Suspended Sentences in Victoria
Monitoring Report

Sentencing Advisory Council
May 2010

Warning to readers

This paper contains subject matter—particularly in the case summaries—that may be distressing to readers. These case summaries are based on real cases and contain explicit material describing sexual offences.

People who have personal concerns about sexual assault can contact the Sexual Assault Crisis Line on 1800 806 292.

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Glossary

Adjourned undertaking (ss 72–79 *Sentencing Act 1991* (Vic))

Unsupervised release, with or without recording a conviction, for a period of up to five years, with conditions that the offender appear before the court if called to do so, that the offender remain of good behaviour and comply with any special conditions, including supervision, treatment and/or unpaid community work (maximum two years). Compliance with the order is supervised by Community Correctional Services.

Combined custody and treatment order (ss 18Q–18W *Sentencing Act 1991* (Vic))

A term of imprisonment served by a combination of an immediate prison term of at least six months followed by supervised drug rehabilitation treatment while living in the community (maximum one year). Compliance with the order is supervised by Community Correctional Services.

Community-based order (CBO) (ss 36–48 *Sentencing Act 1991* (Vic))

A non-custodial sentence, with or without recording a conviction, with conditions including supervision, treatment and/or unpaid community work (maximum two years). Compliance with the order is supervised by Community Correctional Services.

Digital penetration

Under section 35 of the *Crimes Act 1958* (Vic), sexual penetration can take many forms. One form, which is commonly referred to as 'digital' penetration or 'digital' rape, is where the penetration is by a finger.

Fine (ss 49–69 *Sentencing Act 1991* (Vic))

A monetary penalty that may be in addition to, or instead of, another order (with or without recording a conviction).

Home detention order (ss 18ZT–18ZZR *Sentencing Act 1991* (Vic))

A term of imprisonment served by way of home detention. This is not available for certain offences (e.g. sexual offences, breach of intervention or stalking order). While on a home detention order the offender is subject to electronic monitoring (maximum one year). Compliance with the order is supervised by Community Correctional Services.

Hospital security order (ss 93A(1)–(7) *Sentencing Act 1991* (Vic))

An order for the detention in an approved mental health facility of a mentally ill person convicted of an offence, where, but for the person's mental illness, the person would have been sentenced to a term of imprisonment.

Imprisonment (ss 9–18P *Sentencing Act 1991* (Vic))

A term of imprisonment is not always served by confinement in prison (described as an 'immediate' term of imprisonment). It can be served in other ways, such as by an intensive correction order (see below). The maximum term of imprisonment that a judge can impose for an offence is determined by Parliament, although courts generally have the discretion to sentence an offender to less than the maximum penalty.

Intensive correction order (ICO) (ss 19–26 *Sentencing Act 1991* (Vic))

A term of imprisonment served in the community by way of intensive correction, combining supervision and/or personal development programs and including conditions such as treatment and unpaid community work (maximum one year). Compliance with the order is supervised by Community Correctional Services.

Mandatory minimum sentence of imprisonment

Some offences (e.g. a second or subsequent offence of driving while disqualified, under section 30 of the *Road Safety Act 1986* (Vic)) carry a mandatory minimum prison sentence. This means that a judge has no discretion and must impose a term of imprisonment on the offender for the offence.

Sentence escalation

Sentence escalation, as it applies to suspended sentences, refers to the imposition of a type of sentence higher up the sentencing hierarchy than would have been imposed, on the basis that it will be suspended.

Suspended sentence (ss 27–31 *Sentencing Act 1991* (Vic))

A term of imprisonment that is suspended (i.e. not activated) wholly or in part for a specified period (the 'operational period'), subject to the condition to be of good behaviour (i.e. not reoffend) (maximum two years in the Magistrates' Court or three years in the County and Supreme Courts).

Youth justice centre (previously youth training centre) and youth residential centre orders (ss 32–35 *Sentencing Act 1991* (Vic))

A sentence requiring a young offender (under 21 years old) to be detained in a youth justice centre (15 years or older) or youth residential centre (under 15 years old) (maximum two years in the Magistrates' Court or three years in the County and Supreme Courts).

Chapter 1
Background

Introduction

1.1 In 2004, the Council was given its first reference on the use of suspended sentences of imprisonment. The Council conducted extensive research and consultation as part of that reference. The views expressed were widely divergent and strongly held. Much of the concern about suspended sentences related to their use for serious crimes of personal violence, such as rape, sexual assault and intentionally or recklessly causing serious injury. Further, suspended sentences were not considered to have a sufficient punitive element. In addition, there was a view that suspended sentences could be inappropriate for offenders who suffer from underlying problems, such as drug dependency, because there is limited scope for a suspended sentence to address those problems directly.

1.2 The Council examined the option of enabling courts to attach conditions to suspended sentences to address such concerns. Submissions were made to the Council that the availability of a conditional suspended sentence order would provide the courts with greater flexibility in tailoring a sentence to the circumstances of the offence and the offender.

1.3 While the Council was generally supportive of conditional orders, it was concerned that simply grafting conditions onto suspended sentences would fail to resolve more fundamental problems with these orders. Instead, the Council reached the view that:

> We believe that the better option is for suspended sentences to be phased out, and for other conditional orders to be introduced that have a more coherent rationale and that exist as alternatives to imprisonment in their own right.
>
> While conditions on suspended sentences could be introduced in the transitional phase prior to their removal, the Council is concerned that this would risk sentence escalation and lead to significantly higher breach rates. The Council does not consider that providing for more flexible breach provisions is the appropriate solution to such concerns. Any broadening of the courts' powers on breach is undesirable and would compromise the integrity and internal logic of the order. For these reasons the Council suggests that the additional funding and resources that would be required to support conditional suspended sentences properly are better directed towards the revised orders proposed by the Council.[1]

1 Sentencing Advisory Council, *Suspended Sentences: Final Report Part 1* (2006) [xxii].

1.4 The Council concluded that suspended sentences are fundamentally flawed and recommended against introducing a power to attach conditions to them. Instead, it recommended a comprehensive package of reforms to intermediate sentencing orders so that they would provide more effective and more credible alternatives to suspended sentences. It suggested that, if these reforms were to be adopted, the need for suspended sentences would diminish. The Council recognised that, even if its recommendations were adopted, implementing such significant reforms to intermediate orders would take time. As an interim measure, the Council recommended that legislation be introduced to limit the use of suspended sentences for serious offences to cases involving exceptional circumstances.

1.5 The Council's Final Report and recommendations were published in two parts. The first part, containing the recommendation to limit suspended sentences for serious offences, was published in May 2006.[2] That recommendation was adopted in the same year with an amendment to the *Sentencing Act 1991* (Vic) which provides that a court may suspend a sentence of imprisonment for a serious offence (as defined in the Act) only if the court finds that there are exceptional circumstances and that it is in the interests of justice to do so.

1.6 The Council published the second part of its Final Report, containing the package of recommended reforms to intermediate sentencing orders, in April 2008.[3] To date, that package of recommendations has not been adopted or implemented.[4]

Credible alternatives to suspended sentences: reforming intermediate orders

1.7 The recommendations contained in Part 2 of the Council's Final Report formed a comprehensive package of reforms, designed to allow for the further review of suspended sentences once reforms to intermediate orders had been introduced and tested. The orders examined by the Council included:

- **Home detention**—The Council recommended that home detention should:
  - be recast as a sentence in its own right, rather than as a means of serving a sentence of imprisonment; and
  - be restructured to allow an offender increased periods of unsupervised release upon successful progression through the order and that broad statutory guidance be provided as to how this should occur.[5]
- **Intensive correction orders (ICOs)**—The Council found that these orders had only been used in a very small proportion of cases, partly due to problems with the inflexible structure of the order, including that the maximum term of the order is only 12 months. The Council

2 Ibid.

3 Sentencing Advisory Council, *Suspended Sentences: Final Report Part 2* (2008).

4 See discussion of limited implementation at [1.9].

5 The government has recently introduced legislation to make amendments to the home detention scheme. In Part 2 of the Final Report, the Council recommended that home detention should be recast as a separate sentencing order in its own right, rather than as a means of serving a prison sentence. The Justice Legislation Amendment Bill 2010 partly implements this recommendation. Currently, the court must sentence an offender to a term of imprisonment before assessing whether that term may be served by way of an order for home detention. Under the new provisions, the procedure for making a home detention order has been aligned with that of an intensive correction order, whereby the court may consider the suitability of an offender for the home detention program before making that order. However, as with an intensive correction order, the court must then make the order by imposing a sentence of imprisonment, and ordering that it be 'served by way of home detention'.

also found a possible lack of confidence by the courts in its effectiveness. The Council's key recommendations to address some of these concerns were that intensive correction orders should:

- be recast as a sentence in their own right, rather than as a way of serving a sentence of imprisonment;
- be increased from a maximum duration of 12 months to two years (which should address the need, in some cases, for courts to impose a longer order to reflect the seriousness of the offence);
- allow for a court to impose special conditions prohibiting the offender from associating with particular people (non-association conditions) or from visiting or residing in particular areas (place restriction conditions) in certain circumstances; and
- allow the court greater flexibility in the imposition of core conditions.[6]

- **Combined custody and treatment orders (CCTOs)**—The Council found that CCTOs had been almost universally criticised due to their lack of flexibility and the limited time available under the order for treatment to be provided to offenders. The Council recommended their abolition and that in their place a separate form of ICO targeted at offenders who are dependent on alcohol or drugs should be introduced.
- **Intermediate semi-custodial sanctions**—The Council recommended that, consistent with the current power to combine a term of imprisonment with a Community-Based Order (CBO), a court should be permitted to combine an ICO with an immediate term of imprisonment of not more than three months. Similarly, the same power to combine a CBO with a suspended sentence (whether wholly or partially suspended) when sentencing an offender for more than one offence in the same proceeding should apply to an ICO.
- **Community-based orders**—The Council found that there was broad support for retaining community-based orders in their present form, and allowing the court, when sentencing an offender for more than one offence in the same proceeding, to order both an ICO and a CBO.
- **Intermediate sanctions for young adult offenders**—The Council recommended the introduction of a new form of CBO specifically targeted at young adult offenders with a high level of need, and a moderate to high risk of reoffending, the purpose of which is to facilitate their rehabilitation.

1.8 An important theme throughout many of the recommendations was the need for greater transparency in the nature of the orders. Currently, like suspended sentences, several intermediate orders involve what is described as the imposition of a 'term of imprisonment', although the offender does not actually have to serve the sentence in prison unless the order is breached. The Council was of the view that such 'substitutional' orders generate confusion and risk undermining public confidence in sentencing. It recommended that, where possible, substitutional orders should be treated as sentences in their own right, rather than as sentences of imprisonment and the label 'imprisonment' should be reserved for immediate sentences of imprisonment. The Council took the view that this would make it easier to understand the actual nature of the orders.

1.9 The reforms to intermediate orders have not been implemented. The only exception is legislation which has been introduced into parliament adopting the Council's recommendations on the abolition of the offence of breach for intermediate orders.[7]

6 See Sentencing Advisory Council (2008) above n 3 [6.143]–[6.147].

7 Justice Amendment Bill 2010. This bill also includes some minor amendments to the home detention scheme. See above n 5.

Reforming the offence of driving while disqualified or suspended

1.10 In Part 2 of its Final Report the Council also noted the very high, and increasing, number of suspended sentences imposed for the offence of driving while disqualified or suspended. That offence has a mandatory minimum one-month sentence of imprisonment for a second or subsequent offence. In a very large proportion of cases, the sentence of imprisonment is suspended.

1.11 A majority of the Council recommended the abolition of the mandatory sentence of imprisonment, while the Council was unanimous in its view that further research was necessary to establish more effective ways to address this major social issue.

1.12 In April 2009, the Council published a report on the offence of driving while disqualified or suspended.[8] In that report the Council unanimously recommended that the mandatory penalty of imprisonment for a second or subsequent offence be abolished. The Council recommended a series of initiatives to address deterrence, incapacitation and, in relevant cases involving alcohol dependency, rehabilitation. These recommendations have not been formally implemented by the government.

8 Sentencing Advisory Council, *Driving While Disqualified or Suspended: Report* (2009).

Monitoring suspended sentences

1.13 In its Final Report, the Council also undertook to monitor the use and operation of suspended sentences.[9]

1.14 In November 2007 the Council released a statistical profile[10] on the use of suspended sentences in the Magistrates' Court and the higher courts from 2000–01 to 2006–07.[11] The amendment limiting the use of suspended sentences for serious offences applied only to offences committed on or after 1 November 2006. The time necessary for such offences to be detected, investigated and prosecuted meant that few, if any, of the sentences included in the statistical profile would have been governed by the amended provision. Nevertheless, the profile found that overall the use of suspended sentences had declined. Other findings were that:

- Suspended sentences were often combined with other orders, including community-based orders. This showed that, where possible (if there were multiple offences and it was appropriate to do so) courts were already constructing a form of conditional suspended sentence.
- Breach rates for suspended sentences imposed in the higher courts (which are responsible for dealing with more serious offences) were substantially lower than for those imposed in the Magistrates' Court.[12]
- Suspended sentences for a second or subsequent offence of driving while disqualified or suspended[13] represented a significant proportion of suspended sentences imposed in the Magistrates' Court. In 2006–07, the suspended sentences for that one offence constituted almost one-fifth of all suspended sentences imposed in the Magistrates' Court. The number of suspended sentences for this offence was increasing markedly year-on-year.[14]

1.15 This report builds on the analysis in the 2007 statistical profile. It focuses on:

- the continued growth of suspended sentences in the Magistrates' Court for driving while disqualified or suspended; and
- the effect of the 2006 amendments in restricting the use of suspended sentences for section 3 serious offences and increasing transparency in sentencing for section 3 serious offences where a wholly suspended sentence of imprisonment is imposed.

In this report, the Council examines the use of wholly suspended sentences for section 3 serious offences during the reference period of 1 November 2006 to 30 June 2009 to determine the extent to which the legislative purposes in the 2006 amendments have been achieved.

1.16 It is important to note that the Council's analysis of the use of suspended sentences in this report takes place within the context of a broader trend of increasing sentencing severity. During the period of the Council's analysis of suspended sentences, from 2004 to the end of the reference period of this report, there has been an overall increase in the rate of immediate imprisonment for offenders sentenced in the higher courts.[15] In addition to the increase in the rate of imprisonment, the average length of an immediate term of imprisonment imposed in the higher courts has also increased over the same period.[16]

9 See Sentencing Advisory Council (2006) above n 1 (Recommendation 2) and (2008) above n 3 (Recommendation 2.2).

10 Nick Turner, *Suspended Sentences in Victoria—A Statistical Profile* (Sentencing Advisory Council, 2007).

11 During the reference period for that report, there was an insufficient number of people sentenced in the higher courts for a section 3 serious offence after the amendments to the *Sentencing Act 1991* (Vic) to perform a statistical analysis.

12 In the period from 2000–01 to 2001–02 the breach rate for suspended sentences imposed in the Magistrates' Court was 29.1%; the breach rate for suspended sentences imposed in the higher courts was 8.6%. Turner (2007) above n 10, 9.

13 *Road Safety Act 1986* (Vic) s 30.

14 The number of suspended sentences for driving while disqualified increased from 757 people sentenced for this offence in 2000–01 to 1,785 people in 2006–07. Turner (2007) above n 10, 15.

15 See further [4.2]–[4.3].

16 See further [4.2]–[4.3].

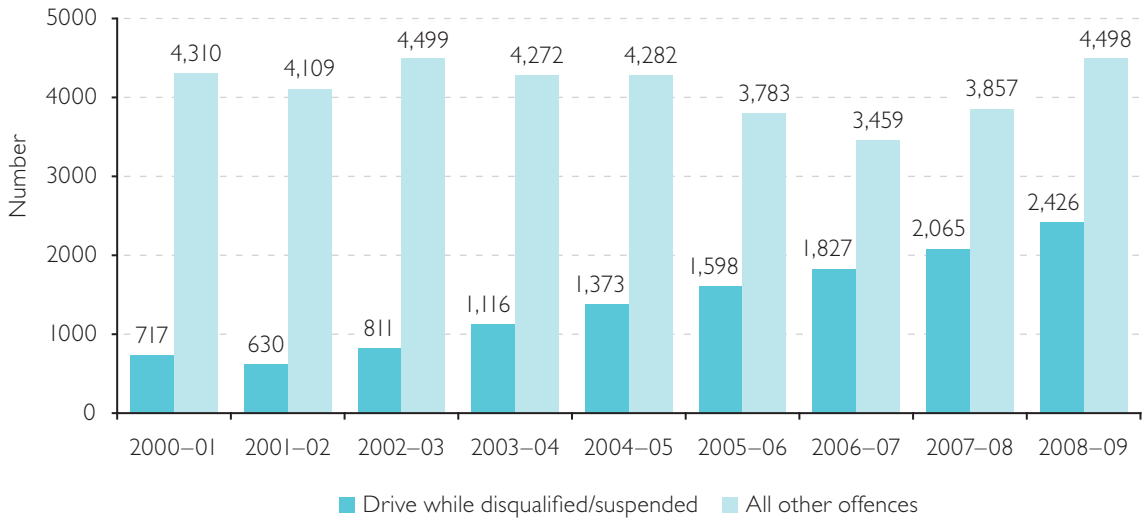
Chapter 2
Magistrates' Court data

Driving while disqualified or suspended

2.1 The Council's analysis of the most recent data shows that the number of suspended sentences imposed for driving while disqualified or suspended has continued to grow.

2.2 Figure 1 compares the number of people who received a wholly suspended sentence in the Magistrates' Court for driving while disqualified or suspended with all other offences each year from 2000–01 to 2008–09. As shown, the number of people sentenced for driving while disqualified or suspended has increased by 385% from 630 people in 2001–02 to 2,426 people in 2008–09.

Figure 1: The number of people who received a suspended sentence in the Magistrates' Court for driving while disqualified or suspended compared with other offences, 2000–01 to 2008–09



2.3 In 2000–01, 14.3% of people receiving suspended sentences were sentenced for driving while disqualified or suspended. By 2008–09, this had increased to 35.0%.

2.4 It is clear from these data that the mandatory minimum term of one month's imprisonment for a second or subsequent offence of driving while disqualified or suspended is continuing to have a disproportionate effect upon the use of suspended sentences in the Magistrates' Court.

Suspended sentences

2.5 Apart from the section 3 serious offence of making a threat to kill, which may be heard summarily,[17] the amendments limiting the imposition of a suspended sentence do not apply to sentences imposed in the Magistrates' Court. However, as part of its ongoing commitment to monitor the use of suspended sentences, the Council has examined data from the Magistrates' Court to identify any change in sentencing practices.

2.6 Data from the Magistrates' Court clearly show that suspended sentences are still frequently used.

2.7 Figure 2 shows the number of people who received a wholly suspended sentence in the Magistrates' Court each year from 2000–01 to 2008–09. As shown, there was a slight downward trend from 5,655 people in 2004–05 to 5,286 in 2006–07, before a substantial increase to 6,924 in 2008–09.

2.8 The increase in the imposition of wholly suspended sentences is, in part, attributable to the increased number of wholly suspended sentences imposed for driving while disqualified or suspended. However, as shown in Figure 1, while there was a downward trend in the use of wholly suspended sentences for all other offences from 2002–03 to 2006–07, this reversed in 2008–09. In that year, the number of wholly suspended sentences imposed for offences other than driving while disqualified or suspended increased substantially. This increase is not limited to one particular offence type or category, but is the result of greater use of suspended sentences across all offences.

Figure 2: The number of people who received a wholly suspended sentence in the Magistrates' Court, 2000–01 to 2008–09

17 If the Magistrates' Court considers it appropriate and the accused consents: *Criminal Procedure Act 2009* (Vic) ss 28–29.

Chapter 3
Limiting the use of suspended sentences for serious offences

Serious offences

3.1 In its original review of suspended sentences the Council found that many of the community concerns about suspended sentences were the result of their use in specific cases—typically serious violent offences where the level of harm to a victim is high. While the courts often express the view that the imposition of a suspended sentence carries significant denunciatory weight, given its place in the hierarchy of sentencing, the Council found that this perception of the order was not shared by many in the community.[18] The Council concluded that a wholly suspended sentence, with its focus on an offender's rehabilitation, may be seen in cases of serious offending as failing to meet sufficiently the purposes of denunciation, deterrence and just punishment.

3.2 The Council shared the community's concern that some offences are so serious that once a prison sentence has been imposed, at least part of the sentence should be served in prison. However, the Council accepted that there may be instances in which it is appropriate for an offender to remain in the community, despite the seriousness of the offence.

3.3 In such cases the Council took the view that something more should be required of the offender than conviction and the threat of imprisonment upon reoffending. Recognising the current problems with intermediate orders, the Council recommended a suite of changes to provide credible alternatives to suspended sentences for those cases in which it was found appropriate that the offender serve a sentence in the community.

18 See Sentencing Advisory Council (2006) above n 1 [3.8]–[3.9].

3.4 This recommendation was made on the basis that any move to restrict the power to impose suspended sentences necessarily required reforms to existing intermediate orders and the introduction of new intermediate orders as recommended by the Council in Part 2 of its Final Report. The Council perceived retaining the power to impose a suspended sentence as a stage in the reform process. It stated:

> We believe that once the new orders come into operation, they will provide a more appropriate alternative to a suspended sentence where there are exceptional circumstances justifying the offender remaining in the community—particularly as conditions will be attached to such orders. However, in the meantime we support the power to suspend being limited rather than removed altogether.[19]

3.5 Given that implementation of the recommendations would take some time, and also that there were legitimate concerns over the use of suspended sentences particularly for serious offences, the Council recommended the introduction of offence-based restrictions that limited the availability of wholly suspended sentences for 'serious offences' as defined in section 3 of the *Sentencing Act 1991* (Vic).

3.6 This section creates a category of 'serious' offences that includes: murder, manslaughter, child homicide, defensive homicide, intentionally causing serious injury, threats to kill, rape, assault with intent to rape, incest, sexual penetration with a child under the age of 16, persistent sexual abuse of a child under the age of 16, abduction or detention, abduction of a child under 16, kidnapping, armed robbery and sexual penetration with a child under 10, and any conspiracy to commit, incitement to commit or attempt to commit these offences.

3.7 In order to effect this restriction, the Council recommended that:

> The *Sentencing Act 1991* (Vic) should be amended to create a presumption against suspension of a prison sentence for certain 'serious offences' (as defined under section 3 of the Act). Once a court has determined that it is appropriate to sentence a person convicted of a serious offence to a term of imprisonment, it should not be permitted to suspend the sentence in full unless the court is satisfied, taking into account all the factors relevant to the decision to suspend, that it is in the interests of justice to do so because of the existence of exceptional circumstances.[20]

3.8 The legislative presumption recommended by the Council sought to clarify the common law position and reflect existing Court of Appeal authority that suspended sentences should only be used for serious offences in exceptional circumstances.[21] While the Council found some support during its consultations for removing the power to suspend terms of imprisonment altogether for serious violent crimes, the Council supported retaining the option for those rare or exceptional cases where it is in the interests of justice to do so, at least until reforms to intermediate orders had been introduced and tested.[22]

3.9 Since the Council released Part 1 of its Final Report, the initial reforms that it recommended (such as restricting suspended sentences for serious offences) have been partially adopted in the *Sentencing (Suspended Sentences) Act 2006* (Vic). However, since then, no further legislative reform has taken place to facilitate the removal of suspended sentences as a sentencing option.[23]

19 Ibid [4.67].

20 Sentencing Advisory Council (2006) above n 1 (Recommendation 5).

21 A number of cases had suggested that for some serious offences a sentence of immediate imprisonment will be warranted, in the absence of exceptional circumstances. See for example: *R v Schubert* [1999] VSCA 25 (Unreported, Winneke P, Brooking and Ormiston JJA, 23 February 1999) [16] (Brooking J).

22 See Sentencing Advisory Council (2006) above n 1 [4.67].

23 See above n 5.

Amendment to the *Sentencing Act 1991* (Vic)

3.10 Section 4(2) of the *Sentencing (Suspended Sentences) Act 2006* (Vic) implemented the Council's recommendation that the power to impose suspended sentences for serious offences be restricted by inserting a new section 27(1A) and (2B)–(2C) into the *Sentencing Act 1991* (Vic).

3.11 Section 27(1A) sets out the following factors to which the court must have regard in considering whether it is desirable in the circumstances to suspend a sentence of imprisonment:[24]

- The need to ensure that the sentence reflects the gravity of the offence and adequately denounces the offender's conduct and has a deterrent effect, taking into consideration:
  - the nature of the offence;
  - the impact of the offence on any victims of the offence; and
  - any injury, loss or damage resulting directly from the offence.
- Any previous suspended sentence of imprisonment imposed on the offender (and whether the offender breached the order suspending that sentence).
- Whether the offence was committed during the operational period of a suspended sentence.
- The degree of risk of the offender committing another offence punishable by imprisonment during the operation period of the sentence, if it were to be suspended.

3.12 The sentencing judge must still determine, as for any other offence, that a sentence of imprisonment is warranted.[25] However, section 27(2B) provides that a court must not make an order suspending the *whole* of a sentence of imprisonment imposed on an offender for a *serious offence* unless it is satisfied, after having had regard to the factors specified in sub-section (1A), that making such an order is—

- appropriate because of the existence of exceptional circumstances; and
- in the interests of justice.

3.13 Section 27(2C) requires that if a court wholly suspends a sentence of imprisonment for a serious offence, it must at the time of imposing the sentence 'announce in open court its reasons for so doing and cause those reasons to be noted in the records of the court'.

3.14 These provisions came into effect on 1 November 2006 and apply to the sentencing of serious offences committed on or after that date.

24 Section 27(1A) applies to the imposition of suspended sentences of imprisonment for all offences and not just section 3 serious offences.

25 In addition, the term of imprisonment, if imposed, cannot be longer than three years in the case of the Supreme Court and the County Court or two years in the case of the Magistrates' Court: s 27(2) *Sentencing Act 1991* (Vic).

Exceptional circumstances

3.15 The amendments to the *Sentencing Act 1991* (Vic) set a higher threshold for imposing a suspended sentence for a section 3 serious offence than for other offences, by in effect creating a presumption against suspending a term of imprisonment for a serious offence.

3.16 The Court of Appeal has not directly considered the meaning of 'exceptional circumstances' under section 27(2B). In the absence of Court of Appeal guidance a threshold question is whether the test for 'exceptional circumstances' in the decision to suspend a sentence of imprisonment is the same as the test for 'exceptional circumstances' required under section 31(5A) of that Act, to avoid the restoration of a suspended sentence upon the offender's conviction for a further offence punishable by imprisonment.

3.17 In *R v O'Rourke*[26] the sentencing judge drew from the interpretation of exceptional circumstances in regard to breach in *R v Ioannou*:[27]

> To determine what amounts to exceptional circumstances for the purposes of this amended provision, I have been guided by earlier authorities dealing with the proper interpretation of this phrase, albeit in a different context to that of 27(2B).

3.18 The judge concluded:

> In my view, to justify a departure from the presumption that sub.s.27(2B) enacts against the imposition of a wholly suspended sentence for a serious offence such as armed robbery, the circumstances you rely on must be exceptional in the way described by His Honour in the extract I have read from *Ioannou's* case.

3.19 The interpretation of exceptional circumstances under section 31(5A) in relation to breaches of suspended sentences has been considered in a number of cases including *R v. Ioannou*,[28] in which Redlich JA said:

> [T]he circumstances … must be clearly unusual or quite special or distinctly out of the ordinary. As these expressions indicate, the circumstances cannot fall within the range of normally anticipated consequences, behaviours or exigencies. *Steggall*[29] is not authority for the proposition that circumstances can only be exceptional if they are beyond reasonable expectation or contemplation.[30]

3.20 The linking of the test to that in relation to breach in *R v O'Rourke*[31] suggests that in principle there would be relatively limited scope for cases to satisfy the exceptional circumstances test in section 27(2B).

26 *R v O'Rourke* [2009] VCC (Unreported, Millane J, 24 April 2008).
27 *R v Ioannou* [2007] VSCA 277 (Unreported, Chernov, Vincent and Redlich JJA, 4 December 2007).
28 Ibid.
29 *R v Steggall* (2005) 157 A Crim R 402.
30 *R v Ioannou* [2007] VSCA 277 (Unreported, Chernov, Vincent and Redlich JJA, 4 December 2007).
31 *R v O'Rourke* [2009] VCC (Unreported, Millane J, 24 April 2008).

3.21 The requirement for exceptional circumstances in section 27(2B) draws from the common law. Eight years prior to the introduction of that section, in *DPP v Buhagiar and Heathcote*,[32] the Court of Appeal held that a court could impose a suspended sentence for the offence of intentionally causing serious injury in the case of an offender with relevant prior convictions only if there were 'exceptional circumstances'.[33] The Crown had appealed against the imposition of suspended sentences for offenders who committed the offences of burglary, theft and intentionally causing serious injury.[34] The majority of the court, Batt and Buchannan JJA, held that strong prospects of rehabilitation could amount to exceptional circumstances:

> [W]e are not persuaded his Honour erred in concluding, as he did in effect if not in terms, that there were exceptional or extraordinary circumstances here in the form of strong rehabilitative prospects, if not reformation already, on the part of the respondent from the commission of the offences up to the time of sentencing.[35]

3.22 In this case the respondent Buhagiar had commenced work, and at the date of sentencing was still working as a rigger and scaffolder on an offshore rig. He no longer used alcohol or drugs, had given up his previous associates and had impressive character references attesting to his change. He had also completed courses in alcohol rehabilitation and anger management.

3.23 The case is authority for the proposition that in some circumstances, rehabilitation of the offender prior to sentencing constitutes 'exceptional circumstances', warranting the suspension of a sentence of imprisonment for a serious offence. However, this raises the question as to whether such circumstances are 'clearly unusual, quite special [or] … distinctly out of the ordinary', as characterised in *Ioannou*.[36] In the absence of statistics establishing the frequency of particular factors, this assessment relies on experience.

3.24 As discussed below, good prospects of rehabilitation have been identified as a mitigating factor in a number of cases in which 'exceptional circumstances' for the purpose of section 27(2B) of the *Sentencing Act 1991* (Vic) were found to exist. In those cases, however, it was the rehabilitation prospects in combination with other mitigating factors that gave rise to 'exceptional circumstances' under the Act.

32 *DPP v Buhagiar and Heathcote* [1998] 4 VR 540.

33 Ibid.

34 Ibid. In this case the Director of Public Prosecutions appealed solely on the basis that the suspension of sentences was in error, not that the sentences themselves were manifestly inadequate.

35 Ibid 543.

36 *R v Ioannou* [2007] VSCA 277 (Unreported, Chernov, Vincent and Redlich JJA, 4 December 2007).

The monitoring study

Reference period

3.25 In this report, the Council examined the use of wholly suspended sentences for section 3 serious offences committed before and after the change in legislation on 1 November 2006, but sentenced between 1 November 2006 and 30 June 2009 (the 'reference period'). Long-term data on sentences imposed from July 2001 to 30 June 2009 were also examined for the purposes of comparison.

3.26 The Council analysed the 83 available sentencing remarks for the 85 higher court cases in which the offender had committed a section 3 serious offence on or after 1 November 2006 and had been sentenced to a wholly suspended sentence between 1 November 2006 and 30 June 2009.

Identifying 'exceptional circumstances'

3.27 All of the sentencing remarks that were analysed by the Council included a comprehensive consideration by the sentencing judge of the aggravating and mitigating circumstances. It is clear from the remarks that, in deciding to impose a wholly suspended sentence, each sentencing judge acknowledged that the offence would ordinarily have required the imposition of an immediate sentence of imprisonment and that suspending the sentence was a departure. In this regard, all of the sentencing remarks satisfied the usual (pre-amendment) requirements for the imposition of a suspended sentence— being first, that a sentence of imprisonment was warranted, and second, that because of the particular circumstances of the case, in the judge's discretion that sentence should be suspended.

3.28 However, the requirements of section 27(2C) are two-fold. When suspending a sentence for a section 3 offence, the judge must 'announce in open court [the] reasons for doing so' *and* 'cause those reasons to be noted in the record of the court'. A sentencing judge has not satisfied section 27(2B)–(2C) if he or she has not completed both these requirements.

3.29 In 50 of the 83 cases analysed, the sentencing judge expressly referred to section 27(2B) or to 'exceptional circumstances'. Explicit reference to the section and to 'exceptional circumstances' has increased over time, from 40% of relevant remarks in the period from January 2008 to June 2008, to 72% in the period from January 2009 to June 2009.

3.30 It is important to note that the Council's analysis was confined to sentencing remarks, which are only a part of the sentencing hearing and not the complete transcript. Therefore in cases in which exceptional circumstances were not referred to in the sentencing remarks it is not possible to conclude definitively that the presence of exceptional circumstances was not discussed between the sentencing judge and counsel in the course of the sentencing hearing.

3.31 For those cases in which the judge referred to section 27(2B) or to the existence of 'exceptional circumstances', the Council analysed the mitigating factors that were mentioned by the sentencing judge. By definition, it is difficult to generalise about the circumstances that are considered 'exceptional', as those circumstances will often be unique to the particular case at hand.

3.32 The manner in which exceptional circumstances were mentioned varied from judge to judge, but two methods were common. Some sentencing judges separately identified within their remarks those circumstances which they considered to be exceptional. Other judges considered all of the mitigating factors and concluded with words such as '*the circumstances as set out above amount in combination to exceptional circumstances as required by s.27(2)(B)*'.

3.33 The sentencing remarks reveal that sentencing judges concluded that exceptional circumstances existed based upon a combination of mitigating circumstances (including factors specific to the offender and to the offending behaviour) that, if present by themselves, would not be considered 'exceptional'. As a consequence, in the following chapter, the Council confined its analysis of the exceptional circumstances for each offence category to identifying the mitigating factors present in the cases in which 'exceptional circumstances' were established rather than concluding that any specific factors have been held to be 'exceptional'.

3.34 In identifying the categories of mitigating factors listed in this report[37] the Council adopted the language used by judges in their sentencing remarks where the factor first appeared, and then coded subsequent references in other cases to analogous mitigating factors.

37 See Figures 11, 14 and 19.

Chapter 4
Has the use of wholly suspended sentences for serious offences changed?

Introduction

4.1 The use of suspended sentences for section 3 serious offences, and the extent to which usage has changed, should be considered in the context of broader sentencing trends.

4.2 In recent years there has been a steady increase in the rate of immediate imprisonment in Victoria. For all higher court offences, the percentage of cases receiving immediate imprisonment has risen from 43.2% in 2003–04 to 47.9% in 2008–09. As a consequence, the total number of prisoners has increased by 28% between the start of 2004 and March 2010 (from approximately 3,500 to approximately 4,500 prisoners) and the number of sentenced prisoners has increased by around 30% (from approximately 2,800 to approximately 3,660 prisoners).

4.3 Further, there has been an increase in the average length of imprisonment. For all higher court offences, the average length of total effective imprisonment terms increased from just over four years (48.6 months) in 2003–04 to four years and seven months (55.0 months) in 2008–09.

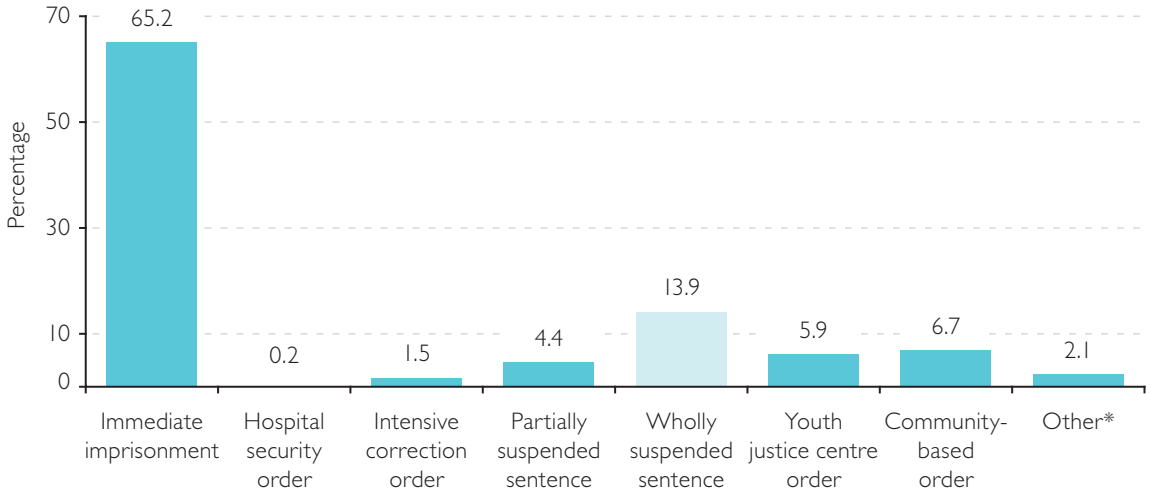
4.4 Figure 3 shows the percentage of people sentenced for section 3 serious offences between 1 July 2008 and 30 June 2009, according to the sentencing outcome.

4.5 Immediate imprisonment is by far the most common sentence for section 3 serious offences being imposed and comprised 65.2% of all sentencing outcomes in 2008–09. This figure increases to 69.6% when partially suspended sentences (which involve a period of immediate imprisonment) are included.

4.6 Although higher up in the sentencing hierarchy than suspended sentences, intensive correction orders were used in only 1.5% of cases, reflecting the findings of the Council in Part 2 of its Final Report, that these orders had only been used in a very small proportion of cases (see [1.7]).

4.7 Wholly suspended sentences represented 13.9% of all of the sentencing outcomes for section 3 serious offences in 2008–09. An analysis of historical data over the last nine years reveals that the proportions of sentencing outcomes for section 3 serious offences have not varied greatly. For the period from July 2001 to June 2009 the proportion of offenders sentenced to immediate imprisonment ranged from approximately 55% to approximately 68%, while over the same period of time the proportion of offenders sentenced to a wholly suspended sentence of imprisonment ranged from approximately 8% to approximately 15%.

Figure 3: **The distribution of sentencing outcomes for people sentenced in the higher courts in 2008–09 for a section 3 serious offence**



Note: Other* includes adjourned undertaking (0.8%), non-custodial supervision order (0.8%), fine (0.2%), unconditional release (0.2%) and residential treatment order (0.2%).

Pre-amendment sentencing practices

4.8 When the Sentencing (Suspended Sentences) Bill 2006 was introduced into Parliament, the 'exceptional circumstances' requirement was explained as follows:

> What [the Bill] will do is stop serious offenders receiving fully suspended sentences unless there are exceptional circumstances. Clause 4(2) of the bill makes it clear that a court can only suspend the whole of the sentence of imprisonment if it is satisfied that there are exceptional circumstances and it is in the interests of justice, and that is an important point. We are allowing the judges to determine whether or not there are exceptional circumstances and whether or not a suspended sentence is in the interests of justice. If a judge wholly suspends a term of imprisonment, they have to give reasons explaining why they have done that.[38]

4.9 In Part 2 of the Final Report, after reviewing more recent evidence on the use of suspended sentences, the Council formed the belief that sentencing practices had already changed (since the release of Part 1 of the Final Report) and that courts were taking a more cautious approach to the use of suspended sentences than was previously the case when the Council commenced its inquiry.[39]

4.10 These changes occurred largely in advance of the initial legislative reforms referred to above. Restrictions on the availability of the power to suspend a sentence in the case of serious offences apply only to offences committed on or after 1 November 2006. Taking into account the time required for offenders charged with these offences to come before the courts and to be sentenced, it is unlikely that the downward trend in the use of suspended sentences for these offences could be attributed to the legislative restrictions.

4.11 The Council intended that the initial reforms, including restricting the availability of wholly suspended sentences for more serious forms of offending and providing legislative guidance on factors that must be taken into account before a prison sentence is suspended, over time would contribute to more appropriate use of this order.

38 Victoria, *Parliamentary Debates,* Legislative Assembly, 14 September 2006 [3343], Rob Hudson.

39 See Sentencing Advisory Council (2008) above n 3 [2.41].

Post-amendment sentencing practices

4.12 To assess whether there has been any significant change since the legislation came into effect, the Council has analysed sentencing practices for section 3 serious offences committed on or after 1 November 2006 to identify the use of wholly suspended sentences in these cases.[40]

4.13 It is difficult to compare directly sentencing outcomes for people who committed offences prior to the change in legislation with those who offended after the change. A case that involves an offence committed on or after 1 November 2006, which is then determined and sentenced within the thirty-two-month period examined by the Council, may be of a different nature—by virtue of it having been finalised within that time—than a case heard and finalised after 1 November 2006, but which involved offending that may have been committed many years earlier.

4.14 This difference is most noticeable for sex offences and particularly for those against children, as a high proportion of sex offence cases have a long lag time from offence date to date of sentencing due to the complex nature of the matter. The complexity can arise from factors including delays in reporting the offence to police, the involvement of multiple victims (which can result in more complex trials) and longer trials. Those cases involving sex offences that have been committed, detected, prosecuted and then sentenced within the thirty-two-month period of this study are therefore more likely to have had characteristics that allowed them to be dealt with in a timely manner—such as admissions, guilty pleas and cooperation with the police. In two out of the three cases in the current study where a wholly suspended sentence was imposed for sexual penetration with a child under 10, the offender made admissions to the police and pleaded guilty.[41] Cases where there are no admissions or the presence of other factors that may prolong the process, in combination with other circumstances in the particular case, may make it less likely that a suspended sentence would be imposed.

4.15 As a consequence, it is possible that the more quickly a case is finalised, from the date of offending to the date of sentence, the higher the likelihood that a suspended sentence of imprisonment will be imposed. It is therefore possible that the reference period from 1 November 2006 to 30 June 2009 is not long enough to account for this 'lag effect' and consequently that a disproportionate number of suspended sentences will appear in the data.

4.16 The lag effect will vary according to the type of offence and will necessarily reduce over time. Revisiting this analysis in the future will allow for a more meaningful comparison with a larger sample of cases to provide a more solid basis for statistical analyses and will lessen the bias of atypical cases with short lag times.

40 The Council obtained the offence dates for these cases by reading the sentencing remarks.

41 See further [4.103]–[4.107].

4.17 Figure 4 shows the number of people sentenced for the most common section 3 serious offences between 1 November 2006 and 30 June 2009 by whether the offence was committed before or after 1 November 2006. The figure also displays the percentage of people who committed the offence after November 2006.

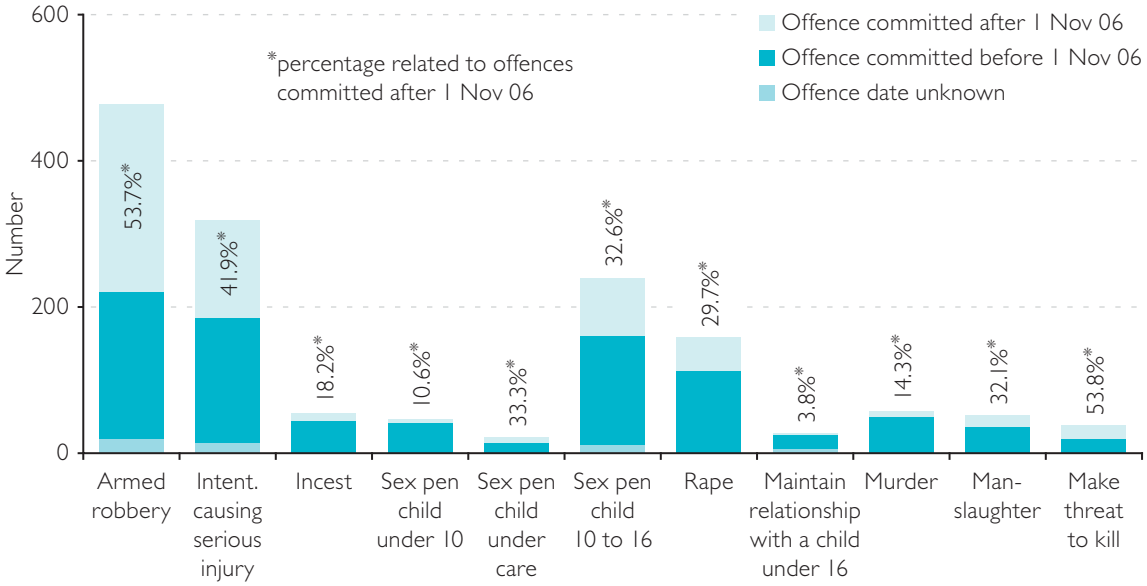
4.18 The most prevalent section 3 offences were armed robbery, intentionally causing serious injury and sexual penetration with a child aged between 10 and 16. These were the only section 3 serious offences with sufficient numbers during the reference period to allow for a more detailed analysis.

4.19 As shown, more than half (53.7%) of the people sentenced for armed robbery committed the offence after 1 November 2006, while just over four in ten people sentenced for intentionally causing serious injury committed the offence after this date. The data for these two categories of offence present comparable 'before' and 'after' groups (with approximately half in each) and also represent a significant number of cases.

4.20 Due to the lag effect described earlier, only a small proportion of people sentenced for sex offences committed those offences after 1 November 2006. For example, 10 out of 55 people (18.2%) sentenced for incest committed the offence after 1 November 2006, while around one in ten people sentenced for sexual penetration with a child aged under 10 committed the offence after this date.

4.21 Around one third of people sentenced for either sexual penetration with a child under care, supervision or authority, sexual penetration with a child aged 10 to 16 or rape, committed the offence after 1 November 2006.

Figure 4: The number of people sentenced from November 2006 to June 2009 for selected section 3 serious offences by whether the offence was committed before or after 1 November 2006



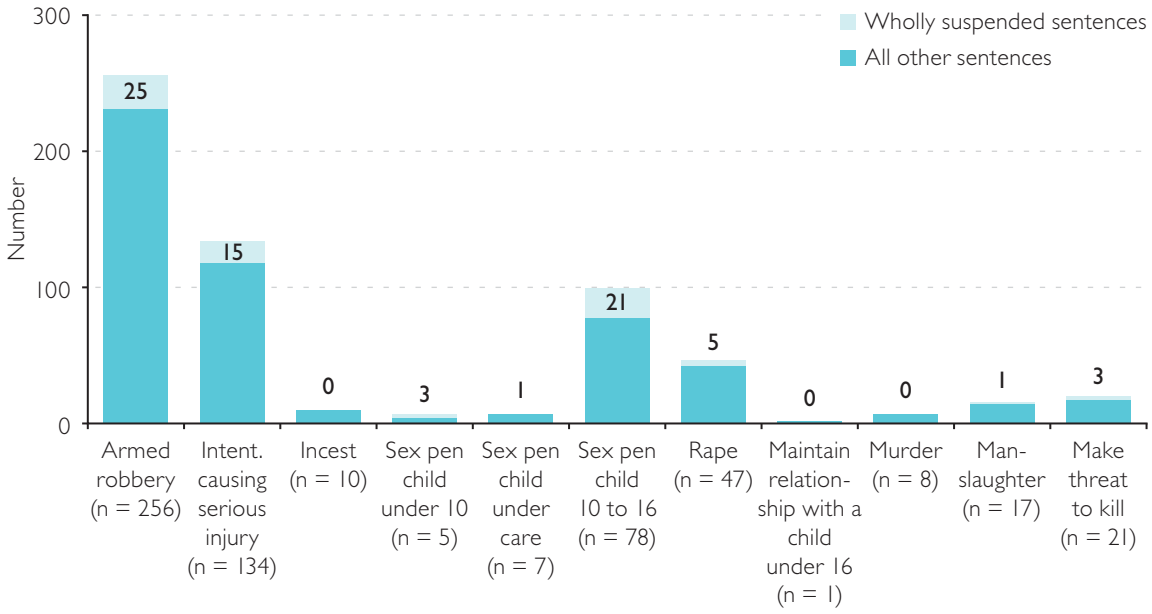
4.22 Figure 5 shows the number of people sentenced for a section 3 serious offence who committed the offence after 1 November 2006 by whether they received a wholly suspended sentence.

4.23 As shown, 25 of the 256 people sentenced for armed robbery received a wholly suspended sentence, while 15 of the 134 people sentenced for intentionally causing serious injury received a wholly suspended sentence.

4.24 The proportion of sex offenders who received wholly suspended sentences was much higher. Of the people sentenced for sex offences, three received a wholly suspended sentence for sexual penetration with a child aged under 10 while one person received a suspended sentence for sexual penetration with a child under care, supervision or authority. There were 21 people who received a wholly suspended sentence for sexual penetration with a child aged 10 to 16, while five people received a wholly suspended sentence for rape.[42] However, in considering these offences, it is important to note the lag effect and the small number of offences. The total number of cases for section 3 serious sex offences during the reference period is relatively low. As a result, no meaningful statistical trends for the imposition of wholly suspended sentences for section 3 serious sex offences can be identified in the data.

4.25 As discussed at [4.13]–[4.16] the lag effect may have a significant impact upon the type of cases in which the offending was committed, and the offender ultimately sentenced, within the thirty-two-month reference period. Those cases which are sentenced relatively quickly are more likely to have characteristics that may be suggestive of their suitability for suspension. The lag effect will therefore be particularly noticeable when there are such low numbers of overall offenders in certain offence categories, such as sex offences.

Figure 5: The number of people sentenced from November 2006 to June 2009 for a section 3 serious offence who committed the offence after 1 November 2006 by whether they received a wholly suspended sentence



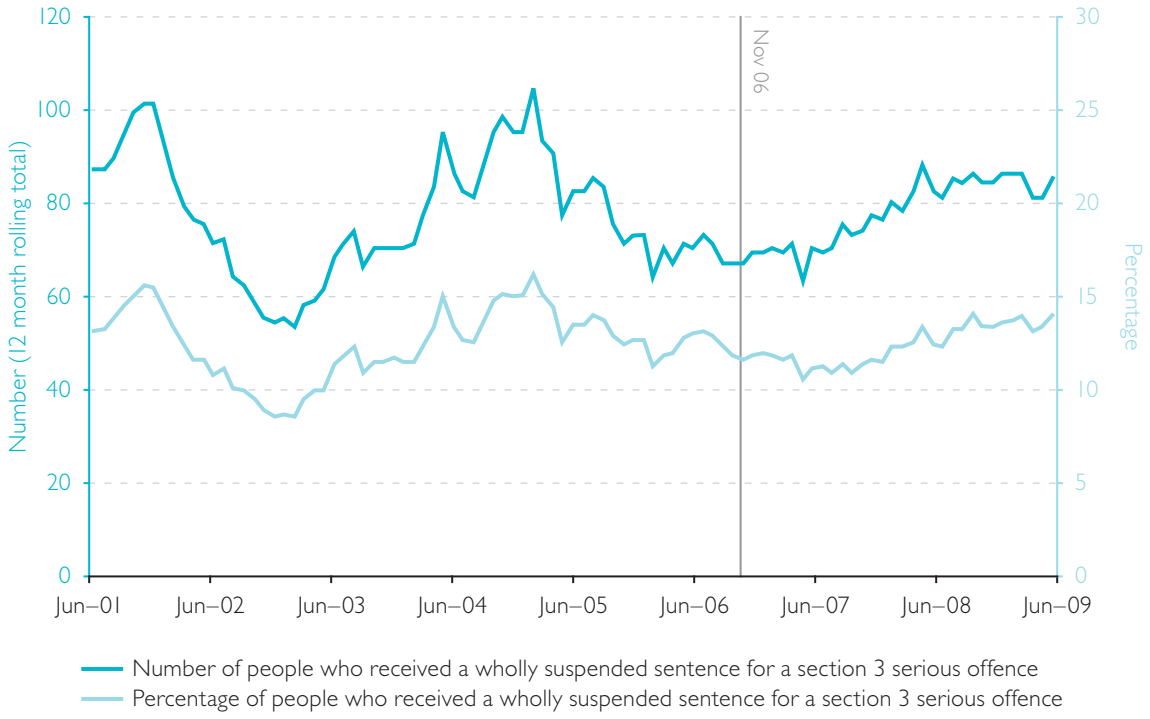
42 These cases are considered at [4.109]–[4.113].

4.26 Figure 6 provides an overview of the number and percentage of people who were sentenced to a wholly suspended sentence for a section 3 serious offence from June 2001 to June 2009. Figure 7 (see page 26) shows the number of people who received wholly suspended sentences for each of the three most common section 3 serious offences (intentionally causing serious injury, armed robbery and sexual penetration with a child aged 10 to 16) as well as all other section 3 serious offences combined for the same period. The counting unit used in each of these Figures is a 12 month rolling total, which shows at any point the number of people sentenced in the past 12 months.[43]

4.27 Figure 6 shows that both the number and percentage of people who received a wholly suspended sentence for a section 3 serious offence reached its low point in early 2003, with fewer than 60 wholly suspended sentences or 9% imposed for these offences. This decrease was consistent for each of the offence categories shown.

4.28 The use of suspended sentences (in both number and percentage) for section 3 serious offences peaked in the first half of 2005 before decreasing steadily over the next year.

Figure 6: The number and percentage of people who received a wholly suspended sentence for a section 3 serious offence, higher courts, June 2001 to June 2009



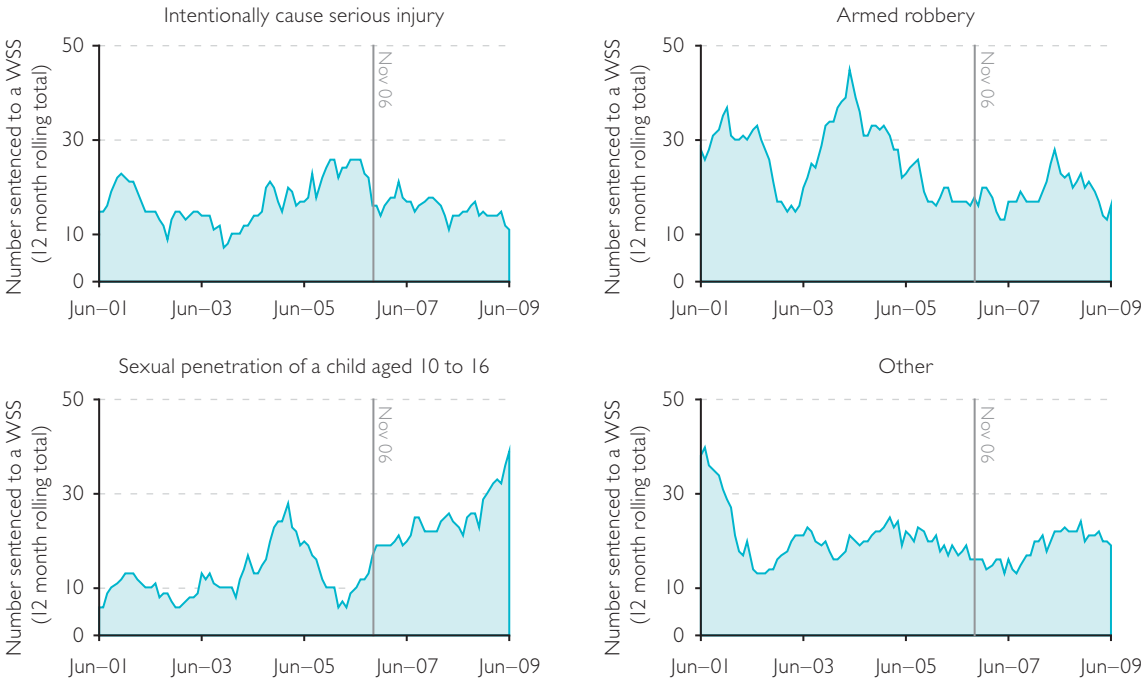
43 The vertical line in this figure marks the point at which the amendments to the *Sentencing Act 1991* (Vic), introducing the 'exceptional circumstances' test, commenced. It is important to note that the new legislation applied only to offences committed on or after 1 November 2006 and not to the offences that were committed before, but sentenced after, that date. The legislation therefore only applies to some of the sentences represented to the right of the line in Figure 6.

4.29 Figure 7 shows that over the past three years, the number of suspended sentences for armed robbery and intentionally causing serious injury has remained relatively stable.[44] Over the same period, however, the number of suspended sentences for sexual penetration with a child aged 10 to 16 has increased substantially. This is mainly due to an increase in the total number of people being sentenced for this offence in recent years. In 2008–09, there were 94 people sentenced for sexual penetration with a child aged 10 to 16 compared to 45 people in 2004–05.[45]

4.30 While the proportion of people receiving a suspended sentence for sexual penetration with a child aged 10 to 16 has increased, so too has the proportion receiving immediate imprisonment. As well, the use of less severe sentencing dispositions such as community-based orders and adjourned undertakings without conviction has decreased in the past three years as a proportion of the offenders sentenced for sexual penetration with a child aged 10 to 16. This may suggest that offenders are receiving more severe sentences for this offence.

4.31 The Director of Public Prosecutions has the power to appeal against a sentence he or she considers to be manifestly inadequate, including the power to appeal against a sentence that the Director does not consider should have been suspended. To date, none of the wholly suspended sentences of imprisonment for a section 3 serious offence examined by the Council during the reference period of this report has been the subject of an appeal.

Figure 7: **The number of people who received a wholly suspended sentence for a section 3 serious offence by type of section 3 serious offence, higher courts, June 2001 to June 2009**



44 The vertical line in each of the figures marks the point at which the amendments to the *Sentencing Act 1991* (Vic), introducing the 'exceptional circumstances' test, commenced. It is important to note that the new legislation applied only to offences committed on or after 1 November 2006 and not to the offences that were committed before, but sentenced after, that date. The legislation therefore only applies to some of the sentences represented to the right of each line in Figure 7.

45 In August 2004, the Victorian Law Reform Commission published its *Sexual Offences Law and Procedure: Final Report*, making 201 recommendations for legislative and procedural reform in the reporting and prosecution of sexual offences. In 2006 the VLRC reported that many of their recommendations had been implemented, including: introduction of specialist sex offences lists in the Magistrates' and County Courts, introduction of specialist prosecutors, establishment of a child witness service, improved counselling and crisis care services for victims of sexual assault, and treatment programs for children aged under 10 who exhibit sexualised behaviours; Victorian Law Reform Commission, *Sexual Offences Implementation Report* (2006). It is likely that these reforms may have contributed to an increase in the reporting of sexual offences, particularly child sex offences, and consequently to an increase in the number of cases being sentenced in subsequent years.

Violent offences

Pre-amendment sentencing practices

4.32 In the five years immediately prior to the amendments, 67 of the 415 people (16%) sentenced for intentionally causing serious injury between July 2000 and June 2005 received a wholly suspended sentence.[46]

4.33 Despite the comments of the Court of Appeal in *DPP v Buhagiar and Heathcote*[47] discussed at [3.21] above, in circumstances where 16% of all people sentenced for intentionally causing serious injury received a wholly suspended sentence, it seems unlikely that a rigorous 'exceptional circumstances' standard (of the sort stated in *R v Ioannou*)[48] was being applied for all serious violent offences.[49]

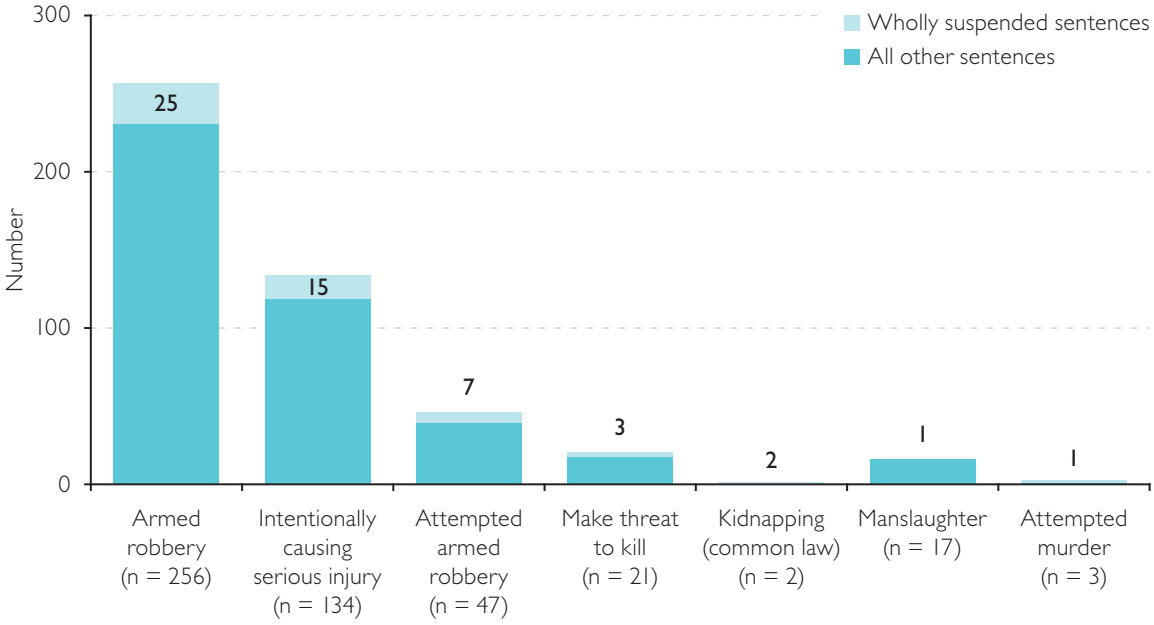
Post-amendment sentencing practices

4.34 For the two serious violent offence categories with the highest number of cases, armed robbery and intentionally causing serious injury, there was no statistically significant difference in the percentage of wholly suspended sentences imposed between the group of people who committed the offence before 1 November 2006 and those who committed the offence after this date.

4.35 Figure 8 shows the number of people sentenced between 1 November 2006 and 30 June 2009 for a section 3 serious violent offence who received a wholly suspended sentence versus some other kind of sentence.

4.36 As shown, the most common violent offences to receive a wholly suspended sentence were armed robbery followed by intentionally causing serious injury.

Figure 8: The number of people sentenced from November 2006 to June 2009 for a section 3 serious violent offence by whether they received a wholly suspended sentence or other sentencing order



46 Sentencing Advisory Council, *Sentencing Trends for Intentionally Causing Serious Injury in the Higher Courts of Victoria, 2000–01 to 2004–05*, Sentencing Snapshot 12 (2006).

47 *DPP v Buhagiar and Heathcote* [1998] 4 VR 540.

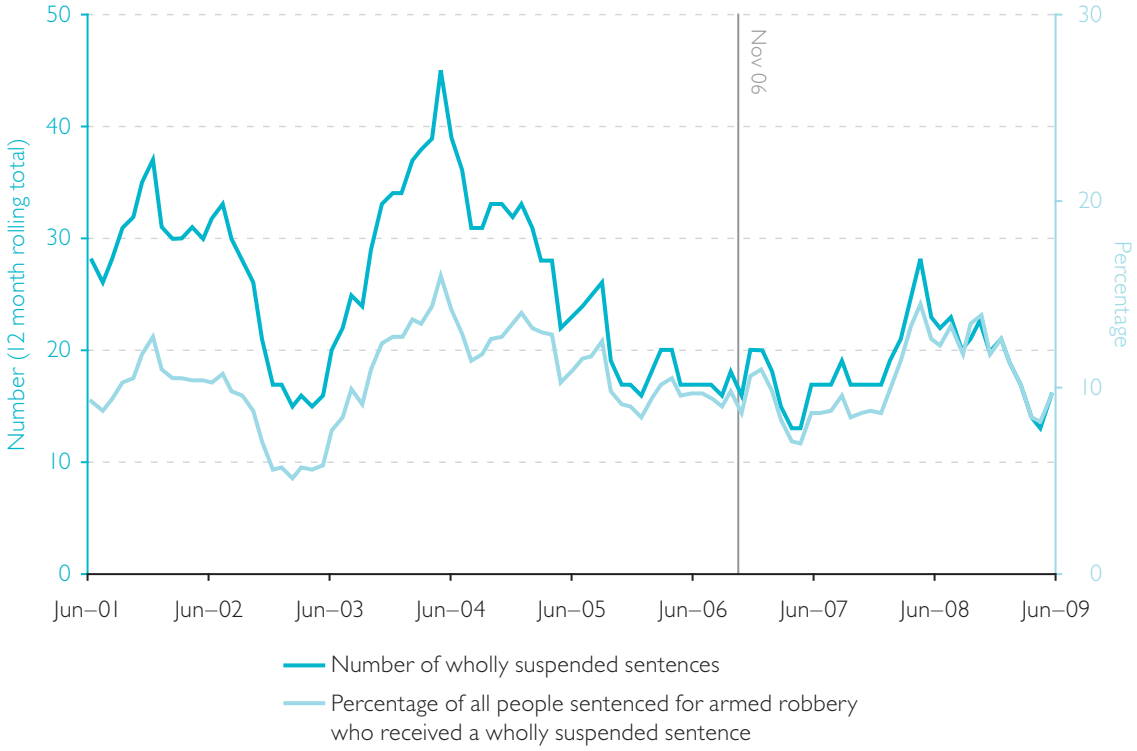
48 *R v Ioannou* [2007] VSCA 277 (Unreported, Chernov, Vincent and Redlich JJA, 4 December 2007).

49 The Council acknowledges that sexual offences contain an element of violence; distinction is drawn in this report between 'sexual' and 'violent' offences for the purposes of analysis only. See Australian Bureau of Statistics, *Australian Standard Offence Classification (ASOC)*, (2nd ed, 2008), 1234.0

Armed robbery

4.37 Figure 9 shows the number of people who received a wholly suspended sentence for armed robbery from June 2001 to June 2009.[50] The counting unit is a 12 month rolling total, which shows at any point the number of people sentenced in the past 12 months.[51]

Figure 9: The number and percentage of people who received a wholly suspended sentence for armed robbery, June 2001 to June 2009



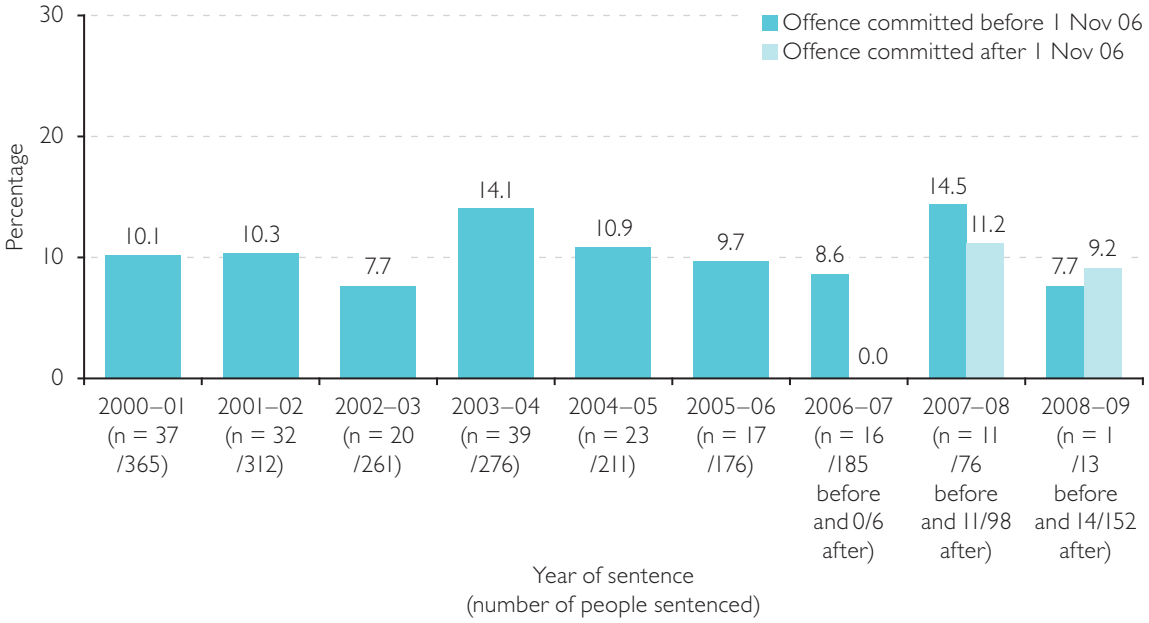
50 The vertical line in this figure marks the point at which the amendments to the *Sentencing Act 1991* (Vic), introducing the 'exceptional circumstances' test, commenced. It is important to note that the new legislation applied only to offences committed on or after 1 November 2006 and not to the offences that were committed before, but sentenced after, that date. The legislation therefore only applies to some of the sentences represented to the right of the line in Figure 9.

51 The chart also shows the percentage of all people sentenced for this offence who received a wholly suspended sentence.

4.38 From 1 November 2006 to 30 June 2009, there were 477 people sentenced for armed robbery in Victoria. Of these people, 256 had committed the offence after 1 November 2006.[52] Of these people, 25 (9.8%) received a wholly suspended sentence.

4.39 When directly comparing the percentage of people who received a wholly suspended sentence for armed robberies committed prior to 1 November 2006 with those committed after this date, no statistically significant difference was found.[53] That is, the change in legislation did not lead to any statistically significant shift in the use of wholly suspended sentences for this offence.

Figure 10: The percentage of people from November 2006 to June 2009 who received a wholly suspended sentence for armed robbery by year of sentence and whether the offence was committed after 1 November 2006



52 There were 18 cases in which the offence date could not be ascertained.

53 A phi co-efficient correlation test was used to determine if there was any statistically significant difference between the percentage of people who received a wholly suspended sentence and who had committed the offence prior to the legislative change, and the percentage of people who received a wholly suspended sentence and who had committed the offence after the legislative change. No statistically significant result was found ($p > 0.05$).

4.40 Of the 25 people who received a wholly suspended sentence for an offence committed on or after 1 November 2006, 14 sentencing remarks specifically referred to exceptional circumstances as required by section 27 of the *Sentencing Act 1991* (Vic). The exceptional circumstances that were identified in each of the 14 cases are presented in Figure 11. The cases are referred to in the figure as 'A' through 'N'.

4.41 An explanation for the characterisation of the relevant mitigating factors in Figure 11 can be found at [3.34].

4.42 'Rehabilitation or good prospects' of rehabilitation was the most commonly mentioned mitigating factor in cases that were found to have exceptional circumstances, followed by 'first offence/lack of relevant priors', then 'youth'. Again, it is important to note that no one particular mitigating factor was considered 'exceptional'; rather, judges considered that a combination of mitigating factors gave rise to the existence of exceptional circumstances. This suggests that sentencing judges are adopting a broader approach to the definition of 'exceptional circumstances' for the purposes of imposing a suspended sentence than the definition of 'exceptional circumstances' for the purposes of breach of a suspended sentence, which referred to circumstances that were 'clearly unusual, quite special [or] out of the ordinary'.[54]

Figure 11: Armed robbery: mitigating factors referred to by the sentencing judge in cases finding 'exceptional circumstances'[55]

54 See further [3.19]–[3.24].

55 The term 'Crown position as to sentence' refers to the circumstance whereby the Crown has submitted that a sentence of imprisonment is warranted, but the manner in which that sentence is to be served is left to the discretion of the judge; or the Crown has submitted that an order by the judge that the sentence be suspended would not lead to an appellable error. Although the Crown's position as to sentence has been considered mitigating by sentencing judges in cases in which it was found that there were exceptional circumstances, it is not correct to conclude from that fact that the Crown has made a submission that exceptional circumstances exist.

4.43 Of the 13 cases for armed robbery in which exceptional circumstances were found to exist, and which mentioned 'rehabilitation or good prospects' of rehabilitation as a mitigating factor, 11 of those offenders were engaged in voluntary rehabilitative treatment for their mental health issues, drug issues, or both, at the time of sentencing.

4.44 Of the 25 offenders who received a wholly suspended sentence for armed robbery, 12 were sentenced for multiple offences in the same hearing. Of these 12, seven also received a community-based order and one received a fine in combination with the wholly suspended sentence.

4.45 This may suggest that, where possible, sentencing judges are endeavouring to combine a suspended sentence with a sentence involving conditions. The Council's recent statistical report on armed robbery[56] indicated that a high proportion of these robberies are drug-related.

4.46 As described above, 'rehabilitation or good prospects' of rehabilitation are commonly highlighted in the cases receiving a suspended sentence, and combining a suspended sentence with a sentence involving conditions might allow for the judge to order combined sentences with drug treatment conditions. However, it is not always possible for a judge to combine the two sentences in this way, for example, if there is only one charge in the case. It may also not be possible to make such orders where there are multiple charges, but they are of comparable gravity (for example, if an offender committed a series of three armed robberies against similar targets in similar circumstances, it may not be possible for the judge to impose a suspended sentence for some of the charges and a community-based order for others).

4.47 In the absence of the ability to order treatment conditions—as is the case when a suspended sentence is imposed in isolation—it is possible that armed robbery offenders with drug issues will be more likely to breach their suspended sentence. The Council's statistical profile on suspended sentences released in 2007 provided an analysis of breach data for people sentenced for different offence types in the higher courts. It revealed that people who receive a wholly suspended sentence for armed robbery are more likely to breach that sentence than people given a wholly suspended sentence for other offences in the higher courts.[57]

4.48 This dilemma in sentencing an armed robbery offender with drug issues, and the apparent desire of judges to find a way to create a more appropriate mix of penalties, reflect the Council's recommendations in Part 2 of its Final Report for a more credible and coherent set of intermediate orders that would allow the judge to order a sentence that included treatment conditions (for example) and replace wholly suspended sentences.

56 Barry Woodhouse, *Sentencing for Armed Robbery: A Statistical Profile* (Sentencing Advisory Council, 2010).

57 See Turner (2007) above n 10, 19.

Attempted armed robbery

4.49 From 1 November 2006 to 30 June 2009 there were 79 people sentenced for attempted armed robbery in Victoria. Of these people, 47 had committed the offence on or after 1 November 2006. Of these people, seven received a wholly suspended sentence. Of these, the sentencing remarks for only one case referred to 'exceptional circumstances'. A case summary for this offence is presented below.

Case Summary 1

Early one morning the offender's co-accused was driving around in his car with the offender, 22. They had both been drinking. They saw a man, asleep in the back of his parked vehicle. The offender approached the victim. The victim had been asleep for a few hours but had been awoken by his dog. The offender appeared to the victim to be affected by drugs or alcohol and asked the victim if he had any money. The victim replied that he did not and the offender said, 'I've got a screwdriver, don't make me use it'. The victim believed by the way the offender was holding his right hand out, that he had a screwdriver in his hand. The offender demanded that the victim hand over his wallet. The victim said he did not have one and the offender then ran off. The victim gave chase and contacted the police and the offenders were found a short distance away.

The judge was satisfied that exceptional circumstances existed in this case in the combination of mitigating factors. The judge considered the offender's youth, his personal background (including that his father committed suicide when he was eight, and then his step-father sexually abused him when he was a child), that he was employed as a chef (with six months left to complete his three-year apprenticeship), and the offending was brief in nature and the offender had run away when resisted. The offender had a limited prior history of offending and was unlikely to reoffend. In those circumstances the judge considered it desirable to wholly suspend the sentence.

4.50 There may have been additional information discussed with the sentencing judge or submitted by counsel during the plea and in the absence of relevant statistics it is difficult to assess the degree to which such a combination of factors is clearly 'unusual or quite special or distinctly out of the ordinary' in the manner in which 'exceptional circumstances' were described in *Ioannou*.[58]

4.51 Such cases highlight the dilemma that judges face when attempting to balance different and often competing sentencing purposes with limited sentencing dispositions available to them. On the one hand, the rehabilitation of young offenders is in the community's interest, and an order that keeps a young offender out of prison and on the path of rehabilitation is to be preferred. On the other hand, where the offending is serious, it warrants appropriate denunciation and just punishment.

4.52 In accordance with the sentencing hierarchy contained in the *Sentencing Act 1991* (Vic), a suspended sentence is higher than orders such as community-based orders. In principle, this means that it should reflect the greater seriousness of an offence and should have a more denunciatory effect. However, from the perspective of many in the community, a suspended sentence that (in the absence of breach) has no effect upon the liberty of an offender—other than requiring that they meet the standard to which all members of the community are held, and not commit a further offence punishable by imprisonment—does not sufficiently denounce or punish the offender.

4.53 In the absence of appropriate intermediate orders with conditions that can be structured by the sentencing judge so as to denounce and punish the offender sufficiently, while at the same time encouraging rehabilitation, it is likely that the use of suspended sentences in such cases as the one above will continue.

58 *R v Ioannou* [2007] VSCA 277 (Unreported, Chernov, Vincent and Redlich JJA, 4 December 2007).

Intentionally causing serious injury

4.54 Figure 12 shows the number of people who received a wholly suspended sentence for intentionally causing serious injury from June 2001 to June 2009.[59] The counting unit is a 12 month rolling total, which shows at any point the number of people sentenced in the past 12 months. The chart also shows the percentage of all people sentenced for this offence who received a wholly suspended sentence.

4.55 Both the number and percentage of people who received a wholly suspended sentence for intentionally causing serious injury peaked in early 2006 before decreasing over the next three years. The number of people who received a wholly suspended sentence did not show the same extent of a decrease as that of the percentage of people due to the fact that there were slightly more people sentenced for this offence in the court in recent years.

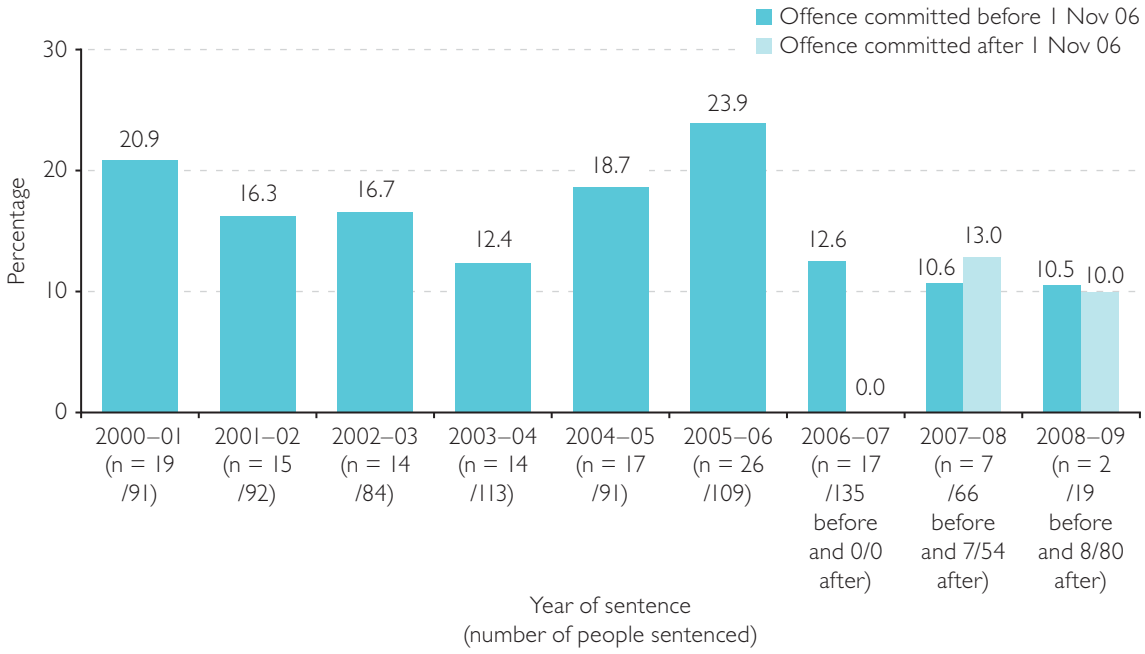
Figure 12: The number and percentage of people who received a wholly suspended sentence for intentionally causing serious injury, June 2001 to June 2009

59 The vertical line in this figure marks the point at which the amendments to the *Sentencing Act 1991* (Vic), introducing the 'exceptional circumstances' test, commenced. It is important to note that the new legislation applied only to offences committed on or after 1 November 2006 and not to the offences which were committed before, but sentenced after, that date. The legislation therefore only applies to some of the sentences represented to the right of the line in Figure 12.

4.56 From 1 November 2006 to 30 June 2009, there were 320 people sentenced for intentionally causing serious injury in Victoria. Of these people, 134 had committed the offence after 1 November 2006.[60] Of these people, 15 (11.2%) received a wholly suspended sentence.

4.57 When directly comparing the percentage of people who received a wholly suspended sentence for intentionally causing serious injury committed prior to 1 November 2006 with those committed after this date, no statistically significant difference was found.[61] That is, the change in legislation did not lead to any statistically significant shift in the use of wholly suspended sentences for this offence.

Figure 13: The percentage of people who received a wholly suspended sentence for intentionally causing serious injury by year of sentence and whether the offence was committed after 1 November 2006



60 There were 13 cases in which the offence date could not be ascertained.

61 A phi co-efficient correlation test was used to determine if there was any statistically significant difference between the percentage of people who received a wholly suspended sentence and who had committed the offence prior to the legislative change, and the percentage of people who received a wholly suspended sentence and who had committed the offence after the legislative change. No statistically significant result was found ($p > 0.05$).

4.58 Of the 15 people who received a wholly suspended sentence for an offence committed on or after 1 November 2006, 12 sentencing remarks referred to exceptional circumstances as required by section 27 of the *Sentencing Act 1991* (Vic). The exceptional circumstances identified in each of the 12 cases ('A' through 'L') are presented in Figure 14.

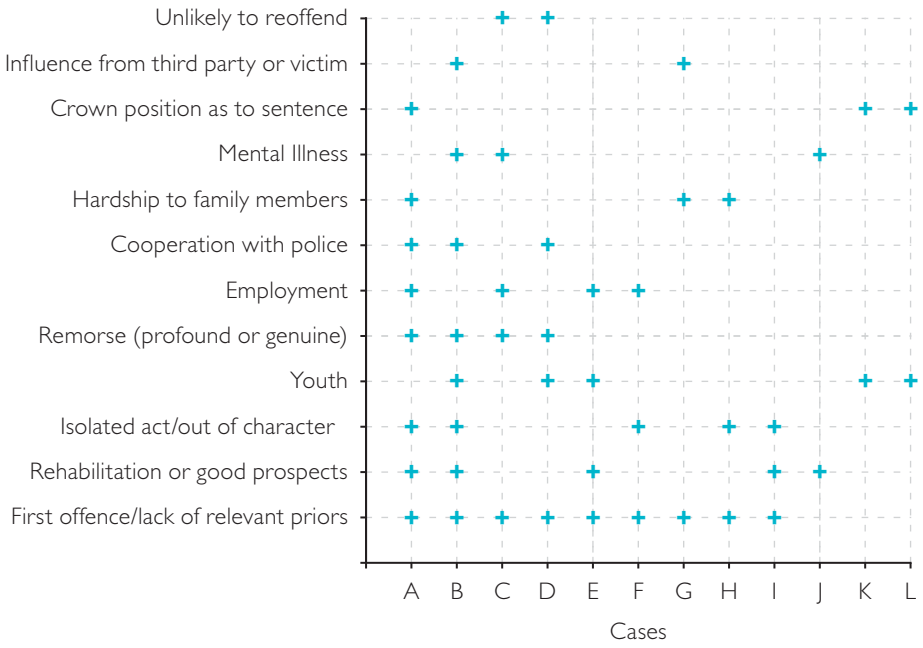
4.59 An explanation for the characterisation of the relevant mitigating factors in Figure 14 can be found at [3.34].

4.60 For intentionally causing serious injury, 'first offence/lack of relevant priors', was the most commonly mentioned mitigating factor in cases that were found to have exceptional circumstances, followed by 'rehabilitation or good prospects' of rehabilitation then 'isolated act/out of character'. This is unlike armed robbery where 'rehabilitation or good prospects' of rehabilitation was the most common.

4.61 Unlike for armed robbery, of the five cases for intentionally causing serious injury in which exceptional circumstances were found to exist, and which mentioned 'rehabilitation or good prospects' of rehabilitation as a mitigating factor, four of the cases referred to 'rehabilitation' in the sense of the offender being unlikely to reoffend, rather than actions taken by the offender to address an underlying drug or alcohol issue. Alcohol, however, was a factor contributing to the commission of the offences in three of those five cases.

4.62 Of the 15 people who received a wholly suspended sentence for intentionally causing serious injury, 10 were sentenced for multiple offences in the same hearing. Of these, two received a community-based order in combination with the wholly suspended sentence.

Figure 14: Intentionally causing serious injury: mitigating factors present in cases finding 'exceptional circumstances'



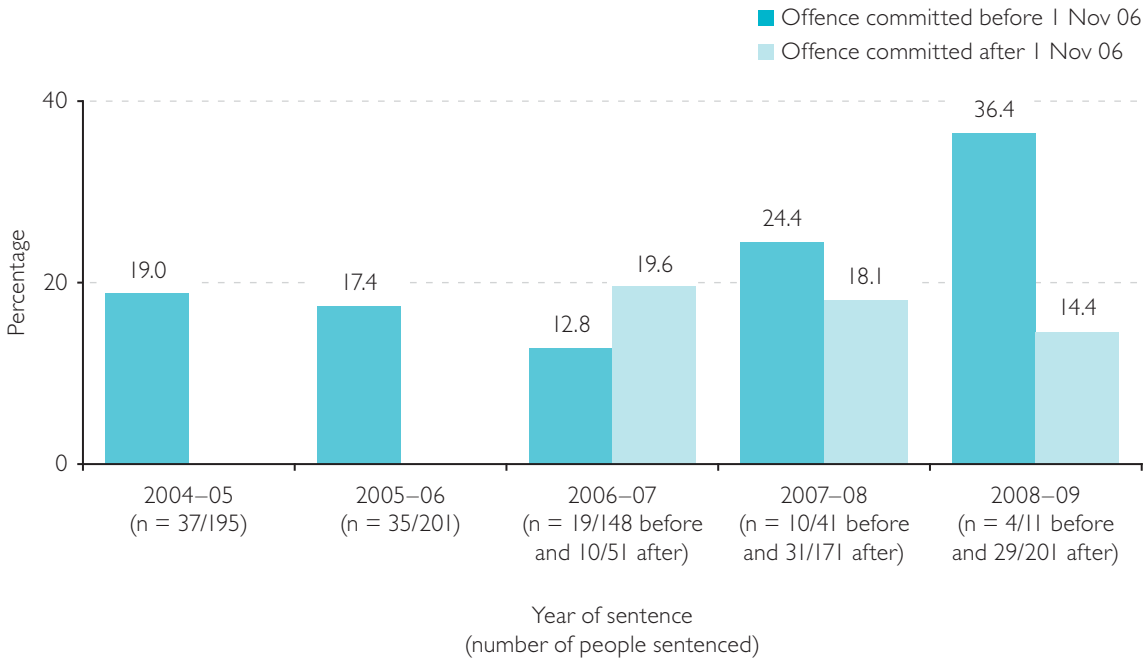
Make threat to kill

Magistrates' Court

4.63 Making a threat to kill is the only section 3 offence that is triable summarily.[62] The following analyses compare the percentage of people who received a suspended sentence for offences committed before 1 November 2006 with the percentage of people who received a suspended sentence for offences committed after that date.

4.64 When looking at the sentencing outcomes for the five years combined, a slightly lower percentage of people who committed the offence after 1 November 2006 received a wholly suspended sentence (16.5% compared to 17.6% of people who committed the offence prior to 1 November 2006). This difference, however, was not statistically significant.[63] That is, the change in legislation did not lead to any statistically significant shift in the use of wholly suspended sentences for this offence.

Figure 15: The percentage of people who received a wholly suspended sentence in the Magistrates' Court for making a threat to kill by year of sentence and whether the offence was committed after 1 November 2006[64]



62 If the Magistrates' Court considers it appropriate and the accused consents: *Criminal Procedure Act 2009* (Vic) ss 28–29.

63 A phi co-efficient correlation test was used to determine if there was any statistically significant difference between the percentage of people who received a wholly suspended sentence and who had committed the offence prior to the legislative change, and the percentage of people who received a wholly suspended sentence and who had committed the offence after the legislative change. No statistically significant result was found ($p > 0.05$).

64 Offenders who received a criminal justice diversion plan are included in the count of all people sentenced. While the criminal justice diversion plan is not a sentencing order, it does help to reflect the work of the court.

Higher Courts

4.65 From 1 November 2006 to 30 June 2009, there were 39 people sentenced in the higher courts for making a threat to kill in Victoria. Of these people, 21 had committed the offence on or after 1 November 2006. Of these people, three received a wholly suspended sentence.

4.66 Given the small number of cases in the higher courts, it is not appropriate to attempt a statistical analysis, however a qualitative analysis can be made regarding the particular circumstances of each case. The cases are disparate in nature, involving quite different offenders and offending behaviour and as a consequence, no meaningful common themes can be identified. A case summary for this offence is presented below.

Case Summary 2

For 16 years the offender and the victim had been next door neighbours and enjoyed a cordial relationship. A dispute arose due to renovations conducted by the victim while the offender was attempting to sell his house. The offender perceived that the adjoining construction debris was devaluing his property and caused an offer to purchase to fall through. The offender went to the victim's front door in an agitated state and produced a handgun, pushing it into the victim's chest. The offender then waved the gun in the victim's face and said, 'I'll kill you'.

The offender was 68 and had no relevant priors. He initially denied the incident, but entered a plea of guilty nearing trial. The offender suffered a heart attack prior to sentencing and underwent triple bypass surgery. He had a dependent wife who had significant health problems, and had moved away from the neighbour to a location near his son and grandson. The judge accepted that there were exceptional circumstances given the offender's serious cardiac history and need for ongoing medication, that imprisonment would be a great burden for the offender, his previous good character was a significant mitigating factor and his prospects of rehabilitation were likely to be very good.

Kidnapping

4.67 From 1 November 2006 to 30 June 2009 there were 15 people sentenced for kidnapping in Victoria. Of these people, two (who were co-accused) had committed the offence on or after 1 November 2006 and both received a wholly suspended sentence. A case summary of the offenders who received a wholly suspended sentence is presented below.

Case Summary 3

It was the belief of the first offender that the victim had stolen heroin from him. The first offender sought the assistance of the second offender to recover the heroin by kidnapping the victim and taking him to various locations where he was punched, kicked, struck with a plastic pipe, tied up, blindfolded and locked in the boot of the first offender's car. The victim eventually told them where the heroin was, at which point they let him go.

The offenders were 26 and 27. Neither had a significant criminal history and both had good work histories. The first offender had a dependent wife and worked as a labour hire manager for a farming business. The second offender lived and worked with his father. Both offenders were heroin users, but had engaged in drug rehabilitation prior to sentencing evidenced by urinalysis results. Both pleaded guilty at the earliest opportunity. The judge did not mention the new legislation or the requirement for 'exceptional circumstances'. He stated that he '[bore] in mind the nature and the circumstances of the offending, the matters personal to each of [the offenders], the principles of deterrence and parity, [their] early pleas of guilty entitling [them] to a discount, and [their] cooperation with the police which is consistent with remorse, as is [their] early plea of guilty'. On that basis, he sentenced the offenders to wholly suspended sentences of imprisonment.

4.68 As with the case for the offence of attempted armed robbery above, although there may have been additional information discussed with the sentencing judge or submitted by counsel during the plea, it is difficult to conclude on the face of the sentencing remarks that such a combination of circumstances are 'unusual or quite special or distinctly out of the ordinary' in the manner in which 'exceptional circumstances' were described in *Ioannou*.[65] In particular, it seems unlikely that the sentence would have been suspended if the nature of the relationship between the victim and the offenders had been different.

Manslaughter

4.69 From 1 November 2006 to 30 June 2009 there were 53 people sentenced for manslaughter in Victoria. Of these people, 17 had committed the offence on or after 1 November 2006. One offender was convicted of manslaughter as a suicide pact survivor, and received a wholly suspended sentence.[66]

4.70 That form of the offence has a lower maximum penalty than manslaughter generally, being 10 years rather than 20 years. A case summary of the one offender who received a wholly suspended sentence is presented below.

65 *R v Ioannou* [2007] VSCA 277 (Unreported, Chernov, Vincent and Redlich JJA, 4 December 2007).

66 A lesser maximum penalty of 10 years (as opposed to 20 years) is applicable where the offender is the survivor of a suicide pact, and is convicted of manslaughter under section 6B of the *Crimes Act 1958* (Vic).

Case Summary 4

The male offender, 80, pleaded guilty to the manslaughter of his wife, 85, as a survivor of a suicide pact. The offender was found unconscious, embracing his deceased wife under a doona and blankets on their bed. There was a gas bottle on the floor beside the bed with a short hose leading into the bed under the doona. A visiting healthcare worker alerted paramedics and the husband was revived. A suicide note written by the offender said, in part, '[W]e don't want to be parted or put in a home. [My wife] told me tonight there is only one way out'.

Reports presented to the court satisfied the judge that the offender was a loving and supportive husband, that his wife was in a deteriorating condition, and that the offender was under severe psychiatric, personal and emotional stress before and at the time of the offence. Prior to his wife's death the offender had developed severe anxiety, insomnia and depression. He had promised his wife that she would not 'end up in a home' and that prospect was something he 'could not bear even to think about'.

Attempted murder

4.71 From 1 November 2006 to 30 June 2009 there were 12 people sentenced for attempted murder in Victoria. Of these people, three had committed the offence on or after 1 November 2006, with one receiving a wholly suspended sentence. A case summary of the one offender who received a wholly suspended sentence is presented below.

Case Summary 5

The female offender, 75, pleaded guilty to the attempted murder of her disabled husband. The offender stabbed the victim once, in the stomach, aiming for his heart and intending to kill him. The offender then attempted to kill herself. The victim was very badly injured, and required intensive medical care over a long period before he recovered.

The victim had lived in various nursing homes since 1999 due to the loss of the use of his legs from diabetes, and this caused the offender considerable and increasing distress. The offender formed a distorted opinion of the standard of care being given to her husband, which indicated a degree of paranoia. She became distressed, and felt overwhelmed by the perception that she was unable to meet her husband's needs. The victim had often pleaded with the offender to be brought home and for the offender to take care of him but the offender could not do so. At the time of the offence, the offender was suffering from a major depressive disorder. The court held that there were exceptional circumstances, as there had been a deterioration in the offender's mental state, that the offence was an isolated act and that it would not have occurred had the offender's mental faculties not been impaired by circumstances beyond her control.

Murder

4.72 From 1 November 2006 to 30 June 2009 there were 56 people sentenced for murder in Victoria. Of these people, eight had committed the offence on or after 1 November 2006, with none receiving a wholly suspended sentence.

Sex offences

Pre-amendment sentencing practices

4.73 Prior to the Council's review, the Victorian Court of Appeal considered the use of suspended sentences for rape—and more specifically digital rape—in *R v Schubert*.[67] Justice Brooking, in rejecting the appeal against a sentence of four years' imprisonment, commented:

> Generally speaking, a digital rape should result in an immediate custodial sentence of substantial duration, and the sentencer should ensure that a substantial part of that sentence will be actually served. Of course, there are no absolute rules, but, generally speaking, notwithstanding a plea of guilty, previous good character and genuine remorse, a rapist, whether the rape is digital or of a different kind, stands in very grave danger of an immediate custodial sentence.[68]

4.74 Justice Winneke, then-President of the Victorian Court of Appeal, echoed this view, suggesting that 'there will be very few crimes of rape, digital or otherwise, which in my opinion will warrant a non-custodial sentence'.[69]

4.75 These views were later affirmed by the Chief Justice of the Supreme Court in *DPP v Fellows*.[70] Justice Phillips suggested that while the words 'in exceptional circumstances' were not used 'to describe the setting in which non-custodial sentences for rape should be imposed … in [his] opinion, *Schubert* and *Buhagiar* stand for that proposition'.[71] In *Fellows* the Court of Appeal upheld an appeal on the grounds that a sentence of three years wholly suspended for a period of three years for one count of rape was inadequate by reason of its suspension.

Sims

4.76 The Court of Appeal considered the use of suspended sentences for rape in the controversial decision of *DPP v Sims*,[72] which was the catalyst for the Council's review. In that case the offender received a wholly suspended sentence for one count of aggravated burglary, two counts of rape and one count of indecent assault. A brief summary of the facts follows:

> The offender entered the victim's apartment through an unlocked door at about 2 AM (the count of aggravated burglary). The complainant, asleep on a couch, awoke to find the offender in the act of cunnilingus upon her (the first count of rape). The victim grabbed the offender's head and pulled it away. At that point he forced a kiss upon her, placing his tongue inside her mouth (the one count of indecent assault). The victim pulled away and said 'No'. While the victim was still on the couch, the offender put his fingers into her vagina (the second count of rape). After the assault the victim remained calm, in fear of further violence, walked over and opened the front door and told the offender to leave, which, after some attempts to explain his behaviour, he finally did.

4.77 Despite the very serious nature of the offending in this case, Justice Eames (in the majority), dismissed an appeal by the Director of Public Prosecutions against the wholly suspended sentence, observing:

> As the authorities … demonstrate, in most instances a crime of rape will result in a sentence of immediate imprisonment, notwithstanding the presence of mitigating factors. But each case must be judged according to its own circumstances.[73]

67 *R v Schubert* [1999] VSCA 25 (Unreported, Winneke P, Brooking and Ormiston JJA, 23 February 1999).
68 *R v Schubert* [1999] VSCA 25 (Unreported, Winneke P, Brooking and Ormiston JJA, 23 February 1999) [16] (Brooking J).
69 Ibid [20], Winneke P.
70 *DPP v Fellows* [2002] VSCA 58 (Unreported, Phillips CJ, Phillips JA and O'Bryan AJA, 18 April 2002) [32]–[33].
71 Ibid [35].
72 *DPP v Sims* [2004] VSCA 129 (Unreported, Batt, Vincent and Eames JJA, 23 July 2004) [31].
73 Ibid [32].

4.78 It was this critical question—of whether or not the particular circumstances in the case justified the departure from a sentence of immediate imprisonment—that divided the court. Justice Batt, in the minority, remarked:

> Having considered the individual features relied on I now consider them in combination, as, naturally, they must be considered. I do not regard them when so considered as amounting to circumstances that are extraordinary, highly unusual or out of the ordinary.[74]

4.79 His Honour's analysis illustrated the common law authority that where the offence is of a serious nature, the exercise of the judge's discretion to suspend must be based upon circumstances that are exceptional. His Honour continued:

> The seriousness of aggravated burglary and rape requires general deterrence, denunciation and just punishment to be the paramount purposes to be served by a sentence for them … Whilst I accept that there are no absolutes, my assessment is that, in the absence of exceptional circumstances, a sentence which permitted a person who had raped another twice in the other's own home to avoid immediate imprisonment is 'so disproportionate to the seriousness of the crime' that it would 'shock the public conscience'.[75]

4.80 The majority of the court in *Sims*[76] did not disagree with Justice Batt's statement of the common law authority regarding the circumstances in which a sentence of imprisonment for a serious offence may be suspended, but held that, on their consideration of the facts, the sentencing judge had not erred. Justice Eames observed that, in an appeal by the Crown:

> To succeed … the Director must clearly demonstrate that it was not open to the judge to take the course he did, having regard to all of the special features of this case which, in my opinion, he carefully weighed. I am not persuaded that the judge failed to have regard to any relevant factor in this case. Nor am I persuaded that it was not open to the judge to adopt the course that he did, in the exercise of his discretion.[77]

4.81 Justice Eames also relied upon the fact that a term of imprisonment greater than three years cannot be suspended[78] in commenting upon the prosecutor's submissions in the first instance, stating:

> It is significant, in my opinion, that the prosecutor did not submit to the judge that a total effective sentence of less than three years would constitute sentencing error, as is now asserted on this appeal. The prosecutor had been fully alerted to the fact that defence counsel was seeking a suspended sentence, which meant that he was urging the judge to impose a sentence, before suspension, that was not longer than three years.[79]

4.82 As a consequence of the decision, given the very serious nature of the offending, there was significant community concern expressed over whether the availability of the judicial discretion to wholly suspend a term of imprisonment for a serious offence ought to be limited or removed altogether.

74 Ibid [21].

75 Ibid [20] (footnotes omitted).

76 *DPP v Sims* [2004] VSCA 129 (Unreported, Batt, Vincent and Eames JJA, 23 July 2004).

77 Ibid [32].

78 *Sentencing Act 1991* (Vic) s 27(2)(a).

79 *DPP v Sims* [2004] VSCA 129 (Unreported, Batt, Vincent and Eames JJA, 23 July 2004) [26].

4.83 Despite the decision in *Sims*, in its review for Part 1 of the Final Report, the Council found that between 1999–2000 and 2003–04, of the 166 people sentenced for rape, 21 received an order that did not require the offender to serve an immediate term of imprisonment or youth detention, accounting for around 13% of all people sentenced for rape over this period.[80] Of these, just under half—or 10—received wholly suspended sentences, constituting 6% of all offenders sentenced for rape over this period.[81] This suggests that, even prior to the amendments, courts were generally reluctant to use the power to wholly suspend or impose a non-custodial order for serious sexual offences, such as rape, and therefore *Sims* was not a typical case.

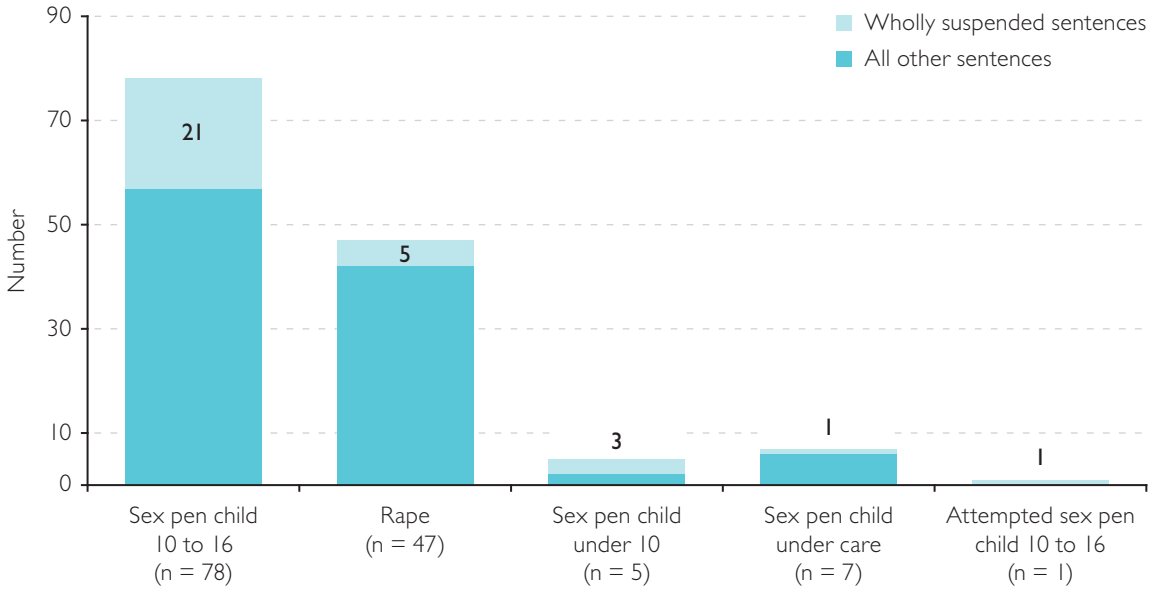
Post-amendment sentencing practices

4.84 Figure 16 shows the number of people who received either a wholly suspended sentence or a different sentencing outcome for a section 3 serious sex offence.

4.85 As shown, the most common type of sex offence to receive a wholly suspended sentence was sexual penetration with a child aged 10 to 16. As discussed below, no statistically significant difference was found when directly comparing the percentage of people who received a wholly suspended sentence for sexual penetration with a child aged 10 to 16 committed prior to 1 November 2006 with those committed after this date.

4.86 Five people sentenced for rape and three people sentenced for sexual penetration with a child aged under 10 received a wholly suspended sentence. These cases are examined later in this Chapter.

Figure 16: The number of people sentenced from November 2006 to June 2009 for a section 3 serious sex offence committed after 1 November 2006 by whether they received a wholly suspended sentence or other sentencing order



80 Sentencing Advisory Council, *Sentencing Trends for Rape in Victoria*, Sentencing Snapshot 7 (2005), Table 1. Offenders ordered to serve an immediate term of imprisonment included nine offenders sentenced to a partially suspended prison sentence and one offender sentenced to a combined custody and treatment order.

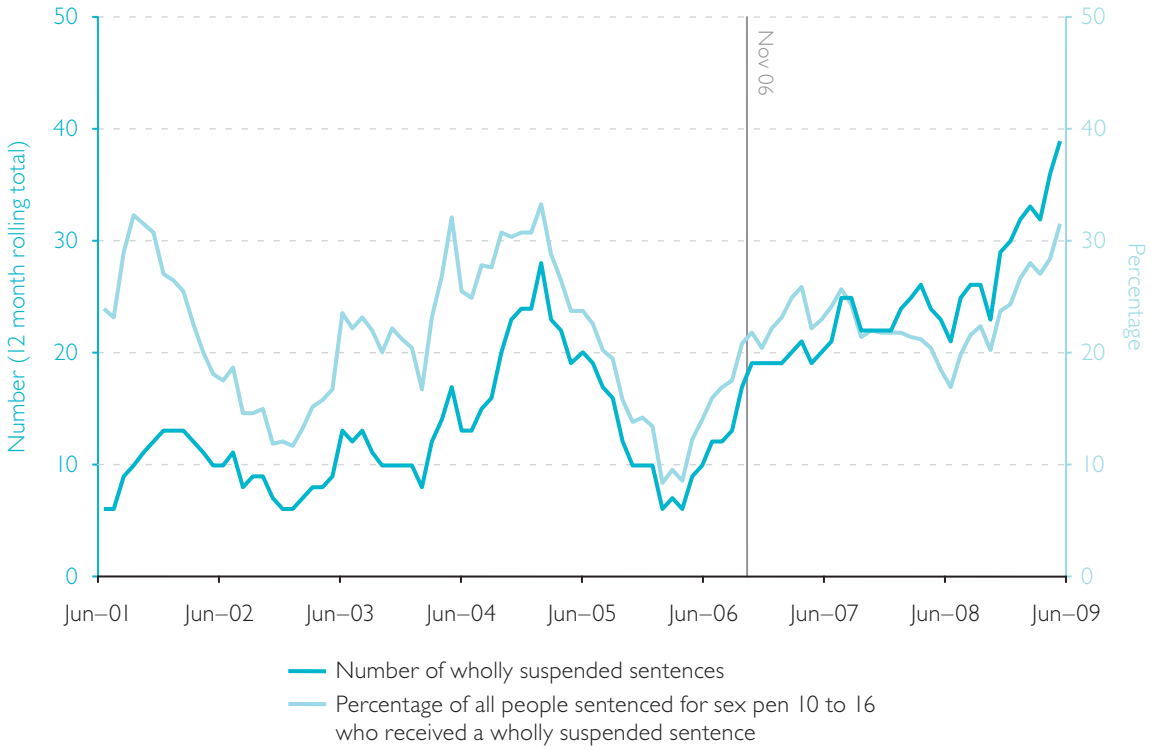
81 Ibid.

Sexual penetration with a child aged 10 to 16

4.87 Figure 17 shows the number of people who received a wholly suspended sentence for sexual penetration with a child aged 10 to 16 from June 2001 to June 2009.[82] The counting unit is a 12 month rolling total, which shows at any point the number of people sentenced in the past 12 months. The chart also shows the percentage of all people sentenced for this offence who received a wholly suspended sentence.

4.88 The number of people who received a suspended sentence for sexual penetration with a child aged 10 to 16 has increased over the past four years. The percentage of people sentenced in the higher courts for this offence has also increased during this period. However, this increase is not evident to the same extent as that of the number of people, indicating that the increase in the imposition of wholly suspended sentences is strongly due to the increased number of people sentenced for this offence.[83]

Figure 17: The number and percentage of people who received a wholly suspended sentence for sexual penetration with a child aged 10 to 16, June 2001 to June 2009



82 The vertical line in this figure marks the point at which the amendments to the *Sentencing Act 1991* (Vic), introducing the 'exceptional circumstances' test, commenced. It is important to note that the new legislation applied only to offences committed on or after 1 November 2006 and not to the offences which were committed before, but sentenced after, that date. The legislation therefore only applies to some of the sentences represented to the right of the line in Figure 17.

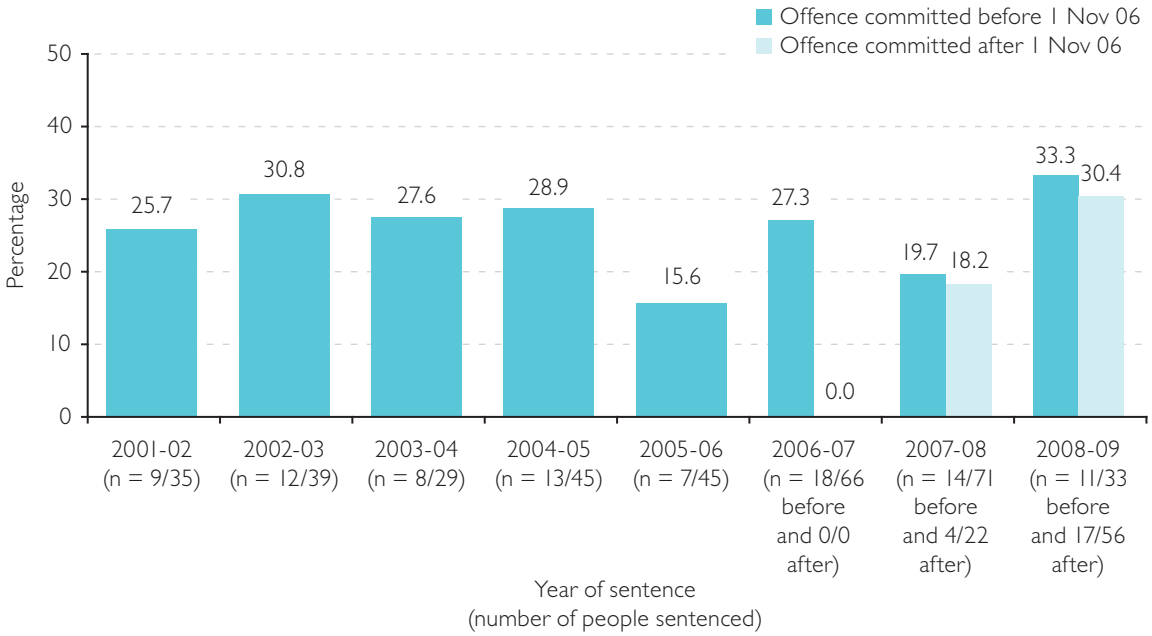
83 See footnote 45.

4.89 Figure 18 shows the percentage of people who received a wholly suspended sentence for sexual penetration with a child aged 10 to 16 before and after 1 November 2006, separated according to the date of the offending.

4.90 No statistically significant difference was found[84] when directly comparing the percentage of people who received a wholly suspended sentence for sexual penetration with a child aged 10 to 16 committed prior to 1 November 2006 with the percentage of people who received a wholly suspended sentence for offences committed after this date.

4.91 From 1 November 2006 to 30 June 2009, there were 239 people sentenced for sexual penetration with a child aged 10 to 16 in Victoria.[85] Of these people, 78 had committed the offence after 1 November 2006.[86] Twenty-one of these people received a wholly suspended sentence.

Figure 18: The percentage of people who received a wholly suspended sentence for sexual penetration with a child aged 10 to 16 by year of sentence and whether the offence was committed after 1 November 2006



84 A phi co-efficient correlation test was used to determine if there was any statistically significant difference between the percentage of people who received a wholly suspended sentence and who had committed the offence prior to the legislative change, and the percentage of people who received a wholly suspended sentence and who had committed the offence after the legislative change. No statistically significant result was found ($p > 0.05$).

85 Including the offences of sexual penetration with a child 10–16 and sexual penetration with a child 10–16 under the care, supervision or authority: ss 45(2)(b)–(c) *Crimes Act 1958* (Vic).

86 There were 11 cases in which the offence date could not be ascertained.

4.92 Of these 21 cases, 11 sentencing remarks referred to exceptional circumstances. The mitigating factors mentioned in those cases ('A' through 'K') are presented in Figure 19.

4.93 An explanation for the characterisation of the relevant mitigating factors in Figure 19 can be found at [3.34].

4.94 The most frequently mentioned mitigating factors were 'first offence/lack of relevant priors', followed by 'Crown position as to sentence'[87] and then 'rehabilitation or good prospects'.

4.95 Given the higher number of cases of sexual penetration with a child aged 10 to 16 compared to the other sex offences during the reference period, the Council undertook an analysis of the sentencing remarks for the cases that received a wholly suspended sentence for offending that occurred after 1 November 2006.

Figure 19: **Sexual penetration with a child aged 10 to 16: mitigating factors present in cases finding 'exceptional circumstances'**

87 See footnote 54.

4.96 As with the analysis of remarks for cases in which exceptional circumstances were found to exist (and were identified in the remarks) the analysis was confined to examining the mitigating factors that were present in the cases that received a wholly suspended sentence to determine if there were themes common to the cases reflecting the circumstances of the offender or the offending behaviour.

4.97 One factor that emerged from this analysis was the relationship between the victim and the offender, and how this affected the judge's assessment of the offender's culpability. In the Council's report *Maximum Penalties for Sexual Penetration with a Child Under 16*, the Council discussed the assessment of culpability in the following manner:

> The focus on some level of consent is not predicated on the idea that culpability for child sexual offences is mitigated by the conduct of the victim or that responsibility for the offence lies with the victim. Rather the lower level of culpability is based on the absence of aggravating factors—such as where the fact that the offender has deliberately sought out and violated the child or the fact that the offender has abused a position of trust.[88]

4.98 It is important to note that the relationship between the offender and the victim and the lack of significant disparity in age between the offender and the victim are not considered mitigating factors. Rather, a large disparity in age between the offender and the victim would constitute an aggravating factor.

4.99 In one-third of the 21 cases, the judge noted in the sentencing remarks that the relationship between the offender and victim was one of boyfriend/girlfriend. Of the five cases with the smallest age disparity, being three years for one case (18/15) and five years for four of the others (18/13, 18/13, 20/15 and 20/15), all of the cases involved a boyfriend/girlfriend relationship between the offender and the victim.

4.100 Despite there being some common themes between cases in which, for example, the victim and the offender are in a boyfriend/girlfriend relationship, overall the cases are quite disparate in nature. A case summary of this offence is presented below.

Case Summary 6

The male offender, 20, and the female victim, 15, were both Sudanese immigrants and refugees who had met through a support network for refugees. The offender and victim were in a boyfriend/girlfriend relationship and engaged in sexual intercourse. The victim fell pregnant and when seeking medical assistance the offending behaviour was detected and reported to police. The victim told police that the offender had been her boyfriend for about a year, that they were in love and that the sexual intercourse between the offender and the victim was consensual. The victim subsequently gave birth to a son and the three continue to live together as a family.

The offender had no relevant prior convictions; there was no coercion or grooming of the victim. The offender planned to marry the victim but had not yet done so for financial reasons and was living with the victim and their son. There was no suggestion of any predatory paedophilic behaviour, and the judge noted that, while not an excuse, the offender was apparently ignorant of the law prohibiting sexual penetration with a girl under the age of 16, as his own mother was 14 when she gave birth to him.

88 Sentencing Advisory Council, *Maximum Penalties for Sexual Penetration with a Child under 16* (2009) [5.75] (citations omitted).

Attempted sexual penetration with a child aged 10 to 16

4.101 From 1 November 2006 to 30 June 2009 there were two people sentenced for attempted sexual penetration with a child aged 10 to 16 in Victoria. One of these people had committed the offence after 1 November 2006 and received a wholly suspended sentence. A detailed case summary for this offender is presented below.

Case Summary 7

The male offender, 40, was separated from his wife and had access on the weekends to his two daughters, aged 16 and 14. The victim, 14, was a female friend of the offender's 14 year-old daughter, who had been invited by her to stay the night. The offender entered the room where the victim, the offender's daughter and another girl were sleeping. The offender got into the bed lying closest to the victim, rubbed her legs and moved his hand up under her skirt. The victim was frozen with fear and unable to get up. The offender then put his hand on top of her underwear and began rubbing her vagina until she got up and left the bedroom.

The judge found that there were circumstances of aggravation, namely that the victim was under the care, supervision or control of the offender, as the offender was the only adult in the household. The offender was an alcoholic and suffered from retinitis pigmentosa. He was declared legally blind in 1996 and was dependent on a Guide Dog for mobility. The judge was satisfied that the state of the offender's vision was such that imprisonment would weigh more heavily on him than it would of a person of normal health, and was satisfied that exceptional circumstances existed so that it was appropriate to suspend the period of imprisonment. The offender pleaded guilty to other lesser offences and so the judge was able to combine the suspended sentence with a community-based order requiring that the offender attend and receive treatment for his alcoholism.

Sexual penetration with a child under care, supervision or authority

4.102 From 1 November 2006 to 30 June 2009, there were 21 people sentenced for sexual penetration with a child under care, supervision or authority in Victoria. Of these people, seven had committed the offence after 1 November 2006.[89] Of these people, one received a wholly suspended sentence. A case summary of the one offender who received a wholly suspended sentence is presented below.

Case Summary 8

The male victim, 15, was living with the female offender, 43, and the offender's husband due to difficulties at the victim's home. The offender had a long history of anxiety and depression but had stopped taking her medication in the period leading up to the offence. On that day, the offender was behaving erratically and irrationally and argued with her husband, then later she entered the victim's bedroom and engaged in sexual intercourse for a short period of time, until discovered by her husband and ejected from their house. The offender was arrested on the street in a confused state, and assessed by a forensic officer. She was deemed unfit for a police interview and admitted to a psychiatric hospital where she was treated for 44 days.

The sentencing judge emphasised the seriousness of the offending behaviour, given the offender's position of authority, care and supervision of the victim. The judge did not expressly refer to section 27(2B), nor 'exceptional circumstances', however he took into account a large number of mitigating factors including: her guilty plea, that the offender was suffering from a diagnosed mental illness at the time of her offending, that the offending behaviour was spontaneous and showed no evidence of 'grooming', that she was supported by her husband, that there was evidence of her rehabilitation through her receiving medical treatment and taking medication for her mental illness, that she had no prior convictions and that she showed genuine remorse and shame.

89 There was one case in which the offence date could not be ascertained.

Sexual penetration with a child aged under 10

4.103 From 1 November 2006 to 30 June 2009, there were 47 people sentenced for sexual penetration with a child aged under 10 in Victoria. Of these people, five had committed the offence after 1 November 2006. Of these people, three received a wholly suspended sentence.

4.104 Despite the data collection period extending for three years, the very low number of cases in which the offence occurred after 1 November 2006 demonstrates the often extremely long lag-times for offending of this nature to be detected, investigated, prosecuted and ultimately sentenced. Unfortunately no meaningful statistical trends for the sentencing of this offence can be ascertained on the basis of such a low number of cases.

4.105 Given the low number of cases, the Council examined the particular circumstances of each case. As was found in the Council's analysis of sentencing remarks for other offences, the sentencing judges did not consider that any one individual mitigating circumstance was in itself exceptional, rather a combination of mitigating factors were referred to by the judges in cases finding 'exceptional circumstances'.

4.106 A case summary for this offence is presented below.

Case Summary 9

The male offender, 20, lived with the victim's family. While babysitting the female victim, 9, the offender digitally penetrated her, for a few minutes, twice on the one occasion.

The offender was intellectually disabled, with significant sub-average general intellectual functioning, and significant deficits in adaptive behaviour. A report of a forensic psychiatrist revealed he suffered from chronic depression and that the offending was considered opportunistic and not paedophilic. The report also described sexual abuse the offender had experienced at age six. He had shown genuine remorse, was engaged in treatment for mental health issues and rehabilitation, including undergoing a sexual offenders program. He was considered to be of a low risk of reoffending and had no prior convictions.

At the time of sentencing, the offender was 22 and so too old for a youth justice centre order, and the judge considered that he would be extraordinarily vulnerable in an adult prison, and would have 'virtually no chance of coping with it'. The judge considered that all of material containing these mitigating circumstances taken together constituted exceptional circumstances.

4.107 Amongst the three cases of this offence in which a suspended sentence was imposed, some common themes can be identified:

- all three cases involved offenders who had some form of intellectual disability, described as 'borderline intellectual capacity', 'extremely low range of intellectual functioning' or 'significant sub-average general intellectual functioning';
- in all three cases the offending behaviour was considered 'opportunistic' and had not involved 'grooming' of the victim or the establishing of relationships over a period of time; and
- in all three cases the offender had no prior convictions and was found by the judge to present a low risk of reoffending.

Maintaining a sexual relationship with a child (persistent sexual abuse)

4.108 From 1 November 2006 to 30 June 2009 there were 26 people sentenced for persistent sexual abuse in Victoria. Of these people, one committed the offence on or after 1 November 2006 and did not receive a wholly suspended sentence.

Rape

4.109 From 1 November 2006 to 30 June 2009, there were 158 people sentenced for rape in Victoria. Of these people, 47 had committed the offence after 1 November 2006.[90] Of these people, five received a wholly suspended sentence.

4.110 Given the low number of cases in this offence category, a qualitative analysis can be made regarding the particular circumstances of each case. The cases are relatively disparate in nature, however two common themes amongst them were that in all of the five cases the offender had no prior convictions and also that the offender was considered unlikely to reoffend.

4.111 In three of the five cases the offender was young and had shown remorse, as illustrated by case summary 10 below.[91]

Case Summary 10

The male offender, 19, was a friend of the female victim, 16, but wished to be her boyfriend. The victim invited the offender to her house one evening to play computer games then invited him to sleep in the same bed overnight. During the night the offender digitally penetrated the victim on two occasions. The offender later apologised to the victim and the victim's mother. A few days later, the offender went to a police station under the pretence of asking for advice about a friend, but then fully confessed to the offence.

The judge found that there were exceptional circumstances on the basis of the following factors taken in combination: the offender and the victim were both young, the offender had no prior convictions and was unlikely to reoffend, he promptly contacted the police and subsequently made full admissions, he expressed great remorse for his conduct and he pleaded guilty at the earliest opportunity.

90 There was one case in which the offence date could not be ascertained.

91 Some cases expressed more than one of the common themes illustrated by the three case summaries for this offence.

4.112 In one of the five cases, the offender was severely disabled as a result of a stroke, and was considered to be unsuitable for prison.

Case Summary 11

The male offender 64, was found guilty at trial of a rape by digital penetration of his female victim, 58, who was his neighbour and friend. The facts of the offending behaviour were not specified in the sentencing remarks, other than that the offender invited the victim to his house for coffee and that is where the offending took place.

The judge found that the offender was a severely disabled man, as a result of a massive stroke in 1996, which left him paralysed down the right side of his body. He had very great difficulty in speaking and could not walk without the aid of a walking stick and required a wheelchair outside of his home. He also had no power in, nor use of his right arm and required ongoing physical care. The judge took into consideration the offender's previous good character and held that there were exceptional circumstances given all of these factors, and given the 'discretion of mercy'.

4.113 In three[92] of the cases the offender and victim had been consuming alcohol, and the offending took place in social situations, as illustrated by the case summary below.

Case Summary 12

The male offender, 20, hosted a barbecue at his home, attended by the male victim, along with a number of other people. Both the offender and the victim had consumed a large quantity of alcohol, and after the victim had passed out on the offender's back veranda the offender removed the victim's pants and underwear and inserted a texta encased in a condom, inside his anus. The offender's actions were witnessed by other party-goers and photographs and video footage was taken with mobile phones. The following morning the victim could not recall anything when he awoke, and a few days later he reported the matter to police. The victim subsequently made a statement of 'no complaint'.

The judge was satisfied that in this case there were exceptional circumstances that warranted a suspended sentence, having regard to the circumstances of the offence, the offender's immediate remorse, his age, his lack of prior or subsequent criminal convictions or appearances, the attitude of the victim, who did not wish to pursue this matter, and the attitude of the prosecution, who conceded that a suspended sentence was not out of the sentencing range. The judge was satisfied that a wholly suspended sentence adequately manifested denunciation of the offender's conduct and would adequately deter him from future offending.

Incest

4.114 From 1 November 2006 to 30 June 2009 there were 55 people sentenced for incest in Victoria. Of these people, ten had committed the offence on or after 1 November 2006, with none receiving a wholly suspended sentence.

92 See footnote 91.

Chapter 5
Summary and conclusions

5.1 In its earlier review, the Council found that suspended sentences were overused and recommended a package of reforms to intermediate sentencing orders to provide credible alternatives. The Council recommended that no final decision be made about suspended sentences until those reforms had been implemented and reviewed.

5.2 Recognising that implementation of the recommendations would take some time, and also that there were legitimate concerns over the use of suspended sentences, particularly for serious offences, the Council recommended, as an interim measure, that the power to impose a wholly suspended sentence for a section 3 serious offence should be restricted.

5.3 The Victorian Parliament adopted this recommendation in 2006 and amended the *Sentencing Act 1991* (Vic) in order to:

- restrict the use of wholly suspended sentences for section 3 serious offences to those cases involving exceptional circumstances; and
- increase transparency in sentencing where a wholly suspended sentence is imposed for a section 3 serious offence, by requiring the sentencing judge to state the reasons for imposing a wholly suspended sentence, and cause those reasons to be recorded.

5.4 The Council's recommendations relating to the reform of intermediate orders have not been implemented as at the time of publishing this report.

5.5 In this report, the Council has examined the use of wholly suspended sentences for section 3 serious offences during the reference period of 1 November 2006 to 30 June 2009 to determine the extent to which those two legislative purposes have been achieved.

Legislative restriction upon the use of wholly suspended sentences

5.6 During the reference period there were sufficient data for offences committed after 1 November 2006 to conduct a statistical analysis of the following three offences:

- armed robbery (25 of the 256 people sentenced for this offence received a wholly suspended sentence);
- intentionally causing serious injury (15 of the 134 people sentenced for this offence received a wholly suspended sentence); and
- sexual penetration with a child aged 10 to 16 (21 of the 78 people sentenced for this offence received a wholly suspended sentence).

5.7 Of the sentences imposed after 1 November 2006 for these three offences, no statistically significant difference was found when directly comparing the percentage of offenders who received a wholly suspended sentence for offences committed prior to 1 November 2006 with the percentage of offenders who received a wholly suspended sentence for offences committed after this date. Therefore the Council concludes that there was no significant change in the use of wholly suspended sentences for those three offences since the amendments to the *Sentencing Act 1991* (Vic).

5.8 While suspended sentences have also been imposed during the reference period for section 3 serious offences other than armed robbery, intentionally causing serious injury and sexual penetration with a child aged 10 to 16, there have been too few cases to draw any meaningful conclusions on whether sentencing practices have changed for these offences.

5.9 The Director of Public Prosecutions has the power to appeal against a sentence he or she considers to be manifestly inadequate. This includes the power to appeal against a sentence that the Director does not consider should have been suspended. To date, none of the wholly suspended sentences of imprisonment for a section 3 serious offence examined by the Council during the reference period of this report has been the subject of an appeal.

5.10 For all section 3 serious offences there is difficulty in comparing the cases committed before and after the amendments. Those cases involving offences committed prior to 1 November 2006 may be dissimilar to those cases involving offences committed after 1 November 2006, but which were sentenced prior to 30 June 2009. This is because the features of those cases committed after 1 November 2006 which allowed for them to be resolved before 30 June 2009 (discussed at [4.13]–[4.16]) may create a bias in favour of the imposition of a suspended sentence. Revisiting this analysis in the future will allow for a more meaningful comparison with a larger sample of cases to provide a more solid basis for statistical analyses and will lessen the bias of atypical cases with short lag times.

Legislative requirement for greater transparency

5.11 The Council analysed the sentencing remarks for section 3 serious offences committed after the amendments to the *Sentencing Act 1991* (Vic). This analysis revealed that not all judges are referring to section 27(2B) of the *Sentencing Act 1991* (Vic) nor to the existence of 'exceptional circumstances' when imposing a wholly suspended sentence for a section 3 serious offence. However, the percentage doing so rose from 40% in the period from January 2008 to June 2008, to 72% in the period from January 2009 to June 2009.

5.12 Analysis of sentencing remarks for cases in which exceptional circumstances were found to exist after the amendments to the *Sentencing Act 1991* (Vic) revealed that sentencing judges found that exceptional circumstances existed based upon a combination of mitigating circumstances (including factors specific to the offender and to the offending behaviour) which, if present by themselves, are not 'exceptional'. This suggests that sentencing judges are adopting a broader approach to the definition of 'exceptional circumstances' for cases imposing a suspended sentence than the definition of 'exceptional circumstances' for cases regarding breach of a suspended sentence, which refers to circumstances that are 'clearly unusual, quite special [or] out of the ordinary'.[93]

5.13 Common themes in those cases in which exceptional circumstances were found included youth, no prior convictions and good prospects of rehabilitation. In such cases the finding that there are exceptional circumstances is likely to reflect concerns of sentencing judges about sending young people with no prior convictions and good prospects of rehabilitation into a prison environment for a long period. However, these cases should be seen in the context of the general sentencing trend of increasing immediate imprisonment in Victoria.

The need for credible alternatives

5.14 The Council's analysis of the data and the sentencing remarks suggests that, in the absence of credible alternatives to suspended sentences, legislative attempts to restrict the use of suspended sentences have not been successful.

5.15 In Part 2 of its Final Report on suspended sentences, the Council recommended that the final decision concerning the removal of the power to suspend should be deferred until the recommended reforms to other intermediate sentencing orders had been made and fully examined. The Council was of the opinion that allowing suspended sentences to exist alongside the reformed intermediate sentencing orders would make it possible to assess the effect of those reforms and to determine whether additional changes to the sentencing hierarchy are necessary. The Council stated:

> While the Council continues to be concerned with what we believe are fundamental flaws with the structure of suspended sentences, and the impact of suspended sentences on community confidence, we equally believe that any changes to other intermediate orders should be fully tested before any additional moves are made to restrict further sentencers' ability to make this order. To do otherwise would risk increasing the prison population substantially, resulting in a sharp rise in correctional system costs.[94]

5.16 Once they have been implemented and available to sentencers for a sufficient period of time, an assessment can be made of the operation of the reformed intermediate orders. Such a review would provide an opportunity to examine any changes in the proportions of sentencing outcomes (for example, if the proportions of suspended sentences and intermediate orders have changed) and also how the reforms to intermediate orders are operating and whether refinements or modifications are desirable (for example, whether a one-year extension to the operational term of an intensive correction order is sufficient).

5.17 The Council's interim recommendation to retain suspended sentences and restrict their use for section 3 serious offences was made on the basis that a scheme of credible alternatives to suspended sentences would be introduced. The data examined in this report suggest that in the absence of implementation of the package of reforms to intermediate orders recommended in Part 2 of the Council's Final Report, it is unlikely that sentencing practices for the imposition of suspended sentences will change.

93 See further [3.15]–[3.24].

94 See Sentencing Advisory Council (2008) above n 3 [2.107].

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