September 2011

Sentencing Advisory Council
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Sentencing Advisory Council

Sentencing Severity for 'Serious' and 'Significant' Offences: A Statistical Report

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Introduction

Offence seriousness is a key factor in sentencing in Victoria. It plays an important role in the sentencing framework. Section 5(2)(a) of the *Sentencing Act 1991* (Vic) requires a court to have regard to the maximum penalty prescribed for the offence, and section 5(2)(c) requires a court to have regard to the nature and gravity of the offence. The concept is also embedded in common law principles of sentencing.

Offence seriousness has both objective and subjective elements. While statutory maximum penalties provide parliament's views on the seriousness of an offence, individuals will differ in their personal opinion about which offences are more serious than other offences, depending on a number of matters, including their value systems, personal beliefs, life experiences and knowledge of offences.

There are a number of sources of information on offence seriousness. Parliament's views of offence seriousness are expressed in legislation (such as the *Crimes Act 1958* (Vic)) defining an offence and setting its maximum penalty. There are many thousands of offences on the statute book, each with its own maximum penalty. One of the purposes of a maximum penalty is to indicate the views of parliament on how serious offences are, compared with other offences, in the form of a 'relative offence seriousness hierarchy'.[1]

Sentencing practices are another way of assessing the relative seriousness of offences. Courts express offence seriousness through the sentences they impose for offences that come before them every day. Although sentencing outcomes are decisions by individual judges, these decisions are made within

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a common law and statutory framework. The imposition of sentence may also communicate or reflect community values and expectations by publicly denouncing the offending conduct and recognising the nature and significance of the wrong that has been committed against a person or society.[2]

A third source of information on offence seriousness is community attitudes, which can be gauged in a number of ways including surveys, focus groups and opinion polls.

Establishing an agreed ranking of offences is important for a number of reasons but primarily because of the sentencing principle of 'proportionality' (also known as 'just deserts' or 'commensurate deserts'). The principle of proportionality requires that the punishment must fit the seriousness of the crime. The principle is expressed in Victorian legislation that requires a court to 'punish the offender to an extent and in a manner which is just in all of the circumstances'.[3] The concept of commensurate deserts also provides the theoretical basis for Victoria's current approach to setting maximum penalties, which ranks offences on a penalty scale according to degrees of relative offence gravity (Sentencing Task Force, 1989).

Significant disparities between the legislature's views of offence seriousness, the courts' views and informed public opinion may result in a loss of confidence in one or more of the arms of government.

This report examines offences defined in section 3 of the *Sentencing Act 1991* (Vic) as 'serious' or 'significant'. In relation to these offences, the report has three purposes:

1. to produce an offence seriousness rank based on current sentencing practices;
2. to present comprehensive data on the range of sentences imposed by the courts; and
3. to compare offence statutory maximum seriousness rankings with rankings based on current sentencing practices.

Harm/culpability framework

There are two major components of offence seriousness: harm and culpability. Harm is defined as 'the degree of injury done or risked by the act' (von Hirsch, 1983, p. 214). The most serious harm is generally considered to be that which affects a victim's physical integrity, such as murder, sexual offences and offences causing serious injury. Offences that have an effect solely on economic wellbeing, such as theft, are generally considered to be less serious, although both the type and degree of harm can be relevant to an assessment of the seriousness of an offence. For example, an act resulting in the death of another person may be considered more serious than an act resulting in significant economic loss, which in turn may be considered more serious than an act resulting in minor injury. As a general rule, offence seriousness is considered to increase with the level of harm caused. Offences that risk harming others, but do not actually result in harm, are problematic because they require an assessment of both the level of harm that was risked and the degree of risk.

Culpability refers to 'the factors of intent, motivation, and circumstance that bear on the actor's blameworthiness' (von Hirsch, 1983, p. 214) and reflects the extent to which an offender should be held accountable for his or her actions. Offence seriousness tends to increase with the increasing culpability of an offender. An action performed with knowledge of its consequences is considered more serious than one performed with a criminally negligent disregard of its consequences. For example, despite the consequence of murder and manslaughter being the same (death of the victim), the culpability for murder is higher because the outcome was intended (or foreseen as probable) by the offender.

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[1] There are also a number of other commonly accepted purposes of a maximum penalty. See Sentencing Advisory Council, 2010, p. vii.

[2] *WCB v The Queen* [2010] VSCA 230 (10 September 2010).

[3] *Sentencing Act 1991* (Vic) s 5(1)(a).

The scale of culpability used in Victorian legislation includes five levels of seriousness: strict liability (where there is no requirement of intent); 'dangerousness', which falls between 'accident' and criminal negligence; criminal negligence; recklessness; and intent. For example, the maximum penalties for *Crimes Act 1958* (Vic) offences relating to serious injury vary according to the differing levels of culpability:

- dangerous driving causing serious injury (5 years' imprisonment);
- negligently causing serious injury (10 years' imprisonment);
- recklessly causing serious injury (15 years' imprisonment); and
- intentionally causing serious injury (20 years' imprisonment).

Not all offences, however, can be viewed according to an escalating scale of culpability. Some offences incorporate different levels of culpability within the one offence. For example, rape involves sexually penetrating or compelling the sexual penetration of a person without the person's consent, with varying levels of culpability with respect to the offender's awareness of, or thought given to, whether the person is not consenting or might not be consenting. Other offences involve more complicated forms of culpability that are based on a combination of knowledge and intent: for example, committing an act with the intention or knowledge that it will lead to certain other consequences.

Cognitive impairment is another component of culpability, the presence of which may reduce an offender's culpability.

The harm/culpability framework can be difficult to apply in practice. There is a wide variety of harms that are often difficult to quantify and compare. Harms can be inflicted upon persons, property or society at large, or some combination of these interests. Some offences, such as attempted robbery, and preparatory offences, such as going equipped to steal, involve an element of risk rather than direct harm. For many offences, determining the culpability of an offender involves examining motivations and conduct that may be outside the elements of the offence. Unlike harm, the level of culpability viewed across different types of offences may not provide a consistent guide to relative offence seriousness. In terms of culpability, criminal negligence is relatively rare, and the majority of offences involve recklessness or intent without discriminating between them.

Statutory maximum penalties in Victoria

Set by parliament, statutory maximum penalties are expressed in legislation as a period of imprisonment and/or a fine. The maximum penalties for many offences, including all offences in the *Crimes Act 1958* (Vic), conform to a penalty scale set out in section 109 of the *Sentencing Act 1991* (Vic). The penalty scale for imprisonment terms has nine levels, ranging from Level 9, which represents six months' imprisonment, to Level 1, life imprisonment. The intermediate levels represent the following maximum terms of imprisonment: one year, two years, five years, 10 years, 15 years, 20 years and 25 years.

Level 1 offences include murder and trafficking a large commercial quantity of a drug of dependence. Level 2 offences include rape, armed robbery, aggravated burglary and trafficking a commercial quantity of a drug of dependence. Level 3 offences include manslaughter and intentionally causing serious injury.

Maximum penalties serve several purposes. One is to place 'a known and legally defined limit on judicial discretion in imposing punishment for that offence' (Sentencing Task Force, 1989, p. 22). Another function is to reflect public attitudes about the offence and the degree to which society condemns such behaviour.

An important function of a maximum penalty is also to serve as a guide from the legislature on the relative seriousness of an offence (Sentencing Task Force, 1989). The link between maximum penalties and offence seriousness allows maximum penalties to be used as a basis for the development of an offence seriousness scale. Table 1 (page 4) provides examples of offences according to six levels of seriousness, based on maximum penalties operating in Victoria.

There are many ways in which seriousness can be determined within the harm/culpability framework other than based on the offender's intentions or culpability.

The different forms of trafficking a drug of dependence vary depending upon the quantity of drug. Larger quantities are ranked as more serious than smaller quantities, on the premise that the greater the quantity of drug trafficked, the greater the harm or potential harm to society.

Table 1: Examples of offences in Victoria with different levels of seriousness

Level of seriousness	Maximum penalty	Offences (examples)
Level 1	Life	Murder
		Trafficking a drug of dependence – large commercial quantity
Level 2	25 years	Rape
		Sexual penetration with a child under 12
		Incest (lineal descendant or step-child of offender)
		Persistent sexual abuse of a child under 16
		Kidnapping
		Armed robbery
		Aggravated burglary
		Trafficking a drug of dependence – commercial quantity
Level 3	20 years	Intentionally causing serious injury
		Manslaughter
		Culpable driving
Level 4	15 years	Recklessly causing serious injury
		Sexual penetration with a child aged 12 to 16 and under the care, supervision or authority of the offender
		Trafficking a drug of dependence – non-commercial quantity
Level 5	10 years	Negligently causing serious injury
		Intentionally causing injury
		Threats to kill
		Stalking
		Conduct endangering life
		Indecent assault
		Sexual penetration with a child aged 12 to 16
		Indecent act with a child aged under 16
		Burglary
		Obtaining property by deception
		Obtaining financial advantage by deception
Level 6	5 years	Recklessly causing injury
		Threats to inflict serious injury
		Conduct endangering persons
		Assaults

Offences that involve a higher level of threat are ranked as more serious than other related offences. For example, armed robbery is more serious than robbery, and aggravated burglary is more serious than burglary, due to the aggravating circumstances of the offence, such as the use of a weapon or the presence of a person in the home being burgled.

In relation to sexual penetration offences, the level of seriousness varies according to the age of the victim and/or the relationship between the offender and the victim. Where the victim is aged under 12, the offence is deemed more serious than where the victim is aged 12 to 16, on the premise that younger victims are more vulnerable than older victims and thus the level of harm is greater.

Sentencing practices

While maximum penalties are designed to represent parliament's views of the relative seriousness of the worst example of an offence, sentencing outcomes represent the synthesis of a range of principles and factors required by statute and common law. The *Sentencing Act 1991* (Vic) provides a statutory framework for sentencing adult offenders.[4]

The *Sentencing Act 1991* (Vic) sets out the hierarchy of sentencing options available, the purposes of sentencing and the factors relevant to the determination of sentence.

Section 5(1) of the *Sentencing Act 1991* (Vic) states that the only purposes for which sentences may be imposed are:

- to punish the offender to an extent and in a manner that is just in all of the circumstances (just punishment);
- to deter the offender (specific deterrence) or others (general deterrence) from committing offences of the same or a similar character;
- to establish conditions that the court considers will facilitate the rehabilitation of the offender (rehabilitation);
- to denounce the type of conduct in which the offender engaged (denunciation);
- to protect the community from the offender (incapacitation); or
- a combination of two or more of those purposes.

[4] Part 5.3 of the *Children, Youth and Families Act 2005* (Vic) governs the sentencing of young offenders.

The *Sentencing Act 1991* (Vic) also sets out the factors to which a court may or must have regard and the factors to which a court must not have regard in sentencing an offender.[5] Section 5(2) requires that a court must have regard to the following factors in sentencing an offender:

- the maximum penalty for the offence;
- current sentencing practices;
- the nature and gravity of the offence;
- the offender's culpability and degree of responsibility for the offence;
- whether the offence was motivated by hatred or prejudice;
- the personal circumstances of, and impact of the offence on, any victim of the offence;
- any injury, loss or damage resulting directly from the offence;
- whether the offender pleaded guilty to the offence and, if so, when the offender pleaded guilty or indicated an intention to do so;
- the previous character of the offender; and
- any aggravating or mitigating factor concerning the offender or any other relevant circumstances.

The legislative provisions operate alongside, and are reflective of, a number of fundamental common law sentencing principles that guide and limit the type or severity of sentence. These include totality, proportionality, parsimony, parity and the prohibitions on double punishment and crushing sentences.

Totality and proportionality are separate but related principles that share the common purpose of ensuring the punishment imposed on offenders is just, fair and proportionate to the offending behaviour. The principle of proportionality operates to prohibit punishment that exceeds the seriousness of the offending behaviour for which the offender is being sentenced. It requires that the punishment must fit the crime and operates as a restraint on excessive punishment as well as a prohibition against punishment that is too lenient (Fox and Freiberg, 1999, p. 724).[6]

The proportionality principle is also reflected in the totality principle, which aims to ensure that there is proportionality between multiple sentences and the overall offending behaviour (Fox and Freiberg, 1999, p. 724). Totality requires that, where there are multiple sentences imposed, the aggregate of the sentences being imposed and any other sentences that the offender is currently serving be proportionate to the total criminality involved. The principle applies to all offenders who are subject to more than one sentence and acts as a 'limitation on excess' beyond that which is commensurate to the seriousness of the whole of the offending behaviour.[7] Mercy may also enliven application of the totality principle and permit an appellate court to intervene if the aggregate effect will be crushing for the offender.[8]

The principle of parsimony is well established in common law and is expressed in sections 5(3)–(7) of the *Sentencing Act 1991* (Vic). It requires that the court select the least severe sentencing option available to achieve the purpose or purposes of sentencing for which the sentence is imposed in the particular case before the court.

The range of purposes and factors that must be taken into account and have an influence on sentencing indicates that sentencing is a reflection of more than just the seriousness of the offence.

Sentencing practices can therefore be seen as representing the cumulative experience of judges in assessing the seriousness of many individual cases.

Sentencing practices, however, are not a perfect guide to offence seriousness, because there are other factors that do not have a direct link to seriousness but that a court may also take into account. An offender's plea of guilty may speed up a case and represent an expression of remorse; however, it is not an indicator of the seriousness of the offence committed. Likewise, the previous character of the offender can be a relevant factor as part of the instinctive synthesis of the objective circumstances of the offence or a factor in aggravation or mitigation separate from the evaluation of the seriousness of the offence itself. All other factors being equal, both the plea type and prior offending may affect the sentence imposed.

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[5] See generally parts 2,3 and 10 of the *Sentencing Act 1991* (Vic).

[6] See also *Veen v The Queen (No 1)* (1979) 143 CLR 458; *Veen v The Queen (No 2)* (1988) 164 CLR 465.

[7] *R v Patison* (2003) 143 A Crim R 118, 133.

[8] *Postiglione v The Queen* (1997) 189 CLR 295, 304.

Methodology

Measuring offence seriousness: previous research

Although sentencing practices are an imperfect representation of offence seriousness, they provide the best available measure of the views of the courts as to offence seriousness. Previous research has used sentencing practices to develop scales of offence seriousness.

The Sentencing Task Force's 1989 review of statutory maximum penalties in Victoria relied heavily on current sentencing practices to help it determine offence seriousness. In order to determine the relative level of maximum penalties, the Task Force attempted to establish the relative seriousness of each offence. It did this by analysing sentencing practices at the time for each of 24 selected 'reference' offences, defined as those that were frequently prosecuted in the higher courts. These offences provided 'a standard or reference point against which other, less frequently prosecuted, offences' could be measured (Sentencing Task Force, 1989, p. 111).

For each offence, sentencing practices were assessed using a combination of the average imprisonment term and the longest imprisonment term. The 24 offences were ranked on the basis of these measures. The remainder of the offences examined were ranked on the bases of degrees of harm and culpability, as defined by the Task Force, as well as other dimensions where offences did not conform to the harm/culpability framework.

One limitation of the sentencing analysis identified by the Sentencing Task Force was that it focused solely on the length of sentences of imprisonment. It did not take into account whether the sentence was suspended or the manner in which the sentence of imprisonment was served. Furthermore, it did not consider non-imprisonment sentences such as community-based orders, fines or adjourned undertakings. The Task Force stated that this limitation would need to be overcome:

> To gauge more accurately the courts' view of relative severity, it would be necessary to devise some formula or index which could combine the two factors of amount of imprisonment and the imprisonment/non-custodial ratio. (Sentencing Task Force, 1989, p. 115.)

The significance of non-imprisonment sentences should not be overlooked. The *Sentencing Act 1991* (Vic) offers a range of sentencing options other than imprisonment, such as wholly or partially suspended sentences, community-based orders, fines and adjourned undertakings. The principle of parsimony as expressed in section 5(4) of the *Sentencing Act 1991* (Vic) requires that imprisonment be imposed only as a last resort.

A subsequent study by Indermaur (1990) also acknowledged the limitations in measuring sentencing severity solely through length of imprisonment terms. To overcome this limitation, Indermaur suggested 'marrying' average imprisonment terms to the proportion of an offence that receives imprisonment: 'when [the average imprisonment term for an offence is] considered in concert with the rate of imprisonment the severity of sentencing will be more fairly revealed' (Indermaur, 1990, p. 21). Although the study combines the two components of sentencing, the methodology it used was not made explicit.

The Australian Bureau of Statistics (ABS) has developed a rank of offences categorised according to the Australian and New Zealand Standard Offence Classification (Australian Bureau of Statistics, 2008).[9] The National Offence Index (NOI) was developed by the ABS (Australian Bureau of Statistics, 2009) using a combination of factors to rank offences: statutory maxima, sentencing practices for principal offences and public and expert opinion. The ABS uses the index to determine a 'most serious' or principal offence where an offender is charged with or sentenced for multiple offences.

MacKinnell, Poletti and Holmes (2010) propose two alternative methodologies for establishing a seriousness rank of offences. The Median Sentence Ranking (MSR) considers the median sentence imposed on principal offences by New South Wales courts on a category of offence. To account for different types of sentence, the researchers derived a severity score using, first, a rank of sentence types and, second, a value assigned to the sentence quantum. The median severity score for each offence was then calculated. The Median Statutory Maximum Ranking (MSMR) supplements the MSR by also considering the statutory maximum penalties for offences within a given category.

[9] As of June 2011, the Australian and New Zealand Standard Offence Classification (ANZSOC) has replaced the Australian Standard Offence Classification (ASOC).

To assess the MSR and the MSMR as well as the NOI, MacKinnell et al. (2010) tested the ability of each to predict a sentence of imprisonment. They found that the MSR measure was a better predictor of sentence outcome than both the MSMR and the NOI and concluded that, for this purpose, the MSR is the better measure to use.

Sentencing data have also been used in the United Kingdom (Francis, Soothill and Dittrich, 2001) and Canada (Statistics Canada, 2009) to develop offence severity indices that take into account the relative seriousness of offences in comparison with other offences.

Measuring offence seriousness: current approach

For the purposes of this statistical report, the Sentencing Advisory Council considered the MSR to be overly complex. The advantage of the MSR is that it is able to consider the seriousness of offences that do not receive imprisonment sentences. As the focus of the current study is on offences that frequently receive an imprisonment sentence, a simplified sentence rank has been used: imprisonment (1) and non-imprisonment sentences (2).

The methodology used in this report for measuring offence seriousness using sentencing outcomes is relatively straightforward. For each offence, two components of sentencing were obtained: (1) the percentage of charges that received a sentence of imprisonment; and (2) the median imprisonment term imposed on charges that received such a sentence.

The median imprisonment term for each offence is adjusted by a factor relating to the proportion of charges of the offence that received imprisonment. The Adjusted Median Imprisonment Term (AMIT) or seriousness score was calculated using the following formula:

Median imprisonment term x imprisonment sentence rate

Apart from the way the score is derived, this measure of offence seriousness differs from the MSR and the NOI in two other important ways. First, it is particular to Victoria and considers specific offences rather than offences grouped according to the Australian Standard Offence Classification (ASOC). Second, it considers the sentences attached to all charges, not just the principal proven charge. This second difference is arguably an improvement on the two other measures, as it represents a complete picture of sentences imposed for an offence.

Target offences

Although there are over 30 serious and significant offences in the *Sentencing Act 1991* (Vic), only 19 were sentenced in sufficient volumes for their sentencing practices data to be meaningfully examined. These were:

- murder;
- manslaughter;
- threat to kill;
- defensive homicide;
- intentionally causing serious injury;
- recklessly causing serious injury;
- aggravated burglary;
- armed robbery;
- arson;
- assault with intent to rape;
- kidnapping;
- rape;
- incest (lineal descendant or step-child of offender);
- sexual penetration with a child aged under 10;
- sexual penetration with a child aged 10 to 16 and under the care, supervision or authority of the offender (CSA);
- sexual penetration with a child aged 10 to 16;
- persistent sexual abuse of a child under 16;
- trafficking a drug of dependence – commercial quantity; and
- trafficking a drug of dependence – large commercial quantity.

The offences of sexual penetration with a child aged under 10, sexual penetration with a child aged 10 to 16 CSA and sexual penetration with a child aged 10 to 16 were amended in March 2010 following a review of maximum penalties for sexual penetration offences with a child under 16.[10] The 10 year age limit was changed to 12 years to create the following offences:

- sexual penetration with a child aged under 12;
- sexual penetration with a child aged 12 to 16 and under the care, supervision or authority of the offender (CSA); and
- sexual penetration with a child aged 12 to 16.

[10] *Crimes Legislation Amendment Act 2010* (Vic) s 3. See Sentencing Advisory Council, 2009.

These offences and a number of other serious and significant offences have not been examined in detail due to the small numbers of cases sentenced in the higher courts during the period 2006–07 to 2009–10. These include abduction or detention, abduction of a child under the age of 16, arson causing death, child homicide and incest (sibling/half-sibling). As Table 2 shows, the volume of these offences sentenced in the higher courts was very low.

Conspiracy, incitement and attempts to commit any of these offences are also included in the definition of a serious or significant offence in the *Sentencing Act 1991* (Vic). These have also been excluded due to low numbers.

Table 2: Number of charges, principal proven charges and cases by selected offences, higher courts, 2006–07 to 2009–10

Offence	Charges	Principal proven charges
Abduction or detention	7	0
Abduction of a child under the age of 16	1	0
Arson causing death	0	0
Child homicide	0	0
Incest – sibling/half-sibling	37	8

Sample

Data used in the current study include all charges of serious and significant offences sentenced in the higher courts over the four-year period between 2006–07 and 2009–10.

Sentencing outcomes represent first-instance outcomes and have therefore not been adjusted for the changes made to sentence as a result of successful appeals against conviction and/or sentence.

The detailed type of drug trafficking offence and sexual penetration with a child offence was not always correct in the higher courts database and therefore was verified using information contained in sentencing remarks.

Limitations

The data used in this study have a number of limitations. One limitation is that they do not include sentencing outcomes for offences sentenced in the Magistrates' Court.

While all of the serious and significant offences included in the detailed analysis are indictable offences, a number of them are triable as summary offences in the Magistrates' Court. These include assault with intent to rape, sexual penetration with a child aged 10 to 16, threat to kill, arson, aggravated burglary and recklessly causing serious injury.[11] Between 5% (assault with intent to rape) and 70% (make threat to kill and recklessly causing serious injury) of the charges of these offences are sentenced in the Magistrates' jurisdiction.

As a general rule, sentences imposed in the Magistrates' Court are less severe than sentences imposed in the higher courts. This reflects the lower level of seriousness of indictable offences that are deemed to be triable at the summary level, compared with those heard in the higher courts. The Magistrates' Court also has a jurisdictional limitation of two years' imprisonment as the maximum penalty that can be imposed for a charge. In contrast, the maximum penalty available for a charge in the higher courts is that stated for the offence in legislation. Therefore, if the data included sentences imposed in the Magistrates' Court for those offences that were tried summarily, they would be expected generally to reduce the level of the severity of sentencing practices.

Another limitation is that one key factor on which sentence outcomes depend is, in part, the type of plea. Section 5(2)(e) of the *Sentencing Act 1991* (Vic) states that in sentencing an offender, a court must have regard to whether the offender pleaded guilty and, if so, the stage in the proceedings at which the offender pleaded guilty or indicated an intention to do so. Section 6AAA of the *Sentencing Act 1991* further requires that in addition to the actual sentence imposed, judges in the higher courts are required to state, for offenders who plead guilty, the notional sentence that would have been imposed but for the plea of guilty. Analysis of these data reveals that the reduction for a guilty plea is, on average, approximately 25% (actual reductions vary considerably within and between offences).

The guilty plea rate for offences examined in this study varies. For most offences, in excess of 90% of offenders plead guilty. However, for some sexual offences, such as rape, only approximately 60% of offenders plead guilty. The variation in guilty plea rate across offences is likely to affect the severity of sentencing outcomes.

A further limitation is the variation across offences in the tendency for multiple charges to be sentenced in one case. In accordance with the principle of totality, where multiple charges are sentenced in a case, the court may moderate the individual sentences imposed for each charge to enable a degree of cumulation (for example, for offences committed on separate occasions or against different victims) while ensuring that the total sentence imposed is just and proportionate to the overall offending behaviour represented by the offences.[12] Thus, the individual sentences imposed on each charge in a case where there are multiple charges may be less severe than might otherwise be the case if there were not multiple charges. Some offences, such as sexual offences against children and aggravated burglary, are more prone to having larger numbers of charges sentenced in a case. Other offences, such as murder, armed robbery and causing serious injury offences, tend to have fewer charges sentenced in a case.

[11] The following offences are also triable summarily but were not included in the detailed analysis due to their low volume: abduction or detention, abduction of a child under the age of 16, sexual penetration with a child aged 12 to 16, incest (sibling or half-sibling) and incitement and attempt to commit any serious or significant offence that is triable summarily.

[12] See, for example, *R v McCorriston* [2000] VSCA 200 (17 October 2000) [13] (Callaway JA).

Offence rank

Using the seriousness score[13] as an offence seriousness rank, as Table 3 shows, predictably, the highest ranked offences involved the death of a victim, sexual penetration or major drug trafficking. There was a variety of lower ranked offences, including serious injury-related offences (recklessly causing serious injury), property-related offences that involved an element of violence or aggravation (arson, aggravated burglary and armed robbery), kidnapping and threats.

The seriousness score was the highest for charges of murder. At 19.0, it was more than double the next highest adjusted term. This suggests that murder sentences were substantially more severe than sentences for any other offence. After defensive homicide (9.0), trafficking a large commercial quantity of drugs had the next highest score (6.7), followed by manslaughter (6.5) and persistent abuse of a child under 16 (5.7).

Table 3: Seriousness score and rank for charges of selected serious and significant offences, 2006–07 to 2009–10

Offence	Seriousness score	Rank
Murder	19.0	1
Defensive homicide	9.0	2
Trafficking a large commercial quantity of drugs	6.7	3
Manslaughter	6.5	4
Persistent abuse of a child under 16	5.7	5
Rape	4.7	6
Incest by parent or de facto of parent	3.8	7
Sexual penetration with a child (under 10)	3.0	8
Trafficking a commercial quantity of drugs	3.0	9
Sexual penetration with a child (10–16) CSA	2.6	10
Intentionally causing serious injury	2.4	11
Armed robbery	2.1	12
Kidnapping	2.0	13
Assault with intent to rape	2.0	14
Arson	1.2	15
Sexual penetration with a child (10–16)	1.1	16
Aggravated burglary	1.1	17
Recklessly causing serious injury	1.0	18
Make threat to kill	0.6	19

[13] Seriousness scores were calculated by multiplying the median imprisonment term for an offence by the proportion of charges that received imprisonment. For example, an offence with a median imprisonment term of 10 years and an 80% imprisonment sentence rate would receive a seriousness score of 8.0.

The scores for particular categories of offence varied along an axis of culpability inherent in the offence. Offences resulting in the death of a victim scored higher if the offender's action was intentional or reckless (murder, 19.0) rather than mitigated by excessive self-defence (defensive homicide, 9.0) or was unintentional (manslaughter, 6.5). Likewise, serious injury to a victim was ranked higher if the offender's action was intentional (intentionally causing serious injury, 2.4) rather than reckless (recklessly causing serious injury, 1.0).

Scores of some groups of offence varied along an axis of harm inherent in the offence. All offences resulting in the death of a victim scored higher than offences resulting in serious injury to a victim, which in turn scored higher than simply threatening to kill. Drug trafficking scored higher if the harm as measured by the quantity of drugs trafficked was greater, with large commercial quantity drug trafficking receiving longer sentences than commercial quantity drug trafficking.

For sexual offences, the offence that involved prolonged offending behaviour against a child had the highest score (persistent abuse of a child under 16, 5.7), followed by penetrative offending where the victim did not consent (rape, 4.7). Otherwise, scores for sexual offences varied according to the age of the victim and the role of the offender. After persistent abuse, sexual offending by family members had the next highest score (incest, 3.8), followed by sexual penetration with a child aged under 10 (3.0), sexual penetration with a child aged 10 to 16 and under the care, supervision or authority of the offender (2.6) and sexual penetration with a child aged 10 to 16 (1.1).

Comparing the rank of offences based on sentencing practices with the rank based on maximum penalties shows a number of similarities. The Level 1 offence of murder is the highest ranked offence using both methods, and the other Level 1 offence, trafficking a large commercial quantity of drugs, is ranked third in terms of sentencing practices. Five Level 2 offences, including rape and trafficking of a commercial quantity of drugs, are ranked fifth to ninth. Level 4 offences, such as arson, and Level 5 offences, such as threat to kill, were among the least severely sentenced.

Some discrepancies in rank using the two methods were also evident. Manslaughter and defensive homicide are both Level 3 offences, but they received among the most severe sentences. Sexual penetration with a child under 16 and under care, supervision or authority is a Level 4 offence, but was ranked relatively high (10th) based on sentencing practices. Aggravated burglary, armed robbery and kidnapping are all level 2 offences, but are ranked in the lower half of offences according to their sentencing practices.

Sentencing outcomes

When examining sentencing outcomes it is important to consider sentencing at both a charge and case level because these levels often differ for a given offence. Sentences are typically imposed on each charge in a case as well as on the case as a whole. Where a case contains only one charge, the sentence imposed on the case is the same as the sentence imposed on the charge. Where a case contains multiple charges, the sentence imposed on the case will generally differ in some respects from the sentences imposed on individual charges.

In order to consider case-level sentencing, decisions need to be made about which offence within a case to count. If all offences are to be counted within a case, this would lead to double counting within offence categories of case-level sentences. For example, if a case with five armed robbery charges receives a 10-year imprisonment sentence, counting that 10-year imprisonment sentence five times would inflate the sentencing for that offence.

A way of dealing with this one-to-many issue is by only selecting the offence that received the most severe charge-level penalty. For example, if a case contains an armed robbery charge with a 10-year sentence and a theft charge with a two-year sentence, the armed robbery charge would be chosen to represent the case. This would be known as the *principal proven charge*.

Another way of dealing with this one-to-many issue is to count each offence type that occurs in a case only once, regardless of the number of charges of the offence. For example, the case-level sentence for a case that includes an armed robbery and a theft would be counted once for armed robbery and once for theft. While this leads to double counting *across* offence categories, it avoids double counting *within* offence categories.

In this report, case-level sentencing is examined for each offence type where that offence is the principal proven offence in a case. Case-level sentencing is considered in terms of both the total effective imprisonment term and the non-parole period.

Charge-level sentencing

Figure 1 shows the number of proven charges for each selected serious and significant offence. Over the four-year period, armed robbery had the highest number of charges (1,452), followed by aggravated burglary (1,067), sexual penetration with a child aged 10 to 16 (887), incest (649), recklessly causing serious injury (624), intentionally causing serious injury (606) and rape (487). Defensive homicide (13) had the smallest number of charges, followed by assault with intent to rape (18) and kidnapping (56).

Figure 1: Number of proven charges by offence, higher courts, 2006–07 to 2009–10

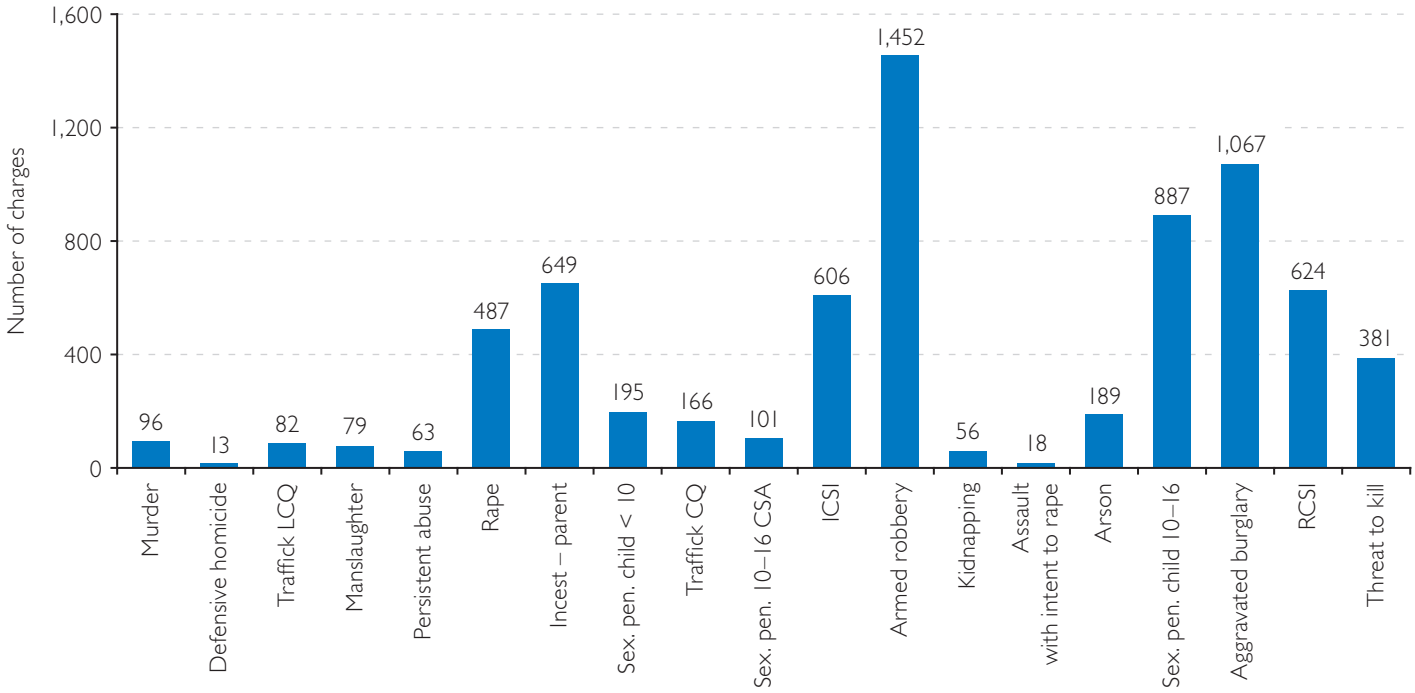


Figure 2 shows the imprisonment sentence rate for each serious and significant offence. Murder and defensive homicide had the highest percentage of charges receiving imprisonment (100.0%). Four other offences had imprisonment sentence rates above 90%, including trafficking a large commercial quantity of drugs (96.3%), persistent abuse of a child (95.2%), rape (94.7%) and incest (94.3%). At the lower end, recklessly causing serious injury had the lowest imprisonment sentence rate (49.0%), followed by sexual penetration with a child aged 10 to 16 (52.0%) and aggravated burglary (55.2%).

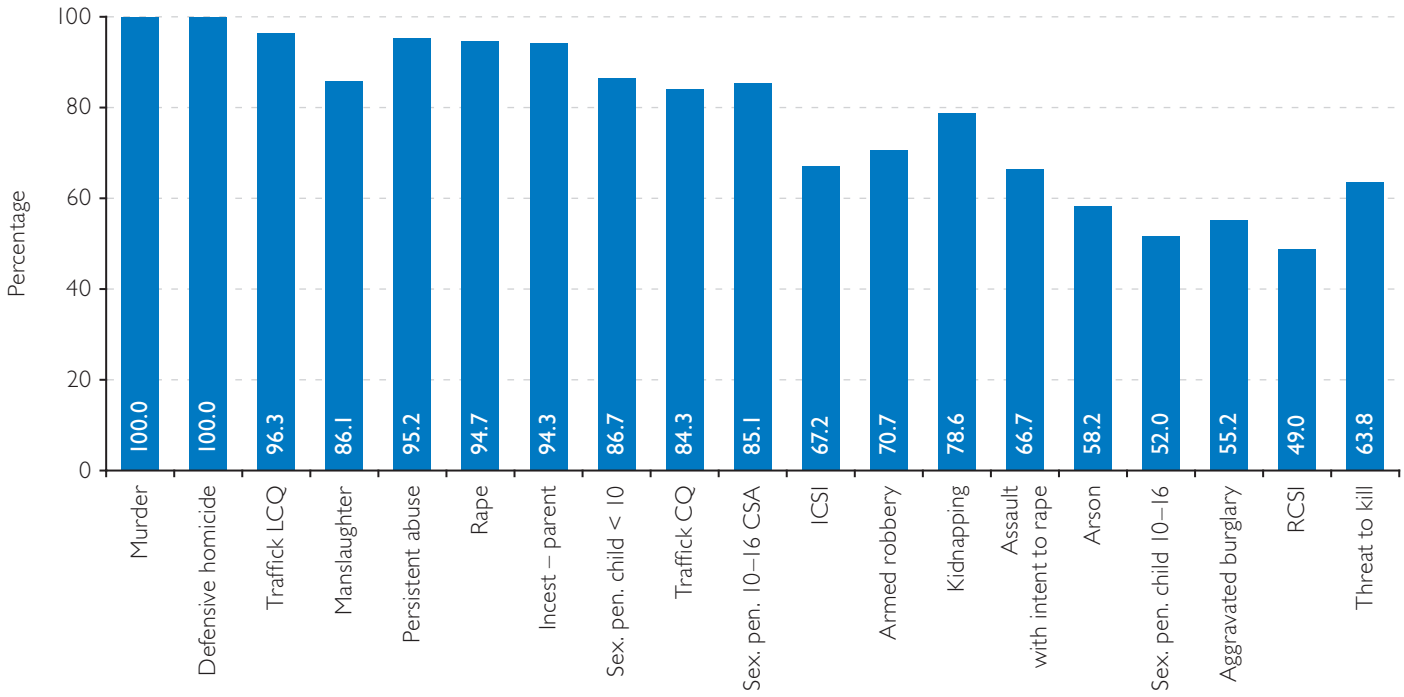
Figure 3 shows the median terms for charges that received imprisonment. For offences that had a high imprisonment rate, the median terms are similar to the adjusted median terms (seriousness scores). For example, the adjusted median and actual median for murder, for which 100.0% of charges received imprisonment, are both 19.0.[14] For offences that had a low imprisonment rate, the median terms differ from the adjusted medians. For example, recklessly causing serious injury, for which 49.0% of charges received imprisonment, had an actual median of 2.0 years but an adjusted median of 1.0 year.

Figure 4 shows the imprisonment terms imposed for charges of each serious and significant offence in terms of the shortest, 25th percentile, median, 75th percentile and longest, as well as the statutory maximum penalty. When examining the range of imprisonment terms for an offence, it is important to bear in mind the maximum penalty available for the offence, which inevitably restricts the range of sentences imposed.

The range of imprisonment terms was greatest for murder (from eight years to 'life'), followed by rape (15.0 year range), trafficking a large commercial quantity of drugs (14.7) and intentionally causing serious injury (14.5). Other offences with a range of 10 or more years were armed robbery (13.2 years), aggravated burglary (12.0), persistent abuse (11.9), incest (11.7) and manslaughter (10.0).

Offences with relatively small ranges included assault with intent to rape (4.3 years), make threat to kill (4.9), defensive homicide (5.0), arson (5.8) and sexual penetration with a child aged under 10 (5.9).

Figure 2: Percentage of proven charges that received imprisonment by offence, higher courts, 2006–07 to 2009–10



[14] For the purposes of calculating severity scores, life sentences were assigned a value of 40 years.

Figure 3: Median imprisonment term for proven charges that received imprisonment by offence, higher courts, 2006–07 to 2009–10

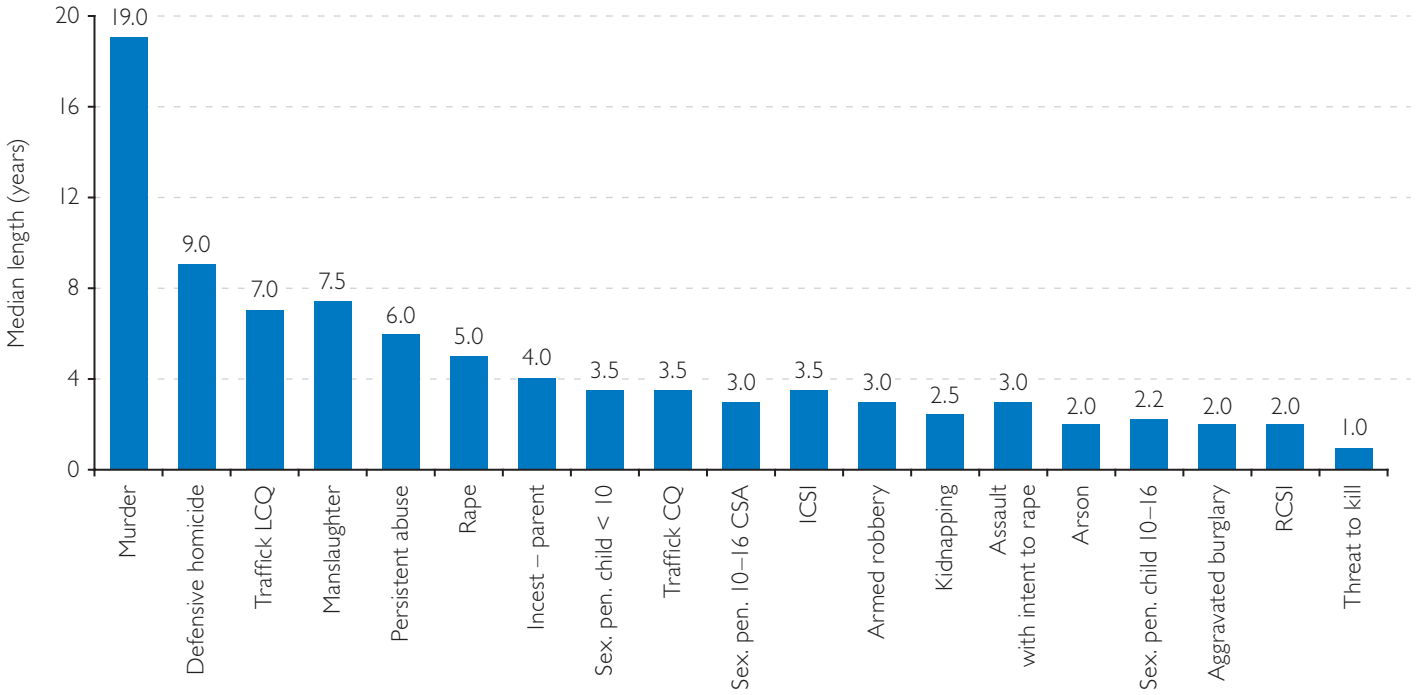
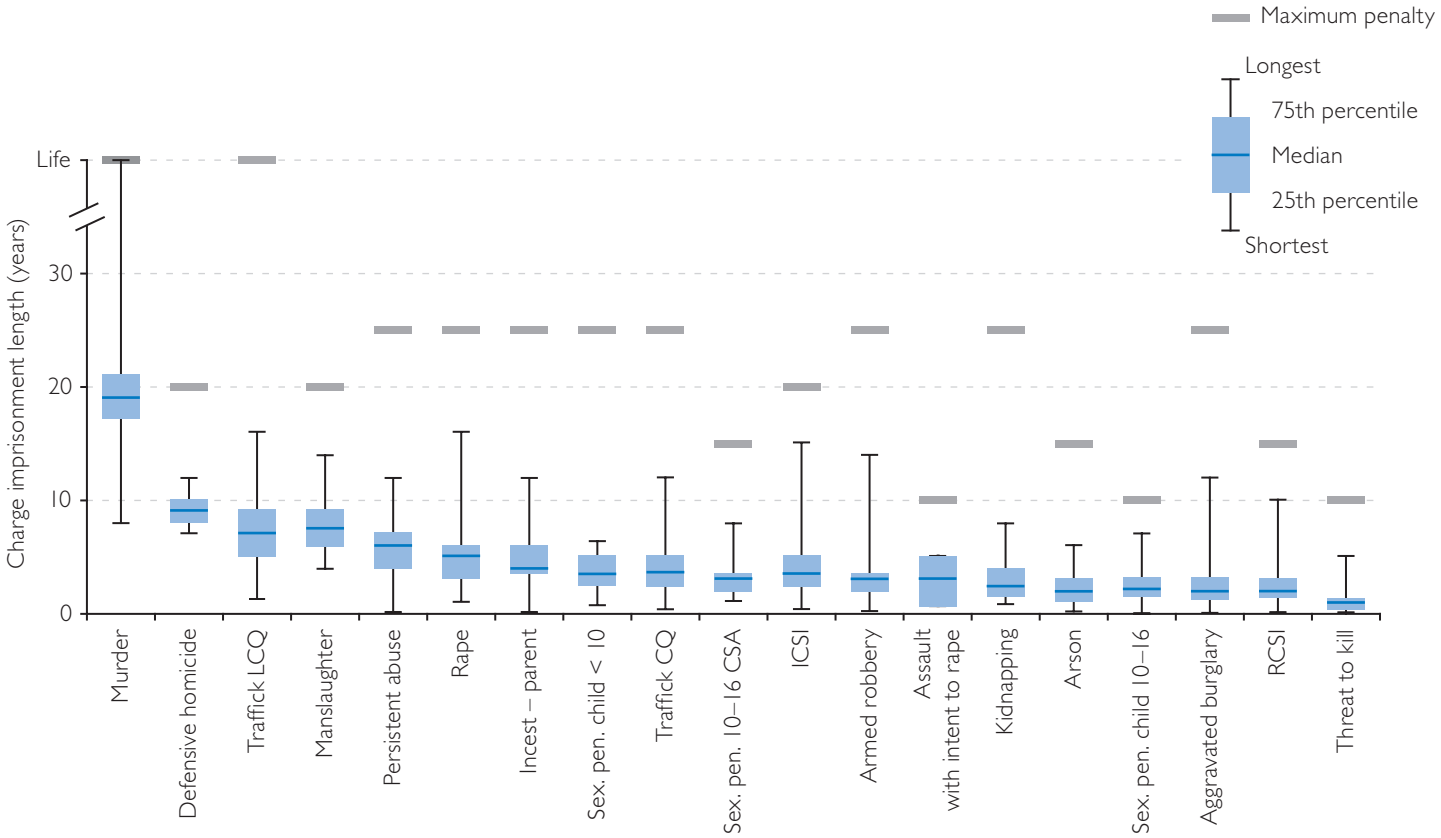


Figure 4: Maximum penalty and range of imprisonment terms for proven charges by offence, higher courts, 2006–07 to 2009–10



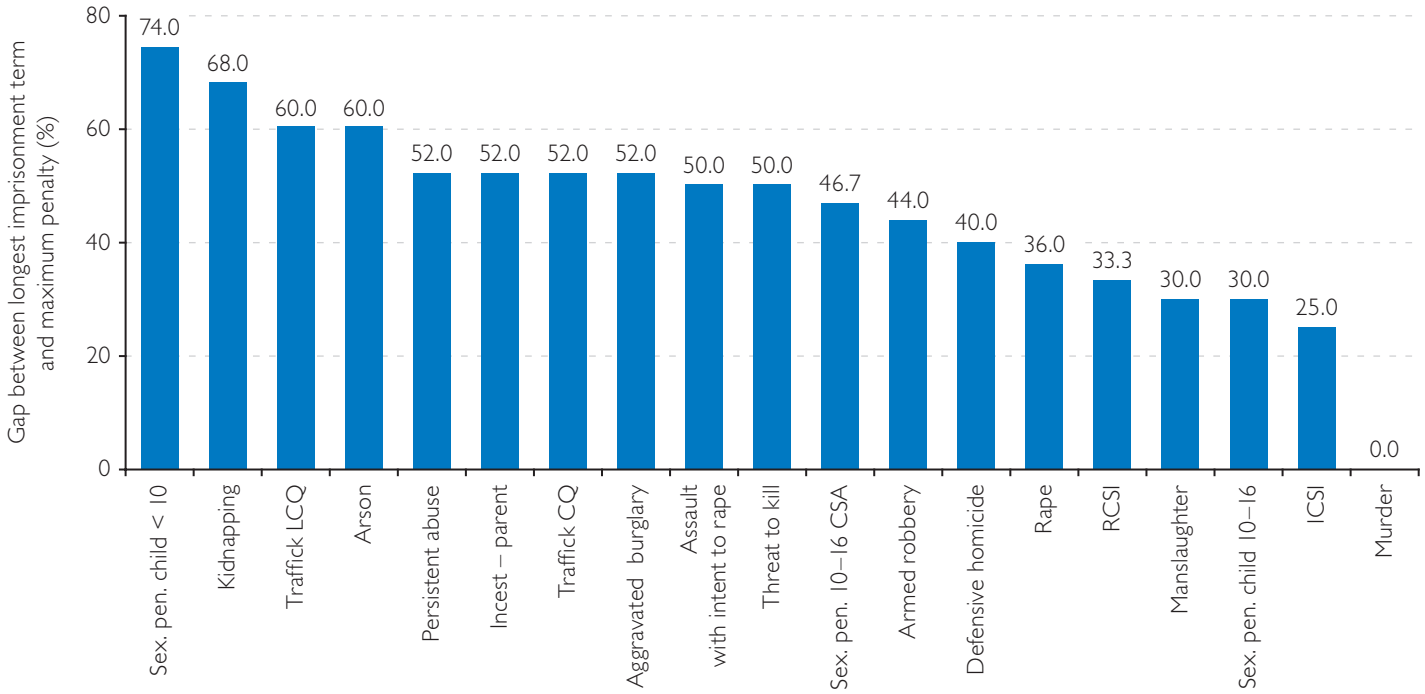
Virtually all offences had some discrepancy between the longest imprisonment term imposed and the maximum penalty available for the offence. In numerical terms, the largest gap was for trafficking a large commercial quantity of drugs (11 years versus 'life'), followed by sexual penetration with a child under 10 (18.5 years), kidnapping (17.0 years) and aggravated burglary, trafficking a commercial quantity of drugs, incest and persistent abuse of a child under 16 (all 13.0 years). The smallest gap was for murder (0 years), sexual penetration with a child aged 10 to 16 (3.0 years) and make threat to kill, recklessly causing serious injury, assault with intent to rape and intentionally causing serious injury (all 5.0 years).

Figure 5 shows the difference between longest and maximum penalties in percentage terms. The largest discrepancy in percentage terms between the longest term imposed on a charge and the maximum penalty was for sexual penetration with a child aged under 10 (74.0% of maximum penalty), followed by kidnapping (68.0%) and arson and trafficking a large commercial quantity of drugs (both 60.0%). The only offence with no discrepancy was murder, while the next smallest discrepancy was 25.0%, for intentionally causing serious injury.

The magnitude of these discrepancies is, at least in part, influenced by the tendency for multiple counts of an offence to be sentenced in the same case. For example, charges of sexual offences committed against children are often sentenced in multiples, and, as a consequence, the sentences imposed on individual charges tend to be lower than the total effective imprisonment term. For sexual penetration with a child aged under 10, the gap for charges was 74.0%; however, for total effective sentences it was much smaller at 28.0% (see Figure 9, page 19).

Another factor that may influence the discrepancy between the longest imprisonment term imposed and the maximum penalty is offence prevalence. The chances of the 'worst' example of an offence increase with prevalence. Frequent offences, such as armed robbery and aggravated burglary, are more likely to have the worst example than relatively rare offences, such as defensive homicide (13 charges) and assault with intent to rape (18 charges). Thus, the offence volume needs to be considered when comparing the discrepancy between sentencing and the maximum penalty.

Figure 5: Difference between longest imprisonment term for a charge and maximum penalty as a percentage of the maximum penalty by offence, higher courts, 2006–07 to 2009–10



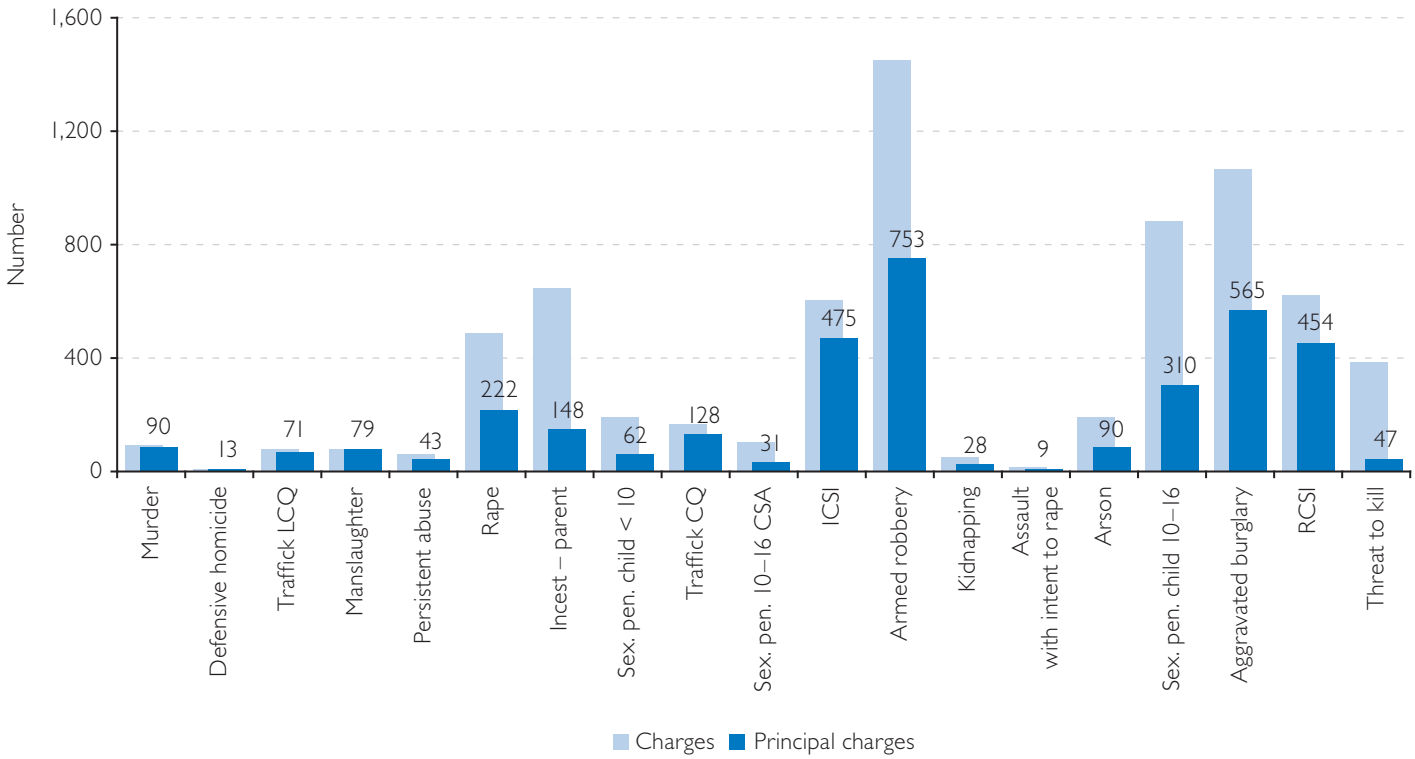
Case-level sentencing for principal proven offence

While charge-level sentencing is arguably the best reflection of the sentencing practices for a given offence, it is also important to consider sentencing at the case level. Sentencing at the case level considers all charges in a case and reduces them to a single sentence type and length.

In this section, case-level sentencing, in terms of the total effective imprisonment term and non-parole period, is examined for serious and significant offences, focusing on cases where the target offence is the principal proven charge in the case.

As Figure 6 shows, for most offences, the number of principal proven charges is considerably less than the number of charges. For example, there were 753 armed robbery principal charges compared with 1,452 armed robbery charges. The reason for the difference is that many cases contain multiple charges, and only one of these charges is selected as the principal proven charge. The offences that tend to occur alongside other offences in cases and tend to receive lesser sentences than these other offences have a greater difference between the number of charges and principal charges.

Figure 6: Number of proven charges and principal proven charges by offence, higher courts, 2006–07 to 2009–10



As with the number of offences, there are differences across offences in the percentage of charges that receive imprisonment and the percentage of principal charges that receive imprisonment (see Figure 7). For example, for sexual penetration with a child aged 10 to 16, 38.4% of principal charges received imprisonment compared with 52.0% of charges.

As with the imprisonment sentence rate, the median total effective imprisonment term for principal proven charges differs from the median imprisonment term of charges. As Figure 8 shows, while the median terms were the same for defensive homicide (9.0), for incest the total effective imprisonment term for principal proven charges (7.0) was nearly double the median imprisonment term for charges (4.0).

The ranges of total effective imprisonment terms for each serious and significant offence, where it is the principal proven charge, are shown in Figure 9. Note that some longest sentences imposed exceed the maximum penalty (for example, rape) because the maximum penalty applies to an individual charge, whereas the sentencing examined here is for a case as a whole.

Figure 10 (page 20) shows the median non-parole period for principal proven charges of each serious and significant offence.

Figure 11 (page 20) shows the range of non-parole periods for principal proven charges of serious and significant offences.

Figure 7: Percentage of principal proven charges that received a total effective sentence of imprisonment and percentage of charges that received an imprisonment sentence by offence, higher courts, 2006–07 to 2009–10

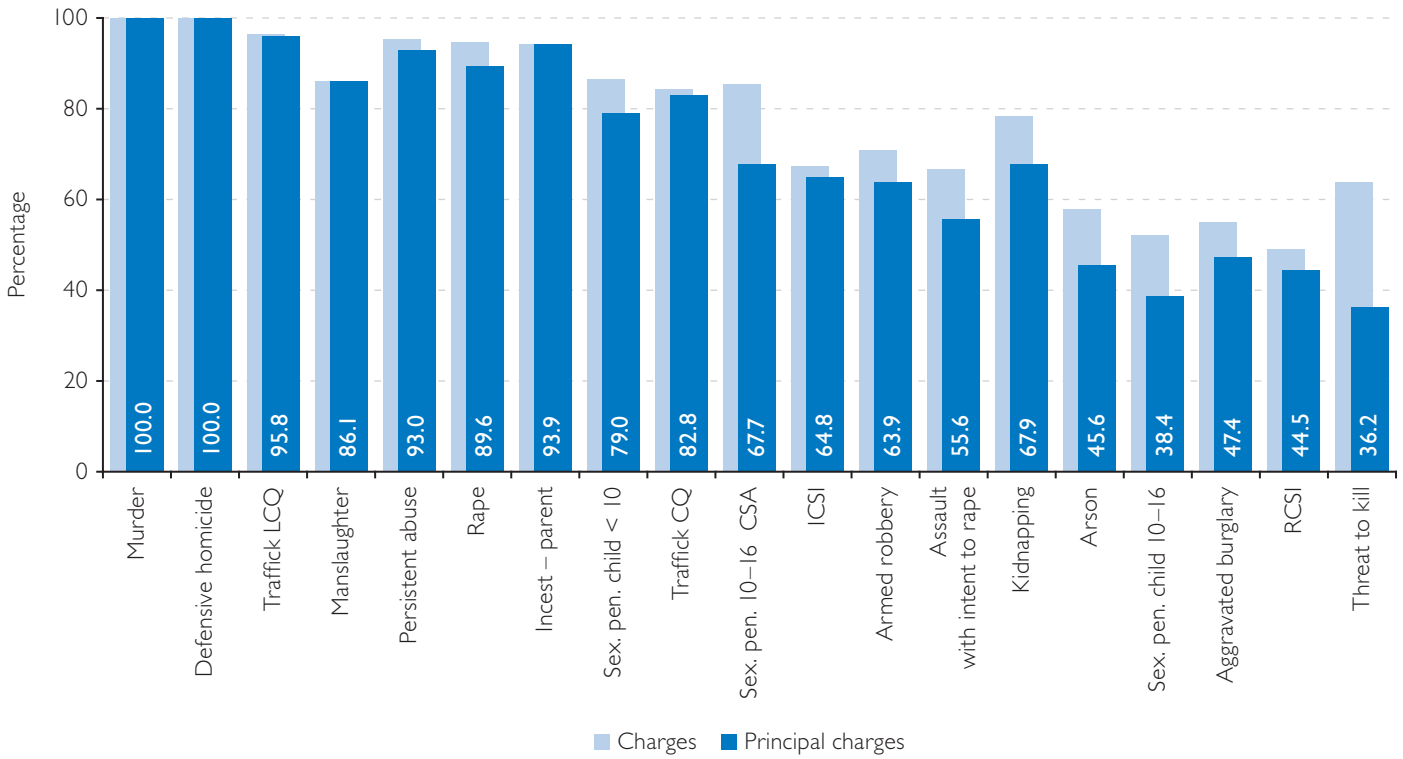


Figure 8: Median total effective imprisonment term for principal proven charges and median imprisonment term for charges by offence, higher courts, 2006–07 to 2009–10

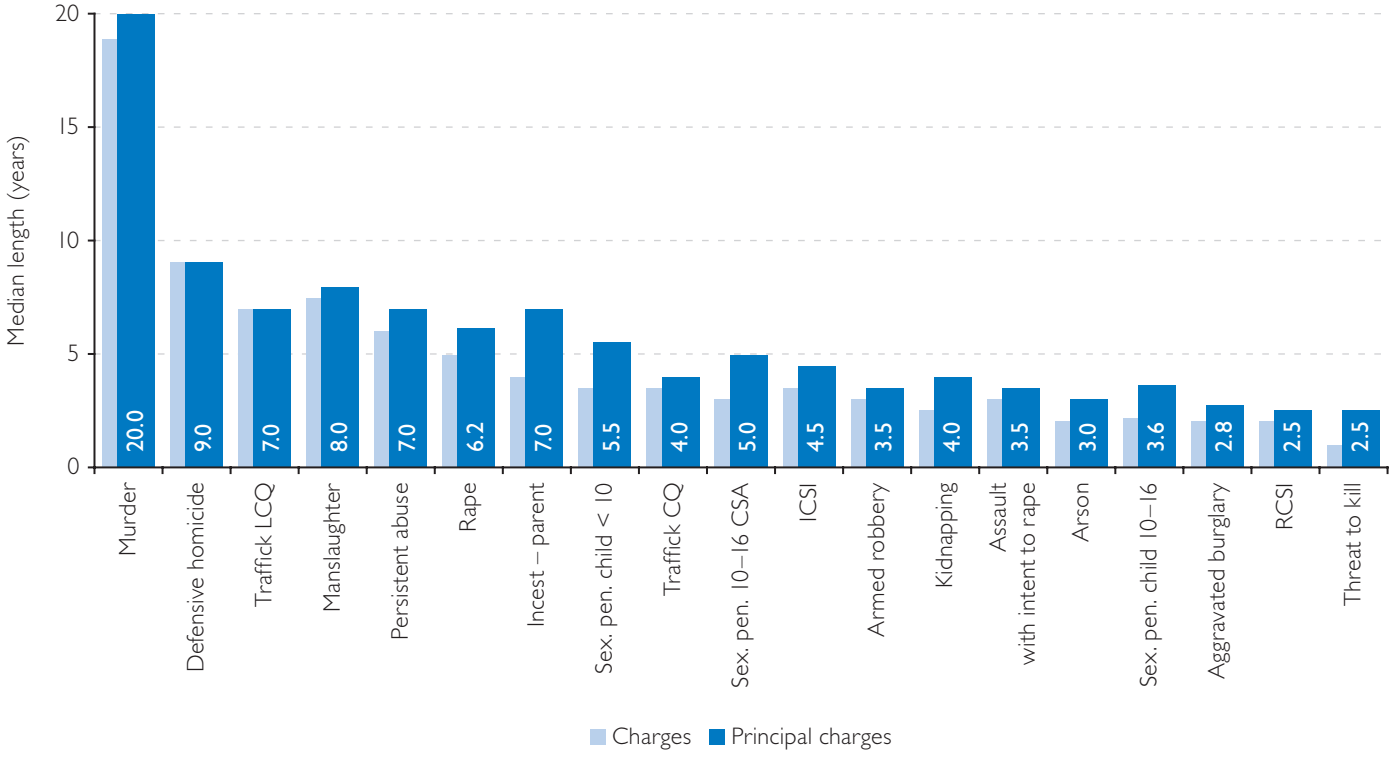


Figure 9: Maximum penalty and range of total effective imprisonment terms for principal proven charges by offence, higher courts, 2006–07 to 2009–10

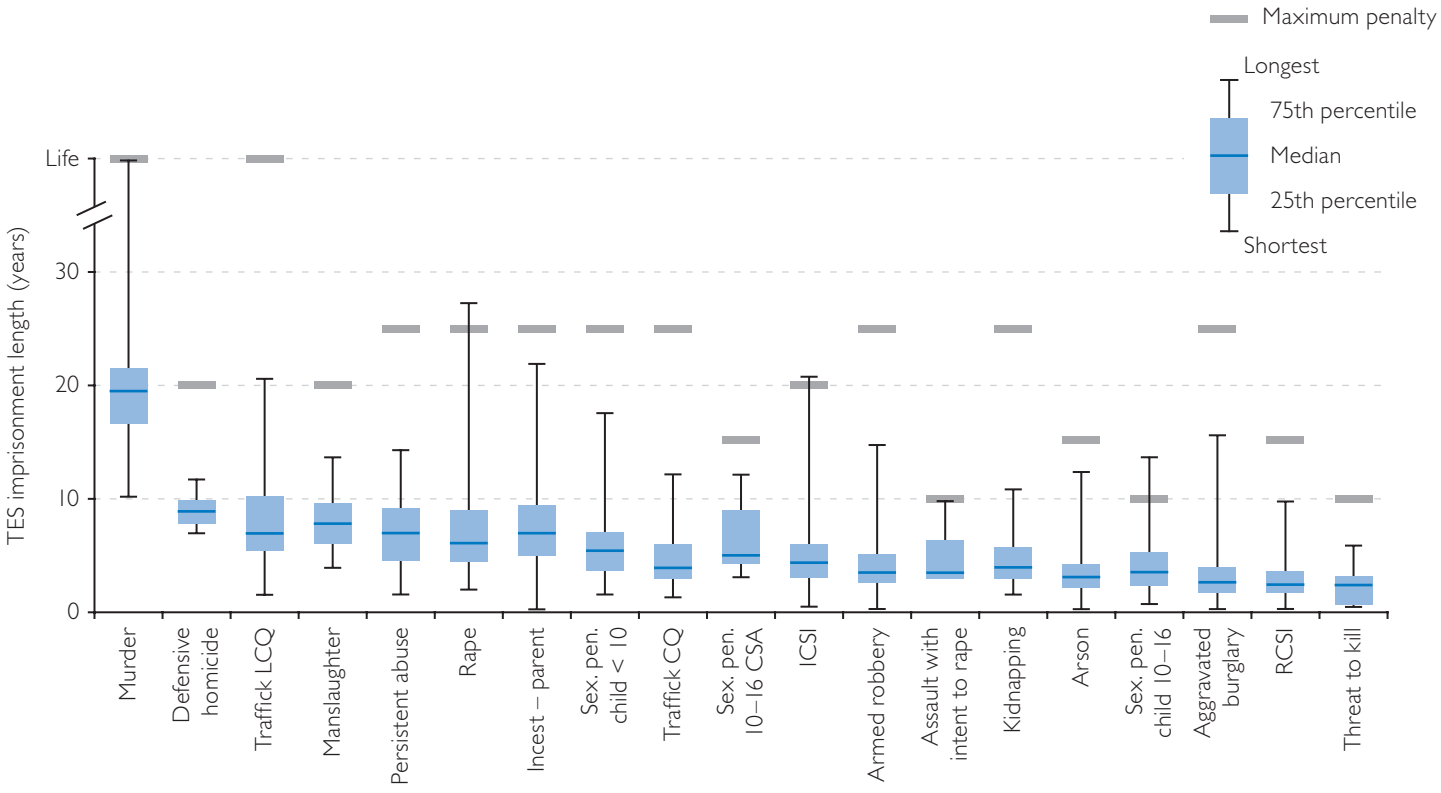


Figure 10: Median non-parole period for principal proven charges by offence, higher courts, 2006–07 to 2009–10

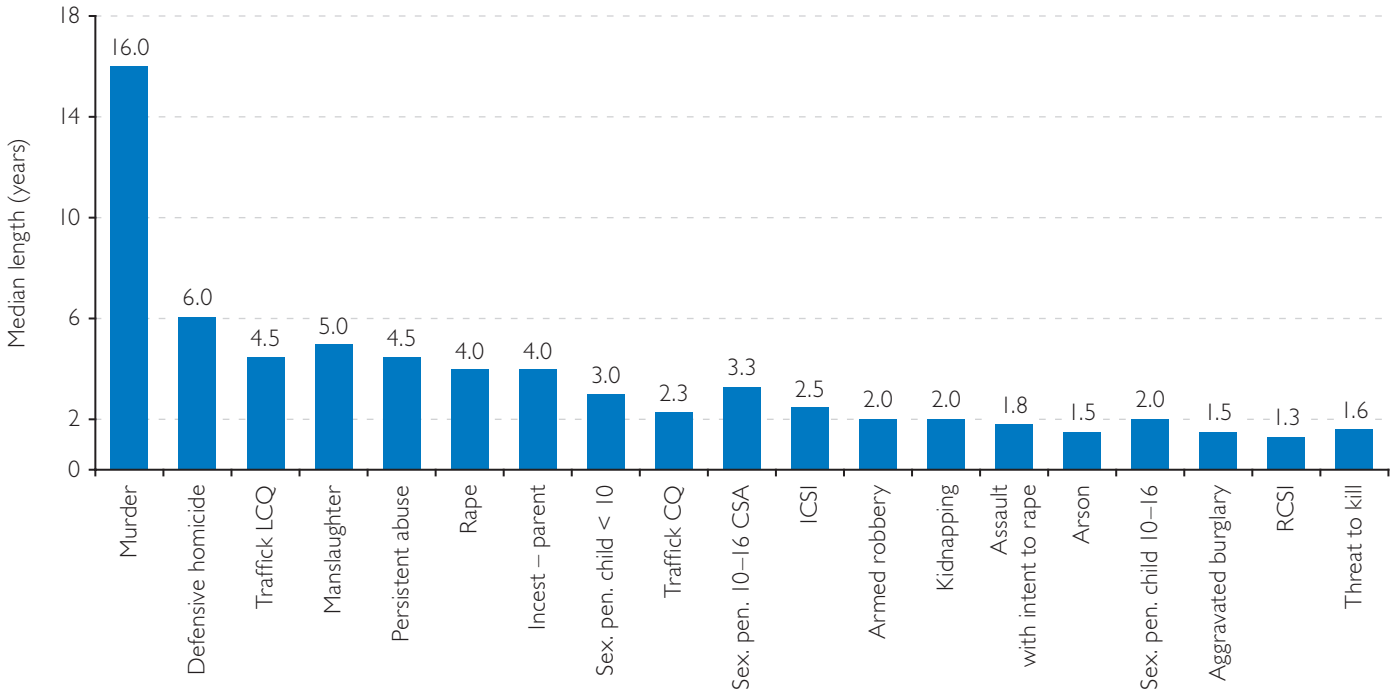
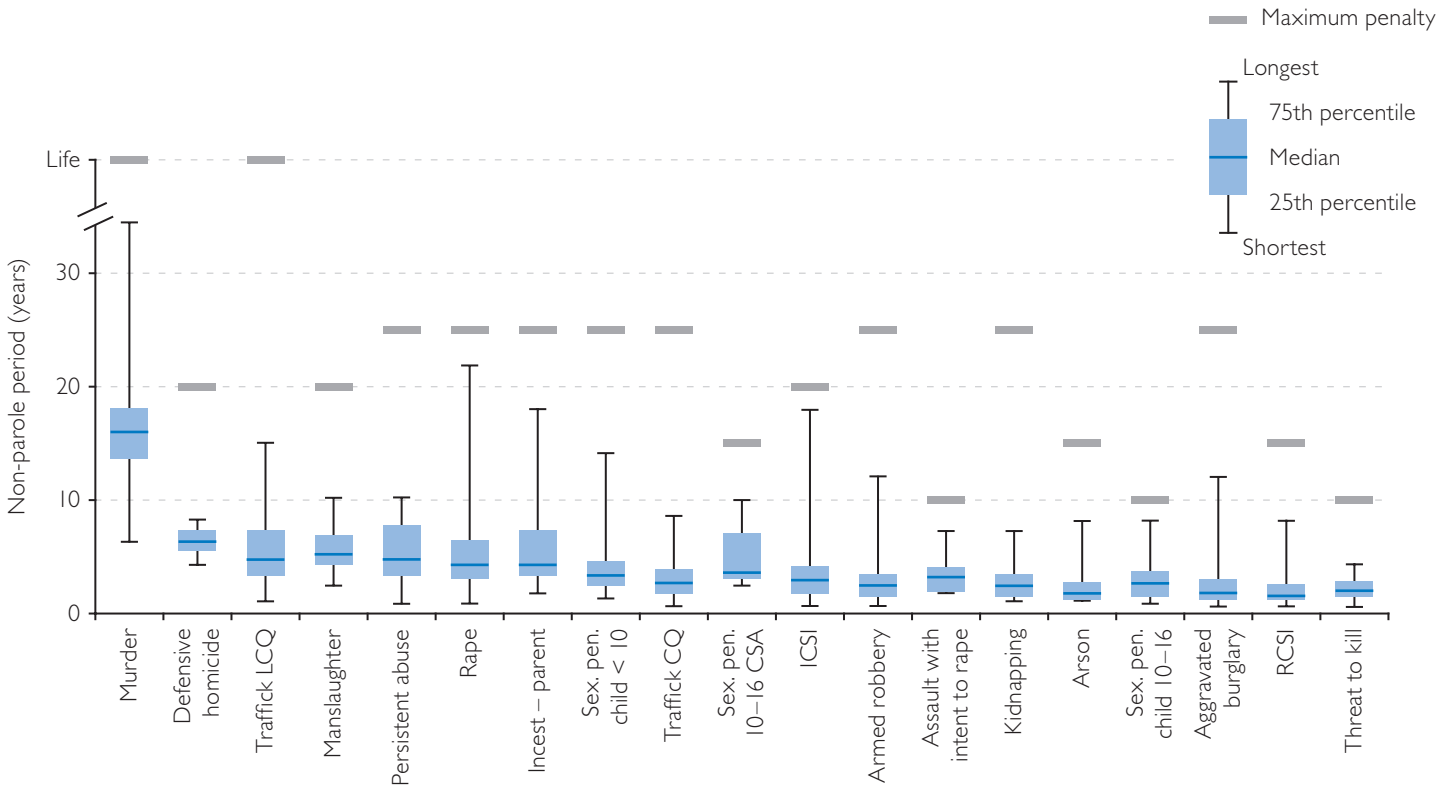


Figure 11: Maximum penalty and range of non-parole periods for principal proven charges by offence, higher courts, 2006–07 to 2009–10



Summary and discussion

This report has examined sentencing practices for a number of serious offences. It proposed a methodology for establishing offence seriousness based on the sentencing decisions of judges in Victoria and presented data on sentencing practices for each of the serious and significant offences.

The methodology used for ranking offences drew on methodologies applied in previous research and, in some respects, enhanced these methodologies by examining specific offences (rather than broad offence categories) and sentences attached to all charges of an offence (rather than the sentence attached to only the most serious or principal offence in a case). The approach involved adjusting the median imprisonment sentence length for each offence by a factor relating to the percentage of charges that received imprisonment. This enabled the range in broad sentence types as well as imprisonment terms to be taken into account.

The offence seriousness methodology was applied to sentencing practices for serious and significant offences in Victoria and found that murder was considered the most serious offence, followed by defensive homicide, trafficking a large commercial quantity of drugs and manslaughter. Persistent sexual abuse of a child under 16 and rape were ranked fifth and sixth respectively.

The rank of offences based on sentencing practices largely conforms to ideas of harm and culpability, with offences of higher harm and/or higher culpability tending to be ranked more seriously. For example, murder and manslaughter both result in a victim's death, but the offence with the higher level of culpability (murder) had a higher rank. Likewise offences resulting in death were ranked more seriously than offences resulting in serious injury. Furthermore, sexual offences involving young children as victims were ranked higher than sexual offences involving older children as victims.

The rank of offences based on sentencing practices also largely conforms to a rank based on maximum penalties. The Level 1 offence of murder is the highest ranked offence using both methods, and five Level 2 offences, including rape and trafficking a commercial quantity of drugs, were highly ranked using sentencing practices (from fifth to ninth). In contrast, Level 4 offences, such as arson, and Level 5 offences, such as threat to kill, were among the least severe.

Some discrepancies in rank using the two methods were also evident. Manslaughter and defensive homicide are both Level 3 offences, but they received among the most severe sentences. Sexual penetration with a child under 16 and under care, supervision or authority is a Level 4 offence, but was ranked relatively high (10th) based on sentencing practices. Aggravated burglary, armed robbery and kidnapping are all Level 2 offences, but were ranked in the lower half of offences according to their sentencing practices.

In examining sentencing practices, a key finding of the report is that there is a great deal of variation in sentencing both within and across offences. Across offences, the median imprisonment term for murder was 19.0 years compared with 1.0 year for making a threat to kill, and the imprisonment sentence rate ranged from 49.0% for recklessly causing serious injury to 100.0% for defensive homicide and murder.

Within offences, the range of imprisonment terms was greatest for murder (from 8.0 years to 'life'), followed by rape (15.0 year range), while offences with relatively small ranges include assault with intent to rape (4.3), make threat to kill (4.9), defensive homicide (5.0), arson (5.8) and sexual penetration with a child aged under 10 (5.9).

Another key finding is that, when assessing sentencing practices, it is important to consider sentencing at both the charge and case level, particularly for offences that tend to be sentenced in multiple charges within a case or along with charges of other offences in a case, such as sexual offences generally committed against children. For example, for incest (parent) the median imprisonment term for charges was four years and the longest term was 12 years; however, the median total effective imprisonment term for cases in which incest was the principal proven offence was seven years and the longest was 22 years. Cases involving charges of incest often involve multiple charges of the offence.

Comparing sentencing practices and maximum penalties reveals that there is, 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 is considered, however, the longest total effective sentence imposed for this offence was 18 years' imprisonment, seven years short of the maximum penalty.

Views on relative offence seriousness vary, and these can be measured in a variety of ways. Parliament's views can be gauged via legislation, while community views can be gauged via surveys and other research. The contribution of this report is that it shows the courts' views measured via current sentencing practices. It thus provides evidence of one of the critical components of understanding offence seriousness.

References

Bibliography

Australian Bureau of Statistics (2009). *National Offence Index, 2009*. Cat. No. 1234.0.55.001. Canberra: Australian Bureau of Statistics.

Australian Bureau of Statistics (2008). *Australian Standard Offence Classification (ASOC), 2008*. Cat. No. 1234.0. 2nd ed. Canberra: Australian Bureau of Statistics.

Fox, R. and A. Freiberg (1999). *Sentencing: State and Federal Law*. South Melbourne: Oxford University Press.

Francis, B., K. Soothill and R. Dittrich (2001). 'A New Approach for Ranking Serious Offences: The Use of Paired-Comparisons Methodology.' *British Journal of Criminology*, 41: 726–737.

MacKinnell, I., P. Poletti and M. Homes (2010). 'Measuring Offence Seriousness.' *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice*. Sydney: NSW Bureau of Crime Statistics and Research.

Indermaur, D. (1990). *Crime Seriousness and Sentencing: A Comparison of Court Practice and the Perceptions of a Sample of the Public and Judges*. Canberra: Criminology Research Council.

Sentencing Advisory Council (2010). *Maximum Penalties: Principles and Purposes*. Preliminary Issues Paper. Melbourne: Sentencing Advisory Council. Available at <www.sentencingcouncil.vic.gov.au/content/publications/maximum-penalties-principles-and-purposes-preliminary-issues-paper.pdf>. Accessed 5 September 2011.

Sentencing Advisory Council (2009). *Maximum Penalties for Sexual Penetration with a Child under 16*. Report. Melbourne: Sentencing Advisory Council.

Sentencing Task Force (1989). *Review of Statutory Maximum Penalties in Victoria: Report to the Attorney-General*. Melbourne: Victorian Govt. Pub. Office.

Statistics Canada (2009). *Measuring Crime in Canada: Introducing the Crime Severity Index and Improvements to the Uniform Crime Reporting Survey*. Cat. No. 85-004-X. Ottawa: Minister of Industry.

Von Hirsch, A. (1983). 'Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale.' *Journal of Criminal Law and Criminology*, 74(1): 211–248.

Legislation

Children, Youth and Families Act 2005 (Vic)

Crimes Act 1958 (Vic)

Crimes Legislation Amendment Act 2010 (Vic)

Sentencing Act 1991 (Vic)

Cases

Postiglione v The Queen (1997) 189 CLR 295

R v McCorriston [2000] VSCA 200 (17 October 2000)

R v Patison (2003) 143 A Crim R 118

Veen v The Queen (No 1) (1979) 143 CLR 458

Veen v The Queen (No 2) (1988) 164 CLR 465

WCB v The Queen [2010] VSCA 230 (10 September 2010)

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Published by the Sentencing Advisory Council, Melbourne Victoria Australia.

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ISBN: 978-1-921100-80-2 (Print)
978-1-921100-81-9 (Online)

Authorised by Sentencing Advisory Council, 4/436 Lonsdale Street, Melbourne. Printed by BigPrint, 50 Lonsdale Street, Melbourne.

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