queen* (2013) 40 VR 134, 137.

600. *Kumar v The Queen* [2013] VSCA 191 (17 July 2013) [28] (citations omitted).

- 6.81 No application for a guideline judgment on intentionally causing serious injury has been made. Nor has the Court of Appeal found an appropriate opportunity to deliver self-initiated guidance on this offence.
- 6.82 In *Miller v The Queen*,⁶⁰¹ the Crown submitted to the court that reliance on sentencing remarks in individual cases, rather than guideline judgments, has the effect of placing an importance on numerical equivalence in sentences rather than consistent application of sentencing principles. By extension, reliance on 'a handful of individual sentences' in lieu of a guideline judgment can lead to a situation where the sentencing judge 'impermissibly treats sentences imposed in other cases as setting the upper and lower limits of the permissible range'.⁶⁰²
- 6.83 While this was not accepted by the court, similar reasoning was recently handed down in *Harrison v The Queen*⁶⁰³ where guiding cases were provided to correct any notion of a false ceiling in negligently causing serious injury by driving cases. The opportunity to deliver a guideline judgment was not taken.
- 6.84 The Court of Appeal's approach does not embrace the ability of the court to self-initiate structured and reviewable guidance that draws in external submissions. Further, concerns about the unintended application of guideline judgments could be assuaged by incorporating them into common practice, thereby minimising delays and allowing the creation, review, and revocation of guidelines to be more responsive to a changing sentencing landscape.
- 6.85 This marries with the perception of the Director of Public Prosecutions who submitted that the main issues with any amendments to the guideline judgment scheme are that they are 'more likely to be ignored than abused'.⁶⁰⁴
- 6.86 Increased consideration of delivering guideline judgments in Victoria may be encouraged by addressing other issues with the Victorian scheme, including expanding application procedures and reducing uncertainty around numerical guidance.

Enhancing the Victorian guideline judgment scheme

- 6.87 The Council considers that the current mechanisms for court-made guidance should be reformed, given the deficiencies in current sentencing practices highlighted by the Court of Appeal for some offences, and the fact that the court has not considered it appropriate to issue guideline judgments to rectify those deficiencies.
- 6.88 Ultimately, the success of this form of guidance will be reliant on the court embracing guideline judgments as common practice, and recognising the important role that guidance plays not just for the lower courts, but for the opportunity to promote consistency of approach and public confidence.
- 6.89 The efficacy of guideline judgments lies not in their ability to address novelties in the sentencing system (as in *Boulton*), but rather in the opportunity they provide to the court to progressively and systematically set down principled yardsticks to guide sentencing practice.
- 6.90 The Court of Appeal has only considered it appropriate for it to engage in this type of guidance once. Similarly, the Director of Public Prosecutions – as the only practical source

601. *Miller v The Queen* [2012] VSCA 265 (31 October 2012).

602. *Miller v The Queen* [2012] VSCA 265 (31 October 2012) [39].

603. *Harrison v The Queen* [2015] VSCA 349 (16 December 2015) [137]–[141].

604. Submission 14 (Director of Public Prosecutions).

of applications for guideline judgments – has not demonstrated an inclination towards putting the question of the appropriateness of a guideline judgment before the courts on a regular basis.

- 6.91 Given the above limitations of the current scheme, the Council has developed recommendations in relation to three areas of reform:
- allowing the Attorney-General to apply for a guideline judgment;
 - clarifying the procedures for submissions on a guideline judgment to facilitate data analysis and public engagement; and
 - providing the Court of Appeal with the express power to give guidance on appropriate sentence levels and ranges.

Application procedures

- 6.92 In comparison with other jurisdictions, Victoria has limited application procedures for guideline judgments. By placing responsibility for initiating guidelines on either the parties to an appeal or the court on its own motion in an appropriate appeal, there is limited scope to address systemic issues in a methodical way.
- 6.93 This limitation ties guidance to appropriate appeals that may only sporadically arise. It also places a responsibility on the court and institutional parties to invest time and resources into monitoring systematic issues. While the ability for parties to apply for guidance and the court to self-initiate guidelines remains appropriate, the mechanisms in other jurisdictions demonstrate that there is room to broaden application procedures to share and alleviate the burden of this responsibility.

Applications by the Attorney-General

- 6.94 Under section 37 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), the Attorney General of New South Wales can apply for a guideline judgment and, as part of that application, submit proposed guidelines. An application under this section cannot be made in proceedings before the court in respect to a particular offender, and the court may choose to deliver the guidelines separately or as part of another judgment. Applications by the Attorney General enable 'the court to redress any perceived inconsistency in sentencing principles, without the need to await for the arrival of a specific case'.⁶⁰⁵
- 6.95 The Attorney General appears as a party to the application hearing, and the Director of Public Prosecutions and the Senior Public Defender may intervene. The Attorney General is expected to make submissions on the proposed guidelines, and interveners can also make submissions as to whether they agree with those guidelines or prefer any that they have drafted themselves.
- 6.96 In general, the New South Wales Court of Appeal has set out four criteria to justify the giving of a guideline that parties have tended to shape their submissions around, including perceptions of prevalence, inconsistency in sentence quantification, sentence patterns that are either too harsh or too lenient, and general deterrence.⁶⁰⁶

605. New South Wales, 'Criminal Procedure Amendment (Sentencing Guidelines) Bill', *Parliamentary Debates*, Legislative Assembly, 28 October 1998, 9191 (Gabrielle Harrison, Minister for Sport and Recreation).

606. *Re Attorney-General's Application No 1 under s 26 of the Criminal Procedure Act (1999)* 48 NSLWR 327, 331; *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Content of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305, 319; *Re Attorney-General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 2 of 2002)* (2002) 137 A Crim R 196, 202.

- 6.97 The New South Wales Court of Criminal Appeal has only refused one application for a guideline judgment by the Attorney General.⁶⁰⁷ In refusing the application for a guideline judgment for the offence of assaulting a police officer, the Court of Criminal Appeal provided three main reasons for concluding that the Attorney General's proposed guidelines were not appropriate.
- 6.98 First, the guidelines recommended a custodial sentence as the most appropriate sentence for assault of a police officer without providing for the wide range of behaviour that can constitute assault, which has varying levels of seriousness. The court acknowledged that there is a 'high public purpose of the courts supporting the authority of the police' but held that 'the court should be very slow to adopt a guideline' in relation to an offence, 'the gravity of which can vary so greatly'.⁶⁰⁸
- 6.99 Second, after reviewing the cases, the court noted that the majority of offences were dealt with in the Magistrates' Court and that there was no evidence of sentence appeals. The court held that '[t]here has been no history of Crown appeals with respect to the offence in question', and that while some sentences could be viewed as objectively inadequate, 'there was nothing to suggest that such defects could not be cured by the normal appeal process'.⁶⁰⁹
- 6.100 The court considered that it should:
- be slow to come to a conclusion that there can be detected any systematic pattern of leniency in sentences by magistrates in a context where the Crown has not exercised its right to lodge appeals against the leniency of sentences at all.⁶¹⁰
- 6.101 Similarly, the court emphasised that there should be evidence of systematic issues to warrant a guideline judgment:
- Before this Court decides that guidance is appropriate it should be satisfied that the pattern of inadequacy extends beyond particular instances. The absence of appeals from magistrates suggests that inadequacy has not been regarded as systematic.⁶¹¹
- 6.102 Third, the court noted amendments to the *Crimes Act 1900* (NSW) that had been introduced since the application for the guideline judgment. These included codified aggravating and mitigating factors and the new standard non-parole periods, both of which applied to the offence in question and could lead to new sentencing patterns. The court preferred to 'allow the new legislative scheme to operate, and to acquire some experience with its effects, prior to determining a guideline with respect to this offence'.⁶¹²
- 6.103 Despite the refusal to give a formal guideline judgment, the court's judgment did set out some core principles in line with the proposed guidelines:
- The authority of the police, in the performance of their duties, must be supported by the courts. In cases involving assaults against police there is a need to give full weight to the objective of general deterrence and, accordingly, sentences at the high end of the scale, pertinent in the light of all the circumstances, are generally appropriate in such cases.⁶¹³

607. *Re Attorney-General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 2 of 2002)* (2002) 137 A Crim R 196.

608. *Re Attorney-General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 2 of 2002)* (2002) 137 A Crim R 196, 205.

609. *Re Attorney-General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 2 of 2002)* (2002) 137 A Crim R 196, 205–206.

610. *Re Attorney-General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 2 of 2002)* (2002) 137 A Crim R 196, 207.

611. *Re Attorney-General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 2 of 2002)* (2002) 137 A Crim R 196, 208.

612. *Re Attorney-General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 2 of 2002)* (2002) 137 A Crim R 196, 209.

613. *Re Attorney-General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 2 of 2002)* (2002) 137 A Crim R 196, 203.

- 6.104 In South Australia, guidelines may be established or reviewed on the initiative of the Full Court or on application by the Director of Public Prosecutions, the Attorney-General, or the Legal Services Commission. Those parties may all appear in any guideline judgment proceedings, in addition to the Commissioner for Victims' Rights, the Aboriginal Legal Rights Movement, and any other victims of crime group that has a 'proper interest in the proceedings'.⁶¹⁴
- 6.105 The South Australian Court of Criminal Appeal may give or review guidelines in an appeal against sentence, unless guidelines are being given or reviewed in response to an application from the Attorney-General, in which case they must be given in separate proceedings.⁶¹⁵
- 6.106 In Queensland, the Attorney-General, Director of Public Prosecutions, and Legal Aid Queensland may apply for a guideline judgment to be given or reviewed, and such applications can be outside of proceedings. In addition, a person may apply to the court for a review of a guideline judgment after he or she has been convicted, as part of the person's appeal, 'to the extent that it contains a guideline that is relevant in the circumstances'. These parties may all appear in relevant guideline proceedings and make submissions on the framing of any guidelines.⁶¹⁶
- 6.107 The Queensland provisions have not been relied on as yet. In 2011, the Attorney-General of Queensland lodged an appeal based on manifest inadequacy due to the courts not taking into account amendments to maximum penalties for assault offences, but 'expressly disclaimed any wish for a guideline judgment'.⁶¹⁷
- 6.108 The 2002 Victorian sentencing review recommended that the Attorney-General be able to make applications, and the Sentencing Advisory Council be able to make proposals for guideline judgments.⁶¹⁸

Reforming Victorian guideline judgment application procedures

- 6.109 As noted above, applications from the Director of Public Prosecutions and self-initiated guidelines from the Court of Appeal are currently underutilised. However, this is primarily due to the need to identify an appropriate 'vehicle' to attach a guideline judgment to, as well as broader timing, resourcing, and cultural issues.
- 6.110 Therefore, in order to address the issue that guideline judgments can only be delivered when the appropriate appeal 'vehicle' is found, there is support for reforms that enable guideline judgments to be delivered outside an appeal. Looking to other jurisdictions and the roles and resourcing of institutional parties, the most appropriate mechanism to reduce the ad hoc nature of guideline judgments would be to allow the Attorney-General to make applications for guideline judgments.

614. *Criminal Law (Sentencing) Act 1988* (SA) s 29B.

615. *Criminal Law (Sentencing) Act 1988* (SA) s 29C.

616. *Penalties and Sentences Act 1992* (Qld) pt 2A.

617. *R v Major; ex parte Attorney-General (Qld)* [2011] 1 Qd R 465, 489. The Attorney-General does not have this power to appeal a sentence in Victoria.

618. Freiberg (2002), above n 98, 215.

Applications by the Attorney-General

- 6.111 Attorney-General applications provide more opportunities for guideline judgments to become common practice for the court, and remove some pressure from the Director of Public Prosecutions and the court in pursuing this guidance. Extending the power to the Attorney-General could open up the dialogue in relation to guideline judgments in Victoria.
- 6.112 Such applications can lead to more comprehensive guidance and can be used to articulate responses to issues identified by the Attorney-General, even where a guideline is not considered appropriate. As demonstrated in New South Wales, if the court provides reasons for refusing an application, this can also serve to depoliticise the process and achieve some of the broader reasons behind a guideline judgment, such as public communication of sentencing practices, transparency, and clear articulation of principles.⁶¹⁹
- 6.113 The ability for the Attorney-General to make applications for guideline judgments was supported by a number of submissions that highlighted the benefit of broadening this responsibility to enable more issues for guidance to be brought before the court.⁶²⁰ The Director of Public Prosecutions stated that he considered 'that this is an appropriate mechanism for the executive arm to engage with and influence the development of sentencing standards', and this would 'permit the Attorney-General to step forward, in the courts, as a "custodian of sentencing standards"'.⁶²¹
- 6.114 Importantly, some submissions cautioned against over-politicising guideline judgment processes through Attorney-General applications. Victoria Legal Aid noted that '[s]uch a facility may alleviate the current difficulty of waiting for an appeal before the Court to initiate the guideline judgment process', but warned that 'appropriate safeguards are required to ensure the appropriate separation and independence of judicial and executive functions'.⁶²²
- 6.115 While noting that it supported reforms to guideline judgment mechanisms that enhance the promotion of public confidence and consistency, the Law Institute of Victoria warned in its submission that:
- If the Attorney-General were able to apply for a guideline judgment separate to proceedings before a court, political issues of the day could influence unnecessary changes to whole areas of criminal law practice and procedure.⁶²³
- 6.116 In addition, the Law Institute of Victoria questioned whether the Attorney-General is better placed to identify the need for a guideline judgment than those exposed to sentencing on a daily basis, and indicated that there could be potential separation-of-powers issues if the Attorney-General exercised too much influence over judicial processes. The Law Institute of Victoria preferred reforms that enabled the Court of Appeal to initiate guideline judgment processes without an appeal.⁶²⁴
- 6.117 In regard to Court of Appeal guidelines outside an appeal, Victoria Legal Aid considered that the current approach was more consistent with the court's traditional role, although it conceded that there may be 'some merit in providing greater flexibility to the Court of Appeal to initiate a guideline absent an appeal with input from institutional stakeholders, or

619. *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 2 of 2002* (2002) 137 A Crim R 196.

620. See Submission 8 (M. Wootten); Submission 13 (Victoria Legal Aid); Submission 14 (Director of Public Prosecutions).

621. Submission 14 (Director of Public Prosecutions).

622. Submission 13 (Victoria Legal Aid).

623. Submission 11 (Law Institute of Victoria).

624. Submission 11 (Law Institute of Victoria).

to separate consideration of a guideline from an appeal before the Court'.⁶²⁵ The Director of Public Prosecutions submitted that a 'reform that permitted the Court to formally create its own "matter" without the benefit of an application or supporting vehicle must press too closely on the limits of judicial function'.⁶²⁶

Decision to make an application

- 6.118 In recommending that the Attorney-General should have the power to apply for guideline judgments, the Council is conscious of concerns about politicising the giving of guidance by the courts. However, the experience of other jurisdictions with similar mechanisms indicates that this power is used sparingly. The Council is of the view that such applications would be appropriate where the Attorney-General considers that there is a systemic sentencing issue and that an application would be in the public interest. This balance hopes to encourage applications by the Attorney-General where guidance is needed, but also limit public pressure for applications on populist sentencing issues.
- 6.119 In this way, the purpose of guideline judgments is reiterated. Guideline judgments should not be sought in respect of individual or notorious cases – consistency of approach remains at the forefront of guidance. It is envisaged that the application power would be used selectively by the government, including where systemic sentencing issues have been identified by the court, but an appropriate 'vehicle' has not arisen to commence guideline judgment proceedings. For example, it may be considered appropriate for the Attorney-General to seek guidance on issues more common in the summary jurisdiction, from which an application attached to an appeal before the Court of Appeal is unlikely, including guidance on sentencing for family violence offences.⁶²⁷
- 6.120 The decision to make an application would not be reviewable by the court. Instead, the court would consider the merits of the application in the same way it considers other party applications, having regard to the need to promote 'consistency of approach in sentencing offenders' and 'public confidence in the criminal justice system'.⁶²⁸ Evidence of systemic sentencing issues would support these purposes.
- 6.121 The Attorney-General's power would be confined to the making of an application. The court would not be required to give a guideline judgment. Nonetheless, an application would commence guideline judgment proceedings, and the court would be required to give reasons for any decision not to give a guideline judgment. This means that, unlike applications from the parties to an appeal, an application by the Attorney-General would create a matter with an associated judgment, even if the court decides not to give a guideline judgment.

Role of the Attorney-General in guideline judgment proceedings

- 6.122 Guideline judgment proceedings commenced on an Attorney-General application would be separate from appeal proceedings. The Council also recommends that this separation extend to the giving of the guideline judgment when it has been commenced by an Attorney-General application, as opposed to the situation in New South Wales where the delivery of the guideline judgment can be attached to other proceedings.

625. Submission 13 (Victoria Legal Aid).

626. Submission 14 (Director of Public Prosecutions).

627. See Victoria, Royal Commission into Family Violence (2016), above n 357, vol. III, 233.

628. *Sentencing Act 1991* (Vic) s 6AE.

- 6.123 Upon application, the Attorney-General would be a party to guideline judgment proceedings in the same way as other applicants for a guideline judgment. The Attorney-General could appear before the court and make submissions on any proposed guidelines, including their form.
- 6.124 In conjunction with the Council's recommendation to clarify submission procedures (Recommendation 5), an application by the Attorney-General for a guideline judgment would enliven the notification procedures associated with the court considering an application for a guideline judgment. Therefore, when considering the Attorney-General's application, the Court of Appeal would request the views of the Council; the Director of Public Prosecutions and Victoria Legal Aid would also be given the opportunity to appear before the court and make submissions.
- 6.125 The Council does not see a need to reform any of the other application procedures. The Attorney-General should not be explicitly provided for as an intervener in other guideline judgment proceedings. The guideline judgment provisions do not abrogate any of the court's inherent powers, and the court may make decisions on interveners and necessary evidence as appropriate in each case.

Recommendation 4: Attorney-General may apply for a guideline judgment

Part 2AA of the *Sentencing Act 1991* (Vic) should be amended to add provisions that allow the Attorney-General to apply for a guideline judgment, absent an appeal.

The procedure for an application by the Attorney-General should mirror, as far as is practicable, the existing provisions, and should provide for the following features:

- The Attorney-General may apply to the Court of Appeal for a guideline judgment if he or she considers that such an application is:
 - required in order to address a systemic issue; and
 - in the public interest.
- An application for a guideline judgment by the Attorney-General is not to be made in any proceedings before the Court of Appeal with respect to a particular offender.
- An application for a guideline judgment by the Attorney-General would enliven the existing provisions that require the Court of Appeal to notify and seek the views of the Sentencing Advisory Council and allow the Director of Public Prosecutions and Victoria Legal Aid to appear and make submissions.
- The Attorney-General may make submissions that include proposals on the form of guidelines.
- The Court of Appeal must consider an application for a guideline judgment by the Attorney-General and provide reasons if it declines the application.
- A guideline judgment delivered by the Court of Appeal in response to an application for a guideline judgment by the Attorney-General must be given separately from any proceedings before the court with respect to a particular offender.

Reforms to procedure for submissions on a guideline judgment

- 6.126 There are procedural requirements for giving or reviewing guideline judgments in Victoria. The Court of Appeal may consider whether to give a guideline judgment when hearing and considering an appeal against sentence, either on its own initiative or on an application by one of the parties to the appeal.⁶²⁹ It may also review and confirm, vary, revoke, or substitute guideline judgments in the same manner. The guideline judgment can be either part of the judgment in an appeal or delivered separately. The court therefore retains the discretion as to whether to give or review a guideline judgment. The major threshold for the delivery of a guideline judgment is that a decision to do so must be reached unanimously by all judges constituting the court.
- 6.127 Once the court decides to give a guideline judgment, it must notify the Council and consider any views submitted in writing by the Council.⁶³⁰ It must also give the Director of Public Prosecutions and Victoria Legal Aid the opportunity to appear before the court to make submissions. The court must have regard to those views and submissions as well as to 'the need to promote consistency of approach in sentencing offenders' and 'the need to promote public confidence in the criminal justice system'.⁶³¹

Timing of submissions

- 6.128 During the guideline judgment application process in *Boulton*, it became clear that the current provisions relating to the timing of submissions do not reflect the court's preferred procedure. Quite properly, the court sought the Council's views and submissions from the Director of Public Prosecutions and Victoria Legal Aid in relation to the court's consideration of whether to give a guideline judgment.
- 6.129 A strict interpretation of the procedural requirements of section 6AD of the *Sentencing Act 1991* (Vic) suggests that the court should seek the views of the Council and submissions from the parties only *after* it has decided to give or review a guideline judgment.
- 6.130 In practice, the court's decision to give a guideline judgment occurred at the same time as it delivered its judgment, and submissions were required before this. Victoria Legal Aid's submission supported clarifying the procedure to expressly allow for submissions to be made while the court is *considering* whether to give a guideline judgment.⁶³²
- 6.131 The Council recommends that the language in this section be amended to reflect the court's preferred procedure. This would require amending section 6AD of the *Sentencing Act 1991* (Vic) to provide that the provisions apply when the court *is considering* whether to give a guideline judgment, rather than when it has decided to give a guideline judgment.
- 6.132 In accordance with similar provisions in other jurisdictions, the Council believes that the parties to the proceedings should be able to make submissions on the proposed form of guidelines. As discussed, this should also include submissions from the Attorney-General in guideline judgment proceedings commenced by an application by the Attorney-General.

629. *Sentencing Act 1991* (Vic) s 6AB.

630. *Sentencing Act 1991* (Vic) s 6AD.

631. *Sentencing Act 1991* (Vic) s 6AE.

632. Submission 13 (Victoria Legal Aid).

Sufficient time for data analysis and public consultation

- 6.133 One of the Council's functions is to 'consult on sentencing matters, with government departments and other interested persons and bodies as well as the general public'.⁶³³ Consultation is integral to all of the Council's work, and critical to both its interpretation of statistical data analysis and its development of evidence-based policy advice.
- 6.134 While the Council supports the current range of submissions and views provided for in section 6AD of the *Sentencing Act 1991* (Vic), it considers that the court, in seeking the Council's views, should allow sufficient time for the necessary data analysis and consultation to take place.
- 6.135 At the Council's Sentencing Guidance Stakeholder Discussion Forum, some participants cautioned against codifying a requirement that may delay and therefore dissuade the court from providing a guideline judgment, while others noted that it was important to allow the Council the time necessary for consultation. One participant stated that 'six months to a year, when you're talking about guidance for the court on incest cases for the next ten years, is not an unreasonable amount of time'.⁶³⁴
- 6.136 Further, any structured public consultation undertaken by the Council in preparing its views is likely to further public confidence in the criminal justice system.
- 6.137 The Council believes that incorporating this consideration to allow sufficient time into the notification provisions of section 6AD may also emphasise the importance of such information in guideline judgment proceedings and allow for its proper preparation.

Recommendation 5: Clarify procedure for submissions on a guideline judgment

Section 6AD of the *Sentencing Act 1991* (Vic) should be amended to clarify that the Court of Appeal must, when it is *considering* whether to give or review, or has decided to give or review, a guideline judgment (including an application for a guideline judgment from the Attorney-General):

- notify the Sentencing Advisory Council and consider its views stated in writing; and
- allow the Director of Public Prosecutions and Victoria Legal Aid an opportunity to appear and make submissions.

Such views and submissions may include proposals on the form of guidelines.

In specifying the period within which the Sentencing Advisory Council may state its views in writing, the Court of Appeal should allow such time as is reasonably required for the Council to undertake:

- research and statistical analysis; and
- consultation with stakeholders within the criminal justice system as well as the general public.

633. *Sentencing Act 1991* (Vic) s 108C(e).

634. Sentencing Guidance Stakeholder Discussion Forum (1 March 2016).

Numerical guidance

- 6.138 Currently, guideline judgments given by the Court of Appeal may include guidance on the following:
- sentencing criteria to assist in selecting various sentencing alternatives;
 - the weight that specific sentencing purposes should have in sentences;
 - criteria for the determination of the gravity of an offence;
 - criteria that may reduce sentences for an offence;
 - the weight to be given to relevant criteria;
 - sentencing for baseline offences; and
 - any other matter consistent with the principles of the *Sentencing Act 1991* (Vic).⁶³⁵
- 6.139 In addition, factors that the court must have regard to when making a guideline judgment include the need to promote consistency of approach and to promote public confidence in the criminal justice system.⁶³⁶
- 6.140 The express power to give guidance on levels and ranges was the only provision not included in the legislation from the list of guideline judgment content provisions recommended in *Pathways to Justice: Sentencing Review 2002*.⁶³⁷
- 6.141 Recent comments by the President of the Court of Appeal seem to confirm that the court does not consider that it can use a guideline judgment to give numerical guidance.
- 6.142 The President has stated:
- It's certainly our provisional view that the guideline provisions don't authorise a *Hogarth* or *Harrison*-type exercise. The provisions seem to steer well away from authorising the Court to say anything about sentencing numbers. So it's not obviously a fit with the question that we've raised and which you evidently support.⁶³⁸
- 6.143 Coupled with uncertainty around numerical guidance generated by High Court commentary around guideline judgments in New South Wales, Victoria is in the curious position that 'denies the guideline judgment a tool that standard appellate judgments are permitted to apply'.⁶³⁹

Numerical guidance and the High Court

- 6.144 There has been uncertainty surrounding the status of guideline judgments since the High Court's decision in *Wong*, which overruled a guideline judgment on Commonwealth drug importation offences promulgated by the New South Wales Court of Criminal Appeal in 1999.⁶⁴⁰
- 6.145 The majority of the High Court held that the sentencing guidelines were invalid because they were inconsistent with the Commonwealth legislation that required the sentencing judge to take into account all of the circumstances, rather than only the quantity of narcotics as set out in the guidelines.⁶⁴¹ Further, the sub-classification of offences based on the quantity of

635. *Sentencing Act 1991* (Vic) s 6AC.

636. *Sentencing Act 1991* (Vic) s 6AE.

637. Freiberg (2002), above n 98, 216; cf. *Sentencing Act 1991* (Vic) s 6AC.

638. Transcript of mention hearing, *Director of Public Prosecutions v Dalgliesh (A Pseudonym)* S APCR 2015 0190 (4 February 2016).

639. Submission 14 (Director of Public Prosecutions).

640. See *R v Wong* (1999) 48 NSWLR 340, overruled by *Wong v The Queen* (2001) 207 CLR 584.

641. *Wong v The Queen* (2001) 207 CLR 584, 597 (Gleeson CJ), 609–611 (Gaudron, Gummow and Hayne JJ).

narcotics, as set out in the guidelines, was inconsistent with the Commonwealth legislation, and was possibly of a legislative, rather than judicial, nature.⁶⁴² This reasoning did not invalidate other guideline judgments for state offences.

- 6.146 Significantly, the court was divided on the validity of numerical guidelines. Gaudron, Gummow, and Hayne JJ were particularly critical of numerical guidelines in their joint decision, asserting that they contravened the common law principles of proportionality, intuitive synthesis, and individualised justice.⁶⁴³ There was, however, some support for qualitative guidelines that act as a 'sounding board' against the exercise of discretion⁶⁴⁴ or that set out broad sentencing standards, rather than numerical ranges.⁶⁴⁵
- 6.147 The High Court's aversion to measures aimed at improving consistency has continued to be articulated since *Wong*. It has been noted that:
- since *Markarian*, the High Court has become more forceful in its view that measures seeking to operationalise consistency constitute an unreasonable fetter on the sentencing discretion and that the fairness of sentencing outcomes is in a direct relationship with the amount of discretion accorded to individualised sentences.⁶⁴⁶
- 6.148 The New South Wales Court of Criminal Appeal responded to the High Court's criticism of guideline judgments in *R v Whyte*⁶⁴⁷ ('Whyte'). After *Wong*, the New South Wales Parliament enacted legislation giving retrospective authority to the court to deliver guideline judgments and incorporate them as a factor that sentencing judges should take into account, thereby nullifying the majority of jurisdictional concerns that the High Court held.⁶⁴⁸ However, it is worth noting that no express jurisdiction to deliver numerical guidance was included in these legislative reforms.
- 6.149 *Whyte* is a court-initiated guideline judgment, involving the revision of its first guideline in *Jurisc* (on dangerous driving). In choosing to restate the guideline, Spigelman CJ noted that 'the numerical guideline contained in *Jurisc* has proven to be significant in ensuring both the adequacy of sentences and consistency in sentencing'.⁶⁴⁹ However, the court considered it appropriate to restate some of the principles set out in *Jurisc* so that it was clear that they should act only as an 'indicator' and to provide more detail on the typical case to which the numerical guideline would apply.⁶⁵⁰
- 6.150 Specifically in response to *Wong*, Spigelman CJ held that 'the Court of Criminal Appeal may give a numerical guideline where the judgment indicates with sufficient detail the kind of case for which that guideline is considered appropriate'.⁶⁵¹ His honour went on to highlight the importance of numerical guidance:

numerical guideline judgments have a role to play in achieving the ultimate goal of equality of justice in circumstances where, as a matter of practical reality, there is tension between the principle of individualised justice and the principle of consistency.⁶⁵²

642. *Wong v The Queen* (2001) 207 CLR 584, 614–615 (Gaudron, Gummow, and Hayne JJ).

643. *Wong v The Queen* (2001) 207 CLR 584, 611, 612–13 (Gaudron, Gummow, and Hayne JJ).

644. *Wong v The Queen* (2001) 207 CLR 584, 635 (Kirby JJ).

645. *Wong v The Queen* (2001) 207 CLR 584, 606 (Gaudron, Gummow, and Hayne JJ).

646. Krasnostein (2015), above n 518, 47.

647. *R v Whyte* (2002) 55 NSWLR 252.

648. See *Criminal Legislation Amendment Act 2001* (NSW).

649. *R v Whyte* (2002) 55 NSWLR 252, 275.

650. *R v Whyte* (2002) 55 NSWLR 252, 283.

651. *R v Whyte* (2002) 55 NSWLR 252, 284.

652. *R v Whyte* (2002) 55 NSWLR 252, 275–276.

- 6.151 Spigelman CJ considered that numerical guidance could be compatible with individualised justice if such guidelines are merely a factor to be taken into account when sentencing, and if a sentencing decision is reached as a final balancing exercise or instinctive synthesis.⁶⁵³
- 6.152 In regard to consistency, Spigelman CJ noted the High Court's concerns about 'impermissibly prescriptive' guidelines and suggested that '[i]t is the very concreteness of a numerical guideline, which may create tension with the principle of individualised justice, that can, as a matter of practical reality, help to avoid impermissible inconsistency'.⁶⁵⁴ Further, consistency would be more communicable to the public, and capable of fostering public confidence in the criminal justice system, if the process of reasoning was clarified through the use of a starting point or range set out in a guideline judgment.⁶⁵⁵
- 6.153 Nonetheless, the New South Wales Court of Criminal Appeal has only issued two guideline judgments since *Whyte*, and both of these were on application from the Attorney General.

Reforms to the content of a guideline judgment

- 6.154 Current restrictions on the content of guideline judgments should be removed so as to allow the court the freedom to give effective guidance on current sentencing practices and appropriate sentences.
- 6.155 The Director of Public Prosecutions submitted that the inability for the court to provide guidance on range 'inhibits the provision to both judges, and the community of simple, clear guidance about sentencing standards'. He further stated that if this situation is preserved, it 'is likely to also preserve the laborious and often unrevealing study of sentencing statistics and decided cases'.⁶⁵⁶
- 6.156 The Director of Public Prosecutions stated that he cautiously supported providing the court with the ability to give guidance on sentencing range and that 'this power would assist the Court of Appeal to break the impasses that must inevitably develop while current sentencing practices continue to influence (or govern) sentencing'.⁶⁵⁷
- 6.157 Victoria Legal Aid noted that any amendments in this area should avoid staged sentencing and prescribing specific sentence outcomes. It was of the view that:
- There may be merit in the Court of Appeal giving guidance on sentencing ranges (in respect of low, medium and high levels of objective offence seriousness, rather than being numerical or 'tariff orientated') and listing a non-exhaustive series of factors that may aggravate or mitigate sentence.⁶⁵⁸
- 6.158 In particular, Victoria Legal Aid suggested that ranges provided in guideline judgments should be a factor to steer by in the same way that the maximum penalty currently operates.⁶⁵⁹

653. *R v Whyte* (2002) 55 NSWLR 252, 278.

654. *R v Whyte* (2002) 55 NSWLR 252, 282.

655. *R v Whyte* (2002) 55 NSWLR 252, 282.

656. Submission 14 (Director of Public Prosecutions).

657. Submission 14 (Director of Public Prosecutions).

658. Submission 13 (Victoria Legal Aid) (citations omitted).

659. Submission 13 (Victoria Legal Aid).

Guidance on sentence levels and range

- 6.159 The decision to give a guideline judgment should be simplified by removing any uncertainty about guideline judgments that may remain from the High Court's judgment in *Wong*. As such, the express power to provide advice on appropriate sentence levels and range should be inserted into the current list of factors the court can give guidance on in section 6AC of the *Sentencing Act 1991* (Vic), with the legislative exclusion of the common law in this area.
- 6.160 The ability to provide advice on the appropriate level or range of sentences for a particular offence or class of offence will also enable the court to provide guidance on the adequacy of current sentencing practices and the manner in which they are taken into account. This could address potential inadequacies for offences and categories of offences within an offence hierarchy.
- 6.161 This guidance would have the same status as other guideline judgments and serve to contextualise appropriate sentences for offences with particular characteristics. Numerical guidance would not be binding or constitute an expected outcome, but rather provide an indication of appropriate sentence levels in certain and clearly identified circumstances, to be taken into account alongside all other factors in the instinctive synthesis process.
- 6.162 Guidance of this nature is permissible under common law, as interpreted by the New South Wales Court of Criminal Appeal in *Whyte*.⁶⁶⁰ However, to remove any uncertainty, the parliament should also express its intention to abolish any common law to the contrary in the legislation.

Recommendation 6: Guideline judgment may contain guidelines on sentencing level or range

Part 2AA of the *Sentencing Act 1991* (Vic) should be amended to provide that a guideline judgment may set out the appropriate level or range of sentences for a particular offence or class of offence and that it is the intention of Parliament to abolish any rule of the common law to the contrary.

660. *R v Whyte* (2002) 55 NSWLR 252, 284.

Limitations of the guideline judgment scheme

- 6.163 Regardless of which reforms are introduced, as with any scheme, there are limitations to a guideline judgment scheme, including:
- guideline judgments require significant resourcing and a judiciary that is willing to take a methodical approach towards disparity reduction;⁶⁶¹
 - guideline judgments are, by nature, delivered on an ad hoc basis to address identified issues, and cannot comprehensively 'cover the field';
 - appropriate consultation may take time, and the development or review of guidance may be necessarily delayed; and
 - the adoption of guideline judgments as a means of providing sentencing guidance is contingent on the approach taken by the court and whether the court considers the scheme worthwhile.
- 6.164 In addition, as a function of the Court of Appeal, guideline judgments are likely to remain focused more on serious offending that reaches the appeal stage and less on the summary jurisdiction. Unless applications from the Attorney-General specifically seek guidance on issues of relevance to the Magistrates' Court, guideline judgments may continue to be of limited utility to the sentencing of the majority of offences.
- 6.165 The experience of other jurisdictions suggests that, while there is scope to reform the Victorian mechanisms, without clear evidence of sentencing inconsistencies and support for addressing those inconsistencies through guideline judgments, the uptake of any enhanced provisions may be limited.

661. Krasnostein (2015), above n 518, 53.

Chapter 7:

A Victorian standard sentence scheme



Overview

- 7.1 The terms of reference specifically ask the Council for advice on:
- the type of sentencing guidance that should feature in a new sentencing scheme;
 - which offences should be subject to such a scheme; and
 - the levels at which sentencing guidance should be set for such offences.
- 7.2 This chapter examines sentencing guidance schemes that take the form of a legislated guidepost in operation in other Australian jurisdictions. The chapter contains contingent recommendations for a new standard sentence scheme in Victoria.
- 7.3 While a legislated guidepost is not its preferred model of sentencing guidance, the Council has developed recommendations in relation to:
- the model for a standard sentence that operates as a guide to objective offence seriousness;
 - the criteria to assess whether an offence is one that would benefit from sentencing guidance in the form of a standard sentence; and
 - the methodology for prescribing the level of the standard sentence.
- 7.4 The Council has also applied its recommended methodology to offences that it identifies as having sentencing problems and considers suitable for a standard sentence.
- 7.5 The Council recommends that if a legislated guidepost is to be introduced, it should be in the form of a standard sentence scheme and should be accompanied by the enhanced guideline judgment scheme recommended by the Council in Chapter 6.

Standard sentence schemes in other Australian jurisdictions

Standard non-parole period schemes

- 7.6 Standard non-parole period schemes establish a 'legislated non-parole period intended to provide guidance to the courts on the minimum length of time an offender found guilty of an offence should spend in prison before being eligible to apply for release on parole'.⁶⁶² The 'standard' or 'presumptive' non-parole period applies to custodial sentences (where a non-parole period is fixed) and does not apply to non-custodial sentences.
- 7.7 Standard non-parole period schemes operate in New South Wales, South Australia, Queensland, and the Northern Territory. In New South Wales, the standard non-parole period is a defined term scheme, that is, a prescribed level represents the standard non-parole period for an offence in the middle of the range of objective seriousness. In South Australia, the standard non-parole period is a defined percentage scheme, whereby for cases involving particular offences, the court must impose a non-parole period that is a minimum defined proportion of the total effective sentence (head sentence).
- 7.8 In the Northern Territory and Queensland, there are both defined term and defined percentage standard non-parole period schemes that apply to different offences.

662. Sentencing Advisory Council (Queensland), *Minimum Standard Non-Parole Periods: Final Report* (2011) xiv.

The standard non-parole period scheme in New South Wales

- 7.9 A defined term standard non-parole period scheme operates in New South Wales. The scheme applies to the sentencing of 33 serious offences; for some offences, there are multiple standard non-parole periods depending on the circumstances in which the offence was committed.⁶⁶³ The offences included in the scheme carry maximum penalties ranging from 7 years' imprisonment to life imprisonment, and the standard non-parole periods range from 3 years to 25 years.⁶⁶⁴
- 7.10 The standard non-parole period represents:
- the non-parole period for [a prescribed offence] that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness.⁶⁶⁵
- 7.11 There has been considerable debate in New South Wales as to what constitutes an 'objective' factor, as opposed to a factor personal to the offender.⁶⁶⁶ For example, premeditation or pre-planning an offence could be considered an aspect of the offending, or an aspect personal to the offender, as could provocation.⁶⁶⁷
- 7.12 There has been some judicial guidance around whether particular factors may be considered in assessing the objective seriousness of the offence, but there has not been a clear resolution on which factors can be considered in determining the objective seriousness of the offence.⁶⁶⁸ A Justice of the New South Wales Court of Criminal Appeal has observed that the judgment of the High Court in *Muldrock v The Queen* ('*Muldrock*')⁶⁶⁹ has 'left somewhat opaque the meaning of the term "*objective seriousness*"'.⁶⁷⁰

New South Wales sentencing process

- 7.13 In New South Wales, a court sentences a charge of an offence by imposing a non-parole period and then a sentence on each charge of an offence (described as a 'bottom up' process), before considering cumulation and concurrency (or imposing an aggregate sentence) in order to arrive at a total effective sentence and a non-parole period for the case as a whole. The non-parole period for either a single sentence or an aggregate sentence must not fall below three-quarters of the term of the sentence unless there is a finding of 'special circumstances'.⁶⁷¹

Compatibility with intuitive synthesis

- 7.14 The New South Wales Court of Criminal Appeal initially determined that, when sentencing for a standard non-parole period offence, a court was to determine whether the offence was in the middle of the range of objective seriousness and then, if the offence was in the middle of the range, the court was to consider the reasons for not imposing the standard non-parole period.⁶⁷²

663. For example, murder; where the victim was a child under 18 years of age, or where the victim was of a prescribed class (including police officers) carries a standard non-parole period of 25 years compared to 20 years in other circumstances: *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A.

664. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A.

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

666. Judicial Commission of New South Wales, '[7-910] What is the Standard Non-Parole Period?', *Sentencing Bench Book* (Judicial Commission of New South Wales, 2016); The Honourable Justice R. A. Hulme, 'Significant Criminal Appellate Decisions in 2013' (2013) 25(11) *Judicial Officers' Bulletin* 89, 89.

667. Judicial Commission of New South Wales (2016), above n 666; *Stewart v The Queen* [2012] NSWCCA 183 (29 August 2012) [38]; *Williams v The Queen* [2012] NSWCCA 172 (16 August 2012) [42].

668. See discussion in New South Wales Law Reform Commission, *Sentencing: Report 139* (2013) 179–180.

669. *Muldrock v The Queen* (2011) 244 CLR 120.

670. *R v Murrell* [2012] NSWCCA 90 (9 May 2012) [36], quoting *Zreika v The Queen* (2012) 223 A Crim R 460, 473.

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

672. *R v Way* (2004) 60 NSWLR 168.

- 7.15 In *Muldrock* the High Court held that this approach was incorrect. The way in which the New South Wales Court of Criminal Appeal had applied a standard non-parole period was held to be inconsistent with the 'instinctive' or 'intuitive' synthesis approach to sentencing (see [2.29]–[2.37]), whereby the sentencing judge weighs all the factors and arrives at one final sentence. This is in contrast to an approach (described as a 'two-stage' approach⁶⁷³) whereby the judge quantifies the individual factors leading to a final determination.
- 7.16 Consistent with instinctive synthesis, the High Court held that a court in New South Wales is not required to explain the extent to which the seriousness of the case before it differs from a hypothetical offence in the middle of the range of seriousness represented by the standard non-parole period. Instead, a court must have regard to the standard non-parole period in the same way it has regard to the maximum penalty: as a 'guidepost' or 'yardstick' to sentencing, and not a starting point.⁶⁷⁴
- 7.17 The New South Wales sentencing legislation was subsequently amended following *Muldrock*, and now provides that:
- The standard non-parole period for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender; without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender.⁶⁷⁵

The defined term standard non-parole period scheme in the Northern Territory

- 7.18 There are two different forms of standard non-parole period schemes in operation in the Northern Territory: one is a defined percentage non-parole period scheme for certain sexual offences and certain offences committed against children under the age of 16, and one is a defined term minimum non-parole period scheme for murder.⁶⁷⁶
- 7.19 With regard to the defined non-parole periods for murder, the court must set a non-parole period of at least 20 years, or 25 years in certain circumstances.⁶⁷⁷

The defined percentage standard non-parole period scheme in the Northern Territory

- 7.20 In the Northern Territory, a defined percentage non-parole period scheme applies to the sentencing of sexual offences involving sexual intercourse without consent under section 192(3) of the *Criminal Code Act* (NT)⁶⁷⁸ and certain offences committed by adult offenders against children under the age of 16, including sexual offences and offences involving physical harm.⁶⁷⁹ If the court sentences an offender to a term of imprisonment for a specified offence and does not wholly or partially suspend the sentence, the court is required to set a non-parole period of not less than 70% of the head sentence.⁶⁸⁰

673. *Muldrock v The Queen* (2011) 244 CLR 120, 132.

674. *Muldrock v The Queen* (2011) 244 CLR 120, 132.

675. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(2).

676. *Sentencing Act 1995* (NT) ss 53A, 55, 55A.

677. *Sentencing Act 1995* (NT) s 53A.

678. *Sentencing Act 1995* (NT) s 55.

679. *Sentencing Act 1995* (NT) s 55A.

680. *Sentencing Act 1995* (NT) ss 55–55A. All other sentences for imprisonment longer than 12 months attract a minimum non-parole period of 50% of the term of imprisonment: *Sentencing Act 1995* (NT) s 54.

- 7.21 The court can depart from this requirement if it considers that the nature of the offence, the past history of the offender, or the circumstances of the particular case makes the fixing of such a non-parole period inappropriate.⁶⁸¹

The defined percentage standard non-parole period scheme in South Australia

- 7.22 In South Australia, if an offender is sentenced for a fatal offence or an offence where the victim suffers total and permanent physical or mental incapacity, the court is required to fix a minimum non-parole period. That period is 20 years for an offender sentenced to life imprisonment for murder and 80% (or four-fifths) of the term of imprisonment for any other major indictable offence.⁶⁸²
- 7.23 The court may impose a non-parole period shorter than the minimum non-parole period after having regard to the following 'special circumstances':
- the victim's conduct or condition substantially mitigating the offender's conduct;
 - the offender's plea of guilty and the fact and circumstances surrounding the plea; and
 - the offender's degree of cooperation in the investigation or prosecution.⁶⁸³

Recommended scheme in Queensland

- 7.24 In Queensland, there are defined term and defined percentage non-parole period schemes in operation for various offences. For example, where an offender is sentenced for multiple convictions of murder or has a prior conviction for murder, he or she is subject to a minimum non-parole period of 30 years, unless exceptional circumstances apply.⁶⁸⁴
- 7.25 In 2011, the Queensland Sentencing Advisory Council's *Minimum Standard Non-Parole Periods* report recommended that a defined percentage standard non-parole period scheme, rather than a defined term standard non-parole period scheme, should be introduced in Queensland.
- 7.26 This recommendation was made on the basis that it would:
- deliver a number of the intended outcomes of a defined term scheme, including the minimum term an offender must spend in prison for a given offence, while preserving the current approach to sentencing in Queensland. It would also largely avoid many of the problems that have arisen in NSW, including the additional complexity such a scheme has introduced to sentencing in that State, increasing the risks of sentencing errors and appeals, and the need for detailed and broad grounds for departure, which compromise the ability of the scheme to operate as a 'standard' non-parole period scheme.⁶⁸⁵
- 7.27 This recommendation has not yet been implemented.

681. *Sentencing Act 1995* (NT) ss 55(2), 55A(2).

682. *Criminal Law (Sentencing) Act 1988* (SA) ss 32(5)(ab), 32(5)(ba).

683. *Criminal Law (Sentencing) Act 1988* (SA) ss 32A(2)(b), 32A(3).

684. *Criminal Code 1899* (Qld) s 305. Other offences also subject to defined percentage and defined term schemes include the following: murder and serious child sexual offences attract a minimum defined term non-parole period of 20 years, and all other life terms attract a minimum defined term non-parole period of 15 years (*Corrective Services Act 2006* (Qld) ss 181, 181A); serious violent offenders are eligible for parole only after serving the lesser of 80% of the term of imprisonment or 15 years (*Corrective Services Act 2006* (Qld) s 182); drug trafficking offences and unlawful striking causing death are only eligible for parole after serving the lesser of 80% of the term of imprisonment or 15 years (*Corrective Services Act 2006* (Qld) s 182A); all other offenders (depending on date of commission of offence) are not eligible for parole prior to serving 50% of the term of imprisonment (*Corrective Services Act 2006* (Qld) s 184).

685. Sentencing Advisory Council (Queensland) (2011), above n 662, xvi.

Purposes of a standard sentence scheme

- 7.28 The Council considered the purposes, benefits, and disadvantages of a standard sentence scheme that would take the form of a legislated guidepost in addition to the maximum penalty. The Council has also considered whether any of the offences with sentencing problems discussed in Chapter 5 would benefit from such a guidepost, where it has been identified that the maximum penalty is not providing adequate guidance to sentencing courts.⁶⁸⁶
- 7.29 In New South Wales, the standard non-parole period scheme represents the non-parole period for an offence that, taking into account 'only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness'.⁶⁸⁷ This guidepost operates within the wider sentencing framework in New South Wales, and the sentencing court is still obliged to take into account all of the relevant factors in determining an appropriate sentence.⁶⁸⁸
- 7.30 A similar guidepost in Victoria could potentially address what has been submitted by some stakeholders as the undue emphasis in sentencing on current sentencing practices without similar regard to the maximum penalty, such that current sentencing practices are said to create a 'ceiling' or upper limit, limiting the range within which the court can sentence (see [3.40]–[3.54]).
- 7.31 Where there is a divergence between the maximum penalty and current sentencing practices, an additional legislated level, indicating parliament's view on the appropriate sentence for an offence in the middle of the range of objective offence seriousness, may be of greater utility as a guidepost than the maximum penalty. A court is far more likely to sentence cases that fall near the middle of the range of objective offence seriousness than cases that represent the worst possible offending by the worst offender, as represented by the maximum penalty.⁶⁸⁹

Stakeholders' views

- 7.32 While the majority of stakeholders did not support a standard sentence scheme, some stakeholders submitted that, if the government is minded to introduce such a scheme, a model based on the 'mid-range' of objective seriousness could be workable.⁶⁹⁰
- 7.33 Stakeholders who provided qualified support for a standard sentence scheme noted that a model based on the New South Wales legislation was preferable, given that it has 'withstood challenge', and there would be some guidance provided by the jurisprudence that has developed since the introduction of the New South Wales standard non-parole period scheme.⁶⁹¹
- 7.34 Several stakeholders emphasised the fact that any proposed standard sentence scheme should operate as a further 'guidepost' in the instinctive synthesis process, and should not involve two-staged sentencing.⁶⁹²
- 7.35 It was considered that a Victorian standard sentence scheme should apply to the sentence on a charge, and not to the non-parole period,⁶⁹³ and it should be limited in application to a narrow range of more serious offences.⁶⁹⁴

686. See, for example, the discussion contained in *Director of Public Prosecutions v OJA* (2007) 172 A Crim R 181, 195–196.

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

688. *Muldrock v The Queen* (2011) 244 CLR 120, 132.

689. See [3.12]–[3.14].

690. Submission 1 (G. Silbert); Submission 2 (Anonymous).

691. Submission 1 (G. Silbert).

692. Submission 12 (Criminal Bar Association of Victoria) 12; Submission 13 (Victoria Legal Aid).

693. Submission 2 (Anonymous); Submission 13 (Victoria Legal Aid).

694. Submission 13 (Victoria Legal Aid).

Structure of a Victorian standard sentence scheme

- 7.36 There are varying forms that a Victorian legislated guidepost could take. The following discussion explores the Council's proposals with regard to the structure of a new legislated guidepost for Victoria, in the form of a standard sentence.

Standard sentence scheme should be combined with guideline judgment reforms

- 7.37 The Council is of the view that a standard sentence scheme cannot provide, on its own, appropriate sentencing guidance for all of the offences with sentencing problems identified by the Council in Chapter 5.
- 7.38 Further, given the particular limitations of a standard sentence scheme (see [7.115]–[7.140]), an enhanced guideline judgment scheme (recommended in Chapter 6) is both necessary to assist in the functioning of the standard scheme itself and able to provide guidance on offences that are properly excluded from the scheme.
- 7.39 For these reasons, the Council recommends that if the government is minded to introduce a standard sentence scheme it should do so in combination with the recommendations made by the Council for an enhanced Victorian guideline judgment scheme.⁶⁹⁵

Standard sentence, not standard non-parole period

- 7.40 As described at [7.13], in New South Wales, the court sentences a charge of an offence by imposing a non-parole period, and then a sentence on each charge (described as a 'bottom up' sentencing process), before considering cumulation and concurrency and arriving at a total effective sentence and a non-parole period for the case as a whole. The non-parole period for either a single sentence or an aggregate sentence must not fall below three-quarters of the term of the sentence unless there is a finding of 'special circumstances'.⁶⁹⁶
- 7.41 In Victoria, a court imposes a sentence on each charge of an offence, and, in a case with multiple charges, makes orders in relation to cumulation, before fixing a single non-parole period for the case as a whole (described as a 'top down' approach). For those cases involving one charge of a prescribed offence (and no other charges), a Victorian court would be able to have regard to a standard non-parole period when fixing the non-parole period for that case.
- 7.42 In light of the current process for fixing a non-parole period, however, there would be difficulty in applying this approach to cases involving multiple charges: approximately 72% of all higher court cases sentenced in Victoria in 2014–15 contained more than one charge.
- 7.43 Therefore, the Council considers that the standard sentence should properly relate to fixing the sentence on a charge, rather than on the non-parole period, in line with Victoria's 'top down' approach to sentencing.

⁶⁹⁵. As discussed in Chapter 6.

⁶⁹⁶. The balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more (in which case the court must make a record of its reasons for that decision): *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2).

- 7.44 This view was reflected in one submission to the Council that stated:
- A system founded on a standard non-parole period should not be introduced in Victoria ... it is contrary to the Victorian sentencing process of determining the individual and head sentence before the NPP. It would be a radical change to sentencing procedure, and in view of the existence of other options, should not be the preferred method.⁶⁹⁷
- 7.45 The Law Institute of Victoria also stated that introducing a defined term standard non-parole period in Victoria would not be appropriate given the sentencing process in Victoria.⁶⁹⁸
- 7.46 There are a number of other reasons for taking this approach. First, the identification of sentencing problems has related to sentencing for particular offences (see Chapter 5) rather than to the sentences for cases as a whole.
- 7.47 Second, the Council's recent analysis of non-parole periods⁶⁹⁹ revealed that there was a strong and consistent relationship between the total effective sentence length in a case and the non-parole period, looking at cases sentenced in the higher courts from 2010–11 to 2014–15.⁷⁰⁰
- 7.48 This suggests that the non-parole period is being determined by courts using the same considerations as those that determine the total effective sentence. In accordance with the case law, the data demonstrates a proportionate relationship between the total effective sentence and the non-parole period.⁷⁰¹ Consequently, there is no evidence, for example, that Victorian courts impose disproportionately low non-parole periods compared with total effective sentences.
- 7.49 Third, a standard non-parole period would undermine the purposes of fixing a non-parole period and would likely conflate issues relating to particular offences with issues relating to cases.
- 7.50 In *Power v The Queen*, the High Court acknowledged that the purpose of parole is 'to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom'.⁷⁰² However, the court stressed that this is only to occur:
- when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence.⁷⁰³
- 7.51 In *Bugmy v The Queen*, the High Court further elaborated on the approach to setting a non-parole period. The majority adopted the view that:
- [the] minimum term is the period before the expiration of which release of that offender would, in the estimation of the sentencing judge, be in violation of justice according to law, notwithstanding the mitigation of punishment which mercy to the offender and benefit to the public may justify.⁷⁰⁴
- 7.52 In other words, although the purpose of release on parole is to promote the offender's rehabilitation, rehabilitation is not the only consideration when the courts fix a non-parole

697. Submission 2 (Anonymous).

698. Submission 11 (Law Institute of Victoria).

699. Sentencing Advisory Council (2016), above n 524.

700. Ibid 52.

701. Ibid.

702. *Power v The Queen* (1974) 131 CLR 623, 629.

703. *Power v The Queen* (1974) 131 CLR 623, 629.

704. *Bugmy v The Queen* (1990) 169 CLR 525, 538, adopting the words of Jenkinson J in *R v Morgan and Morgan* (1980) 7 A Crim R 146, 154.

period. The setting of a non-parole period may serve purposes other than rehabilitation, including community protection and deterrence.⁷⁰⁵ Therefore:

a more serious offence will warrant a greater non-parole period due to its deterrent effect upon others and the need to give close attention to the danger which the offender presents to the community.⁷⁰⁶

- 7.53 Although the fixing of a non-parole period confers a benefit on the offender, the courts have also emphasised that it serves the interests of the community because the rehabilitation of the offender is in the community's interest.⁷⁰⁷

Guidepost to objective offence seriousness

- 7.54 The standard sentence scheme should represent a new guidepost to objective offence seriousness.
- 7.55 The Council does not consider that the common law approach to sentencing represented by the 'instinctive' or 'intuitive' synthesis should be amended. This approach allows for a sentencing court to properly consider all of the relevant facts and circumstances in a case when exercising judicial discretion. There was strong support in submissions from organisations, including the Law Institute of Victoria, that this approach should be retained.⁷⁰⁸
- 7.56 As a result, the Council proposes that the language of the New South Wales standard non-parole period scheme should be adopted, given that the New South Wales scheme was considered by the High Court in *Muldock* to be compatible with the common law, and the sentencing legislation in New South Wales was clarified to accord with the High Court's decision.⁷⁰⁹
- 7.57 The Council therefore considers that the standard sentence should represent the sentence for an offence that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness.
- 7.58 The standard sentence should represent what parliament considers to be the appropriate sentence for an offence in the middle of the range of objective offence seriousness (without limiting the matters that are otherwise required or permitted to be taken into account under sentence).
- 7.59 Critically, the standard sentence relates only to the objective elements of the offence. This means that the standard sentence does not take into account any of the subjective factors that may come to bear on a case, including, but not limited to:
- the significant discount on a sentence that is usually applied for a plea of guilty;
 - a similar discount for cooperation with law enforcement authorities; or
 - any other mitigating factors present in a case that relate to the offender rather than the offending behaviour.

A guidepost, not a starting point

- 7.60 As discussed, the standard sentence should not be legislated as a starting point or a presumptive sentence, and its application in sentencing should be consistent with the instinctive synthesis approach to sentencing in Victoria.

705. *Bugmy v The Queen* (1990) 169 CLR 525, 530–531; *R v Morgan and Morgan* (1980) 7 A Crim R 146, 155.

706. *R v Hillsley* (1992) 105 ALR 560, 572.

707. See, for example, *R v Morgan and Morgan* (1980) 7 A Crim R 146, 154–155; *Bugmy v The Queen* (1990) 169 CLR 525, 531; *R v Krasnov* [1995] VSC 198 (21 September 1995) [22].

708. Submission 11 (Law Institute of Victoria); Submission 12 (Criminal Bar Association of Victoria); Submission 13 (Victoria Legal Aid).

709. *Crimes (Sentencing Procedure) Amendment (Standard Non-Parole Periods) Act 2013* (NSW).

- 7.61 Consistent with the common law as stated in the High Court's decision in *Muldrock*, the Council recommends that the standard sentence should represent a guidepost to offence seriousness. It should not be a starting point, nor perceived as a minimum. It should act as a yardstick to sentencing in the same manner as the maximum penalty, but instead of representing the worst example of offending by the worst offender, which relies on considering objective and subjective factors, the standard sentence should represent the middle of the range of objective offence seriousness only.
- 7.62 In applying the standard sentence, a judge should not be required to distinguish the case before him or her from the hypothetical middle of the range offence or be required to justify why the sentence imposed bears any particular relativity to the standard sentencing range.⁷¹⁰
- 7.63 The standard sentence for an offence should be a matter to be taken into account by a court in determining the appropriate sentence, without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence.

Applying the standard sentence

- 7.64 In accordance with the sentencing principles of the common law articulated in *Muldrock*, it is envisioned that the standard sentence would operate as follows:
- In sentencing an offender, the sentencing court will be obliged to take into account the full range of factors in determining the appropriate sentence for the offence.⁷¹¹
 - In so doing, the court will be mindful of two legislated guideposts: the maximum penalty and the standard sentence.
 - The standard sentence represents the sentence for an 'offence in the middle of the range of objective seriousness'.
 - Meaning is given to the concept of 'the middle of the range of objective seriousness' in the absence of consideration of the characteristics of the offender. That is to say, the objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is determined wholly by reference to the nature of the offending.
 - The standard sentence does not have determinative significance in the sentencing exercise. It is a legislated guidepost.
 - Consideration of factors personal to the offender and the offence remain of equal importance in the sentencing exercise.
- 7.65 Each of these considerations is discussed below.
- 7.66 In *Muldrock*, the High Court in a unanimous judgment stated that the New South Wales standard non-parole period legislation required an approach to sentencing offences that is consistent with the approach to sentencing described by McHugh J in *Markarian v The Queen* ('*Markarian*'). There, His Honour articulated instinctive synthesis as a process by which:
- the judge identifies *all* the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case (emphasis added).⁷¹²

710. *Muldrock v The Queen* (2011) 244 CLR 120, 132.

711. Within the framework provided by section 5 of the *Sentencing Act 1991* (Vic).

712. *Markarian v The Queen* (2005) 228 CLR 357, 378, adopted by *Muldrock v The Queen* (2011) 244 CLR 120, 131–132.

- 7.67 The standard sentence scheme requires an approach whereby the judge identifies all factors, including those at common law, that are relevant to sentence in a way that is consistent with instinctive synthesis as articulated in *Markarian*.
- 7.68 As the court stated in *Muldrock*, the New South Wales legislation:
- oblige[s] the court to take into account the full range of factors in determining the appropriate sentence for the offence. In so doing, the court is mindful of two legislative guideposts: the maximum sentence and the standard non-parole period. The latter requires that content be given to its specification as 'the non-parole period for an offence in the middle of the range of objective seriousness' [s 54A(2)]. Meaningful content cannot be given to the concept by taking into account characteristics of the offender. The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending.⁷¹³
- 7.69 A court is not required to commence with an assessment of whether the offence falls within the middle of the range of objective seriousness (by reference to a hypothesised offence) and then ask whether there are matters that warrant a longer or shorter period.⁷¹⁴
- 7.70 The New South Wales legislation requires the court to make a record of its reasons for increasing or reducing the standard non-parole period. The High Court held that this does not require the court:
- to attribute particular mathematical values to matters regarded as significant to the formation of a sentence that differs from the standard non-parole period, or ... to classify the objective seriousness of the offending.⁷¹⁵
- 7.71 The Court in *Muldrock* stated that the statutory obligation under section 54B(4) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) requires:
- the judge to identify fully the facts, matters and circumstances which the judge concludes bear upon the judgment that is reached about the appropriate sentence to be imposed. The obligation applies in sentencing for all Div 1A offences regardless of whether the offender has been convicted after trial or whether the offence might be characterised as falling in the low, middle or high range of objective seriousness for such offences.⁷¹⁶
- 7.72 Objective offence seriousness takes into account factors present in the offending behaviour,⁷¹⁷ prior to consideration of subjective aggravating and mitigating factors. The range of objective offence seriousness therefore incorporates varying combinations of harm and culpability factors (such as significant planning or a vulnerable victim) that serve to make one charge of an offence more or less serious than the next, prior to the consideration of subjective factors (such as an offender's prior criminal record or remorse).
- 7.73 The consideration of the objective seriousness of a given offence takes place in the absence of consideration of any of the subjective factors that may come to bear on a case, including whether the offender has pleaded guilty.

713. *Muldrock v The Queen* (2011) 244 CLR 120, 132.

714. *Muldrock v The Queen* (2011) 244 CLR 120, 132.

715. *Muldrock v The Queen* (2011) 244 CLR 120, 132.

716. *Muldrock v The Queen* (2011) 244 CLR 120, 132.

717. *Muldrock v The Queen* (2011) 244 CLR 120, 132. See also *R v Way* (2004) 60 NSWLR 168, 186–187; *SKA v The Queen* [2009] NSWCCA 186 (14 July 2009) [129]–[137].

- 7.74 In *R v Way*, the New South Wales Court of Criminal Appeal noted that a mid-range offence is not necessarily represented by a 'typical' or 'common' case, because such a case only indicates the numerical frequency of its occurrence, and not the objective criminality or the consequences of the offence.⁷¹⁸
- 7.75 Practically, the middle of the range of objective seriousness is 'not a precise point, nor is there any paradigm by which it can be identified'.⁷¹⁹ This is a consequence of the scope and variety of circumstances that can be relevant to considering seriousness.
- 7.76 Furthermore, a sentencing court will be in error if it approaches the sentencing task in a way that is overly prescriptive⁷²⁰ or that treats the standard sentence as a starting point.
- 7.77 It is likely that there will be an increase in sentence lengths for some offences included within the standard sentence scheme. This will not be because it is a starting point in the sentencing exercise, but because the standard sentence is a factor added to the 'court's awareness' as a relevant consideration in determining the appropriate sentence.⁷²¹

No minimum non-parole period

- 7.78 Some stakeholders considered that if a standard sentence scheme were introduced and based on the sentence on the charge (rather than the non-parole period – see [7.40]–[7.53]), then it may be necessary to retain similar provisions to the minimum non-parole period requirement introduced as part of the baseline sentencing scheme.⁷²² Those provisions require a minimum proportion of the total effective or head sentence to be imposed as the non-parole period in a case involving a baseline charge (see [4.27]).
- 7.79 One stakeholder commented that '[w]hilst it would be hoped that judges would not circumvent the legislation by imposing low non-parole periods, reality suggests that could well happen'.⁷²³
- 7.80 The Council considers that including minimum non-parole period provisions within a standard sentence scheme would not be appropriate for a number of reasons. As discussed in Chapter 5, the identification of offences with sentencing problems relates to the sentencing of particular offences rather than to the sentences imposed for cases as a whole.
- 7.81 Further, the Council's recent analysis of parole and non-parole periods has shown no evidence of any problem in the proportion of the total effective or head sentence that the non-parole period represents.⁷²⁴
- 7.82 Unlike the baseline sentencing scheme, the operation of the standard sentence scheme, in creating a new guidepost to offence seriousness, is premised on the preservation of judicial discretion; the scheme does not compel a court to sentence in a manner designed to reach a statistical outcome over an undefined term.
- 7.83 To require a minimum proportion non-parole period would not only import bad faith on the part of the judiciary, it would also conflate two models of sentencing guidance – namely a defined term and a defined percentage scheme as discussed at [7.7].

718. *R v Way* (2004) 60 NSWLR 168, 189.

719. *R v Koloamatangi* [2011] NSWCCA 288 (20 December 2011) [19], citing *Carlton v The Queen* (2008) 189 A Crim R 332, 349.

720. *Ross v The Queen* [2012] NSWCCA 161 (4 July 2012) [22].

721. *Muldrock v The Queen* (2011) 244 CLR 120, 133.

722. Submission 2 (Anonymous); Submission 15 (Victims of Crime Commissioner).

723. Submission 2 (Anonymous).

724. As discussed at [7.47]–[7.48]; see Sentencing Advisory Council (2016), above n 524.

Criteria for including offences in the standard sentence scheme

- 7.84 The Council is of the view that only certain offences would benefit from a further legislated guidepost. This is because, as discussed in Chapter 5, not all offences have the same identified problems with regard to sentencing.
- 7.85 In particular, offences that include ‘categories’ of offence typologies, or differing forms of culpability, would not be assisted by a single legislated guidepost. Such a guidepost is unlikely to be of meaningful assistance to a court tasked with sentencing different forms of the offence.
- 7.86 For example, the offence of aggravated burglary, identified by the Council as an offence with sentencing problems, can be committed in a number of ways,⁷²⁵ differentiated by the intent of the offender committing the burglary. This intent could include simply to steal, or it could include an intention to rape or otherwise physically assault a person.⁷²⁶ Consequently, a single legislated guidepost representing the middle of the range of objective offence seriousness cannot properly account for the different objective ranges that would result from differing intents behind the commission of that single offence.
- 7.87 The rationale for including offences within the standard sentence scheme is discussed in detail at [7.144]–[7.156].
- 7.88 The Council is of the view that any standard sentence scheme should only apply to those offences for which a standard sentence is considered appropriate according to the criteria recommended by the Council.

Recommendation 7: Legislated standard sentence scheme as part of a combined model for providing sentencing guidance

If a new legislated guidepost is to be introduced, it should be in the form of a standard sentence scheme accompanied by the enhanced guideline judgment scheme recommended by the Sentencing Advisory Council.

The standard sentence should:

- represent the sentence for an offence that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness;
- not be legislated as a starting point or a presumptive sentence, and its application should be consistent with the instinctive synthesis approach to sentencing in Victoria;
- be a matter to be taken into account by a court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender; and
- only apply to those offences where a standard sentence is considered suitable according to the criteria recommended by the Sentencing Advisory Council.

725. In its 2011 report *Aggravated Burglary: Current Sentencing Practices*, the Council identified six broad categories of aggravated burglary representing different cohorts of offenders and offending within the single offence of aggravated burglary: Sentencing Advisory Council (2011), above n 432, ch 4.

726. *Crimes Act 1958* (Vic) ss 76–77.

Exclusions from the standard sentence scheme

Exclusion of summary jurisdictions

- 7.89 The Council recommends that the standard sentence scheme should not apply to matters heard and determined summarily, in either the Magistrates' Court or the Children's Court.

The Magistrates' Court

- 7.90 In other Australian jurisdictions, such as New South Wales⁷²⁷ and South Australia,⁷²⁸ the standard non-parole periods do not apply to offences heard and determined summarily.
- 7.91 In Victoria, the maximum term of imprisonment that a magistrate can impose for a single charge is two years.⁷²⁹ Given the jurisdictional limit, a further guidepost that is beyond that limit is unlikely to provide meaningful guidance to magistrates in that jurisdiction.
- 7.92 The Council recommends that the summary jurisdictions should be expressly excluded from the operation of the scheme.

The Children's Court

- 7.93 As discussed at [2.13]–[2.16], sentencing in the Children's Court jurisdiction in Victoria operates under a distinct and different policy and legislative framework under the provisions of the *Children, Youth and Families Act 2005* (Vic) compared with the framework for sentencing adults under the *Sentencing Act 1991* (Vic).
- 7.94 The Council recommends that the standard sentence scheme should not apply to children who are sentenced in the Children's Court, as that court is a court of summary jurisdiction.
- 7.95 The Council considers that the particular vulnerability and needs of children constitute more than just mitigating factors to be taken into account by a court when sentencing. Children are in a special category, over and above other mitigating factors (such as mental impairment or lack of prior offending), that requires specific exclusion from the standard sentence scheme in order to avoid unjust consequences.

Children sentenced in the higher courts

- 7.96 Offenders aged 10 and over, but under the age of 18 at the time of committing an offence, may be sentenced to adult imprisonment by the higher courts in certain circumstances.⁷³⁰
- 7.97 For the reasons discussed above, the standard sentence scheme should not apply to offenders aged under 18 at the time of offending, regardless of whether or not they are sentenced in the higher courts, given the different approach to sentencing children in Victoria.⁷³¹
- 7.98 The Council recommends that all offenders under the age of 18 at the time of offending should be expressly excluded from the operation of the scheme.

727. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(2).

728. The scheme only applies to murder and other indictable offences: *Criminal Law (Sentencing) Act 1988* (SA) ss 32(5)(ab), 32(5)(ba), 32(10)(d).

729. *Sentencing Act 1991* (Vic) s 113A.

730. This may occur where child offenders are sentenced for an offence that either is automatically excluded from the jurisdiction of the Children's Court or has been excluded by the discretion of the Children's Court: *Children, Youth and Families Act 2005* (Vic) ss 356(3), 516(1)(b).

731. Matters to be taken into account when sentencing children are listed in section 362 of the *Children, Youth and Families Act 2005* (Vic). A child is a person who is aged 10 years or older but under 18 years at the time of an offence and aged under 19 years when court proceedings begin.

Young offenders

- 7.99 The Council received a number of submissions that proposed the exclusion of, variously, children, young offenders, or youthful offenders from any new sentencing mechanism, or that otherwise raised concerns about the sentencing of youthful offenders in Victoria.
- 7.100 In its submission to the Council, Youthlaw expressed the opinion that 'youth' as a factor should be seen as an 'exceptional circumstance' (for the purposes of any potential mandatory sentencing scheme). Youthlaw recommended that 'youth' be defined as under 25 years of age, based on 'recent brain development science'.⁷³²
- 7.101 The Criminal Bar Association of Victoria submitted that any potential legislation for a standard non-parole period 'should provide express exceptions to the applicability of the standard non-parole provisions with respect to offenders aged 21 or under at the time of offending'.⁷³³ Similarly, Victoria Legal Aid considered that any standard sentence scheme should 'exclude from its ambit offenders under the age of 21 at the time of offending'.⁷³⁴
- 7.102 The Council gave extensive consideration to whether the standard sentence scheme should apply in cases where the court is considering sentencing a young offender, aged under 21, to serve a custodial sentence in a juvenile detention centre (on a youth justice centre order) under Victoria's 'dual track' sentencing system.⁷³⁵
- 7.103 As discussed at [7.60]–[7.63], the standard sentence is intended to represent a further guidepost to offence seriousness; it is not a minimum sentence from which a court must justify its deviation. It was therefore considered unnecessary to expressly exclude from the scheme the circumstances in which a court, having had proper regard to the standard sentence, would appropriately impose a sentence that differs markedly from the standard sentence.
- 7.104 The standard sentence represents a guidepost to objective offence seriousness only – it does not include any reduction in sentence that is required to account for a guilty plea, for example, or for assistance to authorities, or indeed for any other mitigating factors that relate to the offender.
- 7.105 As a result, there are circumstances in which the standard sentence may be of less influence on the final sentence that is imposed, once the court has had proper regard to all of the circumstances of the case. For example, there are cases in which the offender falls to be sentenced as a young or youthful offender, *Verdins* factors are enlivened,⁷³⁶ or the court considers a non-custodial sentencing disposition, such as a community correction order, to be appropriate.
- 7.106 In cases with those circumstances, the court should still have regard to the standard sentence, as part of its instinctive synthesis, when considering the objective seriousness of the case. This regard to the standard sentence, however, does not preclude the consideration of all of the subjective factors of the case as part of the same synthesis.
- 7.107 In order to impose either a youth justice centre order or a community correction order, the court must first seek a report from Corrections Victoria that addresses the suitability of the offender for such an order.⁷³⁷ The standard sentence scheme does not preclude a court requesting or considering such a report.

732. Submission 4 (Youthlaw).

733. Submission 12 (Criminal Bar Association of Victoria).

734. Submission 13 (Victoria Legal Aid).

735. *Sentencing Act 1991* (Vic) s 32. See discussion at [2.23]–[2.25].

736. *R v Verdins* (2007) 16 VR 269, 276.

737. *Sentencing Act 1991* (Vic) s 8A.

- 7.108 Including some circumstances as exceptions to the standard sentence scheme (such as when the court is considering whether to impose a youth justice centre order) and not others (such as when a court is considering the imposition of a community correction order) may imply that the order being considered (if not excluded) cannot be imposed. This would suggest that the standard sentence is a form of minimum sentence, or it is intended to limit the proper exercise of judicial discretion, and that is not the purpose of the standard sentence scheme (see [7.60]–[7.63]).
- 7.109 As a result, the Council has concluded that it is not necessary to expressly exclude from the standard sentence scheme offenders over the age of 18 at the time of offending who are considered eligible for a youth justice centre order under the dual track system.

Recommendation 8: Exclusions from the standard sentence scheme

If a standard sentence scheme is introduced, the standard sentence should not apply to the sentencing of:

- offences determined summarily;
- offenders under the age of 18 at the time of offending.

Current sentencing practices and the standard sentence scheme

- 7.110 The issues surrounding the consideration of current sentencing practices are discussed in detail at [3.24]–[3.54].
- 7.111 The Council considers that where a standard sentence applies to an offence, the standard sentence should operate as a new guidepost to objective offence seriousness (alongside the maximum penalty).
- 7.112 Current sentencing practices are not a definitive guide to the objective seriousness of a given offence, because they reflect the sentence imposed after consideration of all relevant factors, such as the offender's prior character, whether the offender pleaded guilty, and the offender's prospects of rehabilitation.
- 7.113 Nevertheless, current sentencing practices may demonstrate an incompatibility with the standard sentence on the basis that, even accounting for subjective factors, current sentencing practices do not adequately reflect the objective seriousness of an offence. Accordingly, the Council recommends that, where current sentencing practices are incompatible with the standard sentence on that basis, the standard sentence should take precedence as a guidepost for objective offence seriousness, and a court should disregard current sentencing practices in those circumstances.
- 7.114 If, as intended, current sentencing practices change over time for those offences for which a standard sentence has been prescribed, a court should properly have regard to changed current sentencing practices, given that they will no longer be incompatible with the standard sentence.

Recommendation 9: Court must disregard current sentencing practices where incompatible with standard sentence

If a standard sentence scheme is introduced, section 5(2)(b) of the *Sentencing Act 1991* (Vic) should be amended to provide that a court must have regard to current sentencing practices unless doing so would be incompatible with the standard sentence, where a standard sentence applies.

Limitations of a standard sentence scheme model

- 7.115 There are a number of limitations of a legislated guidepost. A number of issues have been raised in relation to the standard non-parole period scheme in New South Wales, which the Council considered in developing its contingent recommendations in relation to a Victorian standard sentence scheme. In addition, a number of concerns were also raised by stakeholders during consultations undertaken by the Council.
- 7.116 The limitations include:
- increased complexity;
 - limited evidence of effectiveness;
 - lack of transparency in identifying offences and levels; and
 - difficulty in applying the standard sentence.
- 7.117 Each of these limitations is discussed below.

Increased complexity

- 7.118 Objections to standard non-parole period schemes include concern about the added complexity and the restrictions placed on judicial discretion,⁷³⁸ which can lead to injustice in individual cases.
- 7.119 In preparing its submission, Victoria Legal Aid consulted with Legal Aid New South Wales, who reported that the standard non-parole period scheme 'had made sentencing in NSW unnecessarily complex'.⁷³⁹
- 7.120 Legal Aid New South Wales reported to Victoria Legal Aid that the scheme has resulted in:
- a greater degree of plea bargaining (in an attempt to avoid offences with a [standard non-parole period]), protracted litigation on the nuances and ambiguities of the scheme and several unintended 'curiosities'.⁷⁴⁰
- 7.121 Victoria Legal Aid stated that:
- VLA opposes a defined percentage and presumptive standard sentence scheme for similar reasons – such schemes are likely to increase sentencing complexity, are resource intensive (in time and cost) and have the potential to disproportionately impact the disadvantaged.⁷⁴¹

738. See, for example, New South Wales Sentencing Council (2013), above n 253, 7; Submission 10 (Liberty Victoria).

739. Submission 13 (Victoria Legal Aid).

740. Submission 13 (Victoria Legal Aid).

741. Submission 13 (Victoria Legal Aid).

Limited evidence of effectiveness

- 7.122 In its 2011 report on minimum standard non-parole periods, the majority of the Queensland Sentencing Advisory Council did not support the introduction of a standard non-parole period scheme,⁷⁴² stating that:

there is limited evidence of the effectiveness of [standard non-parole period] schemes in meeting their objectives, beyond making sentencing more punitive and the sentencing process more complex, costly and time consuming. It also risks having a disproportionate impact on vulnerable offenders, including Aboriginal and Torres Strait Islander offenders and offenders with a mental illness or intellectual impairment.⁷⁴³

- 7.123 In its 2008 report, the Tasmania Law Reform Institute also cited the fact that there was 'no reason to believe that specifying non-parole periods in legislation will have any impact on improving public understanding of, and public confidence in, sentencing practices' as a reason for not recommending the introduction of a presumptive non-parole period scheme in Tasmania.⁷⁴⁴
- 7.124 Victoria Legal Aid referred to the fact that there is a lack of evidence to suggest that standard non-parole period schemes work in achieving consistency and greater public confidence.⁷⁴⁵
- 7.125 The Law Institute of Victoria submitted that the Judicial Commission's evaluation of the standard non-parole period scheme in New South Wales indicated that the scheme had resulted in greater uniformity and consistency in sentencing outcomes but it was not possible to tell whether this was due to dissimilar cases being treated uniformly in order to comply with the regime.⁷⁴⁶

Lack of transparency in identifying offences and levels

- 7.126 In New South Wales, concerns have been raised in relation to principles that are used to identify standard non-parole period offences as well as the inconsistency and the lack of transparency in setting the presumptive non-parole period.⁷⁴⁷
- 7.127 The inconsistencies in the New South Wales standard non-parole period scheme were also raised by Victoria Legal Aid in their submission to the Council, noting the fact that for some offences, the standard non-parole period is 80% of the maximum penalty.⁷⁴⁸

Difficulties in applying the standard sentence

- 7.128 There are a number of issues that have arisen with the application of standard sentences in New South Wales, including difficulties in the assessment of the 'objective seriousness' of the offence.⁷⁴⁹ Closely related to this assessment are uncertainties regarding which 'facts or circumstances' are to be regarded as 'matters personal to a particular offender or class of offenders' and therefore are to be excluded from the assessment of the objective seriousness of the offence.⁷⁵⁰

742. Sentencing Advisory Council (Queensland) (2011), above n 662, xv.

743. Ibid 20.

744. Tasmania Law Reform Institute, *Sentencing: Final Report No 11* (2008) 209.

745. Submission 13 (Victoria Legal Aid), citing Sentencing Advisory Council (Queensland) (2011), above n 662.

746. Submission 11 (Law Institute of Victoria).

747. New South Wales Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-Parole Periods* (2012) 22. See also discussion in Tasmania Law Reform Institute (2008), above n 744, 209.

748. Submission 13 (Victoria Legal Aid).

749. New South Wales Law Reform Commission (2012), above n 747, 25. See, for example, *Stewart v The Queen* [2012] NSWCCA 183 (29 August 2012) [38]; *Subramaniam v The Queen* [2013] NSWCCA 159 (3 July 2013).

750. New South Wales Law Reform Commission (2012), above n 747, 25–27.

- 7.129 During consultations, one stakeholder raised a concern about the conceptualisation of the notion of a 'standard sentence', suggesting it might be perceived as intended to become the new median sentence. Even though the standard sentence does not represent the median sentence, the stakeholder drew attention to the possibility that sentencing judges could conflate the standard sentence with the median and feel 'dragged' towards the standard sentence, stating that 'it's hard to conceptualise a notion of standard sentences that doesn't sound a lot like, over time, this will be the median'.⁷⁵¹
- 7.130 A further issue raised by stakeholders was the uncertainty regarding how the standard sentence (a hypothetical offence at the middle of the range of objective offence seriousness) should be characterised. It was argued that the offence representing the standard sentence is necessarily left undefined, leaving sentencing courts and practitioners uncertain about how to navigate around the new guidepost.⁷⁵²
- 7.131 A number of stakeholders raised potential issues around what is and what is not an objective factor, in assessing where an offence falls with regard to the middle of the range of objective offence seriousness.⁷⁵³
- 7.132 Divergent views have emerged on this point in New South Wales.⁷⁵⁴ This suggests that, with any potential Victorian standard sentence scheme, determining objective seriousness is likely to be an issue on which the court will need to provide guidance. According to one stakeholder, this will be 'a rich vein for submissions at first instance and on appeal'.⁷⁵⁵

Difficulty in applying standard sentences to 'complicity' cases

- 7.133 The law of complicity provides that co-offenders who may have limited involvement in offending can still be convicted of the offence. A sentencing court can impose a sentence that appropriately reflects each co-offender's level of culpability.⁷⁵⁶
- 7.134 The *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) amended the *Crimes Act 1958* (Vic) to provide a clear statutory framework for complicity,⁷⁵⁷ making it clear that a person who is involved in the commission of an offence (as defined) is 'taken to have committed the offence'.⁷⁵⁸
- 7.135 The standard sentence, which represents the sentence for an offence at the middle of the range of objective seriousness, is conceived of in relation to a principal offender. Therefore, the standard sentence would provide limited guidance when sentencing offenders with differing levels of involvement in the commission of an offence subject to the scheme.

Difficulty in applying the standard sentences to different forms of charges

- 7.136 Charges may be brought as rolled-up or representative charges, or, in particular circumstances, as 'course of conduct' charges.⁷⁵⁹ Although there are differences relating to the way in which courts consider these forms of charging, they represent multiple incidents of offending behaviour.

751. Sentencing Guidance Stakeholder Discussion Forum (1 March 2016).

752. Sentencing Guidance Stakeholder Discussion Forum (1 March 2016).

753. Sentencing Guidance Stakeholder Discussion Forum (1 March 2016).

754. See New South Wales Law Reform Commission (2012), above n 747, 25–27.

755. Submission 2 (Anonymous).

756. See Criminal Law Review – Department of Justice, *Complicity Reforms* (2014) 4.

757. The Act came into operation on 1 November 2014; Victoria, *Victoria Government Gazette*, No. S 350, 7 October 2014, 1.

758. *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) s 6.

759. *Criminal Procedure Act 2009* (Vic) sch 1 cl 4A.

- 7.137 The standard sentence, which represents the sentence for an offence at the middle of the range of objective seriousness, is conceived of in relation to a single charge of an offence. Therefore, application of the standard sentence to other forms of charges may be problematic.

Aggregate sentencing and the standard sentence

- 7.138 The *Sentencing Act 1991* (Vic) provides that if an offender is convicted of two or more offences that are ‘founded on the same facts, or form, or are part of, a series of offences of the same or a similar character’,⁷⁶⁰ the court may impose an aggregate (single) sentence ‘in place of a separate sentence of imprisonment in respect of all or any two or more of them’.⁷⁶¹
- 7.139 The court cannot impose an aggregate sentence in relation to serious offenders or offenders who have committed an offence while on parole.⁷⁶² Serious offenders are defined under Part 2A of the *Sentencing Act 1991* (Vic) as serious sexual offenders, serious violent offenders, serious drug offenders, and serious arson offenders.⁷⁶³
- 7.140 There may be difficulty in imposing an aggregate sentence on an offence that is subject to the standard sentence scheme, alongside offences that are not covered by the scheme.

Enhanced guideline judgment scheme in operation with a standard sentence scheme

- 7.141 If the government is minded to introduce a legislated standard sentence scheme, the express power for the court to give guidance on this scheme and any matter related to the scheme should also be included in section 6AC of the *Sentencing Act 1991* (Vic).
- 7.142 Although some of the issues with a standard sentence scheme are intractable (see [7.115]–[7.140]), and are unlikely to be remedied through the provision of additional guidance, a guideline judgment on particular aspects of the scheme may assist in its application.
- 7.143 A provision allowing for a guideline judgment on the standard sentence scheme would enable the court to provide guidance on such issues as:
- the weight that should be given to aggravating and mitigating factors for particular standard sentence offences;
 - how aggravating and mitigating factors would operate in conjunction with the standard sentence as a guidepost; and
 - the concept of objective offence seriousness and the operation of the standard sentence as a yardstick.

Recommendation 10: Guideline judgment may contain guidelines on any matter related to a standard sentence

If a standard sentence scheme is introduced, Part 2AA of the *Sentencing Act 1991* (Vic) should be amended to provide that a guideline judgment may set out guidelines in respect of any matter related to a standard sentence.

760. *Sentencing Act 1991* (Vic) s 9(1).

761. *Sentencing Act 1991* (Vic) s 9(1).

762. *Sentencing Act 1991* (Vic) s 9(1A).

763. *Sentencing Act 1991* (Vic) s 6A.

Offences recommended for inclusion in the standard sentence scheme

- 7.144 Chapter 5 discusses (and Recommendation 2 contains) those offences for which the Council believes there are identified sentencing problems requiring sentencing guidance.
- 7.145 As discussed at [7.84]–[7.88], the Council is of the view that only certain offences with identified sentencing problems are suitable for a further legislated guidepost representing the middle of the range of objective offence seriousness.
- 7.146 There may be a number of reasons for a particular offence not being suitable for guidance in the form of a standard sentence. For example, it may be difficult to identify a single point at the middle of the range of objective offence seriousness because the offence possesses different forms of culpability or different typologies of the offence. In those circumstances, a single guidepost is unlikely to be of meaningful assistance to a court tasked with sentencing different forms of the offence.

Criteria for inclusion of offences in the standard sentence scheme

- 7.147 The Council has developed further criteria to determine whether there are grounds that render the offences suitable for inclusion in a standard sentence scheme. These are:
- evidence from structured community consultation identifying the community's views on the objective seriousness of the offence;⁷⁶⁴
 - evidence that the maximum penalty is not operating as a sufficient source of guidance on the community's and parliament's views of the objective seriousness of the offence, and the maximum penalty has been overshadowed by current sentencing practices, as indicated by Court of Appeal commentary;
 - the offence being one whereby the objective offence seriousness can be readily identified (that is, there are not overlapping or multiple 'classes' of offenders or 'typologies' of offence⁷⁶⁵);
 - the courts identifying a special need for general deterrence; and
 - if the above criteria are met, the following considerations may be relevant:
 - a need to recognise the exceptional harm that the offence may cause;
 - the vulnerability of victims of the offence; and
 - any breach of trust or abuse of authority involved in the offence.
- 7.148 These criteria are supported by other approaches to setting similar guideposts, for example, the approach taken in New South Wales.
- 7.149 The New South Wales Sentencing Council identified a similar set of principles that should apply in deciding whether to include an offence in the standard non-parole period scheme: focusing on the seriousness of the offence, whether it possesses particular harm or culpability factors, and whether the offence is noted to have been subject to a 'pattern of inadequate sentencing' or 'inconsistent sentences'.⁷⁶⁶

764. See [5.64]–[5.70] for further explanation of the Council's findings on the community's views on the objective seriousness of various offences.

765. See [7.85]–[7.86] for further explanation of this concept.

766. New South Wales Sentencing Council (2013), above n 253, 9.

- 7.150 The New South Wales Sentencing Council also factored in consideration of the range of offending behaviour constituted by a particular offence, recommending that the ‘fact that an offence potentially encompasses a wide range of offending behaviour should be a factor that can be considered in deciding whether to exclude an offence from the [standard non-parole period] scheme’.⁷⁶⁷
- 7.151 The Council’s own criteria for including offences in the standard sentence scheme draw from the New South Wales Sentencing Council’s proposal, but they also look to evidence of community views on offence seriousness, as well as evidence that the maximum penalty is not operating as a sufficient guidepost.

Stakeholders’ views

- 7.152 The Council’s criteria are also supported by feedback received in submissions.
- 7.153 For example, Victoria Legal Aid submitted that any legislated scheme should apply to only a restricted set of offences, and that ‘[o]ffences that span a wider degree of behaviour and objective offence seriousness should be excluded’.⁷⁶⁸
- 7.154 The Criminal Bar Association of Victoria submitted that any standard sentence scheme should be limited to offences that are ‘serious, prevalent, and rightly attract the need for condign punishment’.⁷⁶⁹ The Criminal Bar Association of Victoria identified the offence of culpable driving causing death as the ‘least amenable’ to a standard sentence, citing the variety of circumstances capable of leading to the commission of the offence, and the fact that a large cohort of those charged with this offence do not have significant prior convictions of relevance.⁷⁷⁰
- 7.155 The Council did not identify culpable driving causing death as an offence with sentencing problems such that guidance is required (see [5.289]). However, it is useful to raise culpable driving causing death as an example of an offence for which the range of objective offence seriousness is not readily identifiable. This offence has various forms of culpability, as there are both reckless and negligent forms of the offence,⁷⁷¹ and thus sentencing for this offence is unlikely to be assisted by a further legislated guidepost based on a single range of objective offence seriousness.

The Council’s view

- 7.156 The Council considers that offences that are suitable for inclusion within the standard sentence scheme should satisfy a number of criteria outlined at [7.147]. The presence of one of these criteria does not indicate that an offence would necessarily benefit from an additional legislated guidepost in the form of a standard sentence. While there is no exact formula, the Council considers that for an offence to be considered suitable for inclusion within the scheme, it should present with several of these criteria and none of the factors that make an offence unsuitable for this form of sentencing guidance.

⁷⁶⁷ Ibid.

⁷⁶⁸ Submission 13 (Victoria Legal Aid).

⁷⁶⁹ Submission 12 (Criminal Bar Association of Victoria).

⁷⁷⁰ Submission 12 (Criminal Bar Association of Victoria).

⁷⁷¹ *Crimes Act 1958* (Vic) s 318; see also *Pasznyk v The Queen* (2014) 43 VR 169.

Recommendation 11: Criteria for inclusion of offences in the standard sentence scheme

If a standard sentence scheme is introduced, the following criteria should apply to assessing whether an offence with identified sentencing problems is suitable for inclusion in the standard sentence scheme:

1. There is evidence from structured community consultation that identifies community views on the objective seriousness of the offence.
2. The maximum penalty is not operating as a sufficient source of guidance to the community's and parliament's views of the objective seriousness of the offence (for example, the maximum penalty may have been overshadowed by current sentencing practices).
3. The offence is one where the objective offence seriousness can be readily identified for the offending behaviour represented by the offence (that is, there are not overlapping or multiple 'classes' of offending behaviour or 'typologies' of offending behaviour within the one offence).
4. A standard sentence would be effective in providing guidance on the middle of the range of objective seriousness for the particular offence.
5. The courts have identified that there is a special need for general deterrence.
6. If the above criteria are met, the following considerations may also be relevant:
 - a need to recognise the exceptional harm that the offence may cause;
 - the vulnerability of victims of the offence; and
 - any breach of trust or abuse of authority involved in the offence.

Attempt, conspiracy, and incitement forms of offences

- 7.157 The Council has very limited data on attempt, conspiracy, and incitement offences because so few of these offences have been committed over the Council's five-year reference period.
- 7.158 Further, the circumstances in which these forms of offences are committed can vary considerably. In some instances, offences can be as serious as the substantive or completed offence to which they relate. For example, in some cases, the effect on a child who has suffered an attempted sexual penetration may be as great as the effect of the completed offence. In other instances, offences can be substantially less serious.
- 7.159 The Council therefore recommends that, at this stage, separate standard sentences not be set for these offences.

Applying the criteria to identify offences suitable for inclusion in the standard sentence scheme

7.160 In applying its criteria, the Council considers that certain sexual offences are suitable for inclusion in a standard sentence scheme. The Council's analysis of whether offences are suitable for inclusion is presented below.

Sexual offences

- 7.161 Having established the existence of sentencing problems for some sexual offences (see [5.131]–[5.204]), the Council recommends that these sexual offences are suitable for inclusion in a standard sentence scheme.
- 7.162 In applying the criteria, the Council notes that:
- the community views these offences as particularly serious;⁷⁷²
 - there have been several Court of Appeal cases in which the adequacy of current sentencing practices (having regard to the maximum penalty) has been questioned for various sexual offences examined by the Council;⁷⁷³
 - there are particular harm and culpability factors present in the offences, including vulnerability of the victims (where those offences are committed against a child), and a need to recognise the exceptional harm that the offending may cause; and
 - generally, the range of objective offence seriousness can be readily identified.
- 7.163 The Council acknowledges that, for two of the sexual offences – namely sexual penetration with a child 12–16 and indecent act with a child under 16 – there may be a broad range of objective offence seriousness.
- 7.164 A group of these offences may relate to offenders and victims who are relatively close in age. Consent is only a defence to a charge of sexual penetration with a child 12–16 where the accused was no more than 2 years older than the victim.⁷⁷⁴ For example, 'consensual' sex between a child of 15 years and 6 months and an 18 year old would be captured by the offence.
- 7.165 An offence involving a relatively narrow age difference between the offender and the victim (where there are no other aggravating features of the offending) may be assessed as being at the low end of objective offence seriousness.
- 7.166 The inclusion of these offences in the standard sentence scheme is unlikely to influence cases in which the offending behaviour is considered to be at the low end of objective offence seriousness, and consequently, the scheme is unlikely to influence the consideration of whether the offenders receive a non-custodial sentence.
- 7.167 The Council has attempted to take a holistic approach to the inclusion of a category of offences in any possible standard sentence scheme. This is an attempt to avoid a distortion of charging practices or rates of offenders pleading guilty to lesser charges in order to avoid being charged with an offence subject to the standard sentence scheme. The Council has focused on those offences with higher prevalence. The Council acknowledges, however, that there are other sexual offences that have not been included in the analysis.

772. See [5.137]–[5.143] for further discussion.

773. See, for example, *Director of Public Prosecutions v CPD* (2009) 22 VR 533; *Director of Public Prosecutions v DDJ* (2009) 22 VR 444; *Leeder v The Queen* [2010] VSCA 98 (23 April 2010); *R v Bellerby* [2009] VSCA 59 (28 April 2009); *Director of Public Prosecutions v DJ* (2011) 211 A Crim R 367; *Director of Public Prosecutions v BDJ* [2009] VSCA 298 (1 December 2009); *Director of Public Prosecutions v OJA* (2007) 172 A Crim R 181.

774. *Crimes Act 1958* (Vic) s 45(4)(b).

- 7.168 In summary, as discussed in Chapter 5 (see [5.203]), the following observations may be made about the need for guidance on the adequacy of sentences for sexual offences:
- the approach to current sentencing practices has constrained sentencing practices for some offences, where it has been identified that such sentencing practices are inadequate;
 - the maximum penalty has little effect as a guide to the seriousness of the offence;
 - collectively, sentences do not reflect the seriousness with which the community and parliament view the offences; and
 - there is a disparity between sentences for sexual offences and sentences imposed for offences of similar levels of harm and culpability.
- 7.169 These observations suggest that the sexual offences identified by the Council as having sentencing problems would benefit from a further legislated guidepost in the form proposed.
- 7.170 Therefore, the Council concludes that the sexual offences below are suitable for inclusion in the standard sentence scheme.

Recommendation 12: Offences with identified sentencing problems that are suitable for inclusion in the standard sentence scheme

If a standard sentence scheme is introduced, the following offences are suitable for inclusion in the scheme:

Offence	<i>Crimes Act 1958</i> (Vic)
Rape	s 38
Incest with child/step-child	s 44(1)
Incest with child/step-child (under 18) of de facto	s 44(2)
Sexual penetration with a child under 12	s 45(2)(a)
Sexual penetration with a child 12–16 under care, supervision, or authority	s 45(2)(b)
Sexual penetration with a child 12–16	s 45(2)(c)
Indecent act with a child under 16	s 47
Persistent sexual abuse of a child under 16	s 47A

Serious injury offences and aggravated burglary

- 7.171 Although the Council considers the serious injury offences to possess sentencing problems (see [5.205]–[5.250]), the Council does not consider serious injury offences suitable for inclusion in a standard sentence scheme.
- 7.172 In relation to the serious injury offences and aggravated burglary, the issues concerning the adequacy of sentencing for these offences primarily relate to specific forms of the offences (for example, ‘glassing’ forms of recklessly causing serious injury⁷⁷⁵), rather than to the objective seriousness of all forms of the offences.
- 7.173 The primary need for guidance therefore relates to the approach taken to ensure that the distribution of sentences appropriately reflects the factors and principles applicable in the exercise of sentencing discretion.
- 7.174 The issues identified in the sentencing for such offences are ones that more readily lend themselves to the provision of judicial guidance in the form of a guideline judgment, rather than guidance in the form of a standard sentence. The primary need for guidance is to increase the impact of the guidance that the court has already provided about the adequacy of particular forms of offending (in *Winch* and *Hogarth*).
- 7.175 The analysis undertaken at [5.247]–[5.250] indicates that, for the serious injury offences, the objective offence seriousness cannot be readily identified due to the range of offending behaviour within and between each of the offences. Similarly, the analysis at [5.283]–[5.286] demonstrates the same issue with aggravated burglary.
- 7.176 In summary, while the serious injury offences and aggravated burglary are offences that the Council has identified as having sentencing problems, they are not suitable for inclusion in a standard sentence scheme that provides a single legislated guidepost indicating the middle of the range of objective offence seriousness. These offences would benefit from judicial guidance in the form of a guideline judgment.

Methodology and recommended levels

Methodology for prescribing the standard sentence

- 7.177 The Council has developed a framework for prescribing the standard sentence. The framework draws on the methodology adopted in prescribing the standard non-parole periods in New South Wales, but it attempts to adopt a more transparent approach, based on a consistent relationship between the standard sentence and the maximum penalty.

Maximum penalty as the current guidepost to offence seriousness

- 7.178 The maximum penalty is the primary mechanism for parliamentary expression of the gravity or seriousness of an offence. As discussed in Chapter 3 (see [3.7]–[3.11]), the maximum penalty is conceived of as a ‘navigational aid’. A judge should ‘steer by’ not ‘towards’ the maximum penalty.⁷⁷⁶
- 7.179 The Council has adopted the maximum penalty as a starting point to prescribing the standard sentence, given its status as the current guidepost as to parliament’s view of the gravity of an offence.

⁷⁷⁵ *Winch v The Queen* (2010) 27 VR 658.

⁷⁷⁶ *Director of Public Prosecutions v Aydin and Kirsch* [2005] VSCA 86 (3 May 2005) [12].

- 7.180 The maximum penalty is the first factor that a court must consider when sentencing, as specified in section 5(2) of the *Sentencing Act 1991* (Vic): this is an indication of its significance.⁷⁷⁷
- 7.181 The relevance of the maximum penalty to offence seriousness as reflected in current sentencing practices is taken from the Court of Appeal in *Hogarth v The Queen*:
- While the maximum itself is reserved for the worst example of an offence likely to be encountered in practice, it was to be expected that there would be a spread of cases across the statistical range ... To insist upon appropriate relativities between individual sentences and the maximum is to recognise that the maximum is to be treated as a sentencing yardstick ... current sentencing practices for confrontational aggravated burglary do not adequately reflect that yardstick ... where there is a conflict between the guidance afforded by the maximum penalty and that afforded by current sentencing practices, it is the maximum which must prevail.⁷⁷⁸
- 7.182 As discussed above, one criticism of the New South Wales standard non-parole period scheme is the absence of a consistent ratio between the maximum penalty and the standard non-parole period for various offences, such that as a proportion, the standard non-parole periods range from 21.4% to 80% of the maximum penalty applicable to the offence in question.⁷⁷⁹

Issues with using the maximum penalty as a starting point to prescribe a standard sentence

- 7.183 There are a number of limitations associated with using the maximum penalty as a starting point in prescribing a new legislated guidepost indicating the middle of the range of objective offence seriousness.
- 7.184 A discussion of the different purposes of a maximum penalty is contained in Chapter 3. Importantly, the maximum penalty may reflect considerations other than just offence gravity (as there can be different reasons for fixing a maximum penalty at a particular level):
- A maximum sentence fixed by Parliament may have little relevance in a given case, either because it was fixed at a very high level in the last century ... or because it has more recently been set at a high catch-all level ... At other times the maximum may be highly relevant and sometimes may create real difficulties ... A change in a maximum sentence by Parliament will sometimes be helpful where it is thought that the Parliament regarded the previous penalties as inadequate.⁷⁸⁰
- 7.185 Using the maximum penalty as the starting point in prescribing a new legislated guidepost assumes that the current maximum penalties are properly fixed and represent proper relativities, in terms of seriousness, between different offences.
- 7.186 This assumption is problematic given the fact that there has been no holistic review of maximum penalties in Victoria since 1989, when the Victorian Sentencing Taskforce developed a principled approach to setting maximum penalties and rationalisation of the then statutory maxima.⁷⁸¹

777. *Director of Public Prosecutions v Aydin and Kirsch* [2005] VSCA 86 (3 May 2005) [10].

778. *Hogarth v The Queen* (2012) 37 VR 658, 674.

779. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A; for a comparison of the standard non-parole periods and maximum penalties of offences in the standard non-parole period scheme, see New South Wales Law Reform Commission (2012), above n 747, Appendix A.

780. Eric Stockdale and Keith Devlin, *Sentencing* (1987) [1.16]–[1.18].

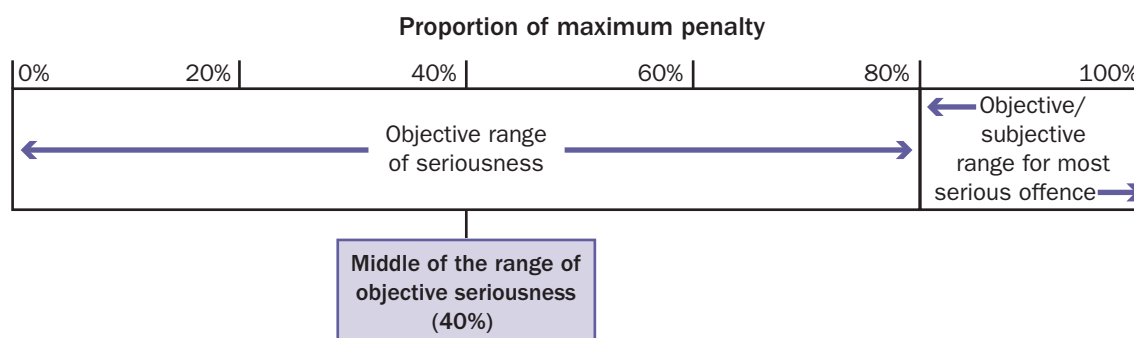
781. Sentencing Task Force, Victoria, *Review of Statutory Maximum Penalties in Victoria: Report to the Attorney-General* (1989).

- 7.187 Instead, maximum penalties have primarily developed in an ad hoc fashion, with some reviews undertaken of specific areas of the law, such as sexual penetration offences, child stealing, and drug and drug-related offences. Some changes have been made as an expression of parliament's denunciation of certain conduct, often in the wake of media attention or community concern.⁷⁸²
- 7.188 Further, the Council's own research into community attitudes suggests that the current maximum penalties may not properly reflect the community's views on the seriousness of some offences or offence categories.
- 7.189 Nevertheless, the scope of this reference has not allowed the Council to conduct a detailed analysis of the current maximum penalties for the offences that the Council has identified as having sentencing problems. The broader question of whether the current maximum penalties are appropriate for these offences has not been considered.
- 7.190 If such reassessment is to occur, the Council considers that it should be within a comprehensive review of maximum penalties for all indictable offences in Victoria, in order to allow the opportunity for a holistic consideration of the relativities between offences and offence categories, informed by public consultation.
- 7.191 In the absence of this analysis, the Council considers that it is appropriate to use the existing maximum penalties as a starting point for prescribing the standard sentence. That way, if, in the future, a particular maximum penalty is amended, the methodology for prescribing any standard sentence that might apply can be readily determined.

Identifying the range of objective offence seriousness with respect to the maximum penalty

- 7.192 In order to prescribe a standard sentence that represents the middle of the range of objective offence seriousness, it is necessary to identify an objective range of seriousness for offences. The Council considers that the *objective* range of seriousness for an offence is represented by the first 80% of the maximum penalty. This is because a proportion of the maximum penalty (at the top end of the range) needs to allow for sentencing the worst case involving the worst offender, which necessarily includes both objective and subjective factors. The Council has reserved 20% of the maximum penalty for this purpose.
- 7.193 Figure 5 shows the Council's proposed methodology for conceptualising the middle of the range of objective offence seriousness, based on a proportion of the maximum penalty for the offence.

Figure 5: Conceptualising the middle of the range of objective seriousness



782. See, for example, discussion of the Council's own reviews of various maxima at [9.6]–[9.12].

- 7.194 At the top 20% of the range, there remains scope for sentencing offenders and offences at the highest end of objective and subjective offence seriousness (for example, those offenders who fall to be sentenced as a 'serious offender' under Part 2A of the *Sentencing Act 1991* (Vic)).
- 7.195 Stakeholders at the Council's discussion forum suggested that the apportioning of 20% to the subjective factors of any given offence made 'some sense', based on participants' impression of what proportion of a sentence is determined by the objective seriousness of the offence, and what proportion could be said to account for subjective factors.⁷⁸³
- 7.196 The Council's methodology for identifying the range of objective offence seriousness also takes into account the Court of Appeal's statements on the appropriate sentences for serious examples of offences with regard to the maximum penalty for the offence in question.⁷⁸⁴

Identifying the middle of the range

- 7.197 Having identified the range of objective offence seriousness as representing zero to 80% of the maximum penalty, the Council identifies the middle of that range as 50% of the zero to 80% range of objective offence seriousness. This translates to 40% of the maximum penalty.
- 7.198 The Council considers that 40% of the maximum penalty represents an appropriate 'rule of thumb' measure for determining the midpoint of objective offence seriousness.
- 7.199 Applying this methodology to an offence with a 25-year maximum penalty, 40% of the maximum penalty is 10 years. Therefore, the standard sentence, representing the middle of the range of objective seriousness, is 10 years.
- 7.200 For an offence with a maximum penalty of 10 years, the standard sentence, representing the middle of the range of objective seriousness, is 4 years.

Community correction orders and the range of objective seriousness

- 7.201 The objective range of seriousness is considered to include 'zero' per cent of the maximum penalty, on the basis that, post-*Boulton*, a lengthy community correction order (CCO) with punitive conditions may be imposed for even serious examples of offending.⁷⁸⁵ Such a sentence would be considered 'zero' for the purposes of an objective sentencing range.
- 7.202 Stakeholders pointed out the inadequacy of treating all CCOs, even those of some length and with punitive conditions attached, as amounting to 'zero' with regard to the maximum penalty, for statistical purposes.⁷⁸⁶
- 7.203 A limitation of the standard sentence scheme is the difficulty in articulating the relationship between the standard sentence of imprisonment and the Court of Appeal's comment in *Boulton* that:
- a CCO may be suitable even in cases of relatively serious offences which might previously have attracted a medium term of imprisonment (such as, for example, aggravated burglary, intentionally causing serious injury, some forms of sexual offences involving minors, some kinds of rape and some categories of homicide).⁷⁸⁷

783. Sentencing Guidance Stakeholder Discussion Forum (1 March 2016).

784. See, for example, *Harrison v The Queen* [2015] VSCA 349 (16 December 2015) [141], where the Court stated that, for negligently causing serious injury involving driving, in the upper category of this offence 'sentences of six or seven years would have been well within range' (where the maximum penalty for negligently causing serious injury is 10 years).

785. *Boulton v The Queen* [2104] VSCA 342 (22 December 2014) [131].

786. Sentencing Guidance Stakeholder Discussion Forum (1 March 2016).

787. *Boulton v The Queen* [2104] VSCA 342 (22 December 2014) [131].

- 7.204 One of the limitations of the standard sentence scheme is that the guidepost can only represent one measure. In the Council's model, the standard sentence, by necessity, represents a term of imprisonment, as the maximum penalty also represents a term of imprisonment.
- 7.205 This model, and indeed any statistical model based on one measure, cannot allow for a comparison between a short imprisonment sentence, for example, and a lengthy CCO combined with punitive conditions. The latter, on a purely statistical basis, will be considered 'zero' for the purposes of a measure based on a term of imprisonment.

Issues with identifying the current sentence imposed for an offence in the 'middle of the range of objective seriousness'

- 7.206 The Council has not undertaken data analysis to attempt to ascertain the current sentence for an offence that falls at the middle of the range of objective offence seriousness.
- 7.207 A sentence that sits at the middle of the range of sentences imposed for a given period does not describe the middle of the range of objective offence seriousness. As discussed at [7.54]–[7.63], sentences are the end result of an instinctive synthesis of all of the relevant factors, including the objective circumstances related to the offending and the subjective circumstances related to the offender, as well as other considerations.
- 7.208 To determine the sentence at the middle of the range of sentences based only on objective factors would require reducing or increasing the sentence that currently sits on the middle of the range of sentences imposed by an estimation of the proportion of the sentence that represents subjective factors (including any discount for a guilty plea). This process would be an attempt to 'reverse engineer' the instinctive synthesis, and it is fraught with uncertainty.
- 7.209 Further, identifying a sentence at the middle of a range of sentences for any given period would only accurately represent the middle of the range that is possible to the extent that the highest and lowest sentences imposed during that period also represent the highest and lowest sentences that are possible.
- 7.210 For a number of offences, it is unlikely that, even within a five-year period, sentences representing the worst category of offending would be present in the distribution. As a result, the distribution of sentences would most likely be skewed to a low range (and consequently produce a low value at the middle of that range).
- 7.211 It is therefore not possible to ascertain a statistically accurate value that represents the sentence currently located at the middle of the range of objective offence seriousness.
- 7.212 Further, given that the middle of the range, despite being a fixed number, applies to a 'hypothetical offence' at the middle of objective offence seriousness, there are challenges in identifying a precise factual matrix that could be said to illustrate an offence deserving of the standard sentence.

Middle of the range is not the median

- 7.213 The median represents the sentence where 50% of sentences are higher and 50% of sentences are lower. The middle of the range of objective offence seriousness does not necessarily bear any relationship to the median sentence.⁷⁸⁸ Further, the median sentence for any offence results from the instinctive synthesis of all of the facts and circumstances in a case, both objective factors relating to the offence and subjective factors relating to the offender.

Recommendation 13: Methodology for prescribing standard sentence level

If a standard sentence scheme is introduced, the standard sentence level should be prescribed at 40% of the maximum penalty for the relevant offence.

Application of methodology for prescribing standard sentences for sexual offences

Rape⁷⁸⁹

Offence characteristics

- 7.214 Rape is an indictable offence with a maximum penalty of 25 years' imprisonment.⁷⁹⁰ Between 1 July 2010 and 30 June 2015 (inclusive), 476 charges of rape were sentenced in Victoria's higher courts. Over this period, a term of imprisonment was imposed on 94% of charges.
- 7.215 The offence of rape can also cover circumstances where the victim is a child. Such a case would likely involve a high level of harm and culpability.

Standard sentence

- 7.216 The maximum penalty for the offence is 25 years' imprisonment. The Council's methodology places the middle of the range of objective seriousness (40%) at 10 years.

Incest with child/step-child

Offence characteristics

- 7.217 Incest is an indictable offence with a maximum penalty of 25 years' imprisonment.⁷⁹¹ Between 1 July 2010 and 30 June 2015 (inclusive), 370 charges of incest with child/step-child were sentenced in Victoria's higher courts. Of these charges, 99% received a term of imprisonment.
- 7.218 Unlike the offence of incest with child/step-child (under 18) of de facto, incest with child/step-child does not have an age element. Therefore, objective offence characteristics can range from offenders sexually penetrating their infant child to sexual penetration involving 'consenting' adults. The baseline sentence for this offence only applied where the child was under the age of 18.

788. For a further explanation of the 'median sentence', see Sentencing Advisory Council (2014), above n 215, [2.19]–[2.23].

789. Appendix 4 contains comprehensive quantitative and qualitative data on each of the sexual offences presented in this section.

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

791. *Crimes Act 1958* (Vic) s 44(1).

Standard sentence

- 7.219 The maximum penalty for the offence is 25 years' imprisonment. The Council's methodology places the middle of the range of objective seriousness (40%) at 10 years.

Incest with child/step-child (under 18) of de facto

Offence characteristics

- 7.220 Incest with child/step-child (under 18) of de facto is an indictable offence with a maximum penalty of 25 years' imprisonment.⁷⁹² Between 1 July 2010 and 30 June 2015 (inclusive), 108 charges of incest with child/step-child (under 18) of de facto were sentenced in Victoria's higher courts. Over this period, a term of imprisonment was imposed on all charges for this offence.
- 7.221 Incest with child/step-child (under 18) of de facto has the same offence elements as incest with child/step-child (see above), with the added element that the victim must be under the age of 18. As such, the range of offence characteristics is not as varied as that for incest with child/step-child because of the significant harm factors associated with a victim aged under 18.

Standard sentence

- 7.222 The maximum penalty for the offence is 25 years' imprisonment. The Council's methodology places the middle of the range of objective seriousness (40%) at 10 years.

Sexual penetration with a child under 12

Offence characteristics

- 7.223 Sexual penetration with a child under 12 is an indictable offence with a maximum penalty of 25 years' imprisonment.⁷⁹³ It is an aggravated form of sexual penetration with a child under 16 (which has a maximum penalty of 10 years' imprisonment). Between 1 July 2010 and 30 June 2015 (inclusive), 202 charges of sexual penetration with a child under 10/12 were sentenced in Victoria's higher courts. Over this period, a term of imprisonment was imposed on 83% of charges.
- 7.224 Given the age and vulnerability of the complainant are characteristics of the offence, harm and culpability factors for this offence start at a high level before any additional characteristics of the offence are taken into account. More weight may generally be given to harm and culpability factors than for other sexual offences because all victims are of a vulnerable age. Further, the nature of the victim also means that this offence may involve more exploitative than violent behaviour, which in no way diminishes harm or culpability.

Standard sentence

- 7.225 The maximum penalty for the offence is 25 years' imprisonment. The Council's methodology places the middle of the range of objective seriousness (40%) at 10 years.

⁷⁹². *Crimes Act 1958* (Vic) s 44(2).

⁷⁹³. *Crimes Act 1958* (Vic) s 45(2)(a).

Sexual penetration with a child 12–16 under care, supervision, or authority

Offence characteristics

- 7.226 Sexual penetration with a child 12–16 under care, supervision, or authority is an indictable offence with a maximum penalty of 15 years' imprisonment.⁷⁹⁴ Between 1 July 2010 and 30 June 2015 (inclusive), 74 charges of sexual penetration with a child 10/12–16 under care, supervision, or authority were sentenced in Victoria's higher courts. Of this period, a term of imprisonment was imposed on 80% of charges.
- 7.227 Such a relationship between the offender and the victim need not be a legally recognised position of authority. In essence, it refers to 'those who, by virtue of an established and on-going relationship involving care, supervision or authority, are in a position to exploit or take advantage of the influence which grows out of that relationship'.⁷⁹⁵

Standard sentence

- 7.228 The maximum penalty for the offence is 15 years' imprisonment. The Council's methodology places the middle of the range of objective seriousness (40%) at 6 years.

Sexual penetration with a child 12–16

Offence characteristics

- 7.229 Sexual penetration with a child 12–16 is an indictable offence with a maximum penalty of 10 years' imprisonment.⁷⁹⁶ An offence against this section cannot be determined summarily.⁷⁹⁷ Between 1 July 2010 and 30 June 2015 (inclusive), 858 charges of sexual penetration with a child 10/12–16 were sentenced in Victoria's higher courts. Over this period, a term of imprisonment was imposed on 55% of charges.
- 7.230 The 10-year maximum penalty applies to the non-aggravated form of this offence. Higher penalties apply if the complainant was under the age of 12 or if the complainant was between the age of 12 and 16 and under the care, supervision, or authority of the offender. Thus, this offence applies where the complainant is aged between 12 and 16 and the offender is not charged with the care, supervision, or authority offence. Prior to 17 March 2010, this offence applied to children aged between 10 and 16 years of age.
- 7.231 For children aged between 12 and 16, the defence of consent is available in three circumstances only:
1. the accused reasonably believed that the child was 16 or older; or
 2. the accused was not more than 2 years older than the child; or
 3. the accused reasonably believed that he or she was married to the child.
- 7.232 The second of these defences is aimed at consensual sex between two similarly aged children, for example, a 15 year old child and a 17 year old child. However, given the strict age requirements within the offence and the defence of consent, a sentencing judge may be faced with sentencing a young offender who engaged in what he or she thought was consensual sex, but the offending was outside the scope of the defence (for example, sex

794. *Crimes Act 1958* (Vic) s 45(2)(b).

795. *R v Howes* (2000) 2 VR 141, 143.

796. *Crimes Act 1958* (Vic) s 45(1), (2)(c).

797. *Crimes Act 1958* (Vic) s 45(9).

between a girl aged 15 years and 6 months and a boy aged 18 years). This would represent an offence at the low range of objective seriousness compared with sexual penetration between a 12 year old and a 40 year old, which would be objectively more serious.

Standard sentence

- 7.233 The maximum penalty for the offence is 10 years' imprisonment. The Council's methodology places the middle of the range of objective seriousness (40%) at 4 years.

Indecent act with a child under 16

Offence characteristics

- 7.234 Indecent act with a child under 16 is an indictable offence triable summarily with a maximum penalty of 10 years' imprisonment.⁷⁹⁸ It is the most prevalent of the sexual offences considered by the Council, with many cases involving multiple charges or charges in conjunction with other sexual offences. Between 1 July 2010 and 30 June 2015 (inclusive), 1,589 charges of indecent act with a child under 16 were sentenced in Victoria's higher courts. Over this period, a term of imprisonment was imposed on 80% of charges.
- 7.235 This offence encompasses a wide range of offender behaviour with the following characteristics: an indecent act must be wilfully committed, and the act must occur with or in the presence of a child under 16.
- 7.236 An indecent act is any act that 'right-minded persons would consider to be contrary to community standards of decency'⁷⁹⁹ and that has a sexual connotation.⁸⁰⁰ A sexual connotation may be demonstrated by the area of the body used by the offender; or due to the offender's motive (that is, obtaining sexual gratification).⁸⁰¹ As such, an indecent act may encompass behaviour ranging from offenders rubbing their genitals in the proximity of a child under 16 to behaviour on the cusp of sexual penetration, including sexual touching of the outside of the victim's genitals or breasts.

Standard sentence

- 7.237 The maximum penalty for the offence is 10 years' imprisonment. The Council's methodology places the middle of the range of objective seriousness (40%) at 4 years.

Persistent sexual abuse of a child under 16

Offence characteristics

- 7.238 Persistent sexual abuse of a child under 16 is an indictable offence with a maximum penalty of 25 years' imprisonment.⁸⁰² Between 1 July 2010 and 30 June 2015 (inclusive), 54 charges of persistent sexual abuse of a child under 16 were sentenced in Victoria's higher courts. Over this period, a term of imprisonment was imposed on 89% of charges.
- 7.239 Given the youth of the victim and the combination of offences (some with the same maximum penalty), the objective seriousness of this offence starts from a high level.

798. *Crimes Act 1958* (Vic) s 47.

799. *Director of Public Prosecutions v Scott* [2004] VSC 129 (20 April 2004) [16]; *Curtis v The Queen* [2011] VSCA 102 (15 April 2011) [12]–[13].

800. *R v Court* [1989] AC 28; *R v RL* [2009] VSCA 95 (19 May 2009); *Sabet v The Queen* [2011] VSCA 124 (5 May 2011).

801. See *Crimes Act 1958* (Vic) s 37E.

802. *Crimes Act 1958* (Vic) s 47A.

Standard sentence

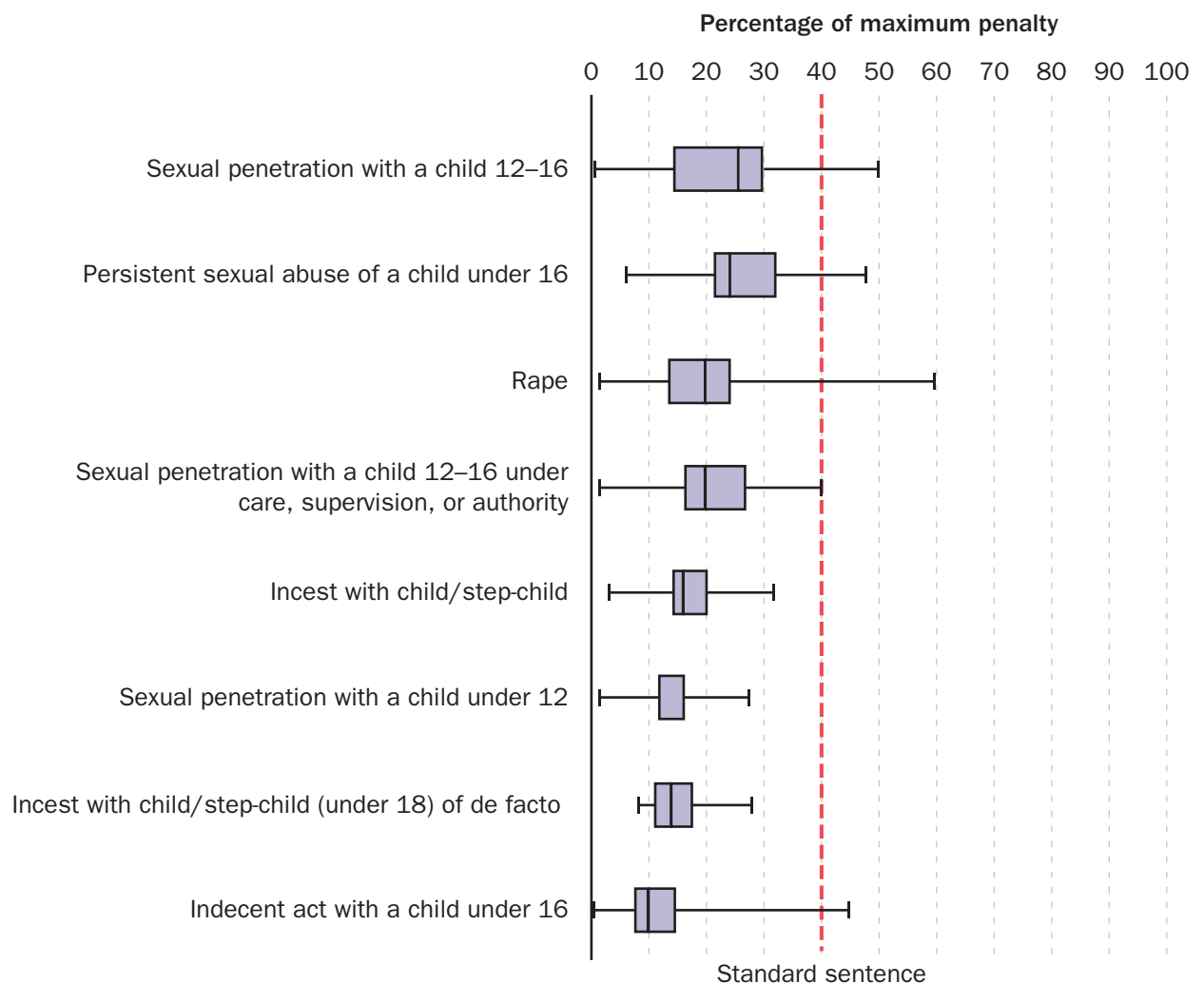
7.240 The maximum penalty for the offence is 25 years' imprisonment. The Council's methodology places the middle of the range of objective seriousness (40%) at 10 years.

Standard sentence compared to current median

7.241 Figure 6 displays the distribution of sentences (as a proportion of each offence's maximum penalty) for the offences considered suitable for inclusion within the standard sentence scheme for the period between 1 July 2010 and 30 June 2015 (inclusive). The standard sentence is indicated on the figure at 40% of the maximum penalty.

7.242 As discussed at [7.213], the standard sentence does not represent the median sentence, but instead provides a further guidepost to objective offence seriousness by representing the sentence for an offence in the middle of the range of objective seriousness, prior to consideration of any of the subjective factors relevant to the offender.

Figure 6: Comparison of standard sentence with sentencing distribution, as a proportion of the maximum penalty, for select sexual offences, 2010–11 to 2014–15, higher courts



Recommended levels for sexual offences

Recommendation 14: Recommended standard sentence levels for offences suitable for inclusion within the standard sentence scheme

If a standard sentence scheme is introduced, the standard sentence levels should be prescribed as follows:

Offence	Maximum penalty	Standard sentence
Rape	25 years	10 years
Incest with child/step-child	25 years	10 years
Incest with child/step-child (under 18) of de facto	25 years	10 years
Sexual penetration with a child under 12	25 years	10 years
Sexual penetration with a child 12–16 under care, supervision, or authority	15 years	6 years
Sexual penetration with a child 12–16	10 years	4 years
Indecent act with a child under 16	10 years	4 years
Persistent sexual abuse of a child under 16	25 years	10 years

Summary of criticisms of, and issues with, a standard sentence scheme model

- 7.243 As discussed at [7.115]–[7.140], there are a number of concerns regarding standard sentence schemes, including:
- increased complexity in sentencing;
 - limited evidence of effectiveness of the standard sentence scheme improving community confidence in sentencing;
 - lack of transparency in identifying offences that should be subject to the scheme, and in prescribing standard sentence levels; and
 - difficulty in applying the standard sentence, and in identifying the ‘objective seriousness’ of a given offence.
- 7.244 While the Council has proposed what it considers to be a rational and transparent method for prescribing the standard sentence with the intention of overcoming the third criticism, nevertheless a number of problems with this method of sentencing guidance remain.
- 7.245 It is not known how the prescribed levels relate to current sentencing practices, given that it is not possible to ascertain the sentences that currently sit at the middle of the range of objective offence seriousness (see discussion at [7.206]–[7.212]).
- 7.246 Further, the legislated guidepost does not provide a court with the characteristics of an offence that would sit in the middle of the range of objective offence seriousness. The standard sentence level can merely represent the sentence for a hypothetical offence.

- 7.247 It is possible that the same issue experienced with baseline sentencing will arise with a standard sentence scheme; namely, the difficulty in determining the features of a 'median' sentence case in order to compare the case at hand with a case deserving of the median sentence.⁸⁰³ The standard sentence does not provide the court with the content of which offending circumstances may represent the middle of the range of objective offence seriousness.
- 7.248 There is a wealth of jurisprudence, however, from both New South Wales and Victoria, which suggests that meaningful content can be given to the concept of the 'middle of the range of objective seriousness'. Unlike the concept of a future 'intended' median in the example of baseline sentencing, the range of objective seriousness is a concept that is 'known and can be understood and applied'.⁸⁰⁴
- 7.249 Despite this, as discussed at [7.11]–[7.12], there remains disagreement over whether particular factors, such as provocation or the presence of a mental illness,⁸⁰⁵ may be considered in the assessment of objective offence seriousness, or whether they are properly considered as subjective factors of the offender. The difficulty in resolving these issues in New South Wales is a possible limitation to the operation of the scheme in Victoria, unless the court gives guidance on these issues.
- 7.250 The Council considers that a standard sentence scheme alone cannot adequately provide a court with meaningful guidance. Similarly, guideline judgments suffer from a number of limitations, including that they are, by nature, delivered on an ad hoc basis to address identified issues and cannot comprehensively 'cover the field'.
- 7.251 Therefore, the Council recommends that if a legislated guidepost is introduced, it should be accompanied by the enhanced guideline judgment scheme recommended in Chapter 6. This will allow for the Court of Appeal to provide further clarity and guidance around the application of the standard sentence scheme and the issues discussed at [7.128]–[7.140]. Such issues may include how various instances of the offence can be ranked, what aggravating and mitigating factors should be taken into account, as well as whether particular factors are considered objective or subjective in the assessment of the objective seriousness of a given offence.
- 7.252 Given the above limitations with both the standard sentence scheme and the guideline judgment scheme, the Council has explored in the following chapter an aspirational model for guidelines delivered by a sentencing council. In practice, guidance delivered by such a council could serve to address all of the issues inherent in the combined guideline judgment scheme and the standard sentence scheme.

803. *Director of Public Prosecutions v Walters (A Pseudonym)* [2015] VSCA 303 (17 November 2015) [69] (Maxwell P, Redlich, Tate, and Priest JJA).

804. Sentencing Guidance Stakeholder Discussion Forum (1 March 2016).

805. See, for example, *Subramaniam v The Queen* [2013] NSWCCA 159 (3 July 2013) [58]; *Williams v The Queen* [2012] NSWCCA 172 (16 August 2012) [42].

Chapter 8:

An aspirational model for a sentencing guidelines council



Overview

- 8.1 This chapter sets out an aspirational model that would allow sentencing guidelines to be delivered by a sentencing council. First, it analyses the key sentencing guidelines council models in England, Scotland, and New Zealand, before discussing the potential obstacles that would need to be overcome before a sentencing guidelines council could be introduced in Victoria. It then presents the Council's preferred model. This 'dialogue model' retains the ownership of guidance within the Court of Appeal, but allows for the systematic preparation of guidance by a separate, judicially led body.
- 8.2 This model of sentencing guidance could address some of the issues identified with the combined guideline judgments and standard sentence scheme reforms (see [7.244]–[7.252]). The Council recognises, however, that a sentencing guidelines council model represents a significant departure from the current sentencing framework in Victoria, and will require further development. Nevertheless, the Council considers that this model ought to be given consideration, particularly after the Council's recommended reforms have been implemented and evaluated.

Guidance delivered by a sentencing council

- 8.3 Sentencing guidelines prepared by a body separate from the legislature and the judiciary can provide a comprehensive, methodical, and independent framework to guide sentencing courts. A well-resourced sentencing council can also undertake significant public consultation and sentence monitoring functions. The combination of these responsibilities has the effect of encouraging consistency through clearly articulated principles, as well as promoting public confidence in the criminal justice system through education, engagement, and transparency.
- 8.4 Sentencing guidelines developed by a council have the capacity to structure the sentencing framework for particular offences and classes of offences. As noted by the Tasmanian Sentencing Advisory Council:

Sentencing guidelines have the benefit of creating a framework for sentencing decisions, consolidating principles of sentencing for a particular offence, and providing a vehicle for consideration of 'interrelationships of sentences for the different forms of an offence'.⁸⁰⁶
- 8.5 Other benefits highlighted by the Tasmanian Sentencing Advisory Council include 'a significant effect on penalty levels', increased transparency of the sentencing system and the relative severity of offences, improved public confidence in sentencing processes, maintenance of judicial discretion, and greater consistency without the need for mandatory sentences.⁸⁰⁷
- 8.6 Further, because sentencing guidelines councils are led by judicial members, they can provide practical guidance on sentencing that has legitimacy within the judiciary and that is more likely to be accepted by judicial peers.⁸⁰⁸

806. Sentencing Advisory Council (Tasmania), *Sex Offence Sentencing: Final Report* (2015) 84, quoting Andrew Ashworth, 'Techniques of Guidance on Sentencing' (1984) *Criminal Law Review* 519, 521.

807. Sentencing Advisory Council (Tasmania) (2015), above n 806, 84.

808. Julian V. Roberts, 'Structured Sentencing: Lessons from England and Wales for Common Law Jurisdictions' (2012) 14(3) *Punishment & Society* 267.

- 8.7 In the Victorian context, a sentencing guidelines council has the potential to solve many issues with the Victorian sentencing framework that the recommended enhanced guideline judgment scheme, and the combined guideline judgment and standard sentence scheme, cannot address.
- 8.8 For example, by comprehensively providing guidance on all offences in Victoria, some of the legislative mechanisms that are intended to provide for particular outcomes, but currently add complexity to, and reduce the transparency of, the sentencing framework,⁸⁰⁹ could be repealed and their purposes met within sentencing guidelines. In this way, comprehensive guidelines would serve to simplify the sentencing task.
- 8.9 Similarly, the ongoing and systematic preparation of sentencing guidelines would overcome the sporadic nature of guidance delivered through guideline judgments. The resourcing of an external body allows for continual development and delivery of guidance in a way that cannot be achieved through judicial or legislated guidance, even under the Council's recommended enhanced guideline judgment scheme.
- 8.10 Finally, and perhaps most critically in terms of the need to promote public confidence in the criminal justice system, public engagement and community testing are central to the development of sentencing guidelines by a council.
- 8.11 As a result, a sentencing guidelines council could adopt a rigorous and tested methodology for setting appropriate sentence levels, grounded by a rational and holistic consideration of offence seriousness, informed by public opinion. While this would require sufficient time to complete, public consultation on guidelines could be far more extensive than that which is possible for a guideline judgment (even within the Council's recommended enhanced guideline judgment scheme).
- 8.12 There are significant obstacles to the introduction of a sentencing guidelines council model in Victoria, discussed at [8.78]–[8.81]. Nevertheless, the Council considers that this model ought to be given further consideration, particularly after the Council's recommended reforms have been implemented and evaluated.
- 8.13 The Council has examined sentencing guidelines councils introduced or proposed in other jurisdictions. Of these models, the Council believes that the most appropriate is a 'dialogue model' of sentencing council guidance, drawing largely from earlier experiences in England and Wales and the sentencing guidelines council recently introduced in Scotland. The Council has also looked at the sentencing guidelines council that was proposed for New Zealand, but does not consider it appropriate for Victoria.

English model

- 8.14 Sentencing guidelines are prepared by the Sentencing Council for England and Wales (the 'Sentencing Council') with the aim to 'promote greater transparency and consistency in sentencing, while maintaining the independence of the judiciary'.⁸¹⁰ Every court in England and Wales must follow any relevant guidelines when sentencing an offender unless it would be 'contrary to the interests of justice to do so'.⁸¹¹

809. See discussion at [2.38]–[2.60].

810. Sentencing Council for England and Wales, *About Us* (Sentencing Council for England and Wales, 2015) <<https://www.sentencingcouncil.org.uk/about-us/>> at 31 March 2016.

811. *Coroners and Justice Act 2009* (UK) s 125(1).

The Sentencing Council

- 8.15 The Sentencing Council was established in April 2010 under the *Coroners and Justice Act 2009* (UK) to replace the former Sentencing Guidelines Council and the Sentencing Advisory Panel.⁸¹²
- 8.16 Guidelines delivered by the new Sentencing Council operate presumptively, meaning that they are binding upon a court, unless the court considers that it is not in the interests of justice to apply the guidelines. The Sentencing Council was established to 'lay out the logic of judicial sentencing in such a manner as to guide sentencers but also make the process of sentencing more transparent to the public'.⁸¹³ The Sentencing Council also has targeted research and analysis functions.
- 8.17 The Sentencing Council consists of eight judicial members and six non-judicial members. Judicial members are appointed by the Lord Chief Justice of England and Wales and must include at least one of each of a circuit judge, a district judge, and a lay justice. Non-judicial members are appointed by the Lord Chancellor and are required to have experience in criminal defence or prosecution, policing, sentencing policy, victims of crime policy, criminological research, statistics, or offender rehabilitation. The Lord Chief Justice of England and Wales is the president of the Sentencing Council. The Sentencing Council must also be chaired by a judge of the Court of Appeal, a puisne judge of the High Court, a circuit judge, a district judge, or a lay justice.⁸¹⁴

Previous sentencing bodies

- 8.18 The current Sentencing Council evolved from a system grounded in court-made guidance. From 1982, the Court of Appeal of England and Wales had given guideline judgments without any statutory basis.⁸¹⁵ In 1998, the limitations on the court to consult on the development of guideline judgments was recognised, and the Sentencing Advisory Panel was established to draft and consult on guidelines that the Court of Appeal could then choose to deliver.⁸¹⁶ Between 2000 and 2003, the Sentencing Advisory Panel delivered advice to the Court of Appeal on 12 occasions, with only one of those occasions not resulting in the court delivering a guideline judgment.⁸¹⁷
- 8.19 In 2003, this process was removed from the courts in recognition that more comprehensive guidance could be delivered outside the bounds of particular appeals. The Sentencing Guidelines Council was established to deliver guidelines based on the research and consultation prepared by the Sentencing Advisory Panel, which continued in operation. Under this model, courts were required to 'have regard to' definitive guidelines prepared by the Sentencing Guidelines Council.⁸¹⁸

812. See *Coroners and Justice Act 2009* (UK) pt 4 ch 1.

813. Paul Wiles, 'Foreword' in Julian V. Roberts (ed.) *Exploring Sentencing Practice in England and Wales* (2015) xii.

814. *Coroners and Justice Act 2009* (UK) sch 15.

815. Julian V. Roberts, 'Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of the Courts to Comply in England and Wales' (2011) 51 *British Journal of Criminology* 997, 998; see, for example, *R v Aramah* (1982) 4 Cr App R (S) 407.

816. Andrew Ashworth and Julian V. Roberts, 'The Origins and Nature of the Sentencing Guidelines in England and Wales' in Andrew Ashworth and Julian V. Roberts (eds), *Sentencing Guidelines: Exploring the English Model* (2013) 4.

817. Saul Holt, 'Appellate Sentencing Guidance in New Zealand' (2006) 3 *New Zealand Post-Graduate Law E-Journal* <<http://www.nzpglejournal.auckland.ac.nz/en/about/subscribe/issue2006-1.html>> at 31 March 2016, 19–20.

818. Julian V. Roberts and Anne Rafferty, 'Sentencing Guidelines in England and Wales: Exploring the New Format' (2011) 9 *Criminal Law Review* 681.

- 8.20 The Court of Appeal of England and Wales also resumed delivering guideline judgments on its own initiative under the 2003 reforms.⁸¹⁹ These guideline judgments essentially operate as interim guidance while sentencing guidelines are being prepared. In 2010, there were 15 guideline judgments in operation.⁸²⁰
- 8.21 Guideline judgments and the sentencing guidelines prepared by the Sentencing Guidelines Council continue to operate until they are replaced by sentencing guidelines from the current Sentencing Council, which took on the merged roles of the Sentencing Guidelines Council and the Sentencing Advisory Panel.
- 8.22 The courts of England and Wales therefore had extensive experience in the interpretation and application of sentencing guidance, including a familiarity with prescribed starting points and structured decision-making, prior to the introduction of binding sentencing guidelines.
- 8.23 Importantly, the majority of sentencing in the lower courts of England and Wales is undertaken by a lay magistracy, making structured guidance particularly valuable. To this end, in addition to broad, principle-based guidelines and offence-specific guidelines, the Sentencing Council produces regular updates of its Magistrates' Court Sentencing Guidelines, which consolidates different sources of sentencing guidance into a single manual that covers most offences that appear before the lower courts.⁸²¹ An online version of the Magistrates' Court Sentencing Guidelines has also been created, with additional features such as searchable offences and a fine calculator.⁸²²

England and Wales guidelines

- 8.24 Under section 121 of the *Coroners and Justice Act 2009* (UK), for each offence, sentencing guidelines should create categories of the offence based on culpability and harm, specify sentencing ranges for the offence and the offence categories, create starting points in each sentencing range for an offence category, and list any aggravating or mitigating factors that are relevant for that offence.
- 8.25 When preparing guidelines, the Sentencing Council has regard to a variety of factors including current sentencing practices, the need to promote consistency and public confidence, the impact of sentencing on victims of crime, the cost of sentencing options and their effectiveness in preventing reoffending, and any results from ongoing monitoring of the guidelines.⁸²³ Guidelines are published on offence types and broader sentencing principles. When the Sentencing Council was established, it was also given the statutory duty to provide guidelines on how to apply the principle of totality and reductions for guilty pleas.⁸²⁴ In addition, the Sentencing Council was given a separate power to prepare allocation guidelines (on the decision of whether a case should be tried summarily or on indictment).⁸²⁵

819. Andrew Ashworth, 'The Struggle for Supremacy in Sentencing' in Andrew Ashworth and Julian V. Roberts (eds), *Sentencing Guidelines: Exploring the English Model* (2013) 27.

820. Sentencing Guidelines Council (UK), *Guideline Judgments Case Compendium: Update 5* (2010).

821. Sentencing Council for England and Wales, *Magistrates' Court Sentencing Guidelines* (Sentencing Council for England and Wales, 2016) <<https://www.sentencingcouncil.org.uk/publications/item/magistrates-court-sentencing-guidelines/>> at 31 March 2016.

822. Sentencing Council for England and Wales, *Welcome to the Online Magistrates' Court Sentencing Guidelines* (Sentencing Council for England and Wales, 2016) <<https://www.sentencingcouncil.org.uk/the-magistrates-court-sentencing-guidelines/>> at 31 March 2016.

823. *Coroners and Justice Act 2009* (UK) s 120(11).

824. *Coroners and Justice Act 2009* (UK) s 120(3).

825. *Coroners and Justice Act 2009* (UK) s 122.

- 8.26 The sentencing guidelines prepared by the Sentencing Council provide for a staged approach to sentencing, and generally involve a nine-step process:⁸²⁶
1. determine the offence category;
 2. identify the starting point and sentence range for that offence category;
 3. consider any other factors that indicate a reduction;
 4. apply a guilty plea reduction;
 5. consider the dangerousness of the offence and the appropriateness of an extended sentence;
 6. apply the totality principle (for offenders being sentenced to more than one offence);
 7. make any compensation or ancillary orders;
 8. give reasons for, and explain the effect of, the sentence;
 9. take into consideration any time served on remand.
- 8.27 At the first stage, the category of offence that is being sentenced (that is, the category of offending that the particular example of the offence represents) is determined through a combination of culpability and harm factors (see Figure 7). Objective offence factors that point to greater or lesser harm and higher or lower culpability are set out in the guidelines for each offence, and usually identify three categories of offence: low, mid, and high level. For example, for assault offences, a Category 1 offence would have greater harm and higher culpability, a Category 2 offence would have either greater harm and lower culpability or lesser harm and greater culpability, and a Category 3 offence would have lesser harm and lower culpability.
- 8.28 For sexual offences, harm factors are set out for Category 2 offences, with Category 1 offences representing extreme examples of those factors, and Category 3 offences involving none of those factors. This is combined with an 'A' culpability whereby higher culpability is demonstrated by a range of factors, or a 'B' culpability whereby none of those factors is present.
- 8.29 For each offence category, an appropriate sentencing range and starting point are provided (see Figure 8). Also detailed is a non-exhaustive list of subjective aggravating and mitigating factors that may then be considered by the court in order to reach a sentence above or below the relevant starting point.
- 8.30 When imposing a sentence, the court is not required to stay within the limited category range, but is expected to stay within the range available for the offence (unless doing so would be contrary to the interests of justice). Consequently, while the process of decision-making is clearly structured, the court retains discretion as to the sentence finally imposed.
- 8.31 The Lord Chancellor or the Court of Appeal can make a proposal to the Sentencing Council that guidelines be prepared or revised, and the Sentencing Council must consider whether to do so when such a proposal is made.⁸²⁷
- 8.32 Importantly, there are some offences for which guidelines do not apply. For example, England and Wales have a statutory minimum sentence for the offence of murder. There have been recent calls, however, for this statutory minimum to be replaced with a comprehensive guideline.⁸²⁸

826. See Sentencing Council for England and Wales, *Publications: Definitive Guidelines* (Sentencing Council for England and Wales, 2016) <<https://www.sentencingcouncil.org.uk/publications/?cat=definitive-guideline&s>> at 31 March 2016. Some offences, such as drug offences, only involve eight steps, as the dangerousness factor at step 5 is not relevant.

827. *Coroners and Justice Act 2009* (UK) s 124.

828. Kate Fitz-Gibbon, 'Minimum Sentencing for Murder in England and Wales: A Critical Examination 10 Years after the *Criminal Justice Act 2003*' (2016) 18(1) *Punishment & Society* 47.

Figure 7: Determining the offence category for rape in England and Wales

Harm		Culpability
Category 1	The extreme nature of one or more category 2 factors or the extreme impact caused by a combination of category 2 factors may elevate to category 1	A
Category 2	<ul style="list-style-type: none"> Severe psychological or physical harm Pregnancy or STI as a consequence of offence Additional degradation/humiliation Abduction Prolonged detention/sustained incident Violence or threats of violence (beyond that which is inherent in the offence) Forced/uninvited entry into victim's home Victim is particularly vulnerable due to personal circumstances* <p>* for children under 13 please refer to the guideline on page 27</p>	Significant degree of planning
		Offender acts together with others to commit the offence
		Use of alcohol/drugs on victim to facilitate the offence
		Abuse of trust
		Previous violence against victim
		Offence committed in course of burglary
		Recording of the offence
		Commercial exploitation and/or motivation
		Offence racially or religiously aggravated
		Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation) or transgender identity (or presumed transgender identity)
Category 3	Factor(s) in categories 1 and 2 not present	Offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)
		B
		Factor(s) in category A not present

Sentencing Council of England and Wales, *Sexual Offences: Definitive Guidelines* (2013) 10. Reproduced under the Open Government Licence 3.0 (UK): www.nationalarchives.gov.uk/doc/open-government-licence/version/3/.

Figure 8: Determining the starting point and category range for rape in England and Wales

	A	B
Category 1	Starting point 15 years' custody	Starting point 12 years' custody
	Category range 13 – 19 years' custody	Category range 10 – 15 years' custody
Category 2	Starting point 10 years' custody	Starting point 8 years' custody
	Category range 9 – 13 years' custody	Category range 7 – 9 years' custody
Category 3	Starting point 7 years' custody	Starting point 5 years' custody
	Category range 6 – 9 years' custody	Category range 4 – 7 years' custody

Sentencing Council of England and Wales, *Sexual Offences: Definitive Guidelines* (2013) 11. Reproduced under the Open Government Licence 3.0 (UK): www.nationalarchives.gov.uk/doc/open-government-licence/version/3/.

Preparation and consultation

- 8.33 Building on guidelines prepared by its predecessor, the Sentencing Council has selectively, and progressively, prepared guidelines for a range of offence types, informed by evidence garnered through broad consultation, sentence monitoring, and public engagement. The Sentencing Council's first definitive guideline was for assault (published in March 2011), and the most recent is a definitive guideline for dangerous dog offences (published in March 2016).⁸²⁹
- 8.34 The Sentencing Council publishes draft guidelines and, following consultation, definitive guidelines. For example, the draft guideline for sexual offences was first published in December 2012 as part of a consultation process that extended until March 2013. This consultation also included an analysis and research bulletin, social research on community attitudes to sentencing for sexual offences, a draft 'equality impact assessment', and a resource assessment. The definitive guideline was published in December 2013, and sets out the separate sentencing guidelines for 49 offences ranging from rape to exposure.
- 8.35 In this way, guidelines developed by the Sentencing Council have covered all of the major sexual offences in England and Wales in a systematic and holistic fashion. In so doing, the guidelines can consider relativities between offences within a given offence category. As a result, the charging and pleading practices for any offence within that category is unlikely to be improperly affected. This can be contrasted to, for example, the ad hoc reform to the maximum penalties⁸³⁰ and charging practices⁸³¹ for sexual offences in Victoria.
- 8.36 The appropriate starting points and category ranges are developed through consultation during the draft guidelines stage, usually through the use of consultation papers, vignette/case study testing of the guidelines, and community attitude surveys.⁸³²
- 8.37 In addition, a resource assessment must be prepared to accompany draft and definitive guidelines. This assessment must provide details on the expected effects of the guidelines and forecast resources required for additional prison places, probation provision, and youth justice services.⁸³³ For example, the resource assessment for the sexual offences definitive guideline forecast that the guideline would result in a moderate increase in sentence length of an average of approximately six months (before guilty plea discounts), and that between zero and 180 additional prison places would be required (correlating to £0–£5 million per annum in additional resources).⁸³⁴

829. See Sentencing Council for England and Wales (2016), above n 826.

830. For example, the amendment to the offence of sexual penetration with a child under 10/12 in 2010: *Crimes Legislation Amendment Act 2010* (Vic) s 3.

831. For example, the introduction of 'course of conduct' charges in 2015: *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) pt 3.

832. Mike Hough and Amy Kirby, 'The Role of Public Opinion in Formulating Sentencing Guidelines' in Andrew Ashworth and Julian V. Roberts (eds), *Sentencing Guidelines: Exploring the English Model* (2013) 149–155.

833. *Coroners and Justice Act 2009* (UK) s 127.

834. Sentencing Council for England and Wales, *Final Resource Assessment: Sexual Offences* (2013) 5.

Evaluation of the English sentencing guidelines

- 8.38 The Sentencing Council has a duty to monitor the operation of its sentencing guidelines. This monitoring includes:
- the frequency of departures from guidelines;
 - the factors that courts take into account when sentencing under guidelines;
 - the effect of guidelines on consistency; and
 - the effect of guidelines on the promotion of public confidence.⁸³⁵
- 8.39 Data produced by the Sentencing Council has also been used by a variety of academics to test the efficacy of the guidelines.

Sentencing Council research

- 8.40 Between 1 October 2010 and 31 March 2015, the Sentencing Council was assisted in its monitoring and research functions through the Crown Court Sentencing Survey.⁸³⁶ This survey was completed by all sentencing judges in the Crown Court and provided information on the sentence handed down and the factors that the sentencer had taken into account when working out an appropriate sentence.
- 8.41 The 2014 annual Crown Court Sentencing Survey report provides analysis of the application of the assault, burglary, and drug offences definitive guidelines.⁸³⁷ In relation to harm and culpability factors, the 2014 assessment found that, as expected, cases that involved greater culpability or harm factors were more likely to receive a custodial sentence and this term of imprisonment was more likely to be longer. Similarly, low harm and culpability factors correlated with lesser likelihood of receiving a custodial sentence and greater likelihood of a shorter sentence.⁸³⁸
- 8.42 The distribution of offence categories across burglary and assault offences was also as expected, with the majority of offences being classified as mid-range Category 2 offences in 2014 (54% of assault offences and 52% of burglary offences). However, from 2012 to 2014, there was a slight increase in the proportion of sentences identified as the most serious Category 1 offence, with the proportion of Category 1 assault offences increasing from 22% to 33%, and Category 1 burglary offences increasing from 28% to 37%.⁸³⁹
- 8.43 Compliance with offence ranges was high. Across all assault offences, 97% of cases were sentenced within the guideline range. The proportion of sentences within range was the same for burglary offences, with 98% of drug offences sentenced within the guideline range. Departures from the range were most likely for possession of a controlled drug Class A, with 8% of cases sentenced below the range of a fine to 51 weeks imprisonment, and 6% sentenced above the range. Departures below the range were also high for causing grievous bodily harm with intent, with 7% of cases being sentenced to less than 3 years' imprisonment.

835. *Coroners and Justice Act 2009* (UK) s 128.

836. Following a review, the Sentencing Council has since decided to redirect its limited resources towards more targeted sentencing surveys; Sentencing Council for England and Wales, *Crown Court Sentencing Survey* (Sentencing Council for England and Wales, 2015) <<https://www.sentencingcouncil.org.uk/analysis-and-research/crown-court-sentencing-survey/>> at 31 March 2016.

837. Sentencing Council for England and Wales, *Crown Court Sentencing Survey Annual Publication: January to December 2014* (2015).

838. *Ibid* 2–3.

839. *Ibid* 3.

- 8.44 In addition to the annual Crown Court Sentencing Survey, the Sentencing Council conducted its first analysis of the operation of a definitive guideline, the *Assault Definitive Guideline*, in 2015. Overall, the assessment found that sentencing severity had decreased for assault offences as a whole in the 12 months after the guideline was introduced (compared with the 12 months prior to the introduction of the guideline), largely due to the decrease in severity for the frequently sentenced offence of common assault.⁸⁴⁰
- 8.45 Sentencing severity, however, increased for two offences in excess of that predicted in the resource estimate prepared prior to the implementation of the guideline. The average custodial sentence length for grievous bodily harm with intent increased by 17%, from 5.9 years to 6.9 years, compared with an expected increase of 2%. Sentencing severity for actual bodily harm also increased, with more custodial sentences being delivered, compared with an expected reduction in sentencing severity for that offence.
- 8.46 This increase in severity was exacerbated by confusion and disparity in the application of the offence category harm factor of 'injury which is serious in the context of the offence'. The presence of that factor added 29% (1.7) years to the average custodial sentence length for grievous bodily harm with intent, 20% (0.3 years) to the average custodial sentence length for grievous bodily harm, and 26% (0.2 years) to the average custodial sentence length for actual bodily harm. There was also confusion regarding the application of the 'injury which is less serious in the context of the offence' factor.
- 8.47 The qualitative review of the *Assault Definitive Guideline* prepared as part of the 2015 assessment found that most interviewees (from a sample of judges, magistrates, and lawyers with experience of the guidelines) were 'generally positive about the assault guideline, especially the consistency it has brought to the sentencing process while still allowing a degree of judicial discretion'.⁸⁴¹ This research also identified that the guideline:
- enables more structured, logical sentencing;
 - gives judges and magistrates confidence in their 'instinct';
 - helps guide and build the confidence of inexperienced sentencers;
 - helps mitigate against the potential of overly harsh or lenient sentences; and
 - ensures better transparency in terms of explaining sentencing.⁸⁴²
- 8.48 Most of the issues identified by respondents went to semantics and consistency of approach in regard to the meaning of certain factors (especially the 'seriousness of the injury in the context of the offence' factor). The report concluded on a quote by a magistrate respondent that 'there are one or two factors that could be tidied up, but the way that it is written and structured helps sentencers come to a decision'.⁸⁴³

840. Sentencing Council for England and Wales, *Assessing the Impact of the Implementation of the Sentencing Council's Assault Definitive Guideline* (2015) 1.

841. Kelly Lock, *Assault Definitive Guideline: Findings from Discussions with Sentencers and Practitioners: Research Conducted by Opinion Research Services for the Sentencing Council for England and Wales* (2015) 8.

842. *Ibid* 9.

843. *Ibid* 44.

Academic analysis

- 8.49 According to the 2011 Crime Survey of England and Wales, only 26% of respondents were fairly confident or very confident that 'courts are effective at giving punishments which fit the crime', with 41% indicating that they were not very confident and 32% indicating that they were not confident at all.⁸⁴⁴ In 2012–13, the proportion of respondents that had confidence rose to 29%, and in 2013–14 it increased to 31%.⁸⁴⁵ While these increases were statistically significant, they still represent low levels of public confidence.
- 8.50 Research conducted by Pina-Sánchez and Linacre has used the Crown Court Sentencing Survey data to develop methods of measuring consistency in sentencing. The researchers developed two measures: exact matching and dispersion of residuals. Through exact matching, the researchers found a statistically significant reduction in variability of sentence length of 7.7% after the introduction of the assault guideline, and less variability in 57% of offence groups covered by the guideline. However, the second method did not find a definitive causal link between the guideline and the observed improvements in consistency.⁸⁴⁶
- 8.51 A 2012 study of public perceptions of sentencing guidelines and the lay magistracy in England and Wales found that the general population was largely unaware of the ways in which the public are involved in the development of sentencing guidelines. In particular, this research found essentially no awareness of the existence of sentencing guidelines. However, 93% of respondents thought sentencing guidelines were a good idea. Building on prior research that more informed respondents are less punitive towards specific offenders, this study demonstrated that the 'information effect' also extends to information regarding sentencing processes. In particular, 'the guideline serves as a frame of reference to constrain more punitive reactions to cases'.⁸⁴⁷
- 8.52 Overall, the study found that 'if the public were better informed about the sentencing process, public attitudes would change and public confidence in sentencing would improve'.⁸⁴⁸ This finding highlights that, even with clearly communicated sentencing guidelines, promotion of public confidence in sentencing is reliant on significant public engagement. The study suggested that greater confidence could be achieved through further engagement by the Sentencing Council, increased reference to the guidelines in news reports, and greater articulation of the use of guidelines by sentencers in their sentencing remarks.
- 8.53 A 2015 analysis of judicial compliance with the definitive guideline on guilty plea reductions, based on Crown Court Sentencing Survey data, found mixed results. For offenders that submitted an early plea, 80% received the recommended one-third reduction in sentence and 98% were given a discount of more than 20%. For those who submitted an intermediate plea, 34% received a discount around the recommended 25% discount, while 49% of offenders who submitted a late guilty plea received a discount the same as or less than the recommended discount of 10%.⁸⁴⁹

844. Mike Hough, Ben Bradford, Jonathan Jackson, and Julian V. Roberts, *Attitudes to Sentencing and Trust in Justice: Exploring Trends from the Crime Survey for England and Wales*, Ministry of Justice Analytical Series (2013) 31.

845. Krista Jansson, *Public Confidence in the Criminal Justice System – Findings from the Crime Survey for England and Wales (2013/14)*, UK Ministry of Justice Analytical Summary (2015) 4.

846. Jose Pina-Sánchez and Robin Linacre, 'Enhancing Consistency in Sentencing: Exploring the Effects of Guidelines in England and Wales' (2014) 30 *Journal of Quantitative Criminology* 731, 742–744.

847. Julian V. Roberts, Mike Hough, Jonathan Jackson, and Monica M. Gerber, 'Public Opinion towards the Lay Magistracy and the Sentencing Council Guidelines: The Effects of Information on Attitudes' (2012) 52 *British Journal of Criminology* 1072, 1086.

848. *Ibid.*

849. Julian V. Roberts and Ben Bradford, 'Sentence Reductions for a Guilty Plea in England and Wales: Exploring New Empirical Trends' (2015) 12(2) *Journal of Empirical Legal Studies* 187, 197.

Resourcing

- 8.54 As with any agency, the functions undertaken by the Sentencing Council are necessarily limited by its level of resourcing. Constraints on funding have seen the discontinuation of the Crown Court Sentencing Survey, the only ongoing and comprehensive sentencing data collected by the council.
- 8.55 Further, while it has been highlighted that the preparation and publication of sentencing statistics akin to those prepared by the Victorian Sentencing Advisory Council would assist the Sentencing Council in achieving its monitoring and public education functions (while also providing sentencing judges with measures of consistency), it is not foreseen that the Sentencing Council will be provided with the resources to collect and analyse such data.⁸⁵⁰ This lack of data also affects the preparation of guidelines and the forecasting of guideline implications. Without adequate funding to carry out its core functions, the Sentencing Council of England and Wales is restricted in achieving its full potential.

Scottish model

- 8.56 The responsibility for legislating in the majority of criminal law areas has been devolved to the Scottish Parliament, and criminal justice in Scotland is dealt with by Scottish courts. The Scottish Parliament has recently introduced a sentencing council model that encourages a dialogue between guideline judgments delivered by the High Court of the Justiciary (the highest court of criminal appeal in Scotland) and sentencing guidelines delivered by the newly established Scottish Sentencing Council.
- 8.57 Under this model, the Scottish Sentencing Council prepares sentencing guidelines that only come into effect if they are approved by the High Court. In addition, the High Court can continue to deliver guideline judgments, which they can then use as a trigger to require the Scottish Sentencing Council to prepare sentencing guidelines.
- 8.58 Under the *Criminal Procedure (Scotland) Act 1995* (UK), the High Court may ‘pronounce an opinion on the sentence or other disposal or order which is appropriate in any similar case’,⁸⁵¹ and Scottish courts ‘shall have regard to any relevant opinion’ pronounced in such a way.⁸⁵² These pronounced opinions are known as guideline judgments. The new Sheriff Appeal Court, which first sat on 4 November 2015, may also pronounce opinions. Any such pronouncements trigger the power of the High Court or the Sheriff Appeal Court to require the Scottish Sentencing Council to prepare sentencing guidelines.
- 8.59 Any request from the High Court or the Sheriff Appeal Court for the preparation or review of sentencing guidelines must be complied with by the Scottish Sentencing Council. Scottish ministers may also request the preparation or review of sentencing guidelines, but the Scottish Sentencing Council may decide not to comply with such a request, as long as it provides reasons.

850. Julian V. Roberts and Mike Hough, ‘Empirical Sentencing Research: Options and Opportunities’ in Julian V. Roberts (ed.), *Exploring Sentencing Practice in England and Wales* (2015) 2–3.

851. *Criminal Procedure (Scotland) Act 1995* (UK) ss 118(7), 189(7).

852. *Criminal Procedure (Scotland) Act 1995* (UK) s 197.

- 8.60 The Scottish Sentencing Council can also self-initiate sentencing guidelines, which must be approved by the High Court before having any effect. Specifically, sentencing guidelines prepared by the Scottish Sentencing Council may include:
- the principles and purposes of sentencing;
 - sentencing levels;
 - the particular types of sentence that are appropriate for particular offences or offenders; or
 - circumstances in which the guidelines may be departed from.⁸⁵³
- 8.61 Any guidelines must first be prepared as draft guidelines, and coupled with draft impact assessments, before consultation with Scottish ministers, the Lord Advocate, and any other appropriate parties. Impact assessments must consider the likely costs and benefits of implementing the guidelines and the broader effects on the criminal justice system.
- 8.62 Upon receiving the final guidelines and impact assessments, the High Court may approve the Scottish Sentencing Council's guidelines in whole or in part, modify them, or reject them in whole or in part, as well as decide the date on which the guidelines come into effect.
- 8.63 Scottish courts must then take into account any applicable guidelines when sentencing offenders, or give reasons for not doing so (including reasons for departing from the guidelines in a manner set out by the guidelines).
- 8.64 The framework for the Scottish Sentencing Council was prescribed in the *Criminal Justice and Licensing (Scotland) Act 2010* (UK), but the Scottish Sentencing Council was not established as an independent advisory body until 19 October 2015 due to 'constraints on government spending'.⁸⁵⁴ The first meeting of the Scottish Sentencing Council was on 14 December 2015. The Scottish Sentencing Council comprises six judicial members, three legal members, and three lay members (including a police constable and a victims' representative) and is chaired by the Lord Justice Clerk.
- 8.65 The adoption of sentencing guidelines was first recommended by the Sentencing Commission for Scotland, which operated from November 2003 to November 2006 to advise on sentencing issues, such as the use of bail and remand, early release and supervision provisions, and consistency in sentencing.⁸⁵⁵ The Scottish Sentencing Council model was considered in detail in a 2008 consultation paper and received wide opposition from senior judges due to concerns around judicial independence.⁸⁵⁶
- 8.66 In announcing the launch of the Scottish Sentencing Council, Scottish Justice Secretary Michael Matheson stated:
- While the independence of Scotland's judiciary of course remains a fundamental part of the Scottish legal system, as does judicial discretion in individual sentencing decisions, the Council will help to ensure transparency and consistency in all sentencing decisions made in Scotland, as well as helping the public better understand the sentencing process.⁸⁵⁷

853. *Criminal Justice and Licensing (Scotland) Act 2010* (UK) s 3(3).

854. Alan Robertson, 'Scottish Sentencing Council Launched', *Holyrood* (Edinburgh) 19 October 2015 <<https://www.holyrood.com/articles/news/scottish-sentencing-council-launched>> at 31 March 2016.

855. Neil Hutton, 'The Sentencing Commission for Scotland' in Arie Freiberg and Karen Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (2008) 139.

856. Scottish Government, *Sentencing Guidelines and a Scottish Sentencing Council: Consultation and Proposals* (2008); Robertson (2015), above n 854.

857. Scottish Sentencing Council, 'Council Established and Membership Announced', Media Release (19 October 2015) <<https://www.scottishsentencingcouncil.org.uk/news-media/establishment-and-membership/>> at 31 March 2016.

- 8.67 According to this announcement, the Scottish Sentencing Council will also:
- conduct research into sentencing practice;
 - help develop sentencing policy;
 - publish information about sentences;
 - provide general advice and guidance on sentencing; and
 - publish guideline judgments (these are court opinions that provide guidance on sentences in similar cases).⁸⁵⁸
- 8.68 The long period between the introduction of the Scottish Sentencing Council's founding legislation and its establishment suggests that while there are obstacles to overcome when setting up a sentencing guidelines body, there is still momentum for the establishment of new bodies to provide comprehensive and independent guidelines. Further, the Scottish model draws on key lessons from the English system and develops that model in a way that bridges the divide between ad hoc court-made guideline judgments and comprehensive, externally prepared guidelines, allowing for a clear dialogue between the Courts and the Scottish Sentencing Council.
- 8.69 This dialogue model may help to address any resistance to prescriptive guidance from the judiciary, as well as ensure that sentencing guidance remains practical, impartial, and without unintended consequences. It also encourages the High Court to be proactive in its preparation and consideration of guideline judgments for the lower courts, while allowing for a methodical and comprehensive approach to the preparation of sentencing guidelines. The efficacy of this approach in practice will be clearer once the Scottish model is fully operational and has been evaluated.

New Zealand

- 8.70 The legislative framework for a New Zealand sentencing council was passed in 2007, but the sentencing council was never established after a change of government in 2008. Under the *Sentencing Council Act 2007* (NZ), a sentencing council chaired by a member of the judiciary and composed of five judicial members and five non-judicial members would prepare sentencing guidelines.⁸⁵⁹
- 8.71 Guidance under the scheme would be self-initiated by the sentencing council and could cover sentencing or parole. The sentencing council would consult on draft guidelines through formal public notification and submission procedures before finalising guidelines and associated cost-benefit analyses.
- 8.72 The point of differentiation for the New Zealand model is that guidelines would need to be approved by parliament before coming into effect. Under this model, the sentencing council would present finalised guidelines to the minister, who would then present them to the House of Representatives. The inaugural guidelines were intended to be presented as a group of guidelines covering most offences, which could then be 'disapplied' by the House within 30 days of their presentation. Subsequent guidelines could be presented individually or in groups and disapplied within 15 days of their presentation. If the guidelines were not disapplied, they would come into force.

⁸⁵⁸. Ibid.

⁸⁵⁹. See Warren Young, 'Sentencing Reform in New Zealand: A Proposal to Establish a Sentencing Council' in Arie Freiberg and Karen Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (2008); Warren Young and Andrea King, 'The Origins and Evolution of Sentencing Guidelines: A Comparison of England and Wales and New Zealand' in Andrew Ashworth and Julian V. Roberts (eds), *Sentencing Guidelines: Exploring the English Model* (2013).

- 8.73 The New Zealand Law Commission drafted the inaugural guidelines, with the intention that the sentencing council would add or review these with subsequent guidelines. The inaugural guidelines were never presented to parliament. In lieu of the new sentencing council, the New Zealand Court of Appeal continues to give guideline judgments.⁸⁶⁰

Sentencing council guidelines considered in other jurisdictions

- 8.74 Given the significant investment required to set up independent bodies to prepare sentencing guidelines, and the significant reform sentencing guidelines represent in relation to current sentencing practices, efforts to establish sentencing guidelines councils have had limited success in other jurisdictions.
- 8.75 An independent, but judicially dominated, Sentencing Commission was established in South Korea in 2007 to counteract concerns about sentencing disparity held both by the public and within the legal system. The commission chose to adopt an approach to sentencing guidelines modelled on the English system, and in 2009 it prepared guidelines on seven offence types.⁸⁶¹ These guidelines are not binding, but a judge must have regard to them and provide written reasons for any departure. In their first six months of operation, the guidelines attracted a compliance rate of 89% and a reduction in disparity.⁸⁶²
- 8.76 A comprehensive review of the South African sentencing system in 2000 recommended establishing a sentencing council to prepare sentencing guidelines, but this recommendation was not adopted.⁸⁶³
- 8.77 In Israel, a Bill to create a Starting Sentences Committee to prepare guidelines on appropriate starting points for certain offences committed under typical circumstances was proposed in 2006.⁸⁶⁴

Sentencing council guidelines in Victoria

Obstacles to overcome

- 8.78 The introduction of a sentencing guidelines council could address the majority of sentencing problems identified by the Council through the provision of clear and comprehensive guidance. Nevertheless, introduction of sentencing council guidelines will face some obstacles, including:
- the significant resources and investment required to develop systematic guidelines;
 - the significant amount of time needed to prepare and consult on guidelines – this may be particularly lengthy given the novelty and utility of this type of guidance in Australia; and
 - the success of this model being reliant on judicial ownership and leadership of the process.

860. Courts of New Zealand, *Sentencing* (Courts of New Zealand, 2015) <<http://www.courtsofnz.govt.nz/about/system/role/sentencing/#appeal>> at 31 March 2015. See, for example, *R v AM* [2010] 2 NZLR 750.

861. Hyungkwan Park, 'The Basic Features of the First Korean Sentencing Guidelines' (2010) 22(4) *Federal Sentencing Reporter* 262, 262.

862. *Ibid* 269.

863. South African Law Commission, *Sentencing (A New Sentencing Framework): Project 82* (2000) 43–50. See also Stephan Terblanche, 'A Sentencing Council in South Africa' in Arie Freiberg and Karen Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (2008).

864. Penal Law Bill (Amendment No. 92, Structuring Judicial Discretion in Sentencing) 5766-2006 (Israel). See Ruth Kannai, 'Sentencing in Israel' (2010) 22(4) *Federal Sentencing Reporter* 223, 224–225; Oren Gazal-Ayal and Ruth Kannai, 'Determination of Starting Sentences in Israel – System and Application' (2010) 22(4) *Federal Sentencing Reporter* 232, 232.

- 8.79 Guidelines of the complexity and detail provided for in other jurisdictions are not currently prepared in Australia. Furthermore, the staged process of decision-making set out by these guidelines is in direct contrast to the instinctive synthesis approach taken by Australian courts (see [2.29]–[2.37]). Reforms in this area would need to address the prohibition in Australian common law of staged sentencing and prescriptive numerical guidance, as affirmed by successive decisions of the High Court.⁸⁶⁵
- 8.80 Victorian sentencing courts do not have much experience with the application of structured guidance, in contrast with the steady introduction of progressively binding guidelines in England and Wales. It is unlikely that the sudden imposition of structured guidelines would be well received in Victoria, particularly if this took place before the enhanced guideline judgment scheme had had the opportunity to flourish.
- 8.81 Nonetheless, further consideration of a sentencing guidelines council may promote judicial ownership of an enhanced guideline judgment scheme as well as operate as a natural product of a guideline judgment scheme that is operating proficiently. As noted by Krasnostein, even though the establishment of a sentencing guidelines council represents a ‘seismic shift’ in Australian sentencing culture, ‘the initial move to judicially-generated guidelines may normalise structured sentencing, and, in time, lead towards greater formalised involvement by sentencing councils’.⁸⁶⁶

Stakeholders’ views

- 8.82 In considering whether an external body should develop sentencing guidelines, a number of submissions noted the utility of externally developed guidelines, but preferred more extensive use of the Court of Appeal’s existing role in providing sentencing guidance.
- 8.83 For example, Victoria Legal Aid considered the current institutional parties (including Victoria Legal Aid, the Director of Public Prosecutions, and the Sentencing Advisory Council) as being ‘uniquely placed to assist the court’ and that ‘[m]ore proactive use of the current scheme is likely to deliver on the stated aims’.⁸⁶⁷
- 8.84 Victoria Legal Aid also recognised that ‘there are advantages of an external judge-guided body developing draft guidelines’, such as formalised community consultation processes and the ability to avoid court delays, concluding that ‘[i]f a UK-style body is contemplated, care must be taken to ensure the model adopted does not offend instinctive synthesis or compromise judicial independence’.⁸⁶⁸
- 8.85 Liberty Victoria cautioned that ‘there is already a system for guideline judgments that must take into account consistency in sentencing and public confidence’ and suggested that ‘[i]t should be used more regularly before other more radical measures are contemplated’.⁸⁶⁹
- 8.86 The Director of Public Prosecutions submitted that such a body should only be introduced if the courts demonstrate that they are incapable of managing the responsibility for issuing guidelines or if the courts seek the assistance of such a body, and until such time no non-judicial guideline scheme should be introduced.⁸⁷⁰

865. See [2.26]–[2.37].

866. Krasnostein (2015), above n 92, 295.

867. Submission 13 (Victoria Legal Aid).

868. Submission 13 (Victoria Legal Aid).

869. Submission 10 (Liberty Victoria).

870. Submission 14 (Director of Public Prosecutions).

- 8.87 Another stakeholder considered that the ‘enactment and enforcement of the criminal law is a matter for parliament and the courts’.⁸⁷¹
- 8.88 The Law Institute of Victoria was supportive of introducing a sentencing guidelines council, and proposed that it resemble the Sentencing Council of England and Wales. Specifically, the Law Institute of Victoria emphasised that such a body must be constituted by members of the legal community.⁸⁷² The Director of Public Prosecutions also supported greater inclusion of judicial members if a sentencing guidelines council were established.⁸⁷³

The Council’s view: a dialogue model of sentencing guidance

- 8.89 Despite the obstacles to be overcome when considering introducing a sentencing guidelines council in Victoria, the Council is of the view that there are clear merits in the dialogue model of sentencing guidance, and that it is worthy of further consideration.
- 8.90 A dialogue model of sentencing guidance, similar to that in Scotland, is the Council’s preferred model on the available evidence, as it preserves the primacy of the Court of Appeal as a source of sentencing guidance, but enables research, consultation, and resourcing issues to be dealt with externally. In particular, the dialogue model is presented as a valuable future consideration to overcome problems in the existing sentencing framework in Victoria and problems that cannot be overcome by the Council’s recommended model for sentencing guidance.

Membership of a new guidelines council

- 8.91 In order to ensure guidance continues to be developed by those with experience in sentencing, and is subsequently highly regarded by sentencing courts applying such guidance, the Council considers it important that a newly constituted sentencing guidelines council is comprised of a majority of judicial members.
- 8.92 Legislatively, this could reflect a similar composition as the Adult Parole Board, but with a majority of judicial members. The numbers could also be expressly provided for in the legislation, for example, eight judicial members (including representation from the Magistrates’ Court and the higher courts in Victoria) and six non-judicial members (including representatives from the Office of Public Prosecutions, Victoria Legal Aid, Victoria Police, and victims of crime associations). It is proposed that, recognising the need for judicial leadership, the Chief Justice of the Supreme Court would also be the Chair of the council.

Content and nature of guidelines

- 8.93 The Council believes that guidelines delivered by a non-judicial body should have the same application as guideline judgments. A guideline could apply generally, to a particular or class of court, offence, or penalty, or to a particular class of offender. A guideline could include guidance on sentencing criteria, the weight of specific sentencing purposes, criteria for determining the gravity of an offence, criteria that may reduce sentences for an offence, and the weight given to relevant criteria. Similarly, the sentencing guidelines council should also be able to give guidance on appropriate sentence levels and ranges and the operation of any standard sentence.

871. Submission I (G. Silbert).

872. Submission II (Law Institute of Victoria).

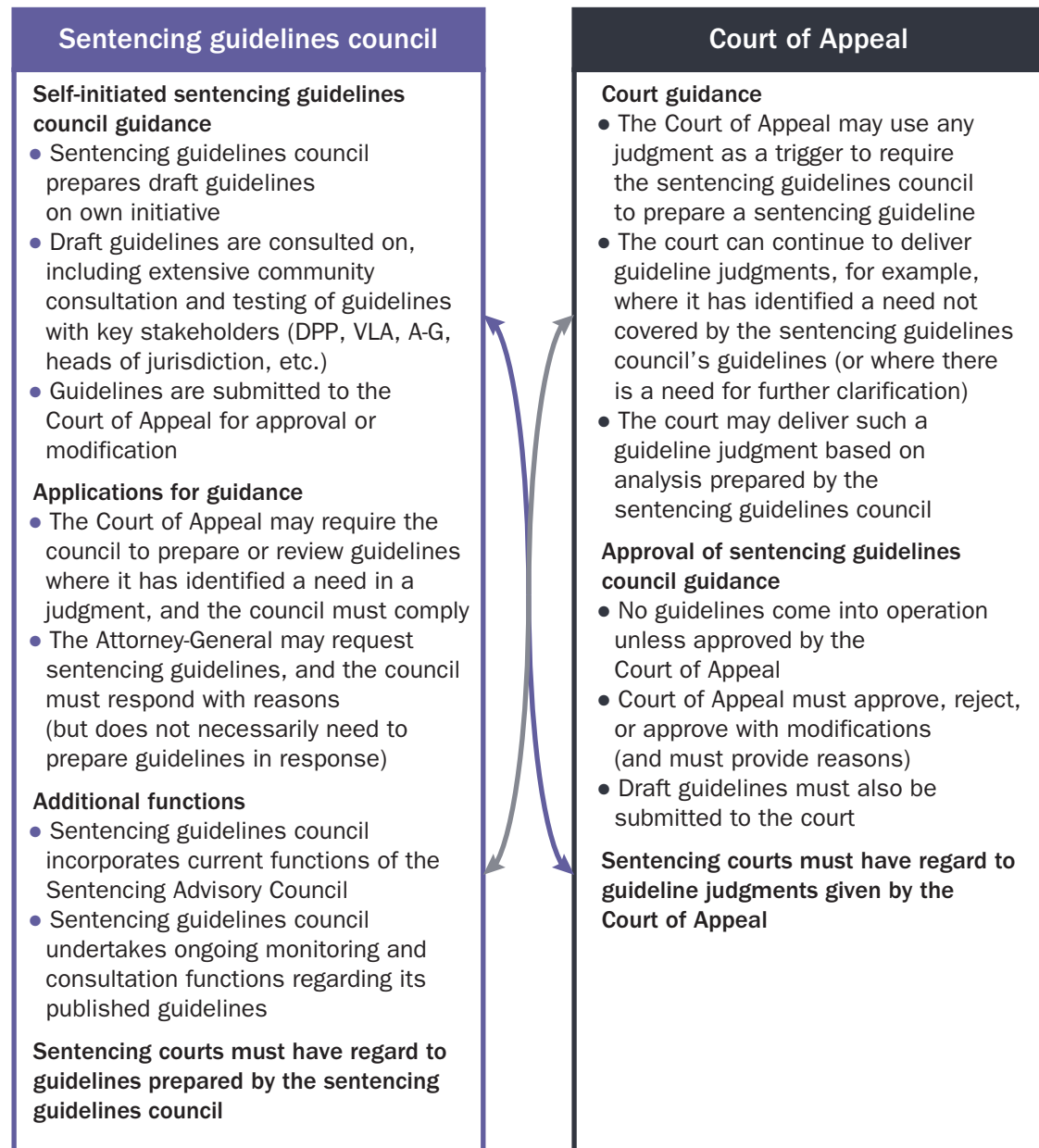
873. Submission I4 (Director of Public Prosecutions).

- 8.94 In relation to the force of guidelines under this model, the Council believes that the appropriate balance would be gained by requiring a sentencing court to 'have regard to' any relevant guidelines. Reasons would not need to be given for not following a sentencing guideline. Rather, it is envisaged that the guidelines could frame sentencing considerations, or principles, that can be taken into account when sentencing.
- 8.95 Further consideration would need to be given to whether there is any utility in introducing staged sentencing similar to that in the England and Wales guidelines. If structured sentencing of this nature were preferred, legislation would be required to expressly exclude the common law. Significantly, instinctive synthesis would need to be clarified so that it only played a role in determining the final sentence outcome rather than in the entire decision-making process. This would be a significant departure from the current approach to sentencing, but it may significantly improve the transparency of the sentencing exercise.

Initiation of guidelines

- 8.96 The Council prefers a dialogue model of guidance with the Court of Appeal at the pinnacle of that guidance, as this model would retain the primacy and authority of the court in delivering sentencing guidance. Under such a model, all guidelines would need to be approved by the Court of Appeal before they came into operation.
- 8.97 The dialogue model (described in Figure 9 below) allows for sentencing guidance to be initiated in one of three ways:
- The sentencing guidelines council can prepare guidelines on its own initiative, as part of an ongoing guideline preparation timeline aimed at eventually preparing guidelines for all offences.
 - The Court of Appeal can require the sentencing guidelines council to prepare or review guidelines once it has identified the need for a guideline in a judgment in an appeal against sentence.
 - The Attorney-General may request that the sentencing guidelines council prepare or review sentencing guidelines at any time.
- 8.98 Court of Appeal requests for a sentencing guideline must be complied with, while Attorney-General requests must be considered (and reasons provided if refused).
- 8.99 This model is intended to share the responsibility for sentencing guidelines in Victoria so that they can be delivered in a more systematic and comprehensive manner. Guidelines would therefore eventually extend beyond the current offences with identified sentencing problems (see Chapter 5) and could articulate sentencing practices already being applied for other offences.
- 8.100 This shared responsibility retains ownership of sentencing guidance within the Court of Appeal, while providing for research and consultation capacities within a judge-led external body.
- 8.101 It is envisaged that the Court of Appeal would not need to exercise its referral power often, given the sentencing guidelines council's ongoing preparation of guidelines. Such a referral might serve to prioritise the development of sentencing guidelines and suggest possible content. Conversely, the extensive drafting and consultation stage for sentencing guidelines that incorporates the Court of Appeal is intended to remove any likelihood that sentencing guidelines would be contentious or rejected at the final stage.

Figure 9: Dialogue model of sentencing guidance



Development and consultation on guidelines

- 8.102 Under this model, the sentencing guidelines council would be required to publish draft guidelines and submit them to the Court of Appeal. These draft guidelines would then undergo extensive consultation.
- 8.103 In England and Wales, this consultation stage on the draft guidelines extends for approximately 6 to 12 months. This enables the council to consult widely through public submissions, public forums and roundtables, testing of levels and ranges through community surveys and sentencing acceptance studies, and conversations with key stakeholders.
- 8.104 In Victoria, the Council is of the view that, at a minimum, the sentencing guidelines council would consult with:
- the Attorney-General and other relevant ministers;
 - the Court of Appeal;
 - the Supreme Court;
 - the County Court;
 - the Magistrates' Court;
 - the Director of Public Prosecutions;
 - Victoria Legal Aid; and
 - the Victims of Crime Commissioner, as well as other relevant advocacy and policy groups.
- 8.105 Public consultation and community attitudes surveys are also crucial, and are particularly relevant when first considering how to set appropriate sentence ranges.
- 8.106 Once a draft guideline has undergone consultation, it would be amended, finalised, and submitted to the Court of Appeal as a sentencing guideline. The Court of Appeal may then reject or approve (with or without modifications) the guideline. The Court of Appeal would be required to consider the guideline and provide reasons for its decision.
- 8.107 If impact assessments with modelling of resource implications of guidelines are also provided for, these should be prepared in draft and final forms alongside the draft and final guidelines.
- 8.108 The sentencing guidelines council would continue to monitor the impact of guidelines and identify any need to review or update a guideline.

Other functions of the sentencing guidelines council

- 8.109 It is preferable that only one body be responsible for advising on sentencing issues in Victoria. The current functions of the Council would complement the task of preparing sentencing guidelines. The Council is of the view that a new sentencing guidelines council – as an essentially reconstituted Sentencing Advisory Council – should take on the Council's compatible existing functions⁸⁷⁴ in addition to its guideline development functions.
- 8.110 To complement the guidelines, the sentencing guidelines council should promote public awareness of the guidelines and undertake extensive research, monitoring, and evaluation in relation to the guidelines. The work of the sentencing guidelines council should be public in nature, with research and analysis published regularly.

874. *Sentencing Act 1991* (Vic) s 108C(1).

Constitutionality of sentencing council guidance

- 8.111 The establishment of an executive body to advise the judiciary on legislative penalties has been seen as a success in the United Kingdom, but could potentially encounter issues of constitutional validity in Australia.
- 8.112 In Australia, state superior courts also exercise Commonwealth judicial power conferred on them by the Commonwealth Constitution and the *Judiciary Act 1903* (Cth). As a result, state legislatures cannot confer powers on state courts that can be characterised as ‘repugnant to or incompatible with their exercise of the judicial power of the Commonwealth’.⁸⁷⁵
- 8.113 It is therefore worth considering the type of guidance that is most compatible with the courts’ exercise of Commonwealth judicial power.
- 8.114 In *Magaming v The Queen*, the court held that mandatory minimum sentences were compatible with judicial power as discretion was still exercised as to the giving of a sentence and the quantum of the sentence awarded above the minimum. Further, it is the court’s duty to obey the statute when imposing a punishment, and parliament is well within its capacity to deny the court discretion.⁸⁷⁶ As stated in *Magaming v The Queen*:
- In very many cases, sentencing an offender will require the exercise of a discretion about what form of punishment is to be imposed and how heavy a penalty should be imposed. But that discretion is not unbounded. Its exercise is always hedged about by both statutory requirements and applicable judge-made principles. Sentencing an offender must always be undertaken according to law.⁸⁷⁷
- 8.115 While mandatory minimums transferred much of that discretion to the prosecution, the High Court held that prosecutorial decisions within a legislative framework are a well-established role of the prosecution.⁸⁷⁸ In summary, mandatory minimum sentences were held to form one end of the ‘yardstick’ in the same manner that maximum sentences operate at the other end of the yardstick. In doing so, statutory mandatory minimums avoid contravening the common law principle of instinctive synthesis.
- 8.116 In relation to instinctive synthesis, the High Court has stated that the common law prohibits sentencing that involves starting points or a ‘two-tier’, staged approach.⁸⁷⁹ Legislated guidance that creates starting points has been read down as being part of the yardstick approach to be taken into account when holistically applying instinctive synthesis. This reasoning, however, has its basis in common law, rather than constitutional considerations, and can be overridden by express legislative intention.
- 8.117 A staged approach was also rejected in *Wong*, although in those circumstances the New South Wales guideline judgment also faced constitutional invalidity. The joint judgment of Gummow, Gaudron, and Hayne JJ held that there was a distinction between guidelines that articulate principles that should underpin the determination of a sentence and prescriptive guidelines that set out expected results. In regard to ‘a guideline judgment which purports to identify a particular range of results that should be reached in future cases, rather than considerations which a judge should take in to account when arriving at those results’, their Honours held that ‘the publication of expected or intended results of future cases is not within the jurisdiction of the powers of the court’ and ‘at least begins to pass from the judicial

875. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 103 (Gaudron J).

876. *Magaming v The Queen* (2013) 252 CLR 381, 390; see also *Palling v Corfield* (1970) 123 CLR 52, 58.

877. *Magaming v The Queen* (2013) 252 CLR 381, 396 (citations omitted).

878. *Magaming v The Queen* (2013) 252 CLR 381, 390, 394.

879. *Markarian v The Queen* (2005) 228 CLR 357, 377 (McHugh J); *Muldock v The Queen* (2011) 244 CLR 120, 132.

to the legislative'.⁸⁸⁰ Callinan J similarly noted that the prescriptive tone and operation of the New South Wales guideline suggested 'a legislative quality, not only in form but also as they speak prospectively'.⁸⁸¹

- 8.118 This prospective quality was found despite the fact that the promulgated guideline judgments were intended merely to provide indications. Where departure from the guidelines must be justified, this would constitute prescriptive guidance that takes on a legislative quality.⁸⁸² As noted by Donnelly:

It is not enough for the [Court of Criminal Appeal] to state that a guideline is not prescriptive ... The statement of the CCA that sentences imposed outside the ranges suggested in the guideline will attract 'close scrutiny' indicated that the guideline had a prescriptive effect. This is because a departure from it would evidence an error of sentencing principle.⁸⁸³

- 8.119 Importantly, the three guideline judgments published in New South Wales after *Wong*⁸⁸⁴ still provide some indication on sentencing range (but wind back any implications of a binding nature).
- 8.120 While the guideline judgment in *Wong*⁸⁸⁵ dealt with a Commonwealth offence, it is clear that for guideline judgments to avoid a legislative characterisation, they must not be overly prospective or binding on outcome, and instead focus on guidance regarding the approach to be taken.
- 8.121 As a result, the constitutionality of guidance may depend on the combination of its source and nature. Legislated guidance can remove almost all discretion, while judicial guidance must preserve it. Both judge-made principles in the form of non-binding guideline judgments and mandatory guidelines provided for in legislation are valid limitations on judicial discretion.
- 8.122 In relation to sentencing council guidelines and judicial involvement in executive guidance, constitutional limitations go to the independence of judicial officers. Primarily, the role of a sentencing judge cannot be seen as taking on an executive or administrative character to the detriment of the reputation of the court.
- 8.123 In *Kable*, the ability for state legislatures to confer executive government functions on state court judges was recognised as valid in a *persona designata* capacity, unless that judicial appointment 'gave the appearance that the court as an institution was not independent of the executive government of the State'.⁸⁸⁶ However, it was also noted that:

there are few appointments of a judge as *persona designata* in the State sphere that could give rise to the conclusion that the court of which the judge was a member was not independent of the executive government.⁸⁸⁷

- 8.124 Ultimately, non-judicial functions may be conferred on a state judge or court unless:

the vesting of those functions or duties might lead ordinary reasonable members of the public to conclude that the State court as an institution was not free of government influence in administering the judicial functions invested in the court.⁸⁸⁸

880. *Wong v The Queen* (2001) 207 CLR 584, 613–614, 615.

881. *Wong v The Queen* (2001) 207 CLR 584, 642.

882. *Wong v The Queen* (2001) 207 CLR 584, 615 (Gaudron, Gummow, and Hayne JJ), 634 (Kirby J).

883. Hugh Donnelly, 'Wong and Leung: the Kable Guy and Numerical Guidelines' (2001) 8(11) *Criminal Law News* 1, 18.

884. *Wong v The Queen* (2001) 207 CLR 584.

885. *Wong v The Queen* (2001) 207 CLR 584.

886. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 117 (McHugh J).

887. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 117–118 (McHugh J).

888. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 119 (McHugh J).

- 8.125 A properly constituted, judicially led sentencing guidelines council could have a similar status to the Adult Parole Board. In *Kotzmann v Adult Parole Board of Victoria*, it was held that the mandatory appointment of a Supreme Court judge as chairperson of the board, as well as other judicial members, was a valid appointment of a state court judge as *persona designata*.⁸⁸⁹ However, the Supreme Court noted that '[i]ndividual views will differ as to what will erode public confidence in the court and judiciary'.⁸⁹⁰
- 8.126 Judd J found, however, that there was no impact on the perceived independence of the court as the Adult Parole Board was not made up entirely of currently serving judicial members and decisions were made collectively.⁸⁹¹ While executive interference in the decisions of the board was possible, there was no evidence of such interference. Further, the involvement of judges in the process could be seen as providing more independence, including 'appropriate and independent supervision of an executive function that has the potential to be employed unfairly'.⁸⁹²

Sentencing guidelines council compatibility with separation of powers

- 8.127 Consequently, the Council considers that a sentencing guidelines council, established with a judicial majority and the purpose of providing sentencing guidance to courts, would be compatible with the separation of powers doctrine. This is particularly the case where the aims of such a council and its associated guidelines would be to promote consistency of approach in sentencing and to promote public confidence in the courts and the judiciary.
- 8.128 Despite these considerations, all of the constitutional issues take on a different character if guidance were applied to Commonwealth offences. In any event, the Council does not consider that it would be the proper role for a state sentencing guidelines council to promulgate sentencing guidelines in relation to Commonwealth offences or matters concerning the sentencing of such offences.

889. *Kotzmann v Adult Parole Board of Victoria* (2008) 29 VAR 391.

890. *Kotzmann v Adult Parole Board of Victoria* (2008) 29 VAR 391, 402.

891. *Kotzmann v Adult Parole Board of Victoria* (2008) 29 VAR 391, 403.

892. *Kotzmann v Adult Parole Board of Victoria* (2008) 29 VAR 391, 403.

Chapter 9:

Other models of sentencing guidance considered by the Council



Overview

- 9.1 This chapter discusses other models of sentencing guidance, and other legislative mechanisms, that were considered by the Council or proposed by stakeholders in their submissions. These models and mechanisms are:
- changes to maximum penalties;
 - mandatory sentences and statutory minimum sentences;
 - sentencing grids or matrices; and
 - jury sentencing.
- 9.2 The Council has not made any recommendations in relation to changes to maximum penalties, mandatory and statutory minimum sentences, and sentencing grids or matrices.
- 9.3 The Council has examined in detail the issues surrounding jury sentencing as a model of sentencing guidance (in light of consideration of this model by government), and recommends that jury sentencing should not be introduced in Victoria.

Changes to maximum penalties

Purposes of a maximum penalty

- 9.4 The purposes of a maximum penalty are discussed at [3.7]–[3.14].
- 9.5 In summary, the maximum penalty for an offence is the highest sentence that a court can impose on a person who has been found guilty of the offence. It serves as an indication of parliament's view of the gravity of that offence.⁸⁹³ A sentencing court complies with the requirement to consider the maximum penalty in section 5(2)(a) of the *Sentencing Act 1991* (Vic) by 'steering by the maximum' rather than 'aiming at the maximum'.⁸⁹⁴ Further, the High Court in *Markarian* held that the maximum penalty should be used as a 'yardstick' to be 'taken and balanced with all of the other relevant factors'.⁸⁹⁵

Reviews of maximum penalties in Victoria

- 9.6 In 1989, the Victorian Sentencing Task Force, chaired by Frank Costigan QC, developed a principled approach to setting statutory maximum penalties and recommended a rationalisation of statutory maximum penalties under the *Crimes Act 1958* (Vic) as well as a number of amendments to statutory maxima.⁸⁹⁶

893. *Hansford v His Honour Judge Neesham* [1995] 2 VR 233, 236.

894. *Director of Public Prosecutions v Aydin and Kirsch* [2005] VSCA 86 (3 May 2005) [12].

895. *Markarian v The Queen* (2005) 228 CLR 357, 372.

896. Sentencing Task Force, Victoria (1989), above n 781, 193–200.

- 9.7 Since that time, the Council has provided advice to the government on the maximum penalties for a range of discrete offences or offence categories, including:
- repeat drink-driving;⁸⁹⁷
 - preparatory offences;⁸⁹⁸
 - negligently causing serious injury;⁸⁹⁹
 - breaching intervention orders;⁹⁰⁰
 - driving while disqualified or suspended;⁹⁰¹ and
 - sexual penetration with a child under 16.⁹⁰²
- 9.8 In 2012, following a reference from the Attorney-General, the Council was asked to systematically review maximum penalties for offences in the *Crimes Act 1958* (Vic) that were to be included in a new Crimes Bill. Due to a change of government, however, this review was never completed.⁹⁰³
- 9.9 Apart from these reviews, Victoria's maximum penalties have developed in an ad hoc fashion. For example, in 2002 the Victorian Government commissioned a review of aspects of Victoria's sentencing laws, including the adequacy of the maximum penalties for the offences of child stealing and various drug and drug-related offences.⁹⁰⁴
- 9.10 Some maximum penalties have been individually increased to express parliament's denunciation of certain conduct, often in the wake of a particularly bad example of an offence receiving attention in the media.⁹⁰⁵
- 9.11 Although the maximum penalty is reserved for the worst example of an offence, the jurisdictional limit is not. In other words, where an offence with a maximum penalty of more than 2 years' imprisonment is heard in the Magistrates' Court, the magistrate is guided by the maximum penalty in sentencing the offender, rather than the two-year jurisdictional limit. It is only if the offence warrants a sentence longer than 2 years' imprisonment that the jurisdictional limit would apply to cap the sentence.⁹⁰⁶ Therefore, the maximum penalty still provides a legislative guide to the relative seriousness of the offence, even if it cannot be imposed.
- 9.12 Where there has been an increase in the maximum penalty for an offence, however, it is expected that sentences will also increase, which will require a change to current sentencing practices.⁹⁰⁷

897. Sentencing Advisory Council, *Maximum Penalties for Repeat Drink Driving: Report* (2005).

898. Sentencing Advisory Council, *Review of Maximum Penalties for Preparatory Offences: Report* (2007).

899. Sentencing Advisory Council, *Maximum Penalty for Negligently Causing Serious Injury: Report* (2007).

900. Sentencing Advisory Council, *Breaching Intervention Orders: Report* (2008).

901. Sentencing Advisory Council, *Driving While Disqualified or Suspended: Report* (2009).

902. Sentencing Advisory Council, *Maximum Penalties for Sexual Penetration with a Child under 16: Report* (2009).

903. Sentencing Advisory Council, *Maximum Penalties: Principles and Purposes: Preliminary Issues Paper* (2010) 7. The systematic review of maximum penalties in the *Crimes Act 1958* (Vic) was never completed due to a change of government. Following the election of the Liberal Nationals Coalition Government in November 2010, the Council received a letter from the Attorney-General in April 2011 requesting advice on two new projects as part of major sentencing reforms being undertaken by the government. Due to this new work and a delay with preparation of the Crimes Bill, the Council's work on the Maximum Penalties for Crimes Bill Offences project was placed on hold.

904. Freiberg (2002), above n 98.

905. Sentencing Advisory Council (2010), above n 903, 7.

906. *Hansford v His Honour Judge Neesham* [1995] 2 VR 233, 236–7; *R v Duncan* (2007) 172 A Crim R 111. See also discussion in Freiberg (2014), above n 23, 278–279.

907. *R v AB (No 2)* (2008) 18 VR 391.

Limited guidance provided by a change in maximum penalty

- 9.13 As discussed at [3.16]–[3.20], a court is bound to have regard to a change in the maximum penalty. Where there has been an increase in the maximum penalty prior to the commission of the offence, the court must sentence the person in accordance with the new penalty without the benefit of a phase-in period.⁹⁰⁸ Conversely, a reduction in the maximum penalty applies to any offence sentenced after the change.⁹⁰⁹ This will necessitate a change to current sentencing practices.⁹¹⁰
- 9.14 As stated at [3.19], some caution needs to be exercised in concluding that an increase to the maximum penalty for an offence necessitates an increase in sentences. An increase to the maximum penalty for an offence will demand an increase to sentences ‘whenever the increase shows that Parliament regarded the previous penalties as inadequate’.⁹¹¹
- 9.15 In *Ashdown*, Maxwell P stated that:
- The Parliament’s function is to set the parameters for sentencing, by fixing maximum penalties. This court’s function is to ensure that, in the exercise of the sentencing discretion, sentencing judges are ‘maintaining adequate standards of punishment’ within those parameters.⁹¹²
- 9.16 Ashley JA similarly held that an increase in the maximum penalty could be used to ‘dismiss the relevance of an earlier pattern of sentences upon which counsel for the prisoner had relied’.⁹¹³

Stakeholders’ views

- 9.17 There were a variety of views expressed in relation to maximum penalties during the Council’s stakeholder consultation.
- 9.18 The Victorian Women’s Trust called for greater consistency in maximum penalties, and noted the lack of consistency in seriousness for sexual offences committed against children as opposed to sexual offences committed against adults, stating:
- There needs to be consistency of maximum penalties for all sexual offences against children and adults.
- A stronger response for all crimes involving sexual offences against children aged [under] 12 and [under] 16 is critical. To promote the significance and seriousness of child sex offences within the broader community this response should be in line with the severity of maximum sentences for sexual offences, 25 years.⁹¹⁴
- 9.19 Another stakeholder considered the issue with maximum penalties to be with the court’s application, rather than the statutory levels:
- Properly analysed there should be no issues with current maximum penalties. The failure lies in the refusal of the Court of Appeal to use the maximum penalties as the yardsticks in sentencing as the High Court has directed. The subordination of the maxima to ‘current sentencing practices’ has rendered the maxima nugatory.⁹¹⁵

908. *R v Slattery* (1996) 90 A Crim R 519. See Freiberg (2014), above n 23, 270.

909. *Sentencing Act 1991* (Vic) s 114.

910. Freiberg (2014), above n 23, 269–271.

911. *R v Grossi* (2008) 23 VR 500, 512.

912. *Ashdown v The Queen* (2011) 37 VR 341, 356 (Maxwell P).

913. *Ashdown v The Queen* (2011) 37 VR 341, 376 (Ashley JA) (citation omitted).

914. Submission 7 (Victorian Women’s Trust).

915. Submission 1 (G. Silbert).

- 9.20 This was supported by other submissions indicating that the court 'should give greater regard to the maximum penalty'.⁹¹⁶
- 9.21 The Director of Public Prosecutions was of the view that '[m]aximum penalties provide, at the least, a starkly misleading guide to sentencing ranges'. He suggested that:
- SAC should consider means to closing the gap between the maximum permitted, and maximum recorded sentences. If circumstances cannot be conceived that would properly attract the maximum penalty, then that maximum penalty should be reduced. If those circumstances can be articulated, then consideration should be given to reforms that permit and promote the imposition of that maximum sentence in appropriate cases.⁹¹⁷
- 9.22 Victoria Legal Aid submitted that '[s]ome of the perceived lack of confidence in the sentencing system arises from a lack of understanding of the role and purpose of maximum penalties'. It suggested that '[t]argeted public education programs have a role to play in improving public understanding of maximum penalties and their purpose and relevance to the sentencing task'.⁹¹⁸
- 9.23 Other submissions noted that there were no maximum penalties that were clearly too low,⁹¹⁹ or that require amendment.⁹²⁰
- 9.24 Conversely, the Director of Public Prosecutions indicated that the 25-year maximum penalty for aggravated burglary 'is difficult to justify'.⁹²¹ The Director of Public Prosecutions also stated that the five-year maximum penalty for recklessly causing injury is 'arguably too low' but that doubling it to the next level of imprisonment 'is arguably problematic in a number of contexts'.⁹²²

The Council's view

- 9.25 The Council's analysis of sentencing problems did not identify a systemic issue with, or the inadequacy of, the maximum penalty for particular offences. Rather, the available evidence indicates that a lack of adequate weight may be given to some existing maximum penalties, and that simply adjusting these maximum penalties would not rectify the problem.
- 9.26 Moreover, increasing or changing current maximum penalties may serve to exacerbate the lack of relativity between views of offence seriousness and the current maximum penalties that have resulted from ad hoc amendments.
- 9.27 The Council is not of the view that amending maximum penalties is a suitable model for providing sentencing guidance. The Council considers, however, that there may be value in a systematic and holistic review of maximum penalties, similar to the review that was proposed to coincide with a review of the *Crimes Act 1958* (Vic),⁹²³ particularly given the variety of changes to maximum penalties that have occurred since the last systematic review in 1989.⁹²⁴

916. Submission 9 (C. Politi); Submission 3 (C. Murphy).

917. Submission 14 (Director of Public Prosecutions).

918. Submission 13 (Victoria Legal Aid).

919. Submission 2 (Anonymous).

920. Submission 11 (Law Institute of Victoria).

921. Submission 14 (Director of Public Prosecutions).

922. Submission 14 (Director of Public Prosecutions).

923. Attorney-General (Victoria), *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004).

924. See Sentencing Task Force, Victoria (1989), above n 781.

Mandatory and statutory minimum sentences

- 9.28 Mandatory minimum sentences are fixed minimum penalties prescribed by parliament for committing a particular criminal offence. Mandatory minimum sentencing can refer to the requirement to impose a particular sentencing order in response to a criminal offence (mandatory penalty types) or the requirement to impose a sentence of imprisonment of a minimum length (minimum penalty length). Mandatory minimum sentences of imprisonment leave the court with a discretion to impose a more severe sentence in a particular case, but little or limited ability to impose a lesser sentence where it considers it appropriate to do so.
- 9.29 Mandatory sentencing removes the judicial discretion to impose a sentence tailored to the circumstances of the offence and the offender. However, the degree to which discretion is removed varies according to the legislation in question. In some jurisdictions (including Victoria), there are 'statutory' minimum sentencing schemes, which allow the court to depart from the statutory minimum sentence in particular circumstances (for example, where the court finds there are 'exceptional circumstances' of the offence or offender).
- 9.30 Mandatory and statutory sentencing schemes have been implemented in various forms in Australia and around the world, including 'three strikes' legislation and as statutory minimum sentences and standard non-parole periods.
- 9.31 The different forms of mandatory sentencing have included:
- mandatory head sentences;
 - mandatory head sentences and mandatory minimum non-parole periods;
 - mandatory sentences that are cumulative upon other sentences;
 - mandatory minimum head sentences and mandatory minimum non-parole periods;
 - mandatory head sentences and presumptive or discretionary non-parole periods;
 - discretionary head sentences and mandatory non-parole periods;
 - mandatory minimum sentences fixed in relation to the prison term imposed;
 - mandatory minimum sentences of imprisonment;
 - presumptive non-parole periods;
 - mandatory imprisonment; and
 - mandatory non-custodial sentences.

Mandatory sentencing schemes

- 9.32 The aim of mandatory sentencing is to provide consistency both between the offence and its sanction (so that the punishment fits the crime) and between punishments imposed on different offenders.
- 9.33 The desire for consistency, however, must be balanced with the well-established principle that sentences should be proportionate to the gravity of the offence and the culpability of the offender. Mandatory sentences have the potential of treating unlike cases alike, which may amount to an inappropriate form of consistency.
- 9.34 Mandatory sentencing laws for various offences are in force in a number of Australian jurisdictions. The degree to which there remains some scope for judicial discretion varies according to the particular legislation in question.

- 9.35 For example, mandatory sentencing applies in:
- Western Australia for repeat adult and juvenile offenders convicted of residential burglary, grievous bodily harm, or serious assault to a police officer (among other offences);⁹²⁵
 - the Northern Territory for sexual offences, where the court must record a conviction and must order that the offender serve a term of actual imprisonment or a term of imprisonment that is suspended partly but not wholly;⁹²⁶
 - New South Wales for murder of a police officer, or the offence of assault causing death (if committed by an adult when intoxicated);⁹²⁷
 - Queensland for certain child sexual offences, murder, and offences involving multiple murders⁹²⁸ (however, 'exceptional circumstances parole' can be sought);⁹²⁹ and
 - the Commonwealth for particular people-smuggling offences (without provision for exceptions).⁹³⁰

Statutory minimum sentences

- 9.36 Statutory minimum sentencing schemes are similar to mandatory sentencing schemes in that they assign particular penalties or sentence types to particular offences. However, statutory minimum sentences leave some scope for the sentencing court to impose a sentence other than the statutory minimum sentence. The degree of judicial discretion that remains varies according to the particulars of the legislative provision in question.
- 9.37 There is a range of ways in which the legislature accommodates exceptions to the prescribed minimum sentence.
- 9.38 For example, in South Australia, statutory minimum non-parole periods exist for the offence of murder and serious offences against the person. However, a court can fix a shorter non-parole period if it believes that a special reason exists. In determining whether such a reason exists, the statute sets out several factors to which the court can have regard. The court is not at large to take into account any factors it considers relevant.⁹³¹
- 9.39 In Tasmania, for the offence of causing serious bodily harm to a police officer, the court must order a person to serve a term of not less than six months, unless the court finds that there are exceptional circumstances present in the case.⁹³²
- 9.40 In the Northern Territory, there are mandatory penalties for violent offences, which escalate according to offence level and whether the offence is a subsequent violent offence. However, there is an exceptional circumstances exemption that may be enlivened. In considering whether the circumstances of the case are exceptional, the court may have regard to 'any other matter the court considers relevant'. However, even if exceptional circumstances are established, the court must still impose a sentence of imprisonment. Alcohol and drug intoxication is not considered an exceptional circumstance.⁹³³

925. See *Sentencing Act 1995* (WA) ss 9D–9F; *Criminal Code Act Compilation Act 1913* (WA) ss 297(5)–(8), 318(2)–(5), 401(4)–(6).

926. *Sentencing Act 1995* (NT) s 78F.

927. *Crimes Act 1900* (NSW) ss 19B, 25B.

928. See *Penalties and Sentences Act 1992* (Qld) s 161E; *Criminal Code Act 1899* (Qld) sch 1 ('Criminal Code').

929. *Criminal Code Act 1899* (Qld) sch 1 ('Criminal Code') s 305.

930. *Migration Act 1958* (Cth) s 236B.

931. *Criminal Law (Sentencing) Act 1988* (SA) s 32A.

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

933. *Sentencing Act 1995* (NT) pt 3 div 6A sub-div 2.

- 9.41 In Victoria, statutory minimum non-parole periods were first introduced for 'gross violence' offences.⁹³⁴ The scheme was subsequently expanded to include manslaughter in circumstances of gross violence and manslaughter by a single punch or strike (in certain circumstances).⁹³⁵ For the offences of causing serious injury (either intentionally or recklessly) in circumstances of gross violence, a non-parole period of not less than 4 years must be imposed unless a special reason exists. The non-parole period for single punch or gross violence manslaughter must be not less than 10 years, unless the court finds that a 'special reason' exists.⁹³⁶ Among other factors, the court may declare that a 'special reason' exists 'if there are substantial and compelling circumstances that justify doing so'. This allows for unforeseen offence or offender circumstances that may require a penalty other than the statutory minimum.⁹³⁷
- 9.42 Statutory minimum non-parole periods also apply to five offences where those offences are committed against an emergency worker on duty.⁹³⁸ These include the two offences of intentionally and recklessly causing serious injury in circumstances of gross violence (minimum non-parole period of 5 years), as well as the two offences of intentionally and recklessly causing serious injury (minimum non-parole period of 3 years) and the offence of intentionally or recklessly causing injury.⁹³⁹ For the two offences of intentionally and recklessly causing serious injury, a minimum term in a youth justice centre also applies to sentencing young offenders (3 years and 2 years respectively).⁹⁴⁰ During the course of this reference, legislation was introduced to extend the circumstances of these offences to include custodial officers on duty.⁹⁴¹
- 9.43 Proponents argue that statutory minimum sentencing schemes are an approach that can be tailored to allow for appropriate exceptions and residual judicial discretion, while increasing sentences for particular offences of concern. Criticisms of statutory minimum sentences include that they unnecessarily constrain judicial discretion, and that offenders sentenced for the kind of offending to which statutory minimum sentences apply already receive substantial prison sentences.

Concerns with mandatory and minimum sentencing

- 9.44 There are a number of issues with mandatory and minimum sentencing schemes, including:
- concern around the inappropriate erosion of the separation of powers through the fettering of judicial discretion by the legislature;
 - compelling judges to impose sentences that they believe to be unjust;⁹⁴²
 - the existence of vast differences in the degree of culpability of particular offenders who may be convicted of the same crime, such that imposition of the mandatory penalty may lead to unjust results;
 - potential systemic pressures, as mandatory and minimum sentences remove the incentive for an offender to plead guilty to an offence, thereby increasing the numbers of contested charges and increasing court delays;

934. *Crimes Act 1958* (Vic) ss 15A–15B.

935. *Sentencing Act 1991* (Vic) ss 9A–9C.

936. *Sentencing Act 1991* (Vic) s 9B(2).

937. *Sentencing Act 1991* (Vic) ss 10, 10A.

938. See *Sentencing Act 1991* (Vic) s 10AA.

939. See *Crimes Act 1958* (Vic) ss 15A, 15B, 16, 17.

940. *Sentencing Act 1991* (Vic) s 10AA(2).

941. *Crimes Legislation Amendment Bill 2016* (Vic).

942. See, for example, *R v Nafi* (Unreported, Supreme Court of the Northern Territory, Kelly J, 19 May 2011).

- the disproportionate effect they have on disadvantaged or marginalised social groups;⁹⁴³
 - transferring the sentencing discretion to prosecutors and law enforcement agencies, who decide whether to charge an alleged offender. An offence attracting a mandatory penalty can lead to plea-bargaining negotiation whereby an offender agrees to plead to a lesser charge in order to avoid a mandatory penalty; and
 - the creation of discrepancies in the offence hierarchy.⁹⁴⁴
- 9.45 Those in support of mandatory minimum sentences argue that they promote consistency in sentencing outcomes, prevent crime as it incapacitates offenders for the period of mandatory detention, and have a deterrent effect.
- 9.46 In its 2008 research paper on mandatory sentencing, the Council concluded that the disadvantages of implementing a mandatory sentencing regime weigh strongly against establishing such a scheme, and that mandatory sentencing is likely to be unsuccessful in achieving its aims of deterrence and consistency in sentencing.⁹⁴⁵ Furthermore, several Justices of the High Court, the Law Council of Australia, the Law Institute of Victoria, and numerous other prominent organisations have in various contexts cautioned against the use of mandatory sentencing.⁹⁴⁶

Stakeholders' views

- 9.47 Submissions to the Council expressed a range of views on mandatory sentences.
- 9.48 The Law Institute of Victoria reiterated its firm opposition to mandatory sentences in Victoria:
- As stated in previous submissions, the LIV is strongly opposed to the introduction of mandatory sentences in Victoria. As stated in the LIV's submission to SAC on statutory minimum sentences for gross violence, the LIV strongly objects to the introduction of mandatory minimum terms of imprisonment.
- Mandatory sentencing does not fulfill its stated aims; mandatory penalties do not provide a significant marginal deterrent effect, reduce crime rates, or provide consistency in sentencing. By their very nature, mandatory sentencing regimes and the 'one size fits all' approach to sentencing leads to unjust outcomes, as offenders with unequal culpability and circumstances are sentenced to the same minimum sentence of imprisonment, or more.⁹⁴⁷
- 9.49 The Law Institute of Victoria also recommended that the current statutory minimum sentences for gross violence offences be repealed.⁹⁴⁸
- 9.50 Similar sentiments were expressed by Youthlaw in its submission, stating:
- Youthlaw maintains our opposition to sentencing options including mandatory sentences, being too prescriptive and restrictive of judicial discretion in sentencing.⁹⁴⁹

943. An example being the disproportionate impact of the (since repealed) mandatory sentencing laws for property offences on Indigenous people in the Northern Territory. For further discussion see Australian Human Rights Commission, 'Laws Mandating Minimum Terms of Imprisonment ('Mandatory Sentencing') and Indigenous People, in Australian Human Rights Commission (ed.) *Social Justice Report 2001* (2001) 101.

944. For example, in New South Wales, the offence of 'assault causing death when intoxicated' carries a mandatory minimum sentence of not less than 8 years, yet where the offence of assault causing death is committed in the absence of intoxication, the minimum sentence does not apply: *Crimes Act 1900* (NSW) ss 25A–25B.

945. Sentencing Advisory Council, *Mandatory Sentencing: Research Paper* (2008) 21.

946. See, for example, Law Council of Australia, *Mandatory Sentencing: Policy Discussion Paper* (2014); Law Institute of Victoria, Submission to Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences* (2011).

947. Submission 11 (Law Institute of Victoria) (citation omitted).

948. Submission 11 (Law Institute of Victoria).

949. Submission 4 (Youthlaw).

- 9.51 Liberty Victoria was also concerned with the potential limitation on judicial discretion, submitting that the problem with mandatory sentencing is that it:
- removes the discretion from the sentencing judge to impose a sentence that is appropriate having regard to the circumstances of the particular instance of the offence. It is contrary to the fundamental sentencing principle that the punishment should be proportionate to the seriousness of the offence having regard to the circumstances of the offender.⁹⁵⁰
- 9.52 Victoria Legal Aid was particularly critical of mandatory sentencing, stating that mandatory sentencing is 'not supported by the rationale proposed, namely increased consistency and enhanced public confidence', and 'cannot be said to achieve its other stated aims'.⁹⁵¹ Further, Victoria Legal Aid submitted that:
- Under the guise of enhancing consistency, mandatory schemes produce arbitrary and *unjustly* consistent outcomes, and in doing so, offend against other important principles of sentencing, including individualised justice, proportionality and parsimony.⁹⁵²
- 9.53 Conversely, one member of the public welcomed the reduction of discretion given to judges as 'discretion is what confuses the community ... and leads to society questioning the delivery of just punishment'.⁹⁵³ Similarly, another submission suggested that:
- There would not be a need for Mandatory Sentences if sentences given to offenders were harsher and proportionate to the gravity of the offence. Unfortunately, it is 'parity' that currently dictates sentencing and often keeps repeating the sentencing error.⁹⁵⁴
- 9.54 Another stakeholder noted that he did not support mandatory sentencing, and that '[i]f the Court of Appeal would properly apply the maxima as the yardsticks they should properly represent there should be no need for mandatory sentences'.⁹⁵⁵
- 9.55 Two submissions on behalf of Victorian councils advocated for an extension of the current statutory minimums for causing serious injuries against emergency workers on duty to include the assault of authorised officers employed by Victorian councils. These submissions argued that a statutory minimum was required due to an increasing prevalence of assaults against council workers and the need for equality in protection between emergency workers and the similar work undertaken by authorised council officers.⁹⁵⁶
- 9.56 The Victims of Crime Commissioner submitted that a standard sentence scheme should be created that would 'substitute the current Levels of imprisonment attached to various crimes with a 'Range Level' for each of those crimes'. It was proposed that the 'Range Level' would be between 50% and 100% of the maximum penalty for the relevant offence, and would apply to offences such as murder, rape, armed robbery, serious violence offences, family violence offences, and sexual offences against children.
- 9.57 By setting a minimum on this range, the 'Range Level' standard sentence scheme would essentially operate as a mandatory or statutory minimum sentence, whereby the minimum sentence is set at 50% of the maximum penalty.

950. Submission 10 (Liberty Victoria).

951. Submission 13 (Victoria Legal Aid).

952. Submission 13 (Victoria Legal Aid).

953. Submission 3 (C. Murphy).

954. Submission 9 (C. Politi).

955. Submission 1 (G. Silbert).

956. Submission 5 (Whitehorse City Council); Submission 16 (Local Government Professionals Inc.).

- 9.58 In particular, the Victims of Crime Commissioner noted that part of the current problem with sentencing lay in the fact that there is 'no minimum term on which to base a range'. In addition, he proposed that sentences under this scheme would not be able to be served concurrently.⁹⁵⁷

The Council's view

- 9.59 The Council considers that mandatory sentences and statutory minimum sentences are not, in effect, models of sentencing guidance. A minimum sentence does not provide guidance to, or structure, a sentencing court's exercise of discretion; rather it simply prescribes the minimum penalty that must be imposed (subject to limited exceptions in the example of statutory minimum sentences).
- 9.60 The Council's own research into mandatory sentencing, consistent with research from other jurisdictions, has found that:
- mandatory and other prescriptive schemes are unlikely to achieve their aims. To the extent that such schemes achieve some of their aims, the research indicates that they are achieved at a high economic and social cost.⁹⁵⁸
- 9.61 Similarly, during the Council's consultations in relation to the introduction of statutory minimum sentences for gross violence offences:
- A significant number of both the submissions and comments received by the Council from stakeholders in consultations strongly objected to the introduction of statutory minimum sentences ... Many stakeholders were of the view that discretion is a fundamental principle of sentencing that allows a court to tailor a sentence to the unique requirements of a particular case, and consequently, any form of fixed penalty, however carefully structured, could not entirely avoid unjust outcomes.⁹⁵⁹
- 9.62 The Council shares these views, and considers that, based on all of the available evidence, mandatory sentences and statutory minimum sentences are incompatible with the framework of structured discretion for sentencing in Victoria, and are liable to result in inappropriate consistency and, ultimately, injustice.
- 9.63 As discussed at [10.38]–[10.42], the scope of this reference (and a lack of sufficient data) has not enabled the Council to evaluate existing schemes under the *Sentencing Act 1991* (Vic), including the statutory minimum sentences scheme. In the circumstances, the Council cannot make any recommendations as to the expansion, or alternatively the repeal, of that scheme.

Sentencing grids

- 9.64 In the United States, prescriptive sentencing guidelines that leave little judicial discretion have been introduced, for offenders sentenced both under federal law and under the laws of a number of states. These guidelines usually involve a sentencing grid (sometimes known as a sentencing matrix) whereby an appropriate sentence range is determined by calculation of the offence and offender characteristics. These grids essentially operate as tables of mandatory sentence ranges.
- 9.65 Legislation providing for a similar sentencing matrix scheme was passed in Western Australia in 2000, but it never commenced due to a change of government.⁹⁶⁰

957. Submission 15 (Victims of Crime Commissioner).

958. Sentencing Advisory Council, *Sentencing Matters: Mandatory Sentencing* (2008) 1.

959. Sentencing Advisory Council (2011), above n 946, 2 (citation omitted).

960. See Sentencing Amendment Bill 2000 (WA); Western Australia Legislative Council, *Report of the Standing Committee on Legislation in Relation to the Sentencing Matrix Bill 1999*, Report 53 (2011).

United States federal scheme

- 9.66 The United States Sentencing Commission prepares the *Guidelines Manual*, which sets out all factors to be considered when sentencing an offender under federal jurisdiction, and the methods for calculating a numerical 'offence level' and 'criminal history category'.⁹⁶¹ With reference to a sentencing table or grid, the offence level is combined with the criminal history category of the offender to identify an applicable sentence range, expressed in months.
- 9.67 To reach the appropriate offence level, a number of steps are taken. Each offence carries a base offence level, which is then increased by predetermined amounts to account for specific offence characteristics. Mandatory increases to the offence level are then made in relation to the victim, the role of the offender in the offence, and whether the offender has obstructed the administration of justice. For multiple counts, offences can be grouped and an appropriate offence level determined for that group of charges. A numerical discount to the offence level can then be applied to accord with the offender's acceptance of responsibility.
- 9.68 For example, the base offence level for criminal sexual abuse is 30, but it would increase to 34 if the victim had been abducted. If that victim had been physically restrained (a victim factor), the offence level would increase to 36. If that offence had been committed while the offender was on release from prison, the offence level would increase to 39. If the offender accepted responsibility for the offence and assisted in the investigation and in the prosecution of the offence by pleading guilty, the offence level would reduce to 36. If the offender had five criminal history points due to a prior sentence and the commission of the offence while on release, this offender would be placed in the criminal history category of III. Combining the offence level of 36 with a criminal history category of III means that the offender could be sentenced to a period of imprisonment of between 235 months (approximately 19 and a half years) and 293 months (approximately 24 and a half years).
- 9.69 This brief sentencing exercise demonstrates the complexity of the scheme, the limited personal offender characteristics that are taken into account when calculating the appropriate sentence, and the limited role of mitigating factors.
- 9.70 Historically, departures from the federal grid have been limited, although following a series of U.S. Supreme Court challenges, the guidelines now operate in an advisory capacity.⁹⁶² In practice, this means that when sentencing for federal offences, a judge must calculate the appropriate sentence using the grid and then provide substantial reasons if he or she then departs from the sentence range indicated in the grid.⁹⁶³

United States state schemes

- 9.71 Other U.S. jurisdictions that operate mandatory sentencing grids include Minnesota, North Carolina, Oregon, and Washington.⁹⁶⁴ Common features of these state schemes are that they replaced parole schemes in those jurisdictions and that sentencing appeals are only allowed if there has been a departure from the grid.

961. See United States Sentencing Commission, *Guidelines Manual* (United States Sentencing Commission, 2015) <<http://www.ussc.gov/guidelines-manual/2015/2015-ussc-guidelines-manual>> at 5 April 2016.

962. See *United States v Booker*, 543 US 220 (2005); *Gall v United States*, 552 US 38 (2007).

963. Regina Stone-Harris, 'How to Vary from the Federal Sentencing Guidelines without Being Reversed' (2007) 19(3) *Federal Sentencing Reporter* 183.

964. See National Center for State Courts, *State Sentencing Guidelines: Profiles and Continuum* (2008).

- 9.72 The Minnesota Sentencing Guidelines Commission, established in 1978, prepares guidelines to promote 'uniform and proportional sentences' and 'ensure that sentencing decisions are not influenced by factors such as race, gender, or the exercise of constitutional rights by the defendant'.⁹⁶⁵ The Minnesota felony grid provides presumptive and fixed sentences for a typical offender, with two-thirds of a sentence of imprisonment served in prison and the remaining third served on supervised release.
- 9.73 Felony offences are ranked with a severity level from I to II. This is then combined with the offender's criminal history score to reach a presumptive sentence and sentencing range. A separate grid operates in a similar manner for sex offenders. Courts must sentence within the grid unless there are 'identifiable, substantial and compelling circumstances to support a departure', and any departure from the grid must be accompanied by reasons.⁹⁶⁶
- 9.74 Similarly, the North Carolina Sentencing and Policy Advisory Commission prepares mandatory sentencing grids (for felonies and misdemeanours), ranked by class of offence. The North Carolina grid also prescribes aggravating and mitigating factors, and if these are utilised, the judge must provide written justification.
- 9.75 The Oregon Criminal Justice Commission prepares a mandatory felony grid, which has allowable upwards departures built in to the grid, and some discretion in regard to custodial and non-custodial sentences. A judge can further depart from the grid for 'substantial and compelling reasons', with those reasons stated on the record, although many offences are coupled with separate statutory minimum sentences.⁹⁶⁷
- 9.76 Since 2011, the Washington grid has been prepared by the Caseload Forecast Council. Departures from the Washington matrix are known as 'exceptional sentences' and must be explained in writing, be due to 'substantial and compelling reasons justifying an exceptional sentence', and comply with any separate statutory minimum or maximum terms of confinement.⁹⁶⁸

Key concerns about sentencing grids

- 9.77 There are many concerns about sentencing grids, in line with those raised in relation to other mandatory sentencing schemes.⁹⁶⁹ One of the most common arguments against grids is that the discretion traditionally exercised by judges is transferred to prosecutorial decisions and 'plea-bargaining', processes that are less transparent or contestable.⁹⁷⁰
- 9.78 Sentencing grids can also be problematic as they are open to politicisation and amendments to severity during election periods. Further, they have not proven to be particularly adaptable to non-custodial options and, by nature, focus on the punitive aspects of sentencing rather than the full range of sentencing factors.⁹⁷¹

965. Minnesota Sentencing Guidelines Commission, *About the Guidelines* (Minnesota Sentencing Guidelines Commission, 2015) <<http://mn.gov/sentencing-guidelines/guidelines/about/>> at 5 April 2016.

966. Minnesota Sentencing Guidelines Commission, *Minnesota Sentencing Guidelines and Commentary* (2015) 39.

967. Robina Institute of Criminal Law and Criminal Justice, *Jurisdiction Profile: Oregon* (2015) 3.

968. Washington State Caseload Forecast Council, *2015 Washington State Adult Sentencing Guidelines Manual* (2015) 3.

969. See, for example, Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) 537; Kate Stith, 'The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion' (2008) 117(7) *Yale Law Journal* 1420, 1424.

970. See, for example, Australian Law Reform Commission (2006), above n 969, 538; Freiberg (2002), above n 98, 201–202.

971. Freiberg (2002), above n 98, 202.

- 9.79 The inflexibility of sentencing grids was demonstrated by the 2005 Supreme Court judgment that rendered the federal guidelines purely advisory due to the inability for sentencing judges to sentence outside the grid based on facts that the jury had not considered. This was in conflict with the right to a fair trial provided for in the Sixth Amendment to the U.S. Constitution.⁹⁷²
- 9.80 The sentencing grids have only had a limited effect on consistency. A 1999 evaluation of the federal guidelines (prior to them becoming advisory only) suggested that the guidelines had a modest impact on improving consistency overall, but in some types of cases, there had been no improvement and, for regional disparity, the issue had worsened.⁹⁷³ Other studies have similarly found continued disparity between courts and a lack of national uniformity, despite the prescriptive nature of the federal grid.⁹⁷⁴
- 9.81 Additionally, there are concerns about the consistency of outcomes that sentencing grids are designed to achieve. Critics of uniformity caution that using grids to address disparity in sentencing can lead to 'unjustifiable parity' that sees two offenders receive the same sentence but with 'unjust' outcomes.⁹⁷⁵ Sentencing grids were not recommended by the Australian Law Reform Commission in its inquiry into sentencing of Commonwealth offenders as it found that 'grid sentencing inappropriately prioritises consistency over individualised justice' and 'has the potential to result in injustice'.⁹⁷⁶

Stakeholders' views

- 9.82 None of the submissions received by the Council supported the adoption of sentencing grids in Victoria; all of the submissions that commented on sentencing grids strongly opposed their introduction in Victoria.⁹⁷⁷
- 9.83 For example, Victoria Legal Aid submitted that:
- As with mandatory sentencing, grids and matrix schemes have the potential to operate in an arbitrary and unjust manner, and are unlikely to be effective in promoting public confidence and enhancing consistency (in more than a superficial sense). They are too blunt an instrument to deal with the complexities of sentencing, and are likely to result in discretion being displaced, rather than reduced.⁹⁷⁸

The Council's view

- 9.84 As discussed above, sentencing in Victoria operates within a framework of structured judicial discretion. Given the numerous issues with sentencing grids and the vastly different approach taken to the exercise of judicial discretion that they require, the Council does not consider that sentencing grids are appropriate for Victoria.

972. *United States v Booker*, 543 US 220 (2005).

973. Paul J Hofer, Kevin R Blackwell and R Barry Ruback, 'Effect of the Federal Sentencing Guidelines on Interjudge Sentencing Disparity' (1999) 90(1) *Journal of Criminal Law & Criminology* 239, 241.

974. Jawjeong Wu and Cassia Spohn, 'Interdistrict Disparity in Sentencing in Three U.S. District Courts' (2010) 56(2) *Crime & Delinquency* 290; Caleb Mason and David Bjerk, 'Inter-Judge Sentencing Disparity on the Federal Bench: An Examination of Drug Smuggling Cases in the Southern District of California' (2013) 25(3) *Federal Sentencing Reporter* 190.

975. Freiberg (2002), above n 98, 202.

976. Australian Law Reform Commission (2006), above n 969, 538.

977. Submission 1 (G. Silbert); Submission 2 (Anonymous); Submission 10 (Liberty Victoria); Submission 11 (Law Institute of Victoria); Submission 13 (Victoria Legal Aid); Submission 14 (Director of Public Prosecutions).

978. Submission 13 (Victoria Legal Aid).

Guidance from juries

- 9.85 The 2014 Victorian Australian Labor Party Platform committed to introducing legislation to conduct a trial of a form of jury sentencing for serious indictable offences to ensure that penalties for convicted offenders reflect community standards and expectations.⁹⁷⁹
- 9.86 The key features of the proposed Victorian model to be trialled are that:
- the jury would give the judge their view of the appropriate range for the non-parole period after hearing the submissions of counsel on the plea, and having access to any exhibits on the plea; and
 - the sentencing judge would be free to depart from that recommended range, but would be required to give reasons for doing so.
- 9.87 The commitment provided that sentencing recommendations would be made by the jury where it returned a finding of guilt for a 'serious indictable offence'.⁹⁸⁰
- 9.88 Jury trials make up a very small proportion of court cases in Victoria. In 2013–14, there were 1,966 cases sentenced in the County and Supreme Courts. Of those, only 219 (11.1%) were sentenced following a trial.

The role of the jury in sentencing

- 9.89 The jury's traditional role in a criminal trial is to determine questions of fact, and to apply the law, as stated by the judge, to those facts to determine guilt or otherwise. If a jury finds the accused guilty, it is the judge that determines sentence. There is no formally defined role for the jury in the sentencing process in Australia.⁹⁸¹
- 9.90 Although there is no formally defined role for juries, they can play an indirect role in sentencing through:
- recommendations for mercy or leniency; and
 - special findings.

Recommendations for mercy or leniency

- 9.91 The High Court has recognised a jury's right to recommend leniency. In *Whittaker v The King*, Isaacs J said:

The recommendation of a jury for leniency should always be treated with respect and careful attention. It is a recognized feature of our legal system. But a recommendation *simpliciter* is, after all, a recommendation only, and the Judge, on whom falls the sole responsibility of measuring the punishment within the limits assigned, must consider for himself how far it is consistent with the demands of justice that he should accede to the recommendation. But that is all.⁹⁸²

979. Victorian Labor, 'Juries to Have a Say in Sentencing under Labor', Media Release (4 February 2013) <<http://www.viclabor.com.au/media-releases/juries-to-have-a-say-in-sentencing-under-labor>> at 5 April 2016.

980. The term 'serious indictable offence' is not defined in the *Sentencing Act 1991* (Vic). It is defined in section 325(6) of the *Crimes Act 1958* (Vic) in the context of provisions for offenders who are accessories to offences. In that context, it means an indictable offence that is punishable, on first conviction, by life imprisonment or by a term of five years' imprisonment or more. The *Criminal Procedure Act 2009* (Vic) also defines the terms by reference to section 325(6) of the *Crimes Act 1958* (Vic).

981. Freiberg (2014), above n 23, 43–45.

982. *Whittaker v The King* (1928) 41 CLR 230, 240 (Isaacs J).

- 9.92 In *R v Harris*,⁹⁸³ it was held that, in deciding what punishment to impose once a jury has delivered a guilty verdict, the judge has to form his or her own view of the facts and decide the seriousness of the crime and how severely or leniently to deal with the offender. However, the judge must not form a view of the facts that conflicts with the jury's verdict, and must give a jury's recommendation such weight as he or she thinks proper, but is not obliged to take the most lenient view of the facts that would support the verdict, or to assume that the jury took it.
- 9.93 Juries are not informed of their right to recommend leniency (and presumably severity as well) should they choose to convict. Neither the judge nor counsel for either the defence or the prosecution can expressly invite such a recommendation. Juries must make a recommendation of their own accord. To alter this approach may increase the risk of a compromised guilty verdict where the jury finds the defendant guilty on the condition that a lenient punishment be imposed.⁹⁸⁴

Special findings

- 9.94 Sometimes the jury is presented with alternative offences, which may be expressly charged or available as statutory alternatives. In such cases the jury must decide whether the facts support a finding of guilt on one of the offences (for example, murder or manslaughter) or neither offence. Since the offences are likely to carry different maximum sentences, the jury's findings indirectly affect the sentence that the offender may receive.
- 9.95 In addition, a judge may invite the jury to answer specific questions of fact. These questions must be confined to elements of the offence identified in the indictment and not those that relate to sentence only.⁹⁸⁵ However, the special findings of the jury on the questions of fact may indirectly influence the sentence.

New South Wales Law Reform Commission report on the role of juries

- 9.96 In August 2007, the New South Wales Law Reform Commission ('the Commission') published its report, *Role of Juries in Sentencing*.⁹⁸⁶ This report included:
- a discussion of the general principles and current procedures on sentencing in New South Wales;
 - a comparative overview of juries and sentencing in other overseas jurisdictions;
 - a discussion of whether juries have a role in sentencing; and
 - a discussion on sentencing and public opinion and the need to address issues of public perceptions and public confidence in the criminal justice system.
- 9.97 Having canvassed a number of jurisdictions in which the jury plays some role in sentencing, including Canada, the United States, France, Italy, Germany, South Korea, and Japan the Commission concluded:
- there is little or no evidence from the jurisdictions we have studied to suggest that juror involvement in sentencing decisions produces fairer, or more reasoned and consistent, sentencing

983. *R v Harris* [1961] VR 236.

984. New South Wales Law Reform Commission, *Role of Juries in Sentencing: Report 118* (2007) 28.

985. *Kingswell v The Queen* (1985) 159 CLR 264; *Cheung v The Queen* (2001) 209 CLR 1; *Director of Public Prosecutions v Nasralla* [1967] 2 AC 238.

986. New South Wales Law Reform Commission (2007), above n 984.

outcomes. There is, however, a plethora of academic commentary highlighting the drawbacks of jury sentencing. Consequently, we are of the view that overseas experiences of jury sentencing offer no support for the proposal to involve NSW juries in sentencing to any greater degree than at present.⁹⁸⁷

- 9.98 The report notes that of the 22 submissions received in response to the Commission's issues paper, all but one opposed the suggestion that juries should play a direct role in determining sentence following the conviction of an offender. Involving the jury in the sentencing process was widely criticised in the submissions on the basis that:
- public confidence in sentencing was not faltering, and so the rationale for the proposal was flawed;
 - the proposal gave rise to serious natural justice considerations;
 - the proposal would be unlikely to produce any positive effects on sentencing or public confidence; and
 - the practical and procedural difficulties in implementing the proposal were so significant as to render it unworkable in any event.⁹⁸⁸
- 9.99 The Commission recommended that jurors should not be involved in the sentencing process to any greater extent than they are at present. It further indicated that public education was a more effective way to improve public confidence.
- 9.100 The model considered in the Commission's report was different from the Victorian model, in that the New South Wales model envisaged the jury being consulted by the judge following the verdict but prior to the sentencing hearing. However, both models raise similar concerns. The following discussion sets out those concerns with a focus on the Victorian model and whether it would:
- promote consistency of approach in sentencing offenders; and
 - promote public confidence in the criminal justice system.

Community standards and expectations

- 9.101 As the Tasmanian Jury Sentencing Study has found, public opinion on sentencing is 'multi-dimensional and contingent on particular circumstances'.⁹⁸⁹ It is not possible for one jury to represent the views of the community as a whole. The study found 'a striking disparity in attitudes to different types of offences'.⁹⁹⁰ The study also found that:
- 52% of jurors chose a more lenient sentence than the judge and only 44% were more severe than the judge, indicating that informed members of the public are not as punitive as many representative surveys have suggested;
 - 90% of jurors thought the sentence imposed in their trial was appropriate;
 - 83% of jurors, who had first-hand contact with judges, thought that judges were in touch with public opinion, in contrast with representative surveys that found only 18%–20% of respondents thought that judges were in touch with the public; and
 - jurors who are more lenient have more malleable views than jurors who are punitive in sentencing.

987. New South Wales Law Reform Commission (2007), above n 984, 37.

988. Ibid 42.

989. Warner et al. (2011), above n 15, 5.

990. Ibid.

- 9.102 Consequently, it is difficult to predict whether jury sentencing would reflect community standards and expectations, which is the stated aim of the Victorian model. On the one hand, if the majority of jurors share similar views to judges on an appropriate sentence, there would likely be little change in sentencing outcomes following jury trials. On the other hand, if lenient jurors are more open to influence by more punitive jurors, involving jurors in the sentencing process could unfairly skew the sentencing outcomes for those offenders sentenced following a jury trial.
- 9.103 It has been suggested that jury sentencing helps to legitimate the final result.⁹⁹¹ Others suggest that it is a cynical exercise designed 'to make jurors scapegoats for unpopular sentencing decisions'.⁹⁹² Jurors could become the recipients of the same sorts of criticism levelled at judges over sentencing decisions. Furthermore, any division between the judge and the jury, particularly in high profile cases, would be reported in the media, reducing public confidence in the sentencing process.

Practical and procedural issues

- 9.104 There are many practical and procedural issues with jury sentencing that would need to be resolved before jury sentencing could be considered a viable option. These issues, discussed in detail below, include:
- instruction on sentencing law;
 - the timing of the sentencing recommendation;
 - the complex mix of counts;
 - compromised verdicts;
 - a lack of jury consensus;
 - divergence in sentencing practices; and
 - jury opposition to giving sentences.

Instruction on sentencing law

- 9.105 The jury would require some instruction on sentencing law so that jurors would understand the sentencing options available and the purposes and principles that guide judges in the sentencing process.
- 9.106 Additional direction on sentencing may also be necessary. For example, the jury's recommendation on an appropriate range of the non-parole period would be based on the jury's view or views of the facts. The law requires that, when sentencing, the judge must decide mitigating facts on the balance of probabilities, and aggravating factors beyond reasonable doubt. Left uninstructed, there is a risk that a jury may accept an aggravating factor without being satisfied of the applicable criminal standard. The offender's psychiatric condition or intellectual disability and the relevance of the *Verdins* principles⁹⁹³ is another example of where complexity commonly arises in the sentencing process and where the jury would require instruction.

991. Jenia Iontcheva, 'Jury Sentencing and Democratic Practice' (2003) 89 *Virginia Law Review* 311.

992. See New South Wales Law Reform Commission (2007), above n 984, 47–48 citing concerns raised in written submissions and concerns raised by a victim support group during the course of a television broadcast.

993. *R v Verdins* (2007) 16 VR 269. In this case, the Victorian Court of Appeal provided guidance on the relevance of mental impairment to sentencing.

- 9.107 A related issue is the admissibility of evidence tendered during the sentencing hearing. For example, it is common for Victim Impact Statements to contain inadmissible evidence. While an experienced judge can sift the admissible from the inadmissible evidence quickly and disregard the latter, a judge would have to devote significant time to ensuring that no inadmissible material is presented to the jury or that the jury is adequately directed about its use. There may be delays due to the need to discuss issues of admissibility with counsel in the jury's absence.
- 9.108 Instructing a jury on the relevant aspects of sentencing law would increase the length of the sentencing hearing. This would potentially increase delays within the courts and increase costs for both the Crown and the defence. In addition, the instruction to the jury would need to be carefully conducted to ensure that it does not become the basis of an appeal.

Timing of recommendation

- 9.109 The proposed Victorian model envisages that the jury would recommend a sentence range at the sentencing hearing to allow the jury to have access to all reports and submissions relevant to sentencing (for example, medical reports, psychological assessments, Victim Impact Statements, and pre-sentence reports requested by the judge to determine the offender's suitability for a non-custodial sentence). This would require the jury panel to return to court weeks or possibly even months after the verdict.
- 9.110 As noted by the New South Wales Law Reform Commission, it would be very difficult to coordinate a hearing around the availability of 12 jurors, the judge, and counsel for both sides.⁹⁹⁴ Apart from the inconvenience this would cause jurors, any work or family commitments, ill health, or overseas or interstate travel may make it difficult or impossible for all members of the jury to reconvene for the sentencing hearing. Victoria's Chief Crown Prosecutor had similar concerns in his submission: '[r]etaining a jury to sentence, often months after the conclusion of a trial, is unworkable.'⁹⁹⁵
- 9.111 Very few jurors return voluntarily to observe a sentencing hearing, indicating that they are either keen to end their association with a case or simply too busy to attend. Requiring juries to commit even more time to the criminal trial process through participation in the sentencing hearing may increase the rate at which those called for jury duty seek an exemption or ask to be excused. Furthermore, concerns regarding personal safety may also increase, if jurors were required to participate in the sentencing process.⁹⁹⁶
- 9.112 If the jury's recommendation on a sentence range was delayed until the sentencing hearing, it would also be difficult to ensure that jurors were not influenced by the views of family, friends, and the media in the intervening period.
- 9.113 By way of addressing these concerns, if the consultation with the jury occurred immediately after the verdict, much of the information relevant to sentencing would not be available to the jury. The jury's opinion would be less informed and therefore of lesser value, and would have procedural fairness implications.

994. New South Wales Law Reform Commission (2007), above n 984, 49–50.

995. Submission 1 (G. Silbert).

996. Kate Warner and Julia Davis, 'Involving Juries in Sentencing: Insights from the Tasmanian Jury Study' (2013) 37 *Criminal Law Journal* 246, 254.

Interplay when the case has a complex mix of counts

- 9.114 It is possible that juries would hear cases involving a mix of serious indictable offences and lesser charges. It is assumed that the sentencing range provided by the jury on the non-parole period would be limited to the individual charges involving the serious indictable offences and not to all of the charges. However, it is easy to see how jurors may become confused in recommending a sentencing range in these circumstances.
- 9.115 Victorian legislation cannot affect sentencing for a Commonwealth offence unless provided for by the provisions of the *Judiciary Act 1903* (Cth). The interplay between state and Commonwealth sentencing law in Victoria is complex, and it is unclear how jury sentencing would operate where an offender is sentenced for a serious indictable Victorian offence alongside a Commonwealth offence.

Compromise verdicts

- 9.116 As briefly discussed above, research shows that lenient jurors are more malleable than jurors with punitive views on sentencing. Jurors contemplating a not guilty verdict may compromise that view in return for agreement from other jurors that the jury recommend leniency or a low range sentence. While this may be a small risk, the jury's capacity to influence a sentence may also affect the way it settles on a verdict.

Lack of jury consensus on the sentencing range

- 9.117 The *Juries Act 2000* (Vic) allows a judge to take a majority verdict in certain cases. After six hours of deliberation, a judge may generally take the verdict of the majority provided that there is no more than one dissenting juror. Individual jurors sometimes come to the conclusion that the accused is guilty on different factual bases. Consequently, their views on an appropriate sentence may differ markedly from other jurors. Therefore, reaching unanimity on the recommended sentencing range may be difficult, particularly in complex cases. Presumably, the views of individual jurors would become the sentencing range. Their views as to range may be so wide as to be of no assistance to the sentencing judge. It may be possible to address this issue by allowing for majority sentence recommendations where a majority in favour of one particular sentencing range exists.

Divergence in sentencing practices

- 9.118 Jury sentencing would only apply to a small number of cases because of the high percentage of guilty pleas. Consequently, there is a risk that sentencing practices in pleas and jury trials would diverge for no principled reason. It may expose the offender to a higher sentence, as a consequence of the personal bias of some jurors, simply for pleading not guilty. This is contrary to current sentencing principles to the extent that it punishes the offender rather than simply reflecting the fact that he or she is not entitled to a discount for pleading guilty.
- 9.119 There is also a risk of increasing disparity because a jury would only be recommending a sentencing range on a one-off basis, without the benefit of a broader view of offending and sentencing practice. Furthermore, if jury sentencing recommendations result in a clear trend towards increased sentences, it may unduly influence an accused to plead guilty.⁹⁹⁷

997. There is evidence that this has occurred in the United States. See Nancy J King and Roosevelt L Noble, 'Felony Jury Sentencing In Practice: A Three State Study' (2004) 57(3) *Vanderbilt Law Review* 885, 939.

- 9.120 When the findings of the Tasmanian Jury Sentencing Study were applied to the proposed Victorian model, it was concluded that limiting jurors' recommendations to the length of the non-parole period in cases of serious indictable offences may cause problems. The results of the Tasmanian study suggest that there could be a significant proportion of jurors who would not want to recommend an immediate sentence of imprisonment (more than one-third of sentence recommendations in the Tasmanian Jury Study were for a non-custodial sentencing option). Warner and Davis noted that it was unclear how recommendations for non-custodial sentencing options would be treated. If they were excluded, the jury's recommendation may reflect 'a distorted and more punitive view of community expectations'.⁹⁹⁸
- 9.121 While in general, marginally more jurors in the Tasmanian study suggested a more lenient sentence than the judge, jury input could lead to harsher sentences for some offence types. Of concern was that lenient jurors were more malleable than punitive jurors and thus more open to influence from more punitive jurors.⁹⁹⁹ Warner and Davis also suggested that these jurors were also more likely to adopt the judge's view on a more severe sentence, if the judge gave an indication of his or her own view before seeking the view of the jury.¹⁰⁰⁰

Jurors opposed to making sentence recommendations

- 9.122 As part of the Tasmanian Jury Sentencing Study, jurors were asked whether they thought jurors should have a role in sentencing or some other sort of input into the sentencing process. The study found that:
- A majority of those interviewed were not comfortable with making recommendations about the sentence to be imposed, citing lack of expertise, concerns about objectivity and consistency and concerns about the increased burden of asking jurors to be involved in an additional task after delivery of the verdict.¹⁰⁰¹
- 9.123 A number of jurors who were interviewed as part of the study indicated that jury service was a draining process and that to be required to participate in the sentencing process would be very burdensome.¹⁰⁰²
- 9.124 Interviewed jurors who favoured the idea of involving jurors in the sentencing process indicated that it was unlikely that there would ever be agreement among a jury on an appropriate sentence range. Other interviewed jurors suggested that members of the jury make a recommendation to the judge of where they considered the offending to sit on a scale of severity rather than indicate a view on an appropriate sentence.¹⁰⁰³
- 9.125 The study also found that those in favour of jurors having input into the sentencing process were often concerned with being able to recommend leniency rather than having concerns over sentence inadequacy.

⁹⁹⁸ Warner and Davis (2013), above n 996, 255.

⁹⁹⁹ Ibid.

¹⁰⁰⁰ Ibid.

¹⁰⁰¹ Ibid.

¹⁰⁰² Ibid 253.

¹⁰⁰³ Ibid 246–247.

Stakeholders' views

- 9.126 None of the submissions received by the Council expressed support for jury sentencing. Those that addressed jury sentencing considered it both undesirable and impractical.¹⁰⁰⁴
- 9.127 For example, one submission considered that jury sentencing has:
- insuperable problems of practicality and law which militate against the jury being involved in the sentencing process ... the practical difficulties associated with such a process would be considerable. It would add to the complexity of the plea hearing, the time taken for such hearings, and place a significant additional burden on the jurors.¹⁰⁰⁵
- 9.128 Liberty Victoria supported the findings of the New South Wales Law Reform Commission as evidence that jury sentencing should not be introduced in Victoria.¹⁰⁰⁶
- 9.129 Victoria Legal Aid considered that there may be wider detrimental effects:
- Not only is this proposal likely to lead to greater inconsistencies (which may diminish public confidence), it may also discourage jury service and adversely impact on a defendant's right to a fair hearing. It may distract jurors from their primary task.¹⁰⁰⁷

The Council's view

- 9.130 There is no evidence to indicate that jury sentencing would promote either consistency of approach in sentencing offenders or public confidence in the criminal justice system. Nor can jury sentencing address the sentencing problems with particular offences identified by the Council.
- 9.131 It is difficult to justify the cost and inconvenience to the criminal justice system in addressing the many practical and procedural issues raised by jury sentencing, when:
- jury sentencing could only influence the very small proportion of all cases sentenced in the higher courts that are sentenced after a trial; and
 - there is strong evidence indicating that, for many offences, the majority of jurors would sentence in a similar manner to the judge.
- 9.132 If, on the other hand, jury recommendations influenced an increase in sentences for some offences, there may be a growing inconsistency over time between those sentenced following a guilty plea and those sentenced following a jury trial. This may in turn have an unwelcome distorting effect on guilty pleas.
- 9.133 As the New South Wales Law Reform Commission noted, 'public policy and sentencing legislation should not be founded on untested assumptions as to what the community wants or expects'.¹⁰⁰⁸ Such policies often assume a punitive public, 'but a large body of research shows this assumption is at best overstated and at worst simply wrong'.¹⁰⁰⁹ The Tasmanian Jury Sentencing Study provides further evidence that the majority of jurors think judges impose appropriate sentences, although this confidence varies between offences. The Study also found that the majority of jurors surveyed did not think that jurors should be involved in the sentencing process.

1004. Submission 1 (G. Silbert); Submission 2 (Anonymous); Submission 10 (Liberty Victoria); Submission 11 (Law Institute of Victoria); Submission 13 (Victoria Legal Aid); Submission 14 (Director of Public Prosecutions).

1005. Submission 2 (Anonymous).

1006. Submission 10 (Liberty Victoria).

1007. Submission 13 (Victoria Legal Aid).

1008. New South Wales Law Reform Commission (2007), above n 984, 61.

1009. Sentencing Advisory Council, *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing* (2006) 40.

- 9.134 The Council is of the view that its recommended models of sentencing guidance are more likely than jury sentencing to promote consistency and public confidence in sentencing and address particular sentencing problems.

Recommendation 15: Recommendation against jury sentencing

Jury sentencing should not be introduced in Victoria.

Chapter 10:

Assessing and enhancing public confidence in the criminal justice system



Overview

- I0.1 This chapter discusses the importance of developing an evidence base of informed public opinion on sentencing in Victoria, and presents a recommendation for further research in this area.
- I0.2 This chapter also presents related recommendations to enhance community confidence in the criminal justice system, including the publication of sentencing remarks and a review of existing sentencing schemes under the *Sentencing Act 1991* (Vic).

Gauging informed public opinion on sentencing

- I0.3 As discussed at [I.23]–[I.31], there are very few robust indicators of the level of community confidence in relation to sentencing in Victoria, and in particular, studies that gather evidence of informed public opinion regarding sentencing.
- I0.4 The Victorian Jury Sentencing Study is one example of empirical research that provides valuable insights from the informed opinion of Victorian community members. That study, however, is necessarily limited to members of the public who deliberated on jury trials over a confined period.
- I0.5 Alongside the Victorian Jury Sentencing Study, the Council's own work, presented in its report entitled *Community Attitudes to Offence Seriousness*, has informed its determination of offences with sentencing problems that require sentencing guidance (see Chapter 5). These two sources form an important, but incomplete, evidence base of informed community opinion on sentencing in Victoria.
- I0.6 The Council considers that, in addition to providing a sound evidence base for policy development, gauging informed public opinion on sentencing (as part of the Council's statutory functions^{I010}) is an essential part of promoting public confidence in sentencing. Through its financial and in-kind support of both the Victorian Jury Sentencing Study^{I011} and the National Jury Sentencing Research Project,^{I012} the Council aims to address this need.
- I0.7 Such research is resource intensive and requires sufficient time (usually several years) to collect representative samples and properly analyse data. Nevertheless, the value of such work – to the courts, to government, to policy makers, and to members of the public – cannot be overstated. Accordingly, the Council believes that the government should consider opportunities for initiating or promoting such studies, independently of, or through a reference to, the Council.
- I0.8 Further, the Council considers that the importance of seeking informed public opinion on matters of sentencing policy should be recognised in the scope of requests for its advice and the timeframe in which such advice is sought.

Recommendation 16: Comprehensive research on informed public opinion regarding sentencing

The Attorney-General should consider commissioning comprehensive research to gauge informed public opinion regarding sentencing in Victoria with the aim of ensuring that future reform is appropriately evidence-based. The research could occur independently of the Sentencing Advisory Council, or through a sufficiently resourced reference to the Council.

I010. *Sentencing Act 1991* (Vic) s 108C(1)(d).

I011. Warner et al. (under review for publication), above n 18.

I012. See University of Tasmania, Faculty of Law, *National Jury Sentencing Research Project (the National Jury Project)* (Faculty of Law National Jury Project, 2015) <<http://www.utas.edu.au/law/research/jury-study/national-jury-project>> at 23 March 2016.

Publication of sentencing remarks

- 10.9 A number of submissions to the Council raised the importance of community engagement and education in relation to sentencing in Victoria as a means of promoting public confidence in the criminal justice system.
- 10.10 The Council considers that the publication of a judge's reasons for sentence ('sentencing remarks') is a fundamental resource for community education about sentencing, and a prerequisite to informed community debate and discussion on sentencing issues.
- 10.11 The Supreme Court and the Court of Appeal publish, as a matter of course, all appropriate sentencing remarks and judgments through the Supreme Court website¹⁰¹³ and through the Australian Legal Information Institute website ('AustLII').¹⁰¹⁴ On occasion, the Supreme Court also releases audio or video of the judge's sentencing remarks as delivered in court (and edited where required).¹⁰¹⁵
- 10.12 The County Court also currently publishes select sentencing remarks on the 'Recent Decisions' pages of its website¹⁰¹⁶ as well as through AustLII.
- 10.13 As a proportion of sentenced cases, far fewer sentencing remarks are published by the County Court than by the Supreme Court or the Court of Appeal. This is no doubt due to the workload of the County Court, given that it is the major trial court in Victoria and the major court for the sentencing of matters determined on indictment.¹⁰¹⁷
- 10.14 The task of sentencing is an onerous one, and one that, as the Council acknowledges (see Chapter 2), has become increasingly complex. The workload of judges in this regard has consequently increased. Similarly, as 'the number, complexity and length of trials increases'¹⁰¹⁸ there are competing demands on a judge's time both in and out of court (for example, when decisions have been reserved for consideration).
- 10.15 Further, it is important to acknowledge that the primary purpose of sentencing remarks is to convey to the offender the reasons for the sentence. Conveying the reasons for sentence to any victims, for example, or to the community as a whole is essentially a secondary purpose. As a result, sentencing remarks may not be prepared in such a way that they are intended for broader publication.¹⁰¹⁹ Indeed, published remarks would most commonly be revised from a transcript and edited, particularly in order to comply with the requirements of the *Judicial Proceedings Reports Act 1958* (Vic), which prevents the identification of victims of sexual offences.¹⁰²⁰ Even where assistance is provided by judicial staff, such revision and editing necessarily requires judicial oversight and therefore increases the work of the sentencing judge.
- 10.16 While acknowledging these important considerations, the Council believes that the benefits of publishing sentencing remarks outweigh the resourcing implications – particularly if, as recommended by the Council, adequate resources are provided to allow for publication.

1013. See Supreme Court of Victoria, *Judgments and Sentences* (Supreme Court of Victoria, 2016) <<http://www.supremecourt.vic.gov.au/home/law+and+practice/judgments+and+sentences/>> at 17 March 2016.

1014. See Australasian Legal Information Institute, *AustLII* (Australasian Legal Information Institute, A Joint Facility of UTS and UNSW Faculties of Law, 2010) <<http://www.austlii.edu.au/>> at 17 March 2016.

1015. See Supreme Court of Victoria, *Audio and Video Webcasts* (Supreme Court of Victoria, 2016) <<http://www.supremecourt.vic.gov.au/home/contact+us/media+centre/audio+and+video+webcasts/>> at 17 March 2016.

1016. See County Court of Victoria, *Accessing Court Documents* (County Court of Victoria, 2016) <<https://www.countycourt.vic.gov.au/accessing-court-documents>> at 17 March 2016.

1017. See County Court of Victoria, *2013–14 Annual Report* (2015) 10.

1018. *Ibid.*

1019. Further, although rare, a judge may deliver sentencing remarks *ex tempore*, that is, at the conclusion of the plea, and without preparation of formal written remarks.

1020. *Judicial Proceedings Reports Act 1958* (Vic) s 4(1A).

Importance of public access to sentencing remarks

- 10.17 Sentencing remarks are one of the key, primary sources of transparency in the criminal justice system; they assist in communicating sentencing considerations, processes, and judicial reasoning to all interested parties, and their free availability can encourage accurate media coverage of sentencing decisions. Given that neither a court nor a judicial officer can provide public comment on a particular case, sentencing remarks represent one of the few avenues for countering public misunderstanding and, sometimes, deliberate misinformation regarding a judge's decision in a particular case.
- 10.18 The publication of sentencing remarks would also assist the courts in complying with section 24(3) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which provides that:
- All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.

Publication furthers general deterrence

- 10.19 The Council considers that publication of sentencing remarks may also help further the sentencing purpose of general deterrence.
- 10.20 The Council's recent report on current sentencing practices for major driving offences found that general deterrence (along with the seriousness of the harm caused) is a predominant consideration in sentencing such offences.¹⁰²¹
- 10.21 In their sentencing remarks, judges frequently spoke of the need to 'get the message across' to the community about the importance of road safety, and about the catastrophic results of negligent, reckless, or dangerous driving: both to the victims of such offences and to the offenders themselves, who face lengthy terms of imprisonment.
- 10.22 In *Director of Public Prosecutions v Oates*, Neave JA stated:
- general deterrence must be given considerable weight in sentencing an offender for dangerous driving causing death or serious injury. Members of the public must recognise that a person who kills or injures another while driving dangerously is likely to receive a significant term of imprisonment.¹⁰²²
- 10.23 A sentence, however, can only hope to deter members of the community from similar offending if members of the community are aware of that sentence and the penalty imposed.

Publication of remarks and family violence

- 10.24 Another example of the importance of publication of sentencing remarks was highlighted in the recent report of the Royal Commission into Family Violence, where the Commission stated:

The Commission agrees that publicising the court's sentencing reasons more widely and regularly is an important part of influencing the practices and attitudes of people in the justice system, and in the wider community.

...

¹⁰²¹. Sentencing Advisory Council (2015), above n 114, 1.

¹⁰²². *Director of Public Prosecutions (Vic) v Oates* (2007) 47 MVR 483, 486–487.

A stronger focus on family violence matters in the media has helped to highlight the nature and gravity of this type of offending. Comprehensive media coverage is likely to have a greater influence on public awareness than any other single avenue. However, the Commission encourages the Victorian Government to investigate other, more targeted mechanisms—for example, via court websites, the Law Institute of Victoria, the Victorian Bar Council and the Judicial College of Victoria—to ensure significant sentencing reasons are published regularly.¹⁰²³

- 10.25 Traditionally, courts have relied on the mainstream media (such as daily newspapers) to act as the conduit of the judge's sentencing remarks to the community. While the media may still represent the primary source of information on sentencing for the community, providing free public access to sentencing remarks can:
- address inaccuracies or the unavoidable incompleteness in media reporting on a sentencing decision; and
 - create a resource that can be shared online, through such avenues as social media, potentially reaching a far larger audience than the current circulation of all Victorian newspapers.¹⁰²⁴
- 10.26 In summary, the Council considers that, as a matter of course, all appropriate sentencing remarks should be published by the higher courts in Victoria. Further, sufficient resources should be made available to each of the higher courts to enable this publication to occur, including resources that would allow for the editing of sentencing remarks to comply with the requirements of the *Judicial Proceedings Reports Act 1958* (Vic).

Use of plain language in sentencing remarks

- 10.27 Victoria Legal Aid submitted that '[t]here needs to be renewed emphasis on the community's ability to access and understand the law'¹⁰²⁵ and suggested that:
- Public confidence and consistency can be greatly enhanced by a clear, plain language explanation of the factors taken into account in sentence and their weighting. A clear statement of reasons (publicly available, where appropriate) provides greater clarity for clients on sentencing outcomes and appeal prospects, and facilitates 'community and media understanding of the process (including apparent superficial inconsistencies)'.¹⁰²⁶
- 10.28 Victoria Legal Aid further submitted that sentencing remarks could also be complemented by more extensive publication of '[p]lain language summaries, published at the same time as sentencing reasons ... particularly for high profile, controversial cases'.¹⁰²⁷
- 10.29 While the Council makes no specific recommendation in relation to the use of language, the courts may wish to consider an increased use of plain language in sentencing remarks, where appropriate, and the generation of plain language case summaries for particular high-profile cases.

1023. Victoria, Royal Commission into Family Violence (2016), above n 357, vol. III, 233.

1024. For example, in the month of January 2016, Twitter had approximately 2.8 million unique visitors in Australia as reported by Social Media News Australia: Media Access Australia (MAA), Twitter (Media Access Australia, 2012) <<http://www.mediaaccess.org.au/web/social-media/twitter>> at 16 March 2016.

1025. Submission 13 (Victoria Legal Aid).

1026. Submission 13 (Victoria Legal Aid), citing New South Wales Law Reform Commission, *Sentencing: Report 79* (1996) 14–15.

1027. Submission 13 (Victoria Legal Aid).

Recommendation 17: Publication of sentencing remarks online

Victorian higher courts should publish online the sentencing remarks for every case, unless:

- the matter is subject to a suppression order; or
- in the opinion of the sentencing judge, publication of the sentencing remarks would be contrary to the interests of justice.

Sufficient resources should be made available to all higher courts in Victoria to enable publication of sentencing remarks to occur, including resources that would allow for the editing of sentencing remarks to comply with the requirements of the *Judicial Proceedings Reports Act 1958* (Vic).

Review of the Victorian sentencing framework

- 10.30 Next year (2017) will mark 25 years since the commencement of the *Sentencing Act 1991* (Vic) on 22 April 1992. As discussed in Chapter 2, since that time, the statutory framework for the sentencing of adults in Victoria has undergone significant amendment. Those amendments have included the creation of a number of schemes for various purposes, targeting particular offences and particular offenders.
- 10.31 Regardless of the effect of schemes on sentencing outcomes (which has not been separately measured by the Council), it has been argued that the net effect of such schemes has been a marked increase in the complexity of the sentencing exercise,¹⁰²⁸ particularly (but not exclusively) for sentencing judges in the higher courts.
- 10.32 Any increase in the complexity of sentencing is likely to contribute to inconsistency in the approach to sentencing and to a lack of community confidence in the criminal justice system, given that complexity generates a lack of transparency and clarity around the sentencing exercise.
- 10.33 Further, any increase in the complexity of sentencing is likely to lead to delay and a need for both more court time for submissions on sentence and more judicial time for proper consideration of the appropriate sentence.

Stakeholders' views

- 10.34 A number of stakeholders made submissions in relation to sentencing schemes within the existing Victorian sentencing framework.
- 10.35 The Law Institute of Victoria submitted that the 'minimum sentences for gross violence should be repealed',¹⁰²⁹ while Victoria Legal Aid submitted that:

Rather than just overlaying the *Sentencing Act* with yet another scheme, consideration must be given to whether current provisions are fit for purpose, sufficiently clear and internally consistent. Baseline and statutory minimum sentencing provisions should be repealed ... and serious consideration should be given to the efficacy and inter-relationship of other sentencing schemes (for example the serious offender provisions).¹⁰³⁰

1028. See, for example, *R v Kourmis* (2008) 18 VR 434, 439, where the court said: '[t]he requirements of the *Sentencing Act 1991* and the range and complexity of sentencing principles make the role of sentencing a very demanding one'.

1029. Submission 11 (Law Institute of Victoria).

1030. Submission 13 (Victoria Legal Aid).

10.36 The Director of Public Prosecutions noted that the existing schemes within the *Sentencing Act 1991* (Vic) 'all add to the complexity of sentencing and sentencing law, but with some variation, they appear to have limited impact on outcomes'.¹⁰³¹

10.37 In considering the existing schemes, the Director submitted that:

The [Continuing Criminal Enterprise Offenders] scheme is probably the least effective of these schemes, and it is doubtful that its repeal would have any impact on sentencing outcomes.

The serious offender scheme probably does have some marginal impact on individual sentences. That impact should be replicable in any reformed sentencing guidance scheme, without the need for schedules of special offences, qualification rules, and modified approaches to sentencing principle and sentencing methodology.

The new minimum sentence schemes, once applied, should have a substantial impact on sentencing outcomes. The capacity of any reformed sentencing guidance scheme to substitute for the desirable products of these schemes, and to avoid their undesirable features should be a strong criterion in the selection of that new scheme.

The indefinite sentence scheme requires different consideration, governed mainly by an assessment of whether expansion of the continued supervision and detention schemes offers a preferable means of promoting community protection.¹⁰³²

The Council's view

10.38 The scope of this reference has not afforded the Council time to separately analyse components of the sentencing framework in Victoria to gather evidence of how each contributes to, or derogates from:

- consistency of approach in sentencing offenders; and
- public confidence in the criminal justice system.

10.39 Other than for baseline sentencing, the Council has not made recommendations in relation to the repeal of existing legislative schemes within the *Sentencing Act 1991* (Vic) such as the serious offender provisions or the continuing criminal enterprise provisions.

10.40 Nevertheless, the Council considers that the layering of different schema into the *Sentencing Act 1991* (Vic) over time (and on an ad hoc basis) has had the inevitable result of increasing the complexity of the sentencing task.

10.41 As a result, the Council believes that the government's consideration of models for sentencing guidance should pay close regard to whether a particular model would increase transparency in the sentencing process (and thereby assist in the promotion of public confidence), or would exacerbate existing complexities.

10.42 Further, the Council considers that a holistic review of the operation of the various statutory schemes within the Victorian sentencing framework is warranted, either independently or within the context of an evaluation of the operation of any sentencing guidance reforms.

¹⁰³¹. Submission 14 (Director of Public Prosecutions).

¹⁰³². Submission 14 (Director of Public Prosecutions).

Recommendation 18: Review of sentencing schemes within the *Sentencing Act 1991* (Vic)

The Attorney-General should consider reviewing, or requesting that the Sentencing Advisory Council review, the various sentencing schemes within the *Sentencing Act 1991* (Vic) with the aim of ensuring that there is a coherent and transparent sentencing framework in Victoria.

The review should consider whether there is evidence of the need to amend or repeal any of the sentencing schemes within the *Sentencing Act 1991* (Vic), including:

- the serious offender provisions;
- the continuing criminal enterprise offender provisions;
- statutory minimum sentences; and
- indefinite sentences.

Ongoing public education on sentencing

Education and public confidence in the criminal justice system

I0.43 The New South Wales Law Reform Commission report on jury sentencing noted that:

A commonly held view in many countries is that violent crime is spiralling out of control, that judges are out of touch with reality, and that sentences are far too lenient for crimes being committed. Although this perception is not supported by statistics, it nevertheless remains a powerful tool, often acting as a catalyst for reform and influencing the decisions of policy makers.¹⁰³³

I0.44 A number of studies, including the Tasmanian Jury Sentencing Study¹⁰³⁴ and, more recently, the Victorian Jury Sentencing Study,¹⁰³⁵ show that members of the public are far more likely to consider a sentence as appropriate when they:

- have been provided with all of the facts and circumstances of a particular case; and
- understand all of the considerations that were made by the sentencing judge.

I0.45 This finding confirms prior research, including the Council's own work in this area.¹⁰³⁶ These findings also hold true across a number of different jurisdictions.¹⁰³⁷

I033. New South Wales Law Reform Commission (2007), above n 984, 58, citing Julian V. Roberts, Loretta J. Stalans, David Indermaur, and Mike Hough, *Penal Populism and Public Opinion: Lessons from Five Countries* (2003); David Indermaur, 'Public Perceptions of Sentencing in Perth, Western Australia' (1987) 20 *Australian and New Zealand Journal of Criminology* 163.

I034. Warner et al. (2011), above n 15.

I035. Warner et al. (under review for publication), above n 18.

I036. See, for example, Sentencing Advisory Council (2006), above n 1009; Sentencing Advisory Council (2008), above n 15.

I037. The jurisdictions include the United States: Michael J. Hindelang, *Public Opinion Regarding Crime: Criminal Justice and Related Topics* (1975); and the United Kingdom: Andrew Ashworth and Mike Hough, 'Sentencing and the Climate of Opinion' (1996) *Criminal Law Review* 776. See also Michael Zander and Paul Henderson, *The Royal Commission on Criminal Justice: The Crown Court Study*, Research Study no. 19 (1993).

Education as a means of increasing public confidence

- 10.46 In fulfilling its commitment to educating the Victorian public on sentencing, the Council:
- publishes a range of statistical and research reports on different aspects of sentencing;
 - hosts a variety of information and programs on sentencing on its website including:
 - Virtual You Be the Judge (VYBTJ);
 - teaching resources for VCE Legal Studies and Years 9 and 10 cross curriculum (AUSVELS) units;
 - a range of sentencing statistics, including SACStat, Sentencing Snapshots, and sentencing trends such as inter-jurisdictional comparisons and Victoria's prison population;
 - a plain-language guide to Victorian sentencing law entitled *A Quick Guide to Sentencing*; and
 - an 'About Sentencing' section providing general information on sentencing, including a timeline of events in sentencing in Victoria.
- 10.47 Further, the Council has developed a plain language factsheet entitled *How Victorian Courts Sentence Adult Offenders* to help those attending court, including victims of crime, witnesses, offenders, and families of people involved in proceedings.
- 10.48 The Council provides face-to-face You be the Judge and other educational sessions in metropolitan Melbourne and regional Victoria with a focus on educating criminal justice service and advocacy organisations and adult education groups. The Council also speaks on sentencing matters at a range of conferences and presents a public forum on sentencing at Law Week each year.
- 10.49 The Council prepares media releases and new articles about its publications and actively engages with the media to answer questions regarding sentencing matters and provide insights and context to their coverage. The Council Chair makes regular appearances on talk-back radio to extend discussion on sentencing matters to the general community.

Opportunities to collaborate with criminal justice stakeholders

- 10.50 While education of the public on sentencing remains a key focus of the Council's work, it is necessarily limited by its available resources and the competing demands for those resources in fulfilling its statutory functions.¹⁰³⁸
- 10.51 Nevertheless, the Council is committed to exploring opportunities to develop further its educational materials and their accessibility, including opportunities for collaboration.
- 10.52 Victoria Legal Aid, for example, submitted that:
- it is clear that more meaningful engagement and understanding of the criminal justice system are critical to improving public confidence. More needs to be done to 'deal the public in' in the debate about sentencing and punishment ... As with other key institutions, VLA has an educative role to play. VLA also has a role in challenging uninformed public perceptions as part of our legislative mandate to 'dispel fear and distrust'.¹⁰³⁹
- 10.53 To that end, the Council welcomes the participation of Victoria Legal Aid, and all key stakeholders, in contributing to the educational work of the Council, and in so doing, promoting public confidence in the criminal justice system.

¹⁰³⁸ *Sentencing Act 1991* (Vic) s 108C(1).

¹⁰³⁹ Submission 13 (Victoria Legal Aid) (citations omitted).

Appendices



Appendix 1:

Consultation

Meetings/forums

Date	Meeting/forum
17 December 2015	Preliminary meeting with the President of the Court of Appeal and a justice of the Court of Appeal
13 January 2016	Conference call with Hugh Donnelly, Director of Research and Sentencing, Judicial Commission of New South Wales
29 January 2016	Meeting with Magistrate Rozencwajg
3 February 2016	Meeting with Victoria Legal Aid
4 February 2016	Meeting with Supreme Court Justices and Justices of the Court of Appeal
5 February 2016	Meeting with Magistrates of the Magistrates' Court of Victoria
8 February 2016	Meeting with the Chief Judge and Judges of the County Court of Victoria
9 February 2016	Meeting with the Victims of Crime Commissioner
11 February 2016	Meeting with a number of Crown Prosecutors
12 February 2016	Meeting with the Director of Public Prosecutions and the Office of Public Prosecutions Victoria
1 March 2016	Sentencing Guidance Stakeholder Discussion Forum

Submissions

Number	Date received	Person/organisation
1	18 December 2015	G. Silbert
2	13 January 2016	Anonymous
3	28 January 2016	C. Murphy
4	29 January 2016	Youthlaw
5	1 February 2016	Whitehorse City Council
6	1 February 2016	Anonymous
7	1 February 2016	Victorian Women's Trust
8	1 February 2016	M. Wootten
9	4 February 2016	C. Politi
10	8 February 2016	Liberty Victoria
11	8 February 2016	Law Institute of Victoria
12	11 February 2016	Criminal Bar Association of Victoria
13	12 February 2016	Victoria Legal Aid
14	12 February 2016	Director of Public Prosecutions
15	16 February 2016	Victims of Crime Commissioner
16	19 February 2016	Local Government Professionals Inc.

Appendix 2:

Notes on methodology: quantitative data analysis

Appendices 2 to 6 present offence-specific analysis applying the Council's measures for assessing the 23 possible problem offences, as described in Chapter 5. The main source of quantitative data analysed by the Council is sentences imposed on charges in the higher courts between 1 July 2010 and 30 June 2015 (the 'reference period').

This analysis includes sentences changed by the Court of Appeal for charges of each offence following a successful appeal against sentence (where such decisions were available to the Council as at January 2016).

All percentages in figures and tables are rounded to zero decimal places and may not sum to 100%. Percentages described in the text are also rounded to zero decimal places, but may comprise the sum of unrounded data; therefore, percentages in the text may not exactly match the sum of percentages shown in figures and tables.

Distribution of sentences and comparison with maximum penalty

Tables listing the number and percentage of sentence *types* imposed include aggregate sentences and combined sentences. The labelled sentence type is the most serious sentence in the combination. For example, a combined sentence involving a community correction order and a fine is labelled as a community correction order. Aggregate sentences are excluded from sentence *length* analysis.

For the purposes of comparing sentences to the maximum penalty, only immediate custodial sentences are included. For the offences where the maximum penalty is life imprisonment, such as murder, the maximum penalty has been given the numeric value of 40 years' imprisonment. While some life sentences for murder did not receive a non-parole period, 40 years is five years longer than the longest non-parole period imposed for murder in the period examined. This 40-year value is not based on any analysis of actual time served by offenders sentenced to life imprisonment in Victoria. The age of offenders sentenced to life imprisonment for murder in this period ranged from 21 to 57 (median 40 years), and 40 years is assumed to represent the remainder of the natural life of the majority of offenders sentenced to life imprisonment for murder. The 40-year value ascribed to life imprisonment for the purposes of the Council's analysis does not affect the calculation of median sentence length (in years) for murder.

When a partially suspended sentence is imposed, judges typically assign a term of imprisonment to individual charges before imposing a total effective imprisonment term on the case as a whole, part of which is then suspended. This means that the suspended part of an imprisonment term is not nominated for individual charges. In the sentencing data available to the Council, where a case receives a partially suspended sentence, the sentence type for each charge is recorded as a partially suspended sentence. However, the recorded length actually reflects the full imprisonment term imposed on the charge. Although imprisonment terms, wholly suspended sentences are not counted as custodial sentences in this report.

The comparison of the distribution of sentence lengths imposed on charges with the maximum penalty for that offence is presented in two ways:

- Percentage of sentences imposed in six month intervals of length – each sentence length interval represents the six months from the value to the left to the labelled number (for example, ≤ 6 represents sentence lengths of more than 5 years and 6 months up to and including 6 years). See Figure A25 as an example.
- Percentage of sentences imposed in intervals of percentage of the maximum penalty – each percentage interval represents the percentages between the value to the left to the labelled number (for example, $\leq 25\%$ represents the percentages greater than 20% up to and including 25%). Figures presenting this analysis have two sections: one representing the distribution of the shortest 25% of sentences in 5% intervals, and the other representing the distribution of sentences more than 25% of the maximum penalty in 25% intervals. See Figure A26 as an example.

Immediate custodial sentence lengths over time

The sentences imposed in each financial year over the reference period are presented by boxplots for each year.

Each boxplot represents the distribution of immediate custodial sentence lengths imposed in each financial year. The bottom bar represents the shortest 25% of sentences, the box represents the middle 50% of sentences, and the top bar represents the longest 25% of sentences. The middle line in the box represents the 'yearly distribution median', being the median sentence for all sentences imposed in that year. Yearly distributions and medians are of limited value for assessing the consistency of sentencing where there has only been a small number of charges sentenced in a year. See Figure A71 as an example.

The red dots represent the 'cumulative median' of all immediate custodial sentence lengths imposed between July 2010 and the end of that financial year, with the 2014–15 red dot indicating the median of the entire reference period. For the offences analysed, the sentences imposed in each consecutive year were added to the sample from which a 'cumulative median' was calculated. These graphs show that distributions may not be consistent in consecutive years and the effect on the median resulting from an increase in sentence lengths in one year may be masked by a decrease in sentence lengths in a subsequent year. See Figure A27 as an example.

The horizontal axis displays the financial year and the number of charges receiving an immediate custodial sentence in that period.

Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary for definitions).

A small IQR or MAD value may indicate that the charges in the sample represent similar offending. Alternatively, a small IQR or MAD value may indicate that there is unjustified consistency between charges that represent different offending. These measures are therefore limited without accompanying qualitative analysis of sentencing remarks to identify the circumstances of the case in which charges are sentenced.

Appendix 3:

Fatal offences data

Offence 1. Murder

Definition	Killing a person by an act that is intended to kill or cause really serious injury to that person, or killing a person by an act that is done with the knowledge that someone would probably die or suffer really serious injury.
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Offence characteristics

The offence is an indictable offence	Indictable offence.
The extent to which the offence is 'prevalent'	112 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015.
Objective elements involve a vulnerable victim	No.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	No. Not an aggravated offence, although murder of an emergency worker on duty has a higher baseline sentence of 30 years.

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	<p>Yes. Community attitudes research (Sentencing Advisory Council, 2012):</p> <ul style="list-style-type: none"> • ranked as the most serious offence (level 10); • high levels of consensus; • harm and culpability assessed as very high.
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	Yes. Murder consistently viewed as the most serious crime a person can commit; recognition of long-term individual and societal harms; more awareness and concern of family violence (killing of partners and children) and alcohol-related violence.
Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	<p>Yes. Maximum penalty = life imprisonment.</p> <p>Baseline offence (baseline sentence of 25 years); baseline is 30 years for aggravated form of murdering an emergency worker while on duty.</p>

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>No. See sentencing data below: 'distribution of sentences and comparison with maximum penalty'</p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> percentage: 100%; range: 10 years and 9 months to life; median: 20 years. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> median: 50%; percentage of sentences 25% or less: 0%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	<p>No. Note, however, recent case of <i>Director of Public Prosecutions v Daing</i> [2016] VSCA 58 (31 March 2016). The Court of Appeal commented that some sentences imposed for 'murder of domestic partners raise an important question as to whether current sentencing practices adequately reflect the seriousness with which such cases generally ought to be viewed ... it might be queried whether, generally speaking the tariff for such killings is too low'.</p>
No evidence of change in current sentencing practices following the Court of Appeal's declaration or questioning	<p>No. See sentencing data below: 'immediate custodial sentence lengths over time'</p> <p>n.a.</p>

Problem with sentencing: evidence of inconsistency of approach

Treatment of a category of offenders within the offence category	No.
Weight given to aggravating and mitigating factors	<p>No. See sentencing data below: 'measures of consistency'</p> <p>Interquartile range (IQR) = 6 years (18 years to 24 years).</p> <p>Median Absolute Difference (MAD) = 2 years and 6 months.</p>
Categorisation of the objective seriousness of the offence	<p>No. Has the highest median of all offences, which reflects its ranking as the most serious offence.</p>

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 112 charges of murder were sentenced in the higher courts. Murder carries a maximum penalty of life imprisonment.

All charges of murder were sentenced to imprisonment (Table A1).¹⁰⁴⁰

Table A1: Number and percentage of charges of murder, by sentence type imposed, 2010–11 to 2014–15

Sentence type	Number	Percentage
Imprisonment	112	100%

The non-life immediate custodial sentences imposed over the five years ranged from 10 years and 9 months to 29 years (Table A2). Fifteen (13%) life sentences were imposed. The median custodial sentence length of 20 years is 50% of the maximum penalty.

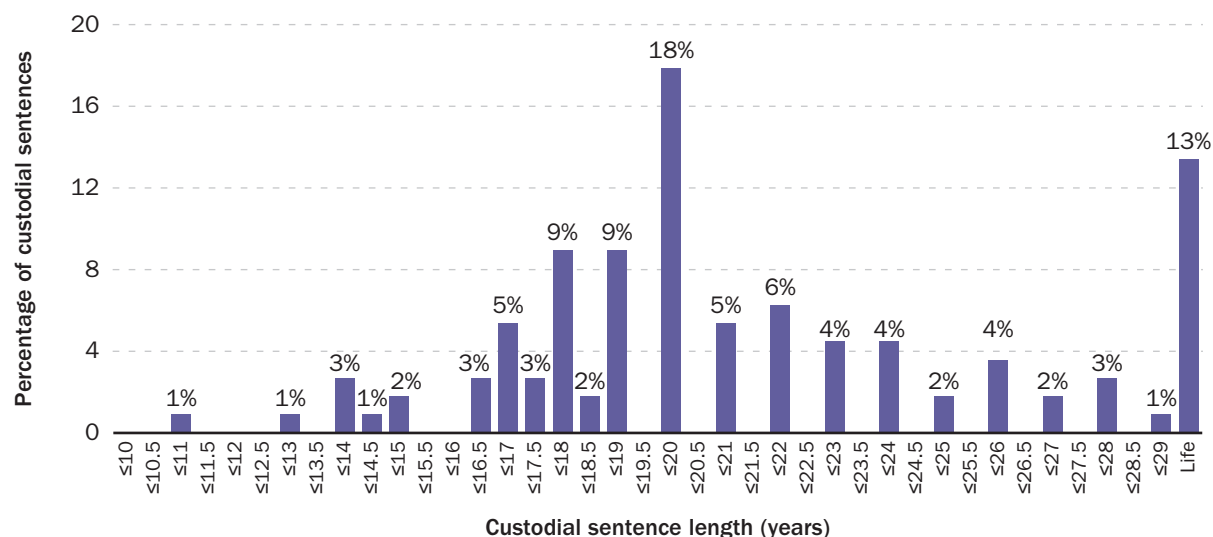
Table A2: Descriptive statistics of custodial sentences imposed for charges of murder, 2010–11 to 2014–15

Statistic	Value
Total charges	112
Immediate custodial sentences	112
<i>Percentage immediate custodial</i>	100%
Shortest	10 years and 9 months
Median	20 years
Longest	Life
Years from median to maximum penalty	20 years
Median % of maximum penalty	50%

¹⁰⁴⁰ There were no aggregate or mixed sentences imposed for murder in this period.

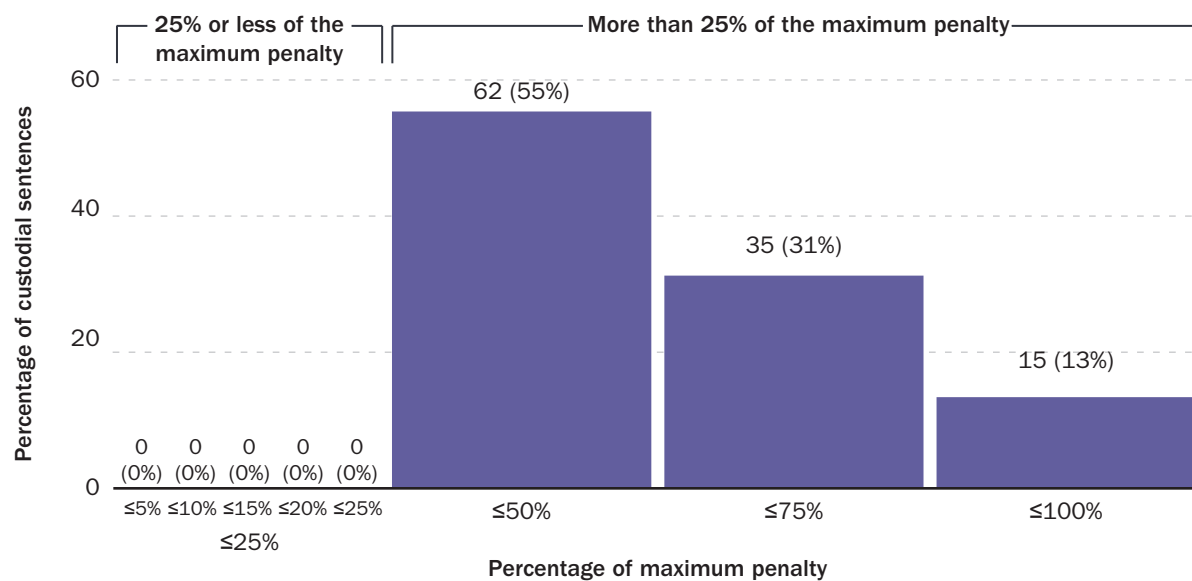
The distribution of immediate custodial sentence lengths in Figure A1 shows that sentences between 19 years and 6 months and 20 years were most common. Excluding life sentences, 9% of sentences were more than 25 years.

Figure A1: Percentage of immediate custodial sentences imposed for charges of murder, by sentence length, 2010–11 to 2014–15



As a percentage of the life imprisonment maximum penalty for murder, 24% of custodial sentence lengths were more than 60% of the maximum penalty (Figure A2).

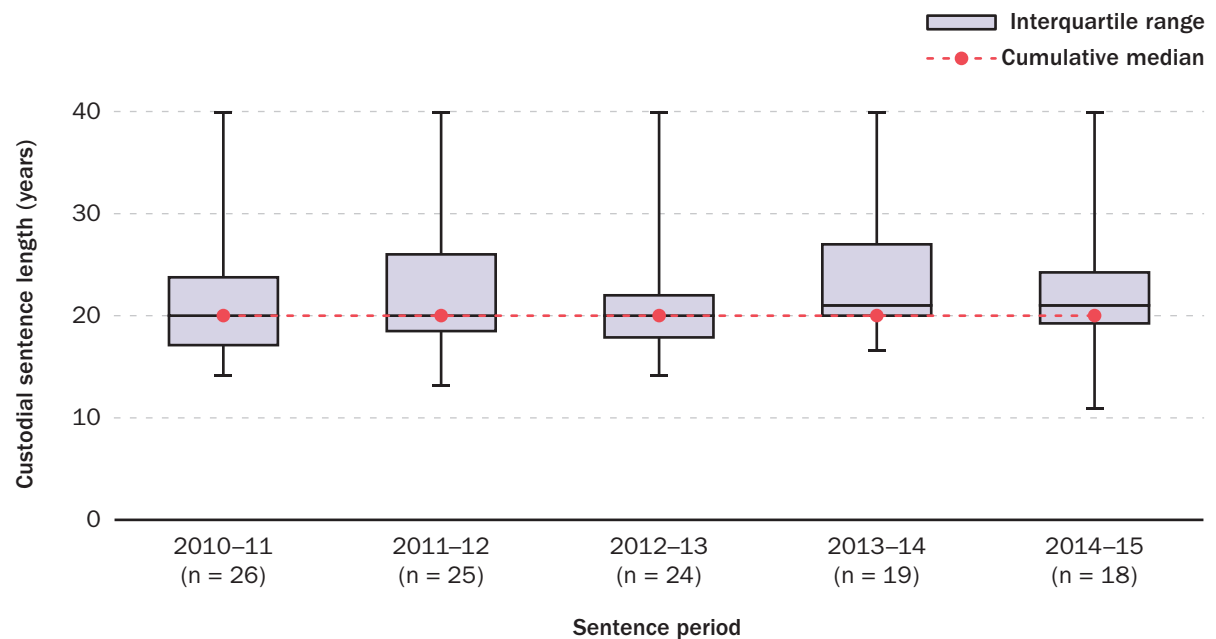
Figure A2: Percentage of immediate custodial sentences imposed for charges of murder, by the percentage of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 112 (100%) custodial sentences imposed over the entire period had a median length of 20 years (Table A2). Figure A3 shows that the charges sentenced in each financial year had consistent distributions, and the 20-year cumulative median remained from 2010–11 to 2014–15. The median immediate custodial sentence was 21 years in both 2013–14 and 2014–15.

Figure A3: Yearly distribution and cumulative median immediate custodial sentence length imposed for charges of murder, by financial year, 2010–11 to 2014–15



Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A4 shows these two measures for the offence of murder.

The IQR was 6 years, and it ranged from 18 years to 24 years.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from zero to 20 years. The median of these differences, the MAD value, is 2 years and 6 months. This means that 50% of custodial sentence lengths are less than 2 years and 6 months from the median (between 17 years and 6 months and 22 years and 6 months) and 50% are further than 2 years and 6 months from the median.

Figure A4: Boxplot distribution of immediate custodial sentence lengths imposed for charges of murder, 2010–11 to 2014–15



Offence 2. Manslaughter

Definition	<p>Killing a person by an act that would constitute murder or infanticide were it not for the mitigating effect of particular circumstances that constitute voluntary or involuntary manslaughter.</p> <p>Voluntary manslaughter – killing a person by an act that is intended to kill or really seriously injure that person or knowledge that someone would probably die or suffer really serious injury where there was the presence of a suicide pact ('manslaughter – suicide pact').</p> <p>Involuntary manslaughter – killing a person by an act that is not intended to kill or really seriously injure someone where:</p> <ul style="list-style-type: none"> a. the act causing death was unlawful and dangerous and there was an appreciable risk of serious injury being caused; or b. the act causing death was a breach of the duty of care owed to the deceased that was of such magnitude that it amounted to 'gross negligence'.
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Offence characteristics

The offence is an indictable offence	Indictable offence.
The extent to which the offence is 'prevalent'	83 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015.
Objective elements involve a vulnerable victim	No.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	No. Not an aggravated offence, although some forms of manslaughter attract a minimum non-parole period of 10 years (circumstances of gross violence and one-punch manslaughter).

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	<p>Inconclusive. Community attitudes research (Sentencing Advisory Council, 2012):</p> <ul style="list-style-type: none"> • ranked the same as aggravated burglary and negligently causing serious injury (level 8); • medium levels of consensus; • medium to low culpability with high harm.
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	Yes. Recognition of long-term individual and societal harms; more awareness and concern of family violence (killing of partners and children) and alcohol-related violence.

Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	<p>Yes. Maximum penalty = 20 years.</p> <p>Mandatory minimum non-parole period of 10 years introduced for manslaughter committed in circumstances of gross violence and one-punch manslaughter.</p> <p>(Not a baseline offence.)</p>
Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>No. See sentencing data below: 'distribution of sentences and comparison with maximum penalty'</p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> • percentage: 98%; • range: 3 years to 13 years; • median: 8 years. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> • median: 40%; • percentage of sentences 25% or less: 17%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	No. Instead noted that range of seriousness and penalties for manslaughter is wide: <i>Shera v The Queen</i> (2011) 32 VR 668.
No evidence of change in current sentencing practices following the Court of Appeal's declaration or questioning	<p>No. See sentencing data below: 'immediate custodial sentence lengths over time'</p> <p>n.a.</p>

Problem with sentencing: evidence of inconsistency of approach

Treatment of a category of offenders within the offence category	No. No evidence found in small sample of sentencing remarks.
Weight given to aggravating and mitigating factors	<p>No. See sentencing data below: 'measures of consistency'</p> <p>Interquartile range (IQR) = 3 years (6 years to 9 years).</p> <p>Median Absolute Difference (MAD) = 1 year and 6 months.</p> <p>No evidence found in small sample of sentencing remarks.</p>
Categorisation of the objective seriousness of the offence	No. Significantly higher median compared with other offences viewed by the community to be as serious (aggravated burglary, culpable driving causing death, negligently causing serious injury).

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 83 charges of manslaughter were sentenced in the higher courts. Manslaughter carries a maximum penalty of 20 years' imprisonment.

Imprisonment was the most common sentence imposed for charges, and 98% of sentences imposed were immediate custodial sentences (Table A3).¹⁰⁴¹

Table A3: Number and percentage of charges of manslaughter, by sentence type imposed, 2010–11 to 2014–15

Sentence type	Number	Percentage
Imprisonment	79	95%
Partially suspended sentence	1	1%
Youth justice centre	1	1%
Wholly suspended sentence	1	1%
Adjourned undertaking with conviction	1	1%
Total	83	100%

The immediate custodial sentences imposed over the five years ranged from 3 years to 13 years (Table A4). The median custodial sentence length of 8 years is 40% of the maximum penalty.

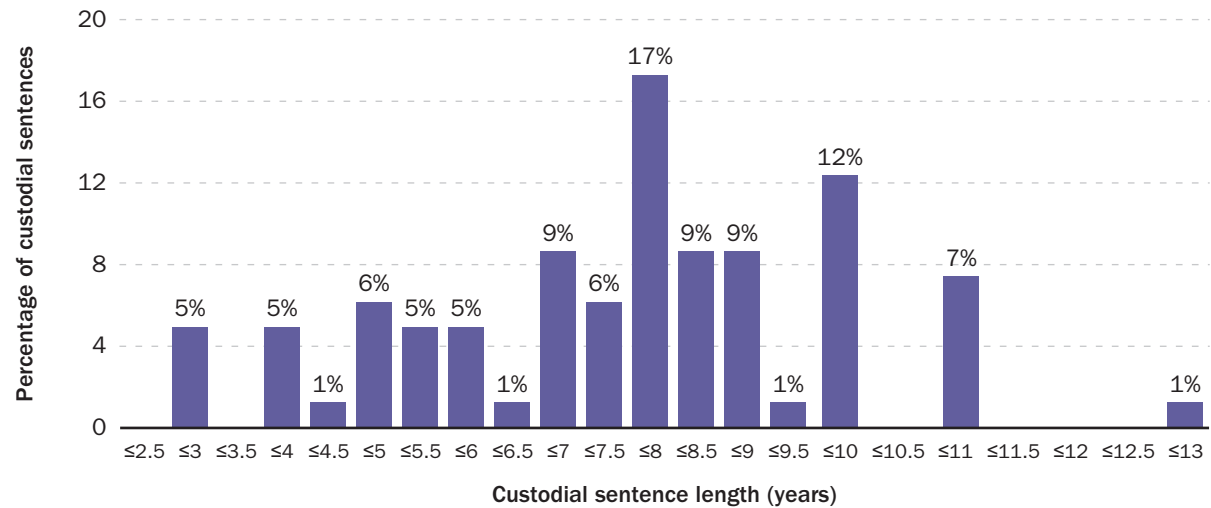
Table A4: Descriptive statistics of immediate custodial sentences imposed for charges of manslaughter, 2010–11 to 2014–15

Statistic	Value
Total charges	83
Immediate custodial sentences	81
<i>Percentage immediate custodial</i>	98%
Shortest	3 years
Median	8 years
Longest	13 years
Years from median to maximum penalty	12 years
Median % of maximum penalty	40%

¹⁰⁴¹ There were no aggregate or mixed sentences imposed for manslaughter in this period.

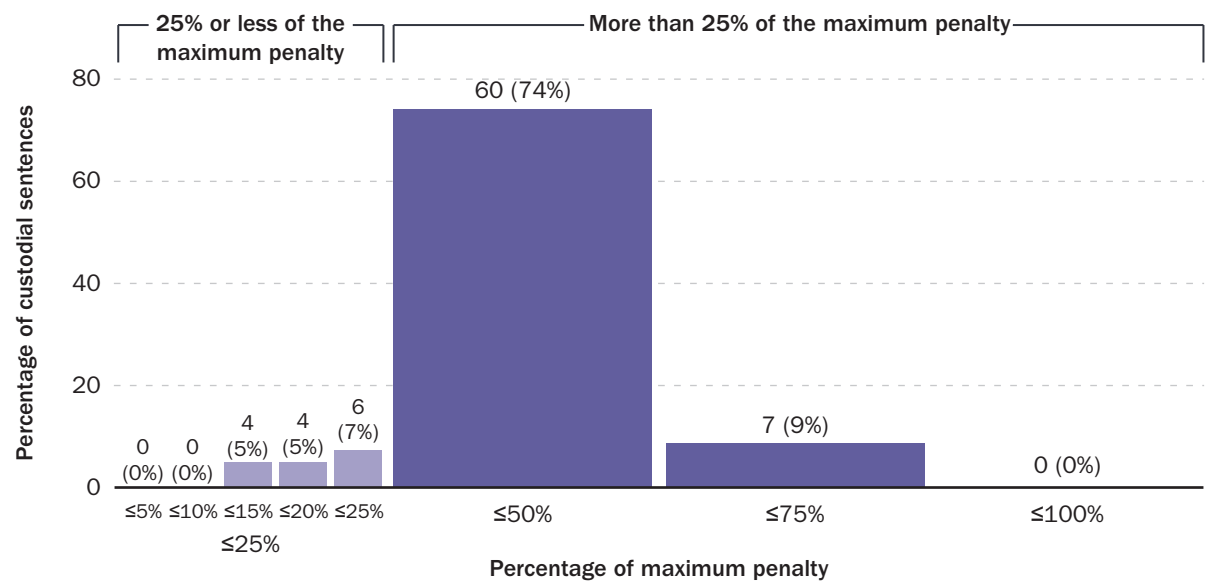
The distribution of immediate custodial sentence lengths in Figure A5 shows that sentences between 7 years and 6 months and 8 years were most common. Overall, 9% of sentences were more than 10 years.

Figure A5: Percentage of immediate custodial sentences imposed for charges of manslaughter, by sentence length, 2010–11 to 2014–15



As a percentage of the 20-year maximum penalty for manslaughter, 17% of custodial sentence lengths were 25% of the maximum penalty or less (Figure A6).

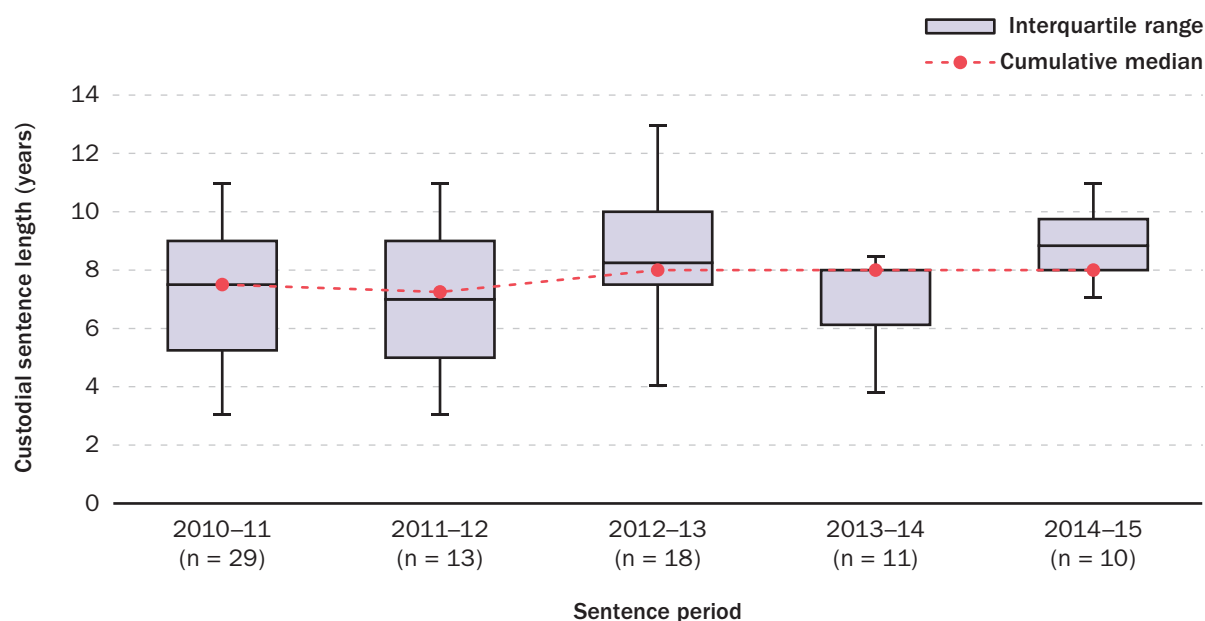
Figure A6: Percentage of immediate custodial sentences imposed for charges of manslaughter, by the proportion of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 81 (98%) custodial sentences imposed over the entire period had a median length of 8 years (Table A4). Figure A7 shows that the yearly distributions of custodial sentences were largely consistent. Charges sentenced each financial year established a cumulative median sentence length of 8 years from 2012–13 to 2014–15 after an increase from 7 years and 3 months in 2011–12.

Figure A7: Yearly distribution and cumulative median immediate custodial sentence length imposed for charges of manslaughter, by financial year, 2010–11 to 2014–15



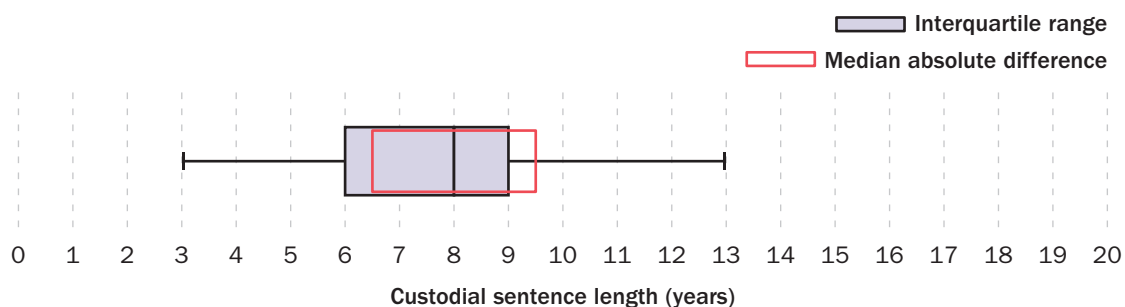
Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A8 shows these two measures for the offence of manslaughter.

The IQR was 3 years, and it ranged from 6 years to 9 years.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from zero to 5 years. The median of these differences, the MAD value, is 1 year and 6 months. This means that 50% of custodial sentence lengths are less than 1 year and 6 months from the median (between 6 years and 6 months and 9 years and 6 months) and 50% are further than 1 year and 6 months from the median.

Figure A8: Boxplot distribution of immediate custodial sentence lengths imposed for charges of manslaughter, 2010–11 to 2014–15



Offence 3. Culpable driving causing death

Definition	Killing a person by the driving of a motor vehicle where the driving was either reckless or negligent or the offender was under the influence of alcohol or a drug to such an extent as to be incapable of having proper control of the vehicle.
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Offence characteristics

The offence is an indictable offence	Indictable offence.
The extent to which the offence is 'prevalent'	66 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015.
Objective elements involve a vulnerable victim	No.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	Yes. Aggravated form of driving offence (more serious than dangerous driving causing death).

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	<p>Inconclusive. Community attitudes research (Sentencing Advisory Council, 2012):</p> <ul style="list-style-type: none"> ranked the same as negligently causing serious injury, aggravated burglary, and manslaughter (level 8); medium levels of consensus; medium to low culpability and high harm. <p>Yes. Tasmanian Jury Sentencing Study (culpable driving): highest rates of satisfaction with sentencing for this offence and jurors likely to be more lenient than the judge (small sample size).</p>
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	Yes. Concerns about road toll and driving offences.
Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	<p>Yes. Maximum penalty = 20 years (increased from 15 years in 1997, after increases in 1991 and 1992).</p> <p>Baseline offence (baseline sentence of 9 years).</p>

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>No. See sentencing data below: 'distribution of sentences and comparison with maximum penalty'</p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> percentage: 94%; range: 2 years and 6 months and 10 years and 6 months; median: 5 years and 6 months. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> median: 28%; percentage of sentences 25% or less: 44%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	No.
No evidence of change in current sentencing practices following the Court of Appeal's declaration or questioning	<p>No. See sentencing data below: 'immediate custodial sentence lengths over time'</p> <p>n.a.</p>

Problem with sentencing: evidence of inconsistency of approach

Treatment of a category of offenders within the offence category	Inconclusive. Some difficulty recognised in distinguishing levels of culpability in the four different forms of the offence: <i>Pasznyk v The Queen</i> (2014) 43 VR 169.
Weight given to aggravating and mitigating factors	<p>Inconclusive. See sentencing data below: 'measures of consistency'</p> <p>Interquartile range (IQR) = 2 years (5 years to 7 years).</p> <p>Median Absolute Difference (MAD) = 6 months.</p>
Categorisation of the objective seriousness of the offence	No. Higher median than some offences ranked at the same level (negligently causing serious injury and aggravated burglary) but lower than others (manslaughter).

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 66 charges of culpable driving causing death were sentenced in the higher courts. Culpable driving causing death carries a maximum penalty of 20 years' imprisonment.

Imprisonment was the most common sentence imposed for charges, and 94% of sentences imposed were immediate custodial sentences (Table A5).¹⁰⁴²

Table A5: Number and percentage of charges of culpable driving causing death, by sentence type imposed, 2010–11 to 2014–15

Sentence type	Number	Percentage
Imprisonment	59	89%
Youth training centre	3	5%
Wholly suspended sentence	4	6%
Total	66	100%

The immediate custodial sentences imposed over the five years ranged from 2 years and 6 months to 10 years and 6 months (Table A6). The median custodial sentence length of 5 years and 6 months is 28% of the maximum penalty.

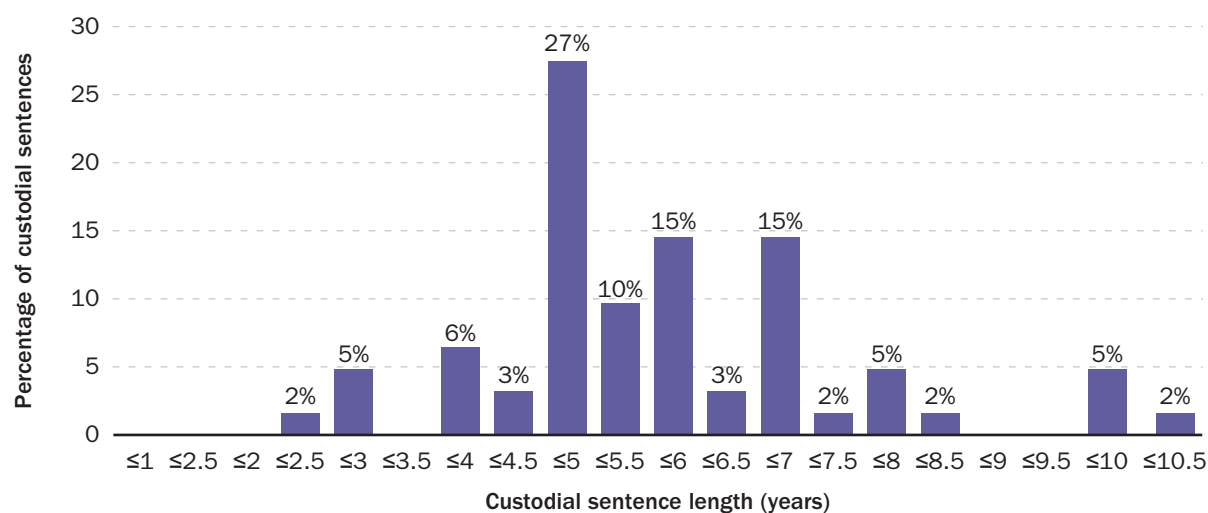
Table A6: Descriptive statistics of immediate custodial sentences imposed for charges of culpable driving causing death, 2010–11 to 2014–15

Statistic	Value
Total charges	66
Immediate custodial sentences	62
<i>Percentage immediate custodial</i>	94%
Shortest	2 years and 6 months
Median	5 years and 6 months
Longest	10 years and 6 months
Years from median to maximum penalty	14 years and 6 months
Median % of maximum penalty	28%

¹⁰⁴² There were no aggregate or mixed sentences imposed for culpable driving causing death in this period.

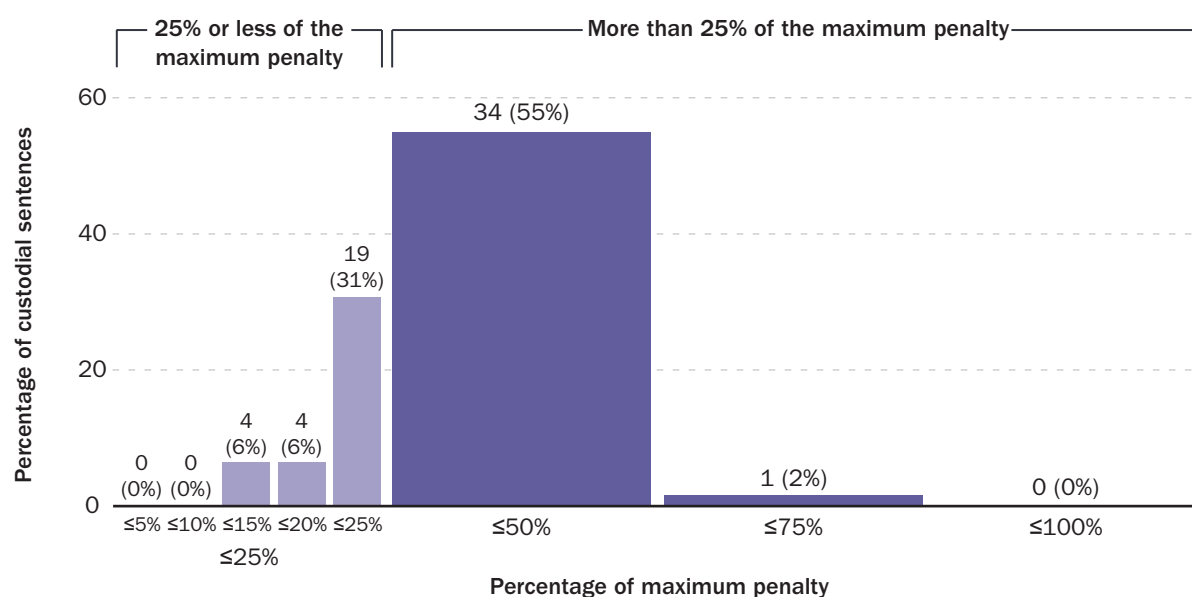
The distribution of immediate custodial sentence lengths in Figure A9 shows that sentences between 4 years and 6 months and 5 years were most common. Overall, 15% of custodial sentence lengths were more than 7 years.

Figure A9: Percentage of immediate custodial sentences imposed for charges of culpable driving causing death, by sentence length, 2010–11 to 2014–15



As a percentage of the 20-year maximum penalty for culpable driving causing death, 44% of custodial sentences were 25% of the maximum penalty or less (Figure A10).

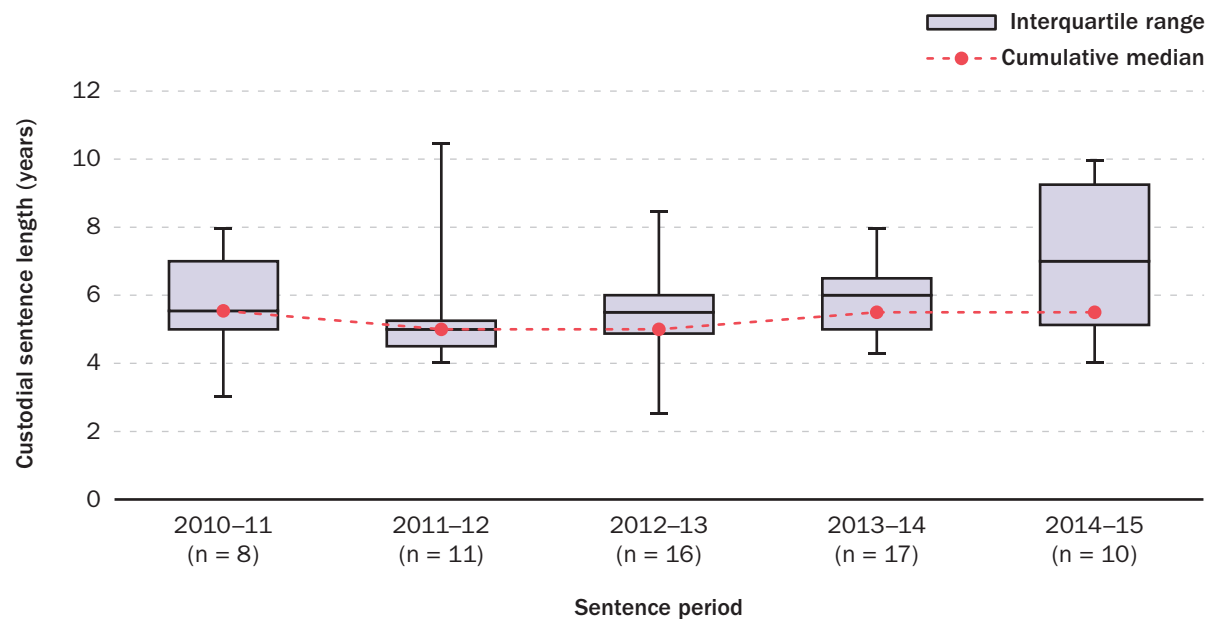
Figure A10: Percentage of immediate custodial sentences imposed for charges of culpable driving causing death, by the proportion of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 62 (94%) custodial sentences imposed over the entire period had a median length of 5 years and 6 months (Table A6). Figure A11 shows that the relatively small number of charges sentenced in each financial year had varied distributions with the cumulative median decreasing to 5 years in 2011–12 and 2012–13 before reaching 5 years and 6 months in 2013–14.

Figure A11: Yearly distribution and cumulative median immediate custodial sentence length imposed for charges of culpable driving causing death, by financial year, 2010–11 to 2014–15



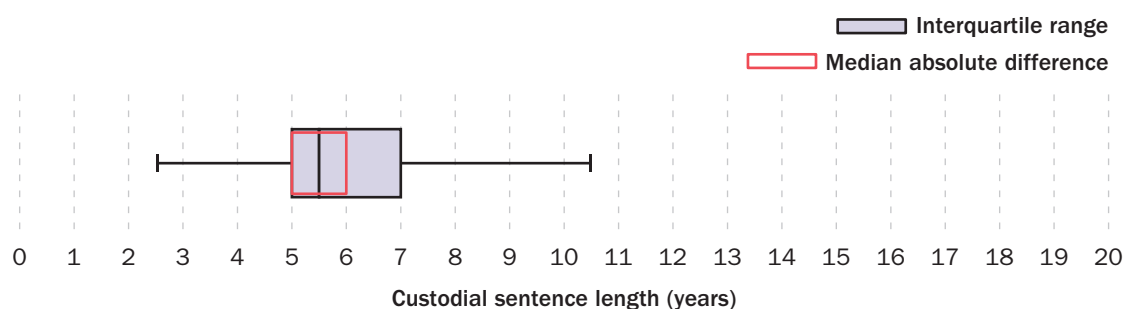
Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A12 shows these two measures for the offence of culpable driving causing death.

The IQR was 2 years, and it ranged from 5 years to 7 years.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from zero to 5 years. The median of these differences, the MAD value, is 6 months. This means that 50% of custodial sentences are within 6 months of the median sentence length (between 5 years and 6 years) and 50% are more than 6 months from the median.

Figure A12: Boxplot distribution of immediate custodial sentence lengths imposed for charges of culpable driving causing death, 2010–11 to 2014–15



Appendix 4: Sexual offences data

Offence 4. Rape

Definition	Taking part in an act of sexual penetration with a person without that person's consent.
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Offence characteristics

The offence is an indictable offence	Indictable offence.
The extent to which the offence is 'prevalent'	476 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015.
Objective elements involve a vulnerable victim	No.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	No.

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	<p>Yes. Community attitudes research (Sentencing Advisory Council, 2012):</p> <ul style="list-style-type: none"> ranked the same as intentionally causing serious injury and reckless murder (level 9); high levels of consensus; harm and culpability assessed as very high. <p>Tasmanian Jury Sentencing Study (sexual offences); Victorian Jury Sentencing Study (sexual offences, including sexual offences involving victims 12 and older and under 12).</p>
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	<p>Yes. Community attitudes research (Vic); recognition of prevalence and long-term individual and societal harms; concerns about prevalence in family violence context; Royal Commissions (for example, Royal Commission into Institutional Responses to Child Sexual Abuse); reforms to sexual assault law and procedure; attitudes to women and attribution of blame.</p>

Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	<p>Yes. Maximum penalty = 25 years.</p> <p>(Not a baseline offence.)</p>
Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>Yes. See sentencing data below: 'distribution of sentences and comparison with maximum penalty'</p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> percentage: 95%; range: 6 months to 15 years; median: 5 years. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> median: 20%; percentage of sentences 25% or less: 79%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	<p>Yes. Questions of adequacy raised by Court of Appeal but conflicting judgments.</p> <ul style="list-style-type: none"> <i>Director of Public Prosecutions v Werry</i> (2012) 37 VR 524: adequacy of current sentencing practices questioned but the court made no comment as it was not appropriate to ventilate arguments in that case; 5-year median considered 'acceptable' compared to starting point in United Kingdom guidelines. <i>Leeder v The Queen</i> [2010] VSCA 98 (23 April 2010): appeal against a sentence for assault with intent to rape. The court compared a sentence of 5 years for assault with intent to rape to the median sentence of 5 years for rape; held that there was no justification for imposing a sentence that is equivalent to the median sentence for rape for assault with intent to rape, when its maximum penalty (10 years) is only 40% of the maximum penalty for rape (25 years). The court commented that a 'very separate and serious question arises about the adequacy of current sentencing practices for rape'; however, the case was not an appropriate vehicle to consider the adequacy of current sentencing practices: see [37].
No evidence of change in current sentencing practices following the Court of Appeal's declaration or questioning	<p>Yes. See sentencing data below: 'immediate custodial sentence lengths over time'</p> <p>Consistent yearly distribution of median and cumulative median over the reference period.</p>

Problem with sentencing: evidence of inconsistency of approach

Treatment of a category of offenders within the offence category	<p>Yes. Sample case analysis, prepared for the Council's forthcoming report on sexual penetration with a child under 12, suggests that the serious sexual offender provisions, though enlivened, were not found to require a disproportionate sentence or additional cumulation.</p>
Weight given to aggravating and mitigating factors	<p>Inconclusive. See <i>sentencing data below: 'measures of consistency'</i></p> <p>Interquartile range (IQR) = 2 years and 6 months (3 years and 6 months to 6 years).</p> <p>Median Absolute Difference (MAD) = 1 year.</p> <p>Less clustering of individual sentences, compared with sentences for penetrative sexual offences with children, supported by sample case analysis prepared for the Council's forthcoming report on sexual penetration with a child under 12, which suggests differences in approach to the identification and weighting of aggravating and mitigating factors.</p>
Categorisation of the objective seriousness of the offence	<p>Yes. Sample case analysis prepared for the Council's forthcoming report on sexual penetration with a child under 12 suggests differences in approach to the treatment of harm and culpability and assessment of seriousness, particularly related to:</p> <ul style="list-style-type: none"> • the characterisation of the violence involved in the physical element of the offence of sexual penetration with a child under 12 compared with rape; • emphasis on traditionally understood notions of violence; • differences in the characterisation of offender's behaviour for the sexual penetration offence. <p>See <i>Clarkson v The Queen</i> (2011) 32 VR 361.</p> <p>Higher median compared with other offences viewed by the community to be equally serious (intentionally causing serious injury), and higher median than offences ranked as more serious (sexual penetration with a child under 12).</p> <p>Lower median compared with some offences ranked as less serious (manslaughter and trafficking in a large commercial quantity of a drug of dependence).</p>

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 476 charges of rape were sentenced in the higher courts. Rape carries a maximum penalty of 25 years' imprisonment.

Imprisonment was the most common sentence imposed for charges, and 96% of sentences imposed were immediate custodial sentences (Table A7).

Table A7: Number and percentage of charges of rape, by sentence type imposed, 2010–11 to 2014–15

Sentence type	Number	Percentage
Imprisonment	447	94%
Partially suspended sentence	3	1%
Community order	8	2%
Youth training centre	2	<1%
Wholly suspended sentence	13	3%
Residential treatment order	3	1%
Total	476	100%

The immediate custodial sentences imposed over the five years ranged from 6 months to 15 years (Table A8). The median custodial sentence length of 5 years is 20% of the maximum penalty.

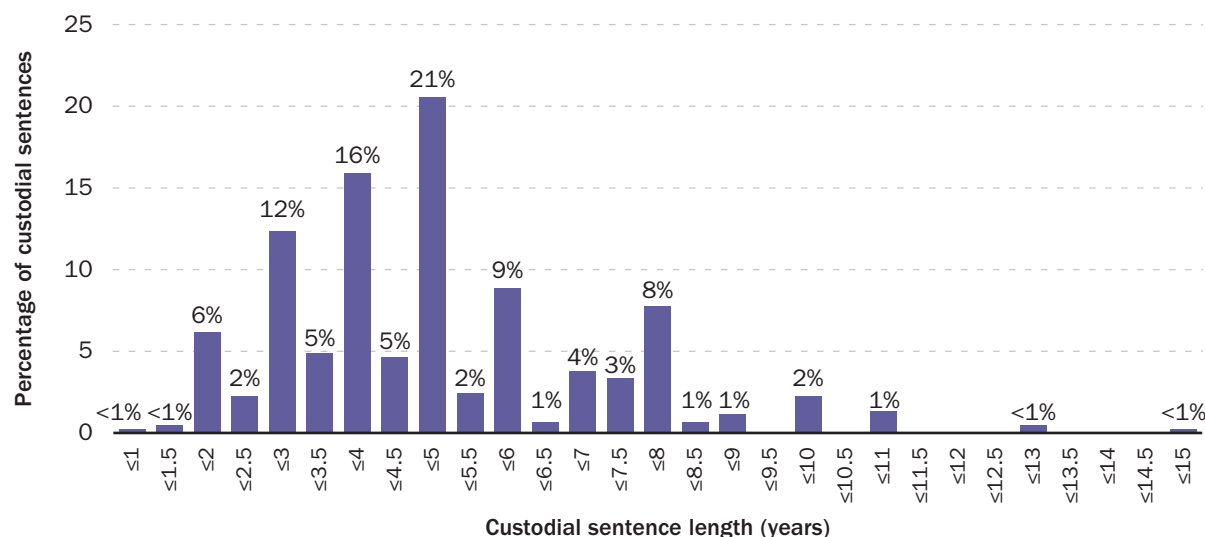
Table A8: Descriptive statistics of immediate custodial sentences imposed for charges of rape, 2010–11 to 2014–15

Statistic	Value
Total charges	476
Immediate custodial sentences	453
Percentage immediate custodial ^a	95%
Shortest	6 months
Median	5 years
Longest	15 years
Years from median to maximum penalty	20 years
Median % of maximum penalty	20%

a. Two aggregate sentences of imprisonment are excluded from the sentence length analysis that follows.

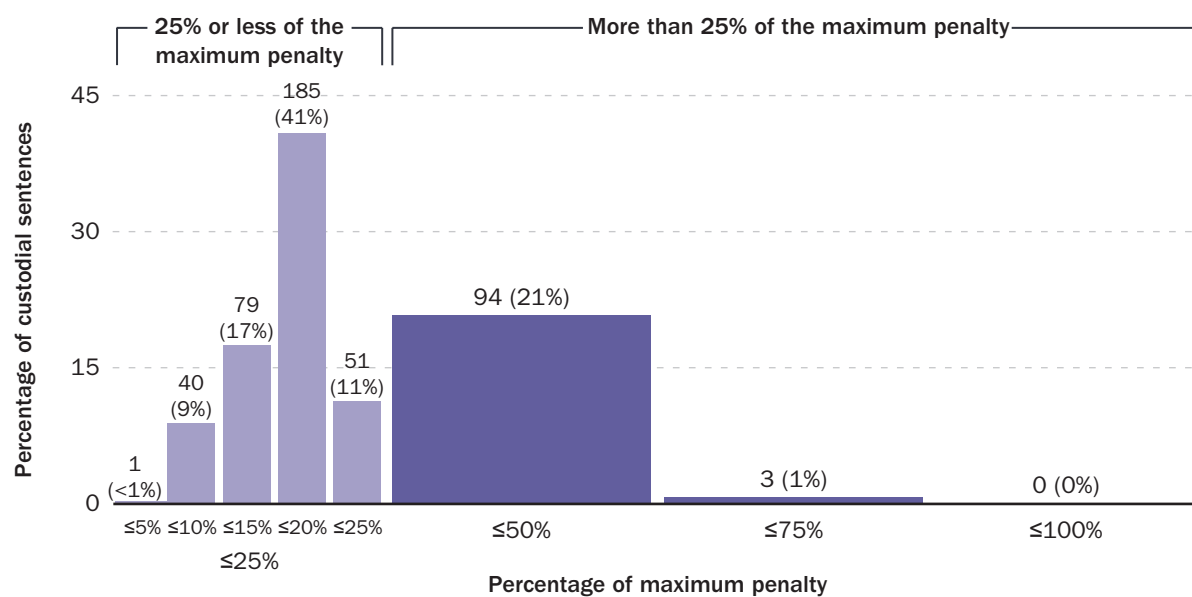
The distribution of immediate custodial sentence lengths in Figure A13 shows that sentences between 4 years and 6 months and 5 years were most common. Overall, 21% of custodial sentences were over 6 years in length.

Figure A13: Percentage of immediate custodial sentences imposed for charges of rape, by sentence length, 2010–11 to 2014–15



In terms of the 25-year maximum penalty for rape, 79% of custodial sentences were 25% of the maximum penalty or less, and 99% were 50% of the maximum penalty or less (Figure A14).

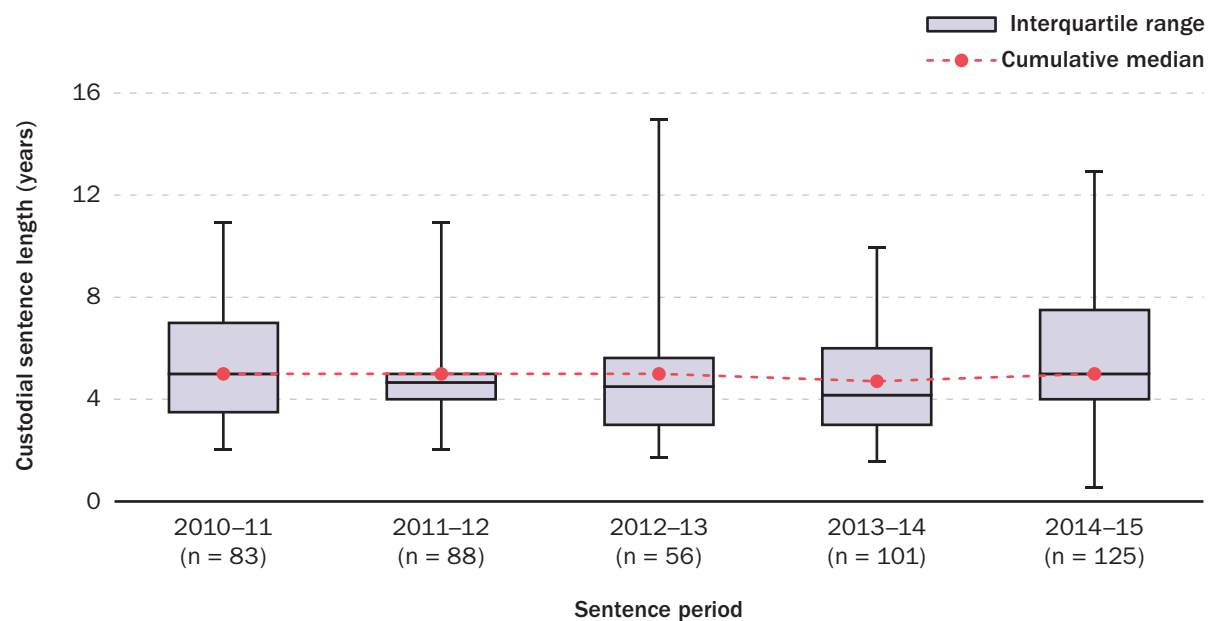
Figure A14: Percentage of immediate custodial sentences imposed for charges of rape, by the proportion of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 453 (95%) custodial sentences over the entire period had a median length of 5 years (Table A8). Figure A15 shows that sentence lengths distributions in each financial year had consistent medians, with only 2013–14 having a median slightly below 5 years. In each year, at least one sentence of 2 years or less was imposed.

Figure A15: Yearly distribution and cumulative median length of immediate custodial sentences imposed for charges of rape, by financial year, 2010–11 to 2014–15



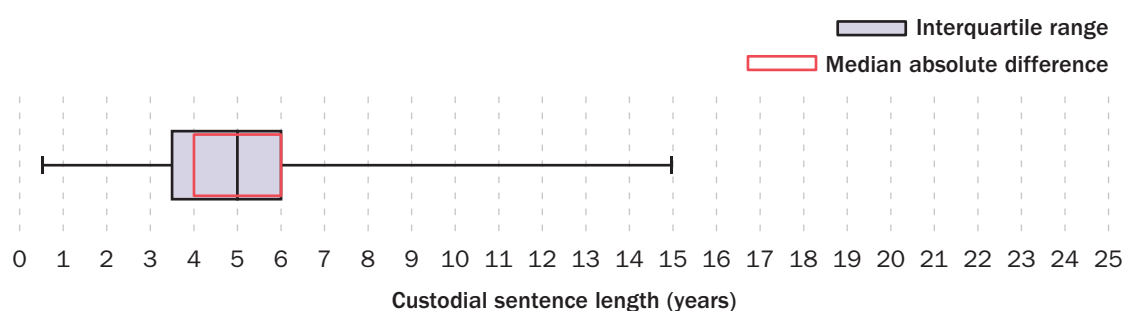
Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A16 shows these two measures for the offence of rape.

The IQR was 2 years and 6 months, and it ranged from 3 years and 6 months to 6 years.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from zero to 10 years. The median of these differences, the MAD value, is 1 year. This means that 50% of custodial sentence lengths are less than 1 year from the median (between 4 years and 6 years) and 50% are further than 1 year from the median.

Figure A16: Boxplot distribution of immediate custodial sentence lengths imposed for charges of rape, 2010–11 to 2014–15



Offence 5. Incest with child/step-child

Definition	Taking part in an act of sexual penetration with a person whom the offender knows is his or her child, lineal descendant, or step-child.
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Offence characteristics

The offence is an indictable offence	Indictable offence.
The extent to which the offence is 'prevalent'	370 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015.
Objective elements involve a vulnerable victim	Yes. Child or step-child (any age) of the offender.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	No.

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	<p>Yes. Not included in community attitudes research (Sentencing Advisory Council, 2012), but findings for sexual penetration with a child under 12 apply where victim of incest is under the age of 12:</p> <ul style="list-style-type: none"> • ranked the same as murder (level 10); • high levels of consensus; • harm and culpability assessed as very high, based on common factors across child sexual offences (vulnerability, sexual invasion, breach of trust). <p>Tasmanian Jury Sentencing Study (sexual offences); Victorian Jury Sentencing Study (sexual offences, including sexual offences involving victims 12 and older and under 12).</p>
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	Yes. Community attitudes research (Vic); recognition of prevalence and long-term individual and societal harms; concerns about prevalence in family violence context; Royal Commissions (for example, Royal Commission into Institutional Responses to Child Sexual Abuse); reforms to sexual assault law and procedure; historically considered to be a 'victimless' crime.
Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	<p>Yes. Maximum penalty = 25 years (increased from 20 years in 1997).</p> <p>Baseline offence if child under 18 years (baseline sentence of 10 years).</p>

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>Yes. See sentencing data below: 'distribution of sentences and comparison with maximum penalty'</p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> percentage: 99%; range: 9 months to 8 years; median: 4 years. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> median: 16%; percentage of sentences 25% or less: 95%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	<p>Yes. <i>R v Bellerby</i> [2009] VSCA 59 (28 April 2009): noted that it could be argued that current sentencing practices do not reflect parliament's intent in increasing the penalty to 25 years, particularly in cases with very young children.</p> <p><i>Reid (A Pseudonym) v The Queen</i> (2014) 42 VR 295: sentences for incest charges ranging from 20% to 40% of the maximum penalty are manifestly excessive (in case of worst category offending), 'having regard to the proper limitations of the use of "like" or "comparable" sentencing cases as informing the "instinctive reaction" to the sentence presently under consideration'.</p> <p>See also <i>Director of Public Prosecutions v CJA</i> [2013] VSCA 18 (15 February 2013); <i>Director of Public Prosecutions v DJ</i> (2011) 211 A Crim R 367; <i>Director of Public Prosecutions v BDJ</i> [2009] VSCA 298 (1 December 2009).</p> <p>Director of Public Prosecutions has initiated an appeal against sentence for incest with child/step-child (under 18) of de facto on grounds of manifest inadequacy: <i>Director of Public Prosecutions v Dalglish (A Pseudonym)</i> S APCR 2015 0190.</p>
Evidence of change in current sentencing practices since raised by Court of Appeal	<p>Yes. See sentencing data below: 'immediate custodial sentence lengths over time'</p> <p>No change in cumulative median, but some fluctuation in yearly distribution of median over reference period.</p>

Problem with sentencing: evidence of inconsistency of approach

Treatment of a category of offenders within the offence category	<p>Yes. Possible issues raised by sample case analysis, prepared for the Council's forthcoming report on sexual penetration with a child under 12, which suggests that the serious sexual offender provisions, though enlivened, were not found to require a disproportionate sentence or additional cumulation.</p>
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Issue to be considered by the Court of Appeal regarding approach to presumption of cumulation under serious sexual offender provisions in upcoming appeal by the Director of Public Prosecutions against sentence for incest with child/step-child (under 18) of de facto on grounds of manifest inadequacy: *Director of Public Prosecutions v Dalgliesh (A Pseudonym)* S APCR 2015 0190.

Issue identified by the Court of Appeal regarding approach to presumption of cumulation under serious sexual offender provisions in successful appeal by the Director of Public Prosecutions against sentence for incest with child/step-child on grounds of manifest inadequacy: *Director of Public Prosecutions v BDJ* [2009] VSCA 298 (1 December 2009).

Weight given to aggravating and mitigating factors

Yes. See sentencing data below: 'measures of consistency'

Interquartile range (IQR) = 1 year and 5 months (3 years and 7 months to 5 years).

Median Absolute Difference (MAD) = 1 year.

Limited case analysis suggests inconsistency of approach to representative counts and identification of and weight given to aggravating factors, e.g., use of threats; coercion or actual force; offending over long period; whether offending results in pregnancy; age of victim.

See *Director of Public Prosecutions v DJ* (2011) 211 A Crim R 367; *Director of Public Prosecutions v BDJ* [2009] VSCA 298 (1 December 2009); *Director of Public Prosecutions v OJA* (2007) 172 A Crim R 181; *Director of Public Prosecutions v Walters (A Pseudonym)* [2015] VSCA 303 (17 November 2015).

Categorisation of the objective seriousness of the offence

Inconclusive. Possible issues raised by sample case analysis prepared for the Council's forthcoming report on sexual penetration with a child under 12, which suggests differences in approach to the treatment of harm and culpability and assessment of seriousness, particularly related to:

- the characterisation of the violence involved in the physical element of the offence of sexual penetration with a child under 12 compared with rape;
- emphasis on traditionally understood notions of violence;
- differences in the characterisation of offender's behaviour for the sexual penetration offence.

See *Clarkson v The Queen* (2011) 32 VR 361.

Median lower than rape but higher than the median for incest with child/step-child (under 18) of de facto; same median as intentionally causing serious injury and sexual penetration with a child under 12.

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 370 charges of incest with child/step-child were sentenced in the higher courts. Incest with child/step-child carries a maximum penalty of 25 years' imprisonment.

Imprisonment was the most common sentence imposed for charges, and 99% of sentences imposed were immediate custodial sentences (Table A9).¹⁰⁴³

Table A9: Number and percentage of charges of incest with child/step-child, by sentence type imposed, 2010–11 to 2014–15

Sentence type	Number	Percentage
Imprisonment	365	99%
Partially suspended sentence	1	<1%
Community correction order	1	<1%
Wholly suspended sentence	3	1%
Total	370	100%

The immediate custodial sentences imposed over the five years ranged from 9 months to 8 years (Table A10). The median custodial sentence length of 4 years is 16% of the maximum penalty.

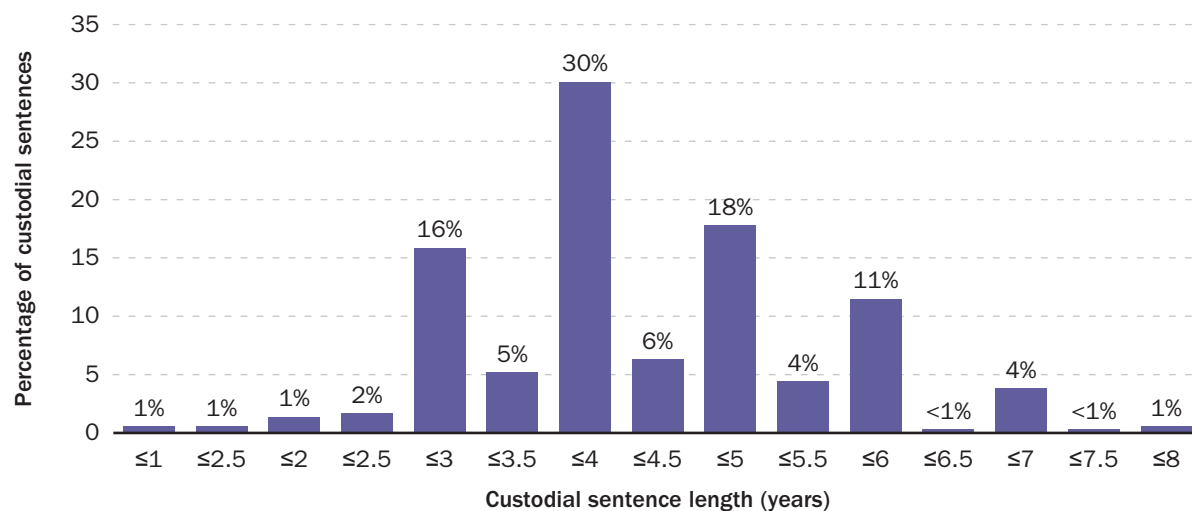
Table A10: Descriptive statistics of immediate custodial sentences imposed for charges of incest with child/step-child, 2010–11 to 2014–15

Statistic	Value
Total charges	370
Immediate custodial sentences	366
Percentage immediate custodial	99%
Shortest	9 months
Median	4 years
Longest	8 years
Years from median to maximum penalty	21 years
Median % of maximum penalty	16%

¹⁰⁴³ There were no aggregate or mixed sentences imposed for this offence in this period.

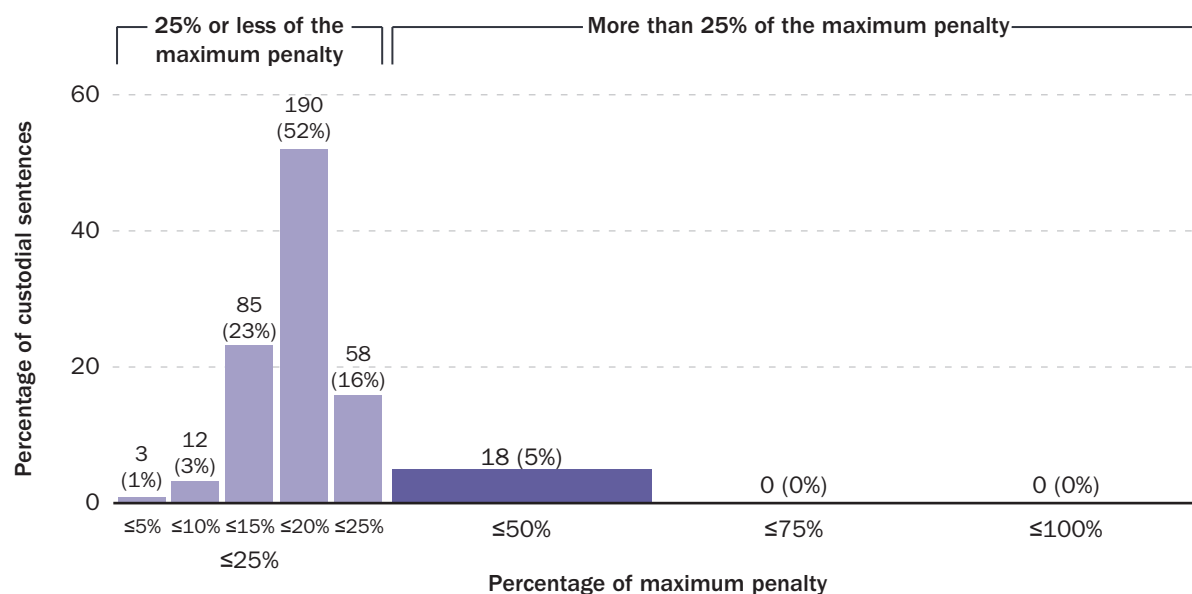
The distribution of immediate custodial sentence lengths in Figure A17 shows that sentences between 3 years and 6 months and 4 years were most common. Overall, 21% of custodial sentence lengths were longer than 5 years.

Figure A17: Percentage of immediate custodial sentences imposed for charges of incest with child/step-child, by sentence length, 2010–11 to 2014–15



In terms of the 25-year maximum penalty for incest with child/step-child, 95% of the immediate custodial sentence lengths were 25% of the maximum penalty or less, and 100% of sentences were below 35% of the maximum penalty (Figure A18).

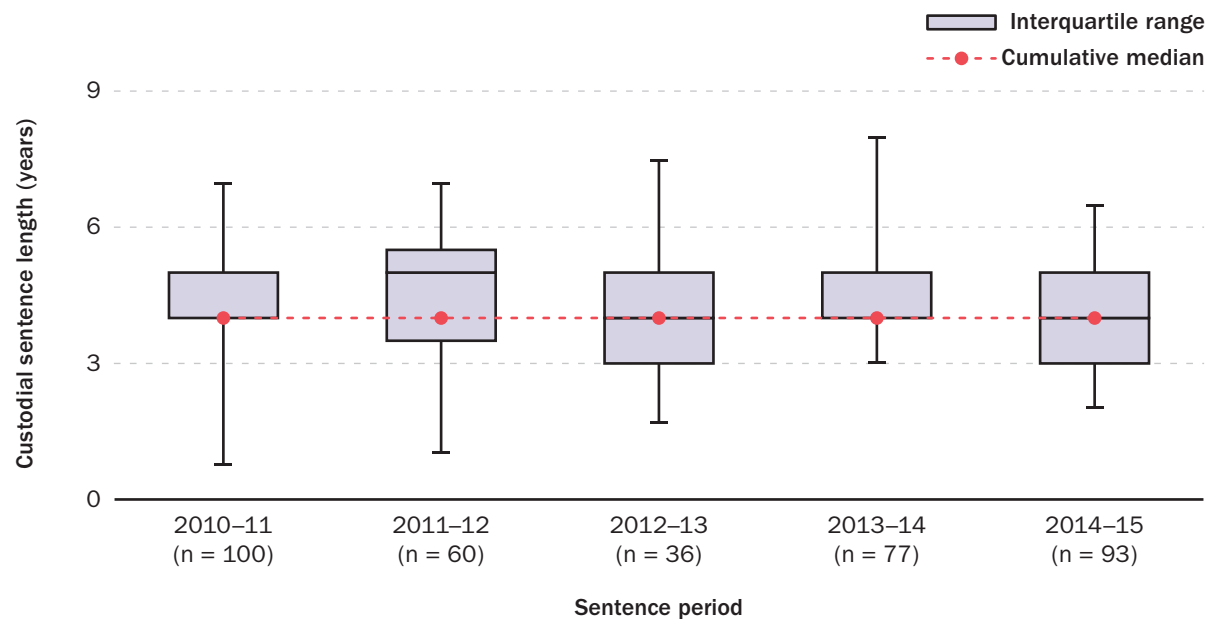
Figure A18: Percentage of immediate custodial sentences imposed for charges of incest with child/step-child, by the proportion of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 366 (99%) custodial sentences over the entire period had a median length of 4 years (Table A10). Figure A19 shows that the median custodial sentence length was consistent at 4 years for all of the five-year period. The median sentence length was 4 years in each financial year except 2011–12, where the 60 sentences imposed had a median of 5 years.

Figure A19: Yearly distribution and cumulative median length of immediate custodial sentences imposed for charges of incest with child/step-child, by financial year, 2010–11 to 2014–15



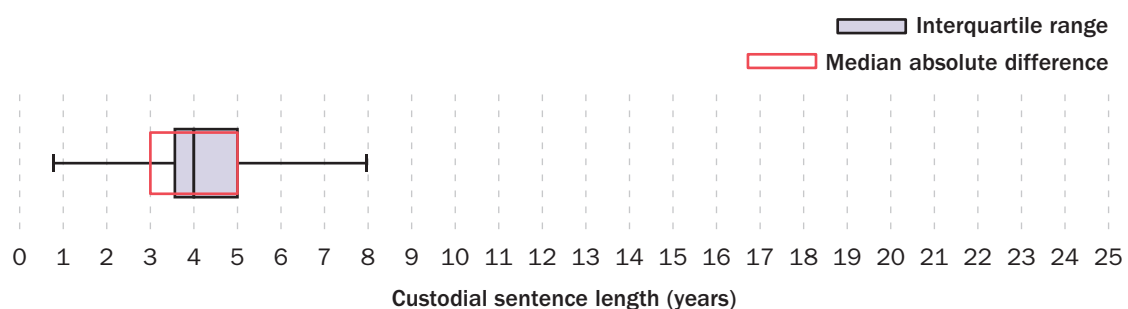
Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A20 shows these two measures for the offence of incest with child/step-child.

The IQR was 1 year and 5 months, and it ranged from 3 years and 7 months to 5 years.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from zero to 4 years. The median of these differences, the MAD value, is 1 year. This means that 50% of custodial sentence lengths are less than 1 year from the median (between 3 years and 5 years) and 50% are further than 1 year from the median.

Figure A20: Boxplot distribution of immediate custodial sentence lengths imposed for charges of incest with child/step-child, 2010–11 to 2014–15



Offence 6. Incest with child/step-child (under 18) of de facto

Definition	Taking part in an act of sexual penetration with a child under the age of 18 whom the offender knows is the child, lineal descendant, or step-child of his or her de facto partner.
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Offence characteristics

The offence is an indictable offence	Indictable offence.
The extent to which the offence is 'prevalent'	108 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015.
Objective elements involve a vulnerable victim	Yes. Child/step-child (under 18) of the offender's de facto partner.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	No.

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	<p>Yes. Not included in community attitudes research (Sentencing Advisory Council, 2012), but findings for sexual penetration with a child under 12 can apply where victim of incest is under the age of 12:</p> <ul style="list-style-type: none"> • ranked the same as murder (level 10); • high levels of consensus; • harm and culpability assessed as very high, based on common factors across child sexual offences (vulnerability, sexual invasion, breach of trust). <p>Tasmanian Jury Sentencing Study (sexual offences); Victorian Jury Sentencing Study (sexual offences, including sexual offences involving victims 12 and older and under 12).</p>
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	Yes. Community attitudes research (Vic); recognition of prevalence and long-term individual and societal harms; concerns about prevalence in family violence context; Royal Commissions (for example, Royal Commission into Institutional Responses to Child Sexual Abuse); reforms to sexual assault law and procedure; historically considered to be a 'victimless' crime.
Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	<p>Yes. Maximum penalty = 25 years (increased from 20 years in 1997).</p> <p>Baseline offence (baseline sentence of 10 years).</p>

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>Yes. See sentencing data below: 'distribution of sentences and comparison with maximum penalty'</p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> percentage: 100%; range: 2 years to 7 years; median: 3 years and 6 months. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> median: 14%; percentage of sentences 25% or less: 99%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	<p>Yes. Director of Public Prosecutions has initiated an appeal against sentence for incest with child/step-child (under 18) of de facto on grounds of manifest inadequacy: <i>Director of Public Prosecutions v Dalglish (A Pseudonym)</i> S APCR 2015 0190.</p> <p>See also Court of Appeal cases in relation to the offence of incest with child/step-child (above).</p>
Evidence of change in current sentencing practices since raised by Court of Appeal	<p>Yes. See sentencing data below: 'immediate custodial sentence lengths over time'</p> <p>Slight increases in yearly distribution of median and cumulative median over reference period.</p>

Problem with sentencing: evidence of inconsistency of approach

Treatment of a category of offenders within the offence category	<p>Yes. Possible issues raised by sample case analysis, prepared for the Council's forthcoming report on sexual penetration with a child under 12, which suggests that the serious sexual offender provisions, though enlivened, were not found to require a disproportionate sentence or additional cumulation.</p> <p>Issue to be considered by the Court of Appeal regarding approach to presumption of cumulation under serious sexual offender provisions in upcoming appeal by the Director of Public Prosecutions against sentence for incest with child/step-child (under 18) of de facto on grounds of manifest inadequacy: <i>Director of Public Prosecutions v Dalglish (A Pseudonym)</i> S APCR 2015 0190.</p> <p>Issue identified by the Court of Appeal regarding approach to presumption of cumulation under serious sexual offender provisions in successful appeal by the Director of Public Prosecutions against sentence for incest with child/step-child on grounds of manifest inadequacy: <i>Director of Public Prosecutions v BDJ</i> [2009] VSCA 298 (1 December 2009).</p>
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Weight given to aggravating and mitigating factors

Yes. See sentencing data below: 'measures of consistency'

Interquartile range (IQR) = 1 year and 8 months (2 years and 10 months to 4 years and 6 months).

Median Absolute Difference (MAD) = 10 months.

Limited case analysis suggests inconsistency of approach to representative counts and identification of, and weight given to, aggravating factors, e.g., use of threats; coercion or actual force; offending over long period; whether offending results in pregnancy; age of victim.

See *Director of Public Prosecutions v DJ* (2011) 211 A Crim R 367; *Director of Public Prosecutions v BDJ* [2009] VSCA 298 (1 December 2009); *Director of Public Prosecutions v OJA* (2007) 172 A Crim R 181; *Director of Public Prosecutions v Walters (A Pseudonym)* [2015] VSCA 303 (17 November 2015).

Categorisation of the objective seriousness of the offence

Inconclusive. Possible issues raised by sample case analysis prepared for the Council's forthcoming report on sexual penetration with a child under 12, which suggests differences in approach to the treatment of harm and culpability and assessment of seriousness, particularly related to:

- the characterisation of the violence involved in the physical element of the offence of sexual penetration with a child under 12 compared with rape;
- emphasis on traditionally understood notions of violence;
- differences in the characterisation of offender's behaviour for the sexual penetration offence.

See *Clarkson v The Queen* (2011) 32 VR 361.

Median lower than offences of similar seriousness (rape, incest with child/step-child, intentionally causing serious injury, and sexual penetration with a child under 12).

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 108 charges of incest with child/step-child (under 18) of de facto were sentenced in the higher courts. Incest with child/step-child (under 18) of de facto carries a maximum penalty of 25 years' imprisonment.

All charges sentenced in this period received imprisonment (Table A11).¹⁰⁴⁴

Table A11: Number and percentage of charges of incest with child/step-child (under 18) of de facto, by sentence type imposed, 2010–11 to 2014–15

Sentence type	Number	Percentage
Imprisonment	108	100%

The immediate custodial sentences imposed over the five years ranged from 2 years to 7 years (Table A12). The median custodial sentence length of 3 years and 6 months is 14% of the maximum penalty.

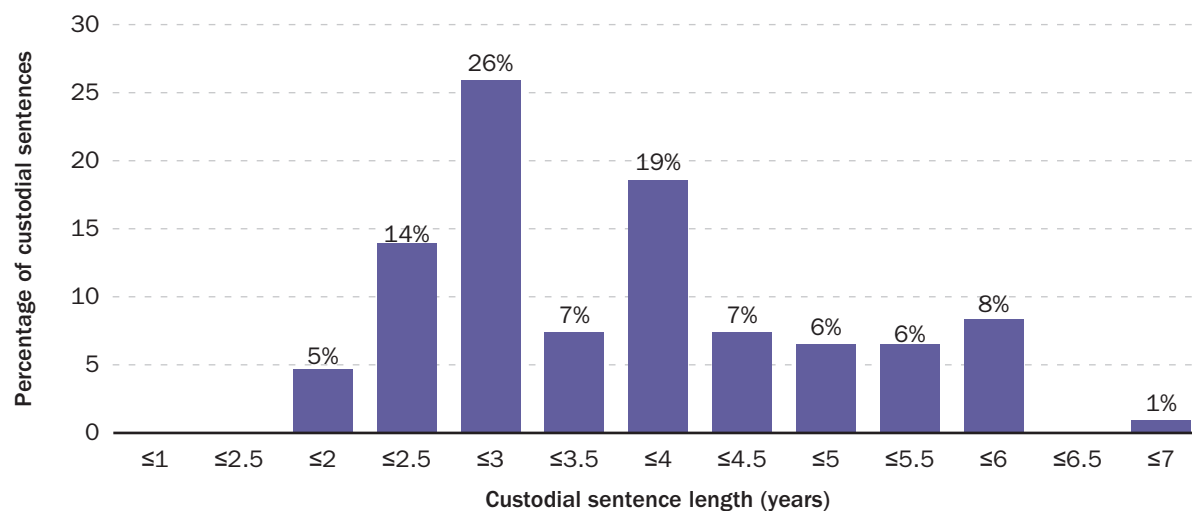
Table A12: Descriptive statistics of immediate custodial sentences imposed for charges of incest with child/step-child (under 18) of de facto, 2010–11 to 2014–15

Statistic	Value
Total charges	108
Immediate custodial sentences	108
Percentage immediate custodial	100%
Shortest	2 years
Median	3 years and 6 months
Longest	7 years
Years from median to maximum penalty	21 years and 6 months
Median % of maximum penalty	14%

¹⁰⁴⁴ There were no aggregate or mixed sentences imposed for this offence in this period.

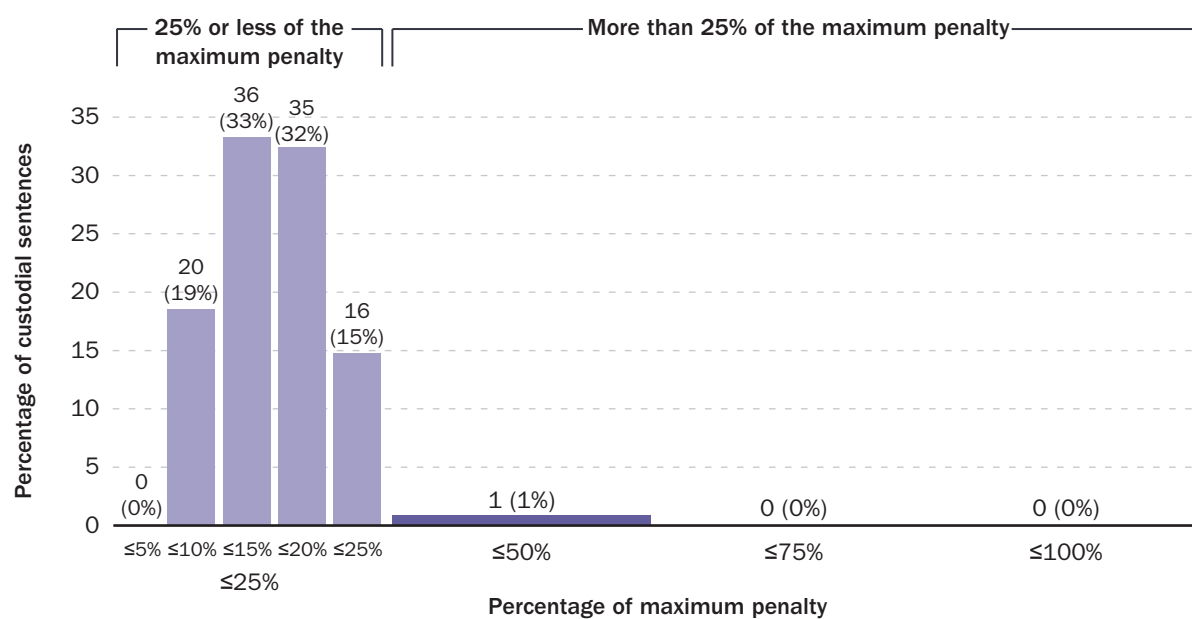
The distribution of immediate custodial sentence lengths in Figure A21 shows that sentences between 2 years and 6 months and 3 years were most common. Overall, 30% of custodial sentence lengths were longer than 4 years.

Figure A21: Percentage of immediate custodial sentences imposed for charges of incest with child/step-child (under 18) of de facto, by sentence length, 2010–11 to 2014–15



In terms of the 25-year maximum penalty for incest with child/step-child (under 18) of de facto, 99% of the custodial sentence lengths were 25% of the maximum penalty or less (Figure A22).

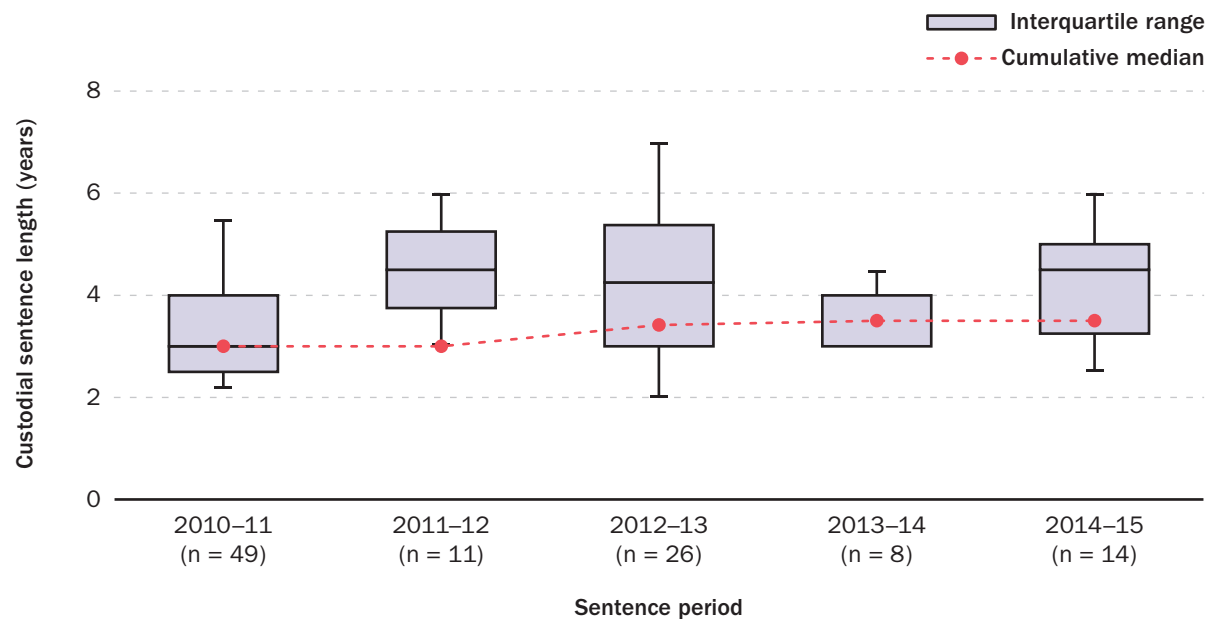
Figure A22: Percentage of immediate custodial sentences imposed for charges of incest with child/step-child (under 18) of de facto, by the proportion of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 108 (100%) custodial sentences over the entire period had a median length of 3 years and 6 months (Table A12). Figure A23 shows that the median custodial sentence length increased from 3 years in 2011–12 to 3 years and 6 months by 2012–13, where it remained until 2014–15. Median immediate custodial sentence lengths for individual years were highest in 2011–12 and 2014–15 at 4 years and 6 months.

Figure A23: Yearly distribution and cumulative median length of immediate custodial sentences imposed for charges of incest with child/step-child (under 18) of de facto, by financial year, 2010–11 to 2014–15



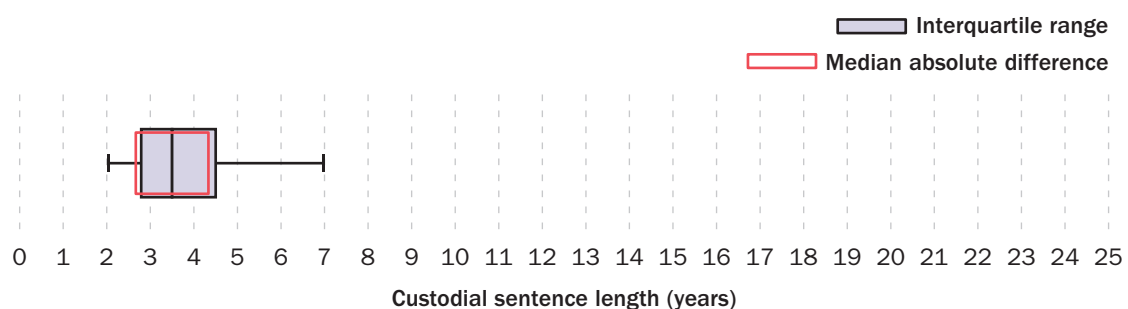
Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A24 shows these two measures for the offence of incest with child/step-child (under 18) of de facto.

The IQR was 1 year and 8 months, and it ranged from 2 years and 10 months to 4 years and 6 months.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from zero to 3 years and 6 months. The median of these differences, the MAD value, is 10 months. This means that 50% of custodial sentence lengths are less than 10 months from the median (between 2 years and 8 months and 4 years and 4 months) and 50% are further than 10 months from the median.

Figure A24: Boxplot distribution of immediate custodial sentence lengths imposed for charges of incest with child/step-child (under 18) of de facto, 2010–11 to 2014–15



Offence 7. Sexual penetration with a child under 12

Definition	<p>Taking part in an act of sexual penetration with a child aged under 12 (previously a child aged under 10).</p> <p>In 2010, the scope of this offence was increased to include victims aged 10 and 11.</p>
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Offence characteristics

The offence is an indictable offence	Indictable offence.
The extent to which the offence is 'prevalent'	202 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015.
Objective elements involve a vulnerable victim	Yes. Child aged under 12.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	Yes. Aggravated form of sexual penetration with a child under 16 based on age of victim (child under 12).

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	<p>Yes. Community attitudes research (Sentencing Advisory Council, 2012):</p> <ul style="list-style-type: none"> ranked the same as murder (level 10); high levels of consensus; harm and culpability assessed as very high, based on common factors across child sexual offences (vulnerability, sexual invasion, breach of trust). <p>Tasmanian Jury Sentencing Study (sexual offences); Victorian Jury Sentencing Study (sexual offences, including sexual offences involving victims 12 and older and under 12).</p>
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	Yes. Community attitudes research (Vic); recognition of prevalence and long-term individual and societal harms; concerns about prevalence in family violence context; Royal Commissions (for example, Royal Commission into Institutional Responses to Child Sexual Abuse); reforms to sexual assault law and procedure.
Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	<p>Yes. Maximum penalty = 25 years (increased from 20 years in 2000).</p> <p>Baseline offence (baseline sentence of 10 years).</p>

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>Yes. See sentencing data below: 'distribution of sentences and comparison with maximum penalty'</p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> percentage: 87%; range: 6 months to 7 years; median: 4 years. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> median: 16%; percentage of sentences 25% or less: 98%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	<p>Yes. <i>Director of Public Prosecutions v CPD</i> (2009) 22 VR 533:</p> <ul style="list-style-type: none"> question of adequacy raised – current sentencing practices difficult to reconcile with high maximum penalty; Court of Appeal held it was precluded from departing from current sentencing practices because not argued on appeal and <i>CPD</i> pleaded guilty.
No evidence of change in current sentencing practices following the Court of Appeal's declaration or questioning	<p>Yes. See sentencing data below: 'immediate custodial sentence lengths over time'</p> <p>No change in cumulative median over 4 years (2011–12 to 2014–15), but some fluctuation in yearly distribution of median over reference period.</p> <p>Council's 2009 review of maximum penalties identified that <i>CPD</i> and use of guideline judgment provisions would be more effective to address inadequate sentencing practices than increasing the maximum penalty.</p> <p>No identified appeals lodged by the Director of Public Prosecutions against sentences imposed since this decision.</p>

Problem with sentencing: evidence of inconsistency of approach

Treatment of a category of offenders within the offence category	<p>Yes. Sample case analysis, prepared for the Council's forthcoming report on sexual penetration with a child under 12, suggests that the serious sexual offender provisions, though enlivened, were not found to require a disproportionate sentence or additional cumulation.</p>
Weight given to aggravating and mitigating factors	<p>Yes. See sentencing data below: 'measures of consistency'</p> <p>Interquartile range (IQR) = 1 year (3 years to 4 years).</p> <p>Median Absolute Difference (MAD) = 1 year.</p> <p>Fidelity to current sentencing practices and clustering of individual sentences, supported by sample case analysis prepared for the Council's forthcoming report on sexual penetration with a child under 12, which suggests differences in approach to the identification and weighting of aggravating and mitigating factors.</p>

Categorisation of the objective seriousness of the offence

Yes. Sample case analysis prepared for the Council's forthcoming report on sexual penetration with a child under 12 suggests differences in approach to the treatment of harm and culpability and assessment of seriousness, particularly related to:

- the characterisation of the violence involved in the physical element of the offence of sexual penetration with a child under 12 compared with rape;
- emphasis on traditionally understood notions of violence;
- differences in the characterisation of offender's behaviour for the sexual penetration offence.

See *Clarkson v The Queen* (2011) 32 VR 361.

Lower median compared with other offences viewed by the community to be equally serious (murder and rape).

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 202 charges of sexual penetration with a child under 12 were sentenced in the higher courts. Sexual penetration with a child under 12 carries a maximum penalty of 25 years' imprisonment.

Imprisonment was the most common sentence imposed for charges, and 87% of sentences imposed were immediate custodial sentences (Table A13).¹⁰⁴⁵

Table A13: Number and percentage of charges of sexual penetration with a child under 12, by sentence type imposed, 2010–11 to 2014–15

Sentence type	Number	Percentage
Imprisonment	167	83%
Partially suspended sentence	5	2%
Community correction order	9	4%
Youth training centre	4	2%
Wholly suspended sentence	17	8%
Total	202	100%

The immediate custodial sentences imposed over the five years ranged from 6 months to 7 years (Table A14). The median custodial sentence length of 4 years is 16% of the maximum penalty.

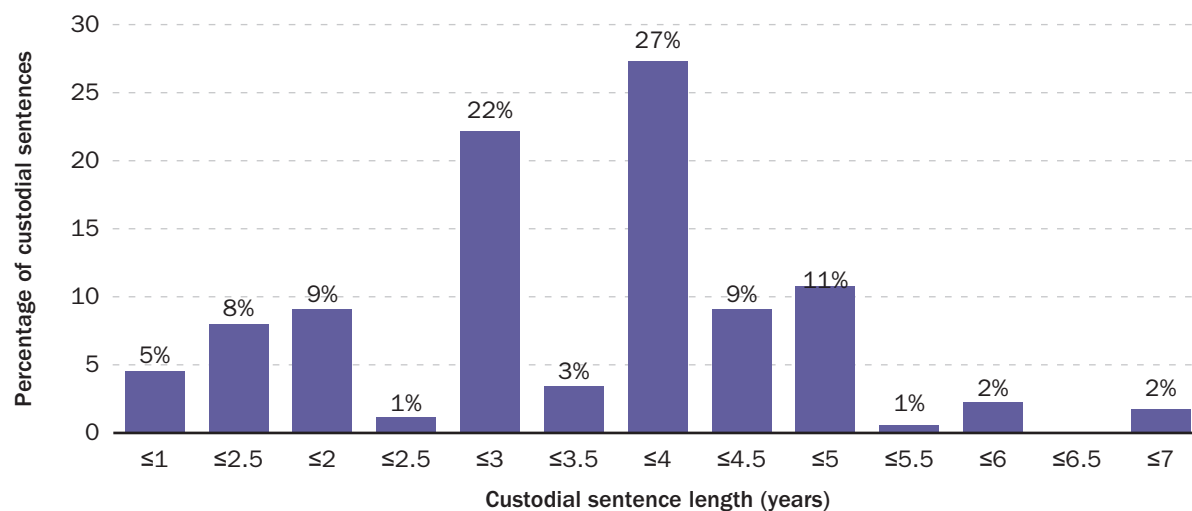
Table A14: Descriptive statistics of immediate custodial sentences imposed for charges of sexual penetration with a child under 12, 2010–11 to 2014–15

Statistic	Value
Total charges	202
Immediate custodial sentences	176
<i>Percentage immediate custodial</i>	87%
Shortest	6 months
Median	4 years
Longest	7 years
Years from median to maximum penalty	21 years
Median % of maximum penalty	16%

¹⁰⁴⁵ There were no aggregate or mixed sentences imposed for this offence in this period.

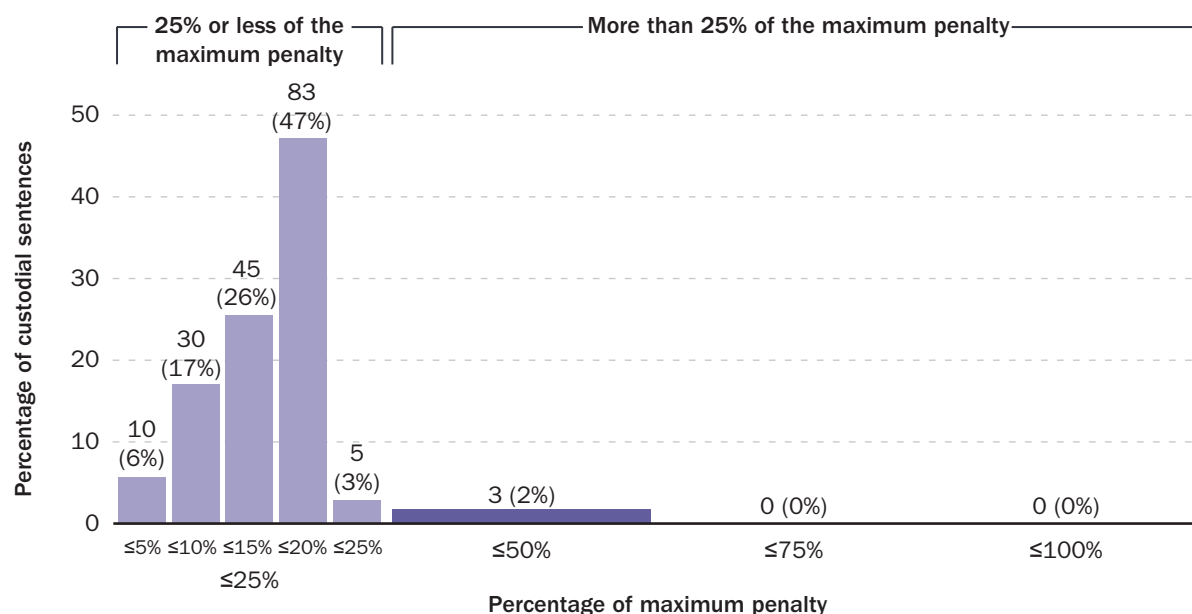
The distribution of immediate custodial sentence lengths in Figure A25 shows that sentences between 3 years and 6 months and 4 years were most common. Overall, 24% of sentences were more than 4 years in length.

Figure A25: Percentage of immediate custodial sentences imposed for charges of sexual penetration with a child under 12, by sentence length, 2010–11 to 2014–15



In terms of the 25-year maximum penalty for sexual penetration with a child under 12, all of the custodial sentences were 30% of the maximum penalty or less (Figure A26). Overall, 98% of custodial sentences were 25% of the maximum penalty or less, with 23% of sentences being 10% of the maximum penalty or less.

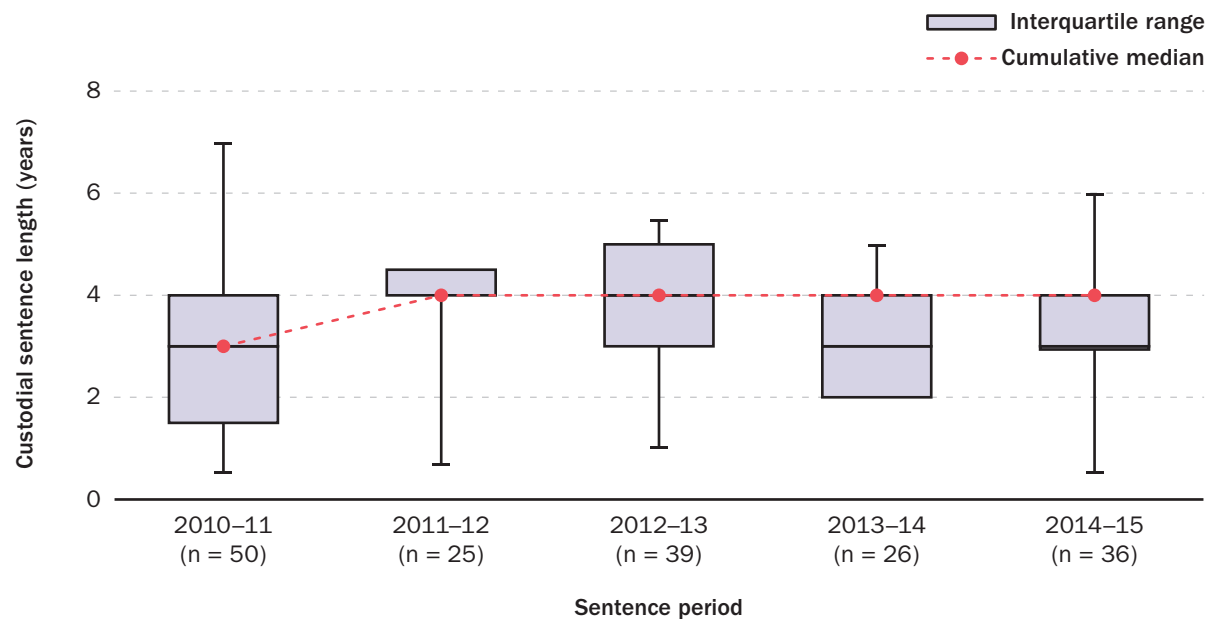
Figure A26: Percentage of immediate custodial sentences imposed for charges of sexual penetration with a child under 12, by the proportion of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 176 (87%) custodial sentences over the entire period had a median length of 4 years (Table A14). Figure A27 shows that sentence length distributions varied across the financial years, with individual medians of 3 years in 2010–11, 2013–14, and 2014–15 and 4 years in 2011–12 and 2012–13. The cumulative median sentence length increased from 3 years to remain at 4 years from 2011–12 to 2014–15, where sentences below the median were more common in the final two years of observation.

Figure A27: Yearly distribution and cumulative median length of immediate custodial sentences imposed for charges of sexual penetration with a child under 12, by financial year, 2010–11 to 2014–15



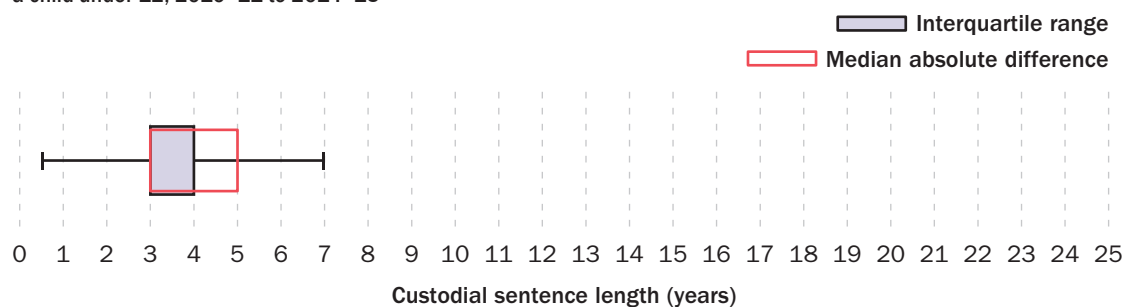
Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A28 shows these two measures for the offence of sexual penetration with a child under 12.

The IQR was 1 year, and it ranged from 3 years to 4 years.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from zero to 3 years and 6 months. The median of these differences, the MAD value, is 1 year. This means that 50% of custodial sentence lengths are less than 1 year from the median (between 3 years and 5 years) and 50% are further than 1 year from the median.

Figure A28: Boxplot distribution of immediate custodial sentence lengths imposed for charges of sexual penetration with a child under 12, 2010–11 to 2014–15¹⁰⁴⁶



¹⁰⁴⁶ The immediate custodial sentences imposed for sexual penetration with a child under 12 clustered at 4 years in length (the most common sentence length), and as a result the 3rd quartile of the lengths is equal to the median of 4 years.

Offence 8. Sexual penetration with a child 12–16 under care, supervision, or authority

Definition	<p>Taking part in an act of sexual penetration with a child aged between 12 and 16 years where the child is under the care, supervision, or authority of the offender.</p> <p>In 2010, the scope of this offence was reduced from victims aged 10–16 to victims aged 12–16.</p>
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Offence characteristics

The offence is an indictable offence	Indictable offence.
The extent to which the offence is ‘prevalent’	74 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015.
Objective elements involve a vulnerable victim	Yes. Child aged 12–16; under care, supervision, or authority of offender.
The offence is an ‘aggravated offence’ (offence objectively more serious than a ‘basic’ version of the offence)	Yes. Aggravated form of sexual penetration with a child under the age of 16.

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	<p>Yes. Community attitudes research (Sentencing Advisory Council, 2012):</p> <ul style="list-style-type: none"> ranked the same as armed robbery and recklessly causing serious injury (level 7); low levels of consensus; harm and culpability assessed as very high, based on common factors across child sexual offences (vulnerability, sexual invasion, breach of trust). <p>Tasmanian Jury Sentencing Study (sexual offences); Victorian Jury Sentencing Study (sexual offences, including sexual offences involving victims 12 and older and under 12).</p>
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	Yes. Community attitudes research (Vic); recognition of prevalence and long-term individual and societal harms; concerns about prevalence in family violence context; Royal Commissions (for example, Royal Commission into Institutional Responses to Child Sexual Abuse); reforms to sexual assault law and procedure.

Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	Yes. Maximum penalty = 15 years. (Not a baseline offence.)
Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>Yes. See sentencing data below: 'distribution of sentences and comparison with maximum penalty'</p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> • percentage: 91%; • range: 3 months to 6 years; • median: 3 years. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> • median: 20%; • percentage of sentences 25% or less: 73%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	Inconclusive. Limited Court of Appeal commentary specifically on sentencing practices for this form of the offence (with a child 12–16). However, comments made in relation to similar offences where offender is in position of authority are relevant, e.g., that offences such as these deserve condign punishment: <i>R v Wakime</i> [1997] 1 VR 242; <i>Director of Public Prosecutions v Riddle</i> [2002] VSCA 153 (11 September 2002).
Evidence of change in current sentencing practices since raised by Court of Appeal	<p>Inconclusive. See sentencing data below: 'immediate custodial sentence lengths over time'</p> <p>No change in cumulative median, but some fluctuation in yearly distribution of median over reference period.</p>

Problem with sentencing: evidence of inconsistency of approach

Treatment of a category of offenders within the offence category	Yes. Possible issues raised by sample case analysis, prepared for the Council's forthcoming report on sexual penetration with a child under 12, which suggests that the serious sexual offender provisions, though enlivened, were not found to require a disproportionate sentence or additional cumulation.
Weight given to aggravating and mitigating factors	<p>Yes. See sentencing data below: 'measures of consistency'</p> <p>Interquartile range (IQR) = 1 year and 6 months (2 years and 6 months to 4 years).</p> <p>Median Absolute Difference (MAD) = 6 months.</p>

Categorisation of the objective seriousness of the offence

Inconclusive. Possible issues raised by sample case analysis prepared for the Council's forthcoming report on sexual penetration with a child under 12, which suggests differences in approach to the treatment of harm and culpability and assessment of seriousness, particularly related to:

- the characterisation of the violence involved in the physical element of the offence of sexual penetration with a child under 12 compared with rape;
- emphasis on traditionally understood notions of violence;
- differences in the characterisation of offender's behaviour for the sexual penetration offence.

See *Clarkson v The Queen* (2011) 32 VR 361.

Higher median compared with other offences viewed by the community to be equally serious (armed robbery and recklessly causing serious injury).

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 74 charges of sexual penetration with a child 12–16 under care, supervision, or authority were sentenced in the higher courts. Sexual penetration with a child 12–16 under care, supervision, or authority carries a maximum penalty of 15 years' imprisonment.

Imprisonment was the most commonly imposed sentence for charges, and 91% of charges of sexual penetration with a child 12–16 under care, supervision, or authority were immediate custodial sentences (Table A15).¹⁰⁴⁷

Table A15: Number and percentage of charges of sexual penetration with a child 12–16 under care, supervision, or authority, by sentence type imposed, 2010–11 to 2014–15

Sentence type	Number	Percentage
Imprisonment	59	80%
Partially suspended sentence	5	7%
Community correction order	4	5%
Youth training centre	3	4%
Wholly suspended sentence	3	4%
Total	74	100%

The immediate custodial sentences imposed over the five years ranged from 3 months to 6 years (Table A16). The median custodial sentence length of 3 years is 20% of the maximum penalty.

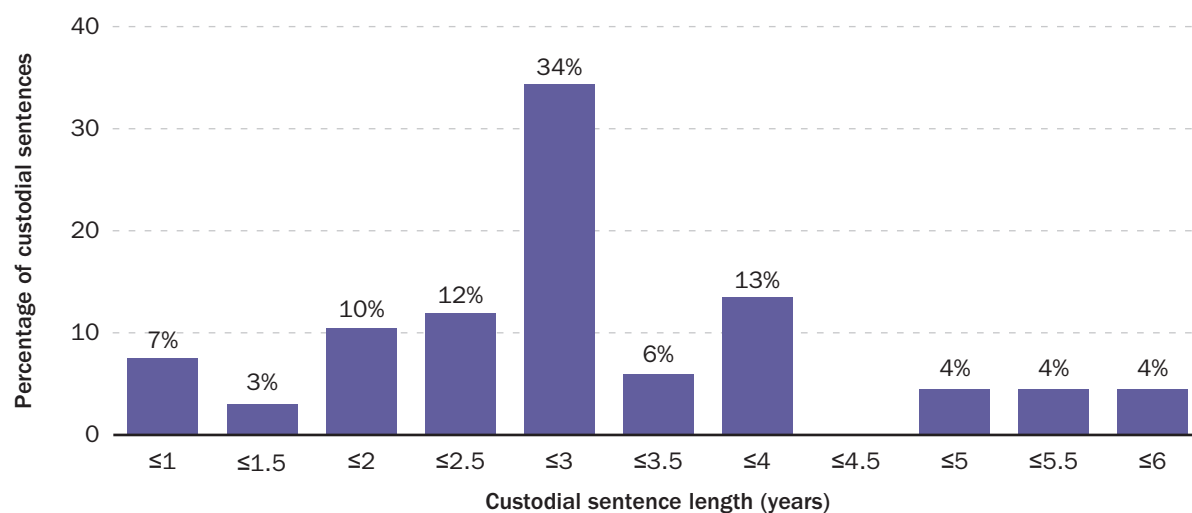
Table A16: Descriptive statistics of immediate custodial sentences imposed for charges of sexual penetration with a child 12–16 under care, supervision, or authority, 2010–11 to 2014–15

Statistic	Value
Total charges	74
Immediate custodial sentences	67
Percentage immediate custodial	91%
Shortest	3 months
Median	3 years
Longest	6 years
Years from median to maximum penalty	12 years
Median % of maximum penalty	20%

¹⁰⁴⁷ There were no aggregate or mixed sentences imposed for this offence in this period.

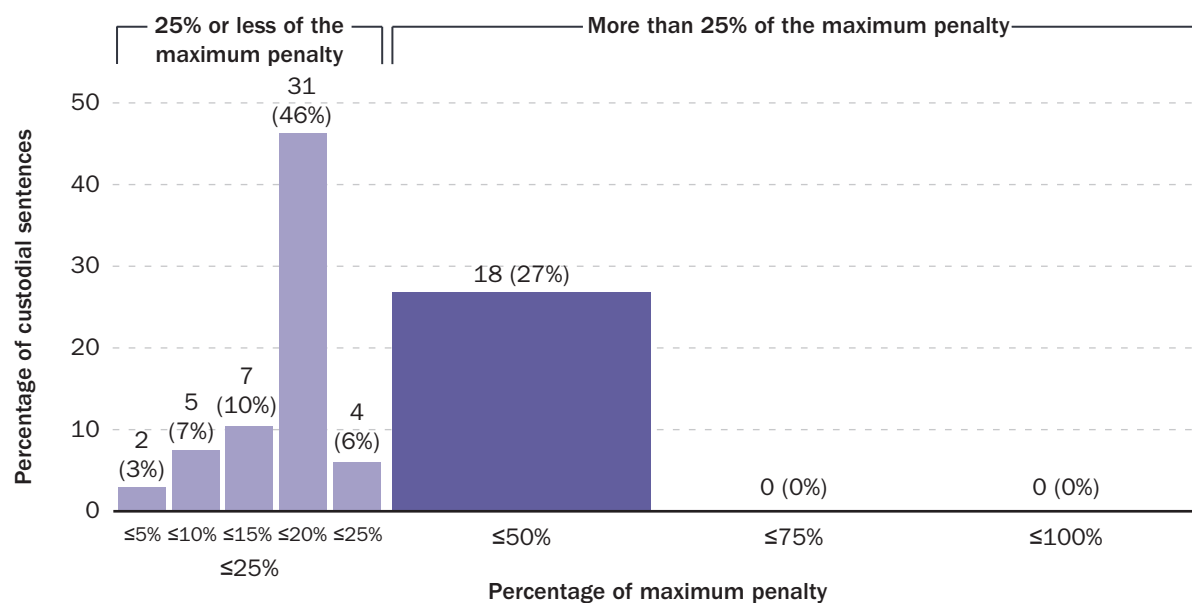
The distribution of immediate custodial sentence lengths in Figure A29 shows that sentences between 2 years and 6 months and 3 years were most common. Overall, 13% of sentences were more than 4 years in length.

Figure A29: Percentage of immediate custodial sentences imposed for charges of sexual penetration with a child 12–16 under care, supervision, or authority, by sentence length, 2010–11 to 2014–15



In terms of the 15-year maximum penalty for sexual penetration with a child 12–16 under care, supervision, or authority, 73% of sentences were 25% of the maximum penalty or less, with 10% of sentences being 10% of the maximum penalty or less (Figure A30).

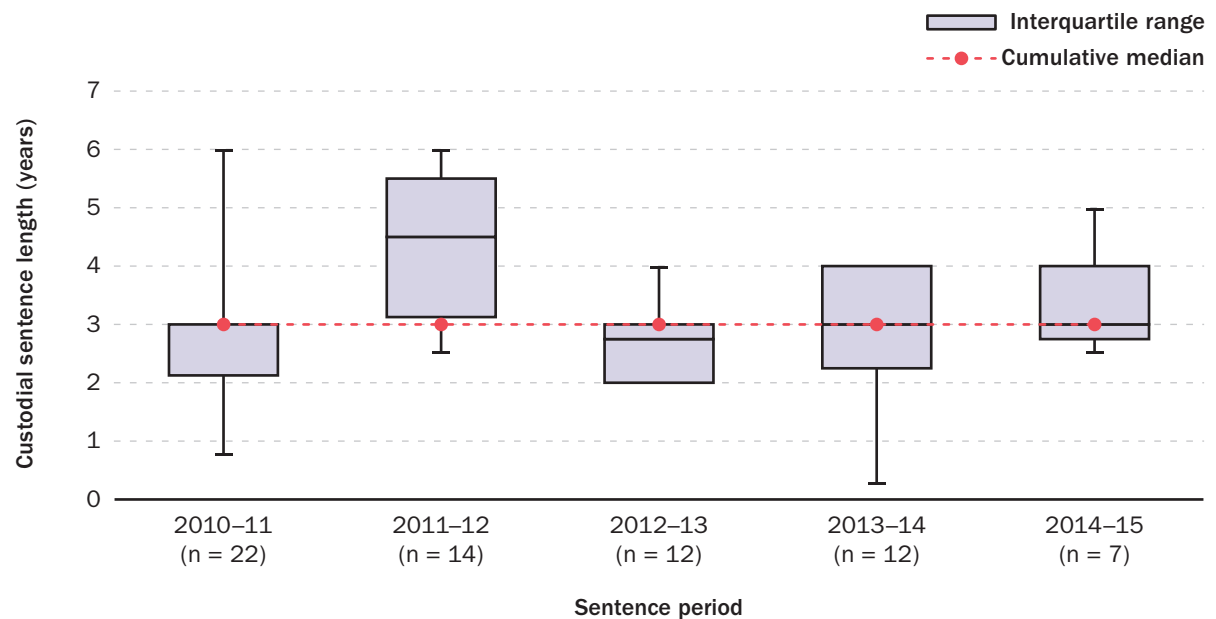
Figure A30: Percentage of immediate custodial sentences imposed for charges of sexual penetration with a child 12–16 under care, supervision, or authority, by the proportion of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 67 (91%) immediate custodial sentences over the entire period had a median length of 3 years (Table A16). Figure A31 shows that sentence length distributions varied across the financial years, with individual medians of 3 years in 2010–11, 2013–14, and 2014–15 and 4 years and 6 months in 2011–12. The cumulative median sentence length was 3 years for the entire period.

Figure A31: Yearly distribution and cumulative median length of immediate custodial sentences imposed for charges of sexual penetration with a child 12–16 under care, supervision, or authority, by financial year, 2010–11 to 2014–15



Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A32 shows these two measures for the offence of sexual penetration with a child 12–16 under care, supervision, or authority.

The IQR was 1 year and 6 months, and it ranged from 2 years and 6 months to 4 years.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from zero to 3 years. The median of these differences, the MAD value, is 6 months. This means that 50% of custodial sentence lengths are less than 6 months from the median (between 2 years and 6 months and 3 years and 6 months) and 50% are further than 1 year from the median.

Figure A32: Boxplot distribution of immediate custodial sentence lengths imposed for charges of sexual penetration with a child 12–16 under care, supervision, or authority, 2010–11 to 2014–15



Offence 9. Sexual penetration with a child 12–16

Definition	Taking part in an act of sexual penetration with a child aged 12–16. In 2010, the scope of this offence was reduced from victims aged 10–16 to victims aged 12–16.
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Offence characteristics

The offence is an indictable offence	Indictable offence.
The extent to which the offence is 'prevalent'	858 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015.
Objective elements involve a vulnerable victim	Yes. Child aged 12–16.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	No.

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	Yes. Community attitudes research (Sentencing Advisory Council, 2012): <ul style="list-style-type: none"> ranked as one of the least serious offences (level 3); low levels of consensus; harm and culpability assessed by some as low, based on a vignette with a 15 year old victim and a 20 year old offender in a boyfriend/girlfriend relationship. Tasmanian Jury Sentencing Study (sexual offences); Victorian Jury Sentencing Study (sexual offences, including sexual offences involving victims 12 and older and under 12).
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	Yes. Community attitudes research (Vic); recognition of prevalence and long-term individual and societal harms; concerns about prevalence in family violence context; Royal Commissions (for example, Royal Commission into Institutional Responses to Child Sexual Abuse); reforms to sexual assault law and procedure.
Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	Yes. Maximum penalty = 10 years. (Not a baseline offence.)

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>Yes. See sentencing data below: 'distribution of sentences and comparison with maximum penalty'</p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> percentage: 61%; range: 1 month to 5 years; median: 2 years and 6 months. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> median: 25%; percentage of sentences 25% or less: 62%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	<p>Inconclusive. Limited Court of Appeal commentary specifically on sentencing practices for this form of the offence (with a child 12–16). However, comments made in relation to similar offences are relevant, e.g., the offence of maintaining sexual relationship with a child under 16, as it then was, 'is of utmost gravity' and of community concern: <i>ED v The Queen</i> (2011) 216 A Crim R 404. Question raised regarding adequacy of current sentencing practices for persistent sexual abuse of child under 16: <i>Director of Public Prosecutions v DDJ</i> (2009) 22 VR 444).</p>
Evidence of change in current sentencing practices since raised by Court of Appeal	<p>Inconclusive. See sentencing data below: 'immediate custodial sentence lengths over time'</p> <p>Slight change in cumulative median, but some fluctuation in yearly distribution of median over reference period.</p>

Problem with sentencing: evidence of inconsistency of approach

Treatment of a category of offenders within the offence category	<p>Yes. Possible issues raised by sample case analysis, prepared for the Council's forthcoming report on sexual penetration with a child under 12, which suggests that the serious sexual offender provisions, though enlivened, were not found to require a disproportionate sentence or additional cumulation.</p>
Weight given to aggravating and mitigating factors	<p>Yes. See sentencing data below: 'measures of consistency'</p> <p>Interquartile range (IQR) = 1 year and 6 months (1 year and 6 months to 3 years).</p> <p>Median Absolute Difference (MAD) = 6 months.</p> <p>Possible issues around charging offenders with this offence, when they could be charged with the 'care, supervision, or authority form' of the offence; unclear whether the aggravating factor of being in such a position is being treated consistently.</p> <p>Limited case analysis suggests inconsistency of approach to representative counts and identification of and weight given to aggravating factors such as use of threats, coercion, or actual force; offending over long period; whether offending results in pregnancy; age of victim.</p>

Categorisation of the objective seriousness of the offence

Yes. Issue with characterisation of assessment of harm in comparison to sexual penetration with a child under 12 offence (see *Adamson v The Queen* (2015) 301 FLR 385: harm is presumed where the child cannot give meaningful consent).

Issue with characterisation of seriousness and different conceptualisation of sexual violence compared with rape: *R v LCC* [2006] VSCA 33 (16 February 2006).

Possible issues raised by sample case analysis prepared for the Council's forthcoming report on sexual penetration with a child under 12, which suggests differences in approach to the treatment of harm and culpability and assessment of seriousness, particularly related to:

- the characterisation of the violence involved in the physical element of the offence of sexual penetration with a child under 12 compared with rape;
- emphasis on traditionally understood notions of violence;
- differences in the characterisation of offender's behaviour for the sexual penetration offence.

See *Clarkson v The Queen* (2011) 32 VR 361.

Lowest median compared with other sexual penetration offences, but sentences represent higher proportions of 10-year maximum penalty.

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 858 charges of sexual penetration with a child 12–16 were sentenced in the higher courts. Sexual penetration with a child 12–16 carries a maximum penalty of 10 years' imprisonment.

Imprisonment was the most common sentence imposed for charges, and 61% of sentences imposed were immediate custodial sentences (Table A17).

Table A17: Number and percentage of charges of sexual penetration with a child 12–16, by sentence type imposed, 2010–11 to 2014–15

Sentence type ^a	Number	Percentage
Imprisonment	471	55%
Partially suspended sentence	30	3%
Community order	202	24%
Intensive correction order	3	<1%
Youth training centre	12	1%
Wholly suspended sentence	119	14%
Other	21	2%
Total	858	100%

a. 'Community order' comprises community correction orders and community-based orders. 'Other' comprises residential treatment orders and adjourned undertakings with and without conviction.

The immediate custodial sentences imposed over the five years ranged from 1 month to 5 years (Table A18). The median custodial sentence length of 2 years and 6 months is 25% of the maximum penalty.

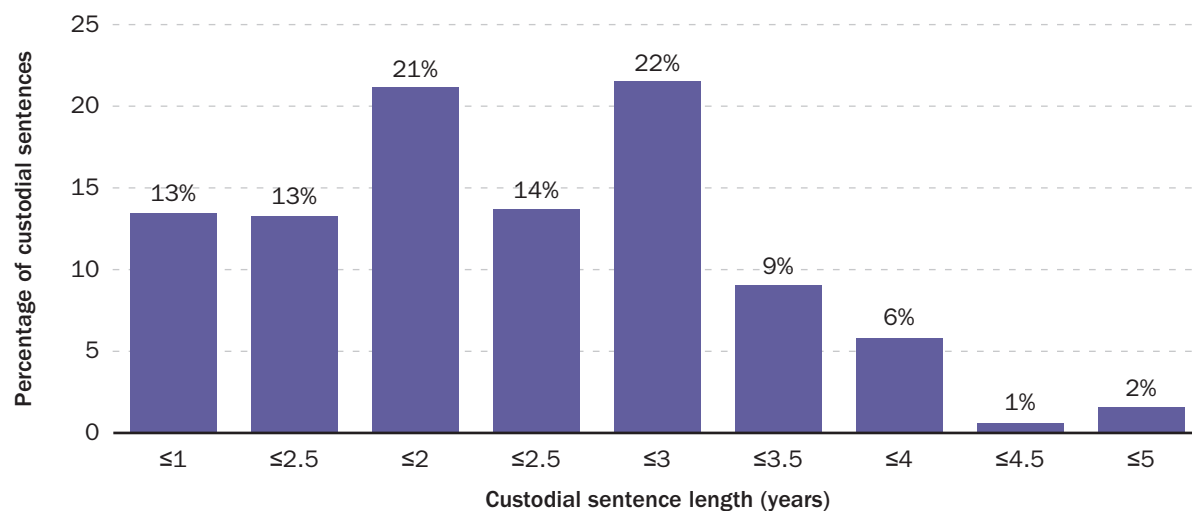
Table A18: Descriptive statistics of immediate custodial sentences imposed for charges of sexual penetration with a child 12–16, 2010–11 to 2014–15

Statistic	Value
Total charges	858
Immediate custodial sentences	520
Percentage immediate custodial ^a	61%
Shortest	1 month
Median	2 years and 6 months
Longest	5 years
Years from median to maximum penalty	7 years and 6 months
Median % of maximum penalty	25%

a. One aggregate sentence of imprisonment is not included in the sentence length analysis that follows.

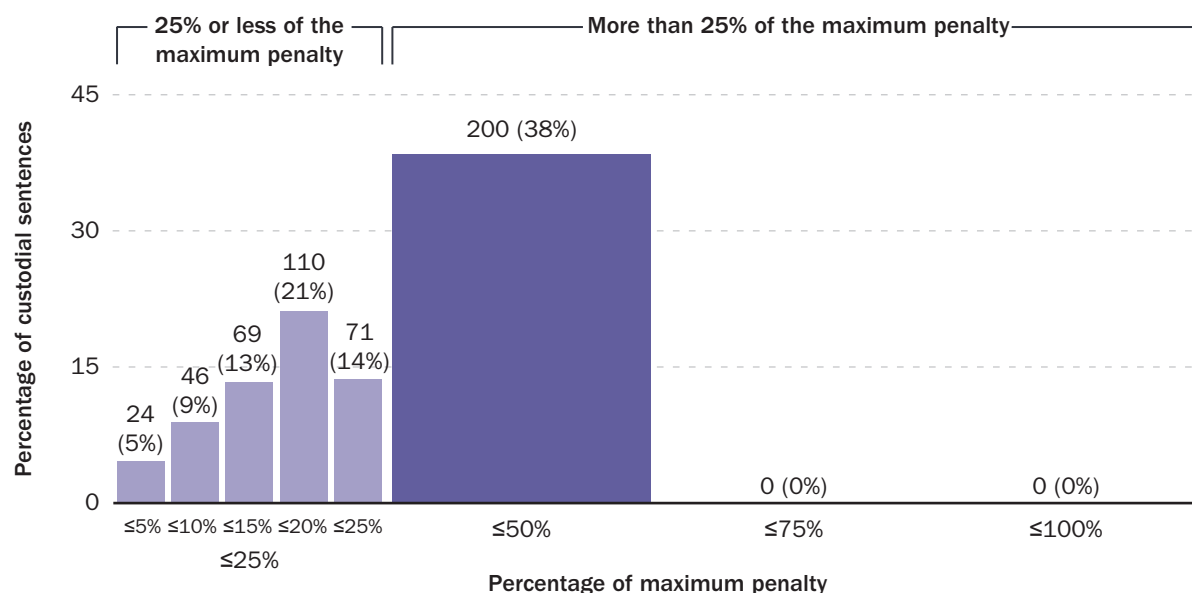
The distribution of immediate custodial sentence lengths in Figure A33 shows that sentences between 2 years and 6 months and 3 years were most common. Overall, 17% of sentences were more than 3 years in length.

Figure A33: Percentage of immediate custodial sentences imposed for charges of sexual penetration with a child 12–16, by sentence length, 2010–11 to 2014–15



In terms of the 10-year maximum penalty for sexual penetration with a child 12–16, 62% of the custodial sentences were 25% of the maximum penalty or less (Figure A34).

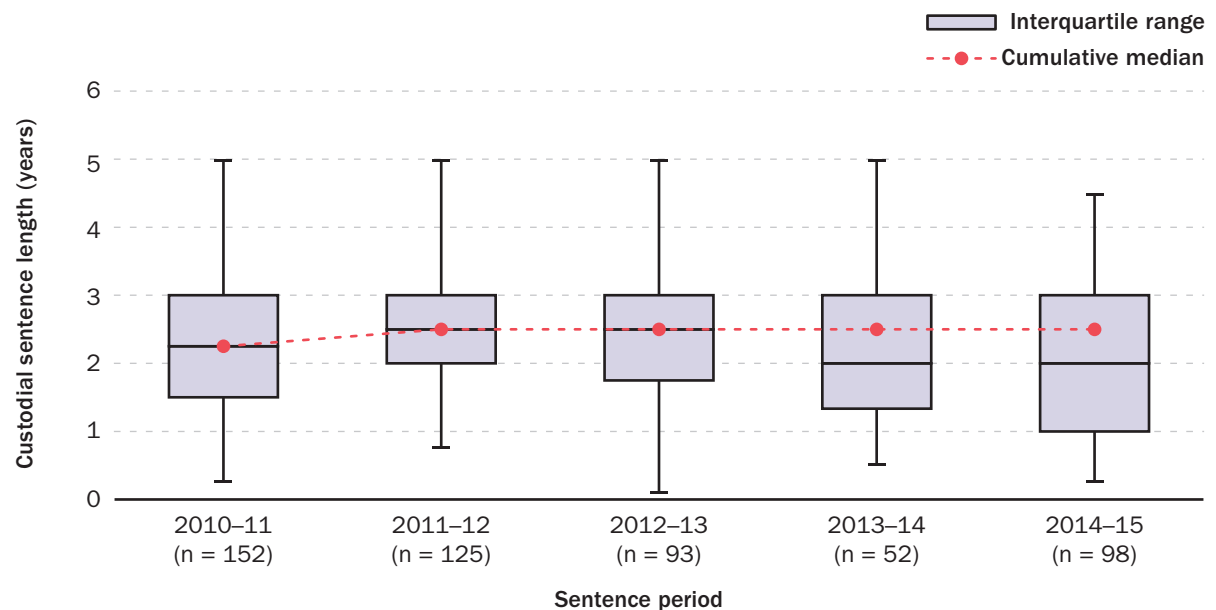
Figure A34: Percentage of immediate custodial sentences imposed for charges of sexual penetration with a child 12–16, by the proportion of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 520 (61%) custodial sentences over the entire period had a median length of 2 years and 6 months (Table A18). Figure A35 shows that sentence length distributions were consistent across the financial years, with individual medians ranging between 2 years and 2 years and 6 months. The cumulative median sentence length increased slightly, from 2 years and 3 months in 2010–11 to 2 years and 6 months from 2011–12.

Figure A35: Yearly distribution and cumulative median length of immediate custodial sentences imposed for charges of sexual penetration with a child 12–16, by financial year, 2010–11 to 2014–15



Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A36 shows these two measures for the offence of sexual penetration with a child 12–16.

The IQR was 1 year and 6 months, and it ranged from 1 year and 6 months to 3 years.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from zero to 2 years and 6 months. The median of these differences, the MAD value, is 6 months. This means that 50% of custodial sentence lengths are less than 6 months from the median (between 2 years and 3 years) and 50% are further than 6 months from the median.

Figure A36: Boxplot distribution of immediate custodial sentence lengths imposed for charges of sexual penetration with a child 12–16, 2010–11 to 2014–15



Sample case analysis – sexual penetration with a child 12–16

Table A19: Sample case analysis for charges of sexual penetration with a child 12–16, 2010–11 to 2014–15

Data point	Sentence on charge	Number of cases examined	Plea	Case identifier	Case notes
Lowest Total number of charges at data point: 1	1 month (combined with CCO for 12 months)	1	Guilty (at committal mention)	S1	Single charge; 38 year old offender; 15 year old victim (friend of offender's son); offence 'at the lower level of the scale of offences of these kind'. Victim was in offender's care as he was staying over at her house (visiting her children); she had known him since he was in grade 3 with her son. Anxiety disorder (pre-dating offending); no nexus with offending; risk of reoffending noted to be low; imprisonment would weigh heavily as the offender had a child with autism.
Median Total number of charges at data point: 63	2 years and 6 months	1	Guilty (early)	S2	13 charges, 3 victims, offending period from late 2009 to early 2010; victims aged 14–15 and offender aged 26 years. Significant planning (offender met victims on the internet, arranged to meet); told them he was 18–19; offender knew the actual ages of victims; significant psychological harm for victims. Good work history; good prospects of rehabilitation.
Highest Total number of charges at data point: 9	5 years	1	Not guilty	S3	5 charges (also 1 charge of indecent act with a child under 16); victim was 14 years old; vulnerable; 'troubled'; dysfunctional family life; offender met victim, her siblings, and her mother at a boarding house; offender 'in a position of trust, which [he] comprehensively abused'.

Offence 10. Indecent act with a child under 16

Definition	Committing an indecent act with, or in the presence of, a child under 16.
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Offence characteristics

The offence is an indictable offence	Indictable offence, triable summarily.
The extent to which the offence is 'prevalent'	1,589 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015. 871 charges sentenced in the Magistrates' Court between 1 July 2010 and 30 June 2015.
Objective elements involve a vulnerable victim	Yes. Child under 16.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	No.

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	Yes. Community attitudes research (Sentencing Advisory Council, 2012): <ul style="list-style-type: none"> ranked the same as manslaughter, aggravated burglary, culpable driving causing death, negligently causing serious injury (level 8); medium levels of consensus; harm and culpability assessed as very high, based on common factors across child sexual offences (vulnerability, sexual invasion, breach of trust). Tasmanian Jury Sentencing Study (sexual offences); Victorian Jury Sentencing Study (sexual offences, including sexual offences involving victims 12 and older and under 12).
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	Yes. Community attitudes research (Vic) found little differentiation in seriousness based on physical act (touching versus penetration); recognition of prevalence and long-term individual and societal harms; concerns about prevalence in family violence context; Royal Commissions (for example, Royal Commission into Institutional Responses to Child Sexual Abuse); reforms to sexual assault law and procedure.

Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	Yes. Maximum penalty = 10 years. (Not a baseline offence.)
Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	Yes. See sentencing data below: 'distribution of sentences and comparison with maximum penalty' Distribution of immediate custodial sentences: <ul style="list-style-type: none"> • percentage: 83%; • range: 7 days to 4 years and 6 months; • median: 1 year. Comparison with maximum penalty: <ul style="list-style-type: none"> • median: 10%; • percentage of sentences 25% or less: 96%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	Inconclusive. <i>Director of Public Prosecutions v OJA</i> (2007) 172 A Crim R 181: commented that the answer to the question of whether a sentence is manifestly inadequate is not just to look at the highest sentence that has previously been imposed; commented that there is a possibility that 'sentences to this point have simply been too low': see 196.
Evidence of change in current sentencing practices since raised by Court of Appeal	Inconclusive. See sentencing data below: 'immediate custodial sentence lengths over time' No change in yearly distribution of median or cumulative median over reference period.

Problem with sentencing: evidence of inconsistency of approach

Treatment of a category of offenders within the offence category	Yes. Possible issues raised by sample case analysis, prepared for the Council's forthcoming report on sexual penetration with a child under 12, which suggests that the serious sexual offender provisions, though enlivened, were not found to require a disproportionate sentence or additional cumulation.
Weight given to aggravating and mitigating factors	Inconclusive. See sentencing data below: 'measures of consistency' Interquartile range (IQR) = 9 months (9 months to 1 year and 6 months). Median Absolute Difference (MAD) = 6 months. Less evidence of clustering of sentences than that observed in the sexual penetration offences.

Categorisation of the objective seriousness of the offence	<p>Yes. Possible issues raised by sample case analysis prepared for the Council's forthcoming report on sexual penetration with a child under 12, which suggests differences in approach to the treatment of harm and culpability and assessment of seriousness, particularly related to:</p> <ul style="list-style-type: none"> • the characterisation of the violence involved in the physical element of the offence of sexual penetration with a child under 12 compared with rape; • emphasis on traditionally understood notions of violence; • differences in the characterisation of offender's behaviour for the sexual penetration offence. <p>Broad range of conduct encompassed by offence may not be reflected in categorisation of seriousness; query whether the range of harm and culpability is reflected in assessments of seriousness particularly where the act is equally as traumatising and frightening for the victim.</p> <p>See <i>Clarkson v The Queen</i> (2011) 32 VR 361.</p> <p>Lowest median compared with other sexual offences.</p> <p>Lowest median compared with other offences viewed by the community to be as serious (manslaughter, aggravated burglary, culpable driving causing death, negligently causing serious injury).</p>
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Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 1,589 charges of indecent act with a child under 16 were sentenced in the higher courts. Indecent act with a child under 16 carries a maximum penalty of 10 years' imprisonment.

Imprisonment was the most common sentence imposed for charges, and 84% of sentences imposed were immediate custodial sentences (Table A20).

Table A20: Number and percentage of charges of indecent act with a child under 16, by sentence type imposed, 2010–11 to 2014–15

Sentence type ^a	Number	Percentage
Imprisonment	1,273	80%
Partially suspended sentence	45	3%
Community order	141	9%
Youth training centre	9	1%
Wholly suspended sentence	97	6%
Fine	6	<1%
Other	18	1%
Total	1,589	100%

a. 'Community order' comprises community correction orders and community-based orders. 'Other' sentences comprises a residential treatment order, adjourned undertakings with and without conviction, and a discharge with conviction.

The immediate custodial sentences imposed over the five years ranged from 7 days to 4 years and 6 months (Table A21). The median custodial sentence length of 1 year is 10% of the maximum penalty.

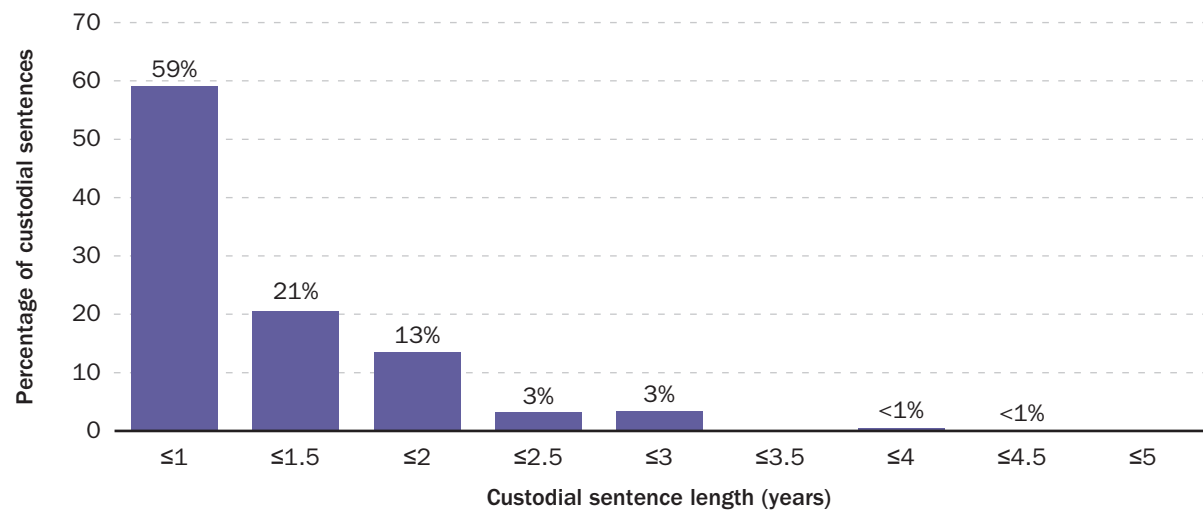
Table A21: Descriptive statistics of immediate custodial sentences imposed for charges of indecent act with a child under 16, 2010–11 to 2014–15

Statistic	Value
Total charges	1,589
Immediate custodial sentences	1,326
Percentage immediate custodial ^a	83%
Shortest	7 days
Median	1 year
Longest	4 years and 6 months
Years from median to maximum penalty	9 years
Median % of maximum penalty	10%

a. Two charges that received aggregate imprisonment are not included in the sentence length analysis that follows.

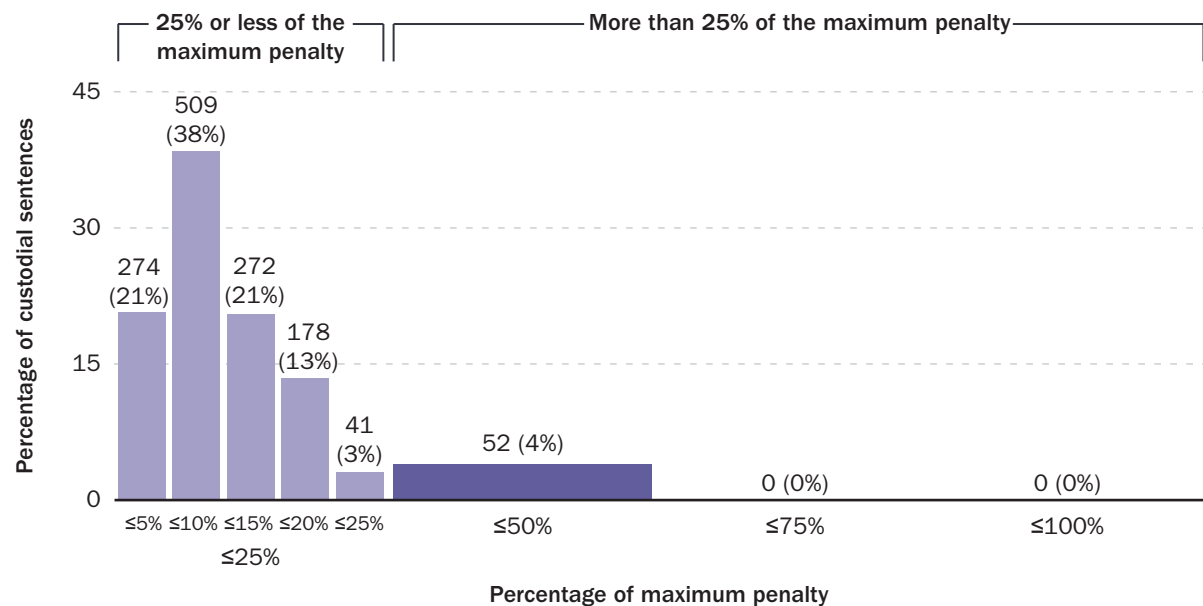
The distribution of immediate custodial sentence lengths in Figure A37 shows that sentences at less than 1 year were most common. Overall, 7% of sentences were over 2 years.

Figure A37: Percentage of immediate custodial sentences imposed for charges of indecent act with a child under 16, by sentence length, 2010–11 to 2014–15



In terms of the 10-year maximum penalty for indecent act with a child under 16, 96% of custodial sentences were 25% of the maximum penalty or less (Figure A38).

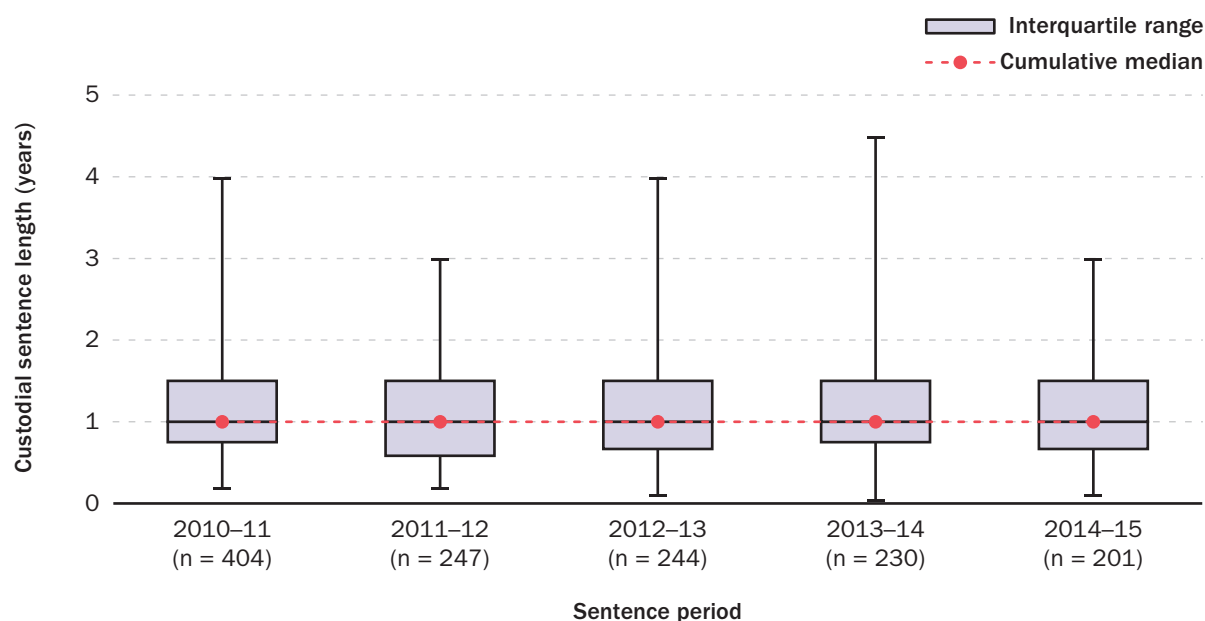
Figure A38: Percentage of immediate custodial sentences imposed for charges of indecent act with a child under 16, by the proportion of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 1,326 (83%) immediate custodial sentences imposed over the entire period had a median length of 1 year (Table A21). Figure A39 shows that the charges sentenced each financial year established a steady cumulative median sentence length of 1 year for the entire period. The median custodial sentence imposed in each financial year was also 1 year.

Figure A39: Yearly distribution and cumulative median length of immediate custodial sentences imposed for charges of indecent act with a child under 16, by financial year, 2010–11 to 2014–15



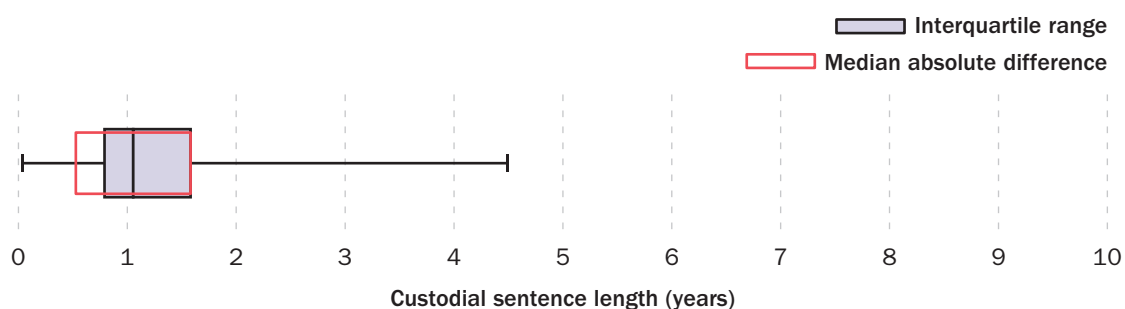
Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A40 shows these two measures for the offence of indecent act with a child under 16.

The IQR was 9 months, and it ranged from 9 months to 1 year and 6 months.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from zero to 3 years and 6 months. The median of these differences, the MAD value, is 6 months. This means that 50% of immediate custodial sentence lengths are less than 6 months from the median (between 6 months and 1 year and 6 months) and 50% are further than 6 months from the median.

Figure A40: Boxplot distribution of immediate custodial sentence lengths imposed for charges of indecent act with a child under 16, 2010–11 to 2014–15



Offence 11. Persistent sexual abuse of a child under 16

Definition	Persistently sexually abusing a child under the age of 16 through at least three acts that would constitute a sexual offence within a particular period.
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Offence characteristics

The offence is an indictable offence	Indictable offence.
The extent to which the offence is 'prevalent'	54 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015.
Objective elements involve a vulnerable victim	Yes. Child under 16.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	Yes. Course of conduct offence (multiple incidents of particular sexual offences).

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	<p>Yes. Not included in community attitudes research (Sentencing Advisory Council, 2012), but all child sexual offences ranked at level 8 or higher due to:</p> <ul style="list-style-type: none"> • age of victim under 12 indicating high harm and culpability; • abuse of trust and power; • wide-reaching and long-lasting harms. <p>Tasmanian Jury Sentencing Study (sexual offences); Victorian Jury Sentencing Study (sexual offences, including sexual offences involving victims 12 and older and under 12).</p>
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	Yes. Community attitudes research (Vic); recognition of prevalence and long-term individual and societal harms; concerns about prevalence in family violence context; Royal Commissions (for example, Royal Commission into Institutional Responses to Child Sexual Abuse); reforms to sexual assault law and procedure.
Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	<p>Yes. Maximum penalty = 25 years (changed in 1997 and offence renamed in 2006).</p> <p>Baseline offence (baseline sentence of 10 years).</p>

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>Yes. See sentencing data below: 'distribution of sentences and comparison with maximum penalty'</p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> percentage: 89%; range: 1 year and 6 months to 12 years; median: 6 years. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> median: 24%; percentage of sentences 25% or less: 56%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	<p>Yes. <i>Director of Public Prosecutions v DDJ</i> (2009) 22 VR 444: questioned adequacy of current sentencing practices given most cases cluster around the 5-year median, representing only 20% of the maximum penalty; no cases exceeding 40% of the maximum penalty including 'some of the very worst examples of the offence'; however, court rejected Crown range as was not supported by current sentencing practices.</p>
Evidence of change in current sentencing practices since raised by Court of Appeal	<p>Yes. See sentencing data below: 'immediate custodial sentence lengths over time'</p> <p>Decrease in yearly distribution of median and cumulative median over reference period. Cumulative median decreased from 7 years and 6 months in 2011–12 to 6 years in 2014–15.</p> <p>Council's 2009 review of maximum penalties identified that current sentencing practices and use of guideline judgment provisions would be more effective to address inadequate sentencing practices than increasing the maximum penalty.</p>

Problem with sentencing: evidence of inconsistency of approach

Treatment of a category of offenders within the offence category	<p>Yes. Possible issues raised by sample case analysis, prepared for the Council's forthcoming report on sexual penetration with a child under 12, which suggests that the serious sexual offender provisions, though enlivened, were not found to require a disproportionate sentence or additional cumulation.</p>
Weight given to aggravating and mitigating factors	<p>Yes. See sentencing data below: 'measures of consistency'</p> <p>Interquartile range (IQR) = 2 years and 7 months (5 years and 5 months to 8 years).</p> <p>Median Absolute Difference (MAD) = 1 year.</p> <p>Fidelity to current sentencing practices and clustering of individual sentences, supported by sample case analysis prepared for the Council's forthcoming report on sexual penetration with a child under 12, which suggests differences in approach to the identification and weighting of aggravating and mitigating factors.</p>

Categorisation of the objective seriousness of the offence

Yes. Extent to which seriousness factors at the 'heart of the offence' are reflected in sentencing practices (the degree to which the persistence of the sexual relationship is reflected in sentencing; differences in the nature of the relationship; categorisation of the nature/intensity of the sexual abuse): *Director of Public Prosecutions v DDJ* (2009) 22 VR 444.

Possible issues raised by sample case analysis prepared for the Council's forthcoming report on sexual penetration with a child under 12, which suggests differences in approach to the treatment of harm and culpability and assessment of seriousness, particularly related to:

- the characterisation of the violence involved in the physical element of the offence of sexual penetration with a child under 12 compared with rape;
- emphasis on traditionally understood notions of violence;
- differences in the characterisation of offender's behaviour for the sexual penetration offence.

See *Clarkson v The Queen* (2011) 32 VR 361.

Median higher than other sexual offences, but lower than other serious offences such as manslaughter and trafficking in a large commercial quantity of a drug of dependence.

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 54 charges of persistent sexual abuse of a child under 16 were sentenced in the higher courts. Persistent sexual abuse of a child under 16 carries a maximum penalty of 25 years' imprisonment.

Imprisonment was the most common sentence imposed for charges (89%) and the only form of custodial sentence imposed (Table A22).¹⁰⁴⁸

Table A22: Number and percentage of charges of persistent sexual abuse of a child under 16, by sentence type imposed, 2010–11 to 2014–15

Sentence type	Number	Percentage
Imprisonment	48	89%
Community correction order	4	7%
Wholly suspended sentence	1	2%
Fine	1	2%
Total	54	100%

The immediate custodial sentences imposed over the five years ranged from 1 year and 6 months to 12 years (Table A23). The median custodial sentence length of 6 years is 24% of the maximum penalty.

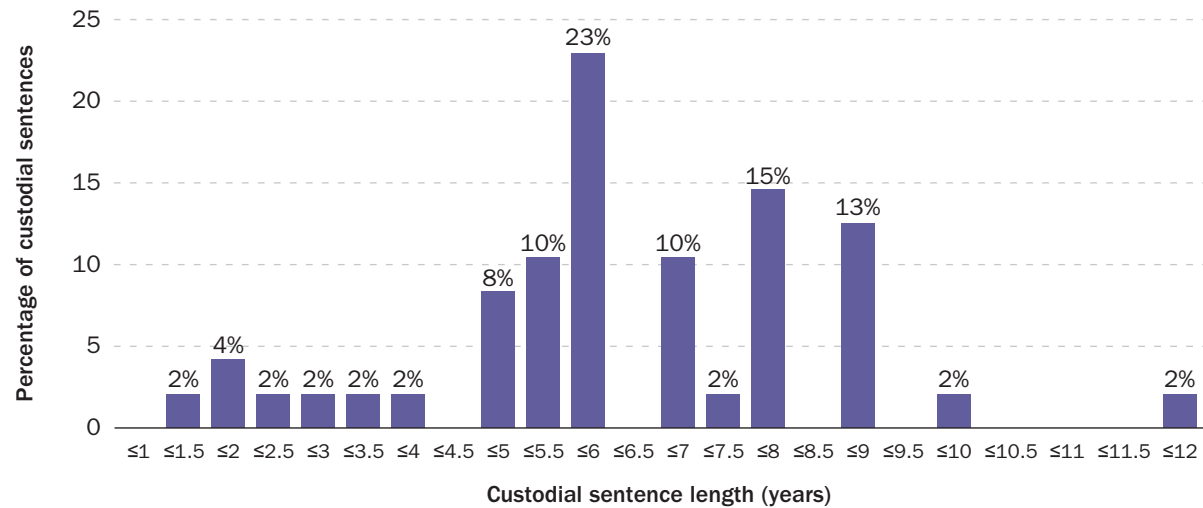
Table A23: Descriptive statistics of immediate custodial sentences imposed for charges of persistent sexual abuse of a child under 16, 2010–11 to 2014–15

Statistic	Value
Total charges	54
Immediate custodial sentences	48
<i>Percentage immediate custodial</i>	89%
Shortest	1 year and 6 months
Median	6 years
Longest	12 years
Years from median to maximum penalty	19 years
Median % of maximum penalty	24%

¹⁰⁴⁸ There were no aggregate or mixed sentences imposed for this offence in this period.

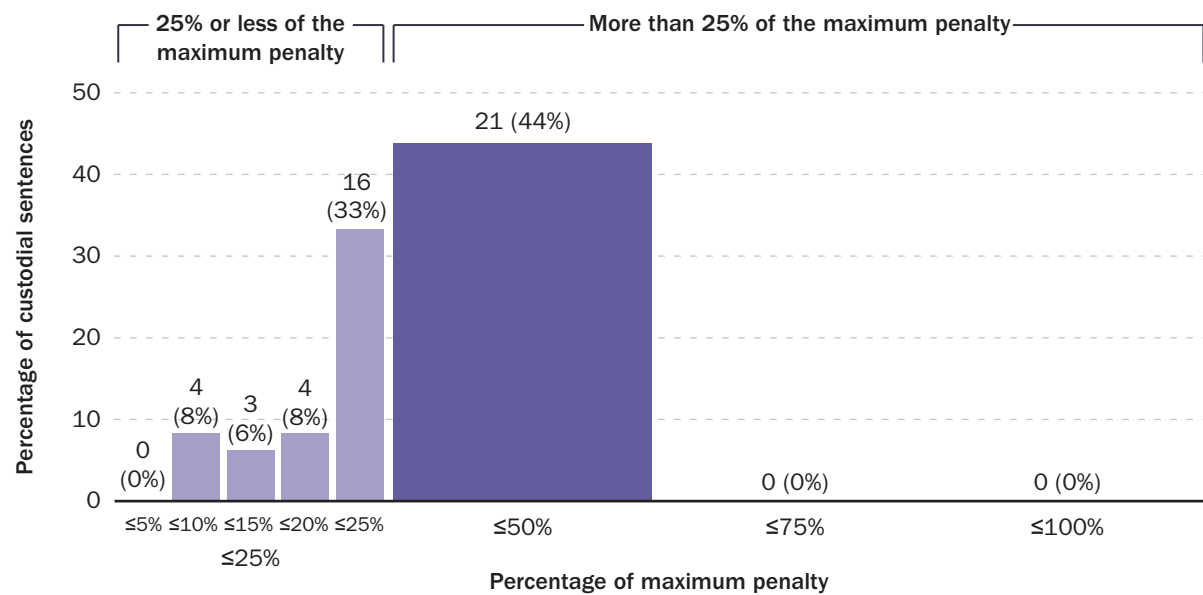
The distribution of immediate custodial sentence lengths in Figure A41 shows that sentences between 5 years and 6 months and 6 years were most common. Overall, 17% of custodial sentence lengths were more than 8 years.

Figure A41: Percentage of immediate custodial sentences imposed for charges of persistent sexual abuse of a child under 16, by sentence length, 2010–11 to 2014–15



In terms of the 25-year maximum penalty for persistent sexual abuse of a child under 16, 56% of immediate custodial sentences were 25% of the maximum penalty or less, and all sentence lengths were less than 50% of the maximum penalty (Figure A42).

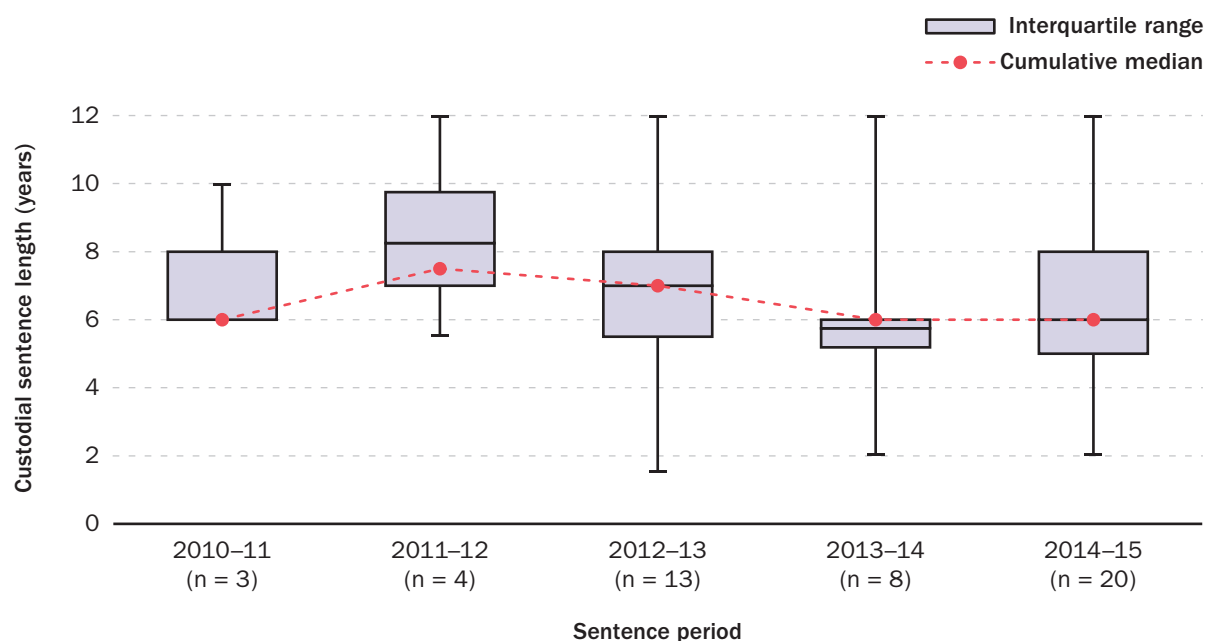
Figure A42: Percentage of immediate custodial sentences imposed for charges of persistent sexual abuse of a child under 16, by the proportion of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 48 (89%) custodial sentences imposed over the entire period had a median length of 6 years (Table A23). Figure A43 shows that the small number of charges sentenced in each financial year lead to a fluctuating cumulative median sentence length that settled at 6 years in 2013–14 after a median of 7 years and 6 months in 2011–12.

Figure A43: Yearly distribution and cumulative median length of immediate custodial sentences imposed for charges of persistent sexual abuse of a child under 16, by financial year, 2010–11 to 2014–15



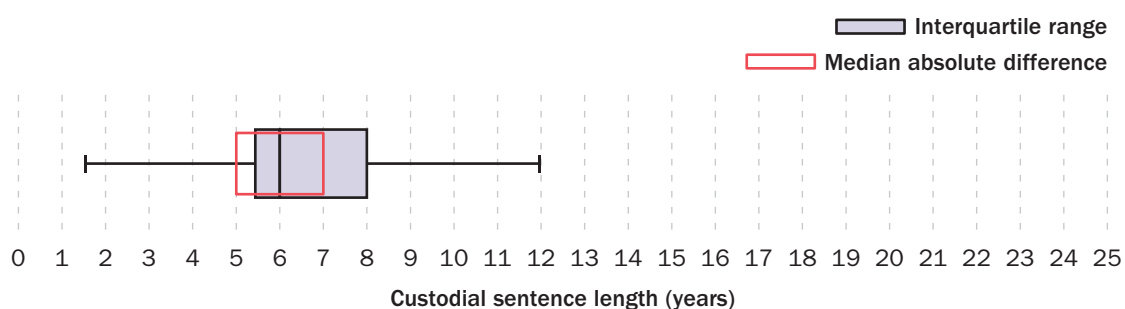
Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A44 shows these two measures for the offence of persistent sexual abuse with a child under 16.

The IQR was 2 years and 7 months, and it ranged from 5 years and 5 months to 8 years.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from zero to 6 years. The median of these differences, the MAD value, is 1 year. This means that 50% of custodial sentence lengths are less than 1 year from the median (between 5 years and 7 years) and 50% are further than 1 year from the median.

Figure A44: Boxplot distribution of immediate custodial sentence lengths imposed for charges of persistent sexual abuse of a child under 16, 2010–11 to 2014–15



Appendix 5:

Serious injury offences data

Offence 12. Intentionally causing serious injury

Definition	Causing serious injury to a person by a physical attack with the intention to cause serious injury. Since 1 July 2013, the definition of 'serious injury' has narrowed to life-threatening injuries, the destruction of a foetus, and injuries that are substantial and protracted.
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Offence characteristics

The offence is an indictable offence	Indictable offence.
The extent to which the offence is 'prevalent'	504 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015.
Objective elements involve a vulnerable victim	Yes. Where the victim is an emergency worker, a minimum non-parole period applies.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	Inconclusive. Most serious form of causing serious injury, but not an aggravated offence; aggravated forms (against an emergency worker) attract a minimum non-parole period of 3 years.

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	Yes. Community attitudes research (Sentencing Advisory Council, 2012): <ul style="list-style-type: none"> ranked the same as rape and reckless murder (level 9); high levels of consensus; high culpability and high harm. Tasmanian Jury Sentencing Study (violent offences); Victorian Jury Sentencing Study (violent offences).
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	Yes. Community attitudes research (Vic); aggravated form for emergency workers, increasing awareness of family violence and serious injury to partners and children.

Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	<p>Yes. Maximum penalty = 20 years (increased from 12.5 years in 1997).</p> <p>Minimum non-parole period for some forms introduced in 2014.</p> <p>(Not a baseline offence.)</p>
Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>Yes. See sentencing data below: 'distribution of sentences and comparison with maximum penalty'</p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> • percentage: 90%; • range: 5 days to 12 years; • median: 4 years. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> • median: 20%; • percentage of sentences 25% or less: 77%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	<p>Yes. <i>Kane v The Queen</i> [2010] VSCA 213 (23 August 2010): court identified possible need to revisit current sentencing practices, which continue to have a downgrading effect on sentences for serious forms of this offence, but indicated that there had been no appropriate case to consider this.</p>
No evidence of change in current sentencing practices following the Court of Appeal's declaration or questioning	<p>Yes. See sentencing data below: 'immediate custodial sentence lengths over time'</p> <p>Increase in yearly distribution of median between 2013–14 and 2014–15 but no change in cumulative median over reference period.</p>

Problem with sentencing: evidence of inconsistency of approach

Treatment of a category of offenders within the offence category	<p>Inconclusive. Possible error regarding the categorisation of the seriousness of intentionally causing serious injury at the high end of objective seriousness and in a family violence context: <i>Kilic v The Queen</i> [2015] VSCA 331 (8 December 2016).</p>
Weight given to aggravating and mitigating factors	<p>Yes. See sentencing data below: 'measures of consistency'</p> <p>Interquartile range (IQR) = 2 years (3 years to 5 years).</p> <p>Median Absolute Difference (MAD) = 1 year.</p> <p>Submissions raised inconsistency in assessment of, and weight given to, premeditation, relationship of trust, seriousness/permanency of injury: <i>Kilic v The Queen</i> [2015] VSCA 331 (8 December 2016).</p>
Categorisation of the objective seriousness of the offence	<p>Yes. Lowest median compared with other offences viewed by the community to be as serious (rape and reckless murder).</p>

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 504 charges of intentionally causing serious injury were sentenced in the higher courts. Intentionally causing serious injury carries a maximum penalty of 20 years.

Imprisonment was the most common sentence imposed for charges, and 92% of sentences imposed were immediate custodial sentences (Table A24).

Table A24: Number and percentage of charges of intentionally causing serious injury, by sentence type imposed, 2010–11 to 2014–15

Sentence type ^a	Number	Percentage
Imprisonment	415	82%
Partially suspended sentence	8	2%
Community order	24	5%
Intensive correction order	1	<1%
Youth centre	38	8%
Wholly suspended sentence	17	3%
Fine	1	<1%
Total	504	100%

a. 'Community order' comprises community correction orders and community-based orders. 'Youth centre' comprises youth training centre and youth justice centre orders.

The immediate custodial sentences imposed over the five years ranged from 5 days to 12 years (Table A25). The median custodial sentence length of 4 years is 20% of the maximum penalty.

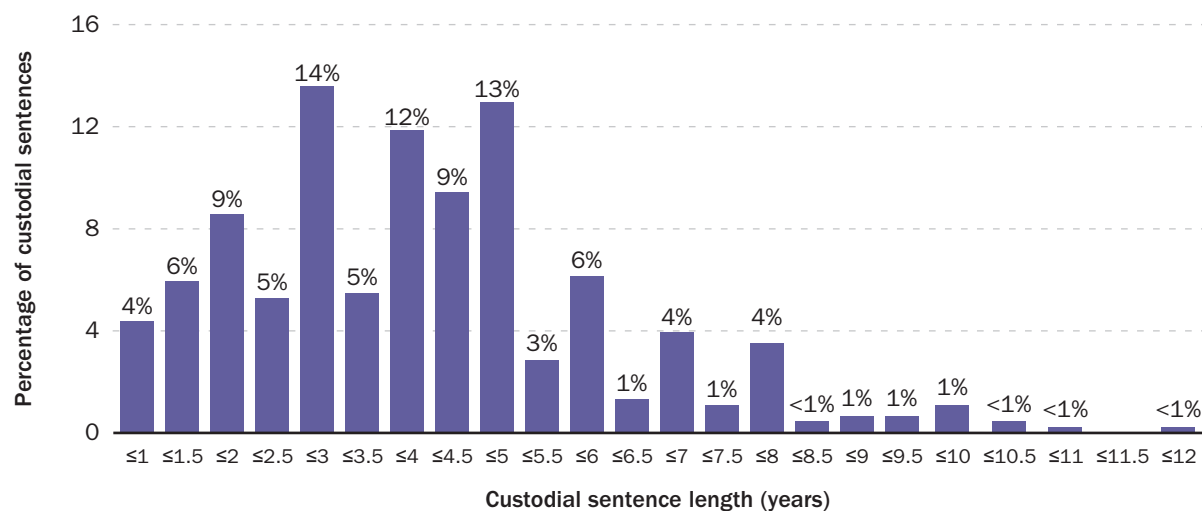
Table A25: Descriptive statistics of immediate custodial sentences imposed for charges of intentionally causing serious injury, 2010–11 to 2014–15

Statistic	Value
Total charges	523
Immediate custodial sentences	456
Percentage immediate custodial ^a	90%
Shortest	5 days
Median	4 years
Longest	12 years
Years from median to maximum penalty	16 years
Median % of maximum penalty	20%

a. Four aggregate sentences of imprisonment and two aggregate youth justice centre orders are not included in the sentence length analysis that follows.

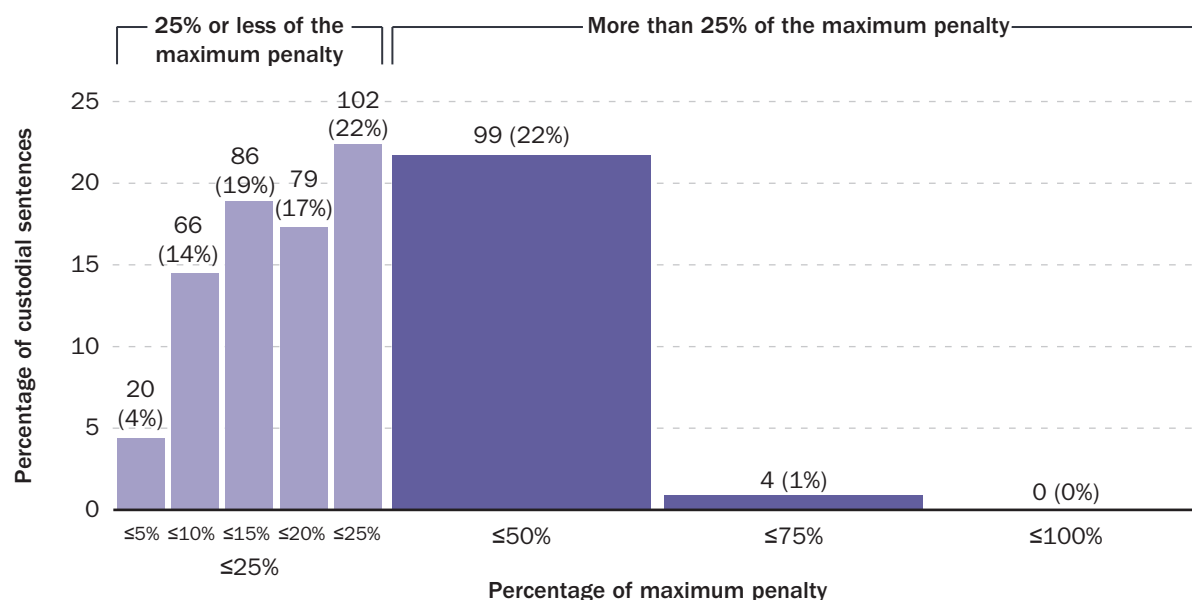
The distribution of immediate custodial sentence lengths in Figure A45 shows that sentences between 2 years and 6 months and 3 years were most common. Overall, 14% of sentences were over 6 years in length.

Figure A45: Percentage of immediate custodial sentences imposed for charges of intentionally causing serious injury, by sentence length, 2010–11 to 2014–15



As a percentage of the 20-year maximum penalty for intentionally causing serious injury, 77% of custodial sentences were 25% of the maximum penalty or less (Figure A46).

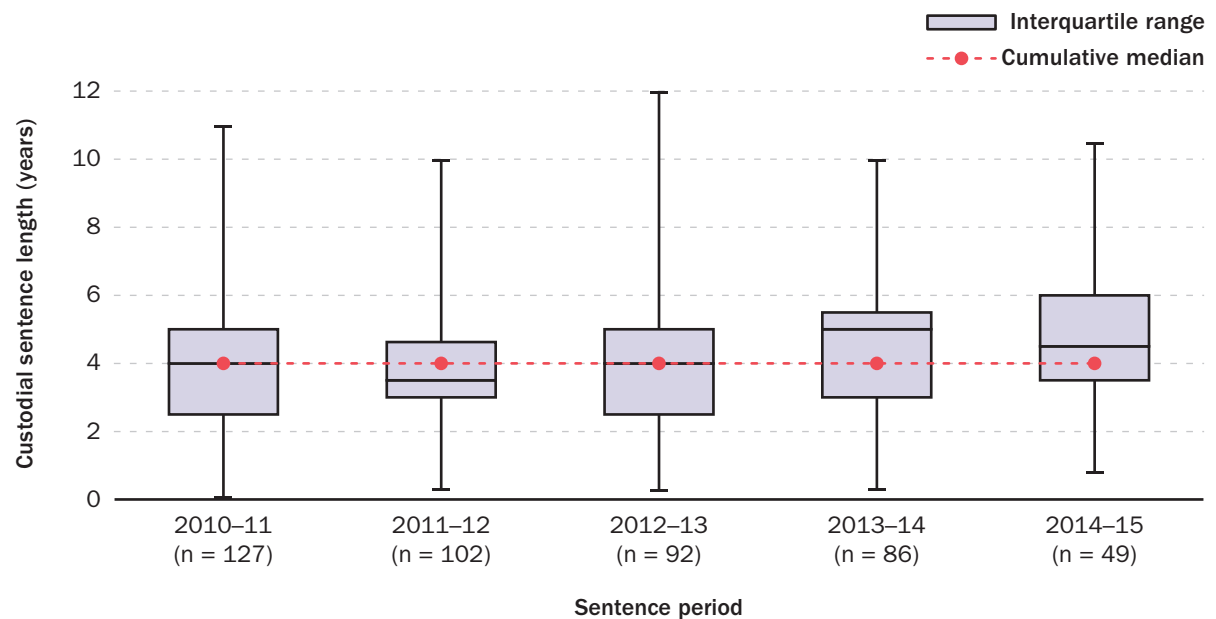
Figure A46: Percentage of immediate custodial sentences imposed for charges of intentionally causing serious injury, by the percentage of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 456 (90%) custodial sentences imposed over the entire period had a median length of 4 years (Table A25). Figure A47 shows that while the number of charges sentenced in each financial year varied, the yearly distributions were consistent and established a steady cumulative median of 4 years for the five-year period.

Figure A47: Yearly distribution and cumulative median length of immediate custodial sentences imposed for charges of intentionally causing serious injury, by financial year, 2010–11 to 2014–15



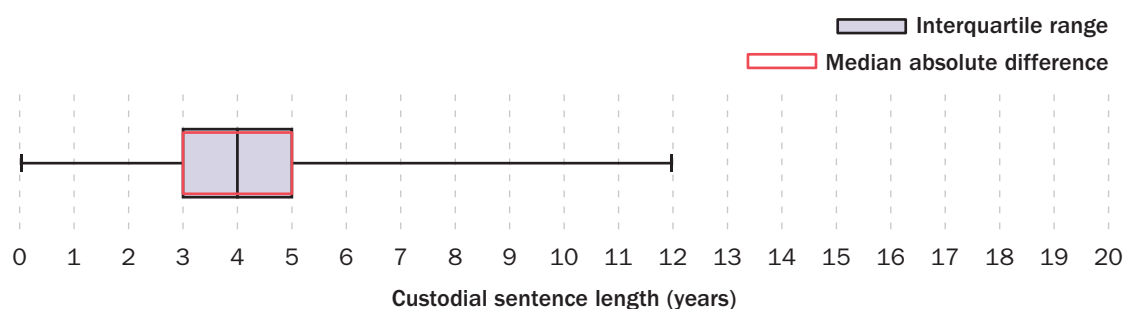
Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A48 shows these two measures for the offence of intentionally causing serious injury.

The IQR was 2 years, and it ranged from 3 years to 5 years.

The size of the difference between the median sentence length and all immediate custodial sentences imposed ranged from zero to 8 years. The median of these differences, the MAD value, is 1 year. This means that 50% of custodial sentence lengths are less than 1 year from the median (between 3 years and 5 years) and 50% are further than 1 year from the median.

Figure A48: Boxplot distribution of immediate custodial sentence lengths imposed for charges of intentionally causing serious injury, 2010–11 to 2014–15



Offence 13. Recklessly causing serious injury

Definition	<p>Causing serious injury to another person in a manner that was reckless as to whether that person would be seriously injured (a reasonable person could foresee that the person would be seriously injured).</p> <p>Since 1 July 2013, the definition of 'serious injury' has narrowed to life-threatening injuries, the destruction of a foetus, and injuries that are substantial and protracted.</p>
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Offence characteristics

The offence is an indictable offence	Indictable offence, triable summarily.
The extent to which the offence is 'prevalent'	<p>646 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015.</p> <p>1,828 charges sentenced in the Magistrates' Court between 1 July 2010 and 30 June 2015.</p>
Objective elements involve a vulnerable victim	Yes. Where the victim is an emergency worker, a minimum non-parole period applies.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	Inconclusive. Aggravated forms (against an emergency worker) attract a minimum non-parole period of 2 years; other forms of this offence, such as 'glassing', are also considered aggravated.

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	<p>Yes. Community attitudes research (Sentencing Advisory Council, 2012):</p> <ul style="list-style-type: none"> ranked the same as armed robbery and arson causing death (level 7); low levels of consensus; medium to low culpability and high harm. <p>Tasmanian Jury Sentencing Study (violent offences); Victorian Jury Sentencing Study (violent offences).</p>
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	Yes. Community attitudes research (Vic); aggravated form for emergency workers, concerns about drunken violence and glassing incidents; increasing awareness of family violence and serious injury to partners and children.

Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	<p>Yes. Maximum penalty = 15 years (increased from 10 years in 1997).</p> <p>Minimum non-parole period for some forms (emergency workers) introduced in 2014.</p> <p>(Not a baseline offence.)</p>
Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>Yes. See sentencing data below: 'distribution of sentences and comparison with maximum penalty'</p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> • percentage: 77%; • range: 14 days to 6 years; • median: 2 years and 3 months. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> • median: 15%; • percentage of sentences 25% or less: 86%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	<p>Yes. <i>Winch v The Queen</i> (2010) 27 VR 658: declaration that current sentencing practices for glassing forms of recklessly causing serious injury are inadequate.</p> <p><i>R v Tran</i> [2009] VSCA 252 (12 October 2009): questioned why the top of the range is below 50% of the maximum.</p> <p><i>Director of Public Prosecutions v Barnes and Barnes</i> [2015] VSCA 293 (12 November 2015): sentences for recklessly causing serious injury recognised as lenient but not manifestly inadequate.</p>
No evidence of change in current sentencing practices following the Court of Appeal's declaration or questioning	<p>Yes. See sentencing data below: 'immediate custodial sentence lengths over time'</p> <p>Cumulative median fell from 2 years and 6 months in 2010–11 to 2 years and 3 months in 2014–15 and some fluctuation in yearly distribution of median over reference period.</p> <p>Detailed data analysis (Appendix 9) provides limited evidence as analysis coincided with the abolition of suspended sentences. Data suggests a 25% (6-month) increase in the median imprisonment term imposed for recklessly causing serious injury glassing charges, and a 22 percentage-point increase in the proportion of recklessly causing serious injury glassing charges receiving immediate imprisonment (including a youth justice centre order and immediate imprisonment combined with a community correction order).</p>

Problem with sentencing: evidence of inconsistency of approach

Treatment of a category of offenders within the offence category	Yes. Inadequacy of current sentencing practices for glassing forms of recklessly causing serious injury identified in <i>Winch v The Queen</i> (2010) 27 VR 658.
Weight given to aggravating and mitigating factors	<p>Yes. See <i>sentencing data below: 'measures of consistency'</i></p> <p>Interquartile range (IQR) = 1 year and 6 months (1 year and 6 months to 3 years).</p> <p>Median Absolute Difference (MAD) = 10 months.</p> <p>Inconsistency of approach to glassing aggravation identified in <i>Winch v The Queen</i> (2010) 27 VR 658.</p>
Categorisation of the objective seriousness of the offence	<p>Yes. Median sentence does not fit in seriousness hierarchy of serious injury offences (lower than both intentionally causing serious injury and negligently causing serious injury) – but fits in seriousness hierarchy in community attitudes research.</p> <p>Median lower than offence ranked at same level (armed robbery) but lower than negligently causing serious injury, which was ranked higher.</p>

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 646 charges of recklessly causing serious injury were sentenced in the higher courts. Charges of recklessly causing serious injury carry a maximum penalty of 15 years.

Imprisonment was the most common sentence imposed for charges, and 77% of sentences imposed were immediate custodial sentences (Table A26).

Table A26: Number and percentage of charges of recklessly causing serious injury, by sentence type imposed, 2010–11 to 2014–15

Sentence type ^a	Number	Percentage
Imprisonment	435	67%
Partially suspended sentence	25	4%
Community order	70	11%
Intensive correction order	1	<1%
Youth centre/supervision	38	6%
Wholly suspended sentence	77	12%
Total	646	100%

a. 'Community order' comprises community-based orders and community correction orders. 'Youth centre/supervision' comprises youth training centre and youth justice centre orders.

The immediate custodial sentences imposed over the five years ranged from 14 days to 6 years (Table A27). The median immediate custodial sentence length of 2 years and 3 months is 15% of the maximum penalty.

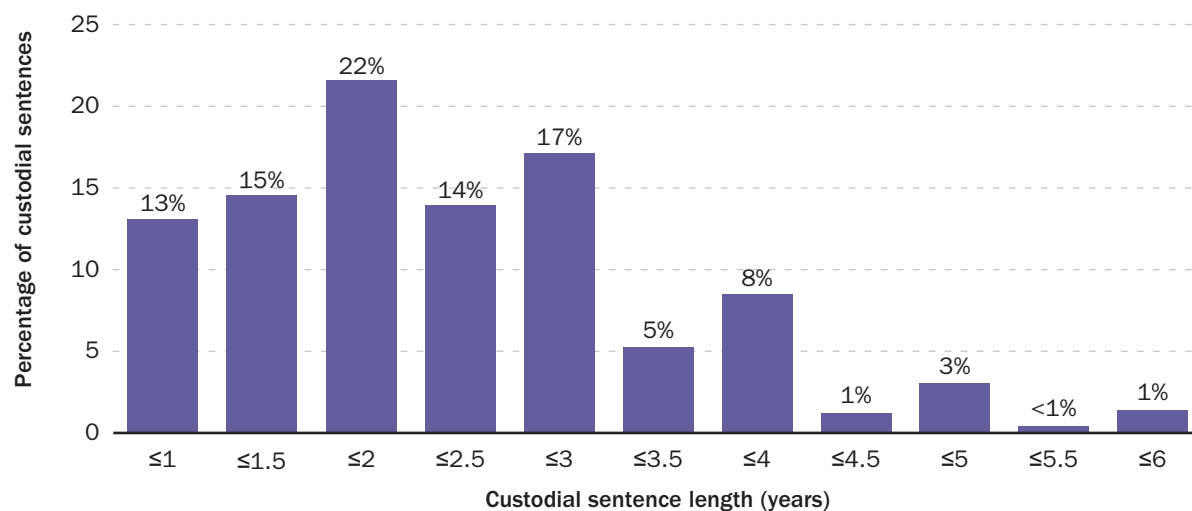
Table A27: Descriptive statistics of immediate custodial sentences imposed for charges of recklessly causing serious injury, 2010–11 to 2014–15

Statistic	Value
Total charges	646
Immediate custodial sentences	496
Percentage immediate custodial ^a	77%
Shortest	14 days
Median	2 years and 3 months
Longest	6 years
Years from median to maximum penalty	12 years and 9 months
Median % of maximum penalty	15%

a. Two aggregate sentences of imprisonment and one aggregate youth justice centre order are not included in the sentence length analysis.

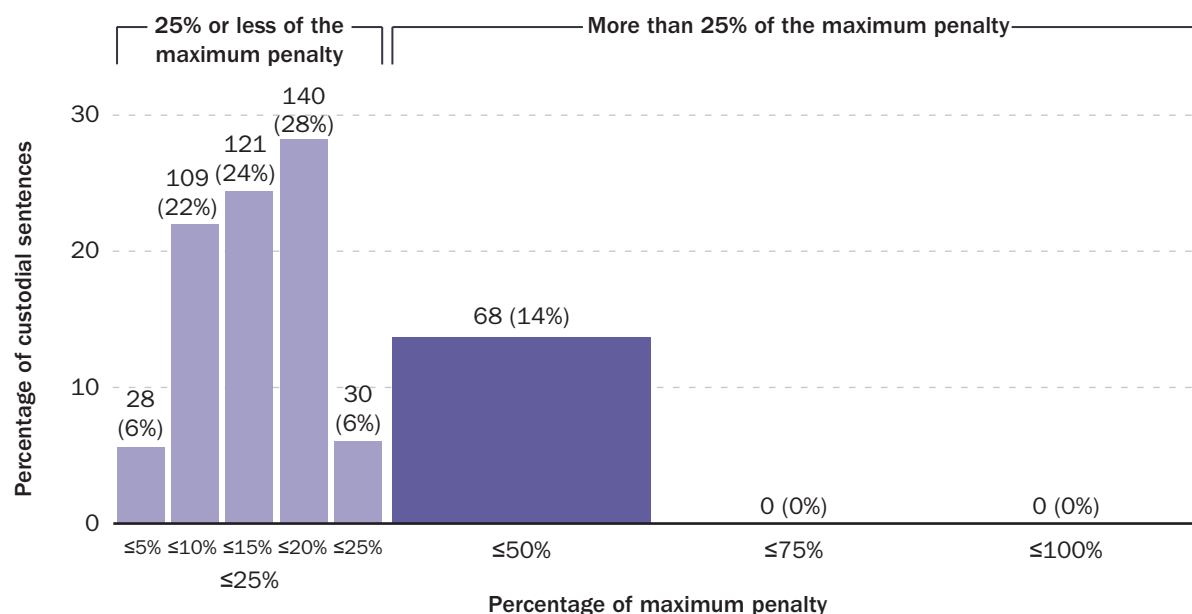
The distribution of immediate custodial sentence lengths in Figure A49 shows that sentences between 1 year and 6 months and 2 years were most common. Overall, 80% of custodial sentence lengths were 3 years or less.

Figure A49: Percentage of immediate custodial sentences imposed for charges of recklessly causing serious injury, by sentence length, 2010–11 to 2014–15



In terms of the 15-year maximum penalty for recklessly causing serious injury, 86% of custodial sentences were 25% of the maximum penalty or less and 28% were 10% of the maximum penalty or less (Figure A50).

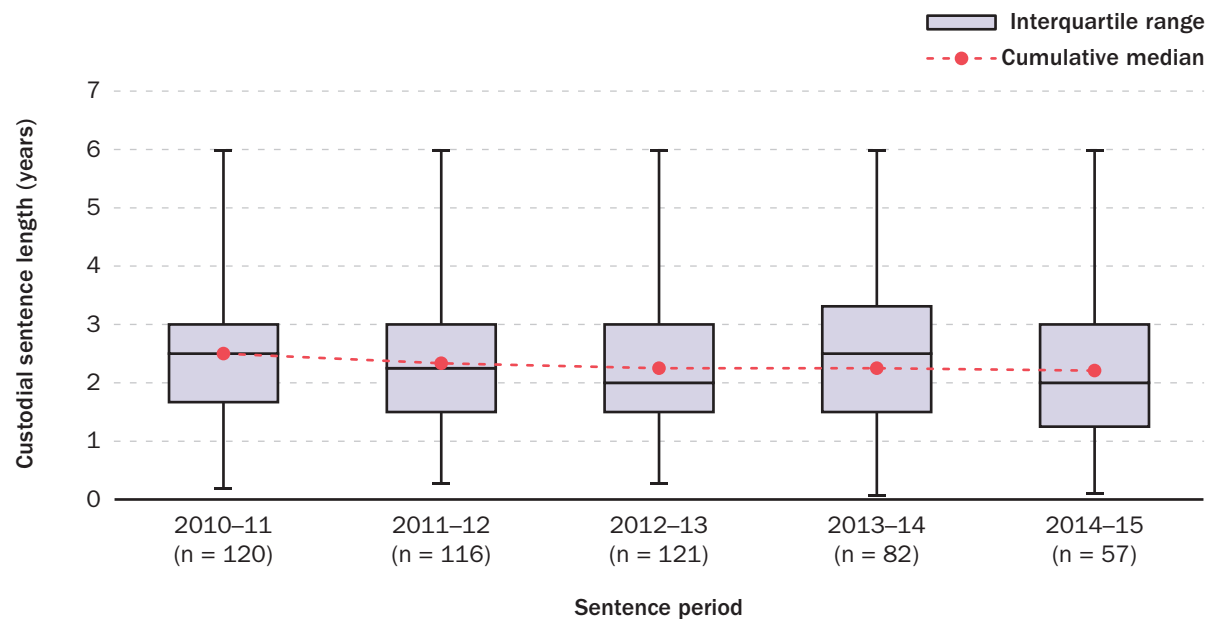
Figure A50: Percentage of immediate custodial sentences imposed for charges of recklessly causing serious injury, by the proportion of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 496 (77%) custodial sentences imposed over the entire period had a median length of 2 years and 3 months (Table A27). Figure A51 shows that while the sentence distributions were consistent, the charges sentenced in each financial year decreased the cumulative median sentence length from 2 years and 6 months in 2010–11 to 2 years and 3 months in 2014–15. The longest sentence length of 6 years was imposed in each year.

Figure A51: Yearly distribution and cumulative median immediate custodial sentence length imposed for charges of recklessly causing serious injury, by financial year, 2010–11 to 2014–15



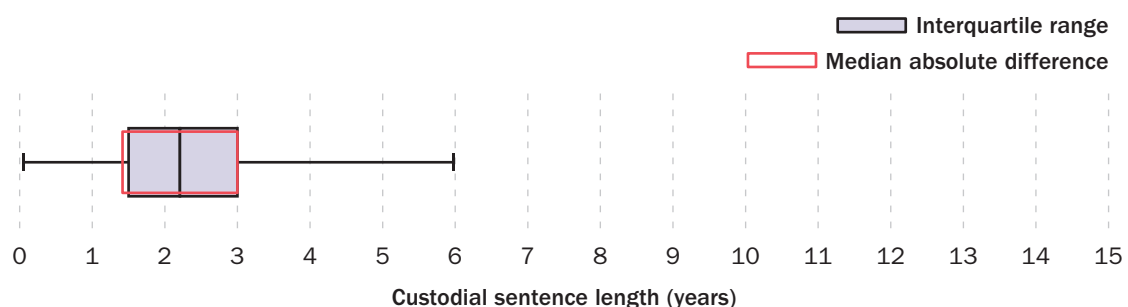
Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A52 shows these two measures for the offence of recklessly causing serious injury.

For this offence, the IQR was 1 year and 6 months, and it ranged from 1 year and 6 months to 3 years.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from zero to 3 years and 9 months. The median of these differences, the MAD value, is 10 months. This means that 50% of custodial sentence lengths are less than 10 months from the median (between 1 year and 5 months and 3 years and 1 month) and 50% are further than 10 months from the median.

Figure A52: Boxplot distribution of immediate custodial sentence lengths imposed for charges of recklessly causing serious injury, 2010–11 to 2014–15



Offence 14. Negligently causing serious injury

Definition	Causing serious injury to another person in a manner that was negligent (usually occurs in the form of driving). Since 1 July 2013, the definition of 'serious injury' has narrowed to life-threatening injuries, the destruction of a foetus, and injuries that are substantial and protracted.
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Offence characteristics

The offence is an indictable offence	Indictable offence, triable summarily.
The extent to which the offence is 'prevalent'	197 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015. 99 charges sentenced in the Magistrates' Court between 1 July 2010 and 30 June 2015.
Objective elements involve a vulnerable victim	No.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	No.

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	Yes. Community attitudes research (Sentencing Advisory Council, 2012): <ul style="list-style-type: none"> ranked the same as aggravated burglary and indecent act with a child under 16 (level 8); medium levels of consensus; medium to low culpability and high harm.
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	Yes. Concerns about the road toll and driving offences.
Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	Yes. Maximum penalty = 10 years (increased from 5 years in 2008). (Not a baseline offence.)

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>Yes. See sentencing data below: 'distribution of sentences and comparison with maximum penalty'</p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> percentage: 91%; range: 6 months to 8 years and 6 months; median: 3 years. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> median: 30%; percentage of sentences 25% or less: 42%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	Yes. <i>Harrison v The Queen</i> [2015] VSCA 349 (16 December 2015): declaration that current sentencing practices are inadequate for upper range cases of negligently causing serious injury by driving (and low and mid-range cases will need to adjust also).
No evidence of change in current sentencing practices following the Court of Appeal's declaration or questioning	<p>Inconclusive. See sentencing data below: 'immediate custodial sentence lengths over time'</p> <p>Fluctuating yearly distribution of median and cumulative median over reference period, but note there has been insufficient time for <i>Harrison</i> to have affected sentencing practices as sentences imposed after this case are not included in period for data analysis.</p>
Problem with sentencing: evidence of inconsistency of approach	
Treatment of a category of offenders within the offence category	Yes. Current sentencing practices inadequate for upper range cases of negligently causing serious injury by driving: <i>Harrison v The Queen</i> [2015] VSCA 349 (16 December 2015).
Weight given to aggravating and mitigating factors	<p>No. See sentencing data below: 'measures of consistency'</p> <p>Interquartile range (IQR) = 3 years (2 years to 5 years).</p> <p>Median Absolute Difference (MAD) = 1 year and 4 months.</p> <p>No evidence of inconsistent approach to factors in case reviews given in <i>Harrison v The Queen</i> [2015] VSCA 349 (16 December 2015) or <i>Gorlachenchearau v The Queen</i> (2011) 34 VR 149.</p>
Categorisation of the objective seriousness of the offence	No. Higher median than offences ranked at same level (aggravated burglary and indecent act with a child under 16).

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 197 charges of negligently causing serious injury were sentenced in the higher courts. Negligently causing serious injury carries a maximum penalty of 10 years' imprisonment.

Imprisonment was the most common sentence imposed for charges, and 91% of sentences were immediate custodial sentences (Table A28).¹⁰⁴⁹

Table A28: Number and percentage of charges of negligently causing serious injury, by sentence type imposed, 2010–11 to 2014–15

Sentence type ^a	Number	Percentage
Imprisonment	157	80%
Partially suspended sentence	9	5%
Community order	5	3%
Youth centre	13	7%
Wholly suspended sentence	12	6%
Fine	1	1%
Total	197	100%

a. 'Community order' comprises community correction orders and community-based orders. 'Youth centre' comprises youth justice centre orders and youth training centre orders.

The immediate custodial sentences imposed over the five years ranged from 6 months to 8 years and 6 months (Table A29). The median custodial sentence length of 3 years is 30% of the maximum penalty.

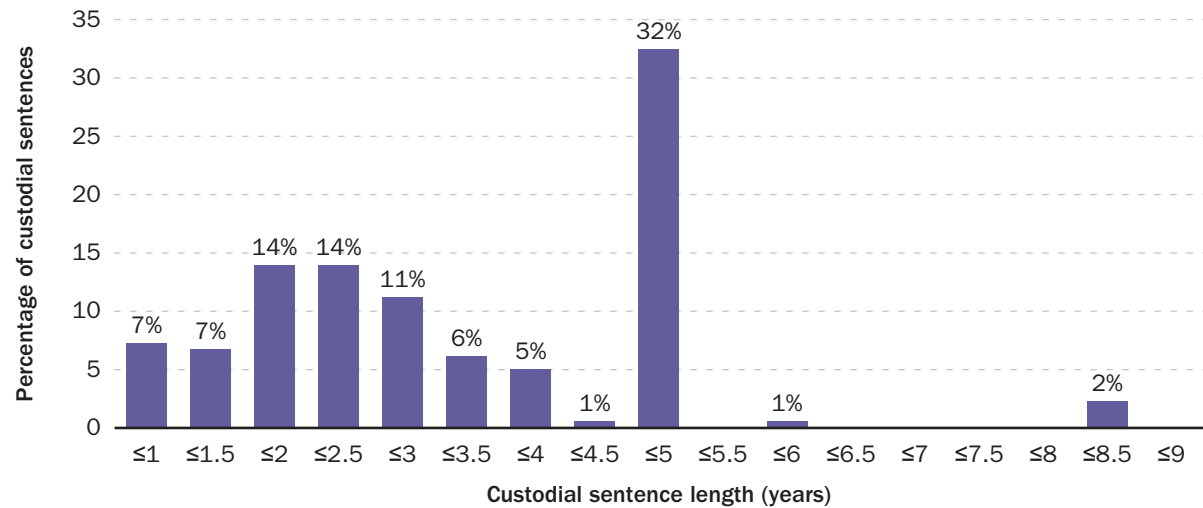
Table A29: Descriptive statistics of immediate custodial sentences imposed for charges of negligently causing serious injury, 2010–11 to 2014–15

Statistic	Value
Total charges	197
Immediate custodial sentences	179
Percentage immediate custodial	91%
Shortest	6 months
Median	3 years
Longest	8 years and 6 months
Years from median to maximum penalty	7 years
Median % of maximum penalty	30%

¹⁰⁴⁹ There were no aggregate sentences of imprisonment imposed in this period.

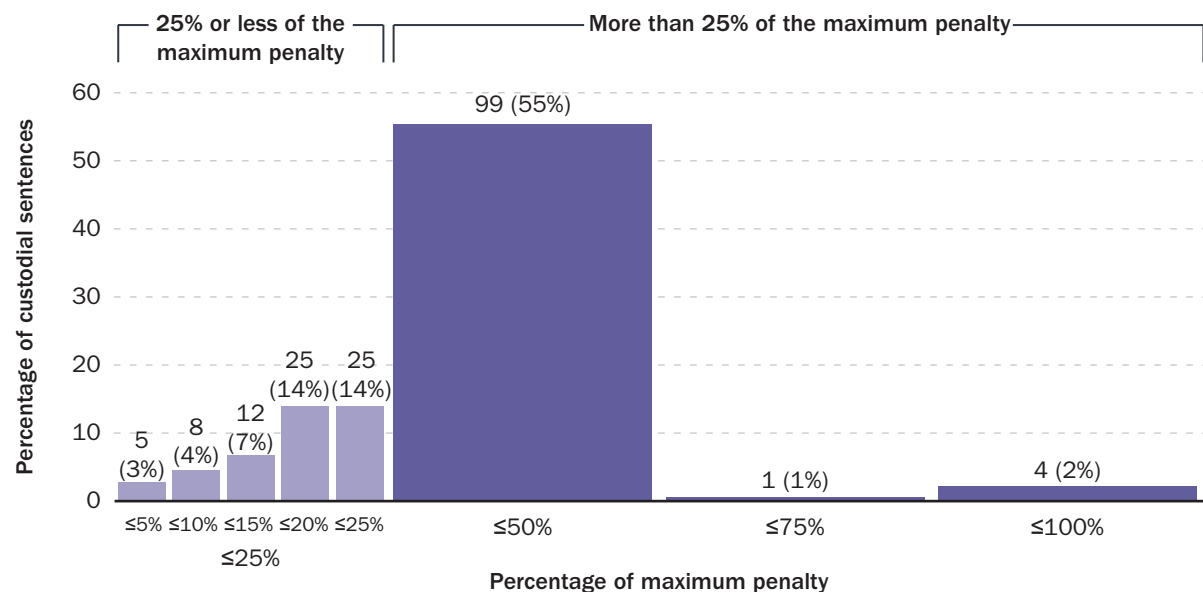
The distribution of immediate custodial sentence lengths in Figure A53 shows that sentences between 4 years and 6 months and 5 years in length were most common. Overall, 3% of immediate custodial sentences were more than 5 years.

Figure A53: Percentage of immediate custodial sentences imposed for charges of negligently causing serious injury, by sentence length, 2010–11 to 2014–15



As a percentage of the 10-year maximum penalty for negligently causing serious injury, 42% of immediate custodial sentences were 25% of the maximum penalty or less (Figure A54). Over half of immediate custodial sentences imposed were between 25% and 50% of the maximum penalty.

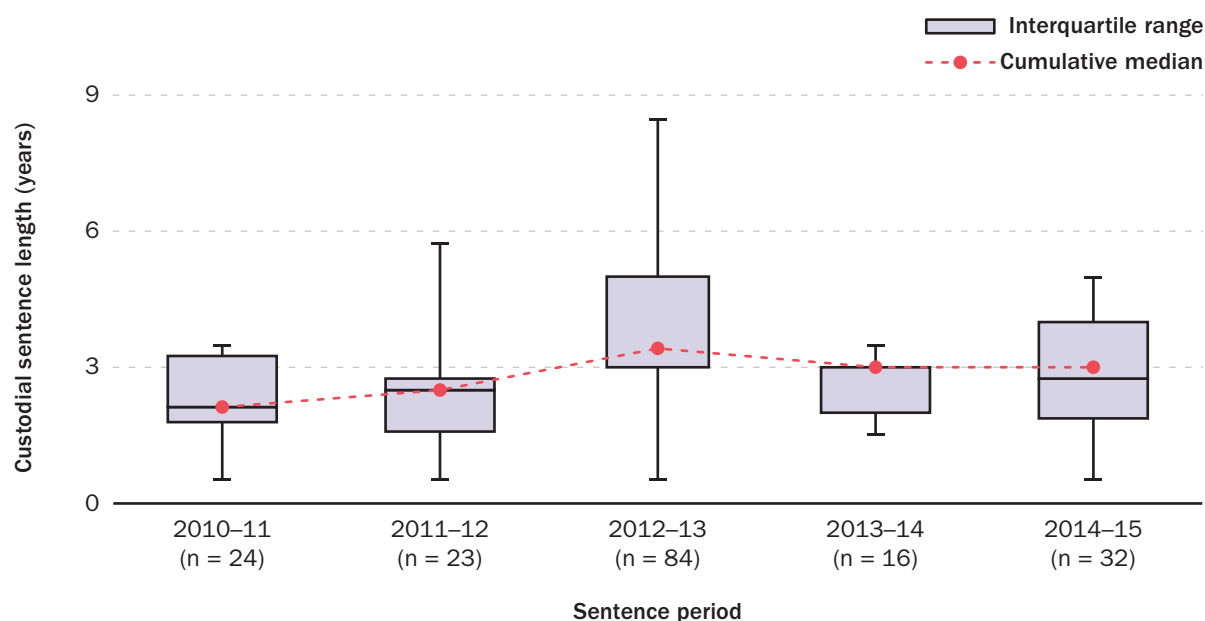
Figure A54: Percentage of immediate custodial sentences imposed for charges of negligently causing serious injury, by the proportion of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 179 (91%) custodial sentences imposed over the entire period had a median length of 3 years (Table A29). Figure A55 shows that the charges sentenced in each financial year had varied distributions, with the 84 sentences imposed in 2012–13 increasing the cumulative median to 3 years and 5 months. The cumulative median decreased to and remained at 3 years from 2013–14.

Figure A55: Yearly distribution and cumulative median immediate custodial sentence length imposed for charges of negligently causing serious injury, by financial year, 2010–11 to 2014–15



Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A56 shows these two measures for the offence of negligently causing serious injury.

The IQR was 3 years, and it ranged from 2 years to 5 years.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from zero to 5 years and 6 months. The median of these differences, the MAD value, is 1 year and 4 months. This means that 50% of custodial sentence lengths are less than 1 year and 4 months from the median (between 1 year and 8 months and 4 years and 4 months) and 50% are further than 1 year and 4 months from the median.

Figure A56: Boxplot distribution of immediate custodial sentence lengths imposed for charges of negligently causing serious injury, 2010–11 to 2014–15



Appendix 6:

Drug offences data

Offence 15. Trafficking in a large commercial quantity of a drug of dependence

Definition	Preparing, making, selling, exchanging, or agreeing to sell a large commercial quantity of an illegal drug or attempting to do any of these things.
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Offence characteristics

The offence is an indictable offence	Indictable offence.
The extent to which the offence is 'prevalent'	75 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015.
Objective elements involve a vulnerable victim	No.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	Yes. Aggravated by quantity.

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	<p>No. Community attitudes research (Sentencing Advisory Council, 2012):</p> <ul style="list-style-type: none"> ranked the same as culpable driving causing death, manslaughter, negligently causing serious injury (level 8); low levels of consensus; indirect societal harms and no direct victims. <p>Tasmanian Jury Sentencing Study (drug offences) (Victorian Jury Sentencing Study did not report findings on drug offences).</p>
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	Yes. Community concern over ice use and serious impact on communities.
Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	<p>Yes. Maximum penalty = life imprisonment (created as a new aggravated offence in 2002).</p> <p>Baseline offence (baseline sentence of 9 years).</p>

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>Inconclusive. See <i>sentencing data below: 'distribution of sentences and comparison with maximum penalty'</i></p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> percentage: 97%; range: 2 years and 6 months to 20 years; median: 7 years. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> median: 18%; percentage of sentences 25% or less: 88%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	<p>Yes. <i>Spiteri v The Queen</i> (2011) 206 A Crim R 528: comment that median sentence of 6 years and 6 months does not adequately reflect seriousness of large commercial quantity offences. Appeal was against sentence for cultivation of a large commercial quantity of a narcotic plant but median sentence taken from the Council's Sentencing Snapshot on sentencing for the offence of trafficking in a large commercial quantity of a drug of dependence from 2004–05 to 2008–09.</p>
No evidence of change in current sentencing practices following the Court of Appeal's declaration or questioning	<p>Inconclusive. See <i>sentencing data below: 'immediate custodial sentence lengths over time'</i></p> <p>No change in cumulative median, but some fluctuation in yearly distribution of median over reference period.</p>

Problem with sentencing: evidence of inconsistency of approach

Treatment of a category of offenders within the offence category	<p>No. Textual analysis of small sample of cases suggests consistent assessment of seriousness for categories of offenders (from courier to manager).</p>
Weight given to aggravating and mitigating factors	<p>No. See <i>sentencing data below: 'measures of consistency'</i></p> <p>Interquartile range (IQR) = 3 years and 6 months (5 years to 8 years and 6 months).</p> <p>Median Absolute Difference (MAD) = 2 years.</p> <p>Textual analysis of small sample of cases suggests consistency in approach to aggravating and mitigating factors.</p>
Categorisation of the objective seriousness of the offence	<p>No. Textual analysis of small sample of cases suggests offenders with higher levels of culpability (those at higher role in offender hierarchy) are sentenced similarly to those in comparable role charged with cultivating a large commercial quantity of a narcotic plant.</p> <p>Higher median than other offences viewed by the community to be equally serious (culpable driving causing death, negligently causing serious injury, aggravated burglary) but lower than manslaughter.</p>

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 75 charges of trafficking in a large commercial quantity of a drug of dependence were sentenced in the higher courts. Trafficking in a large commercial quantity of a drug of dependence carries a maximum penalty of life imprisonment.

Imprisonment was the most common sentence imposed for charges, and 99% of sentences imposed were immediate custodial sentences (Table A30).

Table A30: Number and percentage of charges of trafficking in a large commercial quantity of a drug of dependence, by sentence type imposed, 2010–11 to 2014–15

Sentence type	Number	Percentage
Imprisonment	73	97%
Partially suspended sentence	1	1%
Wholly suspended sentence	1	1%
Total	75	100%

The immediate custodial sentences imposed over the five years ranged from 2 years and 6 months to 20 years (Table A31). The median custodial sentence length of 7 years is 18% of the maximum penalty.

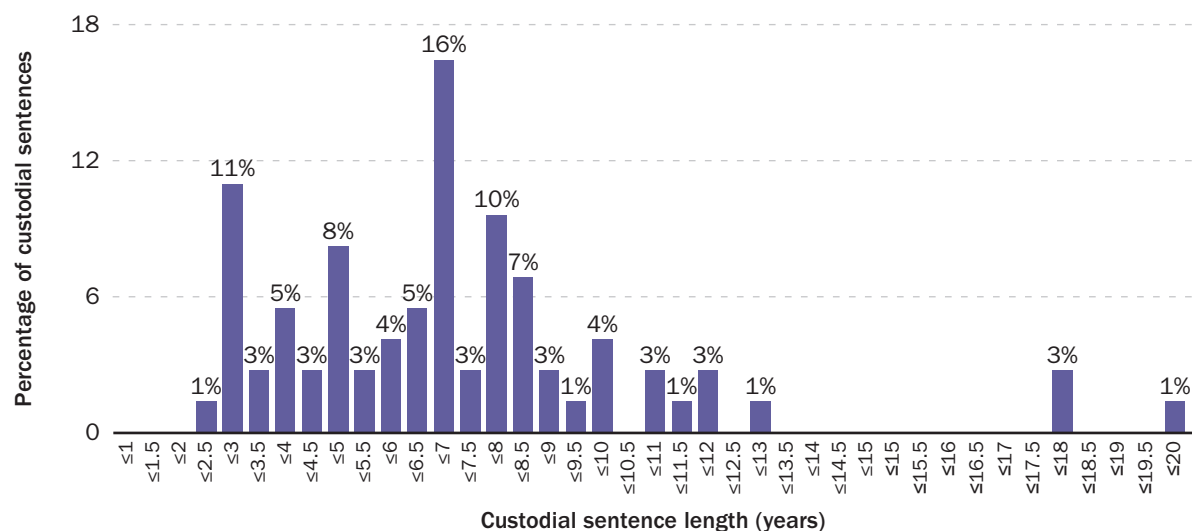
Table A31: Descriptive statistics of immediate custodial sentences imposed for charges of trafficking in a large commercial quantity of a drug of dependence, 2010–11 to 2014–15

Statistic	Value
Total charges	75
Immediate custodial sentences	73
Percentage immediate custodial ^a	97%
Shortest	2 years and 6 months
Median	7 years
Longest	20 years
Years from median to maximum penalty	33 years
Median % of maximum penalty	18%

a. One aggregate sentence of imprisonment is not included in the sentence length analysis that follows.

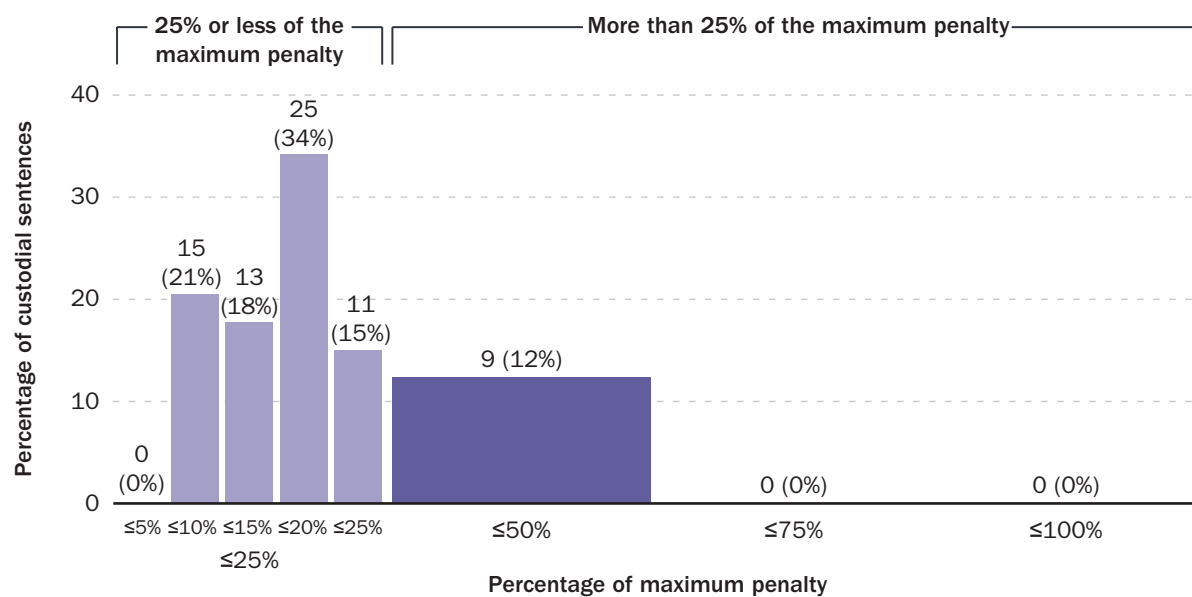
The distribution of immediate custodial sentence lengths in Figure A57 shows that sentences between 6 years and 6 months and 7 years were most common. Overall, 16% of custodial sentence lengths were more than 9 years.

Figure A57: Percentage of immediate custodial sentences imposed for charges of trafficking in a large commercial quantity of a drug of dependence, by sentence length, 2010–11 to 2014–15



As a percentage of the life imprisonment maximum penalty for trafficking in a large commercial quantity of a drug of dependence, 88% of custodial sentences were 25% of the maximum penalty or less (Figure A58).

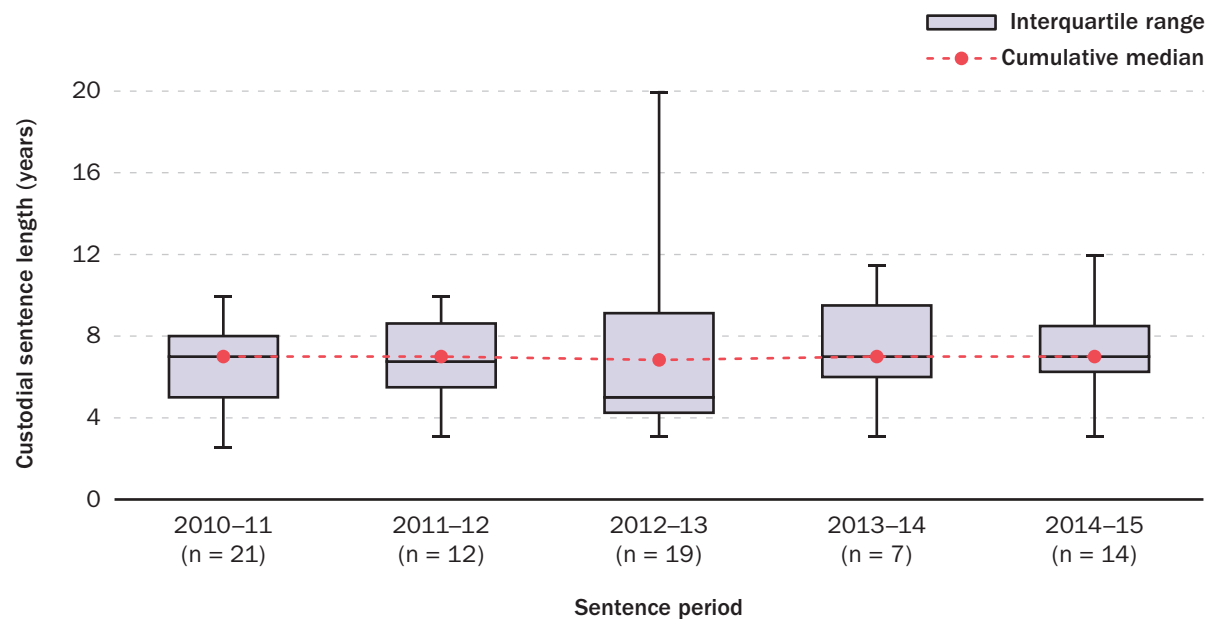
Figure A58: Percentage of immediate custodial sentences imposed for charges of trafficking in a large commercial quantity of a drug of dependence, by the proportion of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 73 (97%) custodial sentences imposed over the entire period had a median length of 7 years (Table A31). Figure A59 shows that the small number of charges sentenced in each financial year established a cumulative median sentence length of 7 years from 2010–11 to 2011–12, after which the median decreased to 6 years and 10 months in 2012–13. The cumulative median immediate custodial sentence length returned to 7 years in 2013–14.

Figure A59: Yearly distribution and cumulative median immediate custodial sentence length imposed for charges of trafficking in a large commercial quantity of a drug of dependence, by financial year, 2010–11 to 2014–15



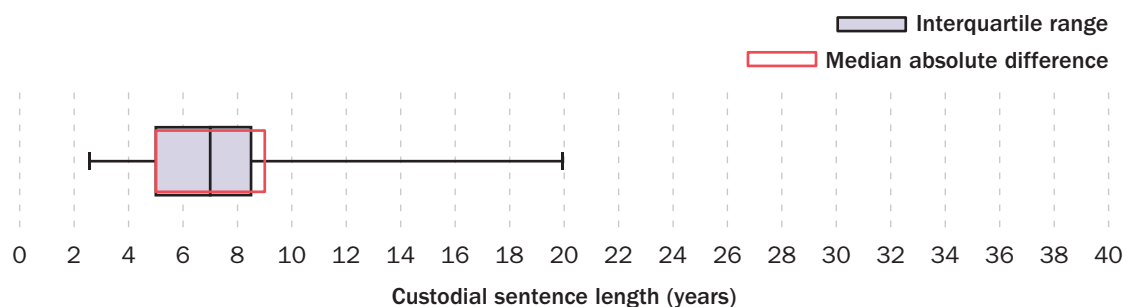
Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A60 shows these two measures for the offence of trafficking in a large commercial quantity of a drug of dependence.

The IQR was 3 years and 6 months, and it ranged from 5 years to 8 years and 6 months.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from zero to 13 years. The median of these differences, the MAD value, is 2 years. This means that 50% of custodial sentence lengths are less than 2 years from the median (between 5 years and 9 years) and 50% are further than 2 years from the median (Figure A60).

Figure A60: Boxplot distribution of immediate custodial sentence lengths imposed for charges of trafficking in a large commercial quantity of a drug of dependence, 2010–11 to 2014–15



Offence 16. Trafficking in a commercial quantity of a drug of dependence

Definition	Preparing, making, selling, exchanging, or agreeing to sell a commercial quantity of an illegal drug or attempting to do any of these things.
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Offence characteristics

The offence is an indictable offence	Indictable offence.
The extent to which the offence is 'prevalent'	186 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015.
Objective elements involve a vulnerable victim	No.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	Yes. Aggravated by quantity.

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	<p>No. Community attitudes research (Sentencing Advisory Council, 2012):</p> <ul style="list-style-type: none"> ranked the same as armed robbery and recklessly causing serious injury (level 7); low levels of consensus; indirect societal harms and no direct victims. <p>Tasmanian Jury Sentencing Study (drug offences) (Victorian Jury Sentencing Study did not report findings on drug offences).</p>
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	Yes. Community concern over ice use and serious impact on communities.
Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	<p>Yes. Maximum penalty = 25 years.</p> <p>(Not a baseline offence.)</p>

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>Inconclusive. See sentencing data below: 'distribution of sentences and comparison with maximum penalty'</p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> percentage: 92%; range: 4 months to 10 years; median: 4 years. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> median: 16%; percentage of sentences 25% or less: 97%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	No. Not specific to this offence but see Court of Appeal cases noted above for other drug offences.
No evidence of change in current sentencing practices following the Court of Appeal's declaration or questioning	<p>No. See sentencing data below: 'immediate custodial sentence lengths over time'</p> <p>n.a.</p>

Problem with sentencing: evidence of inconsistency of approach

Treatment of a category of offenders within the offence category	No. Textual analysis of small sample of cases suggests consistent assessment of seriousness of categories of offenders (from courier to manager).
Weight given to aggravating and mitigating factors	<p>No. See sentencing data below: 'measures of consistency'</p> <p>Interquartile range (IQR) = 1 year and 6 months (3 years to 4 years and 6 months).</p> <p>Median Absolute Difference (MAD) = 1 year.</p> <p>Textual analysis of small sample of cases suggests consistency in approach to aggravating and mitigating factors.</p>
Categorisation of the objective seriousness of the offence	<p>No. Textual analysis of small sample of cases suggests offenders with higher levels of culpability (those at higher role in offender hierarchy) are sentenced similarly to those in comparable role charged with cultivating a commercial quantity of a narcotic plant.</p> <p>Highest median compared with other offences viewed by the community to be as serious (recklessly causing serious injury, armed robbery, sexual penetration with a child 12–16 under care, supervision, or authority).</p>

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 186 charges of trafficking in a commercial quantity of a drug of dependence were sentenced in the higher courts. Trafficking in a commercial quantity of a drug of dependence carries a maximum penalty of 25 years' imprisonment.

Imprisonment was the most common sentence imposed for charges, and 94% of sentences imposed were immediate custodial sentences (Table A32).

Table A32: Number and percentage of charges of trafficking in a commercial quantity of a drug of dependence, by sentence type imposed, 2010–11 to 2014–15

Sentence type	Number	Percentage
Imprisonment	166	89%
Partially suspended sentence	8	4%
Community correction order	7	4%
Wholly suspended sentence	5	3%
Total	186	100%

The immediate custodial sentences imposed over the five years ranged from 4 months to 10 years (Table A33). The median custodial sentence length of 4 years is 16% of the maximum penalty.

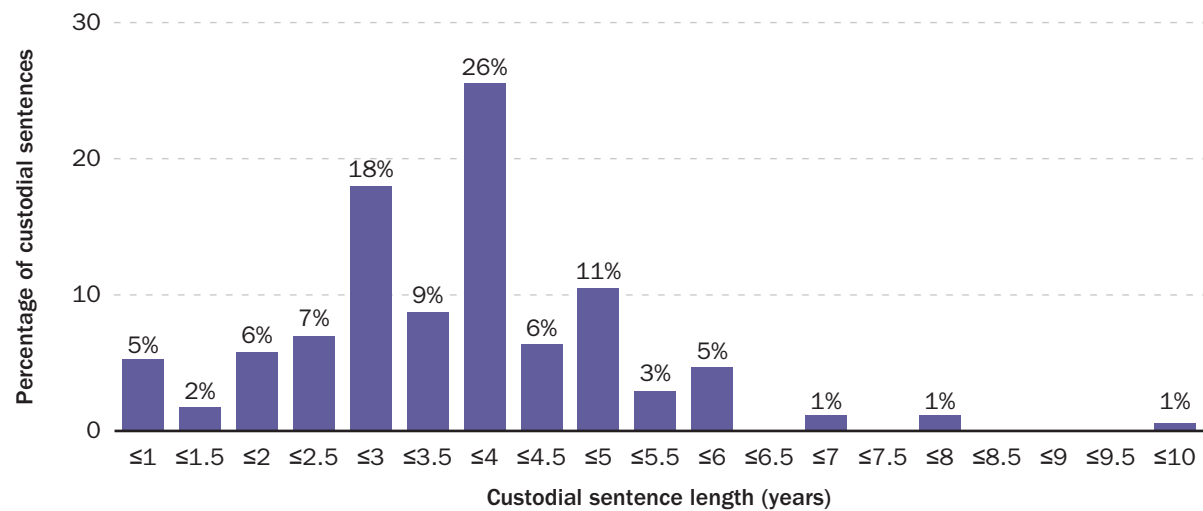
Table A33: Descriptive statistics of immediate custodial sentences imposed for charges of trafficking in a commercial quantity of a drug of dependence, 2010–11 to 2014–15

Statistic	Value
Total charges	186
Immediate custodial sentences	171
<i>Percentage immediate custodial^a</i>	92%
Shortest	4 months
Median	4 years
Longest	10 years
Years from median to maximum penalty	21 years
Median % of maximum penalty	16%

a. Three sentences of aggregate imprisonment are excluded from the sentence length analysis that follows.

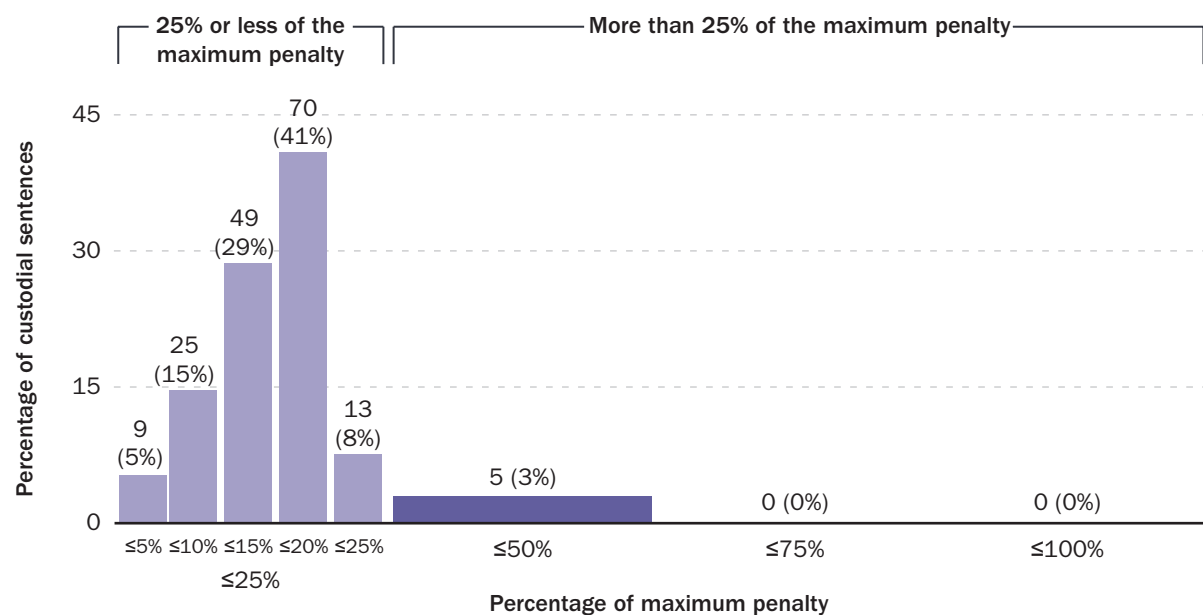
The distribution of immediate custodial sentence lengths in Figure A61 shows that sentences between 3 years and 6 months and 4 years were most common, and 11% of sentences were over 5 years.

Figure A61: Percentage of immediate custodial sentences imposed for charges of trafficking in a commercial quantity of a drug of dependence, by sentence length, 2010–11 to 2014–15



As a percentage of the 25-year maximum penalty for trafficking in a commercial quantity of a drug of dependence, 97% of immediate custodial sentences imposed were 25% of the maximum penalty or less (Figure A62).

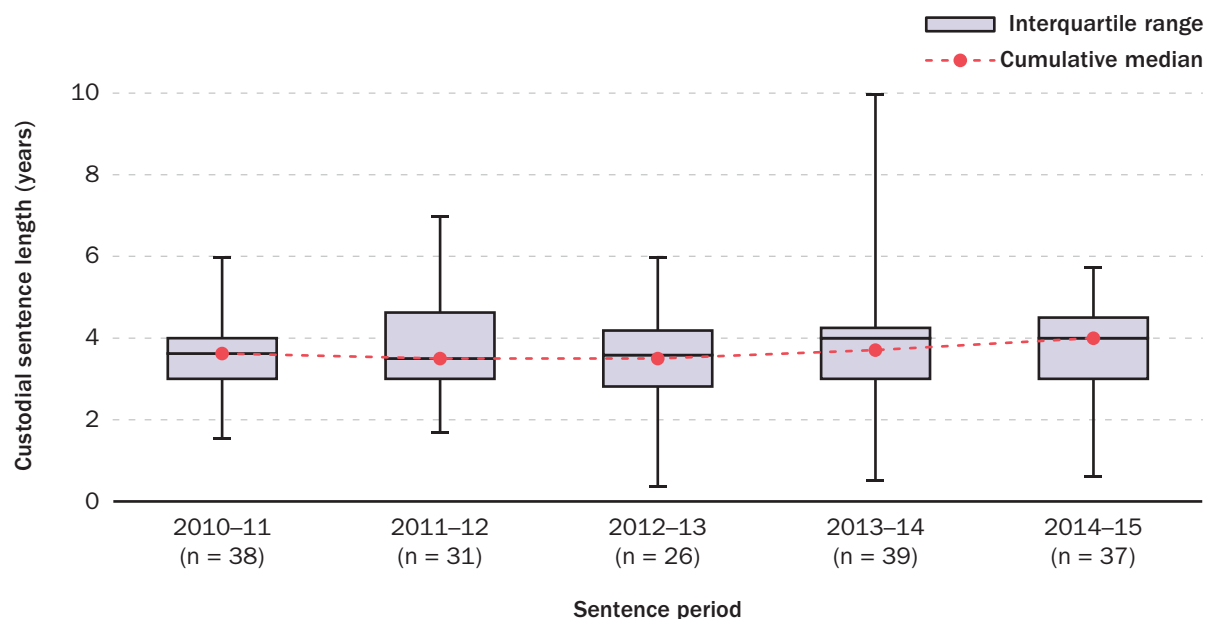
Figure A62: Percentage of immediate custodial sentences imposed for charges of trafficking in a commercial quantity of a drug of dependence, by the proportion of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 171 (92%) custodial sentences imposed over the entire period had a median length of 4 years (Table A33). Figure A63 shows that the charges sentenced in each financial year established a cumulative median sentence length of 4 years only in 2014–15, with yearly distributions varying slightly.

Figure A63: Yearly distribution and cumulative median immediate custodial sentence length imposed for charges of trafficking in a commercial quantity of a drug of dependence, by financial year, 2010–11 to 2014–15



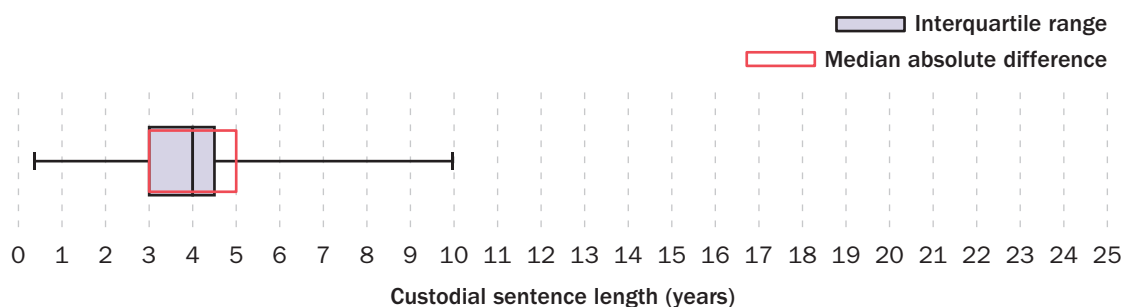
Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A64 shows these two measures for the offence of trafficking in a commercial quantity of a drug of dependence.

The IQR was 1 year and 6 months, and it ranged from 3 years to 4 years and 6 months.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from zero to 6 years. The median of these differences, the MAD value, is 1 year. This means that 50% of custodial sentence lengths are less than 1 year from the median (between 3 years and 5 years) and 50% are further than 1 year from the median.

Figure A64: Boxplot distribution of immediate custodial sentence lengths imposed for charges of trafficking in a commercial quantity of a drug of dependence, 2010–11 to 2014–15



Offence 17. Cultivating a large commercial quantity of a narcotic plant

Definition	Intentional cultivation of a narcotic plant (including sowing a seed, planting, growing, tending, nurturing, harvesting, grafting, or dividing) in not less than a large commercial quantity (currently 250kg or 1,000 plants), or attempting to do so.
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Offence characteristics

The offence is an indictable offence	Indictable offence.
The extent to which the offence is 'prevalent'	4 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015.
Objective elements involve a vulnerable victim	No.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	Yes. Aggravated by quantity.

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	<p>No. Community attitudes research (Sentencing Advisory Council, 2012):</p> <ul style="list-style-type: none"> • cultivation ranked low (level 5); • low levels of consensus; • indirect societal harms and no direct victims. <p>Tasmanian Jury Sentencing Study (drug offences) (Victorian Jury Sentencing Study did not report findings on drug offences).</p>
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	Yes. Research on potential psychological harms.
Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	<p>Yes. Maximum penalty = life imprisonment (created as a new aggravated offence in 2002).</p> <p>(Not a baseline offence.)</p>

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>Inconclusive. See <i>sentencing data below: 'distribution of sentences and comparison with maximum penalty'</i></p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> percentage: 100%; range: 2 years to 8 years and 6 months; median: 6 years and 9 months. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> median: 17%; percentage of sentences 25% or less: 100%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	<p>Yes. <i>Spiteri v The Queen</i> (2011) 206 A Crim R 528: comment that median sentence of 6 years and 6 months does not adequately reflect seriousness of large commercial quantity offences. Appeal was against sentence for cultivation of a large commercial quantity of a narcotic plant but median sentence taken from the Council's Sentencing Snapshot on sentencing for offence of trafficking in a large commercial quantity of a drug of dependence from 2004–05 to 2008–09.</p>
No evidence of change in current sentencing practices following the Court of Appeal's declaration or questioning	<p>Yes. See <i>sentencing data below: 'immediate custodial sentence lengths over time'</i></p> <p>Note very low number of charges.</p>

Problem with sentencing: evidence of inconsistency of approach

Treatment of a category of offenders within the offence category	<p>No. Textual analysis reveals consistent assessment of seriousness of categories of offenders (from crop-sitter to manager). Sample size very small.</p>
Weight given to aggravating and mitigating factors	<p>No. See <i>sentencing data below: 'measures of consistency'</i></p> <p>Interquartile range (IQR) = 2 years (5 years and 5 months to 7 years and five months).</p> <p>Median Absolute Difference (MAD) = 1 year.</p> <p>Textual analysis suggests consistency in approach to aggravating and mitigating factors.</p>
Categorisation of the objective seriousness of the offence	<p>No. Textual analysis of small sample of cases suggests offenders with higher levels of culpability (those at higher role in offender hierarchy) are sentenced similarly to those in comparable role charged with trafficking in a large commercial quantity of a drug of dependence.</p> <p>Median sentence is higher than intentionally causing serious injury and rape.</p>

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 4 charges of cultivating a large commercial quantity of a narcotic plant were sentenced in the higher courts. Cultivating a large commercial quantity of a narcotic plant carries a maximum penalty of life imprisonment.

Imprisonment was imposed for all charges of this offence (Table A34).¹⁰⁵⁰

Table A34: Number and percentage of charges of cultivating a large commercial quantity of a narcotic plant, by sentence type imposed, 2010–11 to 2014–15

Sentence type	Number	Percentage
Imprisonment	4	100%

The immediate custodial sentences imposed over the five years ranged from 2 years to 8 years and 6 months (Table A35). The median custodial sentence length of 6 years and 9 months is 17% of the maximum penalty.

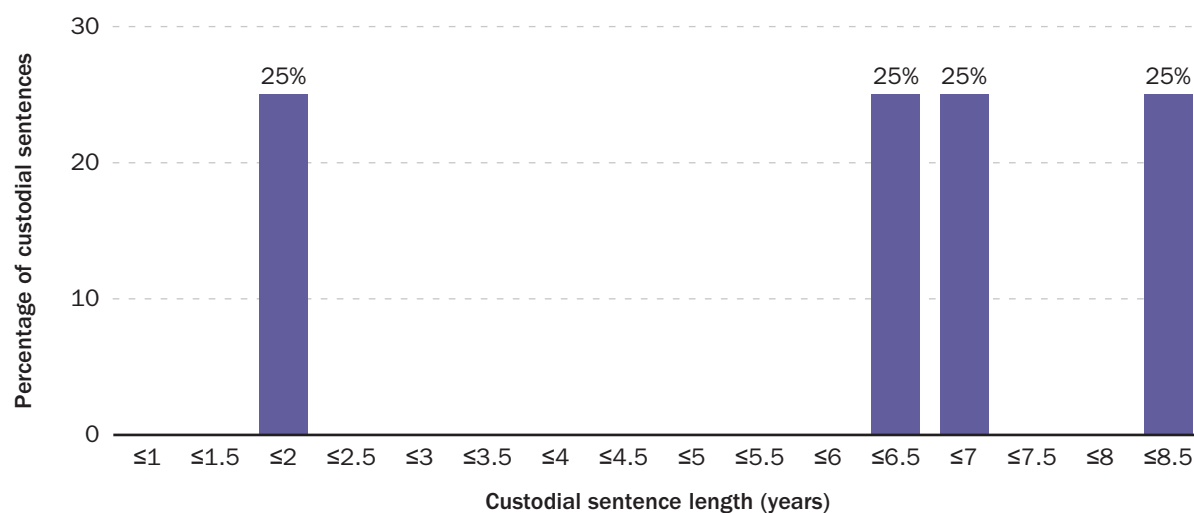
Table A35: Descriptive statistics of immediate custodial sentences imposed for charges of cultivating a large commercial quantity of a narcotic plant, 2010–11 to 2014–15

Statistic	Value
Total charges	4
Immediate custodial sentences	4
Percentage immediate custodial	100%
Shortest	2 years
Median	6 years and 9 months
Longest	8 years and 6 months
Years from median to maximum penalty	33 years and 3 months
Median % of maximum penalty	17%

¹⁰⁵⁰ There were no aggregate or mixed sentences imposed for this offence in the period.

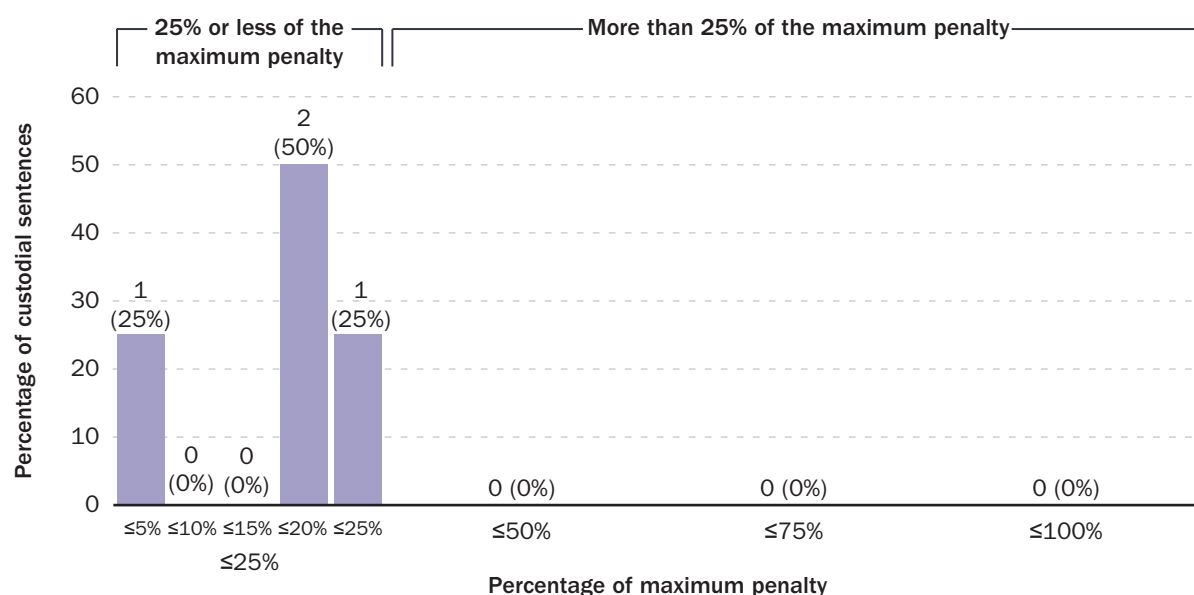
The distribution of immediate custodial sentence lengths in Figure A65 shows that sentences over 6 years were most common. One of the 4 custodial sentences (25%) was 2 years.

Figure A65: Percentage of immediate custodial sentences imposed for charges of cultivating a large commercial quantity of a narcotic plant, by sentence length, 2010–11 to 2014–15



As a percentage of the life imprisonment maximum penalty for cultivating a large commercial quantity of a narcotic plant, all custodial sentences imposed were 25% of the maximum penalty or less (Figure A66).

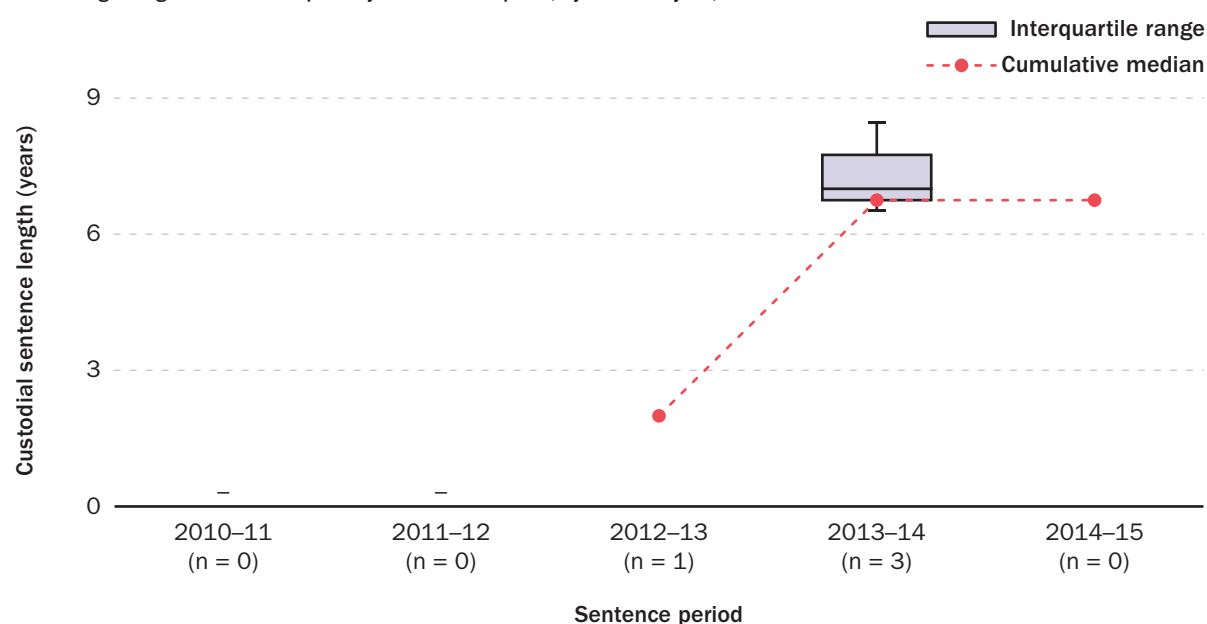
Figure A66: Percentage of immediate custodial sentences imposed for charges of cultivating a large commercial quantity of a narcotic plant, by the proportion of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 4 (100%) immediate custodial sentences imposed over the entire period had a median length of 6 years and 9 months (Table A35). Sentences were only imposed in 2012–13 and 2013–14. The 3 sentences imposed in 2013–14 were much higher than the sole sentence imposed in 2012–13, and they increased the cumulative median sentence length (Figure A67).

Figure A67: Yearly distribution and cumulative median immediate custodial sentence length imposed for charges of cultivating a large commercial quantity of a narcotic plant, by financial year, 2010–11 to 2014–15



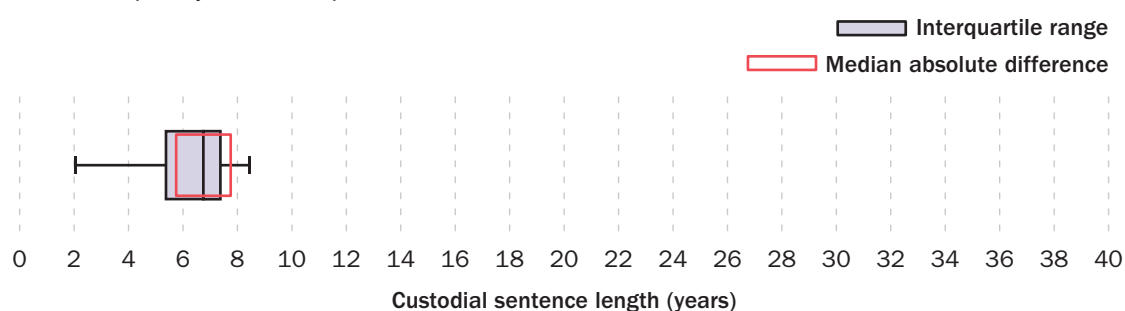
Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A68 shows these two measures for the offence of cultivating a large commercial quantity of a narcotic plant.

The IQR was 2 years, and it ranged from 5 years and 5 months to 7 years and 5 months.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from 3 months to 4 years and 9 months. The median of these differences, the MAD value, is 1 year. This means that 50% of custodial sentence lengths are less than 1 year from the median (between 5 years and 9 months and 7 years and 9 months) and 50% are further than 1 year from the median.

Figure A68: Boxplot distribution of immediate custodial sentence lengths imposed for charges of cultivating a large commercial quantity of a narcotic plant, 2010–11 to 2014–15



Offence 18. Cultivating a commercial quantity of a narcotic plant

Definition	Intentional cultivation of a narcotic plant (including sowing a seed, planting, growing, tending, nurturing, harvesting, grafting, or dividing) in not less than a commercial quantity (currently 25kg or 100 plants), or attempting to do so.
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Offence characteristics

The offence is an indictable offence	Indictable offence.
The extent to which the offence is 'prevalent'	447 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015.
Objective elements involve a vulnerable victim	No.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	Yes. Aggravated by quantity.

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	<p>No. Community attitudes research (Sentencing Advisory Council, 2012):</p> <ul style="list-style-type: none"> • cultivation ranked low (level 5); • low levels of consensus; • indirect societal harms and no direct victims. <p>Tasmanian Jury Sentencing Study (drug offences) (Victorian Jury Sentencing Study did not report findings on drug offences).</p>
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	Yes. Research on potential psychological harms.
Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	<p>Yes. Maximum penalty = 25 years.</p> <p>(Not a baseline offence.)</p>

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>Inconclusive. See sentencing data below: 'distribution of sentences and comparison with maximum penalty'</p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> percentage: 86%; range: 2 months to 5 years and 3 months; median: 2 years. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> median: 8%; percentage of sentences 25% or less: 100%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	<p>No. Court of Appeal has been invited to consider the adequacy of current sentencing practices in cultivating a commercial quantity of a narcotic plant cases pursuant to the appeal of <i>Nam Son Nguyen v The Queen</i> S APCR 2015 0199.</p> <p>See also <i>Nguyen v The Queen</i> (2010) 208 A Crim R 464.</p>
No evidence of change in current sentencing practices following the Court of Appeal's declaration or questioning	<p>No. See sentencing data below: 'immediate custodial sentence lengths over time'</p> <p>n.a.</p>

Problem with sentencing: evidence of inconsistency of approach

Treatment of a category of offenders within the offence category	<p>No. Textual analysis of small sample of cases suggests consistent assessment of seriousness of categories of offenders (from crop-sitter to manager).</p>
Weight given to aggravating and mitigating factors	<p>No. See sentencing data below: 'measures of consistency'</p> <p>Interquartile range (IQR) = 10 months (1 year and 8 months to 2 years and 6 months).</p> <p>Median Absolute Difference (MAD) = 6 months.</p> <p>Textual analysis of small sample of cases suggests consistency in approach to aggravating and mitigating factors.</p>
Categorisation of the objective seriousness of the offence	<p>No. Textual analysis of small sample of cases suggests offenders with higher levels of culpability (those at higher role in offender hierarchy) are sentenced similarly to those in comparable role charged with trafficking in a commercial quantity of a drug of dependence.</p>

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 447 charges of cultivating a commercial quantity of a narcotic plant were sentenced in the higher courts. Cultivating a commercial quantity of a narcotic plant carries a maximum penalty of 25 years' imprisonment.

Imprisonment was the most common sentence imposed for charges, and 88% of sentences were immediate custodial sentences (Table A36).

Table A36: Number and percentage of charges of cultivating a commercial quantity of a narcotic plant, by sentence type imposed, 2010–11 to 2014–15

Sentence type	Number	Percentage
Imprisonment	316	71%
Partially suspended sentence	75	17%
Community-correction order	5	1%
Youth centre order ^a	2	<1%
Wholly suspended sentence	48	11%
Fine	1	<1%
Total	447	100%

a. 'Youth centre order' comprises youth training centre and youth justice centre orders.

The immediate custodial sentences imposed over the five years ranged from 2 months to 5 years and 3 months (Table A37). The median custodial sentence length of 2 years is 8% of the maximum penalty.

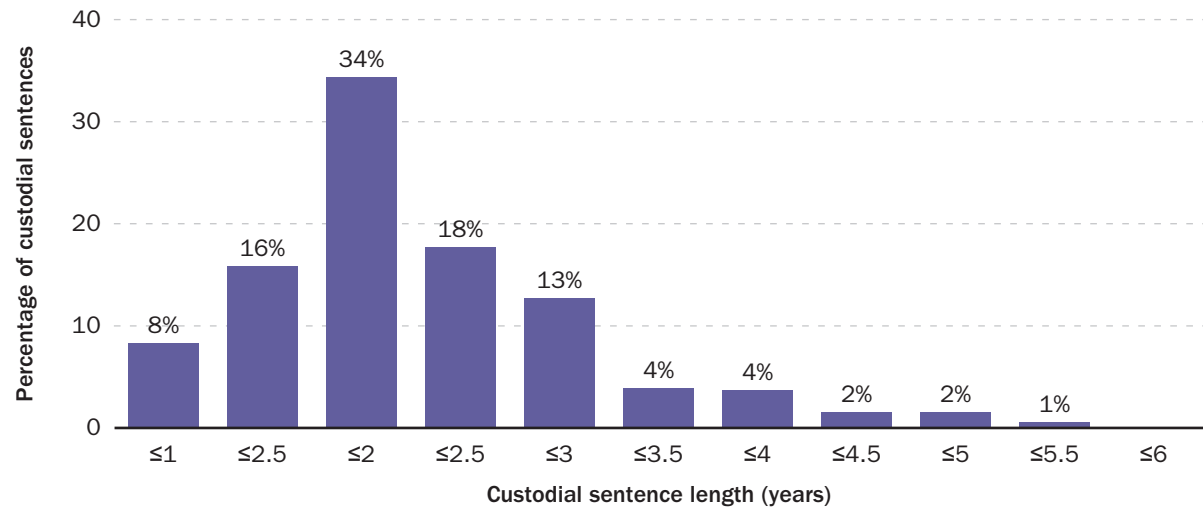
Table A37: Descriptive statistics of immediate custodial sentences imposed for charges of cultivating a commercial quantity of a narcotic plant, 2010–11 to 2014–15

Statistic	Value
Total charges	447
Immediate custodial sentences	385
Percentage immediate custodial ^a	86%
Shortest	2 months
Median	2 years
Longest	5 years and 3 months
Years from median to maximum penalty	23 years
Median % of maximum penalty	8%

a. Six aggregate sentences of imprisonment and 2 aggregate partially suspended sentences imposed are excluded from the sentence length analysis that follows.

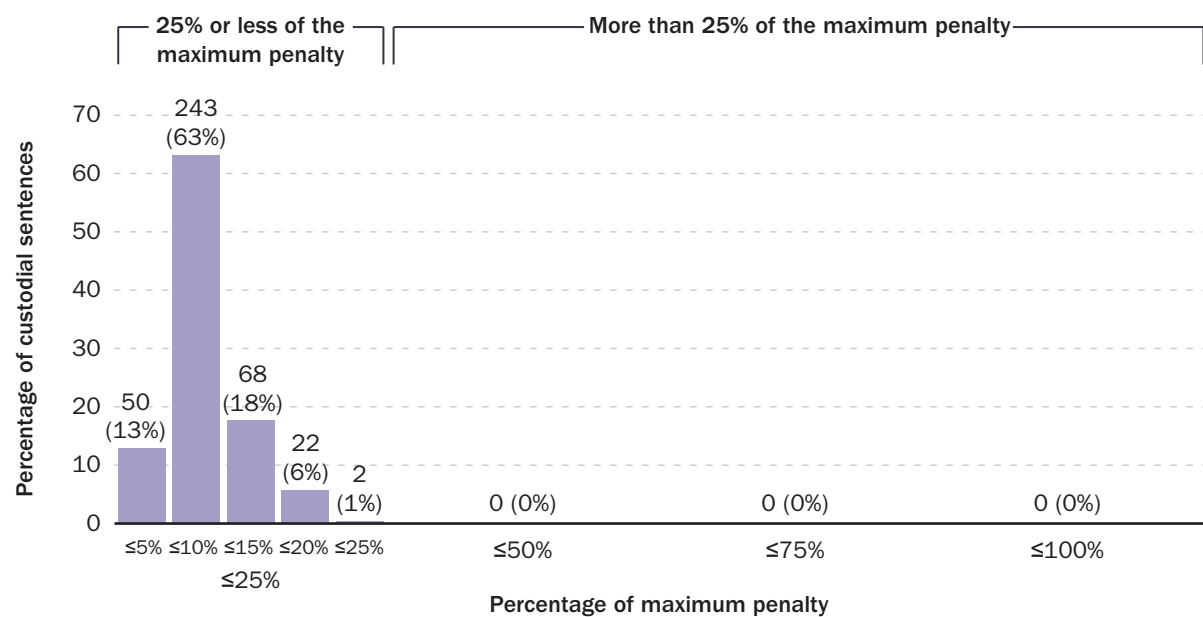
The distribution of immediate custodial sentence lengths in Figure A69 shows that sentences between 1 year and 6 months and 2 years were most common, and 11% of sentences were over 3 years.

Figure A69: Percentage of immediate custodial sentences imposed for charges of cultivating a commercial quantity of a narcotic plant, by sentence length, 2010–11 to 2014–15



As a percentage of the 25-year maximum penalty for cultivating a commercial quantity of a narcotic plant, all custodial sentences imposed were less than 25% of the maximum penalty (Figure A70).

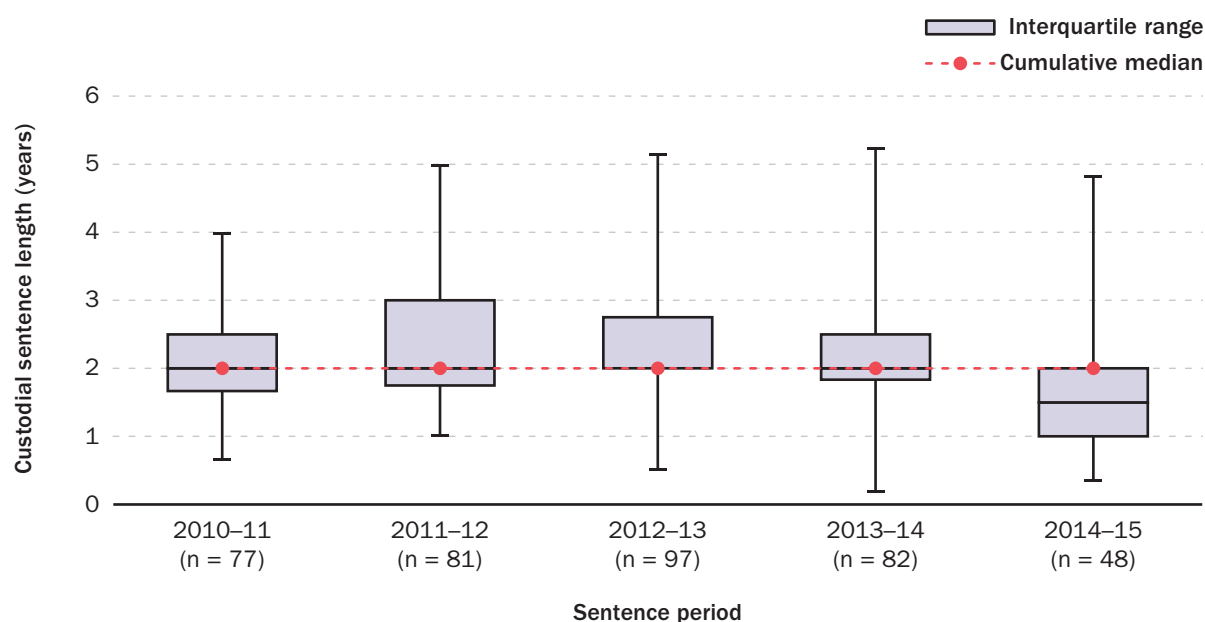
Figure A70: Percentage of immediate custodial sentences imposed for charges of cultivating a commercial quantity of a narcotic plant, by the proportion of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 385 (86%) custodial sentences imposed over the entire period had a median length of 2 years (Table A37). Figure A71 shows that the charges sentenced in each financial year established a cumulative median sentence length of 2 years for the entire five-year period. Each year to 2013–14 had a median sentence length of 2 years, while the median sentence length was 1 year and 6 months in 2014–15.

Figure A71: Yearly distribution and cumulative median immediate custodial sentence length imposed for charges of cultivating a commercial quantity of a narcotic plant, by financial year, 2010–11 to 2014–15



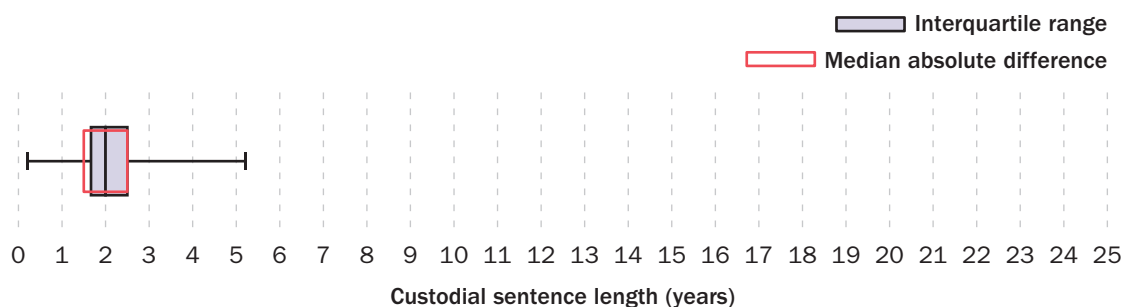
Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A72 shows these two measures for the offence of cultivating a commercial quantity of a narcotic plant.

The IQR was 10 months, and it ranged from 1 year and 8 months to 2 years and 6 months.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from zero to 3 years and 3 months. The median of these differences, the MAD value, is 6 months. This means that 50% of custodial sentence lengths are less than 6 months from the median (between 1 year and 6 months and 2 years and 6 months) and 50% are further than 6 months from the median.

Figure A72: Boxplot distribution of immediate custodial sentence lengths imposed for charges of cultivating a commercial quantity of a narcotic plant, 2010–11 to 2014–15



Drug offences: sample case analysis

Table A38: Sample case analysis for charges of cultivating a commercial quantity of a narcotic plant, 2010–11 to 2014–15

Data point	Sentence on charge	Number of cases examined	Plea	Case identifier	Case notes
Lowest Total number of charges at data point: 1	2 months	1	Guilty (at committal mention)	D1	Offender was a 'house sitter'; was not to benefit financially from the crop; only commercial benefit was to live rent-free; homeless at the time he was recruited; significant physical disability.
First quartile Total number of charges at data point: 21	1 year and 8 months	2	Guilty (at committal mention)	D2	Offender was essentially a 'night watchman'; paid a few hundred dollars a week to be in the house at night; but was also involved in finding a tenant who installed the crop; therefore had 'more than a transitory role'; impoverished background.
			Guilty (at committal mention)	D3	Offender was a crop-sitter with no commercial interest in the crop; was crop sitting for stable accommodation; several mitigating factors; impoverished background; to be deported after sentence.
Median Total number of charges at data point: 91	2 years	2	Guilty (late)	D4	Offender was jointly responsible with co-offender for establishment of a 'sophisticated' cannabis cultivation operation; high moral culpability; delay in prosecution.
			Guilty	D5	Two crop sitters; both offered accommodation and payment for roles; compelling mitigating circumstances for both offenders, including impoverished backgrounds.
Third quartile Total number of charges at data point: 38	2 years and 6 months	1	Guilty (early)	D6	Offender was 'cultivator and maintainer of crop over two months'; to be deported after sentence; impoverished background and circumstances.
Highest Total number of charges at data point: 1	5 years and 3 months	1	Guilty (early)	D7	Set up 'sophisticated and well maintained' hydroponic crop with one co-offender; priors for drug offences; mental health issues; sentenced as a serious drug offender.

Table A39: Sample case analysis for charges of cultivating a large commercial quantity of a narcotic plant, 2010–11 to 2014–15¹⁰⁵¹

Data point	Sentence on charge	Number of cases examined	Plea	Case identifier	Case notes
Lowest Total number of charges at data point: 1	2 years	1	Guilty	D8	Offender tended to crop 3–4 days a week to pay off gambling debt; large crop; to be deported after sentence.
– Total number of charges at data point: 1	6 years and 6 months	1	Guilty (after committal)	D9	Offender at the ‘low non-entrepreneurial end of this drug cultivation operation’ with co-offender (see D10); ‘contributed to an enterprise of a very large scale’; involved for monetary reward; ‘sophisticated and prolonged’ operation with expectation of very high profit to controllers; mitigating circumstances (offender was a refugee whose claim for asylum was rejected; borderline intellectual disability).
– Total number of charges at data point: 1	7 years	1	Guilty (early)	D10	Offender jointly involved in a crop with co-offender as part of a very large-scale enterprise (see D9); not involved in financing, leasing of the property, or setting up of the crop (reported to those higher up); no priors; ‘not particularly remorseful’.
Highest Total number of charges at data point: 1	8 years and 6 months	1	Guilty (late)	D11	Offender was ‘an overseer of some kind’, but still taking direction from ‘someone above in chain of command’; had ‘a managerial role’ (had several phones, changed numberplates); no credit for any genuine remorse; ‘largest identified quantity of cannabis cultivated or trafficked since the introduction of the large commercial quantity category in 2002’.

¹⁰⁵¹ Only four charges of this offence were sentenced within the reference period; all have been examined.

Table A40: Sample case analysis for charges of trafficking in a commercial quantity of a drug of dependence, 2010–11 to 2014–15

Data point	Sentence on charge	Number of cases examined	Plea	Case identifier	Case notes
Lowest Total number of charges at data point: 1	125 days ^a (combined with CCO with a condition of 200 work hours over 2 years)	1	Guilty (early)	D12	Offender's role was that of a courier (although the judge does not state this explicitly); youthful offender (21 years old); good prospects of rehabilitation.
First quartile Total number of charges at data point: 27	3 years	1	Guilty	D13	Offender 'involved in the business of trafficking' – manufacture and distribution (no clear statement made on place of offence in hierarchy of seriousness); offender addicted to methamphetamine during offending period.
Median Total number of charges at data point: 40	4 years	1	Guilty (early)	D14	No comment made on role as such, but offender was found in possession of an amount just over the commercial quantity; other possessions suggesting involvement in trafficking; offender addicted to methamphetamine during offending period (but prospects of rehabilitation noted as good).
Third quartile Total number of charges at data point: 9	4 years and 6 months	1	Guilty (late)	D15	Offender in control of 'a sophisticated drug manufacture and distribution network'; directed and supervised others; however, very significant mitigating factors (life expectancy very short due to illness; had cooperated with authorities in relation to a murder investigation); sentence altered on appeal on basis of fresh evidence that offender only had 3–6 months to live.
Highest Total number of charges at data point: 1	10 years	1	Not guilty	D16	Offender 'involved in virtually every facet of a trafficking business ... in the nature of high level organised crime'; professional involvement in the highest levels of the drug trade.

a. Coded in the data as 4 months and 3 days.

Table A41: Sample case analysis for charges of trafficking in a large commercial quantity of a drug of dependence, 2010–11 to 2014–15

Data point	Sentence on charge	Number of cases examined	Plea	Case identifier	Case notes
Lowest Total number of charges at data point: 1	2 years and 6 months	1	Guilty	D17	Offender tried to extend his own supplies of amphetamines to make it go further; 'no element of commerciality by conduct'; 'very amateurish set up'; heavily addicted to amphetamines; mitigating circumstances.
First quartile Total number of charges at data point: 6	5 years	1	Guilty	D18	Offender was an 'active participant', and 'more than a go-between' as part of a 'commercial endeavour'; suffering from bereavement following death of father over period of offending; mental functioning impaired at the time of offending; reduced moral culpability (to some extent).
Median Total number of charges at data point: 10	7 years	1	Guilty (early)	D19	Offender a 'trusted lieutenant working hand in glove with co-offender'; suffering from drug addiction; objective gravity of offence described as 'substantial'.
Third quartile Total number of charges at data point: 5	8 years and 6 months	1	Guilty	D20	Offender identified as a 'wholesaler' to 'make money rather than merely to support [offender's] own drug habit; was 'head' of the business; 'played a leading and very active role in the planning for, and operation of, that business'; drug user; adjustment disorder with anxiety.
Highest Total number of charges at data point: 1	20 years	1	Guilty (application to change plea was refused)	D21	Offender was the principal of a large drug enterprise; conducted self as a 'manager'; offending over many years; significant priors for similar offending; coronary heart disease; sentenced as a serious drug offender.

Appendix 7:

Other offences data

Offence 19. Armed robbery

Definition	Taking something that belongs to another person while being armed with a firearm, weapon, or explosive (or imitation) and threatening or using force against that person, and not intending to give the property back.
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Offence characteristics

The offence is an indictable offence	Indictable offence.
The extent to which the offence is 'prevalent'	1,937 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015.
Objective elements involve a vulnerable victim	No.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	Yes. Aggravated form of robbery.

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	Inconclusive. Community attitudes research (Sentencing Advisory Council, 2012): <ul style="list-style-type: none"> ranked the same as recklessly causing serious injury (level 7); medium levels of consensus; high culpability and high harm.
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	Inconclusive. Consistently viewed as a prevalent offence that requires deterrent sentences: <i>R v Pratt</i> [2003] VSCA 186 (31 October 2003).
Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	Yes. Maximum penalty = 25 years (increased from 20 years in 1997). (Not a baseline offence.)

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>Inconclusive. See <i>sentencing data below: 'distribution of sentences and comparison with maximum penalty'</i></p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> percentage: 82%; range: 1 month to 14 years and 2 months; median: 2 years and 6 months. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> median: 10%; percentage of sentences 25% or less: 98%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	No.
No evidence of change in current sentencing practices following the Court of Appeal's declaration or questioning	<p>No. See <i>sentencing data below: 'immediate custodial sentence lengths over time'</i></p> <p>n.a.</p>

Problem with sentencing: evidence of inconsistency of approach

Treatment of a category of offenders within the offence category	No.
Weight given to aggravating and mitigating factors	<p>No. See <i>sentencing data below: 'measures of consistency'</i></p> <p>Interquartile range (IQR) = 1 year and 6 months (2 years to 3 years and 6 months).</p> <p>Median Absolute Difference (MAD) = 8 months.</p>
Categorisation of the objective seriousness of the offence	<p>Inconclusive. Median higher than some offences viewed by the community to be as serious (recklessly causing serious injury) but lower than others (sexual penetration with a child 12–16 under care, supervision, or authority, trafficking in a commercial quantity of a drug of dependence).</p>

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 1,937 charges of armed robbery were sentenced in the higher courts. Armed robbery carries a maximum penalty of 25 years' imprisonment.

Imprisonment was the most common sentence imposed for charges, and 86% of all sentences imposed were immediate custodial sentences (Table A42).

Table A42: Number and percentage of charges of armed robbery, by sentence type imposed, 2010–11 to 2014–15

Sentence type ^a	Number	Percentage
Imprisonment	1,445	75%
Partially suspended sentence	6	<1%
Community order	192	10%
Intensive correction order	6	<1%
Youth centre	210	11%
Wholly suspended sentence	72	4%
Fine	1	<1%
Other	4	<1%
Total	1,937	100%

a. 'Community order' comprises community correction orders and community-based orders. 'Youth centre' comprises youth training centre orders and youth justice centre orders. 'Other' sentences comprise a hospital security order and adjourned undertakings with and without conviction.

The custodial sentences imposed over the five years ranged from 1 month to 14 years and 2 months (Table A43). The median custodial sentence length of 2 years and 6 months is 10% of the maximum penalty.

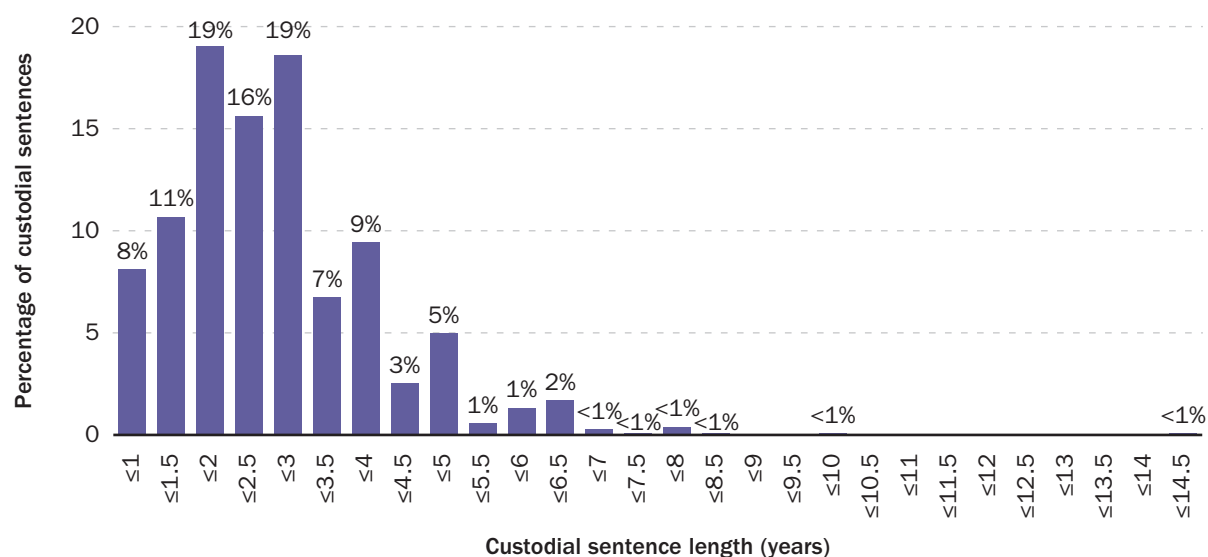
Table A43: Descriptive statistics of immediate custodial sentences imposed for charges of armed robbery, 2010–11 to 2014–15

Statistic	Value
Total charges	1,937
Immediate custodial sentences	1,594
Percentage immediate custodial ^a	82%
Shortest	1 month
Median	2 years and 6 months
Longest	14 years and 2 months
Years from median to maximum penalty	22 years and 6 months
Median % of maximum penalty	10%

a. Sixty-eight aggregate sentences of imprisonment and 6 aggregate sentences of youth justice centre orders are excluded from the sentence length analysis.

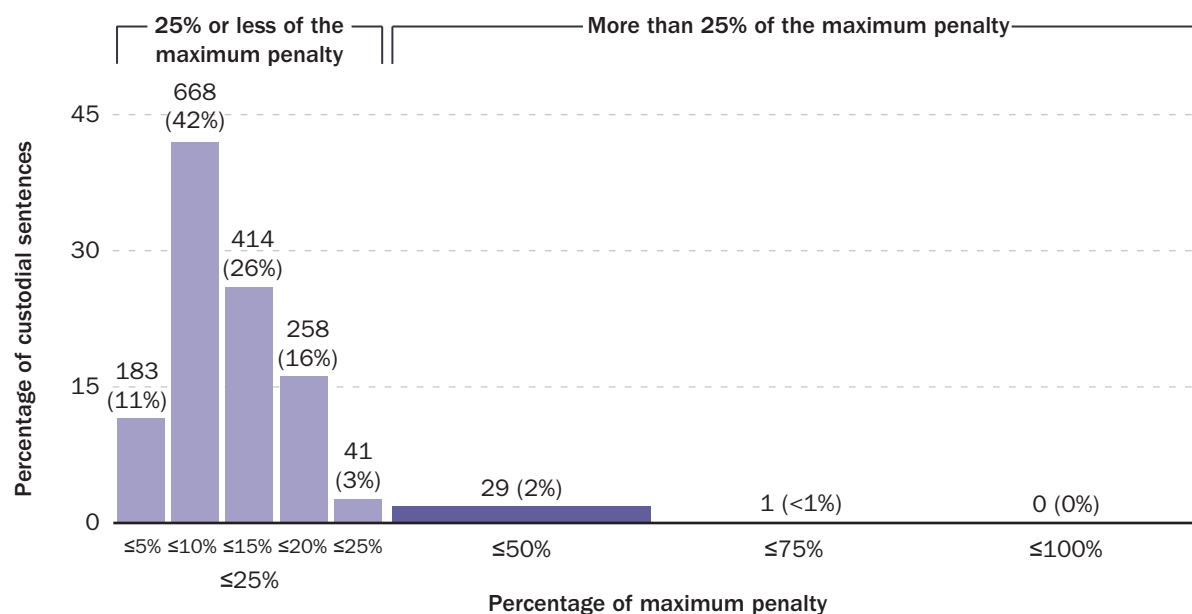
The distribution of custodial sentence lengths in Figure A73 shows that sentences between 1 year and 6 months and 2 years were most common. Overall, 12% of sentences were over 4 years.

Figure A73: Percentage of immediate custodial sentences imposed for charges of armed robbery, by sentence length, 2010–11 to 2014–15



In terms of the 25-year maximum penalty for armed robbery, 98% of custodial sentences were 25% of the maximum penalty or less, with 53% of sentences being 10% of the maximum penalty or less (Figure A74).

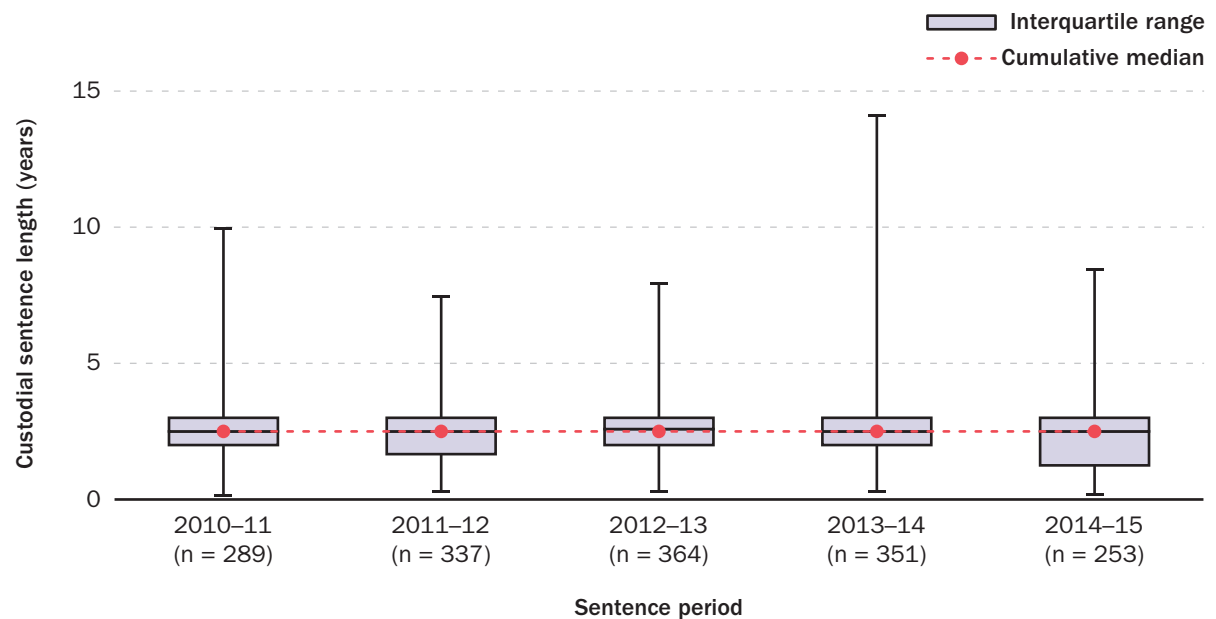
Figure A74: Percentage of immediate custodial sentences imposed for charges of armed robbery, by the proportion of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 1,594 (82%) custodial sentences imposed over the entire period had a median length of 2 years and 6 months (Table A43). Figure A75 shows that the charges sentenced in each financial year established a steady cumulative median sentence length of 2 years and 6 months for the entire period. The median custodial sentence imposed in each interval was also consistent at 2 years and 6 months for each year except 2012–13.

Figure A75: Yearly distribution and cumulative median immediate custodial sentence length imposed for charges of armed robbery, by financial year, 2010–11 to 2014–15



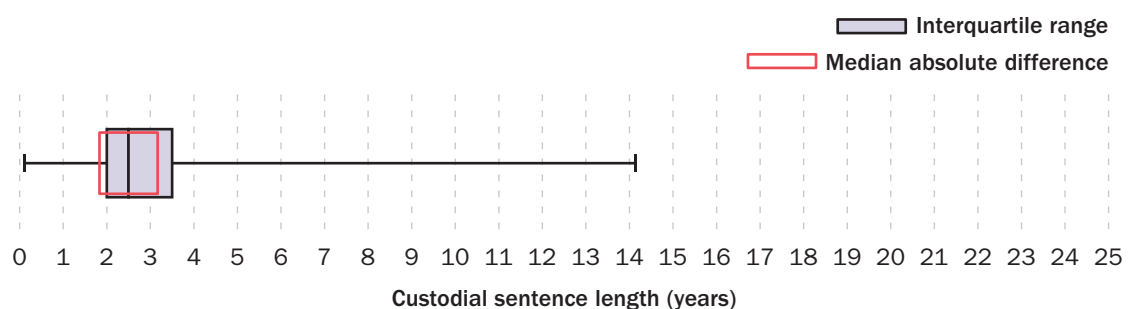
Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A76 shows these two measures for the offence of armed robbery.

The IQR was 1 year and 6 months, and it ranged from 2 years to 3 years and 6 months.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from zero to 11 years and 8 months. The median of these differences, the MAD value, is 8 months. This means that 50% of custodial sentence lengths are less than 8 months from the median (between 1 year and 10 months and 3 years and 2 months) and 50% are further than 8 months from the median.

Figure A76: Boxplot distribution of immediate custodial sentence lengths imposed for charges of armed robbery, 2010–11 to 2014–15



Offence 20. Aggravated burglary

Definition	<p>Going into a building without permission in order to commit an assault or a property damage offence punishable by 5 or more years' imprisonment while:</p> <ul style="list-style-type: none"> • armed with a firearm, weapon, or explosive (or imitation); or • knowing that another person was present or being reckless as to whether or not another person was present.
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Offence characteristics

The offence is an indictable offence	Indictable offence, triable summarily.
The extent to which the offence is 'prevalent'	<p>1,172 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015.</p> <p>1,271 charges sentenced in the Magistrates' Court between 1 July 2010 and 30 June 2015.</p>
Objective elements involve a vulnerable victim	No.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	Yes. Aggravated form of burglary.

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	<p>Yes. Community attitudes research (Sentencing Advisory Council, 2012):</p> <ul style="list-style-type: none"> • ranked the same as negligently causing serious injury, culpable driving, and manslaughter (level 8); • medium levels of consensus; • medium to low culpability and high physical harm.
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	Yes. <i>Director of Public Prosecutions v El Hajje</i> [2009] VSCA 160 (26 June 2009): recognised vulnerability of some victims in confrontational burglary situations (particularly where the offence is sexually motivated).
Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	<p>Yes. Maximum penalty = 25 years (increased from 15 years in 1997).</p> <p>(Not a baseline offence.)</p>

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>Yes. See sentencing data below: 'distribution of sentences and comparison with maximum penalty'</p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> percentage: 65%; range: 1 month to 9 years; median: 2 years and 6 months. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> median: 10%; percentage of sentences 25% or less: 99%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	<p>Yes. <i>Hogarth v The Queen</i> (2012) 37 VR 658: declaration that current sentencing practices are inadequate for serious cases of 'confrontational' aggravated burglary.</p> <p><i>Director of Public Prosecutions v Meyers</i> (2014) 44 VR 486: suggested that current sentencing practices constraints have been removed for all serious forms of the offence.</p> <p><i>Director of Public Prosecutions v El Hajje</i> [2009] VSCA 160 (26 June 2009); <i>Le v The Queen</i> [2010] VSCA 199 (20 July 2010): adequacy of current sentencing practices questioned.</p>
No evidence of change in current sentencing practices following the Court of Appeal's declaration or questioning	<p>Yes. See sentencing data below: 'immediate custodial sentence lengths over time'</p> <p>Slight increases in yearly distribution of median and cumulative median from 2013–14 to 2014–15. Detailed data analysis (Appendix 9) indicates that cumulative median sentences have only increased by 6 months for aggravated burglary since <i>Hogarth v The Queen</i> (2012) 37 VR 658.</p>
Problem with sentencing: evidence of inconsistency of approach	
Treatment of a category of offenders within the offence category	<p>Yes. Sentencing for serious forms of the offence inadequate: <i>Hogarth v The Queen</i> (2012) 37 VR 658.</p>
Weight given to aggravating and mitigating factors	<p>Inconclusive. See sentencing data below: 'measures of consistency'</p> <p>Interquartile range (IQR) = 1 year and 6 months (1 year and 6 months to 3 years).</p> <p>Median Absolute Difference (MAD) = 10 months.</p>
Categorisation of the objective seriousness of the offence	<p>Yes. Lower median than offences ranked as equally serious (manslaughter, culpable driving causing death, and negligently causing serious injury) although higher median than that for indecent act with a child under 16.</p>

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 1,172 charges of aggravated burglary were sentenced in the higher courts. Charges of aggravated burglary carry a maximum penalty of 25 years' imprisonment.

Imprisonment was the most common sentence imposed for charges, and 69% of sentences imposed were immediate custodial sentences (Table A44).

Table A44: Number and percentage of charges of aggravated burglary, by sentence type imposed, 2010–11 to 2014–15

Sentence type ^a	Number	Percentage
Imprisonment	719	61%
Partially suspended sentence	38	3%
Community order	224	19%
Intensive correction order	5	<1%
Youth centre/supervision	53	5%
Wholly suspended sentence	127	11%
Fine	3	<1%
Adjourned undertaking with conviction	3	<1%
Total	1,172	100%

a. 'Community order' comprises community-based orders and community correction orders. 'Youth centre/supervision' comprises youth justice centre orders, youth training centre orders, and youth supervision orders.

The immediate custodial sentences imposed over the five years ranged from 1 month to 9 years (Table A45). The median custodial sentence length of 2 years and 6 months is 10% of the maximum penalty.

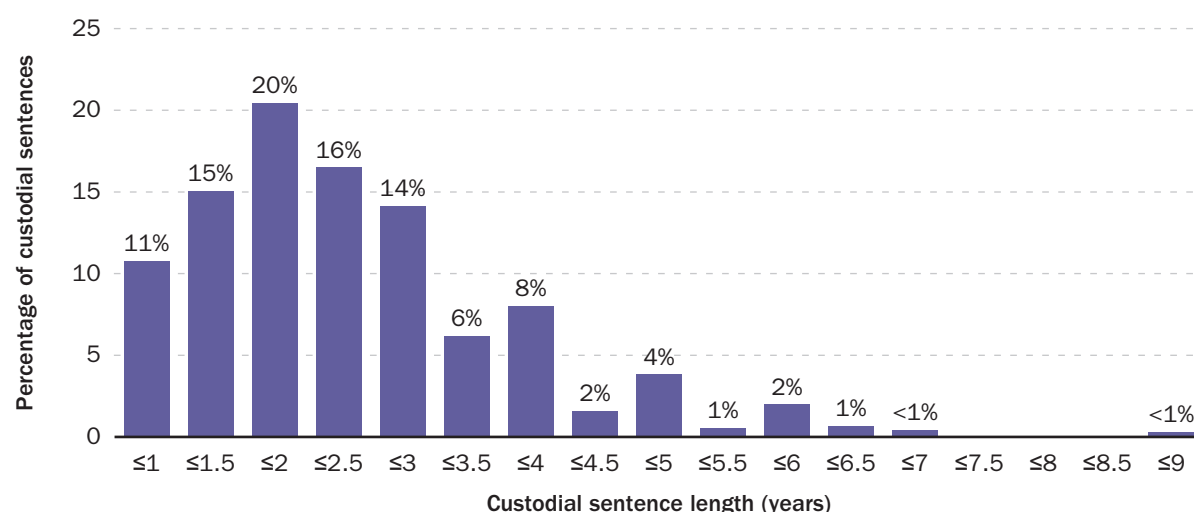
Table A45: Descriptive statistics of immediate custodial sentences imposed for charges of aggravated burglary, 2010–11 to 2014–15

Statistic	Value
Total charges	1,172
Immediate custodial sentences	765
Percentage immediate custodial ^a	65%
Shortest	1 month
Median	2 years and 6 months
Longest	9 years
Years from median to maximum penalty	22 years and 6 months
Median % of maximum penalty	10%

a. Forty-three aggregate imprisonment sentences and 5 aggregate youth justice centre orders are excluded from the sentence length analysis that follows.

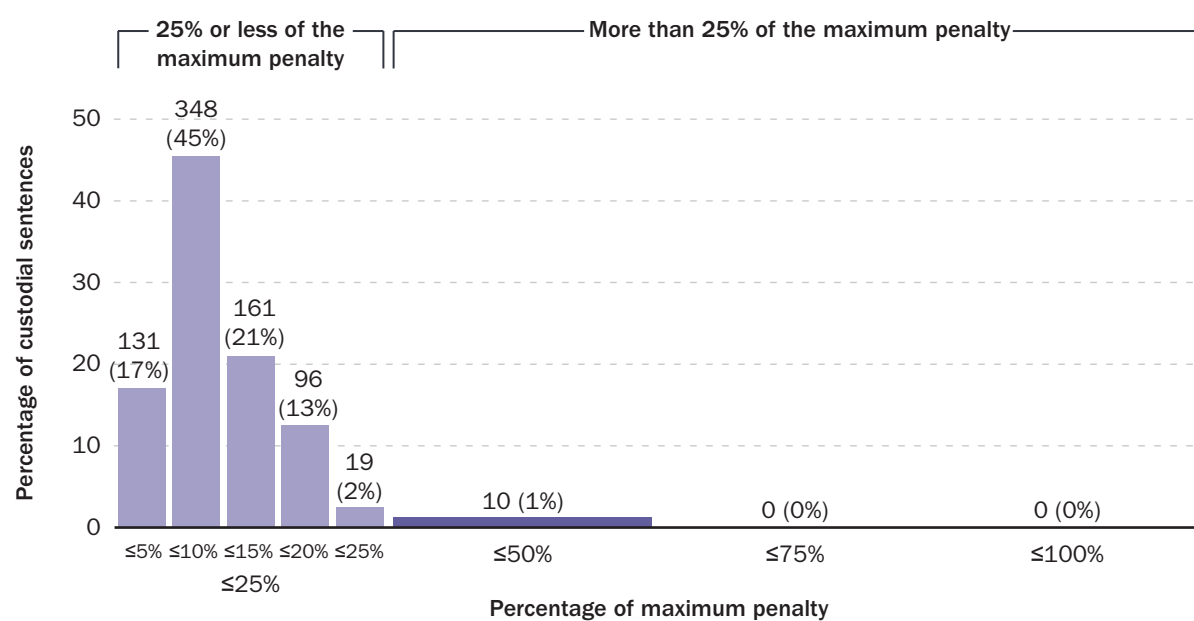
The distribution of immediate custodial sentence lengths in Figure A77 shows that sentences between 1 year and 6 months and 2 years were most common.

Figure A77: Percentage of immediate custodial sentences imposed for charges of aggravated burglary, by sentence length, 2010–11 to 2014–15



As a percentage of the 25-year maximum penalty for aggravated burglary, almost all immediate custodial sentences imposed were 25% of the maximum penalty or less, with 63% of sentences being 10% of the maximum penalty or less (Figure A78).

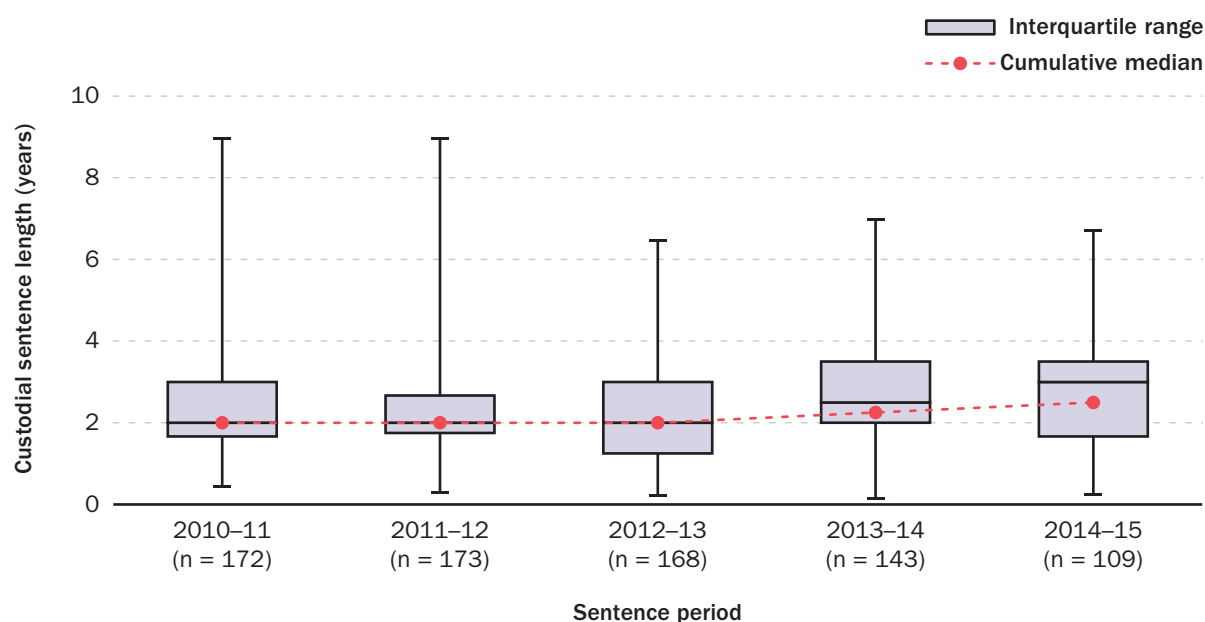
Figure A78: Percentage of immediate custodial sentences imposed for charges of aggravated burglary, by the proportion of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 765 (65%) custodial sentences imposed over the entire period had a median length of 2 years and 6 months (Table A45). Figure A79 shows that the charges sentenced in each financial year established a cumulative median sentence length of 2 years from 2010–11 to 2012–13 after which the median increased to 2 years and 6 months by 2014–15. Sentences of less than one year were imposed in each year.

Figure A79: Yearly distribution and cumulative median immediate custodial sentence length imposed for charges of aggravated burglary, by financial year, 2010–11 to 2014–15



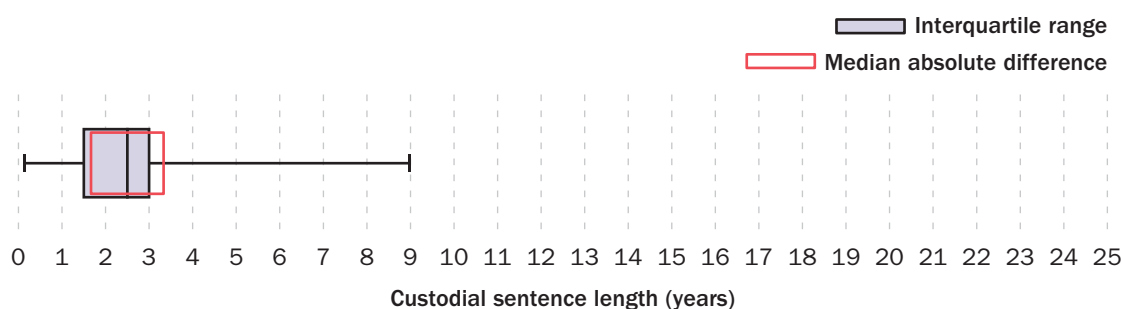
Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A80 shows these two measures for the offence of aggravated burglary.

The IQR was 1 year and 6 months, and it ranged from 1 year and 6 months to 3 years.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from zero to 6 years and 6 months. The median of these differences, the MAD value, is 10 months. This means that 50% of custodial sentences are within 10 months of the median sentence length (between 1 year and 8 months and 3 years and 4 months) and 50% are more than 10 months from the median.

Figure A80: Boxplot distribution of immediate custodial sentence lengths imposed for charges of aggravated burglary, 2010–11 to 2014–15



Offence 21. Perverting the course of justice

Definition	<p>Committing an act that is capable of perverting the course of justice and committing the act with that intent.</p> <p>Can be committed in a variety of circumstances including assisting an offender or witness to abscond, making a false accusation of a crime, concocting a false alibi, concealing or falsifying evidence, and attempting to bribe police, witnesses, or the judiciary.</p>
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Offence characteristics

The offence is an indictable offence	Indictable offence.
The extent to which the offence is 'prevalent'	137 charges sentenced in the higher courts between 1 July 2010 and 30 June 2015.
Objective elements involve a vulnerable victim	No.
The offence is an 'aggravated offence' (offence objectively more serious than a 'basic' version of the offence)	No.

Problem with sentencing: evidence of a lack of public confidence

Evidence from informed and structured community consultation of community views on sentencing/seriousness of the offence	No.
Offence involves a special risk of serious consequences to victims and the community, and there is a better understanding of such consequences	No.
Parliament's view of offence seriousness (significant or increased maximum penalty or other legislative reform, e.g.: baseline offence)	Yes. Maximum penalty = 25 years. (Not a baseline offence.)

Disparity between current sentencing practices and the community's and parliament's views of offence seriousness	<p>Inconclusive. See <i>sentencing data below: 'distribution of sentences and comparison with maximum penalty'</i></p> <p>Distribution of immediate custodial sentences:</p> <ul style="list-style-type: none"> percentage: 50%; range: 1 month to 8 years; median: 1 year. <p>Comparison with maximum penalty:</p> <ul style="list-style-type: none"> median: 4%; percentage of sentences 25% or less: 97%.
Court of Appeal declaration that current sentencing practices are inadequate or questioning of adequacy of current sentencing practices	No.
No evidence of change in current sentencing practices following the Court of Appeal's declaration or questioning	<p>No. See <i>sentencing data below: 'immediate custodial sentence lengths over time'</i></p> <p>n.a.</p>

Problem with sentencing: evidence of inconsistency of approach

Treatment of a category of offenders within the offence category	No.
Weight given to aggravating and mitigating factors	<p>Inconclusive. See <i>sentencing data below: 'measures of consistency'</i></p> <p>Interquartile range (IQR) = 1 year and 4 months (8 months to 2 years).</p> <p>Median Absolute Difference (MAD) = 6 months.</p> <p>Sample of cases indicated consistent identification of high- and low-range offences.</p>
Categorisation of the objective seriousness of the offence	<p>Inconclusive. Low median, but offence recognised as having range of offending of low seriousness that would justify short and non-custodial sentences: <i>Director of Public Prosecutions v Aydin and Kirsch</i> [2005] VSCA 86 (3 May 2005).</p>

Sentencing data: sentences imposed for charges in the higher courts, 2010–11 to 2014–15

Distribution of sentences and comparison with maximum penalty

Between 1 July 2010 and 30 June 2015, 137 charges of perverting the course of justice were sentenced in the higher courts. Perverting the course of justice carries a maximum penalty of 25 years' imprisonment.

Imprisonment was the most common sentence imposed on charges of perverting the course of justice, and 51% of sentences imposed were immediate custodial sentences (Table A46).

Table A46: Number and percentage of charges of perverting the course of justice, by sentence type imposed, 2010–11 to 2014–15

Sentence type ^a	Number	Percentage
Imprisonment	60	44%
Partially suspended sentence	10	7%
Community order	22	16%
Wholly suspended sentence	26	19%
Fine	10	7%
Other	9	7%
Total	137	100%

a. 'Community order' comprises community correction orders and community-based orders. 'Other' comprises adjourned undertakings with and without conviction.

The immediate custodial sentences imposed over the five years ranged from 1 month to 8 years. The median custodial sentence length of 1 year is 4% of the maximum penalty (Table A47).

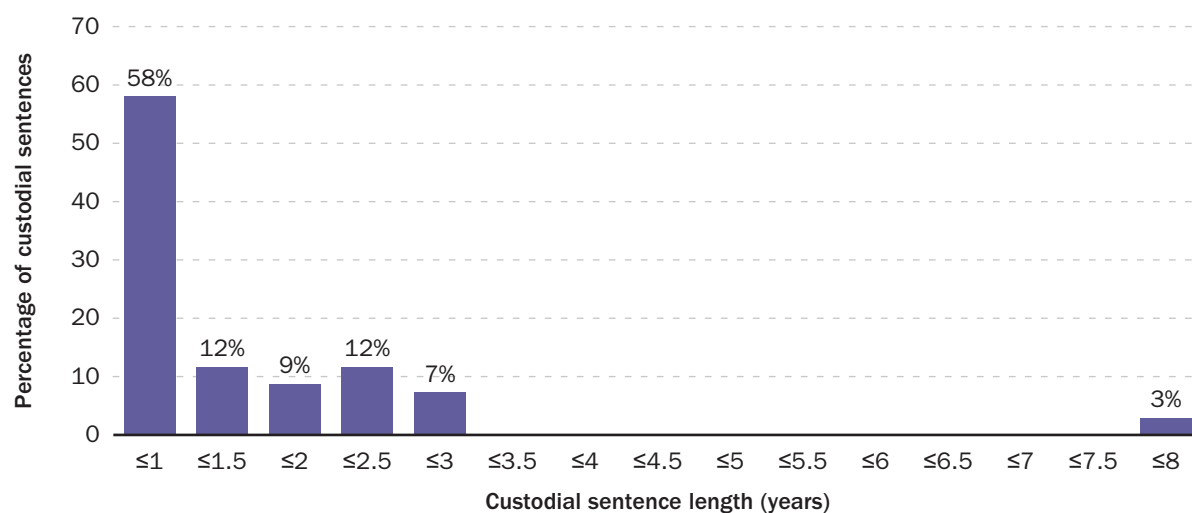
Table A47: Descriptive statistics of immediate custodial sentences imposed for charges of perverting the course of justice, 2010–11 to 2014–15

Statistic	Value
Total charges	137
Immediate custodial sentences	69
Percentage immediate custodial ^a	50%
Shortest	1 month
Median	1 year
Longest	8 years
Years from median to maximum penalty	24 years
Median % of maximum penalty	4%

a. One aggregate sentence of imprisonment is excluded from the sentence length analysis that follows.

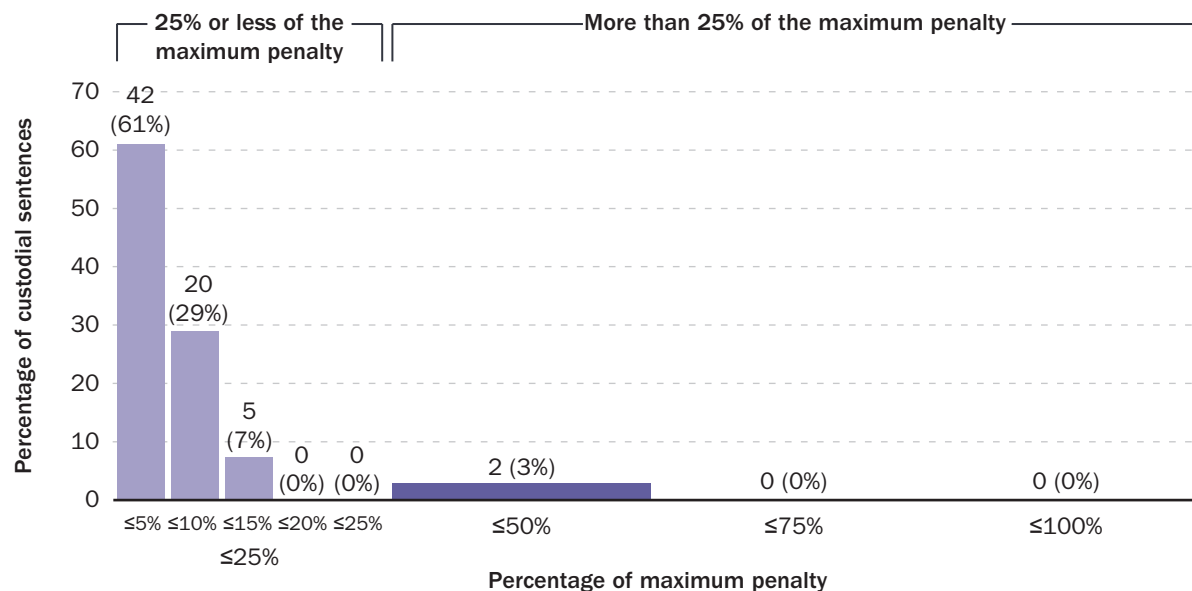
The distribution of immediate custodial sentence lengths in Figure A81 shows that sentences under 1 year in length were most common. Overall, 97% of sentences were 3 years or less.

Figure A81: Percentage of immediate custodial sentences imposed for charges of perverting the course of justice, by sentence length, 2010–11 to 2014–15



As a percentage of the maximum penalty of 25 years' imprisonment for perverting the course of justice, 97% of custodial sentence lengths were 25% of the maximum penalty or less (Figure A82).

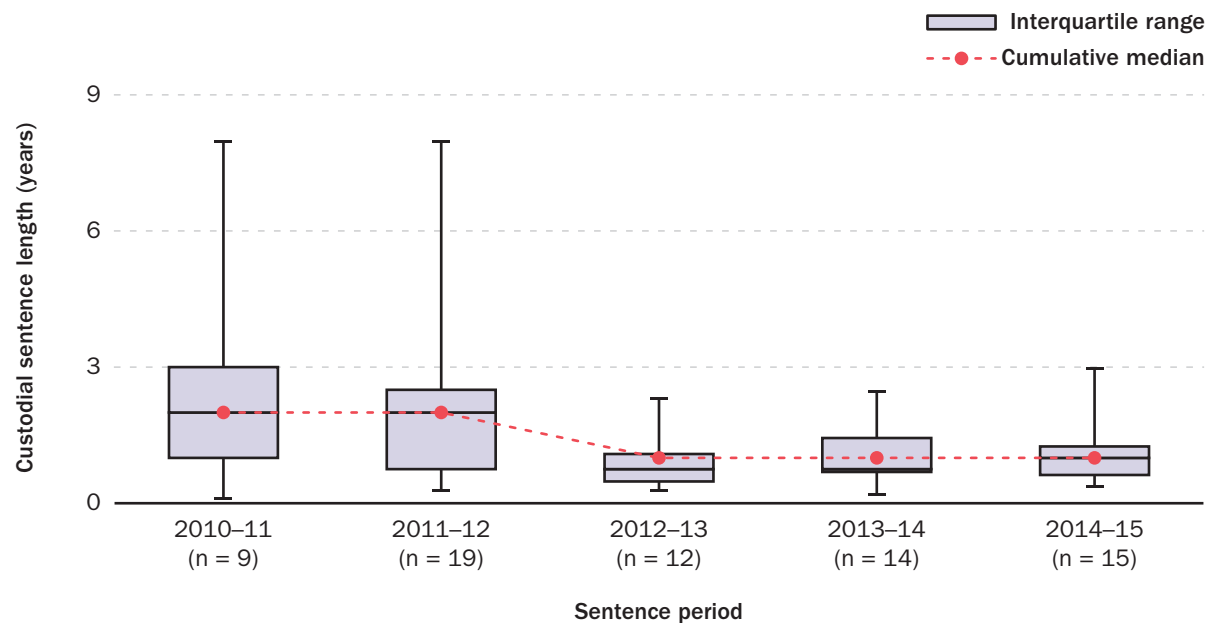
Figure A82: Percentage of immediate custodial sentences imposed for charges of perverting the course of justice, by the proportion of the maximum penalty represented by the sentence length, 2010–11 to 2014–15



Immediate custodial sentence lengths over time

The 69 (50%) custodial sentences imposed over the entire period had a median length of 1 year (Table A47). Figure A83 shows that the small number of sentences imposed decreased the median from 2 years in 2010–11 and 2011–12 to 1 year from 2012–13 to 2014–15. Yearly medians reached a low of 9 months in 2012–13 and 2013–14, and each financial year contained sentences of 3 months in length or less.

Figure A83: Yearly distribution and cumulative median immediate custodial sentence length imposed for charges of perverting the course of justice, by financial year, 2010–11 to 2014–15



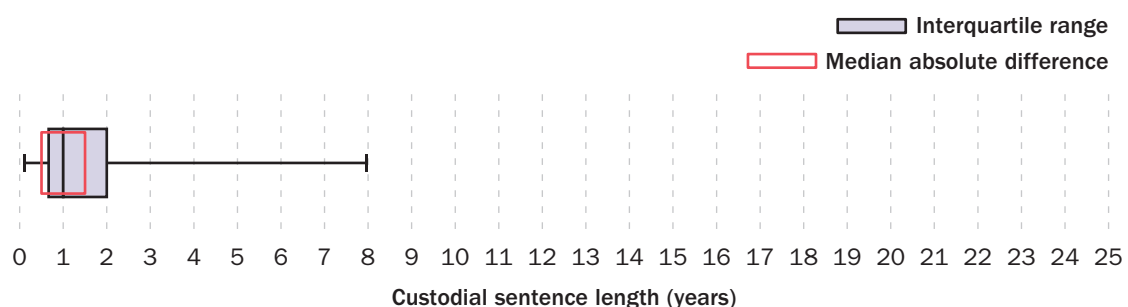
Measures of consistency

Two measures of statistical consistency of immediate custodial sentences were analysed: the interquartile range (IQR) and median absolute difference (MAD) (see Glossary). Figure A84 shows these two measures for the offence of perverting the course of justice.

The IQR was 1 year and 4 months, and it ranged from 8 months to 2 years.

The size of the difference between the median sentence length and all custodial sentences imposed ranged from zero to 7 years. The median of these differences, the MAD value, is 6 months. This means that 50% of custodial sentence lengths are less than 6 months from the median (between 6 months and 1 year and 6 months) and 50% are further than 6 months from the median.

Figure A84: Boxplot distribution of immediate custodial sentence lengths imposed for charges of perverting the course of justice, 2010–11 to 2014–15



Offences 22 & 23. Offences under section 61 of the Road Safety Act 1986 (Vic)

Definition and maximum penalty	<p>Three forms of the offence:</p> <ol style="list-style-type: none"> 1. Failure to stop after an accident and failure to render assistance after an accident <i>resulting in death or serious injury</i>. Maximum penalty: 10 years and/or a fine of 1,200 penalty units <p>Offence elements:</p> <ul style="list-style-type: none"> • person is killed or suffers serious injury as a result of an accident involving a motor vehicle; and • the driver of the motor vehicle knows or ought to reasonably have known that the accident had occurred; and • the driver of the motor vehicle knows or ought to reasonably have known that the accident resulted in a person being killed or suffering serious injury; and • the driver failed to immediately stop the vehicle; or • the driver failed to immediately render assistance. <ol style="list-style-type: none"> 2. Failure to give details to affected persons, failure to give details to police, and failure to report accident to the police following an accident <i>where a person is killed or seriously injured</i>. Maximum penalty: <ul style="list-style-type: none"> • first offence – no more than 80 penalty units or 8 months' imprisonment; • subsequent offence – 240 penalty units or a term of imprisonment between 4 months and 2 years. 3. Failure to comply with any of the above requirements in section 61 where no person is injured or killed (i.e., the accident only results in property damage). Maximum penalty: <ul style="list-style-type: none"> • first offence – 5 penalty units or 14 days imprisonment; • subsequent offence – 10 penalty units or a term of imprisonment of between 14 days and 1 month.
The offence is an indictable offence	Indictable offence triable summarily.
The extent to which the offence is 'prevalent'	See Table A48 on prevalence in the higher courts and Magistrates' Court.

Table A48: Sentencing data: sentences imposed for all charges under section 61 in the higher courts and Magistrates' Court, 2010–11 to 2014–15

Jurisdiction	Total charges	Remarks available	Percentage with remarks
Higher courts	104	55	53%
Magistrates' Court	12,488	0	0%

Appendix 8: Magistrates' Court data

The tables below show sentencing outcomes in the Magistrates' Court for the possible problem offences that are indictable triable summarily and for which there were data. The number of aggregate sentences imposed for offences is shown in a separate column. Immediate non-aggregate sentence types and the numbers of each are shaded. These sentences are included in Table A5I, which shows sentence length statistics.

Table A49: Sentencing outcomes for indecent act with a child under 16 and aggravated burglary, Magistrates' Court, 2010–11 to 2014–15

Magistrates' Court	Indecent act with a child under 16		Aggravated burglary	
	Non-aggregate	Aggregate	Non-aggregate	Aggregate
Imprisonment	111	117	180	560
Partially suspended sentence	12	42	5	55
Combined custody and treatment order				4
Drug treatment order				14
Intensive correction order	3	8	7	19
Wholly suspended sentence	48	71	23	78
Youth justice centre order			66	
Community correction order	267		185	
Community-based order	81		24	
Fine	21	20	2	15
Adjourned undertaking	53		30	
Diversion	15		4	
Convicted and discharged	1			
Dismissed	1			
Total sentences for offence		871		1,271

Table A50: Sentencing outcomes for recklessly causing serious injury and negligently causing serious injury, Magistrates' Court, 2010–11 to 2014–15

Magistrates' Court	Recklessly causing serious injury		Negligently causing serious injury	
	Non-aggregate	Aggregate	Non-aggregate	Aggregate
Most serious penalty for charge				
Imprisonment	283	213	15	10
Partially suspended sentence	69	43	4	1
Home detention order				1
Intensive correction order	97	33	1	4
Wholly suspended sentence	260	111	20	12
Youth justice centre order	43		3	
Community correction order	322		10	
Community-based order	118		3	
Fine	112	41	4	6
Adjourned undertaking	51		2	
Diversion	31		3	
Dismissed	1			
Total sentences for offence		1,828		99

Table A51: Sentencing statistics for possible problem offences (indictable triable summarily), Magistrates' Court, 2010–11 to 2014–15

Possible problem offence (indictable triable summarily)	Immediate custodial sentences	% of all sentences for offence	Sentence measures		
			Minimum	Median	Maximum
Aggravated burglary	258	20%	14 days	1 year	2 years
Indecent act with a child under 16	126	14%	14 days	8 months	2 years
Recklessly causing serious injury	492	27%	6 days	9 months	2 years
Negligently causing serious injury	23	23%	2 months	1 year	2 years

Appendix 9:

Analysis of sentencing practices following inadequacy declaration

Recklessly causing serious injury by glassing

Sentencing practices pre-*Winch*

In the case of *Winch v The Queen (Winch)*,¹⁰⁵² the majority of the Court of Appeal presented a table of cases of recklessly causing serious injury by glassing along with data on the sentence imposed for the relevant charge of recklessly causing serious injury.

The Council has adapted this table to include the resentenced *Winch* case and another case¹⁰⁵³ determined after *Winch*, but pleaded to prior to *Winch* and therefore sentenced under pre-existing current sentencing practices. This table of pre-*Winch* cases is presented below.

When calculated on the length of the term imposed on the charge (regardless of whether that term is wholly or partially suspended, or required to be served immediately) the median sentence for this subset of cases was 2 years.¹⁰⁵⁴

When calculated solely on charges that received a term of imprisonment required to be served immediately or youth justice centre order, the median pre-*Winch* was also 2 years. The longest sentence was 2 years and 6 months.

The distribution of sentence types pre-*Winch* was:

- immediate imprisonment (45%, n = 8);
- wholly suspended sentence (45%, n = 8);
- partially suspended sentence (5%, n = 1); and
- youth justice centre order (5%, n = 1).

Sentencing practices post-*Winch*

The Council has examined data from available sentencing remarks for cases including a charge of recklessly causing serious injury by glassing. Table A52 presents the number of cases of recklessly causing serious injury by their sentencing remarks availability and the overall proportion of remarks available to be analysed (almost three-quarters, or 74.3%).

The Council analysed sentencing remarks for cases of recklessly causing serious injury by glassing, by searching the available sentencing remarks for the terms 'glassing', 'glass', and 'Winch'.

Post-*Winch* cases of recklessly causing serious injury by glassing are presented in Table A55. Twenty-one relevant cases involving recklessly causing serious injury by glassing were identified from the available sentencing remarks.

¹⁰⁵². *Winch v The Queen* (2010) 27 VR 658.

¹⁰⁵³. Pre-W16 (see Table A54) (pleaded to prior to *Winch*).

¹⁰⁵⁴. Amending the first-instance sentence in the case of *Trowsdale* to account for the reduction in sentence by the Court of Appeal does not affect this median, as the substituted sentence of 33 months has no effect on the median.

Table A52: Higher courts cases including a charge of recklessly causing serious injury, by availability of sentencing remarks, 2010–11 to 2014–15

	2010–11	2011–12	2012–13	2013–14	2014–15	Total	Percent
Remarks present	121	122	93	77	50	463	74.3%
Remarks not present	36	27	49	23	25	160	25.7%
Total cases	157	149	142	100	75	623	100%

Analysis of the sentencing outcomes pre- and post-*Winch* assumes that the nature of the glassing offences, in terms of the level of objective seriousness of offending and matters personal to the offenders, are relatively consistent between the two periods.

This issue (of unknown variation) would ordinarily be compounded by the relatively low number of cases within the two periods being compared; however, the similarity of offending in glassing cases, which brings them into the subset of cases being examined, is likely to counter the effect of small numbers.

The Council's analysis of all available sentencing decisions for the subset of recklessly causing serious injury by glassing cases showed that every one of the sentencing remarks for the 21 cases mentioned *Winch* and commonly cited passages from the Court of Appeal's judgment.

When calculated on the length of the term imposed on a charge,¹⁰⁵⁵ the median sentence for this subset of recklessly causing serious injury cases post-*Winch* was 2 years and 3 months (an increase of 3 months).

When calculated solely on charges that received a term of imprisonment required to be served immediately or detention in a youth justice centre, the median post-*Winch* was 2 years and 6 months (an increase of 6 months). The longest sentence was 3 years and 3 months.

The distribution of sentence types post-*Winch* was:

- immediate imprisonment (57%, n = 12);
- wholly suspended sentence (14%, n = 3);
- partially suspended sentence (10%, n = 2);
- youth justice centre order (10%, n = 2);
- a combined immediate imprisonment sentence and community correction order (5%, n = 1); and
- a community correction order (5%, n=1).¹⁰⁵⁶

Table A53: Sentencing statistics for glassing recklessly causing serious injury, by sentencing before or after 17 June 2010, 2006–07 to 2012–13

Glassing recklessly causing serious injury sentenced before/after <i>Winch</i>	Number of charges	Number of charges sentenced to imprisonment ^a	Minimum (years)	Median (years)	Maximum (years)
Before	18	9	18 months	2 years	2 years and 9 months
After	21	15	10 months	2 years and 6 months	3 years and 3 months

a. This includes sentences of immediate imprisonment, detention under a youth justice centre order, and a combined sentence of immediate imprisonment and a community correction order.

1055. This figure is based on the term, regardless of whether that term is a CCO, a combined CCO and imprisonment term, a wholly or partially suspended sentence, a term of imprisonment required to be served immediately, or detention in a youth justice centre.

1056. Note, due to rounding, the total of these sentence types does not add up to 100%.

In summary, post-*Winch*, there has been a 25% increase in the median imprisonment term imposed for charges of recklessly causing serious injury by glassing, and a 22 percentage-point increase in the proportion of charges of recklessly causing serious injury by glassing receiving immediate imprisonment (including a youth justice centre order and immediate imprisonment combined with a community correction order).

Cases pre-*Winch*

Table A54: Recklessly causing serious injury ‘glassing’ cases sentenced from 2007 to 2009 (adapted from ‘Appendix A’ to the majority judgment of *Winch*), by court, date of sentence and sentencing outcome on the relevant charge

Name	Court	Date	Sentencing Order
Pre-W1 ^a	County Court	2007	9 months’ imprisonment wholly suspended for 2 years
Pre-W2	County Court	2007	2 years’ imprisonment – 12 months partially suspended for 18 months
Pre-W3	County Court	2007	18 months’ imprisonment (part of a TES with NPP fixed)
Pre-W4	County Court	2007	15 months’ imprisonment wholly suspended for 18 months
Pre-W5	County Court	2008	2 years’ imprisonment wholly suspended for 3 years
Pre-W6	County Court	2008	12 months’ imprisonment – NPP of 3 months fixed
Pre-W7	County Court	2008	12 months’ imprisonment wholly suspended for 3 years
Pre-W8	County Court	2009	16 months’ imprisonment wholly suspended for 2 years
<i>R v Trowsdale</i>	Court of Appeal	30/3/2011	2 years and 9 months’ imprisonment – NPP of 2 years fixed
Pre-W9	County Court	2009	18 months’ imprisonment wholly suspended for 2 years
Pre-W10	County Court	2009	2 years’ imprisonment – NPP of 12 months fixed
Pre-W11	County Court	2009	2 years and 6 months’ imprisonment – NPP of 16 months fixed
Pre-W12	County Court	2009	2 years and 9 months’ imprisonment – NPP of 1 year and 9 months fixed
Pre-W13	County Court	2009	20 months’ imprisonment wholly suspended for 2 years
Pre-W14	County Court	2009	2 years’ imprisonment wholly suspended for 3 years
Pre-W15	County Court	2009	2 years’ detention in a youth justice centre
<i>R v Winch</i>	Court of Appeal	17/6/2010	2 years and 9 months’ imprisonment – NPP of 15 months fixed
Pre-W16 ^b	County Court	2011	2 years’ imprisonment – NPP of 12 months fixed

a. Case names have been de-identified at the request of the County Court of Victoria.

b. In this case, the plea was entered prior to *Winch*, and consequently the offender was sentenced on the basis of pre-*Winch* current sentencing practices.

Cases post-Winch

Table A55: Recklessly causing serious injury 'glassing' cases sentenced from 2010–11 to 2013–14, where convicted after trial, or plea entered after *Winch*, by court, date of sentence and sentencing outcome on the relevant charge¹⁰⁵⁷

Name	Court	Date	Sentencing Order
Post-W1 ^a	County Court	2010	2 years' imprisonment (part of a TES with NPP fixed)
Post-W2	County Court	2010	2 years and 6 months' imprisonment (part of a TES with NPP fixed)
Post-W3	County Court	2010	20 months' imprisonment wholly suspended for 2 years
Post-W4	County Court	2010	3 years and 3 months' imprisonment on recklessly causing serious injury charge (part of a TES with NPP fixed)
Post-W5	County Court	2010	18 months' imprisonment, all but 363 days suspended (363 days of time served).
Post-W6	County Court	2011	15 months' detention in a youth justice centre
Post-W7	County Court	2011	2 years and 9 months' imprisonment – NPP of 17 months fixed
Post-W8	County Court	2011	2 years' imprisonment wholly suspended for 3 years
Post-W9	County Court	2011	2 years and 6 months' imprisonment – NPP of 12 months fixed
Post-W10	County Court	2011	2 years' imprisonment with 18 months suspended for 2 years
Post-W11	County Court	2011	2 years and 3 months' imprisonment – NPP of 1 year and 3 months fixed
<i>DPP v Giannoukas</i>	Court of Appeal	7/10/2011	2 years and 6 months' imprisonment wholly suspended
Post-W12	County Court	2011	3 years' imprisonment – NPP of 20 months fixed
Post-W13	County Court	2012	3 years' imprisonment – NPP of 2 years fixed
Post-W14	County Court	2012	2 years and 8 months' imprisonment (part of a TES with NPP fixed)
Post-W15	County Court	2012	22 months' detention in a youth justice centre
Post-W16	County Court	2012	3 years and 3 months' imprisonment – NPP of 2 years fixed
Post-W17	County Court	2013	2 years and 10 months' imprisonment (part of a TES with NPP fixed)
Post-W18	County Court	2014	18-month community correction order with 150 hours unpaid community work, alcohol treatment condition, and mental health assessment condition
Post-W19	County Court	2014	10 months' imprisonment and 12-month community correction order (part of a TES with NPP fixed)
Post-W20	County Court	2014	2 years' imprisonment (part of a TES with NPP fixed)

a. Case names have been de-identified at the request of the County Court of Victoria.

¹⁰⁵⁷ During this period, the case of *DPP v Spence* was sentenced in the County Court, involving a sentence of 4 years imprisonment for a glassing offence that was charged as intentionally causing serious injury. This case has been excluded on the basis that, while an instance of glassing, the different maximum penalty for intentionally causing serious injury means the sentence is not comparable with sentences imposed for glassing that are charged as recklessly causing serious injury (being the relevant offence in *Winch*).

Confrontational aggravated burglary

The Council's 2011 report entitled *Aggravated Burglary: Current Sentencing Practices* developed a typology of categories of aggravated burglary offending, in light of the broad spectrum of offending behaviour that is possible under this offence.

The category of 'confrontational' aggravated burglary was assigned if the analysis of sentencing remarks garnered a positive response to the question: 'Did the offender enter the premises in the context of a dispute with or grievance against someone in the premises?'

The report found that confrontational aggravated burglary accounted for over half (57.3%) of the aggravated burglary cases in the period examined.¹⁰⁵⁸

For this report, the Council was unable to code aggravated burglary cases into the typology described in the Council's 2011 aggravated burglary report. Given that the proportion of confrontational aggravated burglary cases is greater than half, however, it is to be expected that any change in the sentencing practices for that category would be reflected in a change to sentencing practices for that offence overall.

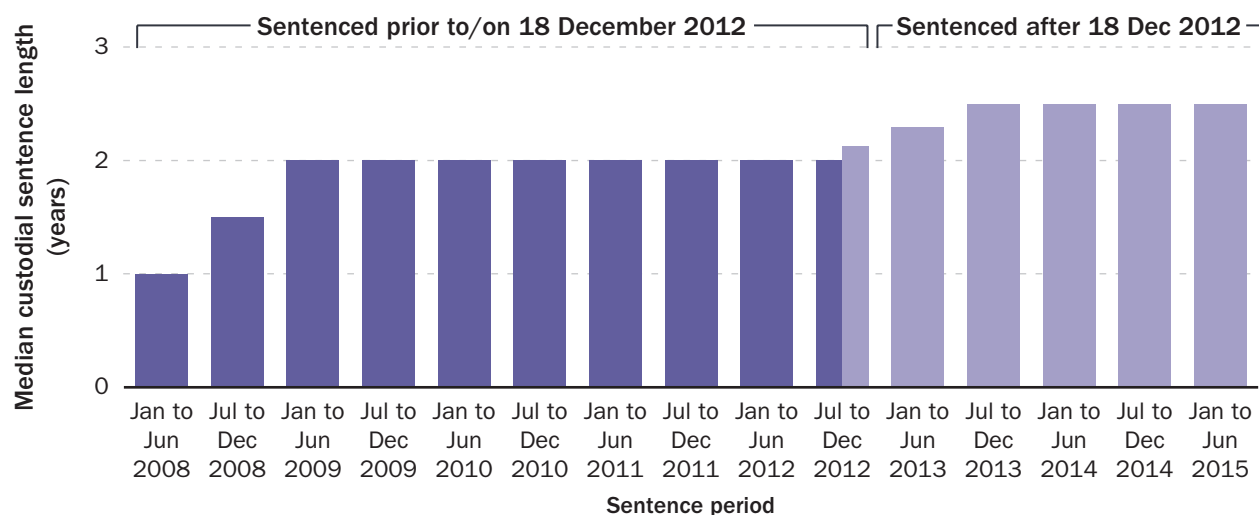
Accordingly, the Council examined overall data on the sentencing practices for aggravated burglary before and after the decision in *Hogarth v The Queen* (*Hogarth*).¹⁰⁵⁹

This analysis necessarily assumes that the nature of the aggravated burglary offences, in terms of the level of objective seriousness of offending, and matters personal to the offenders, are relatively consistent between the two periods. Further, it assumes that the proportion of cases involving confrontational aggravated burglary offences remains consistent at greater than half, or increases, so that any observable differences in the median may be attributable to a change in the current sentencing practices for that category of the offence.

Sentencing practices pre- and post-*Hogarth*

Figure A85 shows the 6-month cumulative median custodial sentence lengths for the offence of aggravated burglary, for approximately five years before the decision in *Hogarth v The Queen* (on 18 December 2012), and for two and a half years after that decision, including the most recently available data to 30 June 2015.

Figure A85: Median custodial sentence lengths for aggravated burglary charges, by six-month intervals, sentenced before and after 18 December 2012, higher courts, January 2008 to June 2015



¹⁰⁵⁸. Sentencing Advisory Council, *Aggravated Burglary: Current Sentencing Practices* (2011) 29.

¹⁰⁵⁹. *Hogarth v The Queen* (2012) 37 VR 658.

This analysis shows that the six-month median custodial sentence length for aggravated burglary increased from a consistent 2 years pre-*Hogarth*, to 2 years and 6 months post-*Hogarth*. This represents a 25% increase in the median custodial sentence.

In both periods, imprisonment (including aggregate and mixed sentences) was the most commonly imposed sentence for charges. Just over 65% of charges received a custodial sentence (including imprisonment) before *Hogarth* compared with just over 73% after the decision.

Table A56 shows the distribution of sentence types for charges of aggravated burglary, ordered by the most common sentence type after the decision in *Hogarth* on 18 December 2012.

Table A56: Percentage of charges of aggravated burglary, by sentence type imposed, before and after 18 December 2012, 2008 to 2014–15

Sentence type	Prior to/on 18 December 2012	After 18 December 2012
Imprisonment	54%	68%
Community order	11%	24%
Youth centre/supervision	4%	4%
Partially suspended sentence	6%	1%
Other	1%	1%
Wholly suspended sentence	23%	1%
Fine	<1%	<1%
Intensive correction order	1%	0%

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