Sentencing Advisory Council

Sentencing of Offenders
Sexual Penetration with a Child under 12

VICTORIA State Government

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- 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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Warning to readers

This report contains subject matter that may be distressing to readers. Anonymised, but explicit, material describing sexual offending against children, drawn from sentencing remarks, is included in this report.

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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Anonymised references

All unpublished sentencing remarks used for the purposes of this report have been anonymised. All cases involving the principal offence of sexual penetration with a child under 12 are referred to numerically with the prefix SP (for example, SP case 1), and all cases involving the principal offence of rape are referred to numerically with the prefix RP (for example, RP case 1).

Where excerpts from sentencing remarks are included in the report, all references to proper nouns – including the names of victims, offenders, judges, and locations – have been replaced with generic terms such as [victim], [offender], [judge], and [location].

Glossary

Case	A collection of multiple charges against a person that are sentenced at the one hearing.
Charge	A single proven count of an offence.
Community-based order	Prior to 16 January 2012, a court could make a community-based order in respect of an offender if the court convicted the offender, or found the offender guilty, of an offence punishable on conviction by imprisonment or a fine of more than 5 penalty units. The order could 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treatment, and being supervised by a community corrections officer (*Sentencing Act 1991* (Vic) pt 3 div 3: now repealed).
Community correction order (CCO)	A flexible, non-custodial sentence that sits between imprisonment and fines on the sentencing hierarchy. The order is served in the community under court-imposed conditions that may include unpaid community work, alcohol and drug treatment, supervision, curfews, and area restrictions.
Imprisonment (IMP)	In this report, a sentence of imprisonment that is served immediately, as distinct from a sentence of imprisonment that is partially or wholly suspended.
Intensive Residential Treatment Program (IRTP)	A short-term stay in a residential treatment facility in order to provide compulsory treatment to persons with an intellectual disability when a residential treatment order is made.
Partially suspended sentence (PSS)	A term of imprisonment that is suspended in part (that is, not activated) for a specified period (the 'operational period') subject to the condition to be of good behaviour (that is, not reoffend). A suspended sentence could be imposed for a maximum of two years in the Magistrates' Court or three years in the County and Supreme Courts. Now abolished in Victoria, suspended sentences cannot be imposed in the higher courts for any offence committed on or after 1 September 2013 and in the Magistrates' Court for any offence committed on or after 1 September 2014.
Principal charge	The charge in a case that received the most severe sentence.
Principal proven offence	The offence attached to the charge that receives the most severe sentence in a case. Where offences have an equal sentence, the offence with the lowest ranking on the Australian Bureau of Statistics' National Offence Index is the principal proven offence.

Reference period

In this report, the reference period is the five years from 1 July 2009 to 30 June 2014.

Residential treatment order (RTO)

A sanction under the *Sentencing Act 1991* (Vic) that enables an intellectually disabled offender to be detained and treated in a residential treatment facility for up to five years if the offender is found guilty of a serious offence as defined in section 3 of the *Sentencing Act 1991* (Vic) or if the offender has been found guilty of an indecent assault.

Total effective imprisonment term

The maximum time an offender must serve in prison in relation to all charges sentenced in a case, sometimes referred to as the 'head sentence'.

Wholly suspended sentence (WSS)

A term of imprisonment that is wholly suspended (that is, not activated) for a specified period (the 'operational period') subject to the condition to be of good behaviour (that is, not reoffend). A suspended sentence could be imposed for a maximum of two years in the Magistrates' Court or three years in the County and Supreme Courts. Now abolished in Victoria, suspended sentences cannot be imposed in the higher courts for any offence committed on or after 1 September 2013 and in the Magistrates' Court for any offence committed on or after 1 September 2014.

Youth justice centre order (YJCO)

An order involving a period of detention in a youth justice centre. A youth justice centre order is the most severe sanction that may be imposed on an offender aged 15 to 20 years at the time of sentencing in the Children's Court under the *Children, Youth and Families Act 2005* (Vic). For offenders in this age group, the maximum length of detention is two years for a single offence or three years for more than one offence.

Under the *Sentencing Act 1991* (Vic), offenders aged 15 to 20 years at the time of sentencing may be sentenced in an adult court (in the Magistrates' Court or in a higher court). Such offenders may be sentenced to a youth justice centre order as an alternative to prison. For these offenders, the maximum length of detention is two years if sentenced in the Magistrates' Court or three years if sentenced in a higher court.

Executive summary

The community views offences involving sexual penetration with children as among the most serious in the criminal law. Research demonstrates that there is community concern in Victoria with sentences imposed for sexual offences involving young children, more so than any other type of offending. Victoria's Court of Appeal has also expressed concern with the adequacy of sentences for sexual offences involving young children and, in particular, with the adequacy of sentences for the offence that is the subject of this report: sexual penetration with a child under 12. Despite the growing awareness of the harm caused by this type of offending, sentences for sexual penetration with a child under 12 remain relatively low when examined against a number of measures. This report analyses the possible reasons underlying the sentences for offenders found guilty of this offence.

Research questions

This report seeks to answer the following research questions:

- What are the sentencing practices for the offence of sexual penetration with a child under 12?
- Are sentencing practices adequate for the offence of sexual penetration with a child under 12?
- How do the courts assess offence seriousness in cases involving sexual penetration with a child under 12?
- Which factors contribute to sentencing practices for sexual penetration with a child under 12?

The Council's approach

In order to answer the research questions, the Council employed both quantitative and qualitative research methods. The Council analysed all 49 County Court cases involving offenders sentenced for the principal proven offence of sexual penetration with a child under 12 between 1 July 2009 and 30 June 2014 (the 'reference period'). The Council also analysed a comparison sample of 105 cases involving offenders sentenced during the reference period for the principal proven offence of rape.

This report focuses on the offence of sexual penetration with a child under 12 for a number of reasons. First, the victims of this offence, due to their age and dependency on adults, are among the most vulnerable in the community. Second, the offenders who commit this offence are often highly culpable because they are in a position of authority over the victim. Finally, and perhaps most importantly, young victims of sexual offending often suffer immediate and ongoing physical and emotional harm as a result of the offending – harm that is of great concern to the community.

The offence of rape has been selected in this report as a comparator to sexual penetration with a child under 12 in order to identify possible factors that might explain differences between sentences imposed for serious sexual offending against young children and sentences imposed for serious sexual offending against adults.

The quantitative analysis involved an examination of sentencing outcomes, at both the charge and the case level, for each of the offences.

The qualitative analysis involved a textual examination of sentencing remarks that provided additional insights into the macro-level results of the quantitative analysis. Although limited to a sample of cases, qualitative analysis provides concrete examples of sentencing issues that may illustrate broader sentencing trends.

Key findings

In spite of the differences that the Council identified in the sentencing of the offences of sexual penetration with a child under 12 and rape, there were some strong similarities between the two offences.

Quantitative findings

A clear majority of principal charges for the offence of sexual penetration with a child under 12 received either imprisonment or another immediate custodial sentence, but almost 15% of principal charges did not. For principal charges that received imprisonment, the median term was 4 years, while the longest sentence was 6 years. Just over 80% of charges received a term of imprisonment of less than 5 years.

Cases involving sexual penetration with a child under 12 commonly include multiple charges. Typically, the cases in the reference period that received imprisonment involved at least two charges of this offence and an average of seven sexual offence charges in total. The median total effective imprisonment term for these cases was 6 years and 1 month, and the longest imposed was 14 years and 6 months.

The adequacy of these sentences can be considered against a number of measures, including the applicable maximum penalty (25 years' imprisonment), which reflects parliament's view of the relative seriousness of the offence. The longest term of imprisonment imposed on a principal charge of sexual penetration with a child under 12 was 6 years, less than 25% of the maximum penalty for that offence.

Principal charges of rape that received imprisonment attracted a median sentence of 5 years, 25% higher than the median for charges of sexual penetration with a child under 12. Analysis of the total effective imprisonment term for cases involving sexual penetration with a child under 12 as the principal proven offence revealed that the median sentence was only slightly higher (6 years and 1 month) when compared with rape (6 years).

Summary statistics for sexual penetration with a child under 12 and rape offences are presented in Table 1.

Qualitative findings

The Council's textual analysis of sentencing remarks for cases in which the principal charge was sexual penetration with a child under 12 revealed that sentences appear to be influenced by problematic assessments of sexual violence. In the language used and the descriptions of offending, courts tended to unintentionally minimise both the harm to victims caused by the offending and the culpability of the offender. The Council often made similar observations from the textual analysis of cases in the rape sample. In addition, sentencers' adherence to current sentencing practices has had the effect of inhibiting increases in sentences regardless of countervailing sentencing considerations, and despite growing recognition of the grave harm involved in this type of offending. The courts' approach to proportionality, totality, and cumulation has also acted to limit increases in sentences for this offence. The Victorian Government's attempts to increase sentences through reforms such as the serious sexual offender regime appear to have had minimal influence on sentencing practices for the offence of sexual penetration with a child under 12.

Table 1: **Summary statistics for sentencing of cases and principal charges of sexual penetration with a child under 12 and rape, 1 July 2009 to 30 June 2014**

Measure	Sexual penetration with a child under 12	Rape
Number of principal charges	49	203
Number of principal charges that received imprisonment	38	186
Length of imprisonment sentences imposed on principal charges		
Median (years, months)	4 years	5 years
Longest (years, months)	6 years	12 years
Length of total effective imprisonment sentences imposed on cases		
Median (years, months)	6 years and 1 month	6 years
Longest (years, months)	14 years and 6 months	23 years and 6 months
Total number of charges by offence category (and average per case)		
Sexual penetration with a child under 12	94 (1.9)	3 (<0.0)
Rape	0 (0.0)	407 (2.0)
Sexual violence	283 (5.8)	737 (3.6)
Non-sexual violence	1 (<0.0)	155 (0.8)
Any offence	311 (6.3)	983 (4.8)
Number and percentage of cases with multiple charges of selected offence categories		
Sexual penetration with a child under 12	17 (34.7%)	0 (0.0%)
Rape	0 (0.0%)	82 (40.4%)
Sexual violence	36 (73.5%)	127 (62.6%)
Number of cases with non-sexual violence charges (and percentage of cases)	1 (2.0%)	71 (35.0%)

The textual analysis also revealed significant inter-judge disparity in the approach to a number of considerations that commonly arise in sentencing for the offence of sexual penetration with a child under 12. These considerations include whether and how *Verdins* principles (which concern how a court is to consider mental impairment of an offender when sentencing) apply to reduce the offender's culpability. These considerations also include the treatment of the offender's 'previous good character' as a mitigating factor when that same good character assisted the offender to commit the offence. Disparity in the approach to these considerations continues to be observed, often in the face of countervailing appellate court guidance on these issues.

Conclusion

The current approach to sentencing for the offence of sexual penetration with a child under 12 suggests that outdated concepts of harm persist in the criminal justice system, and that such concepts of harm are not confined to the courts, but represent a broader, systemic issue. It may be, for example, that such concepts of harm reflect deeply rooted and historical power imbalances. It is clear, however, that current sentencing practices re-enforce past norms, and that trial judges are constrained when imposing sentences for the offence of sexual penetration with a child under 12, regardless of changing community attitudes.

The issues identified in this report with courts' assessment of the seriousness of cases of sexual penetration with a child under 12, and the weighting given to aggravating and mitigating factors within those cases, lend themselves to guidance in the form of a guideline judgment. Such guidance cannot be provided in legislative responses that remove judicial discretion, such as the fixing of mandatory penalties. Comprehensive guidance, in the form of a guideline judgment that addresses sexual offending against children, would provide clarity on the complex issues around the sentencing of offenders who commit this type of offending.

1. Introduction and background

Sexual offences committed against children are among the most serious in the criminal law. Yet, to date, there have been relatively few Australian studies that have empirically examined sentencing for offences involving the sexual abuse of children.[1] The studies that have examined sentencing for these offences within various jurisdictions have almost exclusively relied on quantitative research methods.

The sexual abuse of children has, in addition to the immediate physical and mental harm caused by the offending behaviour, 'a range of very serious consequences for victims'.[2] These include suicidality, post-traumatic stress disorder, alcohol and drug misuse, antisocial behaviours, depression, eating disorders, post-partum depression, parenting difficulties, sexual revictimisation, and sexual dysfunction.[3]

The harm caused by this particular form of offending extends beyond victims and their families, to society at large.[4] The community views sexual offences involving coerced sexual penetration and child victims as among the most serious offences.[5] Despite this, there is a prevailing view that current sentencing practices for sexual offences against children do not reflect the seriousness of the crimes.

At present, the median imprisonment sentence for principal charges of the offence of sexual penetration with a child under 12[6] (4 years) is lower than the median sentence for charges of the offence of rape (5 years),[7] even though the two offences have the same statutory maximum penalty. These median sentences appear to be in conflict with the seriousness with which parliament views sexual offending – in particular sexual offending against children – the prevalence of these crimes, and the opprobrium with which such crimes are treated in both public opinion and sentencing jurisprudence.

It is a truism that the seriousness of each case must be determined on its particular facts. The discretion to individualise sentences is essential to just outcomes; however, so too are the principles of consistency and proportionality. While proportionality is determined on the particular facts of each case, it is also influenced by community values about offence seriousness. In order to maintain public confidence in the criminal justice system, sentencing practices must reflect informed community expectations about appropriate sentencing levels for particular offences, as indicated in the legislated maximum penalty.

1. Arie Freiberg et al., *Sentencing for Child Sexual Abuse in Institutional Contexts: Report for the Royal Commission into Institutional Responses to Child Sexual Abuse* (2015) 106.
2. Kelly Richards, *Misperceptions about Child Sex Offenders*, Trends and Issues in Crime and Criminal Justice no. 429 (2011) 1; Arie Freiberg et al. (2015), above n 1, 70 (noting that '[t]he scientific evidence of the long-term effects of CSA is now extensive and convincing'). See also Queensland Sentencing Advisory Council, *Sentencing of Child Sexual Offences in Queensland: Final Report*, vol. 72 (2012) 72; Australian Psychological Society, Submission 5 to the Joint Select Committee on Sentencing of Child Sexual Assault Offenders, *Sentencing of Child Sexual Assault Offenders*, 13 February 2014; Judith Cashmore and Rita Shackel, *The Long-Term Effects of Child Sexual Abuse*, Paper no. 11 (2013).
3. See, for example, Kathleen Kendell-Tackett et al., 'Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies' (1993) 113 *Psychological Bulletin* 164.
4. See *R v Riddle* [2002] VSCA 153 (11 September 2002) [34] (noting that the consequences of the prevalence of child sexual abuse 'even in terms of the behaviour of ordinary decent adults interacting with children in the course of their work or social activities, have been profound').
5. See, for example, Sentencing Advisory Council, *Community Attitudes to Offence Seriousness* (2012) 55, 'sexual offences against young children are among the most serious'.
6. For consistency, references in this report to 'sexual penetration with a child under 12' include the predecessor to that offence, 'sexual penetration with a child under 10', unless the context provides otherwise.
7. This is for charges sentenced during the reference period of this report, from 1 July 2009 to 30 June 2014.

This report provides a detailed examination of sentencing practices for the offence of sexual penetration with a child under 12. By comparing the sentencing practices for this offence with its maximum penalty and with the sentencing practices for other offences with the same maximum penalty, the Council concludes that sentencing practices for the offence of sexual penetration with a child under 12 are inadequate. Using both quantitative and qualitative research techniques, the Council also explores the factors that contribute to sentencing practices for this offence. These factors, which are not necessarily unique to this offence, include the need for the courts to consider current sentencing practices.

The prevailing Australian sentencing methodology of instinctive synthesis lacks a degree of transparency, and consequently there are difficulties in attempting to identify and analyse individual factors influencing sentencing outcomes in sentencing remarks. This fact is recognised at common law for the purpose of sentence appeals: a flaw in the exercise of the sentencing judge's discretion may be inferred from the manifest excess or the manifest inadequacy of the sentence, even if it is not possible for the Court of Appeal to identify the precise source of error.[8]

Instinctive synthesis involves value judgments on the part of the judge, as it does on the part of those analysing those judgments. However, traditional legal analysis in conjunction with the qualitative and quantitative techniques used in this report allows certain inferences to be drawn. The Council's qualitative analysis in this report provides additional nuance to the macro-level quantitative findings. Separately, these two types of analysis provide different, but complementary, insights. Combined, they provide a more complete picture of factors influencing sentencing than either type in isolation.

This report addresses four research questions:

1. What are the sentencing practices for the offence of sexual penetration with a child under 12?
2. Are sentencing practices adequate for the offence of sexual penetration with a child under 12?
3. How do the courts assess offence seriousness in cases involving sexual penetration with a child under 12?
4. Which factors contribute to sentencing practices for sexual penetration with a child under 12?

One of the Council's key findings is that sexual offending against children is often assessed by the courts as distinct from (and by implication less serious than) 'violent' offending. However, the Council argues that sexual offending is inherently violent and should be characterised as such by the courts. The Council acknowledges that this view of sexual offending (including sexual offending against children) as non-violent is not confined to sentencing, and represents a broad and systemic problem.

For example, the recent report of the Complex Adult Victim Sex Offender Management Review Panel ('Harper Review') found that:

> A key gap in the operation of the [legislation] is that the legislation is limited to protecting the community against the risk of further sexual offending. It does not extend to protection from the risk of violent offending not associated with a sexual assault. The Panel's view is that the legislation should be refocused to ensure that it can, to the maximum extent possible, protect the community against acts of serious interpersonal harm, *regardless of the characterisation of the offending as sexual or violent or both.*[9]

Alongside this broader distinction between 'sexual' and 'violent' offending in the criminal law, historical norms concerning child victims of sexual offending can persist and influence sentencing outcomes long after community views have changed. Sexual offending against children is now

8. See Sentencing Advisory Council, *Sentence Appeals in Victoria* (2012) 22.
9. Complex Adult Victim Sex Offender Management Review Panel, *Advice on the Legislative and Governance Models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* (2015) ix (emphasis added).

recognised as an abuse of control and power resulting in extreme harm to the victim. Even as late as the 1980s, however, the offence of incest, for example, was described in leading criminal law texts as 'a victimless crime' and not an 'offence against the person'.[10]

Despite an awareness of changing community attitudes, courts may be influenced by outdated characterisations of the harms resulting from sexual offending against children. The courts are not assisted if, for example, submissions perpetuate historical norms by failing to identify, or by denying, the inherently violent nature of the offending, or persist in distinguishing between 'sexual' offending and 'violent' offending'.

The current law in Victoria

Section 45 of the *Crimes Act 1958* (Vic) creates three different forms of the offence of sexual penetration with a child under 16. Each form of the offence carries a different maximum penalty as set out in Table 2. The focus of this report is the offence of sexual penetration with a child under 12 under section 45(2)(a) of the *Crimes Act 1958* (Vic).

Table 2: Offences under section 45 of the *Crimes Act 1958* (Vic)

Section	Offence	Maximum penalty
45(2)(a)	Sexual penetration with a child under the age of 12	Level 2 imprisonment (25 years)
45(2)(b)	Sexual penetration with a child aged between 12 and 16 and under the care, supervision, or authority of the offender	Level 4 imprisonment (15 years)
45(2)(c)	Sexual penetration with a child aged between 12 and 16 (in all other circumstances)	Level 5 imprisonment (10 years)

Elements of the offence of sexual penetration with a child under 12

To establish the offence of sexual penetration with a child under 12, the prosecution must prove beyond reasonable doubt that:

- the offender took part in an act of sexual penetration with the victim of the offence;
- the offender intended to take part in that act of sexual penetration; and
- the victim was under the age of 12 years at the time of the offence.

An act of sexual penetration is broadly defined[11] to include:

- the introduction (to any extent) by a person of his penis into the vagina, anus, or mouth of another person whether or not there is emission of semen; or
- the introduction (to any extent) by a person of an object or a part of his or her body (other than his penis) into the vagina or anus of another person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes.

10. See *R v G* (1989) 98 FLR 32, 36, citing Granville Williams, *Textbook of Criminal Law* (2nd ed., 1983) and C. Howard, *Criminal Law* (4th ed., 1982).
11. *Crimes Act 1958* (Vic) s 35(1).

The offence of sexual penetration with a child is gender neutral and criminalises all acts of sexual penetration between adults and children. Moreover, the concept of 'sexual penetration' includes both parties to the act, so as to avoid an inference that the act must be committed on the younger person by the older person. The offence is defined by reference to the age of the child rather than by the relative roles, intentions, or actions of the participants; therefore, the adult is guilty of the offence even if the child sexually penetrates the adult.

The offence is complete once it is established beyond reasonable doubt that an act of sexual penetration occurred and the child was under the age of 12 at the time. The 'consent' of the child to the sexual penetration, if present, is irrelevant to determining the guilt of the offender. The premise of section 45 of the *Crimes Act 1958* (Vic) is that children under the age of 16[12] and, to an even greater degree, children under 12 are not sufficiently mature to consent meaningfully to an act of sexual penetration.

Guiding principles

Section 37B of the *Crimes Act 1958* (Vic) sets out the following guiding principles when dealing with a case involving allegations of sexual offences, including sexual offences against children. These principles require the courts to have regard to the fact that:

- there is a high incidence of sexual violence within society;
- sexual offences are significantly under-reported;
- a significant number of sexual offences are committed against women, children, and other vulnerable persons, including persons with a cognitive impairment;
- sexual offenders are commonly known to their victims; and
- sexual offences often occur in circumstances in which there is unlikely to be any physical signs of an offence having occurred.

The effect of this provision is that courts must assume that 'children are vulnerable persons against whom a significant number of sexual offences are committed, and they must be protected from sexual exploitation'[13] when sentencing an offender for sexual offences against a child aged under 16.

Sentences for these offences 'must also recognise the damage caused to the victim and should also have a deterrent element'.[14] In *Director of Public Prosecutions v DJK*,[15] Vincent JA said in this regard:

> In consequence of an increasing awareness in our society of the incidence of the sexual abuse of children and much greater understanding of the potential destructive impact that it has had and is continuing to have on the lives of so many people in our community, this court has, on a large number of occasions, emphasised two fundamentally important considerations. First, in the assessment of the appropriate level of just punishment, conduct of the kind encompassed by counts 4 and 5 [sexual penetration] will be viewed as gravely serious. Sentences must involve recognition of the kind of personal damage that is occasioned by such behaviour and of the reality the rehabilitation of the victim may be far more difficult to accomplish than that of the perpetrator. This leads to the second consideration. Through the sentences that they impose, the courts must, in order to protect future possible victims against such damage, endeavour to deter those who may be so inclined from engaging in such activities.[16]

12. Subject to the limited defences for the offence of sexual penetration with a child aged 12–16 provided in section 45(4) of the *Crimes Act 1958* (Vic).
13. See Judicial College of Victoria, '31.4.3 – [Sexual] Offences against Children', *Victorian Sentencing Manual* (Judicial College of Victoria, 2013) <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#8761.htm> at 30 March 2015; *Clarkson v The Queen; EJA v The Queen* (2011) 32 VR 361.
14. Judicial College of Victoria (2013), above n 13.
15. *Director of Public Prosecutions v DJK* [2003] VSCA 109 (20 August 2003).
16. Judicial College of Victoria (2013), above n 13; *Director of Public Prosecutions v DJK* [2003] VSCA 109 (20 August 2003) [26].

Legislative changes to the sentencing of sexual offending against children

Successive legislative amendments have emphasised the seriousness with which the legislature views sexual offending against children. These amendments include:

- changes to the statutory maximum penalty for the offence of sexual penetration with a child;
- the introduction of the serious sexual offender scheme; and
- the introduction of a course of conduct charge.

Singly and in combination, these statutory reforms have signalled to sentencers that they should apply the principle of proportionality in light of the gravity with which parliament views the objective elements of sexual offending against children, as a matter of clear legislative intent. However, it has not been demonstrated that the first two changes have had the intended effect on sentencing practices. While the effect of the last, and most recent, change remains to be seen (the course of conduct charge commenced operation on 1 July 2015), the courts' approach to sentencing representative charges, which also comprise multiple incidents of offending, does not suggest that course of conduct charges will give effect to the legislative intent in a way that alters current sentencing practices.

Maximum penalty history: sexual penetration with a child under 12

Table 3 (page 6) presents a summary of the legislative history for the offence of sexual penetration with a child under 12.

Serious sexual offender provisions

Part 2A of the *Sentencing Act 1991* (Vic) contains provisions that apply to the sentencing of repeat offenders who have committed (and have been sentenced to imprisonment or youth detention for) a number of serious offences, including arson, drug, violent, and sexual offences.

A serious sexual offender is an offender who has been convicted of two or more charges of sexual offences[17] and has been sentenced to imprisonment or youth detention for those charges. On the sentencing of the offender's third or subsequent sexual offence (whether in the same case or in any subsequent case), the court, when imposing a sentence of imprisonment:

- must regard the protection of the community as the principal purpose for the sentence; and
- may impose a longer sentence than is proportionate to the objective seriousness of the offence in order to achieve that purpose of community protection.[18]

Further, when sentencing a serious sexual offender to imprisonment for a third or subsequent charge of a sexual offence, the court must order (unless it orders otherwise) that the sentence for that charge be served cumulatively on any other sentences that must be served by the offender.[19]

17. This applies other than where the offender has been convicted and sentenced to imprisonment or youth detention for the offence of persistent sexual abuse of a child under 16, or where the offender has been convicted and sentenced to imprisonment or youth detention for one sexual offence and one violent offence. In either of these circumstances, any second sexual offence will qualify the offender as a 'serious sexual offender': *Sentencing Act 1991* (Vic) ss 6B(2)(ab), 6B(2)(b).
18. *Sentencing Act 1991* (Vic) ss 6D(a)–(b).
19. *Sentencing Act 1991* (Vic) s 6E.

Table 3: Legislative history of offences of sexual penetration with a young child under the *Crimes Act* (as amended)

Year	Reform
1928	The *Crimes Act 1928* (Vic) contained an offence of abusing girl under 10 (section 42), which, like rape (section 40(1)), carried a maximum penalty of 20 years' imprisonment.[a]
1958	When the *Crimes Act 1958* (Vic) replaced the 1928 legislation, the offence and the maximum penalty remained unchanged (section 46).
1980	A new form of the offence – act of sexual penetration with child under 10 – was introduced, which retained the maximum penalty of 20 years' imprisonment and expanded the definition of sexual penetration.[b]
1991	The definition of sexual penetration was again expanded, and a new offence of sexual penetration with a child under the age of 10 substituted for the pre-existing offence, still retaining the maximum penalty of 20 years' imprisonment.[c]
1992	The maximum penalty for the offence of rape was increased to 25 years' imprisonment.[d]
1997	The maximum penalty of 20 years' imprisonment was increased to 25 years' imprisonment in order to 'put it on the same footing as rape'.[e]
2010	Reforms restructured the child sexual penetration offences, and the offence of sexual penetration with a child under 10 was amended to include children under 12 for offences committed on or after 17 March 2010.[f]

a. Hayley Boxall et al., *Historical Review of Sexual Offence and Child Sexual Abuse Legislation in Australia: 1788–2013* (2014) 72.

b. See ibid 78; see also *Crimes (Sexual Offences) Act 1980* (Vic), defining an act of sexual penetration as the introduction (to any extent) of the penis of a person into the vagina, anus, or mouth of another person of either sex, whether or not there is an emission of semen; or the introduction (to any extent) of an object (not being part of the body) manipulated by a person of either sex into the vagina or anus of another person of either sex, otherwise than as part of some generally accepted medical procedure.

c. The *Crimes (Sexual Offences) Act 1991* (Vic) provided that the meaning of sexual penetration is the introduction by a person of his penis into the vagina, anus, or mouth of another person, whether or not there is emission of semen; or the introduction by a person of a part of his or her body (other than the penis) into the vagina or anus of another person, otherwise than in the course of an appropriate and generally accepted medical or hygienic procedure; or the introduction of an object into the vagina or anus of another person, otherwise than in the course of an appropriate and generally accepted medical or hygienic procedure.

d. See *Crimes (Rape) Act 1991* (Vic).

e. See *Sentencing and Other Acts (Amendment) Act 1997* (Vic).

f. See *Crimes Legislation Amendment Act 2010* (Vic).

Development of serious sexual offender provisions

In response to '[s]ignificant community concern … about the inadequacy of custodial sentences imposed, particularly for sexual and violent offenders',[20] the *Sentencing Act 1991* (Vic) was amended in 1993 to incorporate the serious sexual offender provisions.[21] In the amending legislation's Second Reading Speech, the then Attorney-General stated that:

> The Bill represents the government's first step to fulfil its election commitment to bring sentencing practices and sentencing law into line with community expectations.[22]

20. Victoria, 'Sentencing (Amendment) Bill', *Parliamentary Debates*, Legislative Assembly, 29 April 1993, 1354 (Jan Wade, Attorney-General).
21. *Sentencing (Amendment) Bill 1993* (Vic).
22. Victoria, 'Sentencing (Amendment) Bill', *Parliamentary Debates*, Legislative Assembly, 29 April 1993, 1354 (Jan Wade, Attorney-General).

Under a heading entitled 'Increased Custodial Sentences', the then Attorney-General explained that the Bill provided 'for two categories of offenders who will receive increased custodial sentences' – 'serious sexual offenders' and 'serious violent offenders'.[23] The Bill made two mechanisms available to the courts 'to ensure those offenders receive the sentences expected by the community':[24]

- removing both categories of offender from the ambit of the provision requiring the court to take into account the abolition of remissions in sentencing in order to 'have the effect of consistently and uniformly increasing the custodial sentences for serious sexual and violent offenders by 33 per cent';[25] and
- directing the court, once it has decided that a custodial sentence is warranted, 'in determining the appropriate length of the custodial sentence, to the protection of the community as the primary sentencing consideration'.[26]

In service of this second mechanism, the Bill gave 'a clearly expressed statutory authority to courts when determining the appropriate sentence that they need not be constrained by the common law principle of proportionality which effectively prevents a court from imposing a sentence beyond what is proportionate to the crime'.[27] Separately, and significantly, under a different head of explanation in the Second Reading Speech, the Bill 'also addresses the community's concern that multiple offenders generally serve their sentences concurrently' by 'direct[ing] the court that in sentencing serious sexual offenders the presumption is that, unless there are exceptional circumstances, sentences will not be concurrent'.[28]

In conclusion, the then Attorney-General stated:

> The government recognises that parts of the community believe that current sentencing law and practices for violent crime, especially sexual assault, reflect an attitude that such offences are taken lightly. If this were true, it also sends out a dangerous message about how this society values its citizens, particularly women and children. The Bill is clear evidence of the government's abhorrence of such an attitude. The message of the government expressed in this Bill is this: offences involving rape and sexual assault against women and children and, indeed, all forms of violence, are unacceptable.[29]

The structure of the legislative provisions, their content, and the explanatory materials accompanying their introduction demonstrate that the purpose of the scheme is to facilitate community protection not only by incapacitating certain qualifying offenders but also by emphasising the punitive principles of denunciation and general deterrence in the imposition of longer sentences for all qualifying offenders. Judges were directed to do so by disregarding the principle of proportionality where incapacitation was appropriate, and, in all other cases, to understand the principle of proportionality in light of the gravity with which parliament viewed the objective elements of the offending, as a matter of clear legislative intent. This can be contrasted with the particular understanding of the serious sexual offender scheme – evidenced across the sexual penetration cases analysed for this report – as an 'opt-in' means of imposing more severe sentences by releasing judges from the traditional constraints of proportionality.

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23. Victoria, 'Sentencing (Amendment) Bill', *Parliamentary Debates*, Legislative Assembly, 29 April 1993, 1354 (Jan Wade, Attorney-General).
24. Victoria, 'Sentencing (Amendment) Bill', *Parliamentary Debates*, Legislative Assembly, 29 April 1993, 1354 (Jan Wade, Attorney-General).
25. Victoria, 'Sentencing (Amendment) Bill', *Parliamentary Debates*, Legislative Assembly, 29 April 1993, 1355 (Jan Wade, Attorney-General).
26. Victoria, 'Sentencing (Amendment) Bill', *Parliamentary Debates*, Legislative Assembly, 29 April 1993, 1355 (Jan Wade, Attorney-General).
27. Victoria, 'Sentencing (Amendment) Bill', *Parliamentary Debates*, Legislative Assembly, 29 April 1993, 1355 (Jan Wade, Attorney-General). Courts have held, however, that the legislation does not overturn the principle of proportionality in its entirety; see *R v Connell* [1996] 1 VR 436 (13 November 1996) 443 (Charles JA). See also *R v Cowburn* (1994) 74 A Crim R 385; see Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (2014) [3.95].
28. Victoria, 'Sentencing (Amendment) Bill', *Parliamentary Debates*, Legislative Assembly, 29 April 1993, 1355 (Jan Wade, Attorney-General).
29. Victoria, 'Sentencing (Amendment) Bill', *Parliamentary Debates*, Legislative Assembly, 29 April 1993, 1355 (Jan Wade, Attorney-General).

The provision regarding cumulation was amended in 1997, providing judges with increased discretion.[30] No matter how it is understood in the cases discussed later in this report, however, this is not an unregulated discretion; it is subject to the clear directive to impose appropriately punitive sentences for qualifying offenders in order to fulfil community expectations. Where previously sentencers were bound to impose cumulative sentences unless 'exceptional circumstances'[31] were found, the 1997 amendment introduced a presumption of cumulation that could be displaced if the sentencer 'otherwise directed'.[32]

Though silent on this specific change to the cumulation provision, the Bill's Second Reading Speech reaffirmed that:

> When sentencing a repeat serious sexual or serious violent offender to imprisonment the court must regard the protection of the community as the principal purpose of the sentence. The court may also impose a sentence longer than would otherwise be proportionate in order to achieve that purpose. Further, the presumption is that these sentences will be served cumulatively.[33]

Though the threshold for displacing this presumption was lowered, the legislative intention was not altered and remains clear: protection of the community is to be achieved not only by disproportionately long sentences but also by sentences that privilege deterrence and denunciation in the determination of proportionate length. This was further reinforced by the Bill's increase of the maximum penalty for the offence of sexual penetration with a child under 10:[34]

> The government is conscious that there is very clear community concern that the courts should impose higher sentences for sexual offences; crimes committed upon children; offences against the person, particularly where death results; burglaries and home invasion offences; and white-collar crimes, particularly those involving a breach of trust. All these types of crimes will be subject to increased maximum penalties which the government expects will lead to higher sentences being passed on individual offenders … The offences of incest, sexual penetration of a child under 10 years and maintaining a sexual relationship with a child under 16 years will all now have effective maximum terms of 25 years imprisonment, placing them on the same footing as rape offences. The government believes sexual crimes against children are extremely serious and when they occur have the potential to ruin young lives. This view has been repeatedly expressed by members of the public, victims' groups and other specialist bodies, and is now being acted upon.[35]

Understood, therefore, in the full context of the Bill, the changes to the cumulation provision did not fundamentally modify the clear punitive and protective purposes of the serious sexual offender scheme. However, as demonstrated later in this report, this is not the way in which the serious sexual offender provisions are being applied, both at the first instance sentence level and at the appellate level. Rather, the courts approach the task on the basis that the prima facie rules for cumulation and concurrency 'leave the sentencing judge at large, except where the legislature has used the formula "unless otherwise directed by the court because of the existence of exceptional circumstances"'.[36]

30. *Sentencing and Other Acts (Amendment) Act 1997* (Vic).
31. *Sentencing Act 1991* (Vic) s 16(3A).
32. *Sentencing and Other Acts (Amendment) Act 1997* (Vic) s 6 (now *Sentencing Act 1991* (Vic) s 6E).
33. Victoria, 'Sentencing and Other Acts (Amendment) Bill', *Parliamentary Debates*, Legislative Assembly, 24 April 1997, 873–874 (Jan Wade, Attorney-General).
34. The offence at that time was sexual penetration with a child under 10.
35. Victoria, 'Sentencing and Other Acts (Amendment) Bill', *Parliamentary Debates*, Legislative Assembly, 24 April 1997, 872 (Jan Wade, Attorney-General).
36. *R v Mantini* (1998) 3 VR 340, 348.

Course of conduct offences

Since 1 July 2015, an accused has been able to be charged with a 'course of conduct' charge, including for sexual offences, with the consent of the Director of Public Prosecutions.[37] In introducing this legislative change, the Attorney-General stated:

> As the Parliamentary Family and Community Development Committee's Betrayal of Trust report found, repeated and systematic sexual abuse of children is all too common. The government is committed to providing effective criminal law responses to this insidious problem. Regrettably, the criminal law has not responded effectively to some of the most serious instances of repeated sexual abuse. At common law, a high degree of specificity in charges laid against an accused is traditionally required. This is difficult to satisfy in cases of repeated sexual abuse, as it is common for complainants to have trouble recalling precise details of each act of abuse … The bill will address these limitations in the current law by introducing a new way of charging repeated sexual abuse … Where an accused has been found guilty of an offence in a course of conduct charge, the court will be required to impose a sentence reflecting the totality of the offending. This important reform will ensure that the law responds effectively to cases of repeated and systematic sexual abuse.[38]

Considered a single charge, a course of conduct charge for a sexual offence includes more than one incident of that particular offence, committed against the same victim, on more than one occasion over a specified period amounting to a course of conduct having regard to timing, location, purpose of commission, and any other relevant matter.[39] Significantly, it is not necessary for the Crown to prove an incident of the offence with the same degree of specificity as to date, time, place, circumstances, or occasion as would be required if the accused were charged with an offence constituted by only that incident. It is not necessary to provide any particular number of incidents of the offence, or the dates, times, places, circumstances, or occasions of the incidents. Nor is it necessary to provide distinctive features of any of the incidents or the general circumstances of any particular incident.[40]

The court is directed to impose a sentence reflecting the totality of the offending that constitutes the course of conduct, and it must not impose a sentence exceeding the maximum penalty for the offence if charged as a single offence.[41]

While the effect of this new charge on current sentencing practices remains to be seen, the apparent lack of a discernable difference in sentences for representative charges, compared with non-representative charges, suggests that any practical impact of this legislative reform on current sentencing practices may be limited.

A course of conduct charge is distinct from the offence of persistent sexual abuse of a child under the age of 16, which carries a 25-year maximum penalty.[42] This offence was created to overcome 'the real problems the prosecution may face in having to prove the "particulars" of an offence, that is, the time, date and place that an offence took place'.[43] This offence requires proof that the accused did a relevant act during a particular period and that the act took place between the accused and the child

37. *Criminal Procedure Act 2009* (Vic) sch 1 cl 4A.
38. Victoria, 'Crimes Amendment (Sexual Offences and Other Matters) Bill', *Parliamentary Debates*, Legislative Assembly, 21 August 2014, 2934 (Robert Clark, Attorney-General).
39. *Criminal Procedure Act 2009* (Vic) sch 1 cl 4A(2).
40. See *Criminal Procedure Act 2009* (Vic) sch 1 cl 4A(10)–(11).
41. *Sentencing Act 1991* (Vic) s 5(2F).
42. *Crimes Act 1958* (Vic) s 47A.
43. Freiberg et al. (2015), above n 1, 22.

on at least two other occasions during that period.[44] It is not necessary that the acts be of a similar nature or constitute an offence under the same provision. Nor is it necessary to prove the relevant act with the same degree of specificity as to date, time, place, circumstance, or occasion as would be required if the accused were charged with an offence constituted by that act instead of the offence of persistent sexual abuse.[45]

Unlike representative charges, which '[do] not require precision in specifying the other conduct alleged' (an observation also true of the new course of conduct charge), persistent sexual abuse of a child under the age of 16 'requires a degree of specificity of the time period and the specific offending conduct to enable the court to gauge the offender's criminality'.[46] Between 1 July 2009 and 30 June 2014, there were 40 cases involving persistent sexual abuse of a child under 16.[47] The median total effective sentence for this offence was 7 years. The median non-parole period was 4 years and 9 months.[48]

44. *Crimes Act 1958* (Vic) s 47A(2).

45. *Crimes Act 1958* (Vic) ss 47A(2A), (3).

46. Freiberg et al. (2015), above n 1, 26.

47. Sentencing Advisory Council, *Persistent Sexual Abuse of a Child under 16/Maintain Sexual Relationship with a Child Aged under 16* (SACStat, 2015) <http://www.sentencingcouncil.vic.gov.au/sacstat/higher_courts/HC_6231_47A_1.html> at 30 March 2016. See also Arie Freiberg et al. (2015), above n 1, 117.

48. Ibid.

2. Methodology

The focus of this report is on all cases that include, as a principal proven offence, sexual penetration with a child under 12 (or its predecessor, sexual penetration with a child under 10)[49] sentenced at first instance in the County Court of Victoria in the five years from 1 July 2009 to 30 June 2014 (the 'reference period'). Cases were excluded if the Court of Appeal quashed the offender's conviction or made a verdict of acquittal before 1 July 2015. Forty-nine cases of sexual penetration with a child under 12 were analysed.

This number does not represent all sentenced cases of sexual penetration with a child under 12 in the reference period. First, cases were excluded where the offence was not the principal proven offence. The principal proven offence is the offence attached to the charge in a case that receives the most severe penalty. In some cases, an offence of sexual penetration with a child under 12 may not be the offence attached to the charge that received the most severe penalty. Second, cases were excluded where a sexual penetration of a young child occurred but the offence had a different maximum penalty than the current 25-year maximum. As stated above, the maximum penalty changed from 20 to 25 years' imprisonment in 1997. Any offences committed prior to this change but sentenced within the five-year reference period were excluded. Third, offences such as incest, persistent sexual abuse of a child under 16, and rape where the victim was under the age of 12 were excluded.

The research in this report utilised both quantitative and qualitative methods. The first two research questions ('What are the sentencing practices for the offence of sexual penetration with a child under 12?' and 'Are sentencing practices adequate for the offence of sexual penetration with a child under 12?') were addressed primarily through quantitative techniques. These techniques involved an examination of the distribution of sentence types and the median and range of imprisonment terms for the offence of sexual penetration with a child under 12 and for other related offences.

The third and fourth research questions ('How do the courts assess offence seriousness in cases involving sexual penetration with a child under 12?' and 'Which factors contribute to sentencing practices for sexual penetration with a child under 12?') were addressed using primarily qualitative techniques, involving a textual examination of available sentencing remarks both for cases of sexual penetration with a child under 12 and for a sample of rape cases. The final number of rape cases examined was 105. This represents a sample of the 203 rape cases sentenced during the reference period. This sample comprised all rape cases that received a non-imprisonment sentence,[50] and a random selection of 25 cases from each quartile of the range of imprisonment terms imposed on principal charges of rape.

In order to examine, at the micro-level, the factors that sentencers treated as determinative for the purpose of sentence type and duration, and the relative weights of those factors, the following information from the individual sentencing remarks was collected during the textual analysis:

- the sentencing order type and length;
- whether a conviction was recorded;
- whether additional orders were imposed;
- the type and number of charges;
- Crown submissions on range;

49. For consistency, references in this report to 'sexual penetration with a child under 12' include the predecessor to that offence, 'sexual penetration with a child under 10', unless the context provides otherwise.

50. The sample includes cases for which sentencing remarks were available.

- defence submissions on sentence;
- plea and, where relevant, the sentence that would have been imposed but for the plea of guilty (the '6AAA statement');
- prior criminal history;
- whether the offending occurred during a current order or bail;
- the factual context of the offending;
- offender details;
- mitigating factors;
- aggravating factors;
- sentencing principles referred to;
- reasons for imposing the order; and
- reasons for the length of the order.

The Council acknowledges that, while sentencing remarks provide the best available source of data regarding the reasoning for the judge's imposition of sentence, there are limitations to this analysis. Sentencing remarks may not refer, for example, to matters that were fully ventilated between the Crown and the defence during the sentencing hearing.

3. Sentencing practices and their adequacy

This chapter addresses the first two research questions:

- What are the sentencing practices for the offence of sexual penetration with a child under 12?
- Are sentencing practices adequate for the offence of sexual penetration with a child under 12?

Measures and terminology

Sentencing practices for an offence can be described quantitatively in a number of ways. Two ways are focused on here: the type of sentence imposed on principal charges and the term of imprisonment imposed on principal charges. A principal charge is the charge in a case that receives the most severe sentence. It can be considered equivalent to the charge that receives the 'base' sentence in a case with multiple charges. These measures of sentencing practice relate only to the charge being sentenced and therefore are arguably the best measures of sentencing practices for an offence.

A further measure of sentencing practice is the total effective sentence, sometimes referred to as the 'head' sentence. When a sentence of imprisonment is imposed on a case with multiple charges, there is a total effective imprisonment term. Rather than applying to an individual charge, the total effective imprisonment term is the maximum time an offender must serve in prison in relation to all charges sentenced in a case. Guided by legislation and sentencing principles, courts have discretion about the extent to which sentences of imprisonment imposed on individual charges are cumulated to form the total effective imprisonment term.

The total effective imprisonment term is imprecise as a measure of sentencing practice for an offence, due to the potential for other charges within a case to influence the term set. Nevertheless, the total effective imprisonment term is examined in this report for cases in which sexual penetration with a child under 12 was the principal charge in the case (these are referred to as 'cases of sexual penetration with a child under 12').

What are the sentencing practices for sexual penetration with a child under 12?

Figure 1 presents the distribution of sentences imposed on principal charges of sexual penetration with a child under 12. While the clear majority of principal charges received imprisonment (77.6%), a substantial proportion received a non-custodial sentence, including a wholly suspended sentence (8.2%) and a community correction order or a community-based order (6.1%). Other immediate custodial sentences (partially suspended sentences and youth justice centre orders) were imposed on 8.2% of principal charges.

For principal charges that received imprisonment, the median term of imprisonment was 4 years, while the longest term imposed was 6 years. Figure 2 presents the distribution of imprisonment terms imposed on principal charges of sexual penetration with a child under 12. Just over 80% of charges received a term of imprisonment of less than 5 years. The most common range of imprisonment terms imposed was from 4 years to under 5 years (44.7%), while almost 16% of charges received a term of 5 years to under 6 years.

Figure 1: **Percentage of principal charges of sexual penetration with a child under 12 by sentence type, 1 July 2009 to 30 June 2014**[51]

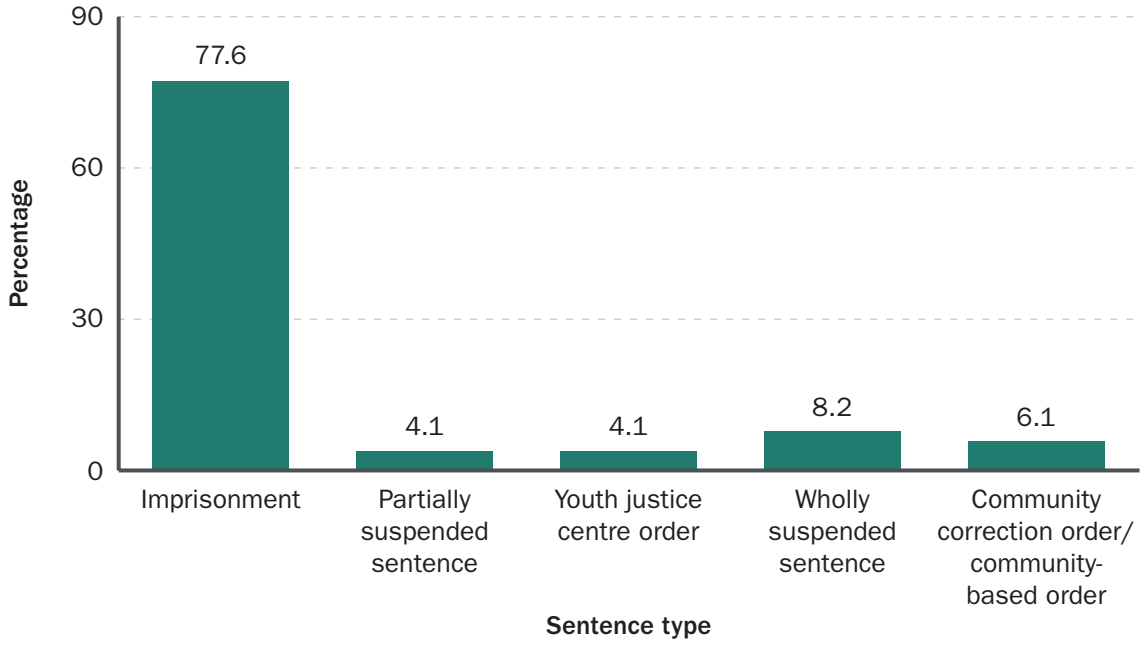
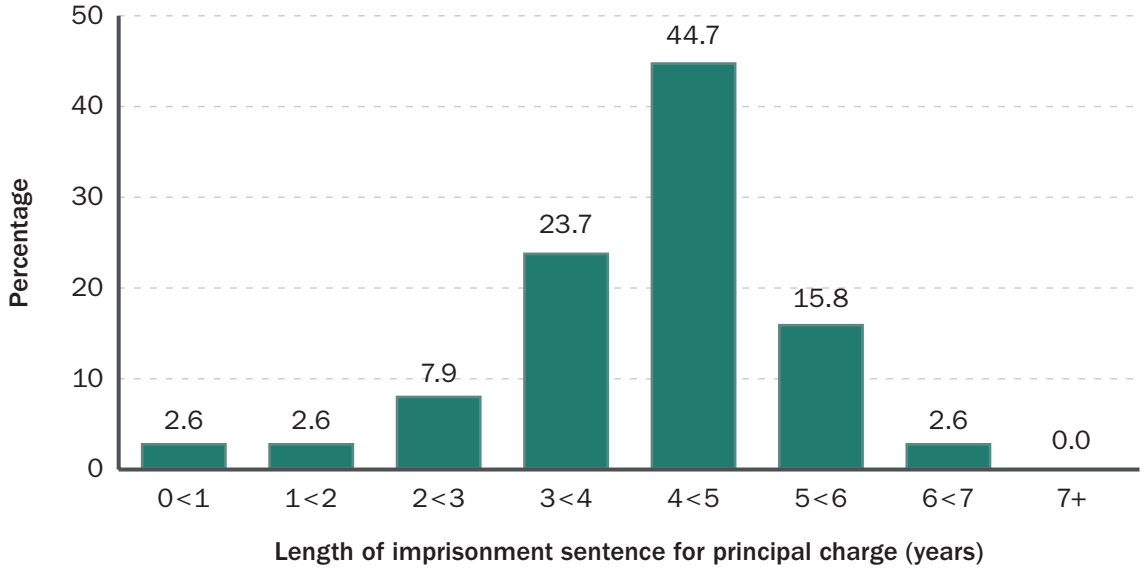


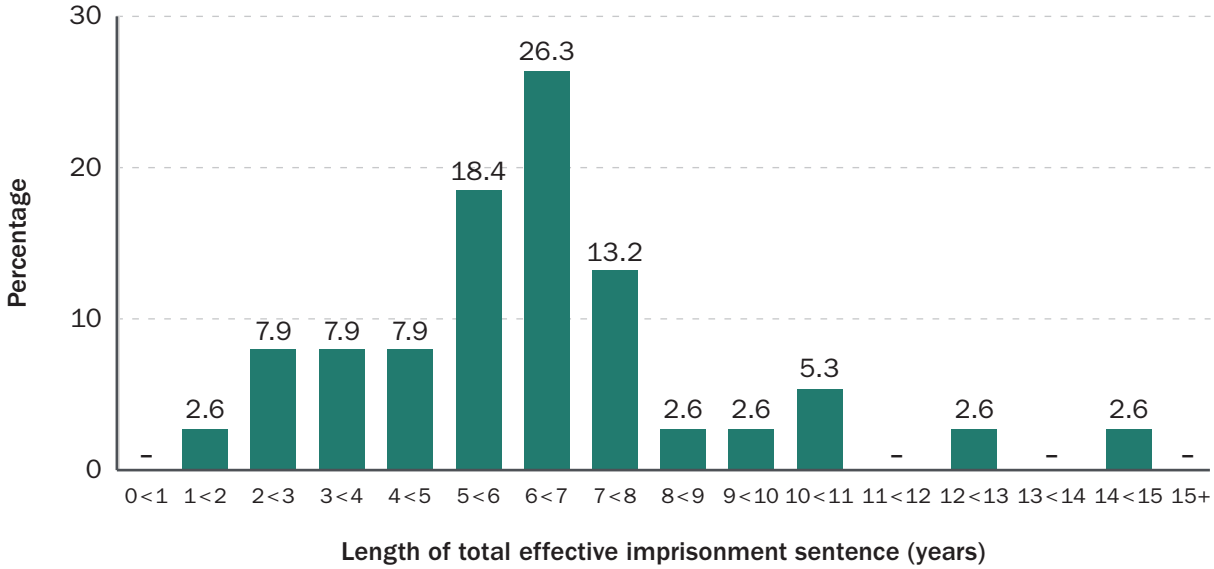
Figure 2: **Percentage of imprisonment sentences by the length of the term of imprisonment for sexual penetration with a child under 12, 1 July 2009 to 30 June 2014**



It was common for cases of sexual penetration with a child under 12 to include multiple charges, particularly charges of sexual offences. Of the 38 cases of sexual penetration with a child under 12 that received imprisonment, 17 cases, or 44.7%, contained more than one charge of sexual penetration with a child under 12, while 35 cases, or 89.5%, included at least one additional sexual offence. Only one case included a charge of a non-sexual violent offence (recklessly causing injury). The average number of charges of sexual penetration with a child under 12 per case was 2.08, while the average number of charges of other sexual offences per case was 7.16.

51. In this figure, community correction order (CCO) also includes one community-based order (CBO) imposed prior to the introduction of CCOs in 2012.

Figure 3: Percentage of cases by the length of the total effective imprisonment term where sexual penetration with a child under 12 was the principal offence, 1 July 2009 to 30 June 2014



Reflecting the fact that multiple charges are often sentenced within a single case, the median total effective imprisonment term for cases that include a charge of sexual penetration with a child under 12 was longer than the median imprisonment term for charges (6 years and 4 years respectively). The longest total effective imprisonment term imposed was 14 years and 6 months.

As Figure 3 shows, the distribution of total effective imprisonment terms had a greater spread than the distribution of imprisonment terms for principal charges (Figure 2). Just over 84% of cases received a total effective imprisonment term of less than 8 years. Cases clustered around the range from 5 years to under 8 years (57.9%), and the most common range was 6 years to under 7 years (26.3%).

Are the sentencing practices adequate?

The second research question seeks to assess the adequacy of sentencing practices for sexual penetration with a child under 12. A number of different approaches are taken. First, research is examined on community and judicial attitudes towards the adequacy of sentencing practices. Second, an assessment is made of the level of harm to victims and the culpability of offenders in cases of sexual penetration with a child under 12. Third, sentencing practices for sexual penetration with a child under 12 are compared with the maximum penalty for the offence. Fourth, sentencing practices for sexual penetration with a child under 12 are compared with sentencing practices for other offences with the same maximum penalty.

Community and judicial attitudes

Research suggests that the community views sexual offending against children as particularly serious. A study undertaken by the Council in 2012, *Community Attitudes to Offence Seriousness*, found that sexual offences involving coerced sexual penetration and child victims were rated by participants as among the most serious offences.[52] The offence of sexual penetration with a child under 12 ranked equally with murder and higher than the offence of rape in terms of community attitudes to offence seriousness.

52. Sentencing Advisory Council (2012), above n 5, 41.

The study found that there were three key factors that led to sexual offences against children being at the very top of the seriousness scale:

- the age of the victim, with a younger victim (under 12) being seen as involving greater harm and culpability;
- the abuse of trust and power that is involved in sexual offences against children; and
- the wide-reaching and long-lasting harm that results from sexual offences against children.

These results can be contrasted to the findings in the Council's report entitled *Sentencing Severity for 'Serious' and 'Significant' Offences: A Statistical Profile*, published in 2011. That report examined sentencing practices in the higher courts in order to calculate an 'offence seriousness' score, based on sentencing outcomes. The report calculated scores for 19 offences, including sexual penetration with a child under 10 and rape. Sexual penetration with a child under 10 was ranked as less serious than rape, as the rate of imprisonment and the median imprisonment term were both lower for sexual penetration with a child under 10 than for rape. The report also noted that:

> Comparing sentencing practices and maximum penalties reveals that there was, for some offences considerable discrepancy between the longest imprisonment term imposed and the maximum penalty available. In percentage terms, the largest discrepancy was 74.0% for charges of sexual penetration with a child under 10. The longest sentence imposed on a single charge of this offence was six years, which is 19 years short of the 25-year maximum for the offence. When case level sentencing was considered, however, the longest total effective sentence imposed for this offence was 18 years' imprisonment, seven years short of the maximum penalty.[53]

Previously, in 2009, the Council published its report on *Maximum Penalties for Sexual Penetration with a Child under 16*. This report was prepared in response to a reference from the then Attorney-General requesting advice on the adequacy of the maximum penalties that applied to the offence of sexual penetration with a child under the age of 16.

The reference was triggered by community concern arising from a case involving the sexual penetration of a child who had turned 10 years of age two weeks prior to the commission of the offence. In *R v Maurice*,[54] the fact that the child was over the age of 10 meant that the available maximum penalty was 10 years' imprisonment. Had the offence been committed two weeks earlier, when the child was under 10 years of age, the applicable maximum penalty would have been 25 years' imprisonment. This case attracted attention because of the 15-year difference between the maximum penalty that applied at that time to offences committed against children under 10 and the maximum penalties that apply where the victim is aged 10 to 16.

The Council's consultations revealed that, while some people did not consider that the maximum penalties for offences involving the sexual penetration of children were inadequate, an overwhelming majority thought that sentences imposed for offences involving the sexual penetration of children were low, or even inadequate, in relation to the existing maximum penalties.

The Council's report[55] noted that the disparity between the sentences handed down and the maximum penalties had been recognised by the Victorian Court of Appeal in the cases of *Director of Public Prosecutions v CPD*[56] and *Director of Public Prosecutions v DDJ*.[57] The Court of Appeal commented that 'a real question arises as to the adequacy of current sentencing for [these] offence[s] … [and] that is a matter of first importance to the administration of criminal justice in this State'.[58]

53. Sentencing Advisory Council, *Sentencing Severity for 'Serious' and 'Significant' Offences: A Statistical Profile* (2011) 21.
54. *R v Maurice* (Unreported, Victorian County Court, Lacava J, 14 October 2008).
55. Sentencing Advisory Council, *Maximum Penalties for Sexual Penetration with a Child under 16 Report* (2009) 65–66.
56. *Director of Public Prosecutions v CPD* [2009] VSCA 114 (28 May 2009).
57. *Director of Public Prosecutions v DDJ* [2009] VSCA 115 (28 May 2009).
58. *Director of Public Prosecutions v DDJ* [2009] VSCA 115 (28 May 2009) [72].

In *Director of Public Prosecutions v DDJ*, the court concluded that it had competency to express a view regarding the adequacy of current sentencing practices in an appropriate case, and invited the Director of Public Prosecutions to address the issue in a fully argued case.[59]

A number of those consulted by the Council argued that sentences imposed for offences involving the sexual penetration with children, in terms of both sentences given for individual charges and total effective imprisonment terms, were too low when considered in the context of the inherent seriousness of sexual offences against children and the relevant maximum penalties. These views were expressed by victims of crime, victim support organisations, and police, and were informed by first-hand knowledge and experience and by reference to the Council's sentencing statistics.

Although recognising that an increase in a statutory maximum penalty is generally considered to be an indication by parliament that longer sentences should be imposed, the Council did not believe that increasing the statutory maximum penalties would have a significant effect on current sentencing practices for the offence of sexual penetration with a child under 16. This view was shared by many of those consulted in the preparation of the report. Instead the Council suggested that the development of a guideline judgment in relation to the offence of sexual penetration with a child under 16 would be a more effective method of addressing the issue of inadequate sentencing practices in relation to this offence.

The Council did, however, recommend that the 'lower' age for this offence be raised from 'under 10' to 'under 12'. While acknowledging that any aged-based legal definition is problematic and to some extent arbitrary, the Council found that the majority of people who were consulted considered that limiting the application of the higher maximum penalty of 25 years' imprisonment to children aged under 10 did not reflect the inherent vulnerability of pre-teen children. This recommendation was implemented by the government in 2010.[60]

Victorian Jury Sentencing Study

Replicating the methodology from the seminal Tasmanian Jury Sentencing Study, the Victorian Jury Sentencing Study[61] involves surveying jurors in real trials to gauge public opinion about sentences and sentencing. Basing these findings on jurors, as opposed to members of the public, allows the researchers to examine views of individuals who, like the judge, are fully informed about the facts of the specific case before them.

There is a body of public opinion research showing that between 70% and 80% of uninformed respondents believe sentences are too lenient. In contrast, by surveying 698 jurors from 138 criminal trials, the Tasmanian Jury Sentencing Study found that over half of those surveyed recommended a more lenient sentence than the sentence that the trial judge actually imposed. When told the final sentence, 90% of jurors said the judge's sentence was very or fairly appropriate.[62]

Overall, the Tasmanian study showed that the jury survey approach provides a viable way to measure informed public judgment about sentencing. This approach surveys people who have direct experience with the criminal justice system rather than relying on respondents without such first-hand knowledge, who may have formed their views through the lens of the mass media.[63]

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59. *Director of Public Prosecutions v DDJ* [2009] VSCA 115 (28 May 2009) [71]–[72].
60. *Crimes Legislation Amendment Act 2010* (Vic) s 3.
61. 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).
62. Kate Warner et al., *Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study*, Trends and Issues in Crime and Criminal Justice 407 (2011) 3.
63. Ibid 6.

The sample of cases used in the Victorian Jury Sentencing Study involved all trials resulting in a guilty verdict in the Victorian County Court from May 2013 to June 2014. A total of 124 trials were included in the study involving both metropolitan and non-metropolitan courts, and 987 jurors participated in the study.

The principal offences included in the study were divided into the following categories:

- sexual offences;
- violent offences;
- property offences;
- drug offences;
- culpable driving; and
- other offences.

Overall, just over 60% of jurors recommended a more lenient sentence than the sentence imposed by the judge in their respective cases.[64] When advised of the sentence imposed by the judge after the trial in which the juror deliberated, almost 87% of jurors indicated that the judge's sentence was very or fairly appropriate.[65] However, the degree to which jurors considered the judge's sentence to be appropriate differed depending on the offence type. Only 50% of jurors indicated a preference for a more lenient sentence than the sentence imposed by the judge in sexual offence cases, compared with 70% of jurors in cases involving other offences.[66]

The Victorian Jury Sentencing Study also examined whether leniency differed according to the type of sexual offence. The study was able to include 45 of the 48 sexual offence cases and considered responses from 342 jurors.[67] The sexual offence cases included in this part of the study were divided into three categories: rape and aggravated sexual assault (124 jurors), child sexual assault involving a child 12 years or older (93 jurors), and child sexual assault involving a child under 12 years (125 jurors). The results showed that jurors were more likely to conform to the overall pattern of juror leniency in trials involving rape and child sexual assault where the child was 12 and older. However, only 36% of jurors recommended a more lenient sentence than the judge in child sexual assault cases in which the victim was aged under 12, with 63% of jurors indicating that a more severe sentence should have been imposed.[68] When jurors were informed of the judge's sentence, only 35.7% of jurors in cases of child sexual assault where the child was aged under 12 considered the sentence to be very appropriate. This can be compared with 52.8% of jurors who considered the sentence to be very appropriate for cases involving other types of sexual offences and 54.8% overall.[69] The Victorian Jury Sentencing Study provides strong evidence of community concern with sentences imposed for sexual offences involving young children.

Harm and culpability

Offence seriousness is often assessed through the prism of harm and culpability. Offending that inflicts high levels of harm on a victim is considered to be more serious than offending that inflicts low levels of harm. Likewise, offending that involves a high level of culpability on the part of the offender is considered more serious.

64. Warner et al. (under review for publication), above n 61.
65. Ibid.
66. Ibid, Figure 1.
67. Three trials had to be excluded from the sexual offence sample. The sentencing remarks were not available, and the necessary classification into the three sub-categories of sex offending could not be undertaken by the researchers.
68. Warner et al. (under review for publication), above n 61, Figure 2.
69. Warner et al. (under review for publication), above n 61.

While the culpability of the offender who has committed a sexual penetration offence will vary, the harm inflicted on victims is typically high in cases of sexual penetration with a child under 12, particularly in the form of long-term psychological harm. In addition to the immediate physical pain often caused by the offending behaviour, it has been recognised that the sexual abuse of children 'has a range of very serious consequences for victims'.[70] These include suicidality, post-traumatic stress disorder, alcohol and drug misuse, antisocial behaviours, depression, eating disorders, post-partum depression, parenting difficulties, sexual revictimisation, and sexual dysfunction.[71]

Maximum penalty

One of the purposes of a maximum penalty is to express parliament's view of the relative seriousness of an offence. Therefore, an assessment of parliament's view of the seriousness of an offence can be gauged by examining the statutory maximum penalty and how it compares with the maximum penalty for other offences.

The maximum penalty for sexual penetration with a child under 12 is Level 2 imprisonment (25 years). This is the second highest maximum penalty available in Victoria, indicating that parliament considers sexual penetration with a child under 12 to be one of the most serious offences. The offence sits alongside a number of other serious offences, including rape, incest and persistent sexual abuse of a child under 16, aggravated burglary, armed robbery, kidnapping, and trafficking in a commercial quantity of a drug of dependence and cultivating a commercial quantity of a narcotic plant. The highest maximum penalty is 'life' imprisonment, which applies to a handful of offences including murder and the most serious drug offences.

Sentencing practices for sexual penetration with a child under 12 fall well short of the maximum penalty of 25 years' imprisonment. In the five-year period from 1 July 2009 to 30 June 2014, the longest term of imprisonment imposed on a principal charge of sexual penetration with a child under 12 was 6 years, which is less than 25% of the maximum penalty for the offence. This imprisonment term was imposed on only one principal charge, while the next longest imprisonment term was 5 years, just 20% of the maximum penalty. Six principal charges received this sentence, representing 15.8% of principal charges that received imprisonment for the offence. On the face of this initial comparison with the maximum penalty, it appears that sentencing practices are inadequate.

Other offences

Examined below are the sentencing practices for a number of other offences in Victoria that share the same maximum penalty of 25 years' imprisonment. The offences selected include other sexual offences (rape, incest, and persistent sexual abuse of a child under 16) and non-sexual offences (aggravated burglary, armed robbery, kidnapping, trafficking in a commercial quantity of a drug of dependence, and cultivating a commercial quantity of a narcotic plant). Figure 4 shows the median imprisonment term for charges of each of these offences. Sourced from SACStat,[72] these data consider all charges (not just principal charges) of an offence sentenced in the period from 1 July 2009 to 30 June 2014.

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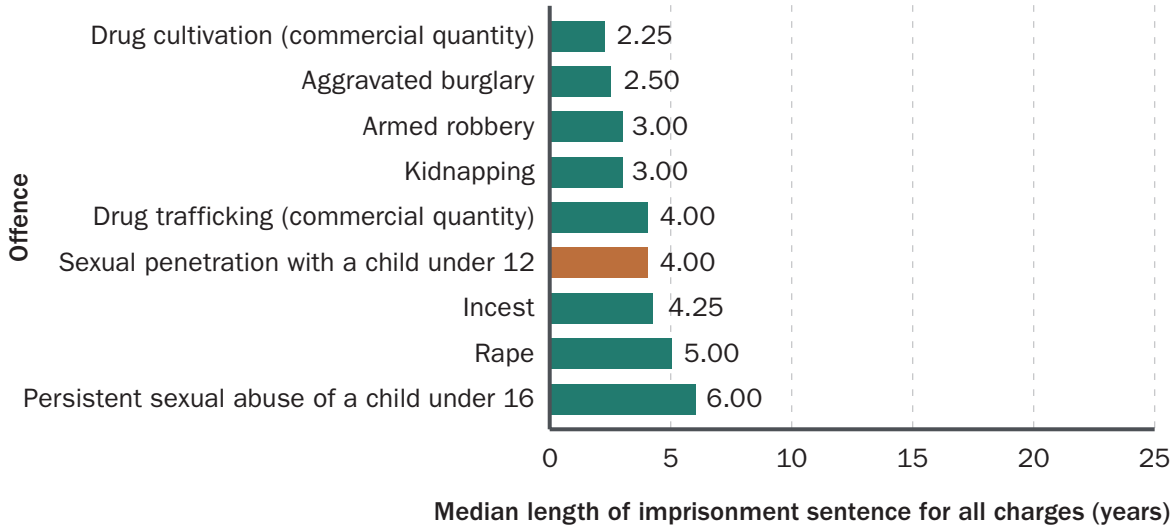
70. Kelly Richards, *Misperceptions about Child Sex Offenders*, Trends and Issues in Crime and Criminal Justice no. 429 (2011) 1; Freiberg et al. (2015), above n 1, 70 (noting that '[t]he scientific evidence of the long-term effects of CSA is now extensive and convincing'). See also Queensland Sentencing Advisory Council (2012), above n 2, 72; Australian Psychological Society (2014), above n 2; Cashmore and Shackel (2013), above n 2.

71. See, for example, Kendell-Tackett et al. (1993), above n 3.

72. Sentencing Advisory Council, *SACStat: Higher Courts User Manual* (2016) <https://www.sentencingcouncil.vic.gov.au/statistics/sacstat/higher-courts-user-manual> at 30 March 2016.

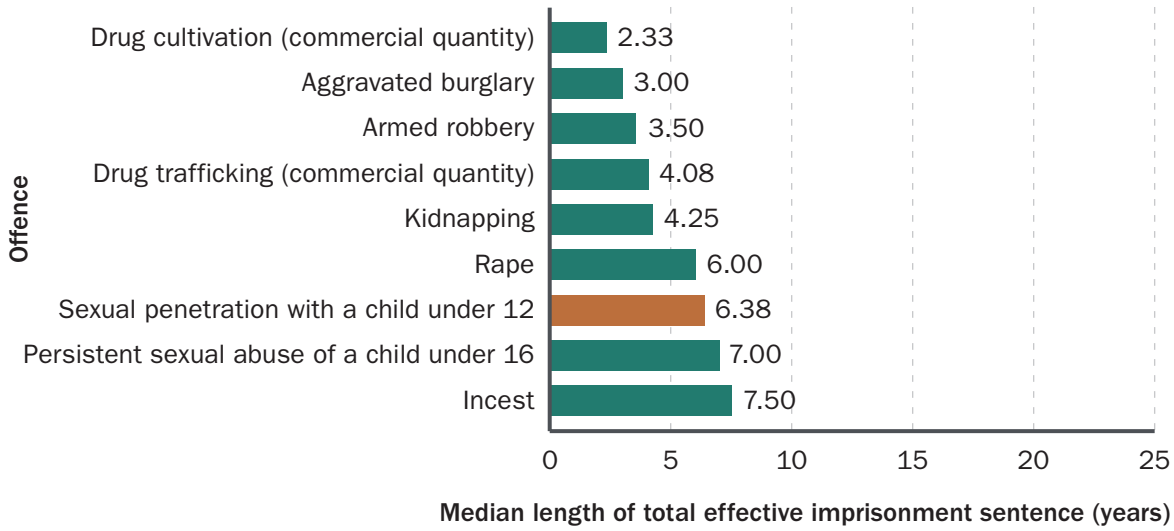
Figure 4: Median imprisonment term for all charges of various offences with a maximum penalty of 25 years' imprisonment, 1 July 2009 to 30 June 2014



Among the nine offences examined, the median imprisonment term for charges of sexual penetration with a child under 12 sits alongside trafficking in a commercial quantity of a drug of dependence (4 years' imprisonment for both offences), but below other sexual offences, including persistent sexual abuse of a child aged under 16 (6 years), rape (5 years), and incest (4 years and 3 months). It appears that sentencing practices for sexual penetration with a child under 12 are low by comparison both with the maximum penalty and with the other sexual offences that have a 25-year maximum penalty.

If total effective imprisonment terms are considered, a somewhat different picture emerges (see Figure 5). For each offence, the median total effective imprisonment term is longer than the median for the principal charge. As with imprisonment terms attached to principal charges, total effective imprisonment terms for non-sexual offences tended to be shorter than total effective imprisonment terms for sexual offences. A key difference from imprisonment terms for charges is that the median total effective imprisonment term for sexual penetration cases was slightly longer than that for rape cases (6.38 years compared with 6 years).

Figure 5: Median total effective imprisonment term for cases in which the offence of interest was the principal offence, 1 July 2009 to 30 June 2014



4. Courts' assessment of offence seriousness

The third research question asks, 'How do the courts assess offence seriousness in cases involving sexual penetration with a child under 12'. In addressing this question, the Council selected the offence of rape as a comparator. Given that the offence of rape has a higher median imprisonment term for principal charges than the offence of sexual penetration with a child under 12 (5 years compared with 4 years), the textual analysis of the cases in the rape sample investigated whether the same factors contributed to the assessment of offence seriousness. If the same factors did contribute, the analysis considered whether there was any observable difference in the weighting of those factors, and whether the age of the rape victim had any observable effect on sentence length.

Across the cases, judges emphasised the inherent seriousness of the offences of sexual penetration with a child under 12 and rape. At the level of principle, the same factors contributed to this assessment for both offences: the harm caused and the offender's culpability. In practice, however, these factors appear to be understood in different ways, depending on the offence.

Placement of descriptions of harm

It was more common in the rape cases for judges to explicitly mention, or elaborate on, the details of the physical and emotional harm caused to the victim, as part of the judge's description of the offending.[73] These details were frequently excluded in the analogous description of the offending in cases of sexual penetration with a child under 12, confined instead to a separate, and later, discussion of victim impact.[74] While it may not be the intention of judges to de-emphasise the level of violence involved in sexual penetration offences, this is the effect.

Weighting of harm and culpability

In cases of sexual penetration with a child under 12, it appeared that considerably greater weight was given to mitigating factors that were personal to the offender, such as prior good character or the burden that imprisonment would impose, than to aggravating factors based on harm to the victim.[75] This was so despite strong language acknowledging the range of physical, mental, and emotional harms suffered by the victim or victims and their families, as well as current authority about the breadth and depth of the harms inherently caused by the offence of sexual penetration with a child under 12.[76] Beyond the difference in median imprisonment sentences imposed on principal charges, this observation did not vary greatly in comparison to the rape sample.

73. RP case 1; RP case 2; RP case 3; RP case 10; RP case 11; RP case 16; RP case 26; RP case 65; RP case 83; RP case 84; RP case 93; RP case 105.

74. SP case 5; SP case 6; SP case 9; SP case 4; SP case 24; SP case 12; SP case 16; SP case 17; SP case 21; SP case 23; SP case 25; SP case 27; SP case 32; SP case 34; SP case 41; SP case 42; SP case 47; SP case 48; SP case 54.

75. This approach to mitigating and aggravating factors can be contrasted to public opinion research that shows that jurors and lay opinion place more weight on aggravating than mitigating factors. See Warner et al. (under review for publication), above n 61; Julian V. Roberts and Mike Hough, 'Exploring Public Attitudes to Sentencing Factors in England and Wales', in Julian V Roberts (ed.), *Mitigation and Aggravation at Sentencing* (2011).

76. See *R v Gavel* [2014] NSWCCA 56 (15 April 2014) [110]; *R v Tuala* [2015] NSWCCA 8 (13 February 2015) [56]; Freiberg et al. (2015), above n 1, 69–73; Australian Psychological Society (2014), above n 2; Cashmore and Shackel (2013), above n 2.

One factor, however, particular to the discussion of harm in the rape sample was the fact that the victim was a virgin before the offending, and this was mentioned as going towards harm to increase offence seriousness for rape.[77] This aggravating factor, given voice in the context of a rape case, and implicit in almost every case of sexual penetration with a child under 12 (thereby increasing the objective seriousness of the offence), was never mentioned in the cases of sexual penetration with a child under 12. This raises concerns that the full range of harms that flow from the offence of sexual penetration with a child under 12 – where, almost universally, the offending represents the child's first sexual experience – may not be explicitly recognised, and therefore not considered, in an assessment of the objective seriousness of this offence.

In terms of the assessment of culpability, two points are salient:

- First, offenders in cases of sexual penetration with a child under 12 were more likely to be found to be acting 'opportunistically' than those in the rape sample. The latter were more likely to be found to have acted predatorily or to have planned the offending to some degree, a fact that increased their culpability.[78] The assessment of opportunistic sexual offending against children as going towards mitigation in the sexual penetration cases is problematic, and this is discussed separately below.
- Second, and in a related manner, for both offences there was an underlying perception of sexual violence that acted to diminish the inherent violence of sexual offending against children and, in certain cases, rape.

Assessments of sexual violence

Although courts routinely recognised, at the level of principle, the seriousness of child sexual assault, the violence involved in the physical element of the offence of sexual penetration with a child under 12 was repeatedly underestimated. This tendency is represented, at the broadest level, in the different associations that attach to the terms 'rape' and 'sexual penetration', and it has the direct effect of making this inherently violent sexual offending appear less so.[79]

Additional charges of non-sexual violence

An examination of the nature of the offences constituting non-principal charges found that there was a clear difference between cases of sexual penetration with a child under 12 and rape cases. A very small proportion of cases of sexual penetration with a child under 12 included at least one charge of a non-sexual violent offence (2%). In comparison, over one-third of rape cases included at least one charge of a non-sexual violent offence (35%). The most common types of non-sexual violent offences were assault, false imprisonment, and intentionally causing injury. Thus, rape cases were far more likely than cases of sexual penetration with a child under 12 to include proven charges of non-sexual violence.

There were too few cases of sexual penetration with a child under 12 to analyse the effect of non-sexual violent offending on the sentences for the charges of sexual penetration. Analysis of rape sentencing practices in relation to the presence of charges of non-sexual violence, however, found that this factor appeared to influence sentencing practices for the charge of rape.

77. RP case 29; RP case 44; RP case 115.

78. RP case 27; RP case 1; RP case 2; RP case 16; RP case 29; RP case 26; RP case 40; RP case 43; RP case 50; RP case 51; RP case 91.

79. See, for example, Freiberg et al. (2015), above n 1, 70; Australian Psychological Society (2014), above n 2; Cashmore and Shackel (2013), above n 2.

The mean[80] imprisonment term imposed was 5.9 years for rape charges that occurred in cases that also involved charges of non-sexual violence, compared with 4.7 years for rape charges that occurred in cases in which there were no charges of non-sexual violence. This difference was found to be statistically significant. Therefore, the presence of charges of non-sexual violence in rape cases was associated with longer imprisonment sentences on the rape charge.

Characterisation of sexual offending

The textual analysis found that cases of sexual penetration with a child under 12 tended to be characterised as less violent than rape cases. In the cases of sexual penetration with a child under 12, this approach took a number of forms. First, there were explicit remarks that 'no violence was involved'.[81] In making such a finding, judges seem ostensibly concerned with physical violence over and above that inherent in the basic physical element of the offending. However, in a context in which the trauma caused by this offence has only very recently been accepted as fact,[82] and in which current sentencing practices for sexual penetration with a child are overwhelmingly concentrated towards the lower end of the scale, such observations reflect an understanding of 'violence' for the purposes of proportionate sentencing that conforms to historical norms of overt, inter-adult stranger assaults involving visible injuries, the use of weapons, and/or disguises.

This characterisation of 'violence' as encompassing only non-sexual violence has the consequence of diminishing the equally destructive and terrifying violence inherent in sexual offending against children, which more often takes the form of physical or emotional coercion, or the simple act of being overpowered. It can also have the effect of rendering invisible and irrelevant the extreme physical pain inherent in the act of an adult forcibly penetrating the genitals and anus of a child. Many of the sexual penetration cases simply did not mention, in the relevant description of the offending, the terror and/or extreme physical pain that objectively would have been caused by the offence.[83] The reason for this is unclear, but it has the effect of diminishing harm.

This point has salience for the rape sample as well. There, too, violence for the purpose of proportionate sentencing, or aggravation increasing sentence length beyond the median, was often understood as represented by stranger attacks and/or traditional signifiers like weapons, disguises, injuries, and overt force[84] (described by one judge as 'a degree of force involved beyond

80. A mean value was used for this measure, rather than a median, because tests for statistical significance can be easily conducted on the mean but not on the median.

81. SP case 53; SP case 38 (the offender pleaded guilty to seven counts of indecent act, one of which was a representative charge, with a child and one count of sexual penetration against his victim, his de facto partner's granddaughter, over a period of six years. The conduct involved rubbing and licking the genitals of the victim, and penetrating her anus, during a five-year period from which she was between four and nine years old, when she had been entrusted into the care of the offender or spending time in her grandmother's home. He received a sentence of 6 years and 3 months, with a non-parole period of 3 years and 6 months. The judge noted: 'Your counsel also urged me on the plea to take into account the fact that no violence or weapons were used in the commission of these offences. I do so, whilst also observing that the young age of your victim and the position of trust in which you were would have made resort to such behaviour unnecessary').

82. See *Franklin v The Queen* [2013] NSWCCA 122 (24 May 2013) [21]; Freiberg et al. (2015), above n 1, 69–70.

83. SP case 3; SP case 4; SP case 24; SP case 12; SP case 14; SP case 16; SP case 25; SP case 27; SP case 41.

84. RP case 16; RP case 19; RP case 29 (this point was confirmed in the appeal for this case in which the rape sentence was found to not be manifestly excessive; see *El-Waly v The Queen* [2012] VSCA 184 (16 August 2012) [84]–[86]); RP case 43; RP case 49; RP case 54; RP case 69; RP case 73; RP case 77; RP case 84; RP case 89; RP case 91; RP case 93 ('[t]he offence which you have committed is thus, in a very serious category of rape; rape of a stranger, committed randomly and accompanied by abduction and violence'); RP case 106; RP case 114; RP case 65 (this sentence was reduced on appeal on the ground of manifest excess, but that appeal provides further evidence of difficulties in assessing the nature of sexual violence. First, it shows a clear preference for weighting subjective offender characteristics as more significant than victim impact in the sentence synthesis. Second, in referring to its prior decision in *Hasan v The Queen* [2010] VSCA 352 (17 December 2010), the court described that the appellate judges had 'referred firstly to the cases of sleeping victims *and then to offences that it classified as cases of violent rape*' (emphasis added). Of the cases in the latter category, the court repeatedly used the phrase 'a violent, *forcible rape*' (emphasis added), the redundancy of which indicates that there are problems in assessment of the nature of inherent violence of the physical elements of the offence itself that are likely to contribute to keeping the sentencing practices for that comparator offence low; see *MC v The Queen* [2011] VSCA 2 (14 January 2011) [30]).

merely proceeding without her consent'[85]). However, in relevantly similar rape cases in which these traditional forms of violence were present, those forms did not always result in significant increases to the total effective imprisonment term and/or the non-parole period,[86] indicating some inter-judge disparity in the rape sample. In the case of RP case 116, a gang rape (not described as such in the sentence remarks), the judge stated:

> I also take into account the fact that although there was no violence as such, the rapes occurred in humiliating and frightening circumstances where a large number of men were gathered, whom the complainant knew to be members of the [motorcycle club] and from whom the complainant heard disparaging comments. She, being in a vulnerable state, knew she had no likely means of escape.

Similarly, in RP case 76, where the offender broke into the home of the victim and raped her six times while her two year old son slept nearby, the judge stated:

> It can be said that upon, if you like, an abstract description, your sexual treatment of her was without particular violence. She did not very significantly resist, she was not left significantly injured. However, it became very apparent to me during the course of her evidence (cross-examination was prolonged; I do not say it was intentionally aggressive or offensive) that [the victim] was very seriously frightened, affected and sexually abused. As she effectively said, she could and did not vigorously resist or complain for fear that her sleeping child would awake and see what was happening to her.

In RP case 86, the offender was at the home of an acquaintance who was pregnant; he pushed her into her two year old son's room and raped her while the infant banged on the door outside. The judge stated, '[w]hile you inflicted no physical injuries, you used preponderant strength to impose yourself upon her and, to my mind, such force is tantamount to physical coercion and violence'. These approaches towards characterising the use of force and the infliction of violence fail to adequately reflect the inherently violent nature of the offence of rape.

Where traditionally understood violence was absent in the rape cases, clear signs of non-consent (that is, where the victim was asleep, unconscious, drunk, and/or drugged) figured in a number of sentences over the median.[87] However, such signs of non-consent were also present in a number of similar cases in which sentences imposed were at or below the median.[88]

Language used to describe sexual offending

In addition to overt statements or assumptions about the violence of the offending, assessments that did not give adequate weight to the degree of violence were apparent in the use of language in the sexual penetration cases. Further, even where the violence used was overt and conformed to traditional notions of attack, the factual matrix was repeatedly described in terms that diminish the offender's agency and the degree of force used.

In SP case 4, the offender was a 60 year old family friend of the 10 year old and 6 year old victims. The offender was charged with 13 counts of sexual penetration with a child under 12 and two counts of indecent act with a child under 16. The language used to describe the offending is set out here in full:

85. RP case 6.

86. RP case 15; RP case 21; RP case 33 (this remains true despite an appeal that further reduced sentence to take into account the impact of delay; see *Flora v The Queen* [2013] VSCA 192 (31 July 2013)); RP case 39; RP case 47; RP case 71; RP case 85; RP case 95; RP case 101.

87. RP case 27; RP case 3; RP case 12; RP case 20; RP case 24; RP case 69.

88. RP case 8; RP case 4; RP case 6 (a sentence of 8 years and 3 months with a non-parole period of 6 years was reduced on appeal to 6 years and 4 months with a non-parole period of 4 years and 9 months); RP case 25; RP case 31; RP case 55; RP case 72; RP case 79.

> Charges 1, 2, 3 and 4 all arise out of the one incident that occurred between 6 October 2005 and 28 October 2005 when [the victim] was sent by his father to stay with you at [location]. *You inserted your penis into [the victim's] anus* which is Charge 1. *You then took [the victim] into the bathroom and again put your penis into his anus*, which is Charge 2. You then took [the victim] back into the bedroom and again put your penis into his anus, which is Charge 3. You then slammed [the victim] against the wall *and kept your penis in his anus,* finally giving [the victim] $200. [The victim] was then aged ten years.
>
> The second incident gives rise to Charge 5 and that occurred during those same dates on a different occasion, when *you were having sex with [the victim]* and you presented him with a dildo. [The victim] was aged ten years *and you placed the dildo in his anus.*
>
> The third incident gives rise to Charges 6 and 7 which occurred at [location] between 28 October 2005 and 24 June 2009. You *had your penis in [the victim's] mouth, that* gives rise to Charge 6 and [this] occurred when [the victim] was aged between 10–13. You told [the victim] to stop and turn around and *you then placed another dildo into [the victim's] anus,* that gives rise to Charge 7.
>
> The fourth incident occurred at [location] between 6 October and 28 October 2005 and that gives rise to Charge 8, when *you were having sex with [the victim]* and you *compelled [the victim] to place his penis into your anus,* [the victim] was aged ten.
>
> The fifth incident which occurred between 1 June 2009 and 24 June 2009 was when *you asked [the victim] to suck your penis,* that matter gives rise to Charge 9. The next incident occurred at [location] between 2 October 2006 and 27 June 2008, and gives rise to Charges 10–13 inclusive. You put your finger into [the second victim's] anus, Charge 10. You *then placed your penis into [the second victim's] anus,* Charge 11. You then placed your hand on *[the second victim's]* penis, Charge 12. You *then put your penis into [the second victim's] mouth* and that is Charge 13.
>
> Charge 14 concerns events at [location] between 2 October 2006 and 27 July 2008 when you had [the second victim] hold your penis. Charge 15 concerns your behaviour at [location] between 2 October 2006 and 24 June 2009 when you *placed your penis in [the second victim's] anus,* [the second victim] was then aged between 6–8 years.[89]

The language used to describe the factual context of this offending downplays the offender's agency and the force used. In this respect, it has the effect of inaccurately describing the context of the offending. For example, someone 'places' their penis in the anus of a six year old founding the basis of a charge of sexual penetration in the same way that a person 'places' a knife in the torso or a glass on the skull of an adult founding the basis of a charge of intentionally causing serious injury. The latter circumstances are never described in such terms.

The Council notes that the use of 'neutral language' is a requirement for the Crown on a plea opening,[90] and that this may influence the courts' choice of language when sentencing. Similarly, there has been both Court of Appeal and High Court commentary on the importance of the court avoiding 'emotion', including disgust or revulsion towards child sex offenders, when sentencing.[91] Nevertheless, the descriptions of the acts constituting the offending in cases of sexual penetration with a child under 12 suggest more than the simple use of neutral language. A substitution of the objectively neutral word 'penetrate' with the words 'put' or 'place' goes beyond neutrality and instead fails to both accurately describe the act itself and convey the inherent violence of that act.

89. SP case 4 (emphasis added).

90. See Director of Public Prosecutions, *DPP Guide: Requirements for Plea Openings* (2014) 2.

91. See *Director of Public Prosecutions v OJA* [2007] VSCA 129, [17], Nettle JA citing *Ryan v The Queen* (2001) 206 CLR 267: 'as Hayne J said in *Ryan*, the sort of emotion which offending of this kind evokes must be put aside. Disgust and revulsion for the offender and sympathy for the victims cannot be allowed to cloud the sentencer's vision'.

The effect of this choice of language is to diminish the offender's culpability as well as the harm caused in the extent of the fear, violence, and pain inherent in the offending. Such language was used repeatedly to describe the factual context of the sexual violence against children. For example:

- victim aged between five and seven years: '[t]he complainant woke and turned over and saw you in her bed. She said that you were doing "stuff" to her that she did not like and that hurt. You put your finger in her navel, and your penis in her anus' (SP case 27);
- victim under 10: '[o]n Count 19, you introduced your finger into the anus of [the victim] and on Count 20, you introduced your penis into the anus of [the victim]. At the time of committing Counts 19 and 20, you smeared cream used in the pig industry to assist in birthing piglets. You smeared that cream over [the victim's] anus and then penetrated him' (SP case 41);
- victim aged seven when offending started: 'Charge 1 is a representative charge where you admitted placing your penis into the victim's mouth when the victim was aged 8. It occurred in the victim's bedroom at her home. This charge represents other incidents where the victim performed oral sex upon you'. 'Charge 2 is a representative charge where you placed your finger into the victim's vagina. The charge is based on the first occasion when the victim was staying overnight at your home. You were on a mattress in the lounge room. This charge represents other incidents where you engaged in digital penetration of the victim's vagina' (SP case 5).

Consequences of assessments of sexual violence

The under-estimation of the violence involved, as seen in the sentencing remarks of the cases, gives rise to concerns that the full range of victim harms are not being accounted for in the sentences. This occurs in a general context of low median imprisonment sentences imposed on principal charges of this offence, and a specific context in which the full range of sentencing considerations have been examined at the micro-level. Viewed in their full factual context, the cases of sexual penetration with a child under 12 indicated that little has changed since the Court of Appeal observed in 2009 that '[w]hen 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'.[92]

In the period 1 July 2009 to 30 June 2014, there was one Crown appeal against a sentence for sexual penetration with a child under 12 on the grounds of manifest inadequacy.[93] Though confirming that the sentences imposed on the counts of sexual penetration with a child under 10 were manifestly inadequate, the court declined to intervene because of the principle of double jeopardy (since abolished), and the fact that even if resentenced, the total effective sentence 'would not increase very much'.[94]

92. *Director of Public Prosecutions v CPD* [2009] VSCA 114 (28 May 2009) [8].
93. *Director of Public Prosecutions v Husar* [2011] VSCA 70 (16 March 2011).
94. *Director of Public Prosecutions v Husar* [2011] VSCA 70 (16 March 2011) [18].

5. Factors contributing to sentencing practices

The fourth research question asks, 'Which factors contribute to the sentencing practices for sexual penetration with a child under 12'. An examination of non-imprisonment sentences is presented followed by a detailed analysis of the length of imprisonment terms imposed. In some instances, the offence of rape is a comparator to the offence of sexual penetration with a child under 12.

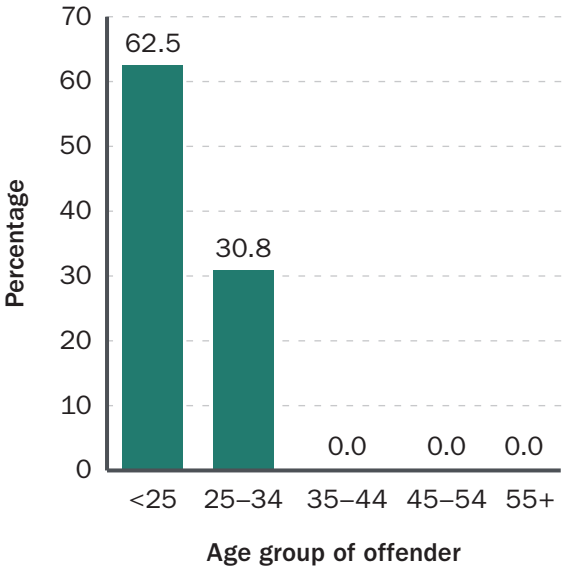
The qualitative analysis explores the possible reasons for the sentencing practices described in Chapter 3. In the cases, sentences imposed for the offence of sexual penetration with a child under 12 were vulnerable to criticism of inadequacy on the basis of the maximum penalty, the harm caused, the offender's culpability, and the application of the serious sexual offender scheme. Textual analysis, at the micro-level, of the particular factual considerations in these individual cases did not moderate this impression. Sentences for principal charges in the rape sample, including both adult and child victims,[95] were for the most part slightly higher, and the same observations as for sexual penetration with a child under 12 offences often applied for both categories of victim.[96]

Non-imprisonment sentences

Of the 49 sexual penetration cases, 38 received imprisonment and two received a partially suspended sentence, while the remaining nine received a non-imprisonment sentence (referring to sentences other than imprisonment and partially suspended sentences). Of the nine cases that received a non-imprisonment sentence, which form the focus of this section, four received a wholly suspended sentence of imprisonment, three received a community correction order or one of its predecessors (intensive correction order or community-based order), and two received a youth justice centre order.

The quantitative analysis found that younger offenders were more likely to receive non-imprisonment sentences than older offenders (see Figure 6). While no offender aged 35 years or older received a non-imprisonment sentence, 30.8% of offenders aged 25 to 34, and 62.5% of offenders aged under 25, received non-imprisonment sentences.

Figure 6: Percentage of offenders that received a non-imprisonment sentence, sexual penetration with a child under 12, by age group, 1 July 2009 to 30 June 2014



95. See analysis of child victims of rape in Chapter 6.

96. See also the argument of the Director about current sentencing practices for rape in *Director of Public Prosecutions v Werry* [2012] VSCA 208 (5 September 2012) [63].

The qualitative analysis confirmed this finding in relation to age, but also found that intellectual or mental impairment was an important factor in the decision to impose a non-imprisonment sentence. The reasons given by judges for these sentences can be summarised as follows:

- the offender was a child himself at the time of offending and therefore culpability was reduced and/or rehabilitation was privileged;
- the offender was relatively young at the time of sentence and therefore rehabilitation was privileged; and/or
- the offender was intellectually or mentally impaired, which reduced culpability or rendered imprisonment inappropriate.

Appendix 1 sets out details of the cases that involved these reasons for the imposition of a non-imprisonment sentence.

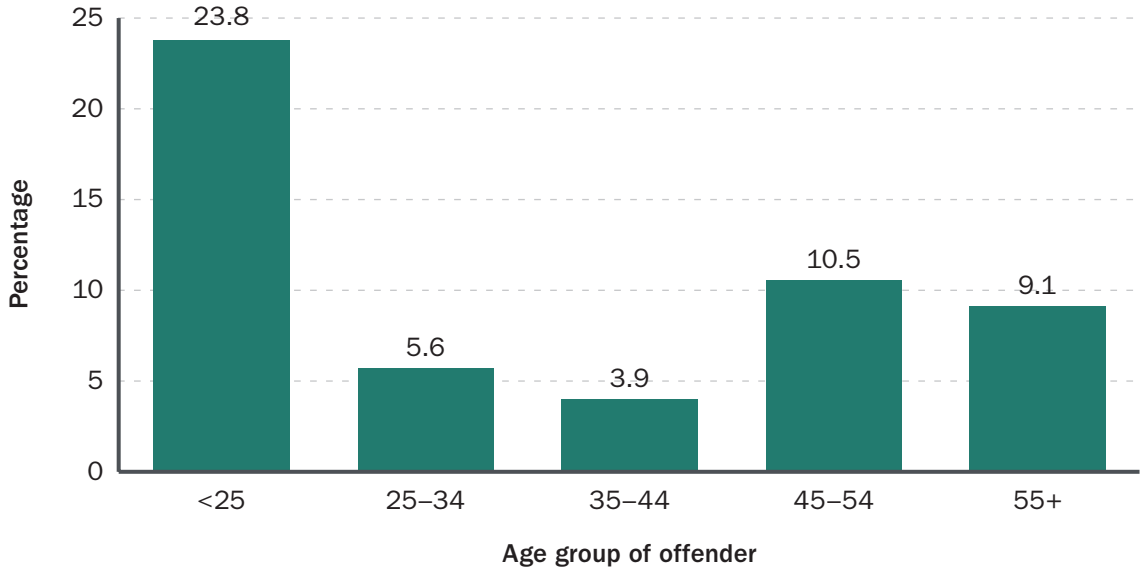
Of the 203 rape cases considered for the quantitative analysis, 8.4% (17 cases) received a non-imprisonment sentence. This is less than half of the percentage of cases of sexual penetration with a child under 12 that received a non-imprisonment sentence (18.4%). This difference was statistically significant, suggesting that cases of sexual penetration with a child under 12 are less likely than rape cases to receive a sentence of imprisonment.

The quantitative analysis of the relationship between offender age and the likelihood of imprisonment for the rape cases found that, as for sexual penetration with a child under 12, relatively young offenders were more likely than older offenders to receive a non-imprisonment sentence. As Figure 7 shows, 23.8% of rape offenders aged under 25 received a non-imprisonment sentence, compared with less than 11% for the older offenders.

The qualitative examination of non-imprisonment cases in the rape sample (10 of 17 cases had remarks available for analysis) found similar factors at play as in the sexual penetration cases. In the rape sample, reasons for non-imprisonment sentences included that offenders were:

- children themselves at the time of offending;
- relatively young at the time of sentence; and/or
- intellectually or mentally impaired.

Figure 7: Percentage of rape offenders that received a non-imprisonment sentence, by age group, 1 July 2009 to 30 June 2014



Additionally, reasons for the imposition of a non-imprisonment sentence included findings by the judge of other exceptional circumstances relating to moral culpability. While more offenders received non-imprisonment sentences for sexual penetration with a child under 12, the qualitative sample showed a broader range of reasons for such dispositions in the rape sample.

Imprisonment terms

A number of other problems were identified by the qualitative analysis, besides the potential minimisation of offence seriousness resulting from mischaracterisations of sexual violence in sexual penetration offences (see above). These problems operate to keep sentences imposed on the principal offence low, despite the language of seriousness employed by most judges. These problems are discussed after a brief examination of the aggregate data for imprisonment sentences.

Distribution of imprisonment sentences for principal charges

Figure 8 shows the distributions of imprisonment terms imposed on principal charges for sexual penetration with a child under 12 compared with rape. For sexual penetration charges, the median imprisonment term was 4 years, the interquartile range was 11 months (from 3 years and 6 months to 4 years and 5 months), and the longest imprisonment term was 6 years. These measures were all longer for rape: the median was 5 years, the interquartile range was 2 years (from 4 years to 6 years), and the longest imprisonment term was 12 years. Thus, there was a tighter clustering around the median for sentences imposed on sexual penetration charges than for sentences imposed on rape charges.

Distribution of total effective imprisonment terms

The tight clustering of sentences for sexual penetration charges also contrasts with total effective imprisonment terms imposed on cases of sexual penetration with a child under 12 (see Figure 9). For total effective imprisonment terms, the interquartile range was 2 years and 9 months (from 4 years and 3 months to 7 years) compared with just 11 months (from 3 years and 6 months to 4 years and 5 months) for imprisonment terms imposed on principal charges. The longest total effective imprisonment term imposed on cases of sexual penetration with a child under 12 was more than double the longest imprisonment term imposed on principal charges of sexual penetration with a child under 12 (14 years and 6 months and 6 years respectively).

While the median total effective imprisonment term for rape cases was very similar to the median imposed on cases of sexual penetration with a child under 12 (6 years and 1 month), there was a far greater range in total effective imprisonment terms for rape cases than for cases of sexual penetration with a child under 12. For total effective imprisonment terms, the interquartile range for rape cases was 3 years and 11 months (from 4 years and 9 months to 8 years and 8 months) compared to just 2 years and 9 months (from 4 years and 3 months to 7 years) for cases of sexual penetration with a child under 12. The longest total effective imprisonment term for rape cases was 23 years and 6 months compared with 14 years and 6 months for cases of sexual penetration with a child under 12.

Figure 8: **Distribution of imprisonment terms for all principal charges of rape and sexual penetration with a child under 12, 1 July 2009 to 30 June 2014**

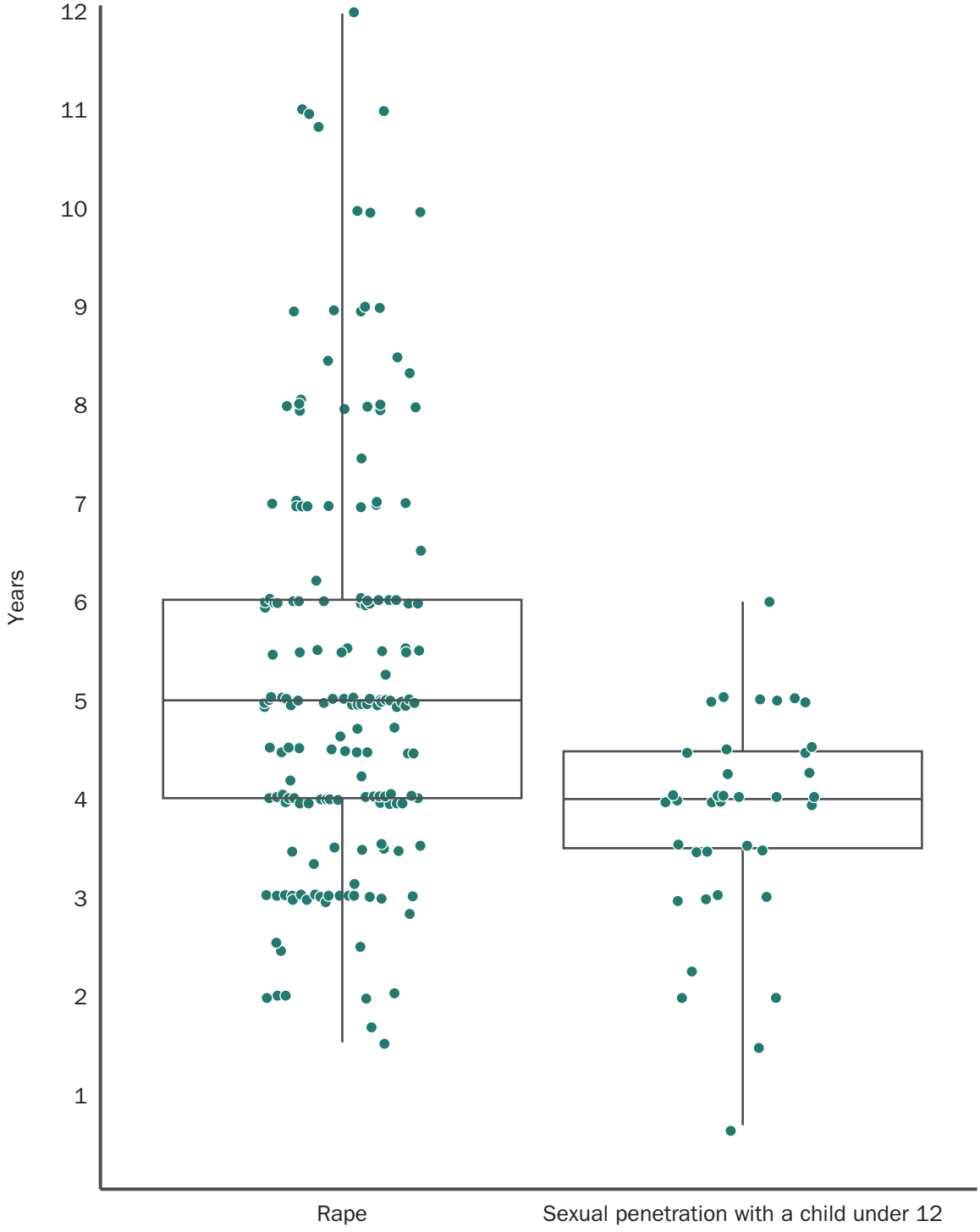
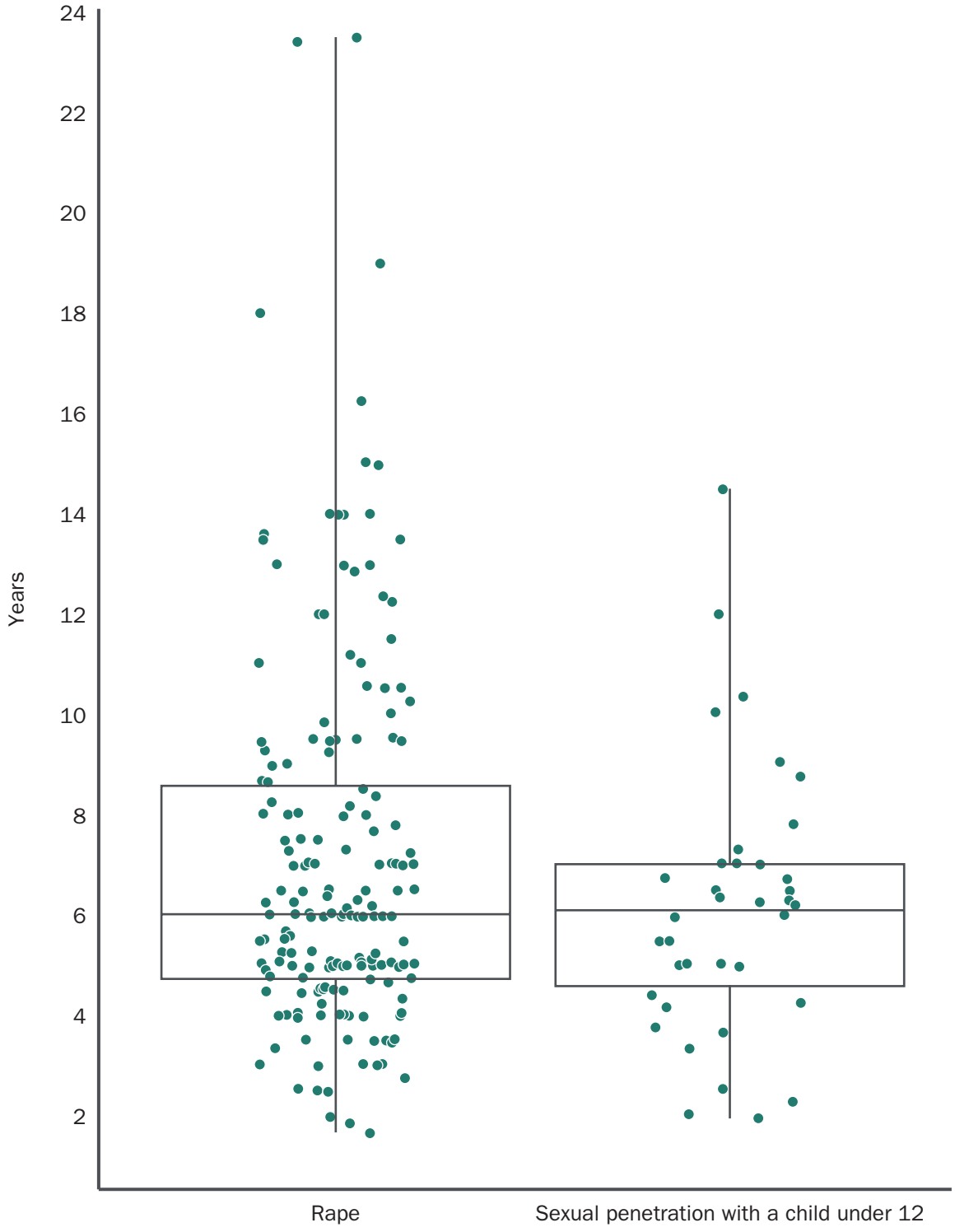


Figure 9: **Distribution of total effective imprisonment terms for cases of rape and sexual penetration with a child under 12, 1 July 2009 to 30 June 2014**



Co-sentenced offending and sentencing

The Council's quantitative analysis of sentencing for sexual penetration with a child under 12 also examined the influence of non-principal charges on imprisonment sentence lengths. This analysis was undertaken to determine whether there was any tendency for judges to moderate sentences imposed on the principal charges in order to allow some degree of cumulation, without resulting in a 'manifestly excessive' total effective sentence.

The analysis found no statistical relationship between the number of charges within a case of sexual penetration with a child under 12 and the imprisonment term imposed on the principal charge of that offence (see Figure 10, page 34).[97] There was, however, a statistically significant correlation between the number of charges in a case and the total effective imprisonment term imposed on a case of sexual penetration with a child under 12 (see Figure 11, page 34).[98] In other words, the presence of non-principal charges within a case does not appear to increase or decrease the sentence imposed on the principal charge. As is to be expected, however, the presence of non-principal charges within a case tends to increase the total effective imprisonment term for the case as a whole.

A similar pattern was found for rape, with the number of charges in the case having no statistical relationship with the length of sentence imposed on the principal charge (see Figure 12, page 35), but there was a positive association with the length of total effective imprisonment term for rape cases (see Figure 13, page 35). These results suggest that, as a general rule, judges do not moderate individual sentences where co-sentenced charges exist. This does not mean that this practice does not occur in isolated sentences.

Characteristics of cases with relatively long total effective sentences

Total effective imprisonment terms of 8 years or more, although exceptional for both offences, were more common for rape. For that offence, such sentences were associated with the number of charges,[99] the number of victims,[100] criminal history,[101] extreme degradation,[102] premeditation,[103] and home invasion.[104] It may be expected that these characteristics were associated with longer terms of imprisonment; however, these characteristics were also present in cases of rape in which a much lower sentence was imposed. This highlights the disparity in the treatment of these characteristics in assessing offence seriousness.

Total effective imprisonment terms of 8 years or more in the cases of sexual penetration with a child under 12 were associated with the number of charges,[105] the number of victims,[106] criminal history,[107] and offending over a protracted period.[108] There were again, however, similar cases in the sexual penetration sample with these characteristics in which a much lower sentence was imposed.

97. ($r = -0.155$, $n = 38$, $p = 0.353$).
98. ($r = 0.590$, $n = 38$, $p < 0.001$).
99. RP case 84; RP case 27; RP case 35; RP case 54; RP case 3; RP case 2; RP case 1; RP case 23; RP case 77.
100. RP case 35; RP case 27; RP case 40; RP case 54; RP case 23; RP case 24.
101. RP case 46.
102. RP case 1.
103. RP case 77; RP case 16.
104. RP case 16.
105. SP case 4; SP case 23; SP case 44; SP case 41; SP case 34.
106. SP case 4; SP case 23; SP case 34; SP case 41.
107. SP case 4; SP case 44.
108. SP case 12; SP case 23; SP case 34.

Current sentencing practices re-enforcing past norms

The ability of a sentencing court to respond to changing community attitudes about a certain type of offence is constrained by current sentencing practices. Under section 5(2)(b) of the *Sentencing Act 1991* (Vic), a sentencing court must have regard to 'current sentencing practices', which can be understood to mean not just general sentencing principles, but also quantitative information about comparable sentences imposed in other cases for the relevant offence.[109]

One of the most common grounds of appeal is that a sentence is manifestly excessive (or inadequate in the case of Crown appeals). While this is an assessment that is made based on all the particular facts of the instant case, it can require a comparison with like cases or with some norm.[110] In this endeavour, sentencing statistics play a role and they are referred to frequently in sentencing remarks, though their utility is often said to be 'limited' by virtue of the fact that they say nothing about reasons for judgment in a particular case.

A person who pleads guilty has a reasonable expectation of being sentenced in line with current sentencing practices.[111] The precise meaning of the term 'current sentencing practices' is not defined in legislation. It may do no more than invoke the doctrine of precedent, or it may be a general reference to the basic principle of justice that like cases should be treated alike. In *Director of Public Prosecutions v CPD*,[112] the Court of Appeal stated that:

> 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.[113]

The fact that a range is recognised to exist does not, however, constrain a judge from imposing a higher or lower sentence. The highest case in the range does not create a ceiling for what might be the 'worst category' of case, nor does it 'cap' the measure of manifest excess or leniency.[114] In the New South Wales case of *Director of Public Prosecutions (Cth) v De La Rosa*, Simpson J stated:

> A history of sentencing can establish a range of sentences that have in fact been imposed. Such a history does not establish that that range is the correct range, nor that either the upper or the lower limit is the correct upper and lower limit. Sentencing patterns are, of course, of considerable significance in that they result from the application of the accumulated experience and wisdom of first instance judges and of appellate courts.
>
> But it would be a mistake to regard an established range as fixing the boundaries within which future judges must, or even ought, to sentence. To take that attitude would be, de facto, to substitute judicial selection of sentences in individual cases for the boundaries of sentencing for a particular offence laid down by Parliament.[115]

109. See Freiberg (2014), above n 27, [6.235]; Arie Freiberg and Sarah Krasnostein, 'Statistics, Damn Statistics and Sentencing' (2011) 21(2) *Journal of Judicial Administration* 72.
110. See Freiberg (2014), above n 27, [17.90].
111. *Hasan v The Queen* [2010] VSCA 352 (17 December 2010) [43]; *Ashdown v The Queen* [2011] VSCA 408 (7 December 2011); *Winch* v *The Queen* [2010] VSCA 141 (17 June 2010); *Director of Public Prosecutions v CPD* [2009] VSCA 114 (28 May 2009) [69].
112. *Director of Public Prosecutions v CPD* [2009] VSCA 114 (28 May 2009).
113. *Director of Public Prosecutions v CPD* [2009] VSCA 114 (28 May 2009) [77]–[78]. See also *Davy v The Queen* [2011] VSCA 98 (8 April 2009) [42].
114. *Director of Public Prosecutions v Terrick* [2009] VSCA 220 (2 October 2009); *Director of Public Prosecutions v CPD* [2009] VSCA 114 (28 May 2009).
115. *Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194 (17 September 2010) [303]–[304].

Figure 10: Imprisonment term imposed on the principal charge by the number of sexual offence charges in cases of sexual penetration with a child under 12, 1 July 2009 to 30 June 2014

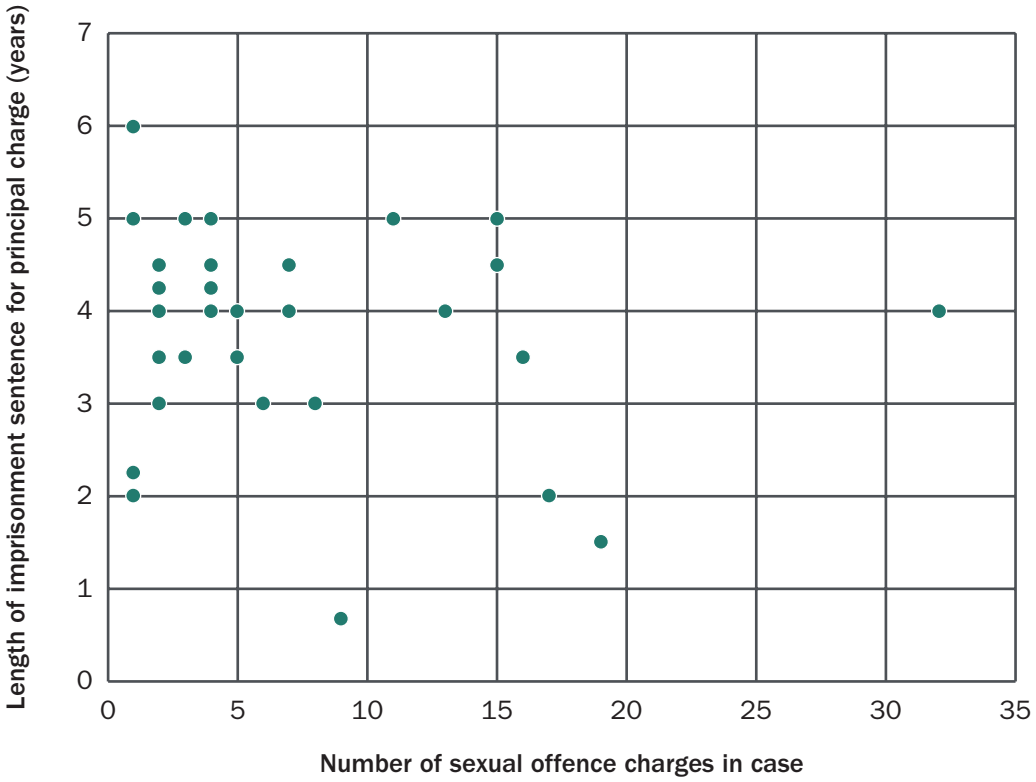


Figure 11: Total effective imprisonment term by the number of sexual offence charges in cases of sexual penetration with a child under 12, 1 July 2009 to 30 June 2014

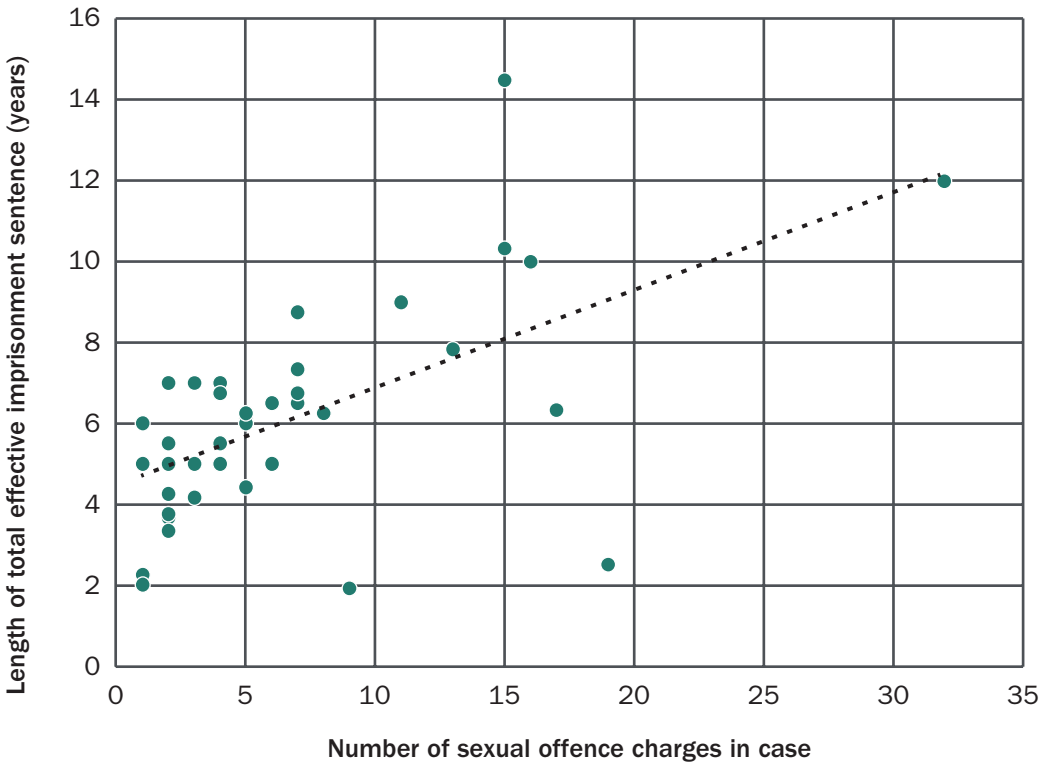


Figure 12: Imprisonment term imposed on the principal charge by the number of sexual offence charges in rape cases, 1 July 2009 to 30 June 2014

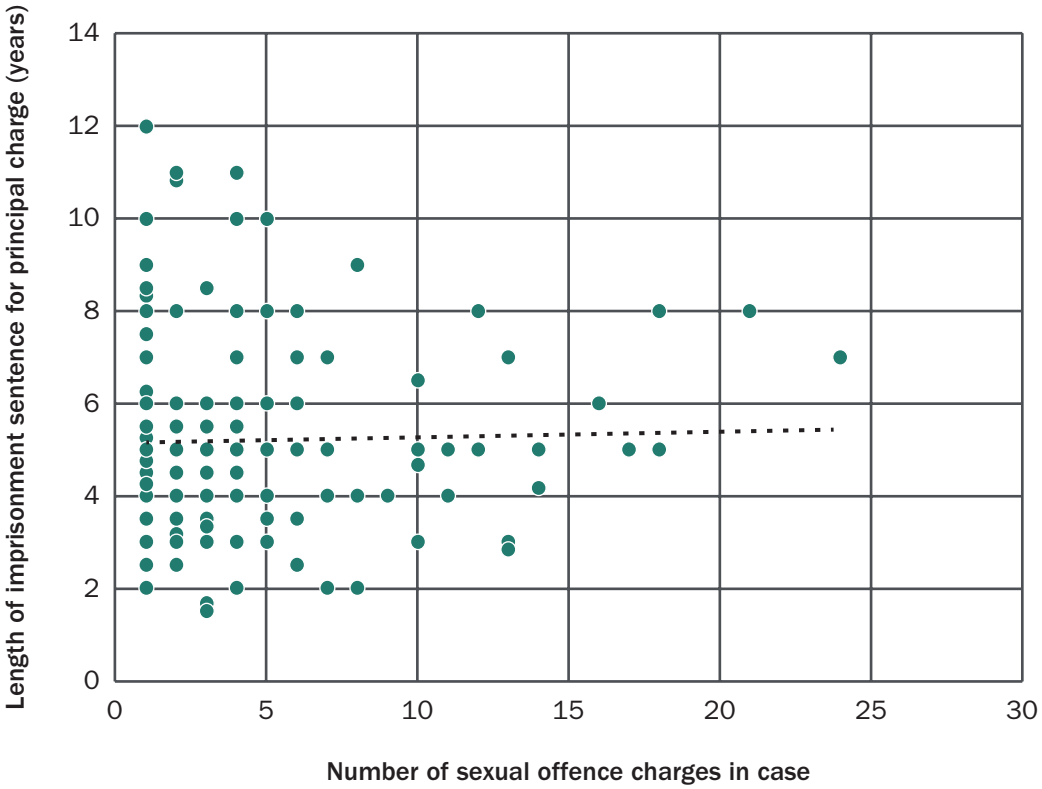
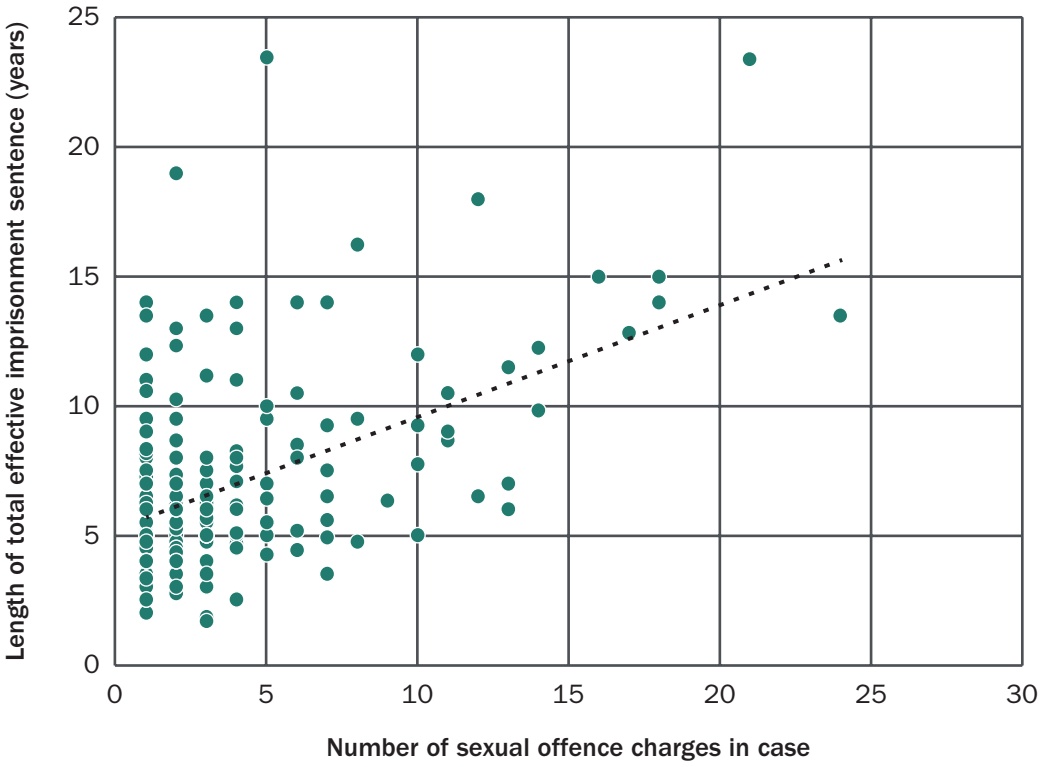


Figure 13: Total effective imprisonment term by the number of sexual offence charges in rape cases, 1 July 2009 to 30 June 2014



Although, in principle, a similar approach is taken in Victoria, the Court of Appeal has stated, in the context of a rape appeal, that:

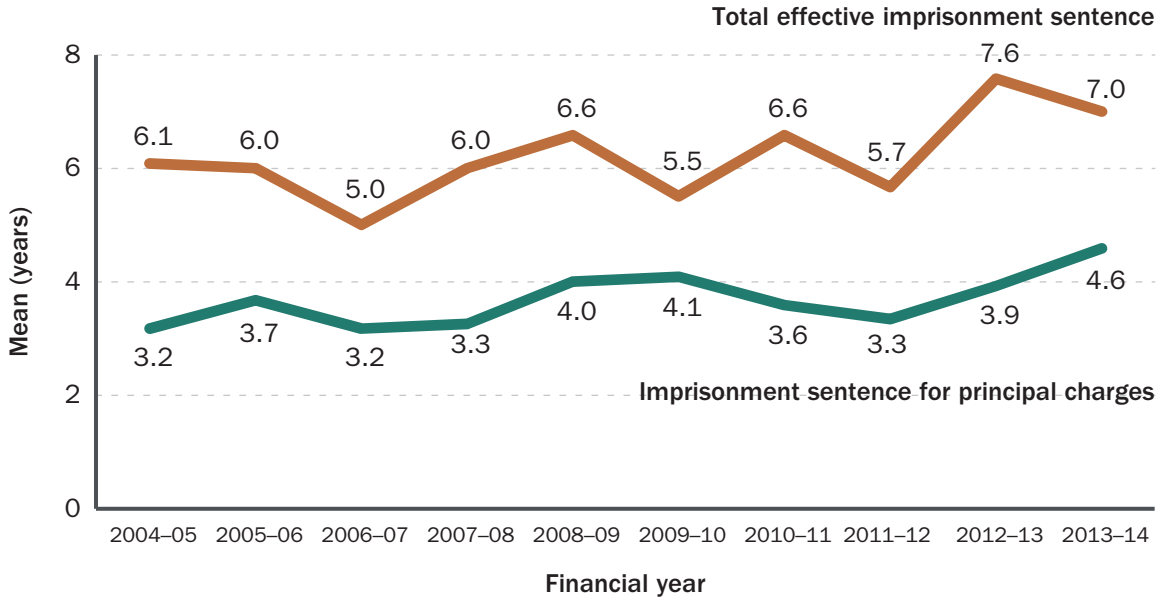
> a sentencing judge must take current sentencing practices into account to the full extent that the law requires. Unless the case can be brought within a recognisable ground for departing from current sentencing practices, a sentencing judge is not at liberty to disregard such practices or qualify the 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.[116]

This is so, even where there is a question as to the adequacy of current sentencing practices, as further elaborated in this appeal:

> Observations sometimes made by the Court of Appeal that the sentencing tariff on current sentencing practices ought to be re-considered, are of no significance whatsoever to a sentencing judge and provide no justification for revisiting the sentencing range. A pending appeal by the Director is also no basis for departing from current sentencing practices. Her Honour could not therefore regard herself as bound by current sentencing practices only to a limited or qualified extent and therefore fell into specific error in sentencing the appellant on both charges of rape.[117]

Accordingly, Victorian judges at first instance are likely to be reluctant to depart from what they perceive to be current sentencing practices, on the basis that, as a matter of law, it is for the Court of Appeal to consider what the appropriate general sentencing standard should be. Further, judges at first instance may lack the resources to properly consider what current sentencing practices are and how they should change.[118] So while the notion of a sentencing range is a useful tool for promoting reasonable consistency, its efficacy as a tool for facilitating fair outcomes depends on the nature of the sentencing process used to arrive at the individual outcomes of which it is comprised. If there is a problem in that process, the utility of the resulting sentences, and therefore the range to which they give rise, is diminished because the sentences cannot be said to reflect the criminality involved in oft-seen or 'average' instances of the particular offence.

Figure 14: Mean total effective imprisonment term and imprisonment term for principal charges for offences of sexual penetration with a child under 12, by financial year, 2004–05 to 2013–14



116. *Anderson v The Queen* [2013] VSCA 138 (6 June 2013) [24].
117. *Anderson v The Queen* [2013] VSCA 138 (6 June 2013) [26].
118. *Director of Public Prosecutions v Werry* [2012] VSCA 208 [35].

If sentencing practices were more readily able to adjust to changing community attitudes towards offending, it is to be expected that a marked increase in the severity of sentences for the offence of sexual penetration with a child under 12 would be observed. Data from the Council's Sentencing Snapshots series, presented in Figure 14, show that over the 10 years between 2004–2005 and 2013–2014, there was only a moderate increase in both the mean imprisonment term on principal charges and the mean total effective imprisonment term for cases of sexual penetration with a child under 12. These data suggest that the courts are able to affect shifts in sentencing practices, but the magnitude of these shifts is small.

For sentences imposed on principal charges of sexual penetration with a child under 12, there was a virtual ceiling at the five-year mark and a striking cluster of charges that received sentences of between 3 years and 5 years' imprisonment. Of the 38 principal charges that received imprisonment, 16% (6) received an imprisonment term of 5 years, while 84% (32) received an imprisonment term between 3 and 5 years. Only one principal charge received a sentence that exceeded 5 years' imprisonment. This clustering occurred despite charges having at least one of the following aggravating features:

- they were part of cases that included multiple charges;[119]
- they were part of cases that included multiple victims;[120]
- they were part of a prolonged period of offending;[121]
- they were representative charges;[122]
- they were committed against victims who were particularly young or vulnerable;[123]
- they were committed by offenders who had relevant prior offending;[124] and
- they were committed by offenders who pleaded not guilty.[125]

This clustering indicates that, at present, adherence to current sentencing practices is producing outcomes that are reasonably consistent, but not consistently reasonable, in light of the objective seriousness involved and the statutory maximum. This is particularly concerning in light of the fact that most of the offenders in these cases fell to be sentenced under the serious sexual offender scheme. The same observations apply to many cases in the rape sample. The inadequacy of current sentencing practices for the offence of sexual penetration with a child under 12 has been recognised by both the Court of Appeal and first instance sentencing judges.[126]

119. SP case 5; SP case 23; SP case 27; SP case 31; SP case 32; SP case 37; SP case 44; SP case 47; SP case 53.

120. SP case 37; SP case 44; SP case 53.

121. SP case 5; SP case 27; SP case 32; SP case 47; SP case 50.

122. SP case 5; SP case 6; SP case 17 (this was unchanged on appeal, which lowered the sentence further on grounds of manifest excess; see *JBM v The Queen* [2013] VSCA 69 (28 March 2013)); SP case 11; SP case 44; SP case 53.

123. SP case 7; SP case 17 (this was unchanged on appeal, which lowered the sentence further on grounds of manifest excess; see *JBM v The Queen* [2013] VSCA 69 (28 March 2013)); SP case 43.

124. SP case 6; SP case 13; SP case 14; SP case 17 (this was unchanged on appeal, which lowered the sentence further on grounds of manifest excess; see *JBM v The Queen* [2013] VSCA 69 (28 March 2013)); SP case 18 (this case also had relevant subsequent offending: '[a]part from the previous convictions to which I have referred, you also have a number of very relevant subsequent convictions. Those convictions were imposed in a sentencing hearing that took place at the Wodonga County Court on 30 November 2004. You had earlier pleaded guilty to one count of indecent assault, such offence having been committed on 19 February 2000, and one count of sexual penetration of a child under 16, such offence having been committed between 13 April and 17 April 2003'); SP case 43; SP case 44.

125. SP case 9 (this was unchanged by the appeal in this case; see *CMG v The Queen* [2013] VSCA 243 (10 September 2013)); SP case 12; SP case 13; SP case 14; SP case 16; SP case 23; SP case 27; SP case 31; SP case 42.

126. SP case 8 was read for this research but was excluded from the cases. The judge noted: 'I am … bound to take into account the maximum penalty for each offence and current sentencing practices in accordance with the Sentencing Act. The Court of Appeal discussed these imperatives in relation to the offence of sexual penetration of a child under 16 in the case of CPD [2009] V.S.C.A. 114. In that case the court said, at Paragraph 68, that the information before them as to current sentencing practices for this offence appeared difficult to reconcile with the high maximum set by Parliament and that it may be that sentencing courts have not responded to the 1997 increase in the maximum from 20 to 25 years. At Paragraph 72, the court stated that there is nothing in the Sentencing Act which suggests that where current sentencing practices are out of step with the maximum fixed by Parliament, current practices must prevail. At Paragraph 74, the court held that a sentencing judge who concludes that current sentencing

This adherence to current sentencing practices, regardless of significant countervailing considerations, carries through to the appeal decisions in the cases for sexual penetration with a child under 12.[127] In *SJ v The Queen*, the Court of Appeal confirmed that the correct approach to sentencing for multiple charges was that of 'passing appropriate individual sentences and making those sentences wholly or partially concurrent, rather than by cumulating inappropriately reduced individual sentences'.[128]

SJ v The Queen involved an appeal against sentence in a case with 37 charges of Victorian and Commonwealth sexual offences against three child victims, summarised as follows:

- The offending against the first victim involved nine charges of an indecent act with a child under 16. The victim was 10 years old when the offending began, and it continued for four years.
- The offending against the second victim involved 11 charges of an indecent act with a child under 16, 11 charges of sexual penetration with a child under 16, one charge of procuring a minor for child pornography, and one charge of producing child pornography. The offending occurred over two and a half years. Three of the sexual penetration charges occurred when the victim was under 10 years. Five of the sexual penetration charges and seven of the indecent act charges occurred while the offender was on bail. The offending involved the 'humiliation and degradation'[129] of the victim.
- The offending against the third victim involved one count of indecent act with a child under 16. The victim was nine at the time of the offending.
- There were also two additional charges of possessing child pornography and one charge of possession of a drug of dependence.

The offender fell to be sentenced under the serious sexual offender legislation. At trial, the offender received a 12-year total effective imprisonment term with a 9-year non-parole period.[130] There was substantial concurrency in the sentences on the individual charges. The offender appealed the sentence on the basis that the total effective sentence was not warranted because much of the offending was evidenced solely by his admissions and because the sentences imposed for the three charges of sexual penetration of the second victim, when the victim was under the age of 10, were manifestly excessive.

In resentencing for the offending against the second victim, the Court of Appeal imposed individual sentences of:

- 4 years' imprisonment on each of the three sexual penetration charges that occurred when the victim was under 10;
- 4 years' imprisonment on each of the five sexual penetration charges that occurred when the offender was on bail; and
- 3 years' imprisonment on each of the three remaining charges of sexual penetration with a child under 12 against the same victim.

---

practices are not consistent with the statutory maximum for the offence in question is not constrained by those practices. In this court, the vast majority of sentences are passed following pleas of guilty where there is a statutory requirement to reduce the sentence to take the guilty plea into account. The sentencing statistics collated for this court, and those decisions contained in the Table of Information in CPD, which flow through to the Sentencing Snapshots with which I was provided, do not differentiate between sentences passed where there is a plea of guilty and sentences passed following a finding of guilt after a trial. As the majority of sentences are given where the offender has pleaded guilty, it follows that the statistics for all offences are skewed towards discounted sentences. I have concluded that based on statistics alone, current sentencing practices are not consistent with the statutory maximum for the offences under consideration here. However, I have considered current sentencing practices for the offences of sexual penetration of a child under 10 and indecent act with a child insofar as it can be ascertained from sentencing remarks in individual cases that there was no reduction for a plea of guilty'.

127. See *CMG v The Queen* [2013] VSCA 243 (10 September 2013); *SJ v The Queen* [2012] VSCA 237 (28 September 2012); *JBM v The Queen* [2013] VSCA 69 (28 March 2013).

128. *SJ v The Queen* [2012] VSCA 237 (28 September 2012) [68].

129. *SJ v The Queen* [2012] VSCA 237 (28 September 2012) [74].

130. See Appendix 3 for a full description of the approach to cumulation and concurrency at first instance and on appeal in this case.

The first charge of sexual penetration (when the victim was under 10) attracted a sentence of 4 years and formed the base sentence. The Court of Appeal cumulated one year of each of the other two sentences for sexual penetration (when the victim was under 10). The court only cumulated 3 months of each of the remaining eight charges of sexual penetration. Each of the 11 indecent acts were sentenced to 2 years. However, of these 11 sentences, four were made wholly concurrent with the base sentence, and one month each of the remaining seven sentences was cumulated.

The Court of Appeal also imposed sentences of 18 months on each of the nine charges of an indecent act with a child under 16. However, only six months of these sentences were cumulated on the base sentence.

Though the sentencing discretion was reopened due to specific error in the case, the original sentence of 12 years was retained, and a new 7-year non-parole period was substituted for the previously imposed 9-year non-parole period. These individual sentences show the problematic effect of current sentencing practices, given the clear guidance that the court issued earlier in this case, that 'a court should avoid imposing artificially inadequate sentences in order to accommodate notions of cumulation',[131] alongside the other acknowledged factors going towards the extreme seriousness of the offending in this case.

Approach to the serious sexual offender regime

In 1994, the Court of Appeal described the serious offender provisions as 'draconian' and as eroding long-established sentencing principles.[132] Since then, the court has curtailed the impact of the legislation by holding that the discretion given by such provisions should be confined to 'very exceptional cases'.[133] Further, the view is frequently espoused that the protective intent of the scheme can be achieved through the imposition of a proportionate sentence. In theory, this is true; the objective of community protection may, in appropriate circumstances:

> equally be achieved by a proportionate sentence, particularly since such a sentence may be quite lengthy if the accused has been found guilty of multiple serious crimes – then it will be unnecessary to impose a longer sentence.[134]

Current sentencing practices are an important 'yardstick' for determining what constitutes an appropriately proportionate sentence. At the level of practice, however, the limiting effect of current sentencing practices, combined with a particular understanding of totality[135] and different understandings of relevant sentencing considerations,[136] suggests that this 'yardstick' is broken. As a result, the courts' approach to applying the serious sexual offender provisions is less effective, whereby the opportunity to impose a disproportionate sentence or more extensive cumulation is declined in favour of aligning a sentence with current sentencing practices.

Further, judges differ in their assessments of an appropriately punitive or proportionate or protective sentence. In this context, then, the frequent claim that the aims of the scheme can be realised through the imposition of a proportionate sentence is problematic. The overall impression from the textual analysis of the cases and, where available, their appeals[137] is that – both singly and in

131. *SJ v The Queen* [2012] VSCA 237 (28 September 2012) [68].

132. *R v Cowburn* (1994) 74 A Crim R 385, 393.

133. See Freiberg (2014), above n 27, [3.95]; *R v Connell* [1996] 1 VR 436; *R v Barnes* [2003] VSCA 156 (2 October 2003); *Director of Public Prosecutions v OJA* [2007] VSCA 129 (22 June 2007); *R v Curtis (No 2)* [2009] SASC 350 (23 November 2009).

134. See Freiberg (2014), above n 27, [3.95]; *R v Robertson* (1995) 82 A Crim R 292, 298; *Director of Public Prosecutions v Papworth* [2005] VSCA 88 (20 April 2005); *R v Cass* [2005] VSCA 77 (13 April 2005); *R v McIntosh* [2005] VSCA 106 (15 April 2005).

135. See discussion below.

136. See discussion below.

137. See *SJ v The Queen* [2012] VSCA 237 (28 September 2012) [68]–[99].

the aggregate – sentences do not sufficiently reflect the objective criminality in light of all relevant considerations. Further, sentences are unlikely to sufficiently deter the offenders or others, denounce the offenders' behaviour, or protect the community under normal sentencing principles. It follows that the sentences fail to meet the elevated expectations of the clearly articulated legislative scheme under which they fall.[138]

Case examples of regard to the serious sexual offender provisions

The following six cases, of sexual penetration with a child under 12, detail the court's application of the serious sexual offender provisions.

In SP case 6, the 58 year old offender with prior convictions for the sexual abuse of his daughter and her friends aged eight to 10, received a total effective imprisonment sentence of 5 years with a non-parole period of 3 years and 9 months. In that case, the serious sexual offender regime applied to one representative count of sexual penetration with a child under 12, and one representative count of indecent act with a child under 16, for sexual offending against the granddaughter of the offender's partner, during the period when the victim was aged between four and seven years. Considered in mitigation was the plea (not early in the process, and after initial denials to police) and positive character references for the offender. In aggravation were the breach of trust and prior relevant history against similar victims for which the offender had served a custodial sentence and completed sex offender treatment in custody. No need was found for a disproportionate sentence, and the judge stated, as to cumulation and totality, that:

> While there is a legislative presumption under section 6E of the Sentencing Act 1991, for the sentence imposed on the second charge to be ordered to be served cumulatively on the sentence imposed in respect of the first charge, I must still have regard to the sentencing principle of totality when considering what, if any, order should be made concerning cumulation. The two offences involved different conduct on your part. However, it is also of relevance that they occurred in close temporal proximity to each other during a single episode of offending. In saying that, I do not suggest that this incident was an isolated one. As the other two incidents to which I have already referred demonstrate, it was not. In the end, I have concluded that it is appropriate to order partial cumulation between the two charges. Such an order would, in my view, properly reflect the overall gravity of your conduct during that incident, without undermining the tenor of the serious sexual offender legislation.

In SP case 13, an offender found guilty of one count of sexual penetration of a five year old had previous child sexual assault convictions involving a similar victim. The judge noted that 13 years had passed between the last instance of relevant offending and the current offending. Notwithstanding this prior history and the absence of a guilty plea, the offender received a sentence of 5 years' imprisonment with a non-parole period of 3 years. The judge found no need for a disproportionate sentence under the serious sexual offender scheme. The judge observed that the maximum penalty of 25 years' imprisonment 'reflects the community's attitude towards sexual crimes against children' and cited the statement by Winneke P in *Director of Prosecutions v CPD* that '[t]hose who engage in sexually abusing young persons who are in their trust can expect to receive condign punishment'.[139]

In SP case 5, the offender was a friend of the victim's family. The offender persistently offended against her over a seven-year period from when the victim was aged seven. Of the four charges of

138. See also the rape sample. See the successful appeal on the grounds of manifest excess *in Pilgrim v The Queen* [2014] VSCA 191 (28 August 2014) [65], a case where 'the principal offences were of a high level of seriousness for their respective categories, involved extensive pre-planning, a long period of captivity and rape in humiliating circumstance' in a purpose-built sound-proof room the offender had constructed. Despite the number and seriousness of charges, the serious sexual offender provisions, and the offender's age on earliest possible release (48 years old), the court reduced his sentence from 23 years and 6 months with a non-parole period of 19 years to 18 years with a non-parole period of 14 years. Cumulation for three of the four rape charges (excluding the first, which was representative and formed the base sentence) was 1 year and 6 months for each.

139. *Director of Public Prosecutions v CPD* [2009] VSCA 114 (28 May 2009) [56].

sexual penetration with a child under 12 and two charges of indecent act with a child under 16, five were representative charges. In mitigation were the offender's plea, admissions, family support, lack of criminal history, previous good character,[140] good prospects of rehabilitation (shown by a lack of evidence regarding general attraction to children), and that the offences related to 'only one victim'. The total effective imprisonment term was 6 and a half years, with a non-parole period of 4 years. The serious sexual offender scheme, though enlivened, was not found to require a disproportionate sentence or additional cumulation.

In SP case 27, the offender was sentenced under the serious sexual offender scheme after being found guilty of two counts of sexual penetration with a child under 10 and two counts of indecent act with a child under 16, which he committed over a two-year period against the daughter, aged five to seven years, of friends. The offender was 26–28 years old at the time, and the judge found that, although the offender did have an intellectual disability, it did not reasonably limit the offender's understanding of the wrongfulness of the conduct. In the absence of a plea, the offender received a total effective imprisonment term of 6 years and 9 months with a 4-year non-parole period. In reference to Table 4, it is questionable whether the cumulation reflects the objective criminality of the separate incidents of offending under normal principles or under the legislative directives.

Table 4: **SP case 27; charge analysis**

Charge	Offence and judge's remarks	Sentence	Cumulation
1	**Sexual penetration with a child under 12** 'As a trusted friend to the complainant's father you persuaded the complainant's parents to allow you to take the complainant with you to stay at your aunt's house in [location] while she was away on holiday. One night you took the complainant from where she was sleeping to a bedroom where you had been sleeping, there you penetrated the complainant's anus with your penis'.	4 years	1 year
2	**Indecent act with a child under 16** 'On another occasion, during the complainant's stay at [location] and whilst the complainant was in the bathroom preparing to shower, you pinned her to the floor and sat on her. You put your penis into her navel'.	12 months	3 months
3	**Sexual penetration with a child under 12** 'Arrangements were made for you to sleep on a futon bed which was situated in the dining room that was used by the complainant as her bedroom. One night when the complainant was asleep you went to her bed. The complainant woke and turned over and saw you in her bed. She said that you were doing "stuff" to her that she did not like and that hurt. You put your finger in her navel, and your penis in her anus'.	5 years	Base sentence
4	**Indecent act with a child under 16** 'The complainant said you were on your knees, and that you put your penis into her navel. (Charge 4, indecent act with a child under 16 years.) The complainant asked you to stop, but you did not. You told the complainant that your penis was stuck. The complainant told you to have a little pull, and you said that your penis would not come out. Shortly thereafter you ejaculated onto the complainant's stomach, you then wiped the ejaculate off the complainant with her special blanket'.	18 months	6 months

140. See below.

Similarly, in SP case 41, the 38 year old offender received a sentence of 12 years' imprisonment with a 9-year non-parole period after pleading guilty to (among other charges) 11 counts of sexual penetration with a child under 12 and 21 counts of indecent act with a child under 16 in relation to three victims to whom he was 'an uncle figure'. This sentence was reduced to 7 years' imprisonment on appeal. The sentence and the non-parole period may appear lengthy in relation to current sentencing practices. However, there is a question as to whether it is sufficiently punitive and protective under the serious sexual offender scheme given the number of victims, the number of offences, the discrete instances of offending, the fact that the offending occurred while the offender was on bail, the escalation in seriousness of his offending, the presence of victim humiliation and degradation, and the offender's age at the earliest release date (approximately 45 years old).

In SP case 54, an offender, who was already on the Sex Offenders Register for sexual offending against a 13 year old when he was aged 39, pleaded not guilty to nine charges of sexual penetration with a child under 12 and three charges of indecent act with an eight year old neighbour. One of the sexual penetration charges occurred in the presence of the offender's daughter. On a second indictment, the offender pleaded guilty to two representative counts of sexual penetration with a child under 16, three counts (one representative) of indecent assault of a child under 16, one rolled-up count of failing to comply with reporting obligations under the *Sex Offenders Registration Act 2004* (Vic), and four counts of supplying a drug of dependence to a child. On the first indictment, the offender was sentenced to 4 years' imprisonment. On the second, he was sentenced to 3 years and 11 months' imprisonment. The judge ordered 2 and a half years on the first indictment to be cumulative on the second indictment, making a total effective imprisonment term of 6 years and 4 months. The judge imposed a non-parole period of 4 years and 3 months. In doing so, the judge stated, '[i]n fixing this sentence, I have considered the principle of totality'. A question arises in relation to this sentence about whether it can be characterised as appropriately fulfilling the punitive and protective intent of the legislation given the number of counts (22), the number of victims (4), the offender's previous sexual offending against children, and his demonstrated failure to comply with reporting requirements.

Approach to proportionality, totality, and cumulation

Over the reference period, the median total effective imprisonment term for cases of sexual penetration with a child under 12 was 6 years and 1 month, nearly 2 years higher than the median for principal charges of the offence (4 years). This is despite cases of sexual penetration with a child under 12 typically including substantial numbers of charges and frequently having multiple victims.

The 'primary mechanism'[141] for giving effect to the totality principle is 'to fix an appropriate sentence for each offence before considering questions of cumulation, concurrence and totality'.[142]

Applying to both the total effective imprisonment term and the non-parole period, the principle of totality holds that the total sentence for multiple offences must be proportionate to, and no more than is necessary to reflect, the offender's overall criminality. Crockett J explained in *R v Nguyen* that:

> What the principle of totality stands for … is that, after orders have been made for concurrency or cumulation, the effective sentence which is left as that to be served by the prisoner must be one which bears a due proportion to the total content of the criminality of the offender being sentenced, having

141. Judicial College of Victoria, '6.4.8 – Mechanisms of Totality', *Victorian Sentencing Manual* (Judicial College of Victoria, 2013) <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#14971.htm> at 1 April 2016 (note further that '[a] secondary mechanism for giving effect to the totality principle is by moderating individual sentences. This mechanism is generally only used where the primary mechanism cannot be applied').

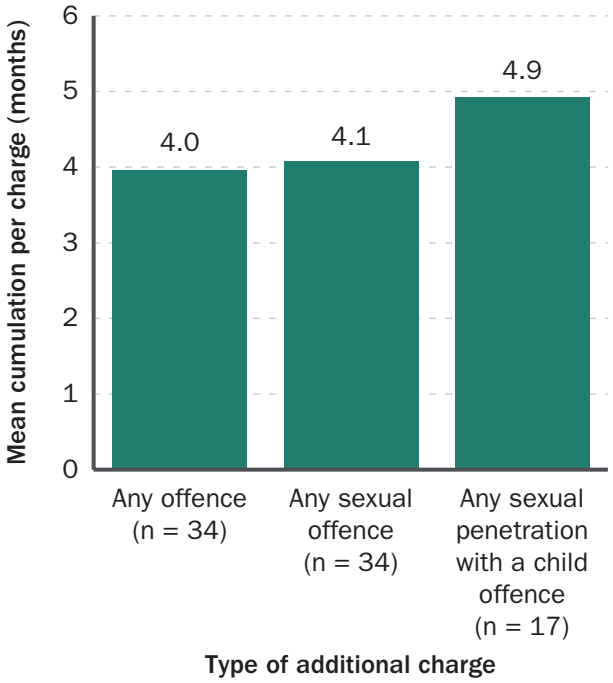
142. *Azzopardi v The Queen; Baltatziz v The Queen; Gabriel v The Queen* [2011] VSCA 372 (18 November 2011) [54]; *Director of Public Prosecutions v Grabovac* [1998] 1 VR 664, 92 A Crim R 258. Compare *R v Izzard* [2003] VSCA 152 (25 September 2003) (Callaway JA).

> regard to the part played by him in each of the offences and the respective degree of gravity which ought to be assigned to each of those offences.[143]

The principle prevents the imposition of a sentence that is beyond this limit in an effort to incapacitate potentially dangerous persons, or to punish offenders with criminal histories more severely than the instant offence warrants, or to emphasise general or specific deterrence through exemplary sentences.[144] Importantly, however, the principle also:

> operates to define the lower as well as the upper reaches of punishment, thus containing excessively lenient as well as overly severe responses to crime: 'a sentence should not be less than the objective circumstances require'.[145]

Figure 15: Mean cumulation in months per non-principal charge according to the type of non-principal charge in cases of sexual penetration with a child under 12, 1 July 2009 to 20 June 2014



Unless guided otherwise by statute, courts sentencing multiple counts will therefore assess generally whether the aggregate of the individual sentences is appropriate for the offender's criminal conduct when viewed as a whole. If not, the totality principle will be invoked to restrict any excessive and, in some cases, inadequate cumulative effect.[146]

The imposition of a sentence of imprisonment (or detention in a youth justice centre) for more than two counts[147] of sexual offending against children enlivens the presumption of cumulation in the serious sexual offender scheme. Freiberg notes that, '[d]espite the sexual or other offences arising out of a single transaction or continuing episode, the serious offender provisions will indicate to the sentencer that cumulation is called for'.[148] Many of the cases of sexual penetration with a child under 12 lacked significant cumulation of individual sentences, suggesting that offenders are not being effectively punished for offences beyond the first one or two in a series over time, or on one prolonged episode.[149]

In fact, the Council estimates the sentence imposed on each additional sexual offence charge in cases of sexual penetration with a child under 12 only adds an average of up to 5 months onto the sentence imposed on the principal charge (see Figure 15).[150]

143. *R v Nguyen* (Unreported, Supreme Court of Victoria, Crockett J, 24 October 1991); *R v Taylor* (1992) 58 A Crim R 337; *R v Everett* (1994) 73 A Crim R 550, 558.

144. See Freiberg (2014), above n 27, [13.80].

145. See Ibid [3.45]; *R v Whyte* [2002] NSWCCA 343 (20 August 2002) [156]; *R v McNaughton* [2006] NSWCCA 242 (11 August 2006) [15]; *Royer v The State of Western Australia* [2009] WASCA 139 (6 August 2009) [237] (Miller JA).

146. Freiberg (2014), above n 27, [13.80]; *Royer v The State of Western Australia* [2009] WASCA 139 (6 August 2009) [237] (Miller JA).

147. This applies other than where the offender has been convicted and sentenced to imprisonment or youth detention for the offence of persistent sexual abuse of a child under 16, or where the offender has been convicted and sentenced to imprisonment or youth detention for one sexual offence and one violent offence. In either of those circumstances, any second sexual offence will qualify the offender as a 'serious sexual offender': *Sentencing Act 1991* (Vic) ss 6B(2)(ab), 6B(2)(b).

148. See Freiberg (2014), above n 27, [13.55]; *McL v The Queen* (2000) 203 CLR 452.

149. See Freiberg (2014), above n 27, [13.60].

150. The method involved two calculations. First, the total amount cumulated on the imprisonment term for the principal proven charge was calculated by subtracting the imprisonment term for the principal charge from the total effective imprisonment term. For example, if the imprisonment term for the principal charge was 4 years and the total effective imprisonment term was 6 years, the

The limited cumulation may be due, in part, to the limiting effect of current sentencing practices (see above). If 6 years is perceived to be the norm for total effective imprisonment terms, then the appropriateness of a particular sentence will be measured in relation to that figure, rather than the statutory maximum. If any sentence above 5 years is perceived to be severe on this scale, judges, while acknowledging the seriousness of the offences, will nevertheless feel constrained to impose minimal cumulation – or in some cases total concurrency – in order to retain due relativity to that number. This is not, however, the same thing as imposing a total effective sentence that accurately reflects:

> the total content of the criminality of the offender being sentenced, having regard to the part played by him in each of the offences and the respective degree of gravity which ought to be assigned to each of those offences.[151]

Across the cases of sexual penetration with a child under 12, the evidence of inadequate cumulation is made stronger in light of the statutory presumption of cumulation for serious sexual offenders. The sustained refusal by nearly all judges to give effect to the presumption stands in contrast not only to the legislative intent but also to High Court authority. In *McL v The Queen*, the High Court observed:

> The need for judges not to compress sentences is especially important where the accused person is a 'serious sexual offender' within the meaning of s 16(3A) of the Sentencing Act, and similar provisions. *Section 16(3A) gives effect to a legislative policy that serious offenders are to be treated differently from other offenders. It was plainly intended to have more than a formal effect, which is the effect it would frequently have if its operation was subject to the full effect of the totality principle. Given the terms of s 16(3A), the scope for applying the totality principle must be more limited than in cases not falling within that section. The evident object of the section is to make sentences to which it applies operate cumulatively rather than concurrently. The section gives the judge a discretion to direct otherwise. But the object of the section would be compromised and probably defeated in most cases if the ordinary application of the totality principle was a sufficient ground to liven the discretion.* Since the relationship between s 16(3A) and the totality principle does not arise in this appeal, it is enough to say that sentencing judges need to be astute not to undermine the legislative policy inherent in s 16(3A) by applying the totality principle to the sentences as if that section (or s 6E which replaced it) was not on the statute book.[152]

In contrast to the authority in *McL v The Queen*, certain judges emphasised a traditional application of the totality principle. In SP case 12, for example, the offender pleaded not guilty to two counts of sexual penetration with a child under 12, two counts of indecent assault, and three counts of indecent act with a child under 16 for offences committed over a three-year period against his stepdaughter, from the age of five, resulting in permanent injuries to her vaginal and anal region. The offender received a sentence of 8 years and 3 months' imprisonment with a non-parole period of 5 years and 9 months. The judge stated that:

> It is necessary for me to have regard to the principle of totality in formulating an appropriate proportionate sentence in your case. As I have already observed, your offending involves serious examples of the sexual abuse of a very young girl who was in your care. The sentence that I will impose will reflect the assessment I have made of your overall criminality and I have moderated the sentences imposed in respect of each charge. I will make orders for cumulation and concurrency to reflect the conclusion that I have reached, in that regard.

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total amount cumulated on the sentence for the principal charge would be 2 years. Second, to arrive at the level of cumulation per charge, the total amount cumulated on the sentence for the principal charge was divided by the number of additional charges within a case. For example, if the total amount cumulated was 2 years, and a case had 4 charges in addition to the principal proven charge, the per charge cumulation would be 6 months. Only cases with multiple charges of interest are included in the calculations.

151. *R v Nguyen* (Unreported, Supreme Court of Victoria, Crockett J, 24 October 1991).

152. *McL v The Queen* (2000) 203 CLR 452, 476–477 [76] (McHugh, Gummow and Hayne JJ) (emphasis added); approved in *Director of Public Prosecutions v Wightley* [2011] VSCA 74 (22 March 2011) [34]; *Director of Public Prosecutions v HPW* [2011] VSCA 88 (5 April 2011) [86]; *MP v The Queen* [2011] VSCA 78 (4 April 2011); *EDM v The Queen* [2010] VSCA 308 (29 November 2010); *R v AMP* [2010] VSCA 48 (16 March 2010); *SJ v The Queen* [2012] VSCA 237 (28 September 2012).

Case examples of limited cumulation

In SP case 23, the offender pleaded not guilty to five counts of sexual penetration with a child under 12 and 10 counts of indecent act with a child under 16 in relation to offending against the two sisters of the offender's partner, from when the victims were each aged nine and the offender was aged between 23 and 25. The judge stated that, '[t]he charges for which you have been found guilty involve nine separate incidents. Your offending was repeated over a three year period'. In mitigation, the judge cited the offender's previous good character (see below), family support, relative youth, lack of relevant prior offences or previous incarceration, and the burden custody would constitute, given the difficulties that would be faced by the offender's family. The judge imposed a sentence of 10 years and 4 months' imprisonment, with a 7-year non-parole period.

Individual sentences and the cumulation of those sentences in SP case 23 raise serious questions as to adequacy: alongside the 'base sentence' charge of sexual penetration with a child under 12 (which received a sentence of 5 years), three further charges of sexual penetration with a child under 12 each received a sentence of 4 years and 6 months. Only 6 months from each of these charges (a total of 18 months for the three charges) were cumulated against the base sentence.

In SP case 44, the 47 year old offender pleaded guilty to two counts of sexual penetration with a child under 12, seven counts of indecent act with a child under 16, two counts of attempted indecent act with a child under 16, and one count of failure to comply with pre-existing sex offender registration reporting obligations. In the instant case, he offended against four victims while on bail for other child sexual offence charges. In addition, the offender had prior child sexual offence convictions dating back to 1997. The offender received 9 years' imprisonment – 4 years of which were cumulated on the 14-year sentence he was currently serving as a serious sexual offender for similar child sexual offending. The new non-parole period for the instant case and the existing sentence was fixed at 12 years and 6 months.

'Crushing' sentences

In SP case 47, the offender pleaded guilty to four counts of sexual penetration with a child under 12, one count of indecent act with a child under 16, and two counts of producing child pornography in relation to a seven-year period of offending against his niece. In mitigation, the judge cited the offender's guilty plea, admissions, the fact that he was in his early 20s at the time the offending commenced, evidence of remorse, progress towards rehabilitation, and the burden posed by imprisonment given his depression and suicidal tendencies. The offender received a sentence of 6 years and 2 months' imprisonment and a non-parole period of 4 years. The judge stated:

> given that this offending occurred on many separate occasions over a long period of time it is my view that there should be some cumulation of sentence to reflect the distinct nature of the offending as I have described it. In doing so, as I have said, I have had regard to the principle of totality and have endeavoured not to impose a crushing sentence.

The need to avoid a 'crushing' sentence was emphasised by some judges as a reason for applying full or partial concurrency.[153] While judges should be mindful, where appropriate, of the importance of imposing a sentence that does not extinguish any hope of rehabilitation, '[e]xtreme length of a sentence alone, even in relation to a youthful offender, does not necessarily allow it to be characterised as "crushing"'.[154] This concern should be assessed in light of the criminality involved and the applicable sentencing purposes, as O'Bryan J stated in *R v Vaitos*:

153. SP case 4; SP case 38; SP case 47.

154. Freiberg (2014), above n 27, [13.85].

> I have some difficulty appreciating the concept that a richly deserved sentence, not manifestly excessive, should be disturbed because the person upon whom the sentence is imposed may feel crushed by it. It is quite true that the applicant has to face a very long term of imprisonment before he will be released and because he is a comparatively young man, many of the best years of his life will be spent in custody. However, from the community point of view, his detention for a very substantial period is necessary to protect females from his criminal behaviour.[155]

Cases involving the sexual penetration with a child under 12, however, showed that the need to avoid a crushing sentence is sometimes treated as an inherent value, in isolation from other sentencing considerations. For example, in SP case 4, the 60 year old offender, with prior 'extensive' relevant sexual and violent convictions, pleaded guilty to 13 counts of sexual penetration and two counts of indecent act with the victims, over a protracted period of separate incidents involving extreme violence and exposure to disease. The judge stated:

> Of course, in sentencing I must keep in mind the principles of totality and avoid a crushing sentence, as was submitted by [defence counsel]. These are, without doubt, most serious offences and in all the circumstances I have no alternative to the imposition of custodial sentences with regard to the matters involving your victims.

The effect of the court's orders for cumulation meant that, for eight of the charges of sexual penetration with a child under 12, the offender received an additional 9 months' imprisonment on each charge (a total of 3 years and 9 months cumulation from these eight charges).

The concern with avoiding a 'crushing' sentence goes to the question of what would be proportionate to the particular case. In SP case 4, this concern to avoid a crushing sentence appears to have been given a weight that overrode considerations such as the number of victims, the prolonged period of offending, the discrete instances of offending, the offender's relevant history, the quality and quantity of factors in mitigation, the harm caused, and the applicable serious offender provisions.

The approach to totality and cumulation seen across these cases stands in contrast to the direction in *McL v The Queen*[156] and the legislative presumption of cumulation for serious sexual offenders.[157] In the absence of practical guidance about offence seriousness, cumulation, and concurrency, the question is, therefore, how to ensure the imposition of sentences that are routinely proportionate to – and not lower than – the totality of criminality involved in the offending where there are multiple counts of distinct offending and/or multiple victims, as is often characteristic of child sexual assault cases. While total cumulation is nearly always unrealistic and inappropriate, the total effective sentence and individual sentences in cases of sexual penetration with a child under 12 could reasonably lead victims and informed members of the community to the impression that offenders are not being effectively punished for offences beyond the first few in a series or episode, thereby threatening public confidence in the criminal justice system.

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155. *R v Vaitos* (1981) 4 A Crim R 238, 301. See also *R v E, AD* [2005] SASC 332 (1 September 2005); *R v Cave* [2012] SASCFC 42 (26 April 2012) [37]–[38] (Doyle CJ) (a sentence that is crushing may be well deserved and need not be reduced merely because it is crushing).

156. *McL v The Queen* (2000) 203 CLR 452.

157. This point is not limited to the sexual penetration cases. In *El-Waly*, an appeal in the case of an abduction and rape of a blind adult victim, the Court of Appeal left the rape sentence unchanged but reduced the abduction sentence from 4 years and 6 months to 3 years. It reduced the amount of cumulation in relation to that sentence from 2 years and 6 months to 1 year and 6 months, confirming that 'some degree of cumulation' was required under the legislative scheme because the offender was a serious sexual offender; see *El-Waly v The Queen* [2012] VSCA 184 (16 August 2012).

Representative counts

Representative counts involve the accused agreeing to be indicted on, and sentenced for, a limited number of counts as representative of more extensive, repeated criminality.[158] A finding or plea of guilty on the representative charge cannot result in a penalty that exceeds what would be appropriate to a single incidence of the actual proven charge. But it will mean that the offender will not be accorded the leniency that otherwise might be entertained by the sentencer on the assumption that the criminality was an isolated offence committed by a person of otherwise good character, or is unlikely to be repeated.[159] For these reasons, a representative charge for the offence of sexual penetration with a child under 12 should signal to the sentencer that the offending occurred in a particular context in which harm to the victim may be significantly grave and/or offender culpability may be significantly increased. As Batt JA said in *R v SBL*,[160] when summarising the effect of representative charges on sentence:

> Not only does the fact that a count is agreed to be representative preclude its being said in mitigation that the offence was isolated, it affirmatively enables the offence to be seen in its full circumstantial context. The offender is not, by a loading of the sentence, to be punished for the represented offences, but the sentence for the representative offence may reflect the fact that it, the offence counted, occurred in the wider context. Consistently with the view which I have expressed about agreed representative counts, regard may in the present case be had to the adverse effect upon the victims of the whole of the conduct, which effect might not have been produced, or produced to the same extent, by the offences counted alone.[161]

Once admitted, the information founding the representative charge is relevant to sentencing as part of the circumstances surrounding an offence tending to demonstrate that it was part of a continuing and systematic series of acts.[162] Viewing the instant offence in this context is likely to provide the court with a broader view as to the extent of the offender's culpability, the need for specific deterrence, community protection, and denunciation, and the offender's prospects of rehabilitation.[163] While an offender cannot be punished for uncharged acts, a representative offence speaks to the context in which the charged act was committed;[164] it is therefore more likely to attract a lengthier sentence than an isolated offence,[165] though it is not strictly or automatically a circumstance of aggravation.[166] Warren CJ observed in *R v CJK* that:

> In my view, it is appropriate to be cautious about the use of terms such as aggravating in sentencing. I do not consider that representative counts should be seen as aggravating per se; nor should the representative nature lead to an inappropriate sentence. However, a sentencing judge is permitted to look to the whole picture, including the conduct which is represented in the count. In light of that conduct, the sentencing judge imposes the appropriate and just sentence in all the circumstances. If those circumstances render the offence more serious and lead to a higher sentence than would otherwise have been imposed in the absence of the representation, then it is not unreasonable or erroneous to observe it as an aggravating feature, even if only 'colloquially'. However, it would be desirable to avoid the expression in the context of sentencing on a representative count.[167]

158. See Freiberg (2014), above n 27, [2.130].
159. See ibid; Freiberg et al. (2015), above n 1, 25–28.
160. *R v SBL* [1998] VSCA 144 (17 December 1998); see Freiberg et al. (2015), above n 1.
161. *R v SBL* [1998] VSCA 144 (17 December 1998) [70].
162. *R v Corbett* (1991) 52 A Crim R 112; *R v H* (1994) 74 A Crim R 41, 43 (Gleeson CJ).
163. *Director of Public Prosecutions v McMaster* [2008] VSCA 102 (12 June 2008) [49].
164. *R v De Simoni* (1981) 147 CLR 383, 398–399.
165. *Director of Public Prosecutions v EB* [2008] VSCA 127 (17 July 2008); *Director of Public Prosecutions v HPW* [2011] VSCA 88 (5 April 2011) [24].
166. Freiberg (2014), above n 27, [2.130].
167. *R v CJK* [2009] VSCA 58 (27 March 2009) [58].

In the sexual penetration cases analysed, there were certain cases in which either no mention was made of the particular significance of representative charges or, where mention was made, the total effective sentence itself did not appear to appropriately reflect the presence of such charges.[168]

There were a number of cases in which the offender's previous good character or good prospects of rehabilitation were emphasised in mitigation, despite the presence of representative charges indicating factual circumstances to the contrary.[169] In SP case 5, the offender was a friend of the victim's family and offended against the victim over a 7-year period from when she was aged 7 to 14 and he was aged 40 to 47. Of the four charges of sexual penetration with a child under 12 and two charges of indecent act with a child under 16, five were representative charges involving, among other incidents of offending, repeated oral, digital, and penile penetration of the victim. The judge did not highlight this as giving context to the offending and in fact described that context in different terms:

> I also accept that consideration should be given to the circumstances of your life leading to and at the time of offending. You had experienced a break-down in your marriage which resulted in the very sad separation of you from your sons whom you loved very much. You never re-partnered and paid for your boys to stay with you on all school holidays throughout the years. You lived alone in what appears to have been quite an isolated life, developing your craft in [occupation]. I accept that the affection you received from and gave to your young victim enhanced your emotional life with love. This cannot excuse your conduct – your acts were clearly predatory – but I accept that your vulnerability gives context to your offending.

The offender received a total effective imprisonment term of 6 years and 6 months, with a non-parole period of 4 years, for the six offences, including five representative charges.

As discussed above (current sentencing practices), despite the lack of exceptional offender circumstances, the sentences for representative charges in a number of cases clustered around the four-year to five-year mark, similar to the sentences for non-representative charges.[170]

168. SP case 5; SP case 6; SP case 17; SP case 24; SP case 25; SP case 44; SP case 53.

169. SP case 5; SP case 6; SP case 24; SP case 25.

170. SP case 5; SP case 6; SP case 17 (this was unchanged on appeal, which lowered the sentence further on grounds of manifest excess); SP case 11; SP case 44; SP case 53.

6. Sentencing discretion and inter-judge disparity

This chapter discusses sentencing issues on which sentencing judges may receive little practical guidance.

In line with the traditional sentencing orthodoxy that identifies fair outcomes largely in terms of the court's broad discretion to tailor sentences for each case,[171] sentencing judges have, for the most part, been left to settle for themselves the correct approach to considering particular issues when sentencing offenders for child sexual assault, including sexual penetration with a child under 12. These issues include:

- the appropriate discount for a guilty plea in light of countervailing considerations;
- whether community protection is best addressed through rehabilitation or incapacitation;
- whether and how the principles from *R v Verdins* ('*Verdins*') apply to reduce the offender's culpability or impact the offender's time in prison;
- the legitimate impact of third-party hardship on the length of an offender's sentence; and
- how to identify and account for the risk of reoffending in sentence type and duration.

These are sentencing issues that lend themselves less to the standards set out in legislation and more to other forms of practical, but contextualised, sentencing guidance. In the cases of sexual penetration with a child under 12, differences observed between judges in their approach to these issues may point to variations in accompanying case facts, such as offender age or prior history. However, relevant similarities in case facts indicate that the differences can also reasonably be attributable to variations in sentencers' personal approach to weighting those facts, their perceptions or understanding of sexual violence and harm caused, and their identification, interpretation, and application of relevant authorities.

While the discretion to individualise sentences is essential to fair sentencing, so too is an approach to relevant issues that ensures that (a) similarly situated offenders receive appropriately similar dispositions and (b) community expectations about appropriate sentencing levels for particular offences, as reflected in statutory maxima, are reflected in current sentencing practices.

In addition to these sentencing issues, this chapter discusses the particular treatment in cases of sexual penetration with a child under 12 of the offender's previous good character, opportunistic offending, and certain aggravating factors on which the authorities are clear.

Sentencing issue 1: guilty pleas and admissions

The utilitarian value of an offender's guilty plea in facilitating the course of justice,[172] which may include sparing the victim from the trauma of having to give evidence, is particularly pronounced in child sexual assault cases. It can also be evidence of remorse, a consideration that goes towards the assessment of prospects of rehabilitation, risk of reoffending, and community protection.

Further, there is a public interest in guilty pleas that reveal additional offences, which would have been difficult to prove without a confession.[173] A public confession of wrongdoing also enables

171. See, for example, *Lowndes v The Queen* (1999) 195 CLR 665, 671–772 [15]; *Markarian v The Queen* (2005) 228 CLR 357, 371 [27]; *Wong v The Queen* (2001) 207 CLR 584, 591; *R v MacNeil-Brown; R v Piggott* [2008] VSCA 190 (24 September 2008) [10]; *R v Whyte* [2002] NSWCCA 343 (20 August 2002) [147]; *Russell v The Queen* [2011] VSCA 147 (19 May 2011) [57]–[58].

172. *Phillips v The Queen* [2012] VSCA 140 (29 June 2012) [55]. See also *Cameron v The Queen* (2002) 2029 CLR 339.

173. *SJ v The* Queen [2012] VSCA 237 (28 September 2012) [64].

victims to realise that they were wholly blameless.[174] These considerations form the basis of Kirby J's observation in *Ryan v The Queen* ('*Ryan*') that 'there are strong reasons of policy why the law should encourage offenders to make full confessions'.[175] The law does so by reducing the sentence – explicitly and sometimes significantly – that an offender would otherwise receive.

It is usual, but not mandatory, for a court to give a discount of up to 25%–30% for pleading guilty at the first opportunity, but there may be exceptional circumstances where the need to protect the public renders a plea discount inappropriate.[176] As with all sentencing considerations, the weight to be accorded to the plea depends on the circumstances of the particular case.[177] In light of the presence of powerful countervailing considerations in the instinctive synthesis, certain cases showed plea discounts of large amounts.[178]

In SP case 35,[179] the offender's guilty plea came late, and after the witnesses had already been subjected to cross-examination. Moreover, the strength of the Crown case was overwhelming.[180] These considerations go not towards the utility of the plea[181] but towards the separate consideration of remorse.[182] Irrespective, the offender received a discount of three years from his total effective sentence (which would have been 9 years instead of 6 years), and 3 years from his non-parole period for this plea (which would have been 7 years instead of 4 years). These reductions in sentence represent a discount of one-third, or 33.3%.

Where little or no remorse is present, the plea will not attract the same level of mitigation. However, the absence of remorse did not prevent a significant discount being given in SP case 39, based on the offender's guilty plea. In this case, although the offender pleaded guilty, he refused to admit his offending, and the judge found that there was no evidence of remorse. His sentence for one count of sexual penetration with a child who was seven at the time of offending was 3 years' imprisonment with 2 years and 2 months of the sentence suspended. The offender was required to serve an imprisonment sentence of 10 months. But for his plea of guilty, the court would have imposed a sentence of 4 years and 6 months with a non-parole period of 2 years – the reduction representing a discount on the sentence of 33.3%.

The fact that an offender pleads not guilty, which results in the victim having to go through the trauma of giving evidence, is not to be treated as an aggravating factor.[183] However, it would be expected that, where relevant, sentences in cases in which the offender had not pleaded guilty would reflect the absence of this powerfully mitigating factor. This was not always seen in the cases of sexual penetration with a child under 12, with many sentences on the principal charge clustering around the four-year to five-year mark, despite the absence of a guilty plea.[184]

174. *SJ v The* Queen [2012] VSCA 237 (28 September 2012) [64].
175. *Ryan v The Queen* (2001) 206 CLR 267, 295 [94]. See *SJ v The Queen* [2012] VSCA 237 (28 September 2012) [64]; *JBM v The Queen* [2013] VSCA 69 (28 March 2013) [20], [41]–[43].
176. *Milat v The Queen* [2014] NSWCCA 29 [73]; *R v Borkowski* [2009] NSWCCA 102 (15 April 2009) [32]. See Sentencing Advisory Council, *Guilty Pleas in the Higher Courts: Rates, Timing, and Discounts* (2015) 64.
177. See Sentencing Advisory Council (2015), above n 176, 64.
178. SP case 17 (38.9%) (on appeal, the sentence was lowered on grounds of manifest excess and the discount received for the guilty plea was 26.6%); SP case 25 (50.9%); SP case 35 (33.3%); SP case 38 (30.6%); SP case 52 (68.1%).
179. SP case 35.
180. For example, the Crown's case included extensive and compelling forensic evidence.
181. The strength of the Crown case is irrelevant to the discount to be allowed for the utilitarian benefit of the plea because it does not affect the objective benefits of the plea: *Phillips v The Queen* [2012] VSCA 140 (29 June 2012) [55] (Redlich JA and Curtain AJA) (Maxwell P agreeing). See also *Anderson v The Queen* [2013] VSCA 138 (6 June 2013) [14].
182. See *Phillips v The Queen* [2012] VSCA 140 (29 June 2012).
183. *Siganto v The Queen* (1998) 194 CLR 656, 667 [35]; *R v GWM* [2005] NSWCCA 101 (30 March 2005) [21].
184. SP case 1; SP case 9; SP case 12; SP case 13; SP case 14; SP case 16; SP case 19; SP case 23; SP case 27; SP case 31; SP case 42.

Though distinct from the guilty plea, the weighting of admissions and cooperation with the authorities is a related matter. There are clear policy reasons for encouraging offenders to disclose offending, particularly in circumstances in which their crime would not otherwise have come to light. However, as with pleas, the weight to be given to such disclosure is a matter to be assessed in all the circumstances of the case. Certain cases revealed weighting choices that raised the issue of whether countervailing matters going towards offence seriousness and community safety had been appropriately considered.

Two appeals in the cases of sexual penetration with a child under 12 demonstrate conflicting stances on this issue. In *SJ v The Queen*, the Court of Appeal noted the value of the offender's confessions, as well as the case law on the need to encourage offenders to bring cases to notice, particularly given that in the majority of instances such crimes will not be reported and will go unpunished.[185] However, the court observed that:

> Nevertheless, in the present case the appellant must confront the gravity of the offences of which he has been convicted and the cumulative degradation of his victims inherent in them. Moreover, as I have said, the fact of extensive confessions is not sufficient, in the present case, to found on the balance of probabilities a conclusion of positive prospects of rehabilitation.[186]

Differently, the Court of Appeal in *JBM v The Queen*[187] found manifest excess was demonstrated because the confession of the offender was not given appropriate weight. Countervailing considerations going towards offence seriousness (extreme youth of victim, representative charges) and the risk posed to the community (previous sexual offending against children, previous completion of sex offender program) did not prevent the appeal court from lowering his sentence from 7 years' imprisonment with a non-parole period of 4 years and 6 months to 5 years and 6 months' imprisonment with a non-parole period of 3 years and 6 months.

In SP case 38, the offender pleaded guilty to seven counts of indecent act with a child under 16, one of which was a representative charge, and one count of sexual penetration, committed against the granddaughter of his de facto partner, over a six-year period. His partner caught the offender licking the genitals of her granddaughter, following which he attended the police station and confessed his involvement in that incident as well as seven other incidents over the previous five years. The conduct involved rubbing and licking the genitals of the victim, and penetrating her anus, during the period from when she was four to when she was nine years old. The offending occurred when the victim had been entrusted into the care of the offender or was spending time in her grandmother's home. The offender received a total effective sentence of 6 years and 3 months' imprisonment, with a non-parole period of 3 years and 6 months. Had the offender pleaded not guilty, he would have received a sentence of 9 years with a 6-year non-parole period.

Of the discounts applied for the offender's plea and his admissions, the judge stated:

> The main thrust of your plea was directed to the proposition that because all of these offences for which I am to sentence you, apart from Charge 8, came to the knowledge of police through your own confession rather than through the complainant, I must be careful to impose a demonstrable discount reflecting the value of that confession. In this respect, I note that although a VARE [a statement taken in the form of an audio or audiovisual recording] was conducted with your victim, she did not identify any abuse when questioned, much less particular incidents of abuse. Thus, had it not been for your explicit descriptions of what you did to her, your offending, other than as I have said in relation to Count 8, may well have gone forever undetected. I agree that in those circumstances a significant discount from the sentence I would

185. See *SJ v The Queen* [2012] VSCA 237 (28 September 2012) [64]; *R v Doran* [2005] VSCA 271 (21 November 2005); *Ryan v The Queen* (2001) 206 CLR 267, 295.

186. *SJ v The Queen* [2012] VSCA 237 (28 September 2012) [65].

187. *JBM v The Queen* [2013] VSCA 69 (28 March 2013).

> otherwise have imposed is appropriate. Without the mechanism of confession, many crimes may go unreported and unpunished. There is a significant public interest in the acknowledgment of a sentencing discount for a person who is prepared to confess to his crimes. This is particularly the case here where, as I have said, your victim is so young and vulnerable that she cannot identify or face up to any incidents of abuse. Public policy demands a significant discount in those circumstances.

This policy must be balanced with the need to impose sentences that the public would understand as proportionate to the gravity of the offending and appropriately protective in all the relevant circumstances.[188]

Sentencing issue II: 'previous good character'

Good character is a relevant sentencing consideration, and the weight given to it as a mitigating factor depends on the circumstances of the offence, which may be countervailing.[189] The *Victorian Sentencing Manual* notes that good character will attract minimal weight where the offence is viewed as grave because other sentencing considerations, such as the need for general deterrence and protection of the community, require emphasis.[190] Prior good character is of less significance in child sexual assault cases, particularly in cases involving repeated offending.[191] Freiberg notes:

> Character can be an aggravating factor if victims, their families and others have been led to trust the defendant because of the person's impeccable background, or where the person's ostensible good character has assisted in the commission of the offence. This is often the case in sexual offences against young victims.[192]

In New South Wales, when an offender is sentenced for a child sexual assault offence, a lack of prior record may need to be considered in light of section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which prevents a court from taking into account an offender's prior good character or lack of previous convictions if that fact assisted the offender to commit the offence.[193]

Though Victoria lacks a similar provision, the point is salient in this state under general sentencing principles. Good character will be of reduced significance for offences that are commonly committed by offenders of otherwise good character, or who exploit their respectability to further their offending.[194] In *R v T*, Allen J stated:

> In the case of a pattern of sexual abuse of a child commencing at a tender age, good character in other respects and the disgrace and humiliation which ensue upon the criminality coming to light are less persuasive as indications that the appropriate sentence is not within the ordinary range than they would be in respect of most other crimes. Partly that is because it lamentably is all too common for the perpetrators of these offences to be men who in other respects have led exemplary lives and have

188. A similar observation applies to SP case 52, in which the offender received a sentence of 23 months with an 8-month non-parole period for one charge of sexual penetration with a child under 16 and eight charges of indecent act with a child under 16 against three of his former foster children. The weight accorded to his admissions did not appear to reflect their self-serving, improbable nature.

189. *Ryan v The Queen* (2001) 206 CLR 267, 278 [33].

190. Judicial College of Victoria, '10.3.5.5 – Offences Where Good Character Afforded Minimal Weight', *Victorian Sentencing Manual* (Judicial College of Victoria, 2014) <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#6031.htm> at 4 April 2016.

191. *R v PGM* [2008] NSWCCA 172 (13 August 2008) [43]–[44].

192. Freiberg (2014), above n 27, [5.45]; *R v Liddy (No. 2)* (2002) 84 SASR 231. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A (5A) ('In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence'. The aggravating factor of breach of trust will still be relevant here: see Freiberg (2014), above n 27, [4.155]).

193. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A) does not apply when there is a family relationship between the offender and the victim, and the provision is limited to when an offender used his or her position to obtain access to children; *AH v The Queen* [2015] NSWCCA 51 (31 March 2015) [22], [25].

194. Judicial College of Victoria (2014). above n 190.

> commanded the respect of others. Partly, also, it is because the very veneer of respectability affords in crimes of this type the cover which conceals them. Indeed on occasions, of which the present case is an example, the offender uses the public disgrace and humiliation which would follow from an exposure of his wrongdoing as a weapon to deter the victim from making that disclosure.[195]

The leading authority on the relevance of character to sentence is *Ryan,* in which the appellant was a Catholic priest sentenced in New South Wales for a large number of sexual offences against children committed over a 20-year period.[196] The High Court majority held that the failure to accord the appellant some leniency because of his otherwise good character constituted sentencing error. Good character must be taken into account, although the circumstances of the offending can limit its mitigating weight.[197]

Despite previous good character facilitating access to child victims, it was taken into account without comment in that regard in a number of cases, as a weighty mitigating factor.[198] It has been approved by the Victorian Court of Appeal, even though there are strong problems with such an approach as a matter of both law and policy. In *CMG v The Queen*,[199] which involved, among other offences, four counts of sexual penetration with a child under 12 (the victim was the offender's niece), Redlich JA stated:

> In addition to the sentencing remarks earlier set out, her Honour referred to the fact that ordinarily the fact that an offender is 'an otherwise respectable person with an excellent work history and no other prior criminal history' as 'is the case with you [the appellant]' would have a 'strong mitigatory effect' but are not to be so viewed 'when sentence is imposed for sexual abuse of children'. Elsewhere in the sentencing remarks her Honour emphasised that the offences involved a gross breach of trust and exploitation of the position he occupied. *It was error in these circumstances to have diminished the weight to be given to the appellant's good character.* The observations of this court in the recent case of *SD v The Queen*, [94] a 40 year old uncle who sexually abused his niece, are apposite:
>
> > It is one thing to describe the offending as a breach of trust – so much cannot be gainsaid – but it is another thing to diminish the weight to be attributed to good character which a person is otherwise possessed of at the time when an offence is committed. If a person is otherwise of good character, he or she is entitled to have that taken into account at the time of sentencing. Moreover, it is difficult to see that it was legitimate to conclude that the appellant's good character was 'exploited'[.] ...
> >
> > In *Ryan*, Mc Hugh J observed:
> >
> > > In considering a prisoner's good character when sentencing, the court must distinguish two logically distinct stages. First, it must determine whether the prisoner is of otherwise good character. In making this assessment, the sentencing judge must not consider the offences for which the prisoner is being sentenced. Secondly, if a prisoner is of otherwise good character, the sentencing judge must take that fact into account. However, the weight that must be given to the prisoner's otherwise good character will vary according to all of the circumstances of the case. ....

195. *R v T* (1990) 47 A Crim R 29, 39. See also *Ryan v The Queen* (2001) 206 CLR 267; *Director of Public Prosecutions v OJA* [2007] VSCA 129 (22 June 2007) [51].
196. *Ryan v The Queen* (2001) 206 CLR 267.
197. McHugh J submitted that the proper approach to character was in 'distinct stages' – first, the determination of whether the offender is of otherwise good character, and second, the determination of the weight that should be accorded to that fact as a mitigating factor. The latter 'will vary according to all of the circumstances'; see *Ryan v The Queen* (2001) 206 CLR 267, 275 [25]. Following *Ryan*, New South Wales legislated to prevent courts from taking into consideration good character or lack of previous convictions as a mitigating factor if the court is satisfied that the factor assisted the offender to offend: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A).
198. SP case 5; SP case 25; SP case 31; SP case 38; SP case 42; SP case 48.
199. *CMG v The Queen* [2013] VSCA 243 (10 September 2013).

> As is made clear in *Ryan*, a sentencing judge is always bound to consider the 'otherwise good character' of the person to be sentenced. In so doing the judge does not take into account the offences for which he or she is being sentenced. If a person is of good character that fact must always be taken into account. However, the weight to be given to a person's good character will vary according to the particular circumstances of the case. In contrast to the present case, in *Ryan* the offences were not isolated, since there were multiple offences over a number of years; and the offences were a breach of trust committed by the prisoner in the context of his role as a priest.
>
> In our opinion, the sentencing judge erred in diminishing the weight to be given to the appellant's otherwise good character, and in finding that the appellant somehow exploited his good character in order to commit the offences. We agree with the submission of counsel for the appellant that her Honour's approach had the effect of punishing her client twice for the breach of trust – first by identifying that breach as an adverse sentencing consideration, and second by using it, inappropriately in the circumstances, to diminish the appellant's otherwise good character.[200]

For the four counts of sexual penetration with a child under 10 and three counts of indecent act with a child under 16, and in the absence of a guilty plea, the Court of Appeal imposed a total effective imprisonment sentence of 5 years with a 3-year non-parole period. The conflict between these appellate statements and the authorities discussed above (the latter adhered to by the sentencing judge in SP case 9) shows that the appropriate impact of an offender's previous good character in cases of child sexual abuse is currently unsettled and unsatisfactory, both as a consideration in itself and in terms of how it interacts with the related, but separate, consideration of breach of trust.

In SP case 25, the offender had previously been a pastor in a church before retirement and had done some pastoral work overseas. It was through his connections with local communities from the same overseas location that, in late 2009, he met the family of his victims: three sisters aged eight, six, and four. The offender visited the family in their home on a number of occasions and conceded that he built up a level of trust in these visits. He was allowed to take the children out alone for the day and then to his home while their father was away. He offended against the three victims while they were at his home, alone with him. The judge, in discussing matters in mitigation, stated:

> as you have no criminal convictions before this offending, you are to be sentenced as a person of previous good character. Indeed, the material I have been provided with shows that before you committed these offences, your reputation in the community both here and in [the overseas location] was excellent.

Yet this 'excellent' reputation was the very reason that the offender was entrusted with the girls in the first place.

In SP case 14, a 35 year old offender with prior relevant history and no guilty plea received a total effective imprisonment term of 4 years and 3 months with a non-parole period of 3 years for one charge of sexual penetration with a child under 12 and one charge of indecent act with a child under 16, in relation to his six to eight year old neighbour. The judge observed that:

> this is one of those rare cases when s.6 paragraph (c) of the *Sentencing Act* is called into consideration. I will not read that section but it says that in considering your character, examination can be had of good works in the community, or what contribution you have made to the community. It is rare that someone can put forward what you put forward in your plea. I take all these matters into account in your favour.

Additionally, the judge observed that '[i]t seems to me that there are matters in mitigation that have been marshalled on your behalf and I must be careful not to give them mere lip service because the offence you committed was so horrid'.

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200. *CMG v The Queen* [2013] VSCA 243 (10 September 2013) [141] (emphasis added).

In SP case 42, the offender pleaded not guilty to one count of sexual penetration with the seven year old daughter of his girlfriend. In imposing a sentence of 2 years with a 15-month non-parole period, the judge noted '[i]n mitigation I accept your previous character' and, elsewhere in the sentencing remarks:

> The very unfortunate fact is that sexual offences against children are not uncommon in our community and are often committed by offenders who are otherwise law-abiding citizens of excellent character. The principle of general deterrence, which intends to make an example of the current offender in order to deter others, assumes importance in the sentencing balance.

Sentencing issue III: rehabilitation versus punishment

Judges have an extremely broad discretion when it comes to the ranking and weighting in individual cases of the unranked legislative purposes of sentencing. While this approach is said to facilitate individualised justice by enabling judges to tailor sentences to the 'wide variations of circumstances of the offence and the offender',[201] it opens the door to unjustified disparity in the sentencing of similarly situated offenders. Inevitably, different judges have different views on what constitutes an appropriate balance between competing sentencing purposes, when one purpose should take priority over another, and how purposes are best to be achieved. Instances of this type of inter-judge disparity were discernable in the cases when different judges dealt with the question of rehabilitation for non-youthful offenders with prior relevant history.

In SP case 6, the 58 year old offender had prior convictions for the sexual abuse of his daughter and her friends, aged eight to 10. He received a sentence of 5 years' imprisonment with a non-parole period of 3 years and 9 months for one representative count of sexual penetration with a child under 12, and one representative count of indecent act with a child under 16 for offending against his partner's granddaughter, when she was aged four to seven years. As a consequence of the offender's prior convictions, the serious sexual offender regime was applicable. In mitigation, the judge considered his guilty plea (not early in the process, and after initial denials to police) and positive character references. In aggravation were the breach of trust and prior relevant history against similar victims, for which he had served a custodial sentence and completed sex offender treatment in custody. The judge stated that, while many considerations went towards favourable prospects of rehabilitation (previous offending was 25 years ago, significant voluntary work history, family support, willingness to undertake a further sex offending program), the offender had limited insight into his motivations. The judge noted that the offender's attempts to minimise his offending, the similar nature of his previous sexual offending against children, and an assessment at the top of the moderate risk range for reoffending, plus paedophile diagnosis, rendered his prospects for rehabilitation 'at best, fair'. A total effective imprisonment term of 5 years with a non-parole period of 3 years and 9 months appears inadequate in this context.

In SP case 1, the offender, who pleaded not guilty to one charge of sexual penetration with a child under 10 and one charge of indecent act in the presence of a child in relation to offending against his child's friend during a sleepover, received a sentence of 3 years and 8 months' imprisonment with a 2-year non-parole period. While victim impact was a relevant consideration, the judge was conscious to not allow 'the effects upon a victim to swamp the sentencing process' in accordance with the authorities on how a court is to regard victim impact. In light of the offender's family support, previous good character, and lack of prior offences, the judge found that the offender had good chances of rehabilitation that needed to be maximised.

201. *R v Whyte* [2002] NSWCCA 343 (20 August 2002) [147].

A readiness to reduce sentences on the grounds of good prospects of rehabilitation – in the face of countervailing considerations such as a not guilty plea and similar prior sexual offending against children – stands in contrast to the case law. It is emphasised repeatedly in the *Victorian Sentencing Manual*, that '[f]or more than one reason the principles of just punishment, public denunciation and general deterrence assume considerable significance as sentencing considerations in such cases'.[202]

Sentencing issue IV: approach to *Verdins* principles

In many of the cases of sexual penetration with a child under 12, judges grappled with the difficult question of the legitimate impact of impaired mental functioning on culpability and on punishment type and duration, both with and without specific mention of the principles in *Verdins*.[203]

Insofar as the *Verdins* principles are concerned, the *Victorian Sentencing Manual* cites the statement of Ashley and Weinberg JJA in *R v Vuadreu*:

> It must be emphasised that Verdins has no application in respect of a condition postulated to have existed at the time of offending unless the condition relied upon can be seen to have some realistic connection with the offending. The Verdins principles are, and should be regarded as, exceptional.[204]

Nevertheless, in the cases of sexual penetration with a child under 12 analysed by the Council, *Verdins* was hardly ever dismissed once raised by counsel, notwithstanding the law on the 'exceptional' nature of the principles. It was taken into consideration as a significant factor in many cases.[205]

Reduced sentences on *Verdins* grounds were seen in a number of cases. Reduction was justified less frequently on the basis of reduced moral culpability than on the grounds that the offender would experience prison as more burdensome[206] or because the offender's condition somewhat moderated the need for general or specific deterrence.[207] Significantly, the psychiatric, psychological, and/or medical evidentiary basis for such reductions was not always clear.

In SP case 27, the judge stated that:

> in your case your intellectual deficit could only have limited your understanding of the wrongfulness of your conduct marginally. In your first interview with police you cast yourself in the role of a family friend helping out the complainant and her family because they were feeling the pressures of everyday life. You denied any wrongdoing and explained how it was that the complainant had knowledge of the kind of acts that she alleged against you. You portrayed yourself as a victim.
>
> The position regarding your level of intellect is not clear. During the police interviews, to my mind, there was no indication of reduced mental function. However, you may have learnt coping mechanisms to mask your deficits from the lay observer. Ultimately, I am of the opinion, that general deterrence must be moderated to some extent in your case.

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202. *Director of Public Prosecutions v Riddle* [2002] VSCA 153 (11 September 2002) [35]; Judicial College of Victoria, '31.3.2.3 – Sexual Offences Against Children', *Victorian Sentencing Manual* (Judicial College of Victoria, 2014) <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#8755.htm> at 4 April 2016; Judicial College of Victoria, '31.4.3.2.1 – Sexual Offences Against Children – Deterrence', *Victorian Sentencing Manual* (Judicial College of Victoria, 2007) <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#45578.htm> at 4 April 2016.
203. See *R v Verdins* (2007)16 VR 269 [32]; *R v Tsiaris* [1996] 1 VR 398.
204. *R v Vuadreu* [2009] VSCA 262 (16 November 2009) [37]; Judicial College of Victoria, '10.9.2.4 – Exceptional Nature of the Principles', *Victorian Sentencing Manual* (Judicial College of Victoria, 2012) <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#6141.htm> at 4 April 2016. See also *Pato v The Queen* [2011] VSCA 223 (2 August 2011) [18]; *Mune v The Queen* [2011] VSCA 231 (18 August 2011) [31]; *Breuer v The Queen* [2011] VSCA 244 (23 August 2011) [17].
205. SP case 3; SP case 28; SP case 15; SP case 21; SP case 22; SP case 27; SP case 35; SP case 38; SP case 39; SP case 51; SP case 52.
206. SP case 32; SP case 28; SP case 21; SP case 38; SP case 52.
207. SP case 27; SP case 22; SP case 35; SP case 38; SP case 39; SP case 51.

In SP case 52, the judge stated that:

> *whilst there may be some shortfall in the material before me to support a submission* that imprisonment would be more difficult for you than a more able-bodied and younger prisoner, I do however accept a term of imprisonment for you, given in particular your back pain, will make incarceration more difficult for you, and I have moderated your sentence accordingly. *Whilst this may arguably be a generous interpretation* of the Verdins principles, I nevertheless proceed on that basis when sentencing you.[208]

The various conditions that can enliven a consideration of the *Verdins* principles to mitigate sentence are broad and nebulous. There are numerous combinations of ways in which *Verdins* principles may do this, and there is an elevated emphasis on community protection, denunciation, and deterrence in cases of sexual penetration with a child under 12. With this in mind, the current lack of detailed guidance leaves judges to decide according to their own perceptions, and anew with each case, the approach surrounding what constitutes a relevant impairment and what its consequences should be.

In *Director of Public Prosecutions v O'Neill,*[209] the Court of Appeal has sought to clarify the use of the *Verdins* principles generally. The court affirmed that *Verdins* principles are confined to where there is impairment of mental functioning and that consideration of the principles should receive a rigorous evaluation of the evidence. The Council notes, however, that the cases in the reference period were determined prior to *Director of Public Prosecutions v O'Neill*.

Sentencing issue V: aggravating factors

It is incumbent on sentencers not only to act impartially in weighing relevant considerations but also to be seen to act impartially. This is why one judge in the cases noted that, while the impact on the victim was a relevant consideration, '[h]owever, I am conscious that I must not allow the effects upon a victim to swamp the sentencing process'.[210] Concerns for impartiality are understandably brought into high relief in dealing with the offence of sexual penetration with a child under 12 because the victims in these cases are in the most vulnerable category known to law. In *R v RGG*, Ashley JA noted that '[t]here is an ever-present danger, I think, when a person is to be sentenced for sexual offences against children, that lip service and nothing more will be paid to matters going in mitigation'.[211]

The duty, however, to impartially consider and reflect on all relevant factors in the sentencing synthesis extends not just to subjective offender factors, which may act in mitigation, but also to those that act in aggravation. The Council's textual analysis of cases of sexual penetration with a child under 12 showed inconsistencies among judges in the identification and weighing of aggravating factors relevant to accurate assessments of objective seriousness, offender culpability, and harm caused.[212] For example, in SP case 4, four charges of anal penetration, with additional violence, received a sentence of 4 years' imprisonment on each charge before cumulation (the victim, a 10 year old, was awoken from sleep by his father's friend). In SP case 24, a representative charge of digital penetration of a seven year old victim by her mother's partner received 5 years' imprisonment and was described as penetration 'towards the lower end of the scale'.

208. Emphasis added.

209. *Director of Public Prosecutions v O'Neill* [2015] VSCA 324 (2 December 2015).

210. SP case 1.

211. *R v RGG* [2008] VSCA 94 (6 June 2008) [3].

212. Problems with the current understandings of harm are discussed in more detail above under 'Assessments of sexual violence'.

Penetration without a condom is an aggravating feature of offending because it exposes the victim to disease.[213] Though a relevant feature of the offending in the cases of sexual penetration with a child under 12, this was often not discussed at all in sentencing remarks nor identified as an aggravating factor.[214] This is in contrast to the rape sample for which sentencing remarks frequently mentioned this feature.[215] Notable exceptions to this for the rape sample involved child victims aged under 12.[216] Further, the fact that this circumstance was mentioned did not mean it was accounted for accurately or meaningfully.[217]

Offending against a victim in the safety and sanctity of his or her home is an aggravating feature of offending. Though a feature of the offending, this was not discussed or identified as an aggravating factor in a number of cases.[218]

Offending against a sleeping victim, or one awoken from sleep, was specifically discussed in the rape cases as aggravating. However, either this was not mentioned or it did not appear to be significantly weighted in the assessment of criminality in the cases of sexual penetration with a child under 12, when sleeping children were victimised in their beds.[219]

The use of a sex toy is an aggravating feature of offending. Though a feature of the offending in certain cases, this was not always discussed or identified as an aggravating factor.[220] Similarly, exposing children to pornography is aggravating, but this did not appear to significantly increase the sentence in the case in which it was relevant.[221]

Permanent injuries to the anal and genital region as a result of the offending occurred in SP case 12, but the victim's injuries were not specifically emphasised as aggravating.

Sentencing issue VI: opportunistic offending

A planned offence is generally regarded more gravely than a spontaneous offence.[222] One basis for this distinction is that the latter speaks to the absence of premeditation. Another basis is that the lack of planning can indicate 'a less sophisticated or less dangerous offender'.[223] However, spontaneity may equally be an indicator of dangerousness. The *Victorian Sentencing Manual* uses the example of a sexual offender acting habitually on impulse and with no regard to the probability of detection: '[i]n such circumstances it may serve not to mitigate an offence, but rather emphasise the sentencing purpose of community protection'.[224]

213. See, for example, Judicial College of Victoria, '31.3.2.2 – Incest', *Victorian Sentencing Manual* (Judicial College of Victoria, 2014) <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#8754.htm> at 4 April 2016; *R v Khem* [2008] VSCA 136 (7 August 2008).
214. SP case 4 (no condom, repeat anal penetration of 10 and eight year olds by offender with hepatitis C); SP case 23; SP case 47.
215. RP case 15; RP case 16; RP case 30; RP case 51; RP case 68; RP case 76; RP case 94; RP case 95; RP case 107; RP case 114.
216. RP case 3; RP case 35; RP case 36; RP case 84.
217. RP case 94: the judge found that because the offender withdrew before ejaculating, he did not expose her to the risk of pregnancy: 'whilst not exposing her to the risk of pregnancy because you withdrew and ejaculated, you did expose the victim to the anguish of worrying about sexually transmitted diseases'; see RP case 94 on appeal, the sentence in this case was reduced from 7 years with a non-parole period of 5 years to 5 years and 6 months with a non-parole period of 3 years and 3 months. In that appeal, the defence counsel's erroneous submission that, because the appellant had withdrawn before ejaculating, 'this had reduced the risk of the victim contracting a sexually transmitted disease' went otherwise unremarked on by the court as it went on to find that there was nothing about this offence that warranted 'a 40 per cent increase above the median range for rape'.
218. SP case 5; SP case 24; SP case 12; SP case 38.
219. SP case 12; SP case 37; SP case 31.
220. SP case 4; SP case 47.
221. SP case 48.
222. See, for example, Judicial College of Victoria, '9.5.1 – Planned Offences Normally More Grave', *Victorian Sentencing Manual* (Judicial College of Victoria, 2005) <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#5253.htm> at 4 April 2016.
223. Ibid.
224. Ibid.

The cases of sexual penetration with a child under 12 fell along a spectrum of planning and premeditation. Some offences involved sophisticated grooming over time, in order to facilitate access to the child victim, and others occurred 'opportunistically'. The latter instance was often highlighted and discussed as though it were a mitigating factor. Rather, such offending:

(a) occurs in the absence of a circumstance of aggravation; or

(b) provides evidence of increased dangerousness, in that the offending occurred when the chance to offend arrived in the course of normal family or social life; or

(c) is cancelled out by the countervailing consideration of the breach of trust that allowed the offender to be alone with the child, or to offend against the victim in the victim's home.[225]

There is a marked tendency for judges to regard 'opportunistic' or 'situational' offending as evidence of decreased dangerousness, or as going towards favourable prospects of rehabilitation. Perhaps this is the result of a comparison with a hypothetical, 'worst case', predatory, paedophilic offender who represents an unspoken but operational stereotype of extreme dangerousness. However, the grounds for considering a 'situational' offender as less dangerous or culpable, or more amenable to rehabilitation, are specious in light of the fact that such offenders offend repeatedly over prolonged periods, and in the course of normal social and family life.

In SP case 27, the fact that the offending was 'situational' was considered in mitigation. This is despite the two charges of sexual penetration with a child under 12 and two charges of indecent act with a child under 16 occurring over a period of two years, in situations where the offender was entrusted with the care of the five to seven year old child. In SP case 37, a relative offended against three children in their beds over a period of weeks. The judge stated, in the context of mitigatory considerations, that 'the offending was probably situational rather than as a result of true paedophilic tendency'.

Sentencing issue VII: third-party hardship

As one of the unfortunate but ordinary consequences of punishment, hardship to a third party caused by the imprisonment of an offender is not normally a mitigating circumstance. However, sentencers have a discretion to mitigate sentence because of third-party hardship where satisfied that the case reveals exceptional circumstances.[226] The *Victorian Sentencing Manual* states that:

> This consideration will generally only arise where the third party is an especially vulnerable dependent of the offender, or where there are a number of vulnerable dependents. The circumstances must be such that they rise above the general and sometimes tragic hardship commonly suffered by the families of imprisoned offenders.[227]

The *Victorian Sentencing Manual* further states that this is a discretionary exercise of mercy and that '[d]espite authority to the contrary, the exceptional circumstances test always applies to that discretion, and there is no other residual discretion that may be exercised without reference to that test'.[228] However, the spirit of this exception is easily eroded, in that sentencers 'may also reduce an

225. SP case 9; SP case 24 (the judge noted the absence of grooming or planning in the case of an offender charged with three representative counts of sexual penetration and indecent act with the seven year old daughter of his partner in the home where they all lived: 'I accept your counsel's submissions that your offending was situational and opportunistic' and 'it appears that this offending took place as a result of you having the child available rather than seeking the child out'); SP case 14; SP case 25; SP case 27; SP case 45; SP case 48.

226. See, for example, Judicial College of Victoria, '11.7.10 – Hardship to the Family of the Offender', *Victorian Sentencing Manual* (Judicial College of Victoria, 2010) <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#16166.htm> at 4 April 2016.

227. Ibid.

228. Ibid.

offender's sentence as an indirect response to third party hardship, where the offender's appreciation of that hardship will increase the burden of imprisonment' – this factor 'is not subject to the exceptional circumstances test'.[229]

The impact of an offender's imprisonment on third parties – usually family – was used in several cases in mitigation, in the absence of a finding of exceptional circumstances, on the basis that such knowledge would cause the offender to experience prison as more burdensome.[230]

Sentencing issue VIII: risk of reoffending

As mentioned, community protection is the principle purpose for imposing custodial sentence under the specific sentencing regime that applies to serious sexual offenders convicted of two or more counts of sexual assault (including child sexual assault).[231] Aside from this, it is appropriate to regard community protection as a factor in determining a proportionate sentence for a child sex offender to whom that regime does not apply.[232]

If 'the surrounding facts' support a conclusion that there is a risk of reoffending, sentencing judges may take community protection into account despite psychological evidence that the offender will not reoffend.[233] Conversely, in light of those surrounding facts, judges are not bound to accept psychological evidence that the offender is likely to reoffend. However, there were instances in the cases of sexual penetration with a child under 12 in which judges were prepared to reduce sentence duration on the grounds of positive prospects of rehabilitation[234] and/or not connect prior relevant offending with the need for an effectively deterring, punitive, or protective sentence,[235] even though there were important countervailing indications and/or psychological evidence indicating a reasonable risk of reoffending. This is an area in which practical guidance around the reoffending rates for particular types of child sex offenders would be useful.

Victims under 12 in the rape sample

The above findings apply also to the majority of the cases in the rape sample involving victims under 12. The sentencing issues are summarised in Table 5.

Table 5 does not include the five-year residential treatment order imposed in RP case 10 for the rape of a nine year old victim by a 20 year old intellectually disabled, suicidal Aboriginal offender deemed to be at risk in custody. Because of the victim's age, the table also does not include the sentence of 4 years and 9 months with a 3-year non-parole period for the rape of a 12 year old victim by a 41 year old offender in RP case 18. But for a period of a few months, RP case 18 too would be included in the sample of child rape cases that match the observations in this report in relation to sexual penetration with a child under 12.

229. Ibid.

230. SP case 1; SP case 14 (a 35 year old offender with some relevant history who pleaded not guilty to the charges of sexual penetration and indecent assault of his six to eight year old neighbour received a sentence of 4 years and 3 months with a 3 year non-parole period. The judge stated that 'as a particular expression of mercy, I take into account that you are very close to your elderly frail parents. You have been a loving and helpful son. What will become of them while you are incarcerated and unable to be with them will weigh heavily on you. I take that matter into account as well'); SP case 28; SP case 23; SP case 16.

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

232. *R v Eather* (1994) 71 A Crim R 305.

233. Judicial College of Victoria, '31.4.3.2.2 – Protection of the Community', *Victorian Sentencing Manual* (Judicial College of Victoria, 2007) <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#45579.htm> at 4 April 2016; *R v Vanetie* (Unreported, Victorian Court of Appeal, Brooking and Charles JJA, Hampel AJA, 20 October 1997). See also *R v Connolly* [2004] VSCA 24 (12 March 2004) [24].

234. SP case 12; SP case 52; SP case 35; SP case 54.

235. SP case 13; SP case 14; SP case 17; SP case 18; SP case 35; SP case 43; SP case 44; SP case 54.

Table 5: **Summary of sentencing issues in cases involving victims aged under 12 in the rape sample**

Case	Summary
RP case 3	Sentence of 9 years and 10 months with a non-parole period of 7 years for three charges of rape and 11 charges of indecent assault involving two victims. This case reflects problems with current sentencing practices, assessments of violence ('[t]he fact that there was only occasional penetration does not diminish the effect of this being rape. However, in my view, it is relevant to the nature of the act and the level of violence'), failure to account for a lack of remorse/insight represented by a not guilty plea, proportionality, cumulation, and totality. Reasonable prospects of rehabilitation were found despite countervailing evidence and application of the serious sexual offender scheme.
RP case 23	Sentence of 13 years and 6 months with a non-parole period of 11 years for six charges of rape, 14 charges of indecent assault, and four charges of incest involving four victims over a period of 25 years. This case reflects problems with cumulation and totality, proportionality, the application of the serious sexual offender scheme, and appropriate recognition of representative charges.
RP case 35	Sentence of 10 years and 6 months with a 7-year non-parole period for three charges of rape, one charge of attempted sexual penetration with a child under 16, and one charge of indecent act with a child under 16 involving two victims over three years. This case reflects problems with proportionality, cumulation, totality, treatment of representative counts, weighting of the plea, assessments of violence, and application of the serious sexual offender scheme. The female victim was aged 10 when the offending began, and the male victim was aged 12 when the offending began. (Note that the historical penalty of 10 years applies to the rapes.)
RP case 36	Sentence of 8 years with a non-parole period of 5 years and 6 months for one charge of rape, one charge of aggravated sexual penetration with a child under 16, and two charges of indecent assault committed against a partner's daughter over a 10-year period from when she was nine years old. This case reflects problems with current sentencing practices (4 years for the aggravated sexual penetration with a child 10–16, 6 years for the rape), effect of the not guilty plea, application of serious sexual offender provisions, appropriate recognition of representative charges, mitigation for delay caused by the victim's hesitancy to report the offending, and the assessments of child sexual violence.
RP case 80	Sentence of 14 months wholly suspended for one charge of rape and one charge of indecent act by a 16–17 year old offender. This case highlights the preferencing of rehabilitation over punishment in the sentencing of a youthful offender for child sexual offending.
RP case 81	Sentence of 11 years and 2 months with a non-parole period of 7 years and 6 months imposed for one count of rape and 10 counts of indecent act with a child under 16 relating to a four year old victim and a six year old victim over a period of 30–40 minutes. This case reflects problems with the failure to address the not guilty plea, aggravation of sexual abuse in the presence of other child, application of the serious offender provisions in light of the offender's age on release, and poor prospects of rehabilitation, totality, and cumulation. Problems exacerbated by the reduction of this sentence to 8 years and 8 months with a non-parole period of 6 years and 6 months by the Court of Appeal following a successful appeal on the grounds of manifest excess and a finding that cumulation orders 'resulted in [a] sentence that was disproportionate to [the] seriousness of [the] offending' and that 'cumulation needed to be tempered somewhat more than [the judge] did to achieve a total effective sentence proportionate to the specific offending being punished'. The court observed that '[s]erious as the criminality in this case is, it must be punished on a sentencing spectrum which includes

Case	Summary
	sentences imposed for long and sustained sexual abuse of children, as well as those for simpler or more confined abuse' – an observation that goes more towards the inadequacy of current sentencing practices than the proportionality of this particular sentence when the final orders for cumulation are assessed in light of all the relevant factors.
RP case 84	Sentence of 11 years and 6 months with an 8-year non-parole period imposed where an 18–19 year old offender charged with four counts of rape, three counts of common assault, eight counts of indecent act with a child under 16, one count of sexual penetration with a child under 16, and one count of imprisonment. This case highlights the preferencing of rehabilitation over punishment in the sentencing of a youthful offender for child sexual offending.

One difference between the sentencing of offenders charged with the rape of a child under 12 and offenders charged with sexual penetration with a child under 12, however, is that, in some of the rape cases, the judge included details of the victim's distress or the offender's coercion or violence in the factual description of the offending. For example, judges noted that 'the victim cried'[236] or 'she attempted to get away from you by crawling backwards',[237] and judges referred to 'that terrified and traumatised child',[238] 'while this was going on he was screaming and crying',[239] and '[y]ou … pushed her to the floor and pulled her pants down'.[240] Such details were lacking from the analogous description in the sexual penetration cases. Presumably, description of victim distress goes towards a lack of consent, as a required element of the offence of rape.

Assessment of rape as more serious than sexual penetration with a child under 12

In RP case 81, the offender was found guilty of one count of rape and 10 counts of indecent act with a child under 16 against two victims who were 4 and 6 years old. The Court of Appeal reduced the offender's sentence from 11 years and 2 months' imprisonment with a non-parole period of 7 years and 6 months to 8 years and 8 months' imprisonment with a non-parole period of 6 years and 6 months.

In summarising the individual arguments comprising the Crown case, the Court of Appeal cited, without critical comment, the submission that 'the rape charge, charge 13, was a serious example of such a charge *and it was significant that the appellant was found guilty of rape rather than sexual penetration of a child under the age of 16, which was an alternative*'.[241] The judge may have been considering the offence of sexual penetration with a child under 16 (with a maximum penalty of 15 years), rather than sexual penetration with a child under 12, as would have applied given the age of the victims in this case. Nevertheless, the implication from this line of reasoning is that rape is to be treated more seriously than sexual penetration with a child. This is despite the fact that the offences carry identical maximum penalties and despite sexual penetration with a child being inherently as serious as rape, if not more serious, given the specific vulnerability of the victim and insofar as a lack of consent is deemed to exist in the elements of the offence.

236. RP case 3.
237. Ibid.
238. RP case 10.
239. RP case 84.
240. RP case 46.
241. *Pottinger v The Queen* [2011] VSCA 409 (8 November 2011) [8] (emphasis added).

Conclusion

It is a significant moment for child sexual assault sentencing. The law is clear, at the level of principle, that children are the category of vulnerable victims owed the highest duty of protection; however, only relatively recently when viewed in a historical context has the maximum penalty for sexual offending against young children been raised to that of adults. Similarly, only very recently has the nature and extent of the trauma caused by the sexual abuse of children been publicly validated and recognised. Mainstream social acknowledgment of, and legal responses to, widespread, institutionalised child sexual abuse in Australia, for example, did not come until 2014, with the establishment of the Royal Commission into Institutional Responses to Child Sexual Abuse. Further, even though there is widespread acknowledgment of the harm of family violence, as traditionally defined, there has not been such acknowledgment of the prevalence of, and harm caused by, child sexual abuse within the contexts of the family and broader community groups.

Sentencing is a difficult exercise in which multiple complex and competing factors must be balanced. Despite sentencing remarks that were highly condemnatory of sexual offending against children, the majority of cases of sexual penetration with a child under 12 showed total effective imprisonment terms, individual sentences for multiple counts (both before and after cumulation), and non-parole periods, that were inadequate when assessed in light of:

- the maximum penalty;
- the legislative intention of the serious sexual offender scheme (where the scheme applied);
- particular measures of objective offence seriousness; and
- applicable authorities regarding the effect of relevant aggravating and mitigating considerations.

Reflecting the necessary complexity of the sentencing process, the current problems with sentences for the offence of sexual penetration with a child under 12 involve many factors. It is concerning that the courts do not sufficiently recognise, or articulate, the inherent violence involved in the sexual penetration of a young child, regardless of whether such acts are accompanied by additional non-sexual violence. The current approach suggests that outdated concepts of harm persist in the criminal justice system, and that such concepts of harm are not confined to the courts, but represent a broader, systemic issue. It may be, for example, that these concepts of harm reflect deeply rooted historical power imbalances. It is clear, however, that current sentencing practices reinforce past norms, and that trial judges feel constrained as a matter of law when imposing sentences for the offence of sexual penetration with a child under 12, regardless of changing community attitudes.

Further, the courts' current approach to considering totality and cumulation has resisted legislative direction aimed at redressing inadequate sentences for repeat offenders. The influence of current sentencing practices stands in contrast to High Court guidance. There is also substantial disparity in the courts' approach to issues that frequently arise in the course of sentencing for the offence of sexual penetration with a child under 12. This disparity of approach occurs despite appellate court guidance. The problems identified in this report are not confined to individual judges or individual jurisdictions – they are broad and systemic, and identifying solutions will be challenging.

The existence of more practical and detailed forms of sentencing guidance on matters of law and policy, however, mean that the problem is not insoluble. The issues identified in this report with courts' assessment of the seriousness of cases of sexual penetration with a child under 12, and the weighting given to aggravating and mitigating factors within those cases, lend themselves to guidance in the form of a guideline judgment. Such guidance cannot be provided in legislative responses that remove judicial discretion, such as the fixing of mandatory penalties.

Comprehensive guidance in the form of a guideline judgment that addresses sexual offending against children as a 'particular offence or class of offence'[242] would provide clarity on the complex issues involved in the sentencing of offenders who have committed sexual offences against children.

242. This is as provided for in *Sentencing Act 1991* (Vic) s 6AA(c).

Appendix 1: Details of the sexual penetration cases that received non-imprisonment sentences

Table A1: **Sexual penetration cases that received non-imprisonment sentences**

Case name	Plea	Charge/s	Sentence	Notes
SP case 3	Guilty	2 x sexual penetration with a child under 12	CBO – 2 years – unpaid work, supervision, medical/ psychological/ psychiatric assessment and treatment, sex offenders treatment program	• Offender aged 15 years at time of offence • Victim was aged seven years • *Verdins*: impaired mental functioning at time of offence, developmental difficulties meant age differential much less than chronological difference • Offender was aged 25 years at sentence • Plea • 'Reasonably good' chances of rehabilitation • 'This, in my view, is a very unusual case with exceptional circumstances'
SP case 30	Guilty	2 x sexual penetration with a child under 12	30 months – wholly suspended	• Offender aged between 12–15 years at time of offending, victims were his cousins aged eight and four to six • Offender was aged 30 years at sentence • Plea • 'This is indeed serious offending, as I said at the beginning of this sentence, and the results have been devastating for the complainants, however you at the time were a child yourself and any sentence I impose must take into account that fact. Had you been sentenced at the time, I have no doubt you would not have received a custodial sentence, in keeping with the legislation which stated that the primary focus of sentencing of a child would be rehabilitation' • No subsequent offending and demonstrated rehabilitation

Case name	Plea	Charge/s	Sentence	Notes
SP case 15	Guilty	1 x sexual penetration with a child under 12	CCO – 3 years – sex offenders programs, anger management programs, alcohol assessment and treatment, mental health assessment and treatment, 150 hours unpaid community work over 12 months, two-year participation in services specified in justice plan	• Offender aged 20 years at time of offence, 21 years at sentence • Victim was six years old • Victim's half-sister's ex-boyfriend • Offender, victim, and half-sister all cognitively impaired • Plea • Significant level of intellectual disability
SP case 20	Guilty	3 x sexual penetration with a child under 12 2 x indecent act with a child under 16	16 months – wholly suspended	• Offender aged 13–14 years at time of offending, victim was his eight year old cousin • Includes representative charges • 'Offender is now 24 years and a PhD student' • 'I accept as accurate, given the age of [offender] at the time, that he did not think it was such a serious thing to be committing (see his answer to Question 389 in the record of interview), and that such was more a sexual exploratory activity rather than a sexual thing'
SP case 21	Guilty	1 x sexual penetration with a child under 12	CCO – 2 years – supervision, unpaid work (50 hours over six months), assessment for a sex offenders treatment program	• Adult offended against nine year old in his neighbour's care • Diagnosis of high functioning autism • *Verdins*: his disability would place him in a vulnerable situation in prison, likely to suffer hardship that others without the disability would not, specific deterrence can be achieved through terms of a CCO
SP case 22	Not guilty	1 x sexual penetration with a child under 12	YJC detention – 2 years	• Offender had just turned 18 years, victim was his seven year old cousin • Previous uncharged acts committed by the offender when he was under 18 years • Offender was aged 19 years at sentence • The guilty verdict will have 'significant' impact on his employment and future career hopes • As a young offender, emphasis is on rehabilitation

Case name	Plea	Charge/s	Sentence	Notes
SP case 26	Guilty	3 x indecent act with a child under 16 1 x sexual penetration with a child under 12	7 months – wholly suspended	• Offender aged 14–16 years, victim was his cousin aged nine to eleven years • Offender was aged 33 years at sentence • 'Clearly you were a very different person at the time the offences occurred and your moral culpability is significantly reduced having regard to the age at which the offence occurred. Also, had you been dealt with at or about the time of the offending conduct you would have been amenable to the jurisdiction of the Children's Court and it is quite possible, if not probable, that you would have received a non-custodial sentence'
SP case 33	Guilty	1 x sexual penetration with a child under 12 1 x indecent act with a child under 16	12 months – wholly suspended for 12 months	• Offender aged 13 at time of offending, victim was his four and a half year old cousin • 'Dealing with an adult who has led a good life for what they did as a child falls into a special category of difficulty in the always difficult task of sentencing. You offended once when you were 13 years of age, or an age when the law requires the prosecution not only to prove you did the acts, but that you knew the conduct was wrong. What this reveals is that the law recognises the immaturity of a child as impacting on all aspects of culpability, most importantly in this case, your moral culpability'
SP case 51	Guilty	1 x sexual penetration with a child under 12	YJC detention – 3 years	• Representative charge • 19 year old offender • Victim was the nine year old granddaughter of the foster parents with whom the offender had lived since he was a baby • Relative youth – 20 years at sentence • *Verdins* – Asperger's syndrome

Appendix 2: Details of cases in the rape sample that received non-imprisonment sentences

Table A2: **Cases in the rape sample that received non-imprisonment sentences**

Case name	Plea	Charge/s	Sentence	Notes
RP case 5	Guilty	1 x rape	ICO – 12 months	• Offender aged 18 years at time of offending, victim was 16 • Maximising good rehab prospects given his age • Plea • No prior offences
RP case 10	Not guilty	1 x rape	RTO – 5 years	• 20 year old offender • Victim was nine year old son of his cousin • Extreme violence inflicted • Aboriginal offender • First sexual offence conviction/prior criminal history of escalating violence • Long history of depression, self-harm, suicide attempts – would be vulnerable in custody • Intellectual disability • Need for community protection – need for sustained, focused treatment
RP case 22	Guilty	2 x rape, 2 x indecent assault	CCO – 2 years – supervision, sexual offender program, continue to participate in psychological treatment and comply with pre-existing justice plan	• Both offender and victim were intellectually disabled residents at the same facility • *Verdins* principles • Lack of available space at the appropriate long term facility: 'The imposition of a Community-based Order, at face value, seems extremely lenient and out of kilter with sentences usually imposed for your type of offending, particularly the rape charges. However, I propose to convict you and release you on all charges on a community-based order for 2 years'
RP case 30	Not guilty	2 x rape	YJC detention – 3 years	• Offender aged 19 years at time of offending, victim was his 17 year old aunt • Offender was aged 20 years at sentence • Good prospects of rehabilitation – primacy of rehabilitation given his age and community interest

Case name	Plea	Charge/s	Sentence	Notes
RP case 38	Not guilty	1 x rape	RTO (length unspecified in remarks)	• Offender aged 18 years at time of offending, victim was aged 17 years • Offender was aged 19 years at sentence • Intellectual impairment • Previous offending • Rehabilitation to be given substantial weight
RP case 41	Guilty	1 x rape	IRTP – 3 years	• Offender aged 39 years, victim was 32 year old sister • Intellectual disability • Need for rehabilitation
RP case 45	Guilty	4 x rape	3 years' imprisonment – wholly suspended for 3 years	• Victim was wife • Wife had mental illness – husband persisted on occasions in having sex with her • Wife in court with her family to support him • Plea/admissions • No prior offences • Exceptional circumstances, 'I am satisfied that exceptional circumstances arise from the combination of the following matters: that the complaint made by your wife to the police was in order to seek help rather than to have you charged; that you and your wife have had a long and supportive relationship; that she and indeed her family do not want you to go to gaol; that both of you have hopes of reconciling and living together again. I will note the finding of exceptional circumstances on the court record'

Case name	Plea	Charge/s	Sentence	Notes
RP case 74	Guilty	1 x rape	3 years' imprisonment – wholly suspended for 3 years	• 29 year old offender, 31 year old victim • 'I do not consider that any given circumstance here amounts to exceptional circumstances in itself, though I think it is arguable that the degree of contrition and remorse and the admissions could do so. I have given the matter anxious consideration and think I should take into account the following matters when determining whether exceptional circumstances have been made out: Firstly, there are your admissions to both your victim and to the police. That, certainly in my experience, and the experience of others is very unusual in such a situation. Secondly, those admissions in such a situation are very significant. Had you not sent, for example, those texts and then denied the matters to the police, the obtaining of a conviction may very well have been very difficult indeed. Thirdly, is your early plea of guilty and the remorse and shame that you have shown to a remarkable degree. Fourthly, is the lack of aggravating features, as I have already mentioned. Fifthly, it was a pre-existing sexual relationship. Sixthly, I think that the risk of you reoffending is very low indeed. Seventh, even though you do have some prior matters, you have nothing of a sexual nature. Eighth, you have excellent family support, who have been at court in attendance and are clearly very concerned about you; good family support is one of the first aspects of a successful rehabilitation. Ninth, I think there has been a punishment for you in what your mother described as you destroying something that you wanted so much. Tenth has been the fear and the possible effect of the separation on you from your daughter that a custodial sentence would involve. There has been clearly a great degree of stress and anxiety over an extended period of time in relation to that on your part. A sentence of imprisonment in these circumstances, bearing in mind the relationship with your daughter, would be harder on you than it might on another prisoner. Eleventh, and I think this is almost unique in my experience, was your proposal to the victim that you would take yourself to the police before she had even suggested it or even reported it. Twelfth, I think the matters are clearly out of character. Thirteenth, was the fact that this offending has cost you your employment where you have a good work ethic, and it would appear that that employment is open again to you, which augurs well for rehabilitation. Fourteenth is the very good work record that you have. All those matters, as well as probably others, I take into account in determining whether this very, very unusual set of circumstances can be fairly described as exceptional'

Case name	Plea	Charge/s	Sentence	Notes
RP case 80	Guilty	1 x indecent act with a child under 16 1 x rape	14 months – wholly suspended for 3 years	• Offender aged 16–17 years at time of offence, victim was 9–10 year old sister of his friend • Representative charge – indecent act • Exceptional circumstances render case at the lowest end of seriousness • 'I assess the objective culpability of each of these charges as in the low to mid-range, albeit that the breach of trust and difference in age would otherwise be seen as aggravating factors. In this case I find such crimes to be opportunistic sexual activity, which was committed by an immature, inexperienced youth. I find such factors are not aggravating in those circumstances'
RP case 103	Guilty	1 x rape	10 months' imprisonment – wholly suspended	• Offender acted outside of the agreed acts he engaged a sex worker for at a brothel • Plea/no prior offences/unlikely to reoffend/ family support • 'The offence of rape is without doubt a very serious one and often occurs in circumstances of violence, brutality, humiliation and cynical exploitation. However, as stated, the circumstances of your offence are agreed to be very unusual. They are such that usually important sentencing considerations of deterrence, moral culpability and denunciation are very substantially moderated. In my view, the combination of those circumstances and the matters personal to you I have described are exceptional and justify in the interest of justice a sentence of imprisonment which is wholly suspended'

Appendix 3: Sentencing orders made in *SJ v The Queen*

Table A3: **Sentencing orders made in *SJ v The Queen*[243] at first instance**

Charge on indictment	Offences	Maximum	Sentence	Concurrency
State offences				
1	Indecent act with a child under the age of 16 [*Crimes Act 1958* (Vic) s 47(1)]	10 years [*Crimes Act 1958* (Vic) s 47(1)]	18 months	With charges 2, 3, 4, 5, 6, 7, 8, and 9
2	Indecent act with a child under the age of 16	10 years	18 months	With charges 1, 3, 4, 5, 6, 7, 8, and 9
3	Indecent act with a child under the age of 16	10 years	18 months	With charges 1, 2, 4, 5, 6, 7, 8, and 9
4	Indecent act with a child under the age of 16	10 years	18 months	With charges 1, 2, 3, 5, 6, 7, 8, and 9
5	Indecent act with a child under the age of 16	10 years	18 months	With charges 1, 2, 3, 4, 6, 7, 8, and 9
6	Indecent act with a child under the age of 16	10 years	18 months	With charges 1, 2, 3, 4, 5, 7, 8, and 9
7	Indecent act with a child under the age of 16	10 years	18 months	With charges 1, 2, 3, 4, 5, 6, 8, and 9
8	Indecent act with a child under the age of 16	10 years	18 months	With charges 1, 2, 3, 4, 5, 6, 7, and 9
9	Indecent act with a child under the age of 16	10 years	18 months	With charges 1, 2, 3, 4, 5, 6, 7, and 8
10	Indecent act with a child under the age of 16	10 years	18 months	With charges 12, 17, and 21
11	Sexual penetration of a child under the age of 16 [*Crimes Act 1958* (Vic) s 45(1)]	25 years [*Crimes Act 1958* (Vic) s 45(2)(a)]	90 months	With charges 13 and 14
12	Indecent act with a child under the age of 16	10 years	18 months	With charges 10, 17, and 21
13	Sexual penetration of a child under the age of 16	25 years	90 months	With charges 11 and 14
14	Sexual penetration of a child under the age of 16	25 years	90 months	With charges 11 and 13

243. *SJ v The Queen* [2012] VSCA (28 September 2012) [13], [99]; tables adapted from judgment.

Charge on indictment	Offences	Maximum	Sentence	Concurrency
15	Procuring a minor for child pornography [*Crimes Act 1958* (Vic) s 69(1)]	10 years [*Crimes Act 1958* (Vic) s 69(1)]	18 months	With charge 16
16	Producing child pornography [*Crimes Act 1958* (Vic) s 68(1)]	10 years [*Crimes Act 1958* (Vic) s 68(1)]	18 months	With charge 15
17	Indecent act with a child under the age of 16	10 years	18 months	With charges 10, 12, and 21
18	Sexual penetration of a child under the age of 16	10 years	2 years	With charges 19 and 20
19	Sexual penetration of a child under the age of 16	10 years	2 years	With charges 18 and 20
20	Sexual penetration of a child under the age of 16	10 years	2 years	With charges 18 and 19
21	Indecent act with a child under the age of 16	10 years	18 months	With charges 10, 12, and 17
22	Possession of child pornography [*Crimes Act 1958* (Vic) s 70(1)]	5 years [*Crimes Act 1958* (Vic) s 70(1)]	12 months	With charge 35
23	Sexual penetration of a child under the age of 16	10 years	3 years	With charges 26, 28, 31, and 34
24	Indecent act with a child under the age of 16	10 years	2 years	With charges 25, 27, 29, 30, 32, and 33
25	Indecent act with a child under the age of 16	10 years	2 years	With charges 24, 27, 29, 30, 32, and 33
26	Sexual penetration of a child under the age of 16	10 years	3 years	With charges 23, 28, 31, and 34
27	Indecent act with a child under the age of 16	10 years	2 years	With charges 24, 25, 29, 30, 32, and 33
28	Sexual penetration of a child under the age of 16	10 years	3 years	With charges 23, 26, 31, and 34
29	Indecent act with a child under the age of 16	10 years	2 years	With charges 24, 25, 27, 30, 32, and 33
30	Indecent act with a child under the age of 16	10 years	2 years	With charges 24, 25, 27, 29, 32, and 33
31	Sexual penetration of a child under the age of 16	10 years	3 years	With charges 23, 26, 28, and 34
32	Indecent act with a child under the age of 16	10 years	2 years	With charges 24, 25, 27, 29, 30, and 33
33	Indecent act with a child under the age of 16	10 years	2 years	With charges 24, 25, 27, 29, 30, and 32
34	Sexual penetration of a child under the age of 16	10 years	3 years	With charges 23, 26, 28, and 31

Charge on indictment	Offences	Maximum	Sentence	Concurrency
35	Possession of child pornography	5 years	12 months	With charge 22
36	Possession of a drug of dependence [*Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 73(1)]	1 year or 30 penalty units [*Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 73(1)(b)]	1 month	–
37	Indecent act with a child under the age of 16	10 years	18 months	–
Commonwealth offences				
38	Using a carriage service to make child pornography available [*Criminal Code 1995* (Cth) s 474.19(1)(a)(i)]	15 years [*Criminal Code 1995* (Cth) s 474.19(1)(a)(i)]	3 years	With charge 39
39	Using a carriage service to access child pornography [*Criminal Code 1995* (Cth) s 474.19(1)(a)(iv)]	15 years [*Criminal Code 1995* (Cth) s 474.19(1)(a)(i)]	3 years	With charge 38

Orders for cumulation

Indictment charges: state offences	**Cumulation**
11, 13, and 14	Base sentence
1, 2, 3, 4, 5, 6, 7, 8, and 9	3 months
18, 19, and 20	3 months
23, 26, 28, 31, and 34	6 months
24, 25, 27, 29, 30, 32, and 33	3 months
37	3 months
Indictment charges: Commonwealth offences	**Cumulation**
38 and 39	36 months
Total effective sentence:	12 years
Non-parole period:	9 years
Pre-sentence detention declaration pursuant to section 18(1) of the *Sentencing Act 1991*:	271 days

6AAA statement: the learned sentencing judge stated that the sentence he would have imposed if the appellant had been convicted of these offences after a trial would have been 15 years' imprisonment, with the appellant becoming eligible for parole after serving 12 years of that sentence

Other relevant orders:

1. The sentence on the state offences was ordered to commence immediately following the conclusion of the sentence imposed on the Commonwealth offences
2. The sentence on the Commonwealth offences was ordered to commence on 24 January 2011
3. Pursuant to section 6B of the *Sentencing Act 1991* (Vic), the appellant was to be sentenced as a serious sexual offender on charges 11 and 13
4. Pursuant to section 6F of the *Sentencing Act 1991* (Vic), it was to be recorded that the appellant was sentenced as a serious sexual offender on charges 11 and 13
5. Pursuant to section 34 of the *Sex Offenders Registration Act 2004* (Vic), the appellant was declared a registrable offender and the length of reporting is life
6. Forfeiture order pursuant to section 78(1) of the *Confiscation Act 1997* (Vic)
7. Forensic sample order pursuant to section 464ZFB(2) of the *Crimes Act 1958* (Vic)

Table A4: **Sentencing orders made for state offences in *SJ v The Queen*,[244] when resentenced on appeal**

Charge on Indictment	Offences	Maximum	Sentence	Cumulation
1	Indecent act with a child under the age of 16 [*Crimes Act 1958* (Vic) s 47(1)]	10 years [*Crimes Act 1958* (Vic) s 47(1)]	18 months	1 month
2	Indecent act with a child under the age of 16	10 years	18 months	1 month
3	Indecent act with a child under the age of 16	10 years	18 months	Wholly concurrent
4	Indecent act with a child under the age of 16	10 years	18 months	1 month
5	Indecent act with a child under the age of 16	10 years	18 months	1 month
6	Indecent act with a child under the age of 16	10 years	18 months	Wholly concurrent
7	Indecent act with a child under the age of 16	10 years	18 months	1 month
8	Indecent act with a child under the age of 16	10 years	18 months	Wholly concurrent
9	Indecent act with a child under the age of 16	10 years	18 months	1 month
10	Indecent act with a child under the age of 16	10 years	18 months	1 month
11	Sexual penetration of a child under the age of 16 [*Crimes Act 1958* (Vic) s 45(1)]	25 years [*Crimes Act 1958* (Vic) s 45(2)(a)]	4 years	Base
12	Indecent act with a child under the age of 16	10 years	18 months	1 month
13	Sexual penetration of a child under the age of 16	25 years	4 years	1 year
14	Sexual penetration of a child under the age of 16	25 years	4 years	1 year
15	Procuring a minor for child pornography [*Crimes Act 1958* (Vic) s 69(1)]	10 years [*Crimes Act 1958* (Vic) s 69(1)]	18 months	1 month
16	Producing child pornography [*Crimes Act 1958* (Vic) s 68(1)]	10 years [*Crimes Act 1958* (Vic) s 68(1)]	18 months	1 month
17	Indecent act with a child under the age of 16	10 years	18 months	1 month

244. *SJ v The Queen* [2012] VSCA (28 September 2012) [13], [99]; table adapted from judgment.

Charge on Indictment	Offences	Maximum	Sentence	Cumulation
18	Sexual penetration of a child under the age of 16	10 years	3 years	3 months
19	Sexual penetration of a child under the age of 16	10 years	3 years	3 months
20	Sexual penetration of a child under the age of 16	10 years	3 years	3 months
21	Indecent act with a child under the age of 16	10 years	18 months	Wholly concurrent
22	Possession of child pornography [*Crimes Act 1958* (Vic) s 70(1)]	5 years [*Crimes Act 1958* (Vic) s 70(1)]	12 months	6 months
23	Sexual penetration of a child under the age of 16	10 years	4 years	3 months
24	Indecent act with a child under the age of 16	10 years	2 years	1 month
25	Indecent act with a child under the age of 16	10 years	2 years	Wholly concurrent
26	Sexual penetration of a child under the age of 16	10 years	4 years	3 months
27	Indecent act with a child under the age of 16	10 years	2 years	1 month
28	Sexual penetration of a child under the age of 16	10 years	4 years	3 months
29	Indecent act with a child under the age of 16	10 years	2 years	1 month
30	Indecent act with a child under the age of 16	10 years	2 years	Wholly concurrent
31	Sexual penetration of a child under the age of 16	10 years	3 years	3 months
32	Indecent act with a child under the age of 16	10 years	2 years	1 month
33	Indecent act with a child under the age of 16	10 years	2 years	Wholly concurrent
34	Sexual penetration of a child under the age of 16	10 years	4 years	3 months
35	Possession of child pornography	5 years	12 months	Wholly concurrent
36	Possession of a drug of dependence [*Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 73(1)]	1 year or 30 penalty units [*Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 73(1)(b)]	1 month	Wholly concurrent
37	Indecent act with a child under the age of 16	10 years	18 months	3 months

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