

Sentencing Sex Offences in Victoria: An Analysis of Three Sentencing Reforms

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Sentencing Sex Offences in Victoria:

An Analysis of Three Sentencing Reforms

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Warning to readers

This report contains material that may cause distress, including case studies based on real examples of sexual offending sentenced in Victorian courts.

If you have personal concerns about sexual assault, you can contact the National Sexual Assault, Domestic Family Violence Counselling Service, available 24 hours a day, seven days a week, on 1800RESPECT (1800 737 732) or on web chat at 1800respect.org.au.

A note on terminology

The descriptions of various sex offences in this report often characterise the relevant conduct (for example, incest) as being committed 'with' a specific complainant (for example, incest *with* a child). This does not imply that the complainant consented to, or was a willing participant in, the conduct. Rather, this terminology is used to indicate that the conduct necessarily involved the physical presence and participation of the complainant, including in circumstances where the offender caused the complainant to sexually penetrate, touch or perform an indecent act with the offender or another person.*

* *SLJ v The Queen* [2013] VSCA 193 (31 July 2013) [14], recently cited with approval in *Freedman (a pseudonym) v The Queen* [2020] VSCA 287 (18 November 2020) [4].

Executive summary

Evidence over the last decade indicates a perception that sex offences are sentenced too leniently in Victoria. Past research suggests that the community views sentencing practices for sex offences as being too low. Judicial commentary indicates that those same sentencing practices are inadequate and do not reflect the seriousness of the offences. And multiple legislative reforms have aimed to make prison sentences longer and mandatory.

In that context, this research has two aims:

1. to determine whether there were any changes in how different types of sex offences were sentenced in Victoria in the decade from 2010 to 2019 (the reference period); and
2. if there were any changes, to determine whether they were influenced by three sentencing reforms.

Overall, little has changed in the number of sex offences sentenced in Victoria each year or the sentence types imposed. However, some offences – particularly rape, incest, child sexual penetration and child sexual assault – received noticeably longer prison sentences by the end of the reference period, especially in 2019. The sentencing reforms, particularly standard sentences, seem to be at least partly responsible.

The three sentencing reforms

As at 20 March 2017, some serious sex offences were classified as *Category 1 offences*. This classification requires courts to impose a term of imprisonment.

As at 1 February 2018, some serious sex offences were classified as *standard sentence offences*. This classification provides courts with numerical guidance about a sentence that reflects the mid-range of objective seriousness, and prohibits courts from taking past sentencing practices into account.

Finally, the various *Dalgliesh* decisions by the High Court and the Victorian Court of Appeal held that sentencing practices for incest were inappropriately low and required immediate rectification.

Changes in sentencing practices

In analysing the effect of these reforms, this report distinguishes between certain categories of sex offences. Below are the key findings in relation to each category.

Rape offences

The number of rape offences recorded by police each year almost doubled between 2010 and 2019 (from 1,577 to 2,935), but the number of charges sentenced each year did not change significantly (from 98 to 116). During the reference period, of the 491 offenders sentenced for rape contrary to section 38 of the *Crimes Act 1958* (Vic), 33 received a sentence other than adult or youth detention. The average prison sentence for rape increased from about 5 years to 6 years in 2017 and has remained stable since then. This was possibly a result of the Court of Appeal's 2017 judgment in *Shrestha v The Queen* calling for an increase in sentencing of digital rape offences. The average prison sentence for the 19 standard sentence offences of rape sentenced in 2019 (nearly 7 years) was longer than the average prison sentence for the 75 charges that were not standard sentence offences (5 years and 8 months).

Sexual assault offences

Between 2010 and 2019, the number of sexual assault offences recorded by police each year more than doubled (from 1,310 to 3,049). The number of sentenced sexual assault offences also increased (in the Magistrates' Court), but it was nowhere near that magnitude (from about 200 to 300). The rate of imprisonment was stable, but it varied by court level (80% in the higher courts and 22% in the Magistrates' Court). By the end of the reference period, a greater proportion of charges in the higher courts were receiving community correction orders, with a corresponding decrease in the use of suspended sentences. There was a slight increase in the average lengths of prison sentences in the higher courts that cannot be explained by any of the three sentencing reforms because none of them applied to sexual assault offences against adults.

Incest offences

The number of incest offences recorded by police changed very little between 2010 and 2019 (about 500 each year). Neither did the number of charges sentenced change much (about 110 each year). The sentence types imposed for incest offences against children were very stable, with just one person receiving a sentence other than an immediate custodial sentence for incest with a child aged under 18. There were, though, significant changes to the *lengths* of prison sentences imposed for incest offences against children. In 2016, the average charge-level prison sentence increased from about 4 years to 5 years, and it increased again to almost 7 years in 2019. The 2019 increase, in particular, seems to be attributable to a combination of factors, including an anomalous high-volume case of especial seriousness, the new-found ability to charge incest as a course of conduct offence, the introduction of standard sentence legislation, and the various *Dalgliesh* decisions.

Child sexual penetration offences

The number of sexual penetration offences against children aged under 16 recorded by police fluctuated between 2010 and 2019 (between 928 and 1,505 offences), as did the number of sentenced charges (between 124 and 321). Most of the sentenced offences (78%) involved children aged 10/12 to 15 years, while the remaining 22% involved children aged under 10/12 years. All but 13 charges were sentenced in the higher courts. The rate of immediate custodial sentences remained stable for offences against children aged under 10/12 years (88%), but it increased significantly in 2019 for offences against children aged 10/12 to 15 years (from 65% to 82%). This could be due to the increase in the maximum penalty from 10 to 15 years' imprisonment for the offence when committed against a child not under the offender's care, supervision or authority. The average prison sentences for child sexual penetration offences increased significantly during the reference period, both for offences against children aged under 10/12 (from about 4 years to 5.5 years) and for offences against children aged 10/12 to 15 (from about 2 years to 3 years).

Child sexual assault offences

Between 2010 and 2019, 21,480 child sexual assault offences were recorded by police, with the yearly number doubling from 1,440 to 2,820 (by 2016) and then decreasing to 1,819 (by 2019). About 500 charges were sentenced each year, most of which (67%) were sentenced in the higher courts. The rate of immediate custodial sentences remained steady in the higher courts (about 85%), while the rate increased from 30% to 51% in the Magistrates' Court. Stakeholders suggested that this could be due to jurisdiction selection, with an increase in serious cases prosecuted in the summary jurisdiction than previously.

The average lengths of prison sentences showed no statistically significant trend, though there was a notable increase in the higher courts in 2019 (from 16 months to 20 months). That increase was partly, but not entirely, influenced by the new four-year standard sentence for this offence.

Persistent sexual abuse of a child offences

During the reference period, 134 persistent sexual abuse of a child offences were recorded by police, and 143 charges were sentenced. Of the 123 offenders sentenced for this offence, 10 received sentences other than adult or youth detention. In those cases, the offending tended to be less predatory instances of young offenders (aged 17 to 22) with children aged 13 to 15. No statistically significant change was shown in the length of prison sentences for this offence, nor were any charges sentenced as standard sentence offences.

Key findings

Based on the data, the following key findings are apparent:

- while the number of police-recorded sex offences against *children* increased during the reference period (25%), the number of recorded sex offences against *adults* more than doubled (increasing by 107%);
- despite this significant increase in *recorded* sex offences (63%), the number of *sentenced* sex offences actually decreased slightly (–8%), indicative of an increasing attrition rate between offences being recorded and offences being sentenced;
- the majority of sentenced sex offences in Victoria were committed against children rather than against adults (at least 55% of offences, and probably closer to 64% given that most incest offending involves child victims);
- the sentence *types* imposed for sex offences changed very little, the main exception being a steady increase in the rate of immediate custodial sentences in the Magistrates' Court for child sexual assaults (from 23% to 40%);
- average prison sentences were longer for most standard sentence sex offences (rape, incest, child sexual penetration offences and child sexual assault) by the end of the reference period;
- the average prison sentence for adult sexual assault offences, though not standard sentence offences, also has increased (in the higher courts) since 2016; and
- the offence type with the greatest shift in sentence lengths (incest) was also the offence type subject to the most reform: the combination of its classification as a standard sentence offence, the various *Dalglish* decisions, and the ability to charge incest as a course of conduct offence together resulted in notably longer prison sentences, particularly in 2019.

The effect of the three sentencing reforms

Because Category 1 offence classification is a mandatory sentencing scheme, it will invariably achieve its intended effect of increasing the rate of imprisonment for relevant offences, particularly as more sentenced offences will have been committed post 20 March 2017. A review of cases receiving non-custodial sentences for offending prior to that date, though, raises genuine questions about whether a reform designed to prevent undue leniency in the sentencing of serious sex offenders might also result in the detention of people who may have otherwise warranted a more merciful sentence.

The introduction of standard sentence offence classification appears to have had a tangible effect on the length of prison sentences imposed, as intended. The average prison sentence for relevant offences was uniformly longer when that classification did apply than when it did not.

Finally, while it is difficult to disentangle the role of the various *Dalglish* decisions in increasing sentence lengths for incest with a child, stepchild or lineal descendant, sentences for these offences were longer in 2019, even excluding standard sentence offences and an anomalous case. Judicial commentary also shows that courts are very much alive to the implications of those decisions.

In sum, each of the three sentencing reforms appears to have influenced sentencing practices for sex offences. There does, though, also seem to be a more general increase in the severity of sentences for sex offences, particularly against children. This could be attributable not to law reform, but to changing community expectations about, and judicial understandings of, the effect of sex offending on victims.

1. Introduction

- 1.1 Laws related to sex offences in Victoria have undergone significant reform in recent decades. Much of this reform has been driven by an increasing awareness of the prevalence and seriousness of child sexual abuse, family violence and gendered violence outside the home. This report focuses on three sentencing reforms that have tried to alter sentencing practices, in particular, increasing the use and duration of prison sentences, for certain sex offences in Victoria.

Aims of this report

- 1.2 This report has two aims. The first is to identify whether there was any change in how certain sex offences were sentenced in Victoria in the 10 years to 2019. The second is to determine, if there were changes in sentencing practices, whether those changes might have been influenced by reforms designed to increase both the rate and the length of prison sentences for certain offences. This involves two legislative reforms (Category 1 offence classification and standard sentence offence classification) and one common law reform (the various *Dalgliesh* decisions).

Which sex offences are analysed?

- 1.3 This report analyses *contact* sex offences (or *assaultive* sex offences¹), which involve 'actual physical contact between the victim and offender for the purpose of achieving sexual gratification [including] penetrative ... and non-penetrative acts'.² None of the three sentencing reforms analysed in this report apply to non-contact sex offences. The report also includes historical (repealed) versions of those offences,³ but not their inchoate equivalents.⁴ It is also primarily concerned with *sentenced* sex offences: there is a known high attrition rate between actual sex offences, sex offences that are reported to police, sex offences that are prosecuted, and sex offences that are *successfully* prosecuted and sentenced.⁵ In Victoria, courts are required to have regard to the significant under-reporting of sex offences, their high incidence, and the over-representation of female and child victims and victims with cognitive impairments.⁶

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1. The third edition of the Australian and New Zealand Standard Offence Classification (ANZSOC) classifies contact sex offences as assaultive sex offences in category 031: Australian Bureau of Statistics, cat no. 1234.0, *Australian and New Zealand Standard Offence Classification (ANZSOC)* (2011). ANZSOC aims 'to provide a uniform national statistical framework for classifying criminal behaviour in the production and analysis of crime and justice statistics': *ibid*.
 2. Hayley Boxall and Georgina Fuller, *Brief Review of Contemporary Sexual Offences and Child Sexual Abuse Legislation in Australia: 2015 Update* (2016) 3. It also includes instances where the offender caused physical contact with the victim and a third person.
 3. Sex offence legislation in Victoria has changed many times since the enactment of the *Crimes Act 1958* (Vic), sometimes in minor ways, other times more comprehensively. See, for example, two legislative instruments passed in 1991 following recommendations by the then Law Reform Commission of Victoria: *Crimes (Sexual Offences) Act 1991* (Vic); *Crimes (Rape) Act 1991* (Vic); Law Reform Commission of Victoria, *Rape and Allied Offences: Substantive Aspects*, Report no. 7 (1987); Law Reform Commission of Victoria, *Sexual Offences Against People with Impaired Mental Functioning*, Report no. 15 (1988); Law Reform Commission of Victoria, *Sexual Offences Against Children*, Report no. 18 (1988); Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure, Interim Report*, Report no. 42 (1991).
 4. Inchoate offences are preliminary offences such as attempt, conspiracy or incitement. These are excluded because relatively few of these offences were sentenced and their maximum penalties are different from their substantive counterparts.
 5. See, for example, Sentencing Advisory Council, *Sentencing for Sexual Penetration Offences: A Statistical Report* (2009) 3 (finding that just over 1% of actual sexual offending and 8% of reported sexual offending were successfully prosecuted); Melanie Millsteed and Cleave McDonald, *Attrition of Sexual Offence Incidents Across the Victorian Criminal Justice System* (2017) 9 (finding that between 9% and 17% of recorded sex offences in 2009 and 2010 were successfully prosecuted); Judith Cashmore et al., 'Fourteen-Year Trends in the Criminal Justice Response to Child Sexual Abuse Reports in New South Wales' (2020) 25(1) *Child Maltreatment* 85, 85 (finding that 12% of child sex offences reported to police resulted in a conviction); Jacqueline Fitzgerald, *The Attrition of Sexual Offences from the New South Wales Criminal Justice System*, Crime and Justice Bulletin no. 92 (2006) 1 (suggesting that about 10% of reported sex offences are successfully prosecuted).
 6. *Crimes Act 1958* (Vic) s 37B, as inserted by *Crimes (Sexual Offences) Act 2006* (Vic) s 5.

- 1.4 This report discusses six categories of contact sex offences:⁷
1. rape offences;⁸
 2. sexual assault offences;⁹
 3. incest offences (against both adults and children);
 4. child sexual penetration offences;
 5. child sexual assault offences; and
 6. persistent sexual abuse of a child offences.
- 1.5 Factually, these offence types overlap in some circumstances (for instance, incest usually involves sexual penetration with a child), but allocating specific offences into these categories helps frame the analysis in this report.

Prior research on sentencing of sex offences

- 1.6 The Council has previously undertaken extensive research on the sentencing of sex offences:
- in 2009, the Council published multiple reports on sentencing for sexual penetration with a child aged under 16.¹⁰ To address the perceived inadequacy of sentencing practices for that offence, the Council recommended against increasing the maximum penalty and instead recommended utilising the guideline judgment provisions of the *Sentencing Act 1991* (Vic);¹¹
 - in 2012, the Council found that the community was 'united' in their view that two of the most serious offence types were *rape* and *child sex offences*, especially those involving younger children; and¹²
 - in 2016, the Council published a report on sentencing for sexual penetration with a child aged under 12.¹³ The Council concluded that sentencing practices for this offence were too constrained and would benefit from formal guidance, particularly through a guideline judgment about sex offences against children.¹⁴
- 1.7 The Council also publishes biennial Sentencing Snapshots of outcomes for certain sex offences sentenced in the higher courts over a five-year period.¹⁵

7. In addition to these categories, Appendix 4 presents data on offences against persons with cognitive impairments. However, due to the low number of sentenced charges of offences against persons with cognitive impairments, and given that none of the mentioned reforms directly affected those offences, they are not the subject of substantive analysis.

8. While sentenced rape offences predominantly involve adult victims, this is not always the case: see, for example, Sentencing Advisory Council, *Sentencing of Offenders: Sexual Penetration with a Child Under 12* (2016) 61–62; *R v Doo* [2010] VSC 325 (18 June 2010).

9. While sexual assault offences predominantly involve adult victims, this is not always the case as they can also involve children aged 16 or 17 who are not captured by child sexual assault offences: see, for example, *DPP v Parker (A Pseudonym)* [2015] VCC 1903 (17 December 2015); *DPP v Jordan (A Pseudonym)* [2015] VCC 1239 (3 September 2015).

10. Sentencing Advisory Council, *Maximum Penalties for Sexual Penetration with a Child Under 16: Consultation Paper* (2009); Sentencing Advisory Council (2009), above n 5; Sentencing Advisory Council, *Maximum Penalties for Sexual Penetration with a Child Under 16: Report* (2009).

11. Sentencing Advisory Council (2009), above n 10, xii, 68–69. To date, there has been just one guideline judgment in Victoria since the provisions came into effect in July 2004. It related to the appropriate use of community correction orders: *Boulton & Ors v The Queen* [2014] VSCA 342 (22 December 2014).

12. Sentencing Advisory Council, *Community Attitudes to Offence Seriousness* (2012) v, 30, 32, 41, 46, 49, 69.

13. Sentencing Advisory Council (2016), above n 8.

14. *Ibid* xiv, 63–64.

15. Those offences include incest, indecent act with a child aged under 16 (and the newer offences of sexual assault of a child aged under 16 and sexual activity in the presence of a child aged under 16), rape, sexual penetration with a child aged under 12, sexual penetration with a child aged 12 to 15, sexual assault, and persistent sexual abuse of a child aged under 16.

- I.8 In 2015, the Tasmanian Sentencing Advisory Council found that sentencing practices for serious sex offences did not accord with public expectations and recommended exploring the use of guideline judgments as a way of providing for a 'measured increase in sentencing for sex offences in appropriate cases'.¹⁶ In 2018, the Tasmanian Sentencing Advisory Council found that 'sentencing for sexual offences involving children in the Supreme Court has clearly increased,' and noted that 'there is scope to impose longer sentences' within their legal frameworks.¹⁷
- I.9 Over the last decade, researchers investigating public attitudes to sentencing in Tasmania and Victoria¹⁸ have found that the offence type for which the community is most likely to impose a more severe sentence than the judge was sex offences (45%),¹⁹ especially against children aged under 12 (63%).²⁰ Further, even after participating in the research, between 70% (Tasmania) and 78% (Victoria) of participants considered sentencing for sex offences to be too lenient.²¹
- I.10 In summary, research has consistently suggested a need to increase sentence lengths for sex offences, particularly child sex offences, and to expand the range of sentences imposed to better distinguish and account for especially serious offending. It has also suggested that formal guidance through a guideline judgment or similar mechanism could be a useful means of doing so.

Report structure

- I.11 Chapter 2 of this report provides an overview of the three sentencing reforms, including some general guidance provided by the courts as to how the reforms should apply. Chapters 3 to 8 then each focus on a category of sex offence, summarising how many offences were recorded and sentenced during the reference period, the sentence types imposed for those offences and the duration of prison sentences at both the charge level and the case level for the most prevalent offences within each category. Chapter 9, the final chapter of this report, provides some concluding remarks arising out of that analysis.

16. Tasmanian Sentencing Advisory Council, *Sex Offences Sentencing: Final Report* (2015) xi, 80, 83–85.

17. Tasmanian Sentencing Advisory Council, *Sentencing for Serious Sex Offences Against Children: Research Paper 3* (2018) v, 37–38.

18. For a summary of this research, see Sentencing Advisory Council, *Public Opinion About Sentencing: A Research Overview* (2018); Sentencing Advisory Council, *Is Sentencing in Victoria Lenient? Key Findings of the Victorian Jury Sentencing Study* (2018).

19. Kate Warner et al., *Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study*, Trends & Issues in Crime and Criminal Justice no. 407 (2011) 4; Kate Warner et al., *Jury Sentencing Survey*, Report to the Criminology Research Council (2010) 49.

20. Kate Warner et al., 'Measuring Jurors' Views on Sentencing: Results from the Second Australian Jury Sentencing Study' (2017) 19(2) *Punishment & Society* 180, 194.

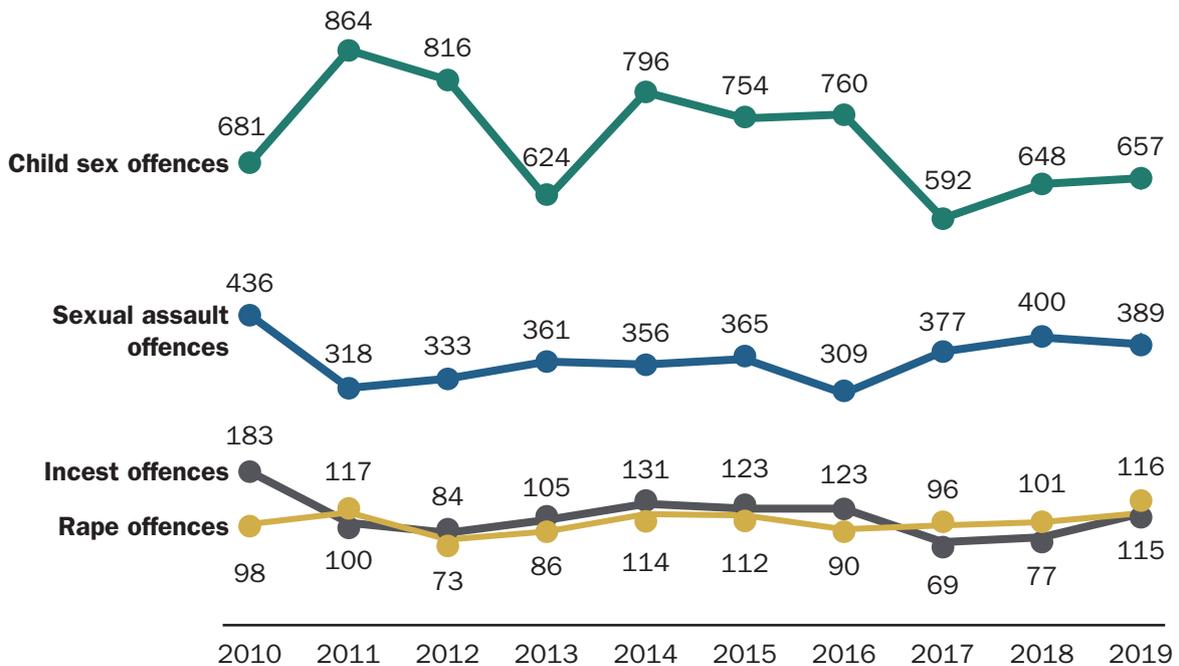
21. Kate Warner and Julia Davis, 'Using Jurors to Explore Public Attitudes to Sentencing' (2012) 52(1) *British Journal of Criminology* 93, 100; Warner et al. (2010), above n 19, 63, 78; Warner et al. (2017), above n 20, 195. The results of the related National Jury Sex Offence Sentencing Study are yet to be released: Kate Warner, 'Are Courts Soft on Crime? Lessons from the Victorian Jury Sentencing Study' (Law Oration 2018, Victorian Law Foundation, Supreme Court of Victoria, 22 August 2018) 1; Kate Warner, 'The Australian National Jury Sex Offence Sentencing Study' (2014) 11(4) *The Judicial Review: Selected Conference Papers: Journal of the Judicial Commission of New South Wales* 459; Lorana Bartels et al., 'National Research with Jurors on Sentences for Sexual Offenders' (2014) 26(2) *Judicial Officers' Bulletin* 9.

A high-level overview

1.12 Between 2010 and 2019, 14,886 contact sex offences were sentenced in 5,527 cases in Victoria (approximately 1,500 charges per year). Almost all of the 5,225 offenders sentenced were male (97%);²² only 132 were female. Many sentenced offences were the historical offence of indecent assault in effect prior to 1991. That offence (and therefore its associated data) did not distinguish between adult and child victims.²³ Because this report analyses offences against adults and children separately, 1,888 sentenced charges of that offence are excluded from the analysis in this report. Of the remaining 12,998 charges, more than half (55%) were child sex offences (Figure 1). That figure is probably closer to 64% given that almost all incest offences are committed against child victims.



Figure 1: Number of contact sex offence charges sentenced in Victoria, by year (12,998 charges)²⁴



22. This is consistent with Australia-wide data: Australian Institute of Health and Welfare, *Sexual Assault in Australia* (2020) 1, 8: 'During 2018–19, nearly all (97%) of sexual assault offenders recorded by police were male'.

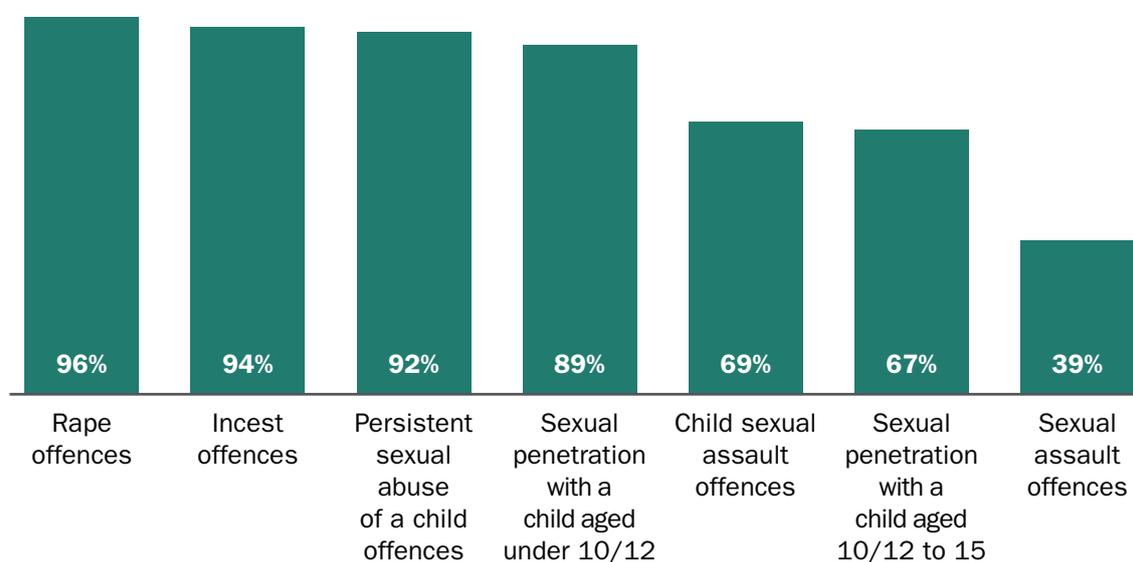
23. It was not until 1991 that the *Crimes (Sexual Offences) Act 1991* (Vic) separately criminalised indecent acts with children aged under 16 years from indecent assaults of anyone aged 16 years and over.

24. Figure 1 does not include the 49 sex offences against persons with cognitive impairments. For an overview of those offences, see Appendices 3 and 4.

How many sex offences received immediate custodial sentences?

I.13 Figure 2 shows the rate at which sex offence charges received immediate custodial sentences by offence type.²⁵ The offence types most likely to receive an immediate custodial sentence were rape offences, incest offences, persistent sexual abuse of a child offences and sexual penetration with a child aged under 10/12 offences. Note, though, that the category of incest offences includes incest with a parent or sibling, which carry much lower maximum penalties than incest with a child, stepchild or lineal descendant. In total, the 6% of incest charges receiving sentences other than an immediate custodial sentence involved (with one exception) incest with a parent or sibling, or a handful of charges of incest with a child aged over 18.

Figure 2: Rate of immediate custodial sentences imposed on charges of certain types of sex offences in Victoria, 2010 to 2019

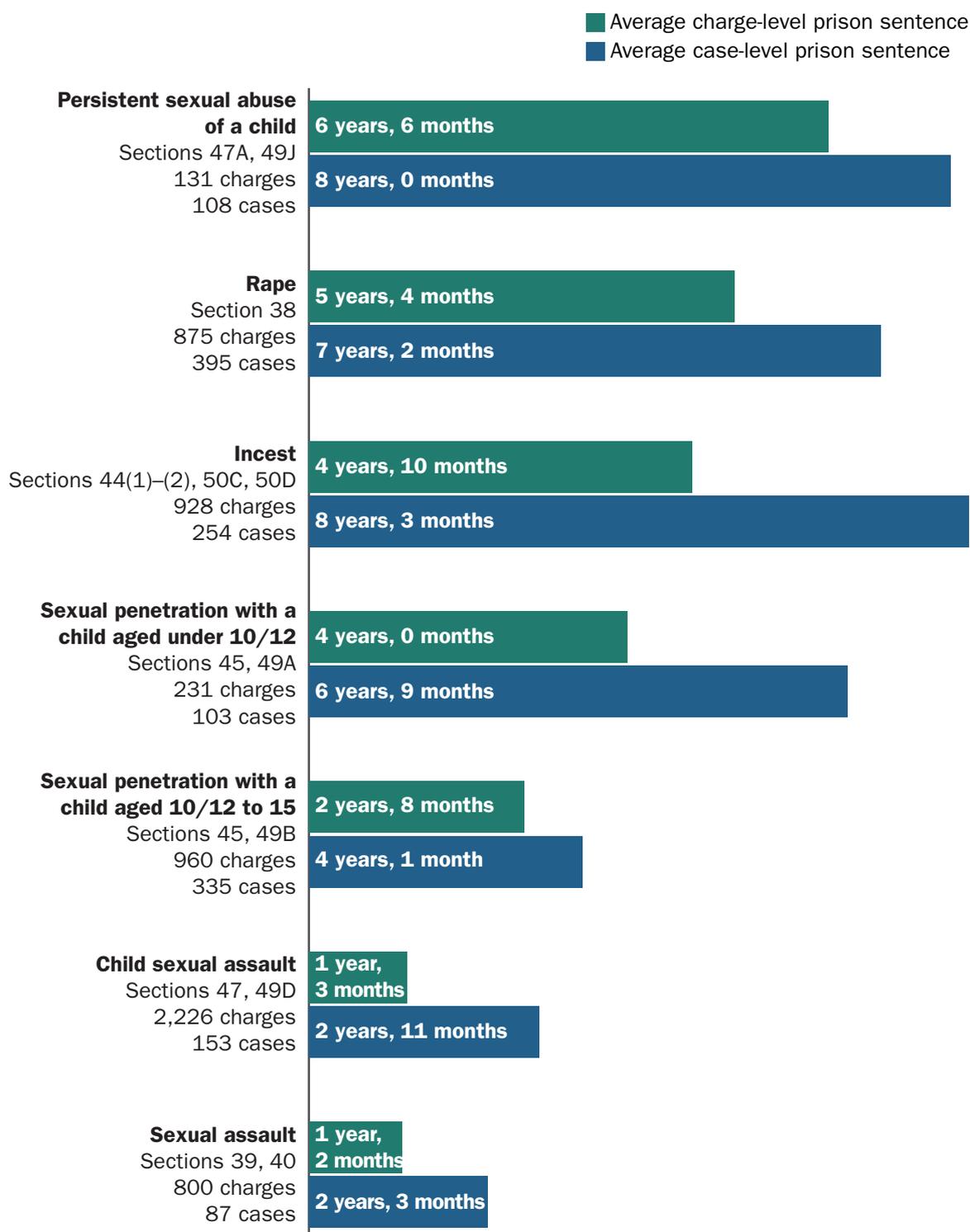


How long were prison sentences for sex offences?

I.14 Figure 3 (page 6) shows the average lengths of prison sentences imposed between 2010 and 2019 in the higher courts for sex offences, but only for the most common (and contemporary) versions of offences in each category (for example, rape contrary to section 38 of the *Crimes Act 1958* (Vic)). It does not include historical versions of offences in each category. Historical offences almost always carry lower maximum penalties, making the lengths of prison sentences imposed for those offences much less comparable to their contemporary counterparts. Average charge-level prison sentence lengths are based on all non-aggregate sentences of imprisonment imposed for relevant offences, while average case-level prison sentence lengths are based on cases in which the relevant offence was the principal proven offence in the case. Persistent sexual abuse of a child was the offence type receiving the longest average charge-level prison sentence and second-longest average case-level prison sentence. This is likely a product of the offending being inherently a course of conduct committed against children that is typically penetrative in nature. Non-penetrative sex offences against both children and adults had the lowest average prison sentences.

25. In this report, *immediate custodial sentences* include any disposition with an actual custodial component: imprisonment, youth detention, combined orders of imprisonment and a community correction order, and partially suspended sentences (see glossary).

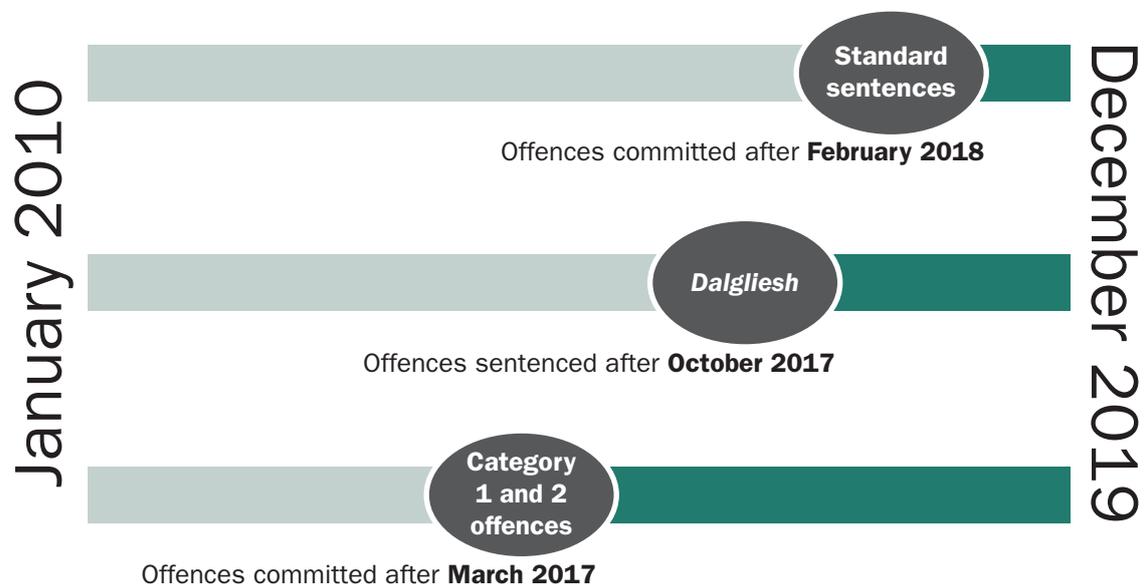
Figure 3: Average prison sentences (in years and months) imposed on charges and cases for certain types of sex offences in the higher courts in Victoria, by year



2. The three sentencing reforms

- 2.1 The three sentencing reforms analysed in this report came into effect at different times in 2017 and 2018. First, certain offences were classified as Category 1 offences if they were committed and sentenced on or after 20 March 2017. Second, the High Court delivered its landmark judgment in *Dalgliesh*²⁶ in October 2017 (and the Court of Appeal delivered its affiliated judgments in June 2016 and December 2017). And third, certain offences were classified as standard sentence offences if they were committed and sentenced on or after 1 February 2018.

Figure 4: The three sentencing reforms that are the focus of this report, and their applicable commencement dates



26. *DPP v Dalgliesh (A Pseudonym)* [2017] HCA 41 (11 October 2017).

Category 1 offences (March 2017)

- 2.2 A court sentencing a Category 1 offence must impose a term of imprisonment²⁷ except in a very narrow set of circumstances where the court finds a 'special reason' exists; even then, the court must impose a mandatory treatment and monitoring order, a residential treatment order or a court secure treatment order.²⁸ None of the sex offences classified as Category 1 offences analysed in this report are specified offences;²⁹ they must therefore always receive a sentence of adult or (if relevant) youth detention if the offence was committed and sentenced while it was a Category 1 offence. The legislation does not, though, specify a minimum period of imprisonment. It is therefore possible for a very short prison sentence, which may even be a time served prison sentence,³⁰ to meet the requirement of Category 1 offence classification.
- 2.3 This reform was partly a consequence of a number of decisions following the Court of Appeal's decision in *Boulton*,³¹ in which the court handed down its first guideline judgment, focusing on the newly introduced community correction order (CCO). After that judgment, the use of CCOs (including combined orders of imprisonment and a CCO) increased substantially.³² In some cases, though, courts cited *Boulton* as the reason for imposing a CCO, rather than a term of imprisonment, for rape or other violent offences.³³
- 2.4 It was in response to cases such as these that the Victorian Government introduced legislation concerned with addressing what it perceived to be an overexpansion of the use of CCOs in cases involving serious offences.³⁴ Accordingly, in March 2017 a number of offences were classified as either Category 1 or Category 2 offences when committed by an offender aged 18 years or over;³⁵ a small number of other offences have been so classified since then.³⁶

27. This does not include combined orders of imprisonment and a community correction order: *Sentencing Act 1991* (Vic) ss 5(2G), 44. However, in theory if there are multiple charges in a case there is nothing prohibiting a court from imposing imprisonment on one charge and a community correction order on another.

28. *Sentencing Act 1991* (Vic) ss 5(2G)–(2GA); for special reasons, see section 10A.

29. The exception to the requirement to impose a custodial sentence if special reasons exist only applies to certain injury and risk offences involving emergency workers, custodial officers and youth justice custodial workers: *Sentencing Act 1991* (Vic) ss 3(ca), (cb), (cc), (ic), (id) (definition of *Category 1 offence*), 5(2GA).

30. See, for example, the Statement of Compatibility accompanying the Bill introducing this reform, which appears to envisage the possibility of time served sentences: 'Although the bill prohibits non-custodial sentences for a "category 1 offence", the sentencing court has discretion to impose any custodial sentence without prescribing the duration of that sentence. In addition, a court may release the offender into the community if it does not consider that additional time in custody is required, for example, where an offender demonstrates strong factors in mitigation beyond that already spent on remand' (emphasis added): Victoria, 'Sentencing (Community Correction Order) and Other Acts Amendment Bill 2016', *Parliamentary Debates*, Legislative Assembly, 13 October 2016, 3860 (Martin Pakula, Attorney-General). On time served prison sentences generally, see Sentencing Advisory Council, *Time Served Prison Sentences in Victoria* (2020).

31. *Boulton & Ors v The Queen* [2014] VSCA 342 (22 December 2014).

32. Sentencing Advisory Council, *Community Correction Orders: Third Monitoring Report (Post-Guideline Judgment)* (2015) x, xii, 29–30, 35–36.

33. See, for example, *DPP v Vacek (A Pseudonym)* [2015] VCC 484 (24 April 2015) [44] ('before *Boulton* sentencing practice would almost certainly have meant that you were going to gaol'); *DPP v Mollison* [2016] VCC 413 (7 April 2016) [22] ('*Boulton* [says] that the existence of CCOs allows what would have normally been automatic gaol effectively to be reconsidered'). The Court of Appeal in *Boulton* said that for 'relatively serious offences which might previously have attracted a medium term of imprisonment (such as, for example ... some kinds of rape ... [t]he sentencing judge may find that, in view of the objective gravity of the conduct and the personal circumstances of the offender, a properly-conditioned CCO of lengthy duration is capable of satisfying the requirements of proportionality, parsimony and just punishment, while affording the best prospects for rehabilitation': *Boulton & Ors v The Queen* [2014] VSCA 342 (22 December 2014) [131].

34. Victoria, 'Sentencing (Community Correction Order) and Other Acts Amendment Bill 2016', *Parliamentary Debates*, Legislative Assembly, 13 October 2016, 3860 (Martin Pakula, Attorney-General); Victoria, 'Sentencing (Community Correction Order) and Other Acts Amendment Bill 2016', *Parliamentary Debates*, Legislative Assembly, 27 October 2016, 4149–4176.

35. *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic).

36. As is discussed at various points in this report, substantial changes to sex offences took effect in July 2017. While previous versions of certain sex offences – in particular, incest, sexual penetration with a child aged under 12, and persistent sexual abuse of a child aged under 16 – were Category 1 offences between 20 March 2017 and 30 June 2017, the repealed versions of these offences were not classified as such between 1 July 2017 and 27 October 2018: *Justice Legislation Miscellaneous Amendment Act 2018* (Vic). Instead, during those 16 months, only the newer versions of these offences were Category 1 offences.

There are currently 23 Category 1 offences and 19 Category 2 offences in Victoria.³⁷ (Some Category 1 offences overlap because they account for previous and current versions of the same offence.) A number of contact sex offences are classified as Category 1 offences (none are classified as Category 2 offences).

- 2.5 Currently, 10 contact sex offences are classified as Category 1 offences in Victoria, including 6 offences in force today and 4 repealed offences:
- rape (section 38 of *Crimes Act 1958* (Vic));
 - rape by compelling sexual penetration (section 39);
 - sexual penetration with a child aged under 12 (section 49A);
 - persistent sexual abuse of a child aged under 16 (section 49J);
 - sexual penetration with a child or lineal descendant if the victim was aged under 18 at the time of the offence (section 50C);
 - sexual penetration with a de facto spouse or domestic partner's child or lineal descendant if the victim was aged under 18 at the time of the offence (section 50D);
 - incest with a child, stepchild or lineal descendant if the victim was aged under 18 (section 44(1), repealed as at 1 July 2017);
 - incest with a de facto spouse's child, stepchild or lineal descendant if the victim was aged under 18 (section 44(2), repealed as at 1 July 2017);
 - sexual penetration with a child aged under 12 (sections 45(1)–(2)(a), repealed as at 1 July 2017); and
 - persistent sexual abuse of a child aged under 16 (section 47A, repealed as at 1 July 2017).³⁸

The High Court's decision in *Dalgliesh* (October 2017)

- 2.6 In June 2016, the Court of Appeal delivered its judgment in *Dalgliesh*.³⁹ In that case, the Director of Public Prosecutions had appealed against a sentence of 5.5 years' imprisonment for multiple sex offences, including 3.5 years' imprisonment for a charge of incest against the offender's stepdaughter, which resulted in the victim becoming pregnant.

The Director submitted that, if the Court concluded that the sentence of three years and six months on the charge of incest resulting in pregnancy was within the permissible range, that would be strongly indicative of the fact that existing sentencing standards were inadequate. He submitted that sentencing practice did not reflect the objective gravity of the offence of incest, at least for offences of mid-range seriousness, and invited the Court to state that current sentencing practice for this category should gradually be uplifted.⁴⁰

37. *Sentencing Act 1991* (Vic) s 3 (definitions of *Category 1 offence* and *Category 2 offence*).

38. The first two offences in this list (sections 38 and 39) were in force between 20 March 2017 and 31 December 2019 and therefore were classified as Category 1 offences if committed and sentenced after 20 March 2017. The next four offences in this list (sections 49A, 49J, 50C and 50D) were in effect from 1 July 2017 and therefore were classified as Category 1 offences if they were committed and sentenced after 1 July 2017. The final four offences in the list (sections 44(1), 44(2), 45(1)–(2)(a) and 47A) are more complicated in their categorisation. The offences were in effect from 20 March 2017 to 30 June 2017 and therefore apply to offences committed between those dates. But while they were originally classified as Category 1 offences during that period, amendments to sentencing legislation meant they were not categorised as such for 16 months between 1 July 2017 and 27 October 2018 (after the new offences came into force). As such, these repealed offences were only Category 1 offences if they sentenced either between 20 March 2017 and 30 June 2017 or between 28 October 2018 and 31 December 2019 – in addition to being committed between 20 March 2017 and 30 June 2017.

39. *DPP v Dalgliesh (A Pseudonym)* [2016] VSCA 148 (29 June 2016).

40. *DPP v Dalgliesh (A Pseudonym)* [2016] VSCA 148 (29 June 2016) [62].

- 2.7 The Court of Appeal agreed with the Director of Public Prosecutions and called for an uplift in the length of prison sentences for incest offences in Victoria:

That current sentencing practices are at such low levels clearly demonstrates that the principles of sentencing are not being consistently and appropriately applied. Put simply, current sentencing does not reflect the objective gravity of such offending or the moral culpability of the offender. There is a lack of differentiation between the different categories of seriousness, and that has resulted in an unworkably narrow band within which judges are able to sentence for offending of this nature ... [W]e have concluded that sentencing courts must, by increments, increase the sentences for mid-range incest offences, so that the range of sentences is uplifted and substantially expanded.⁴¹

- 2.8 The Court of Appeal did not, however, increase the sentence imposed on the particular offender in this case because it considered itself constrained by 'current sentencing practices', a mandatory consideration for sentencing courts in Victoria.⁴²
- 2.9 The Director of Public Prosecutions further appealed to the High Court, arguing that 'the Court of Appeal erred in elevating the significance of current sentencing practices so that they were determinative of the issue'.⁴³ The High Court agreed with the Court of Appeal in relation to its finding that 'current sentencing practices [for incest] did not reflect the objective gravity of the offending'.⁴⁴ However, the High Court also said that given the Court of Appeal had recognised that sentencing practices for incest in Victoria were 'affected by an error of legal principle ... there was no good reason for the Court of Appeal not to correct the effect of the error of principle which it recognised'.⁴⁵ The High Court stated that the Court of Appeal should have increased the offender's sentence in this case because 'current sentencing practices must be taken into account, but only as one factor, and not the controlling factor, in the fixing of a just sentence'.⁴⁶
- 2.10 In effect, the Court of Appeal's and High Court's decisions in these proceedings collectively meant that sentences for incest in Victoria not only should increase to better acknowledge the seriousness of this type of offending and better accord with community expectations, but also should do so immediately, not incrementally.⁴⁷ On remittal, the Court of Appeal subsequently resentenced the offender to 7.5 years for the offence of incest (an increase of 4 years) and imposed a new total effective sentence of 9.5 years' imprisonment (also an increase of 4 years).⁴⁸
- 2.11 The various *Dalgliesh* decisions have subsequently been subjected to considerable analysis. Perhaps most importantly, the Court of Appeal has held that the call to uplift sentencing practices was limited to incest offences (of a child, stepchild or lineal descendant) and did not extend to other child sex offences, such as persistent sexual abuse of a child aged under 16 (even if such offending occurred in incestuous circumstances),⁴⁹

41. *DPP v Dalgliesh (A Pseudonym)* [2016] VSCA 148 (29 June 2016) [64], [131].

42. *DPP v Dalgliesh (A Pseudonym)* [2016] VSCA 148 (29 June 2016) [132]; *Sentencing Act 1991* (Vic) s 5(2)(b).

43. *DPP v Dalgliesh (A Pseudonym)* [2017] HCA 41 (11 October 2017) [37].

44. *DPP v Dalgliesh (A Pseudonym)* [2017] HCA 41 (11 October 2017) [53].

45. *DPP v Dalgliesh (A Pseudonym)* [2017] HCA 41 (11 October 2017) [62]–[63].

46. *DPP v Dalgliesh (A Pseudonym)* [2017] HCA 41 (11 October 2017) [68]. See also *Mush v The Queen* [2019] VSCA 307 (18 December 2019) [63], [110]; *Fichtner v The Queen* [2019] VSCA 297 (12 December 2019) [99]–[100].

47. *Carter (A Pseudonym) v The Queen* [2018] VSCA 88 (11 April 2018) [80].

48. *DPP v Dalgliesh (A Pseudonym)* [2017] VSCA 360 (7 December 2017).

49. *Shawcross (A Pseudonym) v The Queen* [2018] VSCA 295 (14 November 2018) [55]. See also *Lugo (A Pseudonym) v The Queen* [2020] VSCA 75 (30 March 2020) (this case involved a man who sexually assaulted his biological daughter appealing his sentence, with no reference to the various *Dalgliesh* decisions).

nor to other sex offences such as rape⁵⁰ (note, though, that there has been a specific and separate call to uplift sentencing practices for *digital rape*).⁵¹ Therefore, while the Court of Appeal has opined on a number of occasions that sentencing practices for other sex offences against children may be inadequate,⁵² there has not yet been a case in which the Director of Public Prosecutions has sought, and the Court of Appeal has issued, a formal call to uplift those sentences. It has, though, been suggested that the implications of the various *Dalgliesh* decisions – particularly the commentary around the seriousness of child sex offences – have indirectly affected sentencing practices for child sex offences other than incest.⁵³

Standard sentence offences (February 2018)

- 2.12 In 2015, the Court of Appeal found the baseline sentencing scheme to be unworkable.⁵⁴ In response, the Victorian Government repealed the scheme, which had been introduced in 2014 to set median prison sentence lengths for certain serious offences. It subsequently replaced it with the standard sentence scheme.
- 2.13 On 1 February 2018, certain offences were classified as standard sentence offences.⁵⁵ Under the new legislation, if a relevant offence is committed on or after that date,⁵⁶ a sentencing court is required to take into account the numerical legislative guidance as to what parliament considers to be ‘the middle of the range of seriousness’ when looking only at objective factors relevant to the offending.⁵⁷ The court must also disregard any sentencing practices for that offence in cases in which it was not sentenced as a standard sentence offence.⁵⁸ Any non-parole period must also be at least 60% of the total effective sentence.⁵⁹ And aggregate sentences of imprisonment are no longer available for a combination of offences that includes one or more standard sentence offences.⁶⁰ Standard sentences are only applicable if an offence is sentenced in the higher courts and the offender was aged 18 or over at the time of the offence.⁶¹

50. See, for example, *DPP v Za Lian & Anor* [2019] VSCA 75 (8 April 2019) [100] (in which the Director of Public Prosecutions indicated that they were not seeking an uplift in current sentencing practices for rape).

51. *Shrestha v The Queen* [2017] VSCA 364 (11 December 2017) [30]–[31], as applied in *DPP v Macarthur* [2019] VSCA 71 (8 April 2019) and *DPP v Nafady* [2018] VCC 721 (25 May 2018) [83].

52. *DPP v DDJ* [2009] VSCA 115 (28 May 2009) [72] (discussing the offence of maintaining a sexual relationship with a child aged under 16); *DPP v CPD* [2009] VSCA 114 (28 May 2009) [68] (discussing the offence of sexual penetration with a child aged under 10).

53. Roundtable 1 (30 March 2021); see, for example, *DPP v Maudsley (A Pseudonym)* [2019] VCC 1824 (8 November 2019) [64]–[65] (sexual penetration with a child aged under 12), *DPP v Stafford (A Pseudonym)* [2018] VCC 877 (8 June 2018) [96] (indecent act with a child aged under 16).

54. *DPP v Walters (A Pseudonym)* [2015] VSCA 303 (17 November 2015); Victoria, ‘Sentencing Amendment (Sentencing Standards) Bill 2017’, *Parliamentary Debates*, Legislative Assembly, 25 May 2017, 1507–1510 (Martin Pakula, Attorney-General). See further, Sentencing Advisory Council, *Baseline Sentencing: Report* (2012); *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic).

55. *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic) pt 3.

56. *Sentencing Act 1991* (Vic) ss 165A(1)–(2).

57. *Sentencing Act 1991* (Vic) ss 5A(1)(b), (3).

58. *Sentencing Act 1991* (Vic) s 5B(2)(b).

59. *Sentencing Act 1991* (Vic) s 11A. The minimums may be disregarded if the court considers it in the interests of justice to set a lower non-parole period.

60. *Sentencing Act 1991* (Vic) s 9(1A)(ab).

61. *Sentencing Act 1991* (Vic) ss 5B(1)(a)–(b) (‘This section applies in relation to sentencing an offender for a standard sentence offence unless – (a) the offender was aged under 18 at the time of the commission of the offence; or (b) the offence is heard and determined summarily’).

2.14 Of the 13 offences that have been classified as standard sentence offences in Victoria, 10 have a standard sentence that is precisely 40% of the maximum penalty.⁶² The only exceptions are the recently introduced offence of homicide by firearm,⁶³ and two offences with a maximum penalty of life imprisonment.⁶⁴ The standard sentences for the relevant sex offences in this report (and their respective sections of the *Crimes Act 1958* (Vic)) are outlined in Table 1. Relevantly, compared to the baseline sentencing scheme, the standard sentence scheme applies to a broader range of sex offences, including rape, sexual penetration with a child aged 12 to 15 and child sexual assault.

Table 1: The standard sentence for relevant sex offences and their associated sections of the *Crimes Act 1958* (Vic)

Offence	Statutory reference <i>Crimes Act 1958</i> (Vic)	Standard sentence
Rape	Section 38	10 years
Incest with a child, stepchild or lineal descendant	Sections 50C and 50D	10 years
Sexual penetration with a child aged 12 to 15	Section 49B	6 years
Sexual penetration with a child aged under 12	Section 49A	10 years
Sexual assault of a child aged under 16	Section 49D	4 years
Persistent sexual abuse of a child aged under 16	Section 49J	10 years

2.15 The standard sentence scheme shares the broad policy intention of its predecessor – of increasing sentencing practices for certain serious offences to bring sentencing more in line with community expectations.⁶⁵ However, the practical implications of both schemes are notably distinct. While a baseline sentence represented a median prison sentence length for an offence, with half of sentences required to fall below and half above that level,⁶⁶ the standard sentence does not prescribe a statistical outcome:

[T]he middle of the range of objective offence seriousness does not necessarily bear any relationship to the median sentence.⁶⁷

2.16 Rather, the standard sentence scheme aims to increase sentence lengths by providing courts with an additional legislative guidepost, like the maximum penalty, while also prohibiting courts from considering past sentencing practices for the offence.

62. *Crimes Act 1958* (Vic) pt I; see also Sentencing Advisory Council, *Guide to Sentencing Schemes in Victoria* (2021). This accords with the recommendation of the Sentencing Advisory Council in its 2016 advice to the then Attorney-General: Sentencing Advisory Council, *Sentencing Guidance in Victoria: Report* (2016) 186–189.

63. *Crimes Act 1958* (Vic) s 5B, as introduced by *Crimes Amendment (Manslaughter and Related Offences) Act 2020* (Vic). The standard sentence for this offence is 13 years, 52% of the 25-year maximum penalty.

64. The standard sentence for murder is 25 years' imprisonment, or 30 years if the victim was an emergency worker or custodial officer on duty, and the standard sentence for trafficking in a large commercial quantity of drugs is 16 years' imprisonment: *Crimes Act 1958* (Vic) s 3(2); *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71(2).

65. Victoria, 'Sentencing Amendment (Sentencing Standards) Bill 2017', *Parliamentary Debates*, Legislative Assembly, 25 May 2017, 1507–1510 (Martin Pakula, Attorney-General); see also, Victoria, 'Sentencing Amendment (Baseline Sentences) Bill 2014', *Parliamentary Debates*, Legislative Assembly, 3 April 2014, 1275–1277 (Robert Clark, Attorney-General).

66. Victoria, 'Sentencing Amendment (Baseline Sentences) Bill 2014', *Parliamentary Debates*, Legislative Assembly, 3 April 2014, 1276 (Robert Clark, Attorney-General) ('The baseline sentence is the figure that Parliament expects will become the median sentence for that offence. This requires sentencing practices to change so that, over time, for sentences to which baseline sentencing applies, half the sentences imposed for the offence should be less than this figure, and half should be greater').

67. Sentencing Advisory Council (2016), above n 62, 189.

- 2.17 It is possible for standard sentence offences to receive non-custodial outcomes or, if relevant, youth detention (which has an upper limit that falls beneath the standard sentence). In those instances, the numerical guidance of the standard sentence nevertheless remains a relevant guidepost of objective seriousness, similar to the maximum penalty. Section 5B(2)(a) of the *Sentencing Act 1991* (Vic) requires any court sentencing an offender for a standard sentence offence to ‘take the standard sentence into account as one of the factors relevant to sentencing’. There is no qualification that the standard sentence only be taken into account when sentencing a standard sentence offence to a term of imprisonment. For instance, one court said:

[p]arliament has chosen to leave open the possibility of a sentence of youth detention in respect of the standard sentence offence of rape, though it may be expected that such Orders will now be made less frequently. Nevertheless, youth detention will be appropriate in some cases and ultimately I have determined that this is such a case.⁶⁸

- 2.18 Courts have also consistently recognised and emphasised that the standard sentence is just one factor to take into account in sentencing and is neither the primary nor the controlling factor:

[T]he standard sentence is simply another factor to be taken into account in the overall assessment of the appropriate sentence. It is not to be treated as a determinative figure and should not interrupt the operation of the instinctive synthesis principle.⁶⁹

Further:

[a] standard sentence is not the same thing as a mandatory sentence. Nor is a standard sentence the primary sentencing consideration, or the starting point from which to add or subtract time. It is just one of the many matters to be taken into account by a court in performing the instinctive synthesis method of sentencing.⁷⁰

- 2.19 The first standard sentence offence was sentenced in November 2018 (murder),⁷¹ another was sentenced in December 2018 (culpable driving causing death),⁷² and the next was sentenced in February 2019 (rape).⁷³ Given that the first standard sentence sex offence was not sentenced until 2019, this report compares how relevant sex offences were sentenced in 2019, when they either were or were not standard sentence offences.

68. *DPP v Amin* [2019] VCC 1756 (28 October 2019) [43].

69. *R v Brown* [2018] VSC 742 (29 November 2018) [68], approved on appeal in *Brown v The Queen* [2019] VSCA 286 (10 December 2019). The Court of Appeal further clarified that the standard sentence is to be treated as a legislative guidepost, having the same function as the maximum penalty, and that it does not affect the instinctive synthesis approach to sentencing, does not require or permit two-stage sentencing and does not otherwise affect the matters that a court may, or must, take into account during sentencing: *Brown v The Queen* [2019] VSCA 286 (10 December 2019) [4].

70. *DPP v Herrmann* [2019] VSC 694 (29 October 2019) [104]. See further *McPherson v The Queen* [2021] VSCA 53 (12 March 2021) [31] (‘Before concluding we should mention the difficult task with which sentencing judges are confronted when considering the standard sentence for this type of offending ... This is not to say the phrase is meaningless — it must be given its place in the sentencing calculus — but it is an intangible concept, and judges ought to be wary of affording it too much weight in the sentencing exercise.’)

71. *R v Brown* [2018] VSC 742 (29 November 2018).

72. *DPP v Lim* [2018] VCC 2166 (18 December 2018).

73. *DPP v Elwood (A Pseudonym) and Anor* [2019] VCC 128 (1 February 2019).

- 2.20 While the legislation does not itself specify that courts should increase sentencing practices for the various offences as a result of their classification as standard sentences, three factors point to that being the intention of the reforms:
1. an express statement to that effect by the then Attorney-General;⁷⁴
 2. the fact that the standard sentences for these offences are uniformly higher than their previous median/average sentences; and
 3. in turn, the fact that when courts consider current sentencing practices for a standard sentence offence, they are required to consider only those sentences that were imposed under the standard sentence scheme (disregarding sentencing practices from when the offence was a non-standard sentence offence).⁷⁵

- 2.21 A further issue is which current sentencing practices courts should consider. While courts sentencing standard sentence offences must only take into account how the offence has been sentenced as a standard sentence offence, the reverse is not true. Courts sentencing *non*-standard sentence versions of relevant offences must take into account *both* how the offence has been sentenced as a standard sentence offence and how the offence has been sentenced as a non-standard sentence offence.⁷⁶ As an increasing number of standard sentence offences are sentenced, the overall length of prison sentences will therefore increase not just for offences that attract standard sentence offence classification but also for those that do not.

Which current sentencing practices should courts consider?

Standard sentence offence		Non-standard sentence offence	
Current sentencing practices as a standard sentence offence	✓	All current sentencing practices (regardless of standard sentence offence status)	✓
Current sentencing practices <i>not</i> as a standard sentence offence	✗		

- 2.22 In sum, there have been three significant reforms to the sentencing of sex offences in Victoria over the period of just a few years. The overlapping and complex nature of the reforms may present distinct challenges, not only for judges in sentencing cases in which these and other sentencing schemes apply but also for those trying to understand how and why a certain sentence was imposed.

74. Martin Pakula, 'State Election 2018: Statement from Attorney-General Martin Pakula' (liv.asn.au, 2018) <<https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/November-2018/Statement-from-Attorney-General-Martin-Pakula>> at 26 April 2021 ('We have strengthened sentencing laws ... by introducing a standard sentencing scheme that increases sentences for 12 of the most serious crimes').

75. *Sentencing Act 1991* (Vic) s 5B(2)(b). See also *DPP v Nguyen* [2020] VCC 348 (26 March 2020) [40] ('No doubt that [the standard sentence] scheme has been brought in to increase sentencing practices into the future').

76. Explanatory Memorandum, Sentencing Amendment (Sentencing Standards) Bill 2017 (Vic) 16: 'a court is not prevented from taking into account the effect on current sentencing practices of the commencement of [the standard sentence scheme] in sentencing an offender for an offence committed before [the scheme commenced]. While offences committed before the commencement of [the scheme] will continue to be sentenced in accordance with "old" (pre-standard sentence scheme) law, the requirement to consider current sentencing practices under section 5(2)(b) of the *Sentencing Act 1991* will mean that sentencing for these "old" offences may still be indirectly impacted by the standard sentence scheme ... While [the scheme] will prevent a court from having regard to the standard sentence when sentencing an offender for an "old" offence, standard sentencing may indirectly influence the sentencing outcome through consideration of current sentencing practices.' See further at n 145.

3. Rape offences

- 3.1 This chapter discusses the number and types of rape offences⁷⁷ recorded and sentenced in the 10 years from 2010 to 2019 and the sentences imposed for proven rape offences, including the duration of charge-level and case-level prison sentences.
- 3.2 The offence of rape contrary to section 38 of the *Crimes Act 1958* (Vic) is the most common rape offence in Victoria. With some notable exceptions, the offence has existed in its current form since 1992. Prior to that, there had been multiple offences of either rape and rape with mitigating circumstances (1959 to 1981) or rape and rape with aggravating circumstances (1981 to 1992), which had maximum penalties of 10 years' or 20 years' imprisonment. Digital rape was excluded as a form of rape until 1991.⁷⁸ Since 1992, rape has had a maximum penalty of 25 years' imprisonment. In 1993, it was designated a serious offence that could result in disproportionately long prison sentences;⁷⁹ it had its mental element amended in 2008 and 2015;⁸⁰ in 2015, it became capable of being charged as a course of conduct offence;⁸¹ in 2016, it received judicial guidance about a non-exhaustive list of factors typically relevant to its sentencing;⁸² it was designated a Category 1 offence if committed on or after 20 March 2017; and it was designated a standard sentence offence if committed on or after 1 February 2018.

77. The term 'rape offences' refers to the offences listed in Table 2 (see also glossary).

78. *Crimes (Sexual Offences) Act 1980* (Vic) s 4, amending *Crimes Act 1958* (Vic) s 2A (definition of *rape*) (as in effect from 1 March 1981 to 4 August 1991). Prior to this, there was no legislative definition of rape; it was defined at common law. The definition of *sexual penetration* was then amended to account for digital rape in *Crimes (Sexual Offences) Act 1991* (Vic) s 3, inserting *Crimes Act 1958* (Vic) s 37 (as in effect from 5 August 1991 to 31 December 1991). It was then replaced with a near-identical definition: *Crimes (Rape) Act 1991* (Vic) s 3, inserting *Crimes Act 1958* (Vic) s 35 (as in effect from 1 January 1992 to 30 June 2017). For the current definition of *sexual penetration*, see *Crimes Act 1958* (Vic) s 35A, as inserted by *Crimes Amendment (Sexual Offences) Act 2016* (Vic) s 5.

79. *Sentencing Act 1991* (Vic) s 3 (definition of *serious sexual offender*), pt 2A, as inserted by *Sentencing (Amendment) Act 1993* (Vic) ss 4–5.

80. In 2008 and 2015, the offences of rape and rape by compelling sexual penetration were amended to, respectively, account for offenders who either did not give any thought to whether the other person was consenting or did not reasonably believe the other person was consenting. See *Crimes Amendment (Rape) Act 2007* (Vic) s 5, amending *Crimes Act 1958* (Vic) ss 38(2)(a) and 38(4)(b) (as in effect from 1 January 2008 to 30 June 2015); *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) s 4, amending *Crimes Act 1958* (Vic) s 38 (as in effect since 1 July 2015).

81. *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) s 13, amending *Criminal Procedure Act 2009* (Vic) sch 1 cl 4A, especially sub-cl (9).

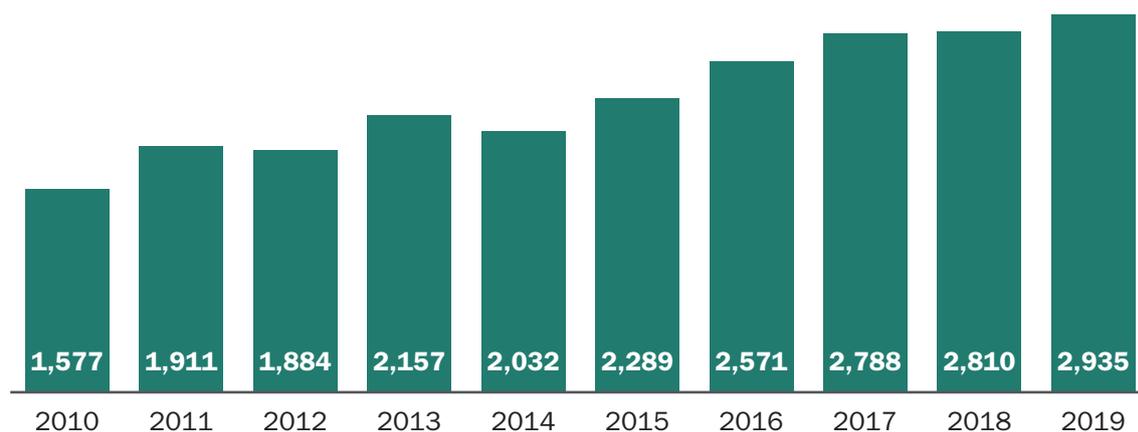
82. *Jurj and Miftode v The Queen* [2016] VSCA 57 (4 April 2016) [80]; see also *DPP v Mokhtari* [2020] VSCA 161 (18 June 2020). Further, in *Patil (A Pseudonym) v The Queen* [2020] VSCA 337 (23 December 2020) [55]–[56] the Court of Appeal recognised 'breach of trust' as relevant to the sentencing rape offences in the context of spouses.

Number of recorded and sentenced rape offences

3.3 Between 2010 and 2019, 22,954 rape offences were recorded by police in Victoria, with the yearly number almost doubling over that period (Figure 5).

Recorded offences

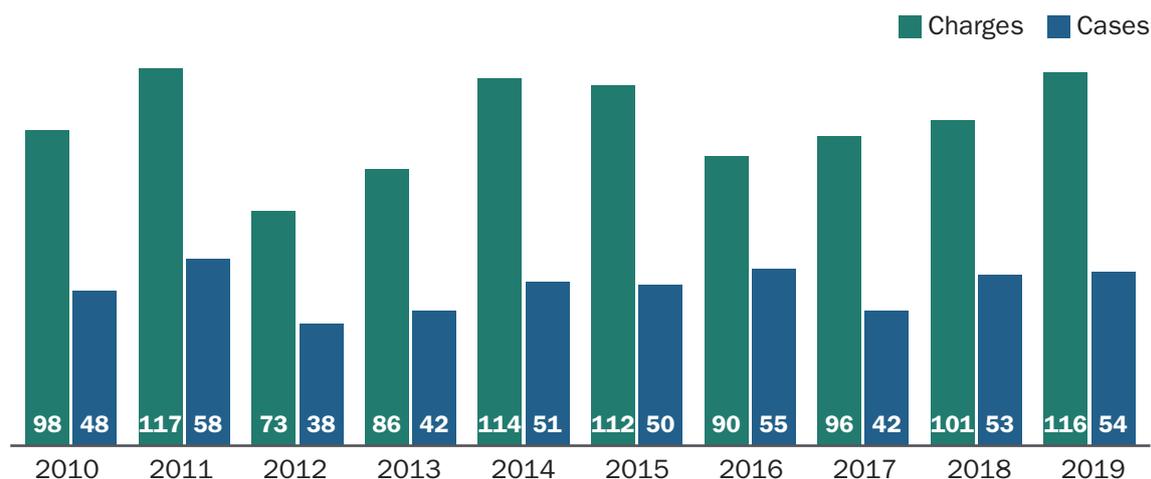
Figure 5: Number of rape offences recorded by police in Victoria, by year (22,954 offences)



3.4 At the same time, 1,003 rape charges were sentenced in 491 cases involving 479 offenders, all in the higher courts (Figure 6); only two of those offenders were female.⁸³ While the number of recorded rape offences almost doubled, there was no corresponding increase in the number of sentenced rape offences, an evident disparity.

Sentenced charges and cases

Figure 6: Number of charges and cases of rape offences sentenced in Victoria, by year (1,003 charges and 491 cases)



83. One woman was sentenced to a 4-year community correction order for a single charge of rape, and another was sentenced to a 3-year community correction order for 3 charges of rape, 2 charges of false imprisonment and 2 charges of theft. That is, not one woman was sent to prison for a rape offence in the 10-year reference period.

3.5 The specific rape offences sentenced during the reference period are outlined in Table 2. The highest numbers of rape charges sentenced in any one case were 14, 12, 11 and 10.

Table 2: Number of rape charges and cases sentenced in Victoria, 2010 to 2019, by operational period and statutory reference (1,003 charges and 491 cases)

Offence	Statutory reference Crimes Act 1958 (Vic)	Operational period	Maximum penalty	Charges	Cases
Rape	Section 44	From 1 April 1959 To 28 February 1981	20 years (10 years if mitigating circumstances exist)	13	9
Rape	Section 45(1)	From 1 March 1981 To 4 August 1991	10 years	26	11
Aggravated rape	Section 45(3)	From 1 March 1981 To 4 August 1991	20 years	13	7
Rape	Section 40	From 5 August 1991 To 31 December 1991	10 years	–	–
Aggravated rape	Section 41	From 5 August 1991 To 31 December 1991	20 years	10	6
Rape	Section 38	From 1 January 1992 To present	25 years	930	463
Rape by compelling sexual penetration	Section 38A	From 1 December 2006 To 30 June 2015	25 years	7	2
Rape by compelling sexual penetration	Section 39	From 1 July 2015 To present	25 years	4	4
Total				1,003	491^a

a. The total number of cases is slightly lower than the sum of the above rows because multiple rape offences under various statutory references were sentenced together in some cases.

Sentence types imposed for rape offences

3.6 Table 3 shows the sentence types imposed for rape offences during the reference period.⁸⁴ Most (96%) were immediate custodial sentences. Given that only a small number of rape charges received non-custodial sentences prior to the introduction of Category I offences, the reform did not have any discernible influence on sentencing outcomes in 2018 and 2019. However, as might be expected, imprisonment was imposed in each of the 27 cases (100%) in which Category I offence classification applied to 45 rape charges.⁸⁵

Table 3: Sentencing outcomes for rape charges sentenced in Victoria, 2010 to 2019, by sentence type and year (1,003 charges)

Outcome	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total
Immediate custodial sentence	95 (97%)	108 (92%)	72 (99%)	81 (94%)	111 (97%)	108 (96%)	84 (93%)	95 (99%)	97 (96%)	113 (97%)	964 (96%)
Community order	1 (1%)	2 (2%)	1 (1%)	–	2 (2%)	3 (3%)	5 (6%)	1 (1%)	4 (4%)	3 (3%)	22 (2%)
Other	2 (2%)	7 (6%)	–	5 (6%)	1 (1%)	1 (1%)	1 (1%)	–	–	–	17 (2%)
Total	98	117	73	86	114	112	90	96	101	116	1,003

3.7 Over the 10-year reference period, 39 charges received sentence types other than an immediate custodial order in 33 cases (2 female offenders and 31 male offenders), and they were all section 38 rape offences.⁸⁶ Those sentences would no longer be possible following the classification of rape as a Category I offence (nor would the 19 combined orders of imprisonment and a community correction order (CCO)). Based on the sentencing remarks in some of the cases involving non-custodial outcomes, it would seem that at least some of those sentences were a direct result of the Court of Appeal's guideline judgment in *Boulton*,⁸⁷ which left open the possibility of non-custodial sentences for some rape offences (see [2.3]). In turn, those cases were in part the catalyst for the introduction of Category I offence classification (see [2.4]).

84. In Table 3, *immediate custodial sentences* include 947 prison sentences (including combined orders), 3 aggregate sentences of imprisonment (including combined orders), 5 partially suspended sentences, and 5 youth justice centre orders or youth training centre orders. *Community orders* include 19 community correction order, 2 community-based orders and 1 intensive correction order. *Other orders* include 13 wholly suspended sentences and 4 residential treatment orders.

85. Further, while no minimum period of imprisonment is required for rape offences, the shortest periods of imprisonment imposed for the 45 rape offences classified as Category I offences were 2 years (2 charges) and 3 years (2 charges).

86. They received 17 community correction orders, 10 wholly suspended sentences, 4 residential treatment orders, 1 community-based order and 1 intensive correction order. See, for example, *DPP v Maxfield* [2014] VCC 911 (18 June 2014) (in which a community correction order was imposed but increased in duration following a successful prosecution appeal in *DPP v Maxfield* [2015] VSCA 95 (12 May 2015); *DPP v Vacek (A Pseudonym)* [2015] VCC 484 (24 April 2015); *DPP v Long (A Pseudonym)* [2015] VCC 1296 (17 September 2015) [42] ('exceptional circumstances ... include your young age, lack of prior criminal history and non-relevant subsequent offending ... your rehabilitation prospects and the prosecution concession that a [CCO] would be within the range of appropriate dispositions'); *DPP v Mollison* [2016] VCC 413 (7 April 2016).

87. *Boulton & Ors v The Queen* [2014] VSCA 342 (22 December 2014).

- 3.8 The introduction of a mandatory sentencing scheme to remedy this perceived issue, though, may also have some unintended consequences of imprisoning offenders whose offending falls at the lower end of objective seriousness and culpability for this type of offending. An analysis of available sentencing remarks suggests that in the cases in which a non-custodial order was not motivated by the comments in *Boulton*, such orders were only imposed because of the exceptional circumstances of each case. Indeed, wholly suspended sentences were only available in cases of 'exceptional circumstances' when sentencing an offender for a serious offence such as rape,⁸⁸ as illustrated in Case Study 1.

Case Study 1: wholly suspended sentence for rape

The male offender and female victim had been married for over a decade. She was diagnosed with borderline personality disorder soon after they were married. They then had a child who died very young. Several years later, they had another child who, after a few years, was removed by the Department of Human Services because of the risk that the victim and her condition posed. Her condition deteriorated and her husband became the sole wage-earner as well as her carer.

A decade later, she indicated to the offender that she did not want to have sex, but he persisted on a number of occasions. When she reported to police, she said she needed help but did not necessarily want her husband charged. Police charged him with 4 counts of rape. When interviewed by police, he made full admissions.

At sentencing, she supported him, as did her parents and siblings. He had no prior criminal history, he pleaded guilty early in the proceedings, and the offender and victim planned to continue their relationship. The legislation at the time only allowed a wholly suspended sentence if 'exceptional circumstances' were present, but the prosecution conceded that they were, and the court agreed. The court imposed a wholly suspended sentence of 3 years' imprisonment.

Unpublished sentencing remarks provided to the Council

88. *Sentencing Act 1991* (Vic) s 27(2B) (repealed), as inserted by *Sentencing (Suspended Sentences) Act 2006* (Vic) s 4, as recommended in Sentencing Advisory Council, *Suspended Sentences: Final Report Part 1* (2006) xxv, 71–72.

- 3.9 The same was true for most community orders imposed for rape offences; courts limited these to exceptional cases. For example, one case involved a man residing in a psychiatric facility who had been diagnosed with Asperger syndrome, attention deficit hyperactivity disorder, obsessive compulsive disorder, Tourette syndrome and low intellectual functioning. He digitally penetrated a 61-year-old fellow female patient and put the penis of a 33-year-old fellow male patient into his mouth. The court commented that it did not see how he could cope in prison and that he was effectively already detained in a psychiatric facility.⁸⁹ In another case, a 48-year-old offender with chronic adjustment disorder, anxiety and psychosexual immaturity digitally penetrated a 17-year-old co-worker during what he believed to be consensual sexual activity and, upon being told to stop, withdrew immediately. The offender lost his job of 30 years and had to sell his house. He had no prior convictions, pleaded guilty at the earliest opportunity, experienced a delay of 2.5 years in being charged for the offending, and had positive character evidence from a child he had previously fostered.⁹⁰

Case Study 2: 12-year prison sentence for rape

The offender in this case had been in an on-off relationship with the victim since 2010, but the relationship ended in August 2014 when he assaulted her. The relationship was underpinned by ‘acts of physical violence and verbal abuse’. For the August 2014 assault, he was sentenced to a partially suspended sentence of 15 months. The new offending in this case began a few weeks after his release from prison.

While visiting the residence where the victim was staying, he produced the brief of evidence against him in the previous case and ‘slapped [her] across the face with it’ (charge 1: common law assault). He then told her that if she went to police again he would kill her (charge 2: make threat to kill). He then pulled down her pants and vaginally raped her (charge 3: rape), during which he placed a lit cigarette against the skin near her vagina (charge 4: intentionally causing injury). Shortly afterward, he anally raped her, after which ‘he was just laughing’ (charge 5: rape).

At sentencing, the court said there was ‘little that can be said by way of mitigation’. He had not pleaded guilty and so was not entitled to any sentence discount. He showed no remorse, had a long list of prior convictions (including for rape and family violence), exploited the victim’s vulnerability, had poor prospects of rehabilitation, and was a high risk of reoffending.

He received a total effective sentence of 21 years’ imprisonment with a non-parole period of 17 years, with the 12-year prison sentence for the charge of anal rape being the base sentence.

DPP v Bolton [2018] VCC 385 (22 March 2018)

89. Unpublished sentencing remarks provided to the Council.

90. *DPP v Briggs* [2014] VCC 1579 (19 September 2014).

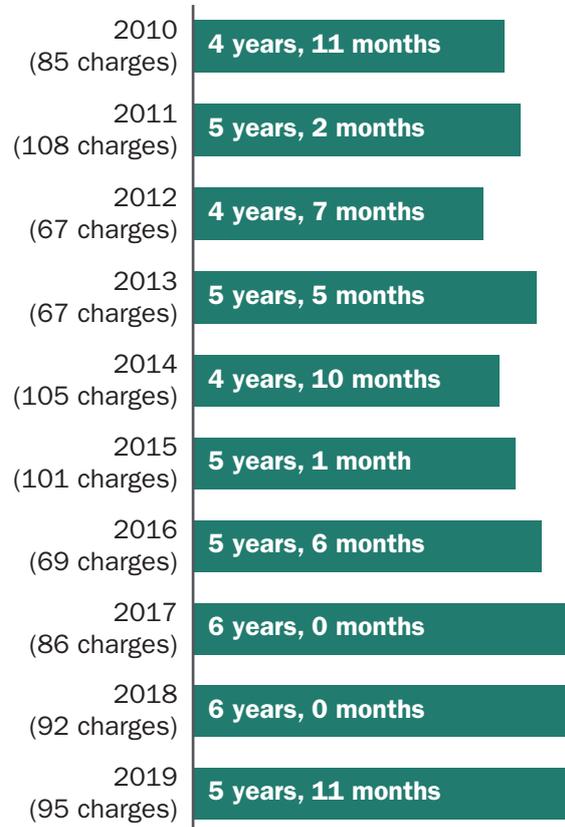
How long were prison sentences for rape?

Charge level

3.10 During the reference period, 875 non-aggregate sentences of imprisonment were imposed for charges of rape contrary to section 38 of the *Crimes Act 1958* (Vic).⁹¹ The yearly average prison sentence lengths for those charges are shown in Figure 7. The *shortest* prison sentence for a charge of rape was just over 1 month⁹² and the *longest* was 15 years.⁹³ However, the longest prison sentence for a rape offence *not* co-sentenced with a homicide offence was 12 years (see Case Study 2, page 20). The average prison sentence for rape was 5 years and 4 months. The gradual change in average prison sentences over the reference period was a statistically significant upward trend.⁹⁴

3.11 While the Court of Appeal has observed an increase in sentences for rape in recent years,⁹⁵ it also describes that change as ‘incremental’.⁹⁶ The highest average prison sentences for rape were in the 3 most recent years, and those figures suggest an approximate 12-month increase compared to the previous 7 years (and earlier⁹⁷). It is not clear, however, whether that increase applied to all rape offences, or just to those involving *digital* rape, for which the Court of Appeal specifically called for an uplift in 2017.⁹⁸ Otherwise, there has been no general call to increase all sentences for rape.⁹⁹

Figure 7: Average prison sentences (in years and months) imposed on charges of rape contrary to section 38 of the *Crimes Act 1958* (Vic), by year (875 charges)



91. This analysis is limited to section 38 rape offences and excludes charges of that offence that received youth detention centre orders (9), partially suspended sentences (5) or aggregate sentences of imprisonment (2). The charge-level prison sentences for other rape offences are outlined in Appendix 3.

92. This was part of a combined order imposed on a 73-year-old offender in 2019 for offending that occurred in 2007.

93. See, for example, *R v Bayley* [2013] VSC 313 (19 June 2013). The rape offence in this case was co-sentenced with a proven murder charge, as were all 6 of the longest prison sentences imposed for individual charges of rape: 15 years, 14 years, 13 years (2) and 12 years (2).

94. From 2010 to 2019, the average term increased by 20%, from 4 years and 11 months to 5 years and 11 months. There was evidence for a statistically significant trend (Pearson's correlation coefficient = 0.804, $p = 0.005$).

95. *DPP v Za Lian* [2019] VSCA 75 (8 April 2019) [60].

96. *DPP v Za Lian* [2019] VSCA 75 (8 April 2019) [100].

97. The 5-year average sentence for rape is largely consistent with the average in the 10 years prior to the reference period: Sentencing Advisory Council, *Sentencing Trends for Rape in the Higher Courts of Victoria, 2005–06 to 2009–10*, Sentencing Snapshot no. 117 (2011) 5; Sentencing Advisory Council, *Sentencing Trends for Rape in the Higher Courts of Victoria, 2001–02 to 2005–6*, Sentencing Snapshot no. 26 (2007) 3.

98. *Shrestha v The Queen* [2017] VSCA 364 (11 December 2017). In this report, rape offences were not coded to identify the type of rape in each case.

99. While in 2012 the Director of Public Prosecutions sought to challenge the adequacy of current sentencing practices for rape, the Court of Appeal did not consider that case an appropriate vehicle to examine the issue: *DPP v Werry* [2012] VSCA 208 (5 September 2012). The Director has since (in 2019) disavowed a further attempt to challenge current sentencing practices for rape: *DPP v Za Lian* [2019] VSCA 75 (8 April 2019) [100].

- 3.12 There were 395 cases in which the principal proven offence was a section 38 rape charge and the offender received a prison sentence. The yearly average total effective sentence length is shown in Figure 8.¹⁰⁰ The longest average total effective sentences were imposed in 2017, 2018 and 2019, similar to the average durations of charge-level prison sentences for rape in Figure 7. The increase is, however, less significant at the case level,¹⁰¹ and again this may be due to the specific call to increase sentences for digital rape (which is not discernible in the data in this report). Over the reference period, the average total effective sentence was 7 years and 2 months.

Case level

Section 38 rape as a standard sentence offence

- 3.13 The standard sentence for rape is 10 years. The first rape offence to attract standard sentence offence classification was sentenced in February 2019¹⁰² (it was also the first standard sentence case for any category of contact sex offence). Of the 95 non-aggregate sentences of imprisonment imposed in 2019 for section 38 rape offences, 18 were for standard sentence offences, 75 were not, and the offence date was not known for 2 charges. The average prison sentence for the 18 charges classified as standard sentence offences was 18%, or 12 months higher (6 years and 8 months) than charges that were non-standard sentence offences (5 years and 8 months).¹⁰³

Figure 8: Average total effective sentence (in years and months) in cases involving rape contrary to section 38 of the Crimes Act 1958 (Vic) as the principal proven offence, by year (395 cases)



100. There were 16 cases in which an offender received a total effective sentence of 15 years or longer for the principal proven offence of rape. The longest sentence was 25 years and 6 months. In that case, the offender pleaded guilty to 39 separate sex offences against children committed over a 12-year period: *R v Doo* [2010] VSC 325 (18 June 2010).

101. From 2010 to 2019, the average total effective sentence increased by 9%, from 7 years and 1 month to 7 years and 9 months. There was no evidence for a statistically significant trend (Pearson's correlation coefficient = 0.415, $p > 0.1$).

102. *DPP v Elwood (A Pseudonym) & Anor* [2019] VCC 128 (1 February 2019).

103. The sentence for 15 charges fell below the standard sentence (4 years, 5 years (2), 5 years and 3 months (3), 5 years and 6 months (2), 6 years (6) and 8 years) while the other 4 charges received sentences above the standard sentence (11 years and 12 years (2)). All 6 charges of rape as a standard sentence offence receiving 6 years' imprisonment were sentenced in the same case, and on appeal these sentences were found to be lenient but within range: *DPP v Drake* [2019] VSCA 293 (10 December 2019). There were also 2 proven rape charges sentenced as standard sentence offences that received youth justice centre orders (of 15 months and 42 months). These are excluded from this analysis of prison sentence lengths.

3.14 While the Court of Appeal has described the 10-year standard sentence for rape as evincing ‘Parliament’s intent to increase overall sentences for rape’,¹⁰⁴ it has also cautioned against treating it as a ‘starting point’. It emphasised that the standard sentence does not alter a court’s obligation to assess the overall seriousness of the offence by reference to the nature of the offending, which remains a ‘necessary part of the process of instinctive synthesis and is not constrained by the legislative definition of “objective factors”’.¹⁰⁵ Accordingly, it also ‘does not in any way diminish the importance of giving proper weight to relevant mitigating factors’.¹⁰⁶

Average prison sentence imposed for rape (section 38) in the higher courts in 2019

**Standard sentence offence (18 offences):
6 years and 8 months**

**Non-standard sentence offence (75 offences):
5 years and 8 months**

3.15 Section 5B(5) of the *Sentencing Act 1991* (Vic) requires courts not only to have regard to the standard sentence for an offence but also to ‘explain how the sentence imposed by it relates to that standard sentence’. The Court of Appeal has clarified that this is not, however, a requirement to ‘classify the subject offence on a scale of seriousness referable to the hypothesised mid-range offence’ because doing so would impute a form of two-step reasoning to the sentencing process, which is impermissible.¹⁰⁷ In complying with the requirement to state how a sentence for a proven charge of rape relates to the relevant standard sentence, then, courts have tended to simply mention whether the sentence falls above or below the standard sentence in light of the various factors taken into account during the instinctive synthesis process. For example:

[t]he sentence I impose in respect of the [rape] charge is lower than the standard sentence. Having identified and considered the relevant factors in assessing sentence, including the standard sentence, the objective seriousness of the offending and matters available in mitigation, this is the sentence I have determined to be appropriate.¹⁰⁸

3.16 There were, though, also cases in which courts specifically elucidated why the sentence fell above or below the standard sentence for rape. In the few cases in which the sentence was higher than the standard sentence, the offending was typically described as falling in the middle to upper range of objective seriousness and involved comparatively few mitigating factors:

The sentence that I intend to impose in respect of each of the charges of rape is higher than the standard sentence. I do that because having identified and considered the relevant factors in assessing sentence such as the gravity of the offence, the running of a trial, the absence of remorse and the absence of a plea of guilty, these are the sentences I have determined to be appropriate.¹⁰⁹

104. *Lockyer (A Pseudonym) v The Queen* [2020] VSCA 321 (9 December 2020) [30].

105. *Brown v The Queen* [2019] VSCA 286 (10 December 2019) [6]–[7]. See also *DPP v Todd* [2019] VSC 585 (2 September 2019) [60]–[61].

106. *Lockyer (A Pseudonym) v The Queen* [2020] VSCA 321 (9 December 2020) [67]–[68].

107. *Brown v The Queen* [2019] VSCA 286 (10 December 2019) [41]–[43].

108. *DPP v Hyde* [2019] VCC 712 (21 May 2019) [23]. For similar comments in cases involving charges of a standard sentence offence of rape, see *DPP v Singh* [2019] VCC 1484 (11 September 2019) [50]; *DPP v Dat (A Pseudonym)* [2020] VCC 344 (25 March 2020) [60]; *DPP v Poole (A Pseudonym)* [2020] VCC 340 (25 March 2020) [111]; *DPP v Serin* [2020] VCC 1190 (5 August 2020) [128]; *DPP v Singh* [2020] VCC 1102 (22 July 2020) [111]; *DPP v Saab* [2020] VCC 1468 (14 September 2020) [45].

109. *DPP v Mitchell* [2019] VCC 305 (13 March 2019) [71]. See also *DPP v Herrmann* [2019] VSC 694 (29 October 2019); *DPP v Todd* [2019] VSC 585 (2 September 2019) [65] (‘Taken together, all of those factors, objectively, place the rape that you committed above the middle range of seriousness for such an offence.’) Note that this charge was wholly concurrent with the sentence for murder and is consistent with previous sentence lengths for rape offences co-sentenced with a charge of murder.

- 3.17 In contrast, in cases in which the sentence for a rape charge fell below the standard sentence, then the objective seriousness of the offending was considered to fall in the lower to middle range and/or more commonly the offender could call on weighty subjective factors in mitigation, such as a plea of guilty:

The sentence that I intend to impose in respect of these charges is lower than the standard sentence. I do that because in this situation there is your age, your plea of guilty, the utilitarian benefit of that plea of guilty, your *Bugmy* type background and the fact that you will, by the end of your sentence, not pose a significant risk to anybody.¹¹⁰

- 3.18 In some cases, the sentencing court did not mention whether the sentence for a rape charge fell above or below the standard sentence.¹¹¹ However, the Court of Appeal has clarified that 'non-compliance with s 5B(5) would not of itself vitiate the exercise of the sentencing discretion'.¹¹²

110. *DPP v Jarvis (A Pseudonym)* [2019] VCC 1943 (20 November 2019) [49]. More recently, see *DPP v Beck* [2021] VSCA 88 (7 April 2021) (in this case the Court of Appeal increased the charge-level prison sentence for 2 charges of a standard sentence offence of rape from 6 years to 8 years due to manifest inadequacy, and increased the cumulation between them to produce a total effective sentence that was 2.5 years longer).

111. See, for example, *DPP v Abdi* [2020] VCC 1668 (15 October 2020); *DPP v Wright* [2020] VCC 837 (12 June 2020); *DPP v Parra (A Pseudonym)* [2020] VCC 829 (11 June 2020); *DPP v McInnes (A Pseudonym)* [2020] VCC 729 (28 May 2020); *DPP v Iudice* [2020] VCC 316 (23 March 2020); *DPP v Prodanovich* [2019] VCC 1730 (24 October 2019).

112. *DPP v Drake* [2019] VSCA 293 (10 December 2019) [17].

4. Sexual assault offences

- 4.1 This chapter discusses the number of sexual assault offences¹¹³ recorded and sentenced during the reference period and the sentences imposed for proven sexual assault offences, including the duration of prison sentences.
- 4.2 Contemporary sexual assault offences against adults include sexual assault, sexual assault by compelling sexual touching and assault with intent to commit a sexual offence, all of which came into effect on 1 July 2015.¹¹⁴ The previous suite of offences included indecent assault (August 1991 to June 2015)¹¹⁵ and assault with intent to rape (August 1993 to June 2015),¹¹⁶ both carrying maximum penalties of 10 years' imprisonment.¹¹⁷ The mental element of the indecent assault offence initially required proof that the offender was aware that the victim was not, or might not be, consenting, with reforms in 2008 and 2015 each lowering the threshold for liability.¹¹⁸ None of the sexual assault offences against adults are Category 1 offences or standard sentence offences, nor has a call been made to uplift sentencing practices for any sexual assault offences.¹¹⁹ In this sense, the offences can be seen as a quasi-control group in this report (that is, if sentencing practices for sex offences have changed, did they only change for offences subject to the various reforms or might they have changed for all sex offences?).

113. The term 'sexual assault offences' refers to the offences listed in Table 4 (see also glossary).

114. *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) s 4, inserting *Crimes Act 1958* (Vic) ss 40–42 (as in effect since 1 July 2015). The maximum penalties are 10 years' imprisonment (sexual assault and sexual assault by compelling sexual touching) and 15 years' imprisonment (assault with intent to commit a sexual offence).

115. *Crimes Act 1958* (Vic) s 42 (repealed), as inserted by *Crimes (Sexual Offences) Act 1991* (Vic) s 3. Aggravated indecent assault was a separate offence for a brief period in 1991 (August to December): *Crimes Act 1958* (Vic) s 43 (repealed), as inserted by *Crimes (Sexual Offences) Act 1991* (Vic) s 3. However, that offence was repealed in January 1992 and instead the maximum penalty for indecent assault was increased from 5 to 10 years' imprisonment: *Crimes (Rape) Act 1991* (Vic) s 3, inserting *Crimes Act 1958* (Vic) s 39 (in effect from 1 January 1992 to 30 June 2015).

116. *Crimes Act 1958* (Vic) s 40 (repealed), as inserted by *Sentencing (Amendment) Act 1993* (Vic) s 20.

117. Prior to August 1991, sexual assault offences did not distinguish between adult and child victims, and so these have been excluded from the analysis of sentencing outcomes and durations in this report.

118. In 2008, the mental element was amended to capture offenders wilfully unaware of whether the victim was not, or might not be, consenting: *Crimes Amendment (Rape) Act 2007* (Vic) s 7, amending *Crimes Act 1958* (Vic) s 39(2) (as in effect from 1 January 2008 to 30 June 2015). In 2015, it was amended to also capture offenders who did not 'reasonably believe' the victim had consented, therefore capturing reckless ignorance about consent: *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) s 4, inserting *Crimes Act 1958* (Vic) s 40(1)(b) (as in effect since 1 July 2015); Department of Justice (Vic), *Review of Sexual Offences: Consultation Paper* (2013) 57.

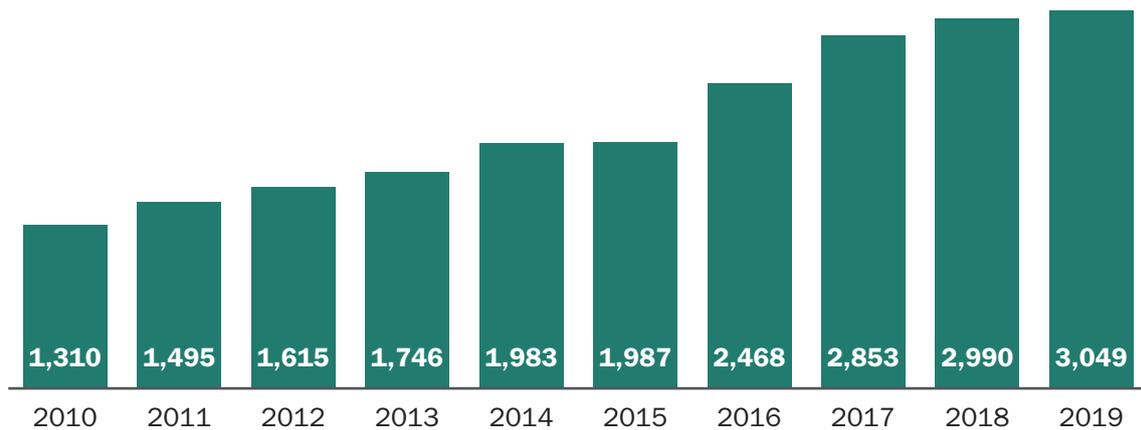
119. Sexual assault and its predecessor offence of indecent assault are, though, 'serious offences' in certain circumstances, a classification that has consequences for how they are sentenced: *Sentencing (Amendment) Act 1993* (Vic) s 4, amending *Sentencing Act 1991* (Vic) s 3 (definitions of *serious sexual offender* and *sexual offence*, as in effect from 15 August 1993 to 1 September 1997). Indecent assault and sexual assault have been included in the serious offender sentencing scheme since then, albeit in amended forms over the years. See Schedule 1 of the *Sentencing Act 1991* (Vic).

Number of recorded and sentenced sexual assault offences

4.3 Between 2010 and 2019, 21,496 sexual assault offences were recorded by police in Victoria, with the yearly number more than doubling over that period (Figure 9).

Recorded offences

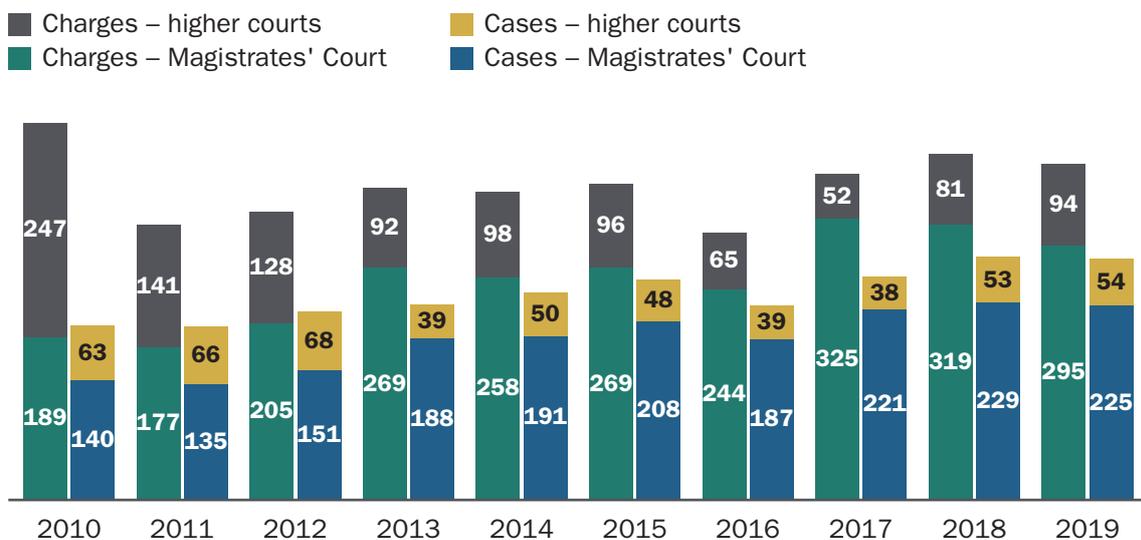
Figure 9: Number of sexual assault offences recorded by police in Victoria, by year (21,496 offences)



4.4 In the same timeframe, 3,644 sexual assault offences were sentenced in 2,393 cases (Figure 10), involving 2,278 offenders, 2,238 of whom were male (over 98%). While the number of recorded offences increased significantly, the number of charges and cases of sexual assault sentenced in the Magistrates' Court increased gradually to a smaller degree,¹²⁰ and the number of charges and cases sentenced in the higher courts had no discernible trend.

Sentenced charges and cases

Figure 10: Number of charges and cases of sexual assault offences sentenced in Victoria, by year and court (3,644 charges and 2,393 cases)



120. The anomalous spike in charges in 2010 was due to an exceptional number of high-volume cases. In 2010, 10 cases had 8 or more charges of sexual assault offences (with 1 case containing 33 charges). In comparison, just nine cases had 8 or more charges in all other years combined.

4.5 Table 4 shows which sexual assault offences were sentenced during the reference period. The most common offences were indecent assault and sexual assault, contrary to sections 39 and 40 of the *Crimes Act 1958* (Vic), respectively. The Magistrates' Court dealt with the majority of both charges (70%) and cases (78%) of sexual assault offences.

Table 4: Number of sexual assault offences and cases sentenced in Victoria, 2010 to 2019, by operational period and statutory reference (3,644 charges and 2,393 cases)

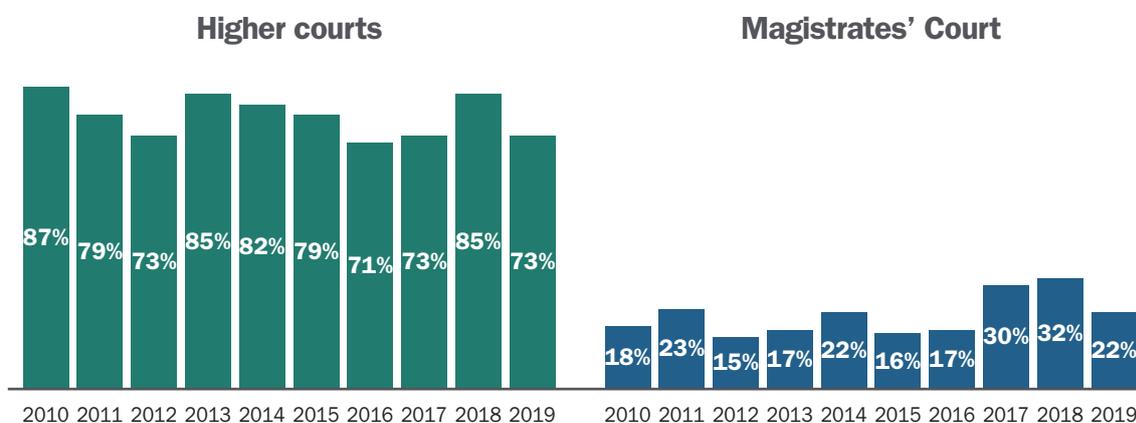
Offence	Statutory reference <i>Crimes Act 1958</i> (Vic)	Operational period	Maximum penalty	Higher courts		Magistrates' Court	
				Charges	Cases	Charges	Cases
Indecent assault	Section 42	From 5 August 1991 To 31 December 1991	5 years	3	2	3	1
Aggravated indecent assault	Section 43	From 5 August 1991 To 31 December 1991	10 years	1	1	0	0
Indecent assault	Section 39(1)	From 1 January 1992 To 30 June 2015	10 years	923	393	1,549	1,145
Assault with intent to rape	Section 40(1)	From 15 August 1993 To 30 June 2015	10 years	20	20	5	5
Sexual assault	Section 40(1)	From 1 July 2015 To present	10 years	130	99	970	720
Sexual assault by compelling sexual touching	Section 41(1)	From 1 July 2015 To present	10 years	4	4	11	11
Assault with intent to commit a sexual offence	Section 42(1)	From 1 July 2015 To present	15 years	13	12	13	13
Total				1,094	518^a	2,550	1,875^a

a. The total number of cases for both court levels in Table 4 is lower than the sum of the respective rows above because there were cases in which sexual assault offences under different statutory provisions were sentenced together.

Sentence types imposed for sexual assault offences

- 4.6 Table 5 (page 29) shows the prevalence of sentence types imposed for sexual assault offences in each jurisdiction during the reference period.¹²¹ As would be expected, charges sentenced in the higher courts were much more likely to receive an immediate custodial sentence (80%) than charges sentenced in the Magistrates' Court (22%). The most common sentences imposed for sexual assault offences in the Magistrates' Court were community orders (35%).
- 4.7 While imprisonment rates for sexual assault fluctuated slightly during the reference period, they did so within relatively stable ranges at both court levels (as illustrated in Figure 11).

Figure 11: Proportion of sexual assault offences receiving immediate custodial sentences in Victoria, by court and year (3,644 charges: 1,094 in the higher courts, 2,550 in the Magistrates' Court)



- 4.8 There was a drop in *other* sentence types at both court levels, primarily due to the abolition of suspended sentences.¹²² The increased use of community orders in the higher courts was likely due to the introduction of community correction orders (CCOs) in 2012¹²³ and the subsequent guideline judgment about their use in 2014.¹²⁴

121. In Table 5, *immediate custodial sentences* include 1,006 prison sentences (including combined orders), 355 aggregate sentences of imprisonment (including combined orders), 62 partially suspended sentences, and 9 youth justice centre orders or youth training centre orders. *Community orders* include 872 community correction orders, 133 community-based orders and 16 intensive correction orders. *Other orders* include 213 wholly suspended sentences, 4 residential treatment orders, 137 diversions, 6 court secure treatment orders and 17 discharges with conviction.

122. *Sentencing Amendment Act 2010* (Vic); *Sentencing Amendment (Abolition of Suspended Sentences & Other Matters) Act 2013* (Vic).

123. *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic).

124. *Boulton & Ors v The Queen* [2014] VSCA 342 (22 December 2014).

Table 5: Sentencing outcomes for sexual assault offences in Victoria, by sentence type, court level and year (3,644 charges: 1,094 in the higher courts, 2,550 in the Magistrates' Court)

Outcome	Court level	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total
Immediate custodial sentence	Higher courts	214 (87%)	111 (79%)	93 (73%)	78 (85%)	80 (82%)	76 (79%)	46 (71%)	38 (73%)	69 (85%)	69 (73%)	874 (80%)
	Magistrates' Court	34 (18%)	41 (23%)	31 (15%)	47 (17%)	57 (22%)	42 (16%)	41 (17%)	97 (30%)	103 (32%)	65 (22%)	558 (22%)
Community order	Higher courts	7 (3%)	10 (7%)	11 (9%)	8 (9%)	13 (13%)	14 (15%)	15 (23%)	11 (21%)	11 (14%)	18 (19%)	118 (11%)
	Magistrates' Court	63 (33%)	67 (38%)	59 (29%)	79 (29%)	78 (30%)	105 (39%)	109 (45%)	128 (39%)	112 (35%)	103 (35%)	903 (35%)
Fine	Higher courts	15 (6%)	1 (1%)	2 (2%)	–	1 (1%)	1 (1%)	1 (2%)	1 (2%)	–	1 (1%)	23 (2%)
	Magistrates' Court	35 (19%)	26 (15%)	41 (20%)	55 (20%)	42 (16%)	50 (19%)	37 (15%)	40 (12%)	52 (16%)	56 (19%)	434 (17%)
Adjourned undertaking	Higher courts	–	–	2 (2%)	1 (1%)	–	3 (3%)	1 (2%)	1 (2%)	1 (1%)	1 (1%)	10 (1%)
	Magistrates' Court	23 (12%)	15 (8%)	35 (17%)	50 (19%)	28 (11%)	46 (17%)	38 (16%)	25 (8%)	34 (11%)	53 (18%)	347 (14%)
Other	Higher courts	11 (4%)	19 (13%)	20 (16%)	5 (5%)	4 (4%)	2 (2%)	2 (3%)	1 (2%)	–	5 (5%)	69 (6%)
	Magistrates' Court	34 (18%)	28 (16%)	39 (19%)	38 (14%)	53 (21%)	26 (10%)	19 (8%)	14 (11%)	18 (6%)	18 (6%)	308 (12%)
Total higher courts		247	141	128	92	98	96	65	52	81	94	1,094
Total Magistrates' Court		189	177	205	269	258	269	244	325	319	295	2,550
Total all courts		436	318	333	361	356	365	309	377	400	389	3,644

How long were prison sentences for sexual assault?

- 4.9 There were 968 non-aggregate sentences of imprisonment imposed for indecent assault and sexual assault contrary to sections 39(1) and 40(1) of the *Crimes Act 1958* (Vic).¹²⁵ The yearly average prison sentence lengths for those 968 charges are shown in Figure 12 (page 31). The average prison sentences for these offences were 14 months in the higher courts and 6 months in the Magistrates' Court. The shortest term was 6 days and the longest was 5 years. In the higher courts, the charge-level prison sentences for sexual assault appear to be slightly longer since 2016, but they have remained fairly stable in the Magistrates' Court.¹²⁶
- 4.10 During the reference period, there were 365 cases in which the principal proven offence was indecent assault or sexual assault contrary to sections 39(1) and 40(1) of the *Crimes Act 1958* (Vic) and the offender received a prison sentence. The average total effective sentence in the higher courts was 2 years and 3 months, ranging from 2 weeks (1 charge of indecent assault) to 9 years (a case with 3 charges of aggravated burglary, 3 charges of indecent assault, and 2 charges of indecent act with a child aged under 16). The average total effective sentence in the Magistrates' Court was 7 months, ranging from less than a week to 3 years. Given the fluctuations in average total effective sentences, there was no discernible trend over the reference period.¹²⁷

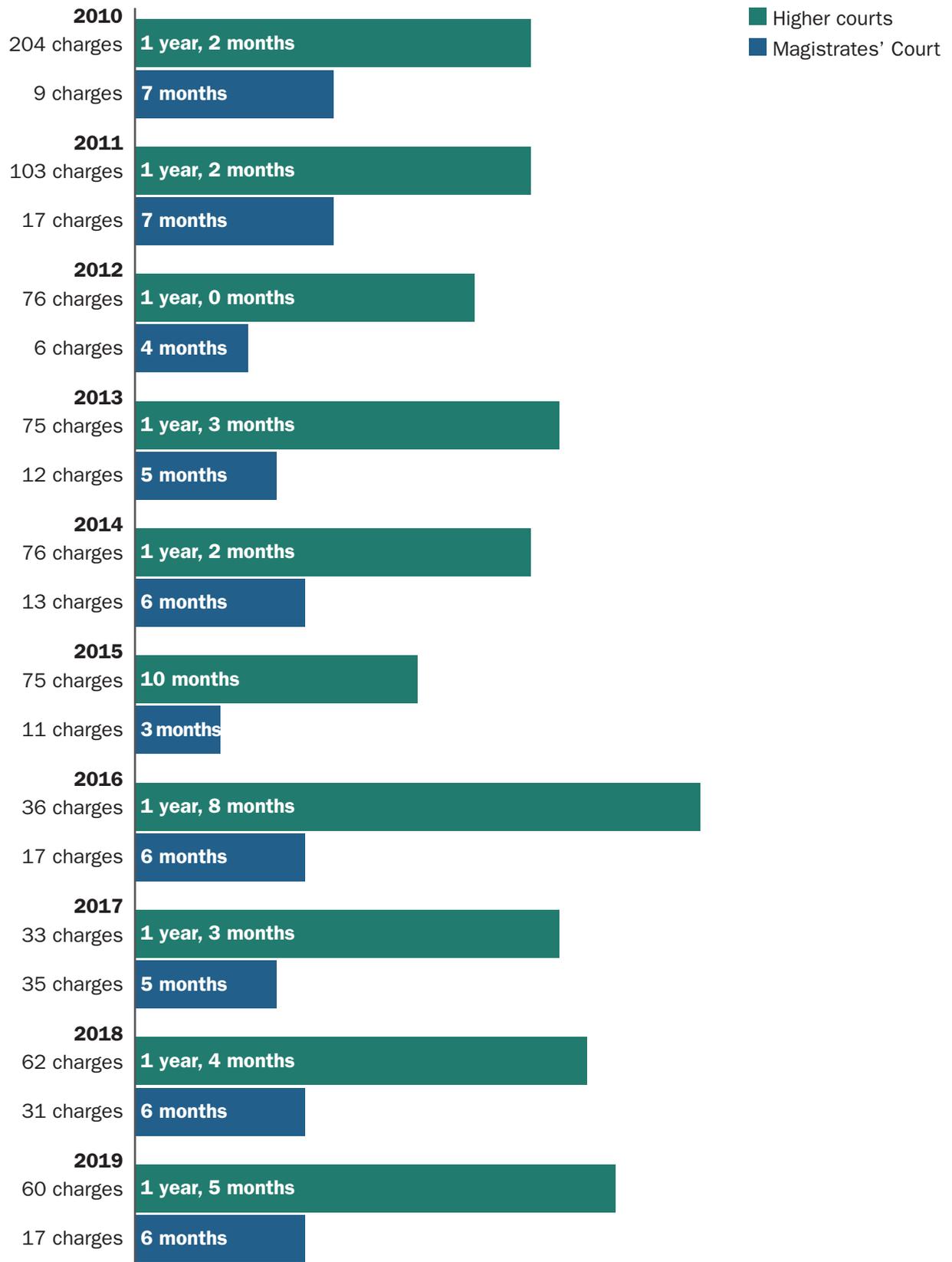
125. These offences are analysed together as they involve substantially the same offence and have the same maximum penalty. Non-aggregate sentences of imprisonment imposed for the other sexual assault offences are outlined in Appendix 3. The section 42 *indecent assault* offence is not included here because the maximum penalty was just 5 years (compared to 10 years since 1 January 1992). This analysis excludes charges that received aggregate sentences of imprisonment on multiple charges (345 charges) or received partially suspended sentences (62 charges) or youth justice centre orders (8 charges).

126. From 2010 to 2019, the average prison sentence increased by 27% in the higher courts (from 1 year and 2 months to 1 year and 5 months) and decreased by 14% in the Magistrates' Court (from 7 months to 6 months). There was no evidence for a statistically significant trend in either court (Pearson's correlation coefficient = 0.467 (HC); -0.217 (MC), $p > 0.1$).

127. From 2010 to 2019, the average total effective sentence decreased by 63% in the higher courts (from 3 years and 9 months to 1 year and 5 months) and decreased by 39% in the Magistrates' Court (from 11 months to 7 months). There was no evidence for a statistically significant trend in the higher court (Pearson's correlation coefficient = 0.344, $p > 0.1$), while the trend was nearing significance in the Magistrates' Court (Pearson's correlation coefficient = 0.604, $p = 0.065$).

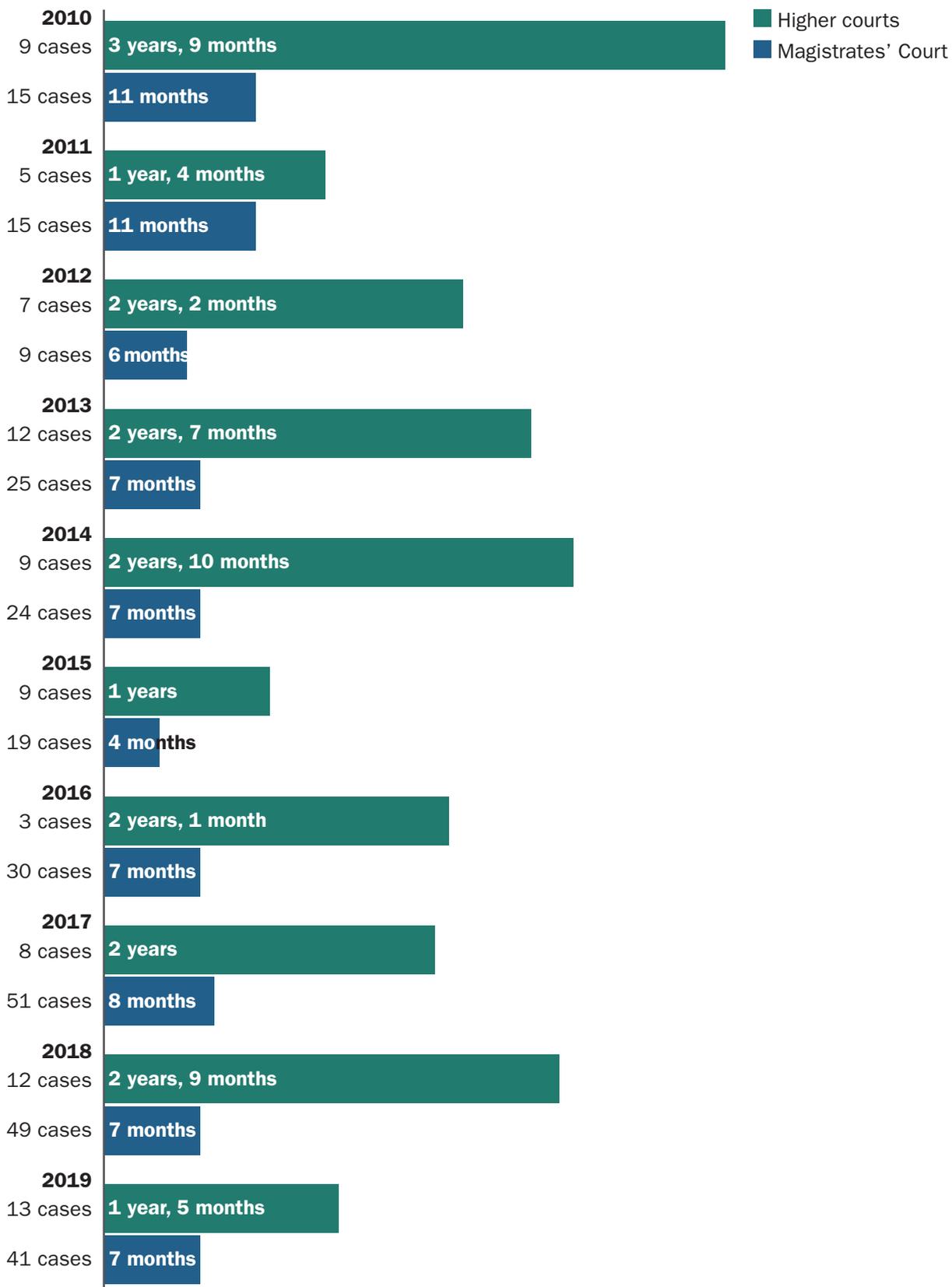
Charge level

Figure 12: Average prison sentences (in years and months) imposed on charges of indecent assault or sexual assault contrary to sections 39(1) and 40(1) of the *Crimes Act 1958* (Vic), by year and court (968 charges: 800 in the higher courts and 168 in the Magistrates' Court)



Case level

Figure 13: Average total effective sentence (in years and months) imposed in cases involving indecent assault or sexual assault contrary to sections 39(1) and 40(1) of the *Crimes Act 1958* (Vic) as the principal proven offence, by year and court (365 cases: 87 in the higher courts and 278 in the Magistrates' Court)



5. Incest offences

- 5.1 This chapter discusses the number and types of incest offences¹²⁸ recorded and sentenced in the 10 years from 2010 to 2019 and the sentences imposed for proven incest offences, including the duration of charge-level and case-level prison sentences. The specific offences of incest with a child, stepchild or lineal descendant were subject to all three sentencing reforms: Category 1 offence classification, standard sentence offence classification and the call to uplift sentencing practices in the *Dalgliesh* decisions.
- 5.2 When the *Crimes Act 1958* (Vic) first came into effect, almost all incest offences were limited to female relatives – daughters, stepdaughters, female lineal descendants, mothers and sisters¹²⁹ – and children aged 10 and over (offences against younger relatives were instead charged as non-incest child sexual penetration or assault offences). In 1981, the various incest offences were broadened to include male relatives, but they still only applied if the victim was aged 10 or over.¹³⁰ In 1991, that minimum age requirement was removed.¹³¹ In 1997, the maximum penalty for incest with a child, stepchild or lineal descendant increased from 20 years' imprisonment to 25 years' imprisonment.¹³² As at March 2017, the offences of incest with a child, stepchild or lineal descendant were classified as *Category 1 offences* (but only if the victim was aged under 18 years at the time of the offending),¹³³ as were the subsequent suite of replacement offences introduced on 1 July 2017.¹³⁴ Similarly, those same incest offences were classified as standard sentence offences if committed on or after 1 February 2018, with a standard sentence of 10 years' imprisonment for incest with a stepchild (section 50D), child or lineal descendant (section 50C).¹³⁵

128. The term 'incest offences' refers to the offences listed in Table 6 (see also glossary).

129. *Crimes Act 1958* (Vic) ss 52–53 (repealed). The one exception was the offence of a female aged 18 years or over consenting to and permitting a male lineal ancestor to have carnal knowledge. The offences included actual or attempted carnal knowledge of a person's daughter, stepdaughter or female lineal descendant (20-year and 10-year maximum penalties, respectively) and actual or attempted carnal knowledge of a person's mother or sister (7-year and 5-year maximum penalties, respectively).

130. *Crimes (Sexual Offences) Act 1980* (Vic) s 3, amending *Crimes Act 1958* (Vic) ss 52–53 (repealed).

131. *Crimes (Sexual Offences) 1991* (Vic) s 3, inserting *Crimes Act 1958* (Vic) s 44 (repealed).

132. *Sentencing and Other Acts (Amendment) Act 1997* (Vic) s 60(1), sch 1 item 21.

133. *Sentencing Act 1991* (Vic) s 3 (definition of *Category 1 offence*), as inserted by *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) s 3.

134. *Sentencing Act 1991* (Vic) s 3 (definition of *Category 1 offence*), as amended by *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) s 23. Between 1 July 2017 and 27 October 2018, the repealed versions of those incest offences were removed from the definition of *Category 1 offence* and the new versions of those offences were added (meaning that imprisonment was not mandatory for that 19-month period if the repealed offences were committed on or after 20 March 2017 and sentenced between 1 July 2017 and 27 October 2018). This was likely an oversight as those repealed offences were then reintroduced to the definition of *Category 1 offence*: *Legislation Miscellaneous Amendment Act 2018* (Vic) s 73. This brief period during which the repealed offences were not classified as *Category 1 offences* did not affect any cases; there were no cases in which those offences received a sentence other than imprisonment during that 19-month period.

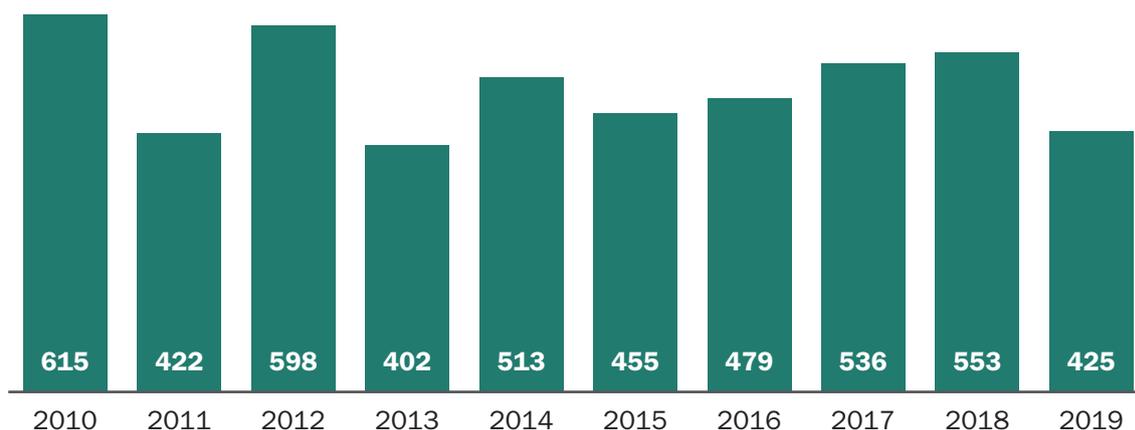
135. *Crimes Act 1958* (Vic) ss 50C(3), 50D(3), as inserted by *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic) ss 33(1), 34(1).

Number of recorded and sentenced incest offences

5.3 Almost 5,000 incest offences were recorded by police in Victoria during the reference period (Figure 14).

Recorded offences

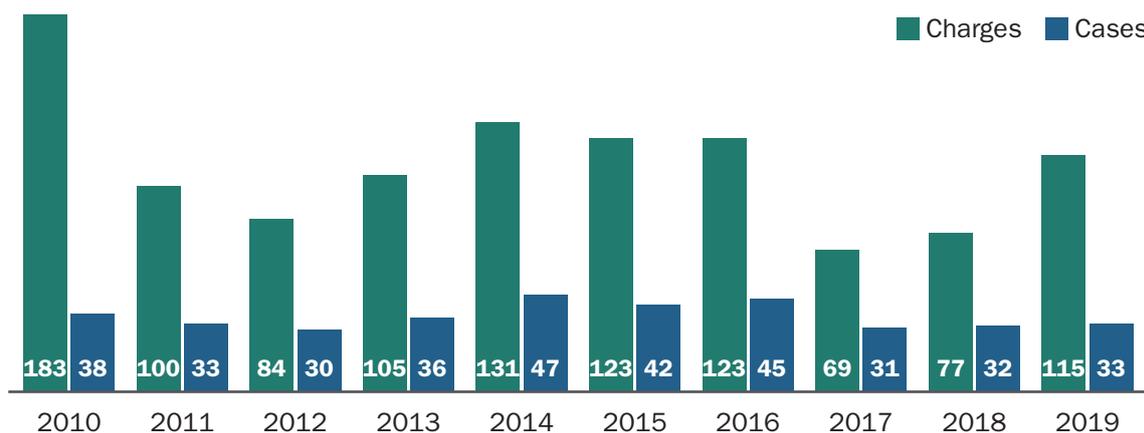
Figure 14: Number of incest offences recorded by police in Victoria, by year (4,998 offences)



5.4 In that same timeframe, 1,110 incest charges were sentenced in 367 cases involving 354 offenders (Figure 15),¹³⁶ just 15 of whom were female (4%). Almost all cases were sentenced in the higher courts, but 5 cases with charges of incest with either a sibling (6 charges) or a half-sibling (7 charges) were sentenced in the Magistrates' Court, all in 2013 and 2015.

Sentenced charges and cases

Figure 15: Number of incest charges and cases sentenced in Victoria, by year (1,110 charges and 367 cases)



5.5 Table 6 outlines the specific incest offences sentenced during the reference period. Where the relationship between the offender and the victim was known, stepparents (by a slim margin over biological parents) were the most commonly sentenced offenders.¹³⁷

136. The unusually high number of incest charges sentenced in 2010 was due to a small number of offenders sentenced for an anomalously high number of charges in their respective cases (26, 13, 11 and 11 charges).

137. This is consistent with prior research finding that stepfathers engage in sexual abuse of children in the home at a higher rate than genetic parents: Agata Debowska et al., 'Violence Against Children by Stepparents', in Todd K. Shackelford (ed.), *The Sage Handbook of Domestic Violence* (2020).

About 6% of Australian couples with children involve a stepparent, but stepparents accounted for 51% of incest offences committed by parents of the victim.¹³⁸ This suggests that stepparents – more specifically, *stepfathers* given that 96% of incest offenders were male – are much more likely to be incest offenders than biological parents/fathers.

Table 6: Number of incest offences and cases sentenced in Victoria, 2010 to 2019, by operational period and statutory reference (1,110 charges and 367 cases)

Offence	Statutory reference <i>Crimes Act 1958 (Vic)</i>	Operational period	Maximum penalty	Charges	Cases
Carnal knowledge of daughter, stepdaughter or lineal descendant aged 10 or over	Section 52(1)	From 1 April 1959 To 28 February 1981	20 years	9	4
Carnal knowledge of mother or sister	Section 52(3)	From 1 April 1959 To 28 February 1981	7 years	8	5
Incest with a child, stepchild or lineal descendant aged 10 or over ^a	Section 52(1)	From 1 March 1981 To 4 August 1991	20 years	51 Stepchild: 23 Child: 21 Unclear: 7	31^c Stepchild: 14 Child: 17 Unclear: 2
Incest with a sibling or half-sibling	Section 52(4)	From 1 March 1981 To 4 August 1991	7 years	12 Sibling: 6 Half-sibling: 6	7 Sibling: 5 Half-sibling: 2
Incest with a child, stepchild or lineal descendant ^b	Sections 44(1) 44(2)	From 5 August 1991 To 30 June 2017	Before 1 September 1997 20 years From 1 September 1997 25 years	925 Stepchild: 427 Child: 418 Lineal descendant: 74 Unclear: 6	286 Stepchild: 138 Child: 134 Lineal descendant: 31 Unclear: 3
Incest with a parent, stepparent or lineal ancestor	Section 44(3)	From 5 August 1991 To 30 June 2017	Before 24 April 1992 5 years 24 April 1992 to 30 August 1997 7 years and 6 months From 1 September 1997 5 years	4 Parent: 4	3 Parent: 3
Incest with a sibling or half-sibling	Section 44(4)	From 5 August 1991 To 30 June 2017	Before 24 April 1992 5 years 24 April 1992 to 30 August 1997 7 years and 6 months From 1 September 1997 5 years	85 Sibling: 61 Half-sibling: 24	34 Sibling: 23 Half-sibling: 11

138. Australian Bureau of Statistics, cat. no. 2008.0, *Census of Population and Housing (2016)* <<https://www.abs.gov.au/websitedbs/censushome.nsf/home/2016>>.

Offence	Statutory reference <i>Crimes Act 1958 (Vic)</i>	Operational period	Maximum penalty	Charges	Cases
Sexual penetration with a child, stepchild or lineal descendant	Sections 50C 50D	From 1 July 2017 To present	25 years	16 Stepchild: 6 Child: 4 Lineal descendant: 6	7 Stepchild: 3 Child: 1 Lineal descendant: 3
Sexual penetration with a parent, stepparent or lineal ancestor	Section 50E	From 1 July 2017 To present	5 years	–	–
Sexual penetration with a sibling or half-sibling	Section 50F	From 1 July 2017 To present	5 years	–	–
Total				1,110	367^d

- This includes 26 charges that were recorded in the data as incest with a child, stepchild or lineal descendant contrary to section 52(1) of the *Crimes Act 1957 (Vic)*. A review of available sentencing remarks in some of these cases suggests that this was a data entry error and that these were in fact contraventions of the more recent offence contrary to section 52(1) of the *Crimes Act 1958 (Vic)*, which was in effect from 1 March 1981 to 4 August 1991.
- This includes 48 charges that were recorded in the data as incest with a child, stepchild or lineal descendant contrary to section 48(1) of the *Crimes Act 1928 (Vic)*. A review of available sentencing remarks in some of these cases suggests that this was a data entry error and that these were in fact contraventions of the more recent offence contrary to section 44(1) of the *Crimes Act 1958 (Vic)*, which was in effect from 5 August 1991 to 30 June 2017.
- The total number of cases in each category is less than the sum of the individual relationship values because in some cases multiple incest offences were sentenced together.
- The total number of cases is lower than the sum of the above rows because there were cases in which multiple incest offences under various statutory references were sentenced together.

Sentence types imposed for incest offences

- 5.6 Table 7 shows the sentencing outcomes for charges of incest during the reference period.¹³⁹ The vast majority (94%) received an immediate custodial sentence. Of the 72 incest charges that received another sentence type, 62 were offences with maximum penalties of 5 years' or 7 years' imprisonment (incest with a parent or sibling). Just 10 incest charges with comparatively higher maximum penalties of 20 years' or 25 years' imprisonment (in 8 cases) received a sentence other than an immediate custodial sentence: incest with a child (4), stepchild (2) or lineal descendant (4).
- 5.7 Sentencing outcomes for incest with a child, stepchild or lineal descendant already involved a consistently high rate of custodial sentences (99%) prior to the introduction of Category 1 offences.¹⁴⁰ Similarly, all of the 16 charges of incest sentenced as Category 1 offences in 2018 and 2019 (in 7 cases) received a prison sentence. As mentioned at [2.2], there is no minimum sentence for offences attracting Category 1 offence classification, including incest with a child, stepchild or lineal descendant aged under 18.

139. In Table 7, *immediate custodial sentences* include 1,033 prison sentences (including combined orders), 1 aggregate sentence of imprisonment and 4 partially suspended sentences. *Community orders* include 32 community correction orders. *Other orders* include 29 wholly suspended sentences, 10 adjourned undertakings and 1 discharge with conviction.

140. Of the 807 charges of all offences against children, stepchildren and lineal descendants sentenced between 2010 and 2017, 798 received an immediate custodial sentence.

Table 7: Number and proportion of each sentence type imposed for incest offences sentenced in Victoria, 2010 to 2019 (1,110 charges)

Outcome	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total
Immediate custodial sentence	172 (94%)	98 (98%)	82 (98%)	92 (88%)	127 (97%)	106 (86%)	119 (97%)	59 (86%)	73 (95%)	110 (96%)	1,038 (94%)
Community order	–	–	–	2 (2%)	1 (1%)	12 (10%)	4 (3%)	8 (12%)	2 (3%)	3 (3%)	32 (3%)
Other	11 (6%)	2 (2%)	2 (2%)	11 (10%)	3 (2%)	5 (4%)	–	2 (3%)	2 (3%)	2 (2%)	40 (4%)
Total	183	100	84	105	131	123	123	69	77	115	1,110

However, the shortest terms of imprisonment imposed for incest offences classified as Category I offences were 3 years (1 charge) and 6 years (2 charges). The lengths of these sentences suggest that these offences would have received prison sentences regardless of Category I offence classification.

- 5.8 Of the eight cases in which an outcome other than an immediate custodial sentence was imposed across the reference period, the victim was aged 18 years or over in 2 cases (the Category I offence classification would not have applied), the victim was aged under 18 years in 1 case, and the victim's age was unknown in 5 cases. The details of the one case involving a victim aged under 18 years are outlined in Case Study 3. On the available data and sentencing remarks, this is the only known case in which classification of incest as a Category I offence would have affected the sentence type imposed during the 10-year reference period.¹⁴¹ The circumstances of this case, in particular, highlight the difficulties that mandatory sentencing schemes may give rise to and the continuing need for judicial discretion in sentencing.

Case Study 3: community order for incest with a child aged under 18

The offending in this case occurred over a decade prior to sentencing. The offender's husband was abusive of both her and their daughter. At the instruction of her husband, she inserted her finger into her daughter's vagina on a single occasion. Her offending came to police's attention because she later approached police in connection with her husband abusing her 10-year-old son.

The offender had a traumatic upbringing, including experiencing residential care and disrupted schooling, and had a low IQ. At the time of sentencing, she was living in commission housing with sole care of her 10-year-old son and had no other immediate or extended family to care for him if she was incarcerated. She had also agreed to testify against her husband.

She received a 3-year community correction order with 250 hours of unpaid community work and a requirement to participate in mental health programs as directed.

Unpublished sentencing remarks provided to the Council

141. No combined orders were imposed for incest with a child, stepchild or lineal descendant during the reference period. These orders are now impermissible for Category I offences.

How long were prison sentences for incest?

5.9 There were 928 charges of incest with a child, stepchild or lineal descendant that received a non-aggregate sentence of imprisonment.¹⁴² Figure 16 shows the average prison sentence imposed for these offences for each year of the reference period. The shortest prison sentence for those offences was 6 months (stepchild) and the longest was 12 years (1 stepchild and 1 biological child).¹⁴³ While the average prison sentence for these offences was relatively stable for the first 6 years, it increased significantly in 2016 and increased even more significantly in 2019.¹⁴⁴ The increase in 2019 seems to have been driven by a combination of four factors:

Charge level

- the classification of incest as a standard sentence offence (sentences for these offences were much higher than sentences for non-standard sentence offences);
- the influence of the various *Dalgliesh* decisions calling for an immediate uplift in sentencing practices;
- the influence of allowing certain sex offences to be charged as course of conduct offences (sentences for course of conduct offences were much higher than sentences for non-course of conduct offences); and
- an anomalous case in which an offender received either 10 years' or 12 years' imprisonment for each of the 16 separate charges of incest with his stepchild (without this case, the average prison sentence in 2019 would have been 6 years and 3 months).

The first three of these factors are discussed in more detail at [5.11]–[5.14].

Figure 16: Average prison sentence (in years and months) for incest with a child, stepchild or lineal descendant offences contrary to sections 44(1), 44(2), 50C and 50D of the *Crimes Act 1958* (Vic), by year (928 charges)



142. This analysis includes the various iterations of incest pursuant to *Crimes Act 1958* (Vic) ss 44(1), 44(2), 50C(1), 50D(1). These can be meaningfully analysed collectively because they share identical, or very similar, maximum penalties and criminality. Furthermore, the section 52(1) offence in effect prior to 1991 against a child, stepchild or lineal descendant was excluded as it not only had a lower maximum penalty of 20 years' imprisonment but it also applied only in respect of victims aged 10 years and over. For the offences that are included, there was little variation in the 10-year average prison sentence based on the relationship between the victim and the offender (4 years and 11 months for incest with a biological child, 4 years and 9 months for incest with a stepchild, and 4 years and 8 months for incest with a lineal descendant). The charge-level prison sentences for other incest offences are outlined in Appendix 3.

143. For an example case in which a particularly long prison sentence was imposed during the reference period for a single charge of incest with a child, see *DPP v Wylie (A Pseudonym)* [2017] VCC 1086 (9 August 2017) (in this case, a sentence of 9.5 years was imposed for a representative charge of incest with the offender's 2-year-old daughter, the court describing it as 'extremely grave offending falling towards the very high end of the offence seriousness').

144. From 2010 to 2019, the average prison sentence increased by 65% from 4 years and 2 months to 6 years and 11 months. There was evidence for a statistically significant trend (Pearson's correlation coefficient = 0.792, $p = 0.006$).

- 5.10 Between 2010 and 2019, there were 254 cases in which a charge of incest with a child, stepchild or lineal descendant was the principal proven offence and the offender received a prison sentence. Figure 17

Case level shows the average total effective sentence in these cases for each year of the reference period.¹⁴⁵ The longest prison sentence was 25 years (in a case with 26 charges of physical or sexual violence against the offender's stepchild), and the shortest was 12 months (imposed on a 79-year-old offender found guilty of incest with a lineal descendant), which was also the only total effective sentence of less than 3 years. The average over the reference period was 8 years and 3 months.

The influence of standard sentence offence classification

- 5.11 The standard sentence for incest offences is 10 years. Of the 101 non-aggregate sentences of imprisonment imposed in 2019 for incest with a child, stepchild or lineal descendant, 9 were for standard sentence offences (in 3 cases) and 92 were not.¹⁴⁶
- 5.12 The average prison sentence for standard sentence offences was 7 years and 7 months, 11% (9 months) higher than the average prison sentence for non-standard sentence offences that year. Excluding those 9 standard sentence offences, the average prison sentence for incest offences in 2019 was still much higher than in the previous year. It is likely that the introduction of a standard sentence for incest offences, coupled with the changing sentencing practices in those cases, is also influencing sentence lengths in cases of non-standard sentence offences, alongside the other reforms applicable to incest offences discussed below.¹⁴⁷
- 5.13 Each of the sentences imposed for standard sentence offences of incest fell below the standard sentence of 10 years.¹⁴⁸ This is, however, not unusual given that the standard

Figure 17: Average total effective sentence (in years and months) in cases involving incest with a child, stepchild or lineal descendant contrary to sections 44(1), 44(2), 50C and 50D of the Crimes Act 1958 (Vic) as the principal proven offence, by year (254 cases)



145. From 2010 to 2019 the average total effective sentence increased by 30% from 9 years and 2 months to 11 years and 11 months. There was no evidence for a statistically significant trend (Pearson's correlation coefficient = 0.449, $p > 0.1$).

146. Two of the standard sentence cases are publicly available: *DPP v Jarvis (A Pseudonym)* [2019] VCC 1943 (20 November 2019); *DPP v Fiskén (A Pseudonym)* [2019] VCC 1572 (20 September 2019). Two charges were committed after 1 February 2018, but the age of the victim could not be determined. Given that this offending most often occurs against children and the victim was the offender's lineal descendant (not their child), the Council has included those charges as standard sentence offences.

147. See, for example, *DPP v Ferreira (A Pseudonym)* [2019] VCC 1212 (8 August 2012) [54], in which the sentencing court noted the new standard sentence for incest offences despite also noting that the offending in the case, which occurred between 2015 and 2016, was not subject to such classification. *Contra DPP v Carr (A Pseudonym)* [2019] VCC 1750 (24 October 2019) [9] ('You are fortunate indeed that the standard sentencing scheme does not apply to you ... Had the scheme actually applied to you, inevitably you would have received more significant terms, a higher total effective sentence and a higher non-parole period').

148. This included prison sentences of 7 years (child), 7 years (child), 7 years (child), 7 years (child), 8 years (stepchild), 8 years (stepchild) and 8.5 years (stepchild).

sentence does not account for subjective factors relevant to the offender, such as a plea of guilty.¹⁴⁹ As the Court of Appeal recently said in *Lockyer (A Pseudonym) v The Queen*:

It must be understood that the standard sentencing regime, so recently introduced, does not in any way diminish the importance of giving proper weight to relevant mitigating factors. These include the personal circumstances of the offender; his or her prospects of rehabilitation and, where appropriate, the need to give due weight to a plea of guilty (particularly if coupled with remorse).¹⁵⁰

- 5.14 There are currently few publicly available sentencing remarks about how standard sentences have been taken into account in sentencing incest offending. In *DPP v Jarvis (A Pseudonym)*, the offender received prison sentences of 8 years each on 2 charges of incest with his biological daughter.¹⁵¹ As the Court of Appeal intimated in *Lockyer*, the effect of the offender's plea of guilty in that case was to drive the actual sentence imposed for the offences below the standard sentence for the offence. The sentencing judge specifically said that were it not for the offender's plea of guilty, 'I would have probably given sentences greater than the standard sentence'.¹⁵² And in *DPP v Murray (A Pseudonym)*, the offender received a 6-year prison sentence for engaging in digital and penile penetration with his stepdaughter.¹⁵³ The court in that case noted that because of the current paucity of cases in which incest offences attracted standard sentence offence classification, there are limited, if any, current sentencing practices to which courts can refer.¹⁵⁴

Average prison sentence imposed for incest with a child, stepchild or lineal descendant (sections 44(1), 44(2), 50C and 50D) in the higher courts in 2019:

Standard sentence offence (9 offences):

7 years and 7 months

Non-standard sentence offence (92 offences):

6 years and 10 months

The influence of the various *Dalgliesh* decisions

- 5.15 Although the Court of Appeal has repeatedly and consistently emphasised the seriousness of the crime of incest,¹⁵⁵ sentences for such offending prior to the various *Dalgliesh* decisions were said to have 'devalued the seriousness of it'.¹⁵⁶ As described at [2.6]–[2.11], the Court of Appeal called for an uplift to sentencing practices for these offences in 2016,¹⁵⁷ a call that was affirmed by the High Court a year later (albeit holding that the uplift should be more immediate).¹⁵⁸

149. Guilty pleas significantly affect sentencing outcomes. The Council has previously found that 72% of guilty pleas in the higher courts attract a sentence discount of between 20% and 40% of the sentence that would have been imposed had the offender not pleaded guilty; 12% received discounts of more than 40%, and only 14% received a discount of less than 20%: Sentencing Advisory Council, *Guilty Pleas in the Higher Courts: Rates, Timing, and Discounts* (2015) 65.

150. *Lockyer (A Pseudonym) v The Queen* [2020] VSCA 321 (9 December 2020) [67].

151. *DPP v Jarvis (A Pseudonym)* [2019] VCC 1943 (21 November 2019).

152. *DPP v Jarvis (A Pseudonym)* [2019] VCC 1943 (21 November 2019) [56].

153. *DPP v Murray (A Pseudonym)* [2020] VCC 1475 (16 September 2020).

154. *DPP v Murray (A Pseudonym)* [2020] VCC 1475 (16 September 2020) [55] ('Falling as it does under the standard [sentence] scheme, the consideration of current sentencing practices ... is limited to sentences imposed under the standard [sentence] scheme. There are currently very few if any comparable cases to establish such a practice').

155. See, for example, *R v Ware* [1997] 1 VR 647; *DPP v G* [2002] VSCA 6 (7 February 2002) [11]; *DPP v BGJ* [2007] VSCA 64 (17 April 2007); *GEM v The Queen* [2010] VSCA 168 (1 July 2010); *DPP v Wilson (A Pseudonym)* [2018] VSCA 263 (17 October 2018) [25] ('Incest involving a child is by definition an offence of very high culpability since it is so obviously contrary to every tenet of parental care for children').

156. *DPP v Shelton (A Pseudonym)* [2020] VCC 1073 (21 July 2020) [85].

157. *DPP v Dalgliesh (A Pseudonym)* [2016] VSCA 148 (29 June 2016).

158. *DPP v Dalgliesh (A Pseudonym)* [2017] HCA 41 (11 October 2017); *Carter (A Pseudonym) v The Queen* [2018] VSCA 88 (11 April 2018) [80].

- 5.16 The timing of these judgments and the actual changes in sentencing practices warrant closer examination. First, while the Court of Appeal called for an uplift to sentencing practices for incest in 2016, most of the 2016 increase actually preceded the Court of Appeal's decision in June (see Figure 16). In particular, the 52 charges of incest offences that received prison sentences in the first half of 2016, prior to the court's decision, had an average prison sentence of 5 years (a year longer than the average prison sentence in 2015), while the average prison sentence for the 49 charges sentenced in the second half of 2016 was only slightly higher, at 5 years and 3 months.
- 5.17 Second, though the High Court's decision and the Court of Appeal's second *Dalgliesh* decision occurred in late 2017, there was no apparent increase in the average prison sentence in 2018; instead, there was a significant increase in 2019. This could suggest that common law attempts to influence sentencing practices may take time to influence sentencing outcomes. For example, the Council's previous analysis of sentences for aggravated burglary pre- and post-*Hogarth v The Queen*¹⁵⁹ (the case called for an uplift in sentencing practices for that type of offending) found that it took about 12 months for the median prison sentence to increase 25% from 2 to 2.5 years.¹⁶⁰ It may also be the case that when there has been a call to uplift sentencing practices, some sentencing courts are cautious about testing the boundaries of that increase until they see the outcomes of appellate review of increased sentences. For example, sentencing courts may have been encouraged by the Court of Appeal's dismissal of three separate sentence appeals in incest cases in May 2018,¹⁶¹ finding charge-level prison sentences of 6 years and 5 months, 6 years and 6 months, and 8 years to be 'well within the range reasonably open'.¹⁶² Similarly, in March 2019 the Court of Appeal held that sentences of 4 years' imprisonment each for 4 incest offences against the offender's stepdaughter were manifestly inadequate and 'fail[ed] to have proper regard to what was said by both the High Court, and by this Court, with regard to sentencing for the offence of incest'; the court thus increased the sentence on each of those charges to 6 years.¹⁶³
- 5.18 The *Dalgliesh* line of authority has affected how Victorian courts sentence incest offences, reducing the weight given to previously inadequate sentencing practices pre-*Dalgliesh*. One court wrote that '[p]re-*Dalgliesh* sentences are of very little weight indeed'.¹⁶⁴ Another wrote of the 'changing landscape for incest sentencing'.¹⁶⁵ Yet another described the High Court's decision as having 'loosened the shackles imposed by the [previous] interpretation of current sentencing practices'.¹⁶⁶ Also, while not a new observation,¹⁶⁷ the various *Dalgliesh* decisions have re-emphasised that 'incest involving a young child' is a 'crime of violence' of 'particular repugnance' that 'inherently involves a gross breach of trust',¹⁶⁸ and that 'offending against children in family situations must be met with heavy punishments'.¹⁶⁹

159. *Hogarth v The Queen* [2012] VSCA 302 (18 December 2012).

160. Sentencing Advisory Council (2016), above n 62, 385 (Figure A85).

161. *Grantley (A Pseudonym) v The Queen* [2018] VSCA 112 (9 May 2018); *Crawford (A Pseudonym) v The Queen* [2018] VSCA 113 (9 May 2018); *Phillips (A Pseudonym) v The Queen* [2018] VSCA 114 (9 May 2018).

162. *Grantley (A Pseudonym) v The Queen* [2018] VSCA 112 (9 May 2018) [35].

163. *DPP v Shearer (A Pseudonym)* [2019] VSCA 47 (12 March 2019). See also the successful prosecution appeals against sentences for incest offences in *DPP v Wilson (A Pseudonym)* [2018] VSCA 263 (17 October 2018), *DPP v Walsh (A Pseudonym)* [2018] VSCA 172 (17 July 2018) and *DPP v Tewksbury (A Pseudonym)* [2018] VSCA 38 (27 February 2018).

164. *DPP v Shelton (A Pseudonym)* [2020] VCC 1073 (21 July 2020) [90]. See also *DPP v Murray (A Pseudonym)* [2020] VCC 1475 (16 September 2020) [58] ('I note in passing the recent history of sentences in this spectrum of incest after the *Dalgliesh* decision').

165. *Grantley (A Pseudonym) v The Queen* [2018] VSCA 112 (9 May 2018) [20].

166. *DPP v Nenna (A Pseudonym)* [2019] VCC 1512 (19 September 2019) [53]. See also *DPP v Molyneux (A Pseudonym) and Anor* [2018] VCC 2225 (21 December 2018) [44] ('The High Court has made it clear that a sentencing judge is not bound by an inadequate past sentencing practice').

167. See, for example, *DPP v Parker (A Pseudonym)* [2019] VCC 918 (31 May 2019) [119] (*Dalgliesh* 'is not the first occasion where statements have been made by the courts over the years, including our Court of Appeal, regarding the serious nature of sexual offending generally and sexual offending specifically by a parent of their child. Such statements are not new').

168. *DPP v Ferreira (A Pseudonym)* [2019] VCC 1212 (8 August 2019) [55], [57].

169. *DPP v Clifton (A Pseudonym)* [2019] VCC 1219 (6 August 2019) [42].

- 5.19 Some courts have, though, cautioned against allowing the *Dalgliesh* jurisprudence to catalyse an unrestrained enhancement in sentencing practices. One court, for example, wrote that '*Dalgliesh* does not dictate that sentencing has become an unconstrained free-for-all. Current sentencing practices are still relevant to sentencing'.¹⁷⁰ Another noted that, '[t]otal cumulation on the relevant charges would infringe the totality principle ... even in the post-*Dalgliesh* landscape'.¹⁷¹ Further, while sentencing courts are bound to apply sentencing practices at the date of *sentence* (as opposed to the date of the *offence*),¹⁷² the Court of Appeal has suggested that the offender may be entitled to have the sentencing court take past sentencing practices into account where there has been a delay in making a complaint about historical incest offending.¹⁷³

The influence of course of conduct incest charges

- 5.20 Another reform, which took effect in mid-2015, would have affected sentencing practices for incest. In particular, it became possible to prosecute multiple incidents of certain sex offences, including incest, as a single charge.¹⁷⁴ This reform has not been a focus of this report for at least two reasons: first, it was difficult to obtain and confirm reliable data and, second, this reform was not designed to increase sentencing practices (unlike the other reforms). Any increase in sentencing practices would instead simply be an unintentional (albeit likely) consequence.
- 5.21 A course of conduct offence will almost invariably be more serious than a single incident of the same offence, by virtue of the offending being repeated or protracted.¹⁷⁵ The *Sentencing Act 1991* (Vic) specifically requires courts sentencing course of conduct offences to 'impose a sentence that reflects the totality of the offending'.¹⁷⁶ The Court of Appeal has even noted that sentencing practices for charges of multi-count offences (course of conduct, rolled-up and representative charges) are not usefully comparable to single incident versions of the same offence.¹⁷⁷ For example, in *McCray (A Pseudonym) v The Queen*, the Court of Appeal said, '[b]ecause the applicant was to be sentenced for multiple incidents of incest [in a single charge], albeit within the confines of a single maximum penalty, sentences imposed for single instances of incest could not provide any relevant guidance'.¹⁷⁸
- 5.22 At least seven charges of incest by a parent (5) or stepparent (2) sentenced in either 2018 (3) or 2019 (4) were recorded as course of conduct offences.¹⁷⁹ The average charge-level prison sentence for those offences was 8 years and 4 months. This was much higher than the average prison sentence of 6 years and 5 months for the 133 other charges of those offences *not* recorded as course of conduct offences that were sentenced in the same years.

170. *DPP v Polat (A Pseudonym)* [2020] VCC 174 (25 June 2020) [82].

171. *DPP v Kestler* [2017] VCC 2027 (22 December 2017).

172. *Stalio v The Queen* [2012] VSCA 120 (12 June 2012). The court must still sentence within the applicable maximum penalty at the time of the offending.

173. *Pitt (A Pseudonym) v The Queen* [2020] VSCA 73 (27 March 2020) [53] ('the delay in this case is relevant in at least two ways. First, had the applicant been sentenced for his sexual offending at a time close to the commission of the offences, when current sentencing practices for sexual offending were somewhat different — sentencing practices for incest being of particular relevance in the present case — the [sentence for incest] ... would in all likelihood have been more moderate than [that] imposed by the sentencing judge.')

174. *Criminal Procedure Act 2009* (Vic) sch 1 cl 4A, as inserted by *Crimes Amendment (Sexual Offences and Others Matters) Act 2014* (Vic) s 13.

175. See, for example, *DPP v Shelton (A Pseudonym)* [2020] VCC 1073 (21 July 2020) [34] ('I was reminded that these were course of conduct offences and the impact of those provisions in the *Sentencing Act*').

176. *Sentencing Act 1991* (Vic) s 5(2F). See, for example, *Pickford (A Pseudonym) v The Queen* [2019] VSCA 195 (11 September 2019) [65]–[66]; *Crawford (A Pseudonym) v The Queen* [2018] VSCA 113 (9 May 2018); *Best v The Queen* [2019] VSCA 124 (7 June 2019) [48]; *Bromley v The Queen* [2018] VSCA 329 (6 December 2018) [57]; *Harlow (A Pseudonym) v The Queen* [2018] VSCA 234 (14 September 2018) [92]–[93]. On the continuing relevance of the maximum penalty as a yardstick in sentencing course of conduct offences, see *Poursanidis v The Queen* [2016] VSCA 164 (11 July 2016).

177. *Crouch (A Pseudonym) v The Queen* [2019] VSCA 30 (22 February 2019).

178. *McCray (A Pseudonym) v The Queen* [2017] VSCA 340 (22 November 2017) [35]–[36].

179. Court data occasionally indicates whether an incest offence was sentenced as a course of conduct charge. Where an incest offence was recorded as being a course of conduct offence, this was confirmed via sentencing remarks (there were no false positives). It was not possible to include all false negatives (course of conduct charges that were not recorded as such in the data) in this analysis.

6. Child sexual penetration offences

- 6.1 This chapter discusses the number and types of child sexual penetration offences¹⁸⁰ recorded and sentenced between 2010 and 2019, and sentencing outcomes for proven offences. This includes an analysis of prison sentence lengths for two kinds of child sexual penetration offences: sexual penetration with a child aged under 10/12 and sexual penetration with a child aged 10/12 to 15.
- 6.2 The current child sexual penetration offences in Victoria have been in effect since July 2017. These offences and their maximum penalties include sexual penetration with a child aged under 12 (25 years),¹⁸¹ sexual penetration with a child aged under 16 (15 years),¹⁸² and sexual penetration with a child aged 16 or 17 under care, supervision or authority (10 years).¹⁸³ These offences have evolved considerably since the enactment of the *Crimes Act 1958* (Vic). The original offences included *carnal knowledge of a girl* and *buggery*, the maximum penalties for which varied by the victim's age.¹⁸⁴ In 1981, those offences were replaced by gender-neutral offences with the maximum penalty again varying by the victim's age, in addition to whether the victim was under the offender's care, supervision or authority.¹⁸⁵ In 1991, just as digital penetration was recognised as a form of rape (by amendment of the term *sexual penetration*), so too was it recognised as a form of child sexual penetration.¹⁸⁶ In 1997, the maximum penalty for sexual penetration with a child aged under 10 was increased to 25 years to put it 'on the same footing' as rape.¹⁸⁷ In March 2010, the application of that 25-year maximum penalty was expanded to offences against victims aged under 12.¹⁸⁸ In March 2017, sexual penetration with a child aged under 12 was classified as a Category 1 offence,¹⁸⁹ and both sexual penetration with a child aged under 12 and sexual penetration with a child aged under 16 were classified as standard sentence offences if committed on or after 1 February 2018.¹⁹⁰

180. The term 'child sexual penetration offences' refers to the offences listed in Table 8 (see also glossary).

181. *Crimes Act 1958* (Vic) s 49A.

182. *Crimes Act 1958* (Vic) s 49B.

183. *Crimes Act 1958* (Vic) s 49C.

184. *Crimes Act 1958* (Vic) s 49C, 48(1), 50(1), 68(1) (as in force from 1 April 1959 to 28 February 1981). The maximum penalties for carnal knowledge of a girl included 20 years (if the victim was aged under 10 years), 10 years (if the victim was aged 10 to under 16 years) and 12 months (if the victim was aged 16 or 17 years). The maximum penalty for buggery also varied by the age of the victim: 20 years (child aged under 14 years), and 10 years (all other cases).

185. *Crimes (Sexual Offences) Act 1980* (Vic) ss 47(1), 48(1) (as in force from 1 March 1981 to 4 August 1991). The maximum penalties for these child sexual penetration offences included 20 years (if the victim was aged under 10 years), 10 years (if the victim was aged 10 to under 16 years), 15 years (if the victim was aged 10 to under 16 years and under care, supervision or authority), 2 years (if the victim was aged 16 or 17 years) and 3 years (if the victim was aged 16 or 17 and under care, supervision or authority).

186. See above n 76. At the same time, sexual penetration with a child aged 16 or 17 was rendered criminal only if the victim was under the offender's care, supervision or authority.

187. Victoria, *Parliamentary Debates*, Legislative Assembly, 24 April 1997, 872 (Jan Wade, Attorney-General); *Sentencing and Other Acts (Amendment) Act 1997* (Vic) s 60, sch 1 item 22.

188. *Crimes Legislation Amendment Act 2010* (Vic) s 3. This was pursuant to recommendations made by the Sentencing Advisory Council: Victoria, 'Crimes Legislation Amendment Bill', *Parliamentary Debates*, Legislative Assembly, 10 December 2009, 4606–4607 (Rob Hulls, Attorney-General); Sentencing Advisory Council (2009), above n 10, xii–xiii, 73–79.

189. *Crimes Act 1958* (Vic) s 45(1), (2)(a) (in force prior to 1 July 2017), s 49A (from 1 July 2017); *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) s 3 (definition of *Category 1 offence*).

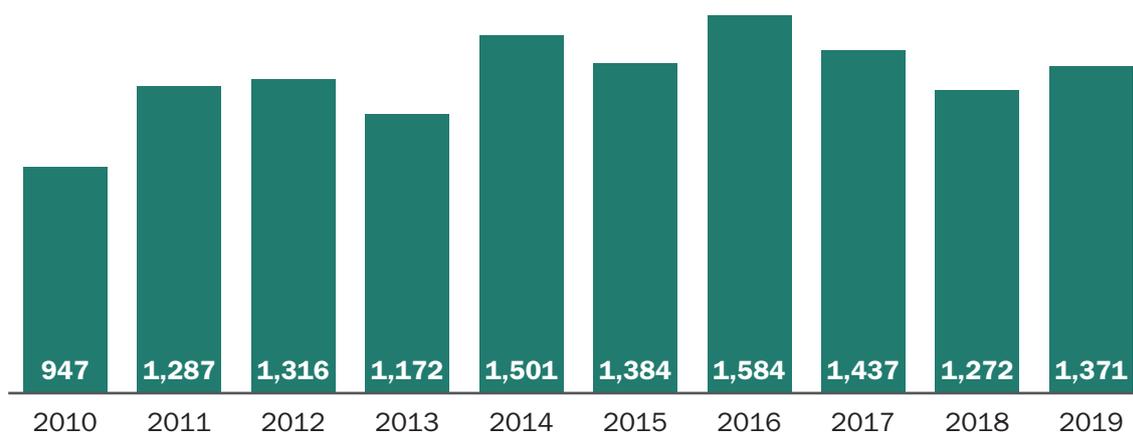
190. *Crimes Act 1958* (Vic) ss 49A(3), 49B(3), as inserted by *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic) ss 27(1), 28(1).

Number of recorded and sentenced child sexual penetration offences

6.3 Between 2010 and 2019, 13,271 child sexual penetration offences were recorded by police in Victoria (Figure 18).

Recorded offences

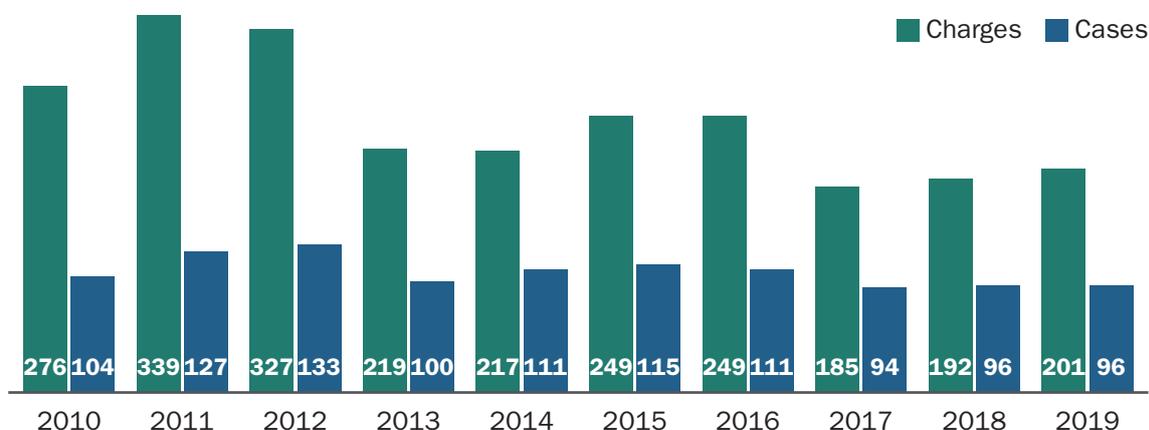
Figure 18: Number of child sexual penetration offences recorded by police in Victoria, by year (13,271 offences)



6.4 In that same timeframe, 2,454 child sexual penetration charges were sentenced in 1,087 cases involving 1,058 offenders (Figure 19), 96% of whom were male (just 40 were female). The high number of charges in 2011 and 2012 were attributable to a small number of high-volume cases. Since 2012, the number of sentenced cases has remained quite stable, with the number of sentenced charges fluctuating within a fairly small range. The highest numbers of child sexual penetration charges in any one case were 23 (2 cases) and 19 (1 case).¹⁹¹

Sentenced charges and cases

Figure 19: Number of charges and cases of child sexual penetration offences sentenced in Victoria, by year (2,454 charges and 1,087 cases)



191. The two offenders sentenced for 23 charges of child sexual penetration were a 57-year-old offender, who was sentenced to 26 years' imprisonment for 58 charges of serious and protracted offending against numerous child victims that spanned some 25 years, and a 26-year-old offender, who was sentenced to 16 years' imprisonment for numerous types of child sex offences. The offender sentenced for 19 charges of child sexual penetration was a 50-year-old offender, who was sentenced to 15 years and 4 months' imprisonment also for numerous types of child sex offences.

6.5 Table 8 outlines which child sexual penetration offences were sentenced in the higher courts (unless otherwise specified¹⁹²) during the reference period. Almost three-quarters of those offences (72%) involved victims aged 10/12 to 15, followed by children aged under 10/12 (20%)¹⁹³ and children aged 16 or 17 (6%). The age of the victim was unclear for 49 charges (2%).¹⁹⁴

Table 8: Number of child sexual penetration offences sentenced in Victoria, 2010 to 2019, by victim age range, operational period and statutory reference (2,454 charges and 1,087 cases: 2,438 charges in 1,080 cases in the higher courts and 16 charges in 7 cases in the Magistrates' Court)

Offence	Statutory reference <i>Crimes Act 1958 (Vic)</i>	Operational period	Maximum penalty	Charges	Cases
Sexual penetration with a child aged under 10/12/14					
Carnal knowledge and abuse of a girl aged under 10 ^a	Section 46	From 1 April 1959 To 28 February 1981	20 years	38	20
Buggery with a person aged under 14 ^b	Section 68(1)	From 1 April 1959 To 28 February 1981	20 years	44	25
Sexual penetration with a child aged under 10	Section 47(1)	From 1 March 1981 To 4 August 1991	20 years	77	44
Sexual penetration with a child aged under 10	Section 45(1)	From 5 August 1991 To 21 November 2000	Before 1 September 1997 20 years From 1 September 1997 25 years	51	20
Sexual penetration with a child aged under 16 ^c	Section 45(1)	From 22 November 2000 To 30 June 2017	Victim aged under 10/12: 25 years	Aged under 10/12: 265 Age unclear: 49	Aged under 10/12: 140 Age unclear: 23
Sexual penetration with a child aged under 12	Section 49A(1)	From 1 July 2017 To present	25 years	9	6

192. The 16 charges sentenced in the Magistrates' Court were triable summarily because they carried a maximum penalty of 10 years' imprisonment: *Criminal Procedure Act 2009 (Vic)* s 28(1)(b)(iii).

193. While most of these offences involved children aged under 10/12 years, there were also 44 charges contrary to section 68(1) of the *Crimes Act 1958 (Vic)* relating to victims aged under 14 years. These charges are counted together in Table 8.

194. As noted at [6.2], in March 2020 the age threshold for the most serious child sexual penetration offence (attracting the highest maximum penalty) was revised upwards from 10 to 12. The titles of the offence groupings in Table 8 reflect this shift (10/12).

Offence	Statutory reference <i>Crimes Act 1958 (Vic)</i>	Operational period	Maximum penalty	Charges	Cases
Sexual penetration with a child aged 10/12 to 15					
Carnal knowledge and abuse of a girl aged 10 to 15 ^d	Section 48(1)	From 1 April 1959 To 28 February 1981	Schoolmaster or teacher: 15 years All other cases: 10 years	27	22
Sexual penetration with a child aged 10 to 15	Section 48(1)	From 1 March 1981 To 4 August 1991	10 years	97	55
Sexual penetration with a child aged 10 to 15 under care, supervision or authority	Section 48(3)	From 1 March 1981 To 4 August 1991	15 years	–	–
Sexual penetration with a child aged 10 to 15	Section 46(1)	From 5 August 1991 To 21 November 2000	Victim under care, supervision or authority: 15 years All other cases: 10 years	54	20
Sexual penetration with a child aged under 16 ^e	Section 45(1)	From 22 November 2000 To 30 June 2017	Victim aged under 16 (care, supervision or authority): 15 years Victim aged under 16: 10 years	Aged under 16 (care, supervision or authority): 176 Aged under 16: 1,357 Age unclear: 49	Aged under 16 (care, supervision or authority): 79 Aged under 16: 642 Age unclear: 23
Sexual penetration with a child aged under 16	Section 49B(1)	From 1 July 2017 To present	15 years	61	27

Offence	Statutory reference <i>Crimes Act 1958 (Vic)</i>	Operational period	Maximum penalty	Charges	Cases
Sexual penetration with a child aged 16 or 17					
Carnal knowledge of an unmarried female aged 16 or 17 (by a person aged 21 years or over)	Section 50(1)	From 1 April 1959 To 28 February 1981	12 months	3	1
Sexual penetration with a person aged 16 or 17	Section 49(1)	From 1 March 1981 To 4 August 1991	2 years	12	9
Sexual penetration with a person aged 16 or 17 under care, supervision or authority	Section 49(3)	From 1 March 1981 To 4 August 1991	3 years	10	1
Sexual penetration with a child aged 16 or 17 under care, supervision or authority	Section 48(1)	From 5 August 1991 To 30 June 2017	Before 1 September 1997 3 years From 1 September 1997 10 years	Higher courts: 118 Magistrates' Court: 2	Higher courts: 42 Magistrates' Court: 2
Sexual penetration with a child aged 16 or 17 under care, supervision or authority	Section 49C(1)	From 1 July 2017 To present	10 years	Higher courts: 3 Magistrates' Court: 1	Higher courts: 1 Magistrates' Court: 1
Total (higher courts)				2,438	1,080^e
Total (Magistrates' Court)				16	7

- This offence includes 13 charges recorded as carnal knowledge of a girl aged under 10 against section 46 of the *Crimes Act 1957 (Vic)* and 9 charges of carnal knowledge of a girl aged under 10 against section 42 of the *Crimes Act 1928 (Vic)*. It is assumed that these were simply data entry errors, given both the unlikelihood of a pre-1958 offence being prosecuted in 2010 or later and the available sentencing remarks indicating that the offence did indeed occur after 1958.
- This offence includes 20 charges recorded as buggery with a person aged under 14 against section 68(1) of the *Crimes Act 1957 (Vic)* and 3 charges of buggery with a person aged under 14 against section 65(1) of the *Crimes Act 1928 (Vic)*. As above, it is assumed that these were simply data entry errors.
- This statutory provision is repeated in Table 8 under both sexual penetration with a child aged under 10/12/14 and sexual penetration with a child aged 10/12 to 15. As a result, the number of charges and cases for which the age of the victim was unclear are referenced twice in this table.
- This includes 17 charges recorded as carnal knowledge of a girl aged 10 to 16 against section 48(1) of the *Crimes Act 1957 (Vic)* and 4 charges of carnal knowledge of a girl aged 10 to 16 against section 44(1) of the *Crimes Act 1928 (Vic)*. As above, it is assumed that these were simply data entry errors.
- The total number of cases for both courts in Table 8 is lower than the sum of values in the rows above because different child sexual penetration offences under various statutory references were sentenced together in some cases.

Sentence types imposed for child sexual penetration offences

6.6 Table 9 shows the proportion of each category of child sexual penetration offence (by age group) that received an immediate custodial sentence, a community order, a wholly suspended sentence or another outcome. Over the reference period, there was a consistently high rate of immediate custodial sentences imposed for sexual penetration with a child aged under 10/12/14. The only other apparent trend in the sentence types imposed for these offences was the significant increase in the rate of immediate custodial sentences in 2019 for sexual penetration with a child aged 10/12 to 15 (from 65% to 81%), which is similar to the rate of immediate custodial sentences imposed in 2019 for sexual penetration with a child aged under 10/12. At least two factors could be responsible for this increase. First, parliament effectively increased the maximum penalty from 10 to 15 years' imprisonment in July 2017,¹⁹⁵ flagging for courts that, in turn, sentencing practices should reflect that increase.¹⁹⁶ And second, perhaps less evidently, is the introduction of the standard sentence. In *DPP v Yuen*, for example, the judge acknowledged that courts could no longer refer to past sentencing practices in cases in which community orders were imposed in circumstances where this offence involved a relatively small (4 or 5 year) age difference between the offender and the victim. Instead, courts had to refer to more recent cases under the standard sentence scheme, which seemed to indicate a higher imprisonment rate.¹⁹⁷

Table 9: Number and proportion of each sentence type imposed for child sexual penetration offences sentenced in Victoria, 2010 to 2019 (2,405 charges)¹⁹⁸

Outcome	Court level	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total
Child aged under 10/12/14^a												
Immediate custodial sentence	Higher courts	44 (94%)	54 (83%)	58 (94%)	46 (87%)	52 (88%)	43 (90%)	45 (92%)	24 (89%)	34 (92%)	31 (84%)	431 (89%)
Community order	Higher courts	–	–	–	2 (4%)	3 (5%)	2 (4%)	1 (2%)	1 (4%)	1 (3%)	2 (5%)	12 (2%)
Wholly suspended sentence	Higher courts	1 (2%)	11 (17%)	4 (6%)	5 (9%)	3 (5%)	2 (4%)	2 (4%)	1 (4%)	1 (3%)	4 (11%)	34 (7%)
Other	Higher courts	2 (4%)	–	–	–	1 (2%)	1 (2%)	1 (2%)	1 (4%)	1 (3%)	–	7 (1%)
Total		47	65	62	53	59	48	49	27	37	37	484

195. In particular, the (higher) 15-year maximum penalty previously applied only where the child was under the care, supervision or authority of the offender; whereas that 15-year maximum penalty now applies to all offences against children aged 12 to 15.

196. Roundtable I (30 March 2021).

197. *DPP v Yuen* [2020] VCC 1527 (24 September 2020) [34]–[35].

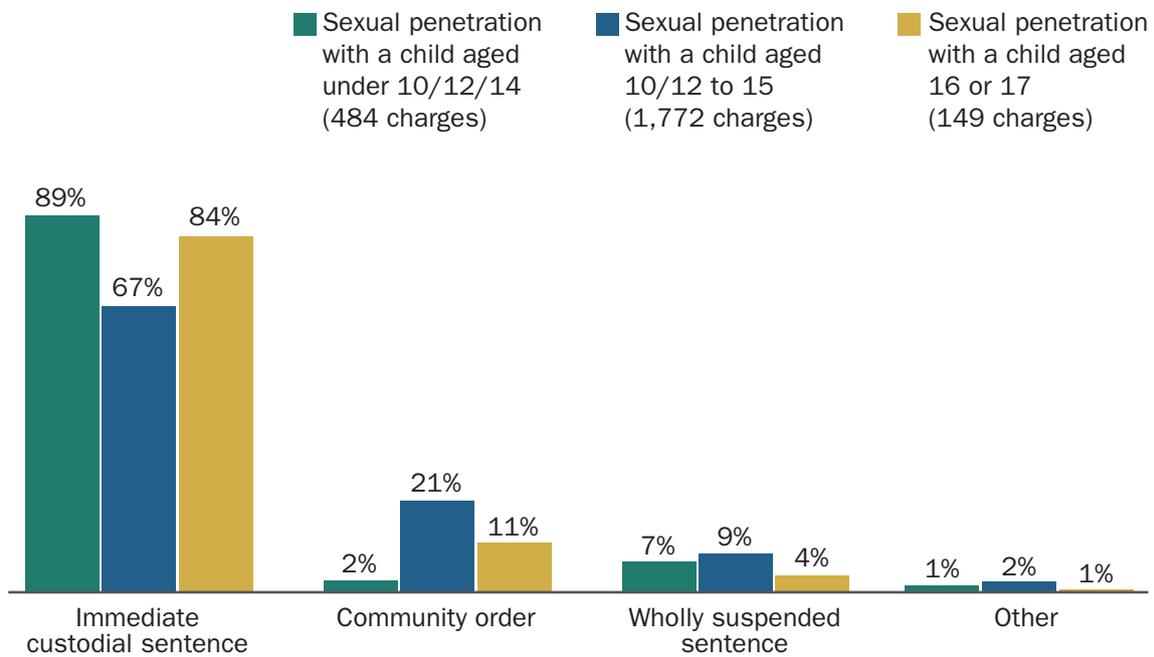
198. Table 9 excludes 49 charges of child sexual penetration offences for which the victim's age could not be determined.

Outcome	Court level	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total
Child aged 10/12 to 15^b												
Immediate custodial sentence	Higher courts	135 (68%)	172 (67%)	169 (70%)	94 (63%)	80 (54%)	113 (65%)	131 (73%)	91 (67%)	90 (65%)	118 (81%)	1193 (67%)
Community order	Higher courts	24 (12%)	17 (7%)	52 (21%)	42 (28%)	58 (39%)	53 (30%)	34 (19%)	35 (26%)	38 (27%)	25 (17%)	378 (21%)
Wholly suspended sentence	Higher courts	36 (18%)	62 (24%)	19 (8%)	9 (6%)	6 (4%)	4 (2%)	9 (5%)	5 (4%)	6 (4%)	3 (2%)	159 (9%)
Other	Higher courts	5 (3%)	5 (2%)	2 (1%)	5 (3%)	5 (3%)	5 (3%)	5 (3%)	5 (4%)	5 (4%)	–	42 (2%)
Total		200	256	242	150	149	175	179	136	139	146	1,772
Child aged 16 or 17^c												
Immediate custodial sentence	Higher courts	15 (68%)	14 (100%)	13 (93%)	15 (100%)	5 (100%)	21 (95%)	12 (100%)	9 (47%)	4 (57%)	16 (100%)	124 (85%)
	Magistrates' Court	–	–	–	–	1 (50%)	–	–	–	–	–	1 (33%)
Other	Higher courts	7 (32%)	–	1 (7%)	–	–	1 (5%)	–	10 (53%)	3 (43%)	–	22 (15%)
	Magistrates' Court	–	–	–	–	1 (50%)	–	–	–	–	1 (100%)	2 (67%)
Total		22	14	14	15	7	22	12	19	7	17	149
Total (all sentences)		269	335	318	218	215	245	240	182	183	200	2,405^a

- a. For offences against children aged under 10/12/14, *immediate custodial sentences* include 405 prison sentences (including combined orders), 5 aggregate sentences of imprisonment (including combined orders), 12 partially suspended sentences and 8 youth justice centre orders or youth training centre orders. *Community orders* include 12 community correction orders. *Other orders* include 2 residential treatment orders and 5 adjourned undertakings.
- b. For offences against children aged 10/12 to 15, *immediate custodial sentences* include 1,099 prison sentences (including combined orders), 19 aggregate sentences of imprisonment (including combined orders), 42 partially suspended sentences and 33 youth justice centre orders or youth training centre orders. *Community orders* include 336 community correction orders, 38 community-based orders, 3 intensive correction orders and 1 youth supervision order. *Other orders* include 9 residential treatment orders and 33 adjourned undertakings.
- c. For offences against children aged 16 or 17, *immediate custodial sentences* include 110 prison sentences (including combined orders) and 15 partially suspended sentences. *Other orders* include six wholly suspended sentences, 13 community correction orders, 4 community-based orders and 1 fine.

6.7 Figure 20 summarises the broad sentence types imposed for child sexual penetration offences over the reference period.¹⁹⁹ There were 12 charges of sexual penetration with a child aged under 12 that attracted Category 1 offence classification during the reference period. As required, these offences each received an immediate custodial sentence of adult (8 charges) or youth (4 charges) detention. The child sexual penetration offence least likely to receive an immediate custodial sentence was sexual penetration with a child aged 10/12 to 15 (67%). Both before and after the introduction of standard sentences, sentencing remarks suggest that where such cases did not receive immediate custodial sentences, the offender was aged under 20 years but nevertheless was sufficiently older than the victim to trigger criminal liability.²⁰⁰

Figure 20: Sentence types imposed on charges of sexual penetration with a child in Victoria, 2010 to 2019, by offence type



199. See Appendix 4 for the shortest, longest and average prison sentence for sexual penetration offences against children aged 16 or 17.

200. See, for example, *Clarkson & Anor v The Queen* [2011] VSCA 157 (3 June 2011) [42] (finding that ‘the relative ages of the offender and the victim’ will be relevant considerations when sentencing this type of offending); *Best v The Queen* [2019] VSCA 124 (7 June 2019) [41], citing *R v MAN* [2005] QCA 413 (11 November 2005) [25] (that ‘greater closeness in maturity, age and balance of power’ will affect the court’s analysis of the seriousness of the offence).

- 6.8 Of the 484 charges of sexual penetration with a child aged under 10/12/14 sentenced during the reference period, 34 received wholly suspended sentences, 12 received community orders and 7 received other orders. None of these sentences would have been permissible had the offending occurred on or after 20 March 2017 once Category 1 offence classification applied. Case Study 4 presents an example of circumstances that previously resulted in a non-custodial sentence. It again demonstrates that while sentences for these serious offences should not be unduly lenient, exceptional cases require judicial discretion in sentencing to avoid the potential for injustice.

Case Study 4: community order for sexual penetration with a child aged under 12

The offender in this case pleaded guilty to 2 charges of engaging in an indecent act with a child aged under 16 and 1 charge of sexual penetration with a child aged under 12.

The offender would occasionally sleep overnight at the victims' house (two boys aged 11 and 12) and would either sleep on the couch or in a queen-size bed with the victims. Two charges related to occasions on which he had put the younger victim's penis in his mouth and masturbated the younger victim. The third charge related to masturbating the older victim.

The court noted during sentencing that the offender had an intellectual disability and an IQ of 70, and he suffered from a rare physical condition resulting in loss of muscle control that caused him to fall.

The court concluded that due to the offender's intellectual disability, plea of guilty, lack of prior sexual offending, rare physical condition, family support and suitability for a justice plan, a prison sentence was not necessary. He was sentenced to a 3-year community correction order.

DPP v Hijazin [2015] VCC 1078 (10 July 2015)

How long were prison sentences for sexual penetration with a child aged under 10/12?

6.9 During the reference period, 231 non-aggregate sentences of imprisonment were imposed for charges of sexual penetration with a child aged under 10/12 contrary to sections 45(1) and 49A of the *Crimes Act 1958* (Vic).²⁰¹ Figure 21 shows the yearly average length of non-aggregate sentences of imprisonment for those charges.

Charge level

The shortest sentences were 5 months' imprisonment (part of a combined order), 6 months' imprisonment and 8 months' imprisonment (in 2 cases), and the longest were 10 years' imprisonment,²⁰² 9 years' imprisonment and 8.5 years' imprisonment. The average prison sentence over the reference period was 4 years. Relatively few charges of this offence type are sentenced each year, compared to most other offences analysed in this report. However, there were noticeable increases in the average prison sentence in 2016 (of 9 months) and in 2019 (of 10 months).²⁰³

Figure 21: Average prison sentence (in years and months) imposed on charges of sexual penetration with a child aged under 10/12 contrary to sections 45(1) and 49A of the *Crimes Act 1958* (Vic), by year (231 charges)



201. This analysis does not include the more historical sexual penetration offences against sections 46(1), 47(1) or 48(1) of the *Crimes Act 1958* (Vic) in operation prior to 22 November 2000. For the average non-aggregate prison sentences imposed for these offences, see Appendix 3.

202. The 10-year prison sentence for a charge of sexual penetration with a child aged under 12 was imposed for a course of conduct over a 3.5-month period: *DPP v Thornton (A Pseudonym)* [2016] VCC 946 (6 July 2016).

203. From 2010 to 2019, the average prison sentence increased by 55%, from 3 years and 8 months to 5 years and 8 months. There was evidence for a statistically significant trend (Pearson's correlation coefficient = 0.722, $p = 0.018$).

6.10 There were 103 cases in which a charge of sexual penetration with a child aged under 10/12 was the principal proven offence and the offender received a term of imprisonment. Between 2010 and 2019, the yearly average total effective sentence increased by 2 years and 6 months (Figure 22); the highest average of the reference period was recorded in 2019.²⁰⁴ The three standard sentence offences of sexual penetration with a child aged under 12 sentenced in 2019 were also the principal proven offence in each case. These three charges were responsible for some of the increase in the average total effective sentence in 2019,²⁰⁵ but not all of it. Excluding these cases, the average total effective sentence in 2019 was 8 years and 3 months, still the highest average in the reference period and higher than in 2018, which contained one particularly serious case of historical offending resulting in a sentence of 17 years and 9 months' imprisonment (the longest of any case in which sexual penetration with a child was the principal proven offence). Over the whole reference period, the average total effective sentence length was 6 years and 9 months.

Case level

6.11 Recent research has found that while charge-level prison sentences for sexual penetration with a child aged under 10/12 in Victoria increased only modestly between 1982 and 2018, average total effective sentences increased much more significantly, doubling from 3.5 years to 7 years.²⁰⁶ In contrast, the findings in this report suggest that in the shorter and more recent period from 2010 to 2019, there was no significant trend apparent in case-level prison sentences but instead a statistically significant increase in charge-level prison sentences.²⁰⁷

Figure 22: Average total effective sentence (in years and months) imposed in cases involving a charge of sexual penetration with a child aged under 10/12 contrary to sections 45(1) and 49A of the *Crimes Act 1958* (Vic) as the principal proven offence, by year (103 cases)



204. From 2010 and 2019, the average total effective sentence increased from 5 years and 10 months to 8 years and 4 months. There was no evidence for a statistically significant trend (Pearson's correlation coefficient = 0.499, $p > 0.1$).

205. The total effective sentences in these three cases were 9 years (2 cases) and 7 years and 6 months (1 case), an average of 8 years and 6 months.

206. Arie Freiberg, 'Institutional Responses to the Sentencing Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse' (2020) 44 *Criminal Law Journal* 127, 142.

207. The findings in this report may differ from those in Freiberg (2020), above n 206, which were derived from the Sentencing Advisory Council's *Sentencing Snapshots*. This is likely a product of the different time periods covered (calendar years versus financial years), the inclusion of offences beyond principal proven offences and the coding of additional cases for the present report to identify the age of victims in earlier section 45(1) offences. The finding in this report is consistent with the Council's previous finding that the average charge-level prison sentence for this offence (as the principal proven offence) increased from 3.2 years to 4.6 years between 2004–05 and 2013–14 (a 33% increase) while in the same timeframe the total effective sentence increased from 6.1 to 7.0 years (a 15% increase): Sentencing Advisory Council (2016), above n 8, 36.

The influence of standard sentence offence classification

6.12 Of the 19 charges of sexual penetration with a child aged under 10/12 receiving non-aggregate sentences of imprisonment in 2019, 3 were standard sentence offences²⁰⁸ and 16 were not. At least some part of the charge-level increase in 2019 appears attributable to the standard sentence offences. The average prison sentence for these 3 charges²⁰⁹ was notably higher than for the remaining 16 charges, though the sample is too low on its own to draw any conclusions. However, even excluding the prison sentences imposed for the three standard sentence offences, the average prison sentence in 2019 was still higher than in any of the previous years of the reference period (5 years and 4 months).

6.13 In the first case in which the standard sentence applied to this offence, the judge said that the 8-year prison sentence was below the standard sentence as a result of a number of mitigating factors personal to the offender.²¹⁰ In the second case, the judge said that the 9-year prison sentence was 'less than the standard sentence because of the personal factors affecting you, principally your mental ill-health', referring to the offender's post-traumatic stress disorder and other conditions arising from his having been sexually abused as a child.²¹¹ In the third case, the sentence of 6 years and 3 months was a result of the offender's 'low-level intellectual functioning', 'plea of guilty', 'genuine remorse' and 'the fact that prison will be more burdensome' for him.²¹² Similarly, in a more recent case after the reference period of this report, a sentencing judge said that '[t]he sentence I intend to pass ... will be lower than the standard sentence' as a result of 'your pleas of guilty, your intellectual impairment, your deprived background and all of the other mitigating factors which apply to you and your offending'.²¹³ Subjective mitigating factors, separate from factors relevant to the objective seriousness of the offending, appear to frequently be weighty considerations in cases involving this type of offending. The principle of totality may also become relevant, especially where other statutory schemes (such as the serious offender provisions) also apply.²¹⁴

Average prison sentence imposed for sexual penetration with a child aged under 10/12 (sections 45(1) and 49A) in the higher courts in 2019:

Standard sentence offence (3 offences):

7 years and 9 months

Non-standard sentence offence (16 offences):

5 years and 4 months

208. The 3 cases involving a charge of sexual penetration with a child contrary to section 49A of the *Crimes Act 1958* (Vic) were sentenced within a week of each other: *DPP v Tobin (A Pseudonym)* [2019] VCC 1709 (17 October 2019); *DPP v Aneterea (A Pseudonym)* [2019] VCC 1721 (22 October 2019); *DPP v McPherson* [2019] VCC 1745 (24 October 2019). Of the 16 charges that were not standard sentence offences, 2 were section 49A offences and 14 were section 45(1) offences.

209. All of these outcomes were below the standard sentence: 9 years, 8 years, and 6 years and 3 months. The 16 charges of non-standard sentence offences (offences contrary to either section 45 or section 49A of the *Crimes Act 1958* (Vic)) received sentences of between 3 years and 7 years.

210. *DPP v Tobin (A Pseudonym)* [2019] VCC 1709 (17 October 2019).

211. *DPP v McPherson* [2019] VCC 1745 (24 October 2019) [38].

212. *DPP v Aneterea (A Pseudonym)* [2019] VCC 1721 (22 October 2019) [69]. This was the lowest sentence imposed for a standard sentence offence of sexual penetration with a child aged under 12 in 2019.

213. *DPP v Purcell (A Pseudonym)* [2020] VCC 757 (10 July 2020) [141]. See further: *DPP v Hinch (A Pseudonym)* [2020] VCC 403 (8 April 2020) (the prosecution accepted that the offending fell below the middle of the range of objective seriousness, and the court identified significant mitigating factors resulting in a 4-year prison sentence); *DPP v Snow (A Pseudonym)* [2020] VCC 146 (25 February 2020) (also imposing a 4-year prison sentence for a standard sentence offence of sexual penetration with a child aged under 12).

214. *DPP v Penning (A Pseudonym)* [2021] VCC 62 (2 February 2021) [124]–[125], citing *DPP v Jones* [2013] VSCA 330 (21 November 2013) [90].

- 6.14 Furthermore, the Court of Appeal has recently commented that the task of ascertaining the 'notional mid-range' of offending in the context of the standard sentence scheme is especially difficult for this offence because it 'covers such a wide range of sexual misconduct':

The misconduct can be penetration by finger, penis or tongue, or by an object. It can be momentary or protracted. It can be committed on all aged up to 12. The impact on the victim can be manageable or catastrophic.²¹⁵

Accordingly, the court considered any 'mid-range' of offence seriousness to be 'an intangible concept' and cautioned judges in 'affording it too much weight in the sentencing exercise'.²¹⁶

- 6.15 As with the other applicable offences, increases in average prison sentences and total effective sentences towards the end of the reference period have also been observed for offences not sentenced as standard sentence offences. Stakeholders consulted by the Council suggested that increased community awareness about the nature and extent of harm suffered by child victims of sexual offending – the consequences of which persist into adult life – are most likely responsible, above and beyond the effect of any specific law reforms.²¹⁷ Consecutive inquiries, most notably the Royal Commission into Institutional Responses to Child Sexual Abuse,²¹⁸ were also considered to have played an important role:

I wonder whether the increases are connected to much wider awareness in the community about the long-term impacts of [child sex offences]. That's particularly when you look at what was happening in the royal commission [into institutional responses to child sexual abuse], and the publicity on the really serious long-term impacts on people who were abused ... It may be that there's this recognition that sentences in the past have been too low, perhaps.²¹⁹

Further:

I think the growing recognition of the impact of sexual offending against children is there. There's also a growing recognition of how that trauma is carried into their adult lives, and how that potentially also manifests itself in offending – potentially where victims become perpetrators as well.²²⁰

215. *McPherson v The Queen* [2021] VSCA 53 (12 March 2021) [31].

216. *McPherson v The Queen* [2021] VSCA 53 (12 March 2021) [31].

217. See, for example, *DPP v Wolfe (A Pseudonym)* [2019] VCC 507 (11 April 2019) [46]–[47], quoting the Court of Appeal's reference in *Dalgliesh* to Sentencing Advisory Council (2016), above n 8, 63: 'It is concerning that the courts do not sufficiently recognise or articulate the inherent violence involved in a sexual penetration of a young child regardless of whether such acts are accompanied by additional non-sexual violence'; *DPP v Hinch (A Pseudonym)* [2020] VCC 403 (8 April 2020) [18].

218. Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report*, vol. 3 (2017) 9–12, 73–147.

219. Roundtable 1 (30 March 2021).

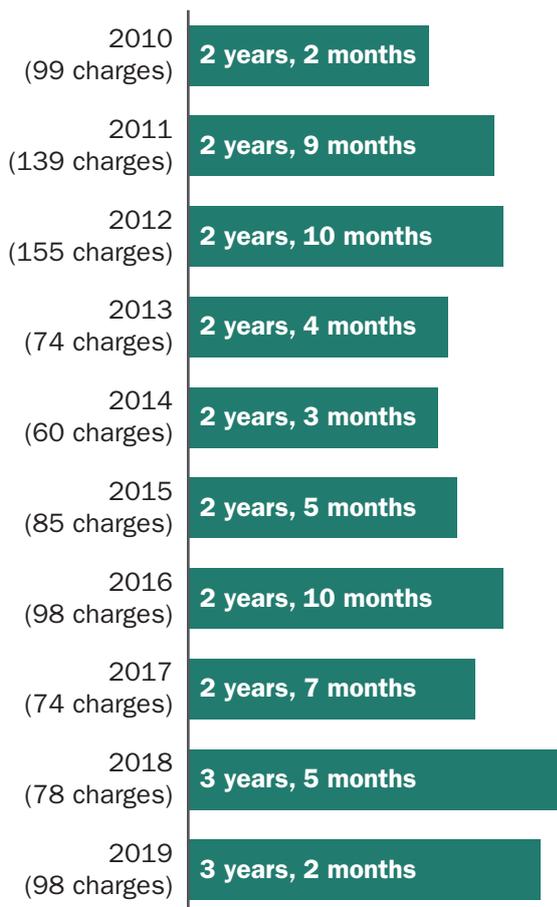
220. Roundtable 2 (31 March 2021).

How long were prison sentences for sexual penetration with a child aged 10/12 to 15?

Charge level

6.16 During the reference period, 960 known²²¹ charges of sexual penetration with a child aged 10/12 to 15²²² received a non-aggregate sentence of imprisonment in the higher courts (the 13 charges of this offence sentenced in the Magistrates' Court all received non-custodial sentences). The shortest sentence for this type of offending was 1 month,²²³ and the longest was 6 years and 10 months. The average sentence over the reference period was 2 years and 8 months. Figure 23 shows the yearly average prison sentence for these offences. The average charge-level prison sentences exhibited a statistically significant upward trend.²²⁴ One distinct, potential contributor to this upward trend was the increase in July 2017 in the maximum penalty for this offence, from 10 years' imprisonment where the child was not under the care, supervision or authority of the offender, to 15 years' imprisonment in all cases.²²⁵

Figure 23: Average prison sentence (in years and months) imposed on charges of sexual penetration with a child aged 10/12 to 15 contrary to sections 45(1) and 49B of the Crimes Act 1958 (Vic), by year (960 charges)



221. As indicated in Table 9, there were a further 49 charges of sexual penetration with a child aged under 16 for which it was not possible to discern whether the child was under 10/12 years, or between 10/12 and 15.

222. Contrary to *Crimes Act 1958 (Vic)* ss 49B (since 1 July 2017) and 45(1) (until 30 June 2017). This includes 155 section 45(1) charges for which the Council could confirm that the victim was under the offender's care, supervision or authority. That delineation is no longer made under the current iteration of the offence, but the average prison sentence for section 45(1) offences where the victim was under the offender's care, supervision or authority received longer average prison sentences (3 years and 6 months) than section 45(1) offences where the victim was not (2 years and 6 months).

223. A combined order of 1 month's imprisonment and a community correction order was imposed in 2 cases. One case involved a female offender engaging in penile—vaginal penetration with her son's 15-year-old friend: unpublished sentencing remarks provided to the Council. The other was a time served prison sentence combined with a community correction order in circumstances involving a 22-year-old male and a 15-year-old female: *DPP v Solomon-Davidson* [2017] VCC 107 (16 February 2017).

224. From 2010 to 2019, the average prison sentence increases by 43%, from 2 years and 2 months to 3 years and 2 months. There was evidence for a statistically significant trend over this period (Pearson's correlation coefficient = 0.639, $p = 0.047$).

225. Roundtable 1 (30 March 2021).

6.17 Between 2010 and 2019, there were 335 cases in which the offender received a prison sentence for a principal proven offence of sexual penetration with a child aged 10/12 to 15. Figure 24 shows

Case-level the yearly average total effective sentence for the 335 cases. Given the fluctuations in the average total effective sentence, the overall increase was not part of a statistically significant trend.²²⁶ Total effective sentences ranged from 1 month (in 3 cases receiving combined orders) to 15 years and 7 months (in a case involving 4 child sex offences). The average prison sentence over the reference period was 4 years and 1 month.

Figure 24: Average total effective sentence (in years and months) imposed in cases involving a charge of sexual penetration with a child aged 10/12 to 15 contrary to sections 45(1) and 49B of the *Crimes Act 1958* (Vic) as the principal proven offence, by year (335 cases)



226. From 2010 to 2019, the average total effective sentence increased by 19%, from 3 years and 8 months to 4 years and 4 months. There was no evidence for a statistically significant trend (Pearson's correlation coefficient = 0.028, $p > 0.1$).

6.18 Of the 98 charges receiving non-aggregate sentences of imprisonment imposed in 2019 for this type of offending, 10 were standard sentence offences and 88 were not. While most of the standard sentence offences received prison sentences shorter than the standard sentence of 6 years, sentences were on average 19% longer than prison sentences imposed for the non-standard sentence offences.²²⁷

6.19 Of the prison sentences imposed for the 10 standard sentence offences for this type of offending, 1 was above the standard sentence, 1 was equal to it, and 8 were below. Both before and after the reference period, sentencing remarks suggest that cases falling below the standard sentence were typically due to the offending falling 'in the low range of seriousness'²²⁸ and/or, more often, subjective mitigatory factors such as a plea of guilty,²²⁹ which are not accounted for in the standard sentence for each offence. In one case, the court pointed to the offender's 'personal history, age, disability and the principles stated in *Verdins*' as reasons that the sentence imposed for sexual penetration of a 15-year-old victim resulted in 'a markedly lesser sentence' than the 6-year standard sentence.²³⁰ In another, the court pointed to the offender's 'youth', 'prospects of rehabilitation' and 'plea of guilty' in explaining why the sentences fell below the standard sentence.²³¹ And in yet another case, the court said:

having regard to all of the relevant factors in this case including the ... offending being at the lower end of seriousness for this kind of offending, and the significant mitigatory factors in this case including your youth, lack of prior offending and prospects of rehabilitation, I am of the view that a sentence lower than the standard sentence is appropriate.²³²

There are a growing number of cases in which sexual penetration with a child aged 12 to 15 has been sentenced as a standard sentence offence, and courts are able to refer to these under the standard sentence scheme. Rather than being left with 'no real case to compare',²³³ as was the situation when standard sentences were introduced, these emerging sentencing practices appear to be considered very useful in guiding decision-makers.²³⁴

Average prison sentence imposed for sexual penetration with a child aged 10/12 to 15 (sections 45(1) and 49B) in the higher courts in 2019:

Standard sentence offence (10 charges):

3 years and 8 months

Non-standard sentence offence (88 charges):

3 years and 1 month

227. The prison sentences for the standard sentence offences ranged from 11 weeks to 6 years and 10 months. The prison sentences for the non-standard sentence offences ranged from 6 weeks to 6 years.

228. See, for example, *DPP v Edmonds (A Pseudonym)* [2019] VCC 1320 (21 August 2019) [45]. One commonly cited factor causing a case to be classified at the lower end of objective seriousness for this type of offending is a relatively low age disparity between the offender and the victim: see, for example, *DPP v Aleksis (A Pseudonym)* [2019] VCC 2101 (18 November 2019) [39].

229. *DPP v Moulden (A Pseudonym)* [2019] VCC 386 (28 March 2019).

230. *DPP v Gay* [2020] VCC 548 (1 May 2020) [30].

231. *DPP v Morey (A Pseudonym)* [2020] VCC 320 (30 March 2020) [100].

232. *DPP v Calladine (A Pseudonym)* [2020] VCC 2014 (14 December 2020) [77].

233. *DPP v Pennington (A Pseudonym)* [2019] VCC 1700 (18 October 2019) [37].

234. See, for example, *DPP v Calladine (A Pseudonym)* [2020] VCC 2014 (14 December 2020) [63], citing a number of cases in which the offence had been sentenced as a standard sentence offence; *DPP v Beck* [2020] VCC 1590 (1 October 2020) [69]; *DPP v Bouris* [2020] VCC 1486 (17 September 2020) [70]; *DPP v Howell (A Pseudonym)* [2020] VCC 1328 (25 August 2020) [37]; *DPP v Prior (A Pseudonym)* [2019] VCC 1672 (14 October 2019) [18]. See also *DPP v Garratt* [2020] VCC 1721 (26 October 2020); *DPP v Jenkins* [2019] VCC 1504 (17 September 2019); *DPP v Moulden (A Pseudonym)* [2019] VCC 386 (28 March 2019); *Contra DPP v Rohan* [2020] VCC 814 (9 June 2020) [83]; *DPP v Leitch (A Pseudonym)* [2019] VCC 1952 (25 November 2019) [78].

7. Child sexual assault offences

- 7.1 This chapter discusses the number and types of child sexual assault offences²³⁵ recorded and sentenced between 2010 and 2019 and the sentencing outcomes for proven offences, including the duration of prison sentences.
- 7.2 Like child sexual penetration offences, child sexual assault offences have evolved considerably since the enactment of the *Crimes Act 1958* (Vic). In 1981, the offence of *gross indecency with a girl* was amended to apply in respect of both male and female victims.²³⁶ In 1991, the offence of indecent assault was separated into two offences: one for offences against adult victims and one for offences against child victims.²³⁷ And in 2006, the offence of indecent act with a child aged 16 under care, supervision or authority was expanded to also apply to 17-year-old victims.²³⁸ The current child sexual assault offences and their maximum penalties include sexual assault of a child aged under 16 (10 years' imprisonment) and sexual assault of a child aged 16 or 17 under care, supervision or authority (5 years' imprisonment).²³⁹ Sexual assault of a child aged under 16 was designated a standard sentence offence as at 1 February 2018, with a standard sentence of 4 years. It is not a Category 1 offence.

235. The term 'child sexual assault offences' refers to the offences listed in Table 10 (see also glossary).

236. *Crimes (Sexual Offences) Act 1980* (Vic) ss 50(1)–(2).

237. The offences of indecent assault of a child aged under 16 and indecent assault of a child aged 16 under care, supervision or authority carried 5-year and 2-year maximum penalties respectively: *Crimes (Sexual Offences) Act 1991* (Vic) s 3, inserting *Crimes Act 1958* (Vic) ss 47, 49 (in effect from 5 August 1991 to 30 June 2017). The maximum penalty for indecent act with a child aged under 16 under care, supervision or authority was increased to 3 years' imprisonment in April 1992 and 5 years' imprisonment in September 1997: *Sentencing Act 1991* (Vic) s 119(3), sch 3 item 8. For offences committed before 1991, it is not possible to determine whether the victim was a child or an adult. A review of cases did, though, overwhelmingly suggest that these offences would have involved child victims.

238. *Crimes (Sexual Offences) Act 2006* (Vic) s 13.

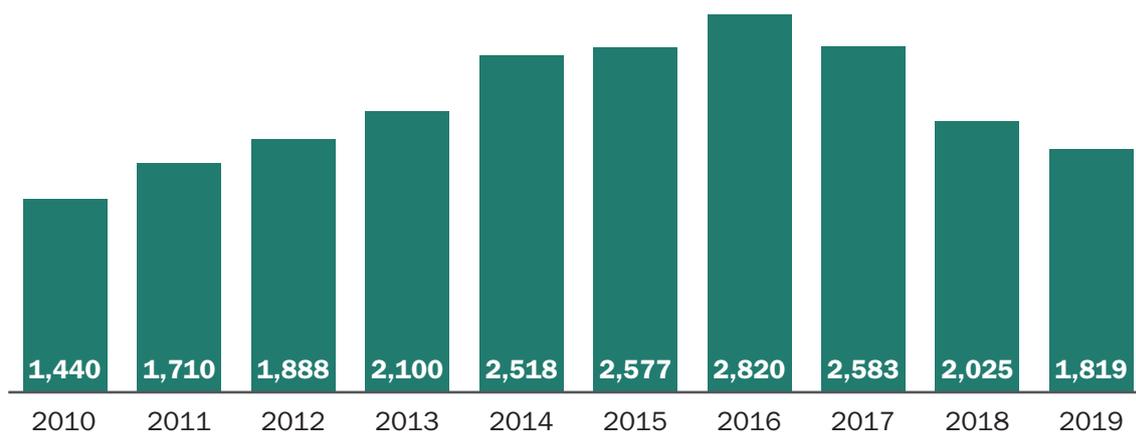
239. *Crimes Act 1958* (Vic) ss 49D–49E.

Number of recorded and sentenced child sexual assault offences

7.3 Between 2010 and 2019, 21,480 child sexual assault offences were recorded by police in Victoria, with a steady increase to 2016 and a steady decrease since then (Figure 25).²⁴⁰

Recorded offences

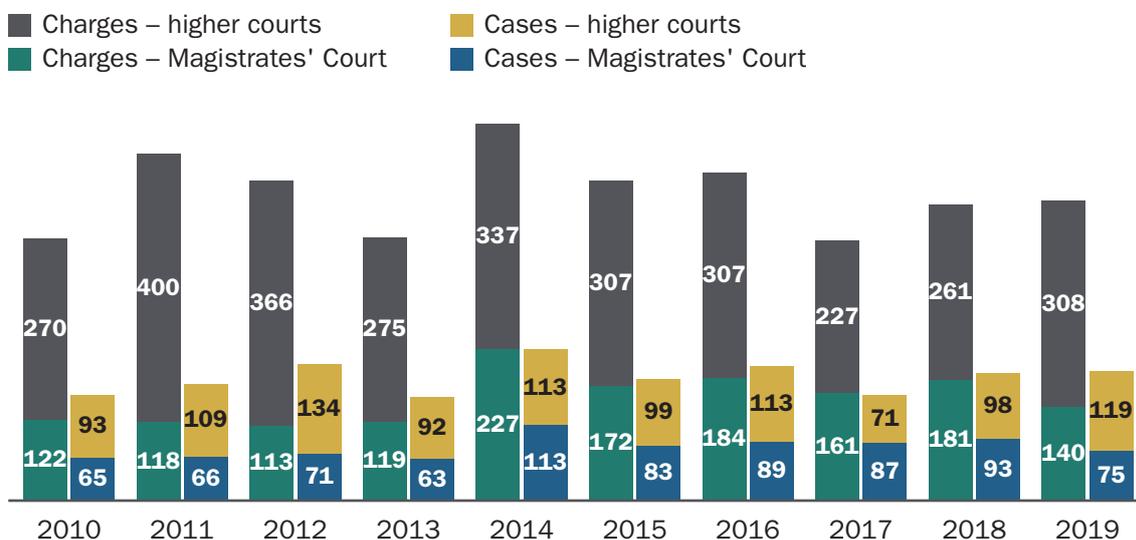
Figure 25: Number of child sexual assault offences recorded by police in Victoria, by year (21,480 offences)



7.4 In that same timeframe, 4,595 child sexual assault charges were sentenced in 1,846 cases involving 1,793 offenders (Figure 26), almost all of whom were male (1,743). In contrast to the number of recorded offences each year, there was almost no significant change in the number of sentenced charges or cases, in either court level. Two-thirds of charges were sentenced in the higher courts (67%), while one-third were sentenced in the Magistrates' Court, with the yearly number of cases sentenced in the lower court increasing in the second half of the reference period.

Sentenced charges and cases

Figure 26: Number of charges and cases of sexual assault of a child sentenced in Victoria, by year (4,595 charges and 1,846 cases)



240. At least 7% of these were historical offences alleged to have occurred either pre-1991 (698) or pre-1981 (820).

7.5 Table 10 shows which specific child sexual assault offences were sentenced and in how many cases. The vast majority of charges (87%) were indecent acts with a child contrary to section 47(1) of the *Crimes Act 1958* (Vic), though about 6% were charges of historical offences that had occurred prior to August 1991.

Table 10: Number of child sexual assault offences sentenced in Victoria, 2010 to 2019, by operational period and statutory reference (4,595 charges and 1,846 cases)

Offence	Statutory reference <i>Crimes Act 1958</i> (Vic)	Operational period	Maximum penalty	Higher courts		Magistrates' Court	
				charges	cases	charges	cases
Indecent assault of a male aged under 16 ^a	Section 68(3)	From 1 April 1959 To 7 November 1967	10 years	90	16	17	8
Gross indecency with a girl aged under 16 ^b	Section 69(1)(a)	From 1 April 1959 To 28 February 1981	2 years (3 years for subsequent offences)	59	32	10	4
Assault with intent to sexually penetrate a child aged under 10	Section 47(2)	From 1 March 1981 To 4 August 1991	10 years	2	1	0	0
Gross indecency with a person aged under 16	Section 50(1)(a)	From 1 March 1981 To 4 August 1991	2 years (3 years for subsequent offences)	86	47	16	12
Gross indecency with a person aged under 16 under care, supervision or authority	Section 50(2)(a)	From 1 March 1981 To 4 August 1991	3 years	14	9	0	0
Indecent act with a child aged under 16	Section 47(1)	From 5 August 1991 To 30 June 2017	10 years	2,649	897	1,328	699
Indecent act with a child aged 16 under care, supervision or authority	Section 49(1)	From 5 August 1991 To 30 November 2006	Before 22 April 1992: 2 years 22 April 1992 to 30 August 1997: 3 years From 1 September 1997: 5 years	13	5	5	3

Offence	Statutory reference <i>Crimes Act 1958 (Vic)</i>	Operational period	Maximum penalty	Higher courts		Magistrates' Court	
				charges	cases	charges	cases
Indecent act with a child aged 16 or 17 under care, supervision or authority	Section 49(1)	From 1 December 2006 To 30 June 2017	5 years	82	39	69	32
Sexual assault of a child aged under 16	Section 49D	From 1 July 2017 To present	10 years	62	38	84	56
Sexual assault of a child aged 16 or 17 under care, supervision or authority	Section 49E	From 1 July 2017 To present	5 years	1	1	8	3
Total				3,058	1,041^c	1,537	805

- a. While this offence did not contain a threshold for the victim's age, sentencing data sometimes specified when this offence was committed against 'a male aged under 16'.
- b. This offence includes 5 charges of gross indecency with a girl aged under 16 against section 66(1)(a) of the *Crimes Act 1928 (Vic)* and 32 charges of gross indecency with a girl aged under 16 against section 69(1)(a) of the *Crimes Act 1957 (Vic)*. It was assumed that these were data entry errors.
- c. The total number of cases for both jurisdictions is lower than the sum of the above rows because there were some cases in which multiple child sexual assault offences under various statutory references were sentenced together.

Sentence types imposed for child sexual assault offences

7.6 Table II shows the sentence types imposed for all child sexual assault offences over the reference period.²⁴¹ While child sexual assault offences have the same maximum penalty as adult sexual assault offences (10 years' imprisonment), child sexual assault offences were more than twice as likely to be sentenced in the higher courts (67% versus 30%), almost twice as likely to receive an immediate custodial sentence in the Magistrates' Court (39% versus 22%), and slightly more likely to receive an immediate custodial sentence in the higher courts (85% versus 80%).

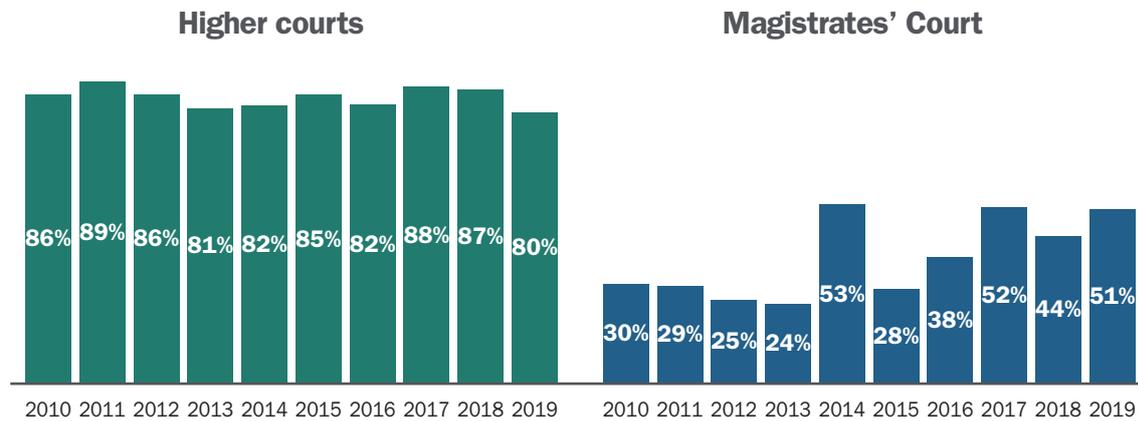
Table 11: Number and proportion of each sentence type imposed for child sexual assault offences sentenced in Victoria, 2010 to 2019 (4,595 charges: 3,058 in the higher courts and 1,537 in the Magistrates' Court)

Outcome	Court level	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total
Immediate custodial sentence	Higher courts	231 (86%)	357 (89%)	313 (86%)	224 (81%)	277 (82%)	262 (85%)	251 (82%)	199 (88%)	227 (87%)	247 (80%)	2,590 (85%)
	Magistrates' Court	36 (30%)	34 (29%)	28 (25%)	28 (24%)	120 (53%)	48 (28%)	69 (38%)	84 (52%)	79 (44%)	72 (51%)	598 (39%)
Community order	Higher courts	11 (4%)	14 (4%)	27 (7%)	26 (9%)	33 (10%)	34 (11%)	35 (11%)	18 (8%)	25 (10%)	33 (11%)	256 (8%)
	Magistrates' Court	52 (39%)	39 (29%)	53 (46%)	48 (40%)	67 (30%)	92 (53%)	89 (48%)	53 (33%)	65 (36%)	48 (34%)	606 (39%)
Wholly suspended sentence	Higher courts	21 (8%)	27 (7%)	18 (5%)	24 (9%)	23 (7%)	7 (2%)	9 (3%)	10 (4%)	9 (3%)	22 (7%)	170 (6%)
	Magistrates' Court	20 (16%)	35 (30%)	14 (12%)	22 (18%)	24 (11%)	11 (6%)	7 (4%)	6 (4%)	15 (8%)	7 (5%)	161 (10%)
Other	Higher courts	7 (3%)	2 (1%)	8 (2%)	1 (<1%)	4 (1%)	4 (1%)	10 (3%)	–	–	6 (2%)	42 (1%)
	Magistrates' Court	14 (11%)	10 (8%)	18 (16%)	21 (18%)	16 (7%)	21 (12%)	19 (10%)	18 (11%)	22 (12%)	13 (9%)	172 (11%)
Total (higher courts)		270	400	366	275	337	307	307	227	261	308	3,058
Total (Magistrates' Court)		122	118	113	119	227	172	184	161	181	140	1,537
Total (all courts)		392	518	479	394	564	479	491	388	442	448	4,595

241. In Table 11, *immediate custodial sentences* include 2,658 prison sentences (including combined orders), 389 aggregate sentences of imprisonment (including combined orders), 122 partially suspended sentences and 16 youth justice centre orders or youth training centre orders. *Community orders* include 742 community correction orders, 105 community-based orders, 11 intensive correction orders and 3 youth supervision orders. *Other orders* include 97 adjourned undertakings, 50 fines, 32 aggregate fines, 30 diversions, 2 residential treatment orders, 2 discharges with conviction and 1 probation order.

7.7 In the Magistrates' Court, the rate of immediate custodial sentences increased significantly during the reference period (Figure 27). In the higher courts, the rate of community orders also increased (coinciding with the introduction of community correction orders and the handing down of the guideline judgment on their use²⁴²), while the rate of immediate custodial sentences remained relatively high (80% or more) and stable. One stakeholder suggested that the increase in the number of cases sentenced in the Magistrates' Court from 2013 onwards may have been caused by changes in jurisdiction selection. In particular, there may have been more cases being prosecuted in the summary stream and/or more successful applications for summary jurisdiction by defendants, leading to more serious forms of this offence being heard and determined in the Magistrates' Court, in turn causing an increase in the rate of immediate custodial sentences. This is consistent with the increase in the number of cases sentenced in the Magistrates' Court since 2015 (see Figure 27).

Figure 27: Proportion of child sexual assault offences receiving immediate custodial sentences in Victoria, by year and court (4,595 charges: 3,058 in the higher courts and 1,537 in the Magistrates' Court)



242. *Boulton & Ors v The Queen* [2014] VSCA 342 (22 December 2014).

How long were prison sentences for child sexual assault offences?

- 7.8 There were 2,370 non-aggregate sentences of imprisonment imposed for the offences of indecent assault or sexual assault contrary to sections 47(1) and 49D of the *Crimes Act 1958* (Vic), 144 in the Magistrates' Court and 2,226 in the higher courts. The yearly average prison sentence length for these offences is shown in Figure 28 (page 64). The shortest prison sentence was one week (in 2 cases) and the longest prison sentences were 7 years and 6.5 years.²⁴³ The average prison sentence was 15 months in the higher courts and 7 months in the Magistrates' Court.²⁴⁴ There was no statistically significant trend in average prison sentences over the reference period,²⁴⁵ though the average was notably longer in the higher courts in 2019 than in all previous years (even excluding the charges attracting standard sentence offence classification).²⁴⁶
- 7.9 There were 345 cases in which a charge of indecent assault of a child or sexual assault of a child was the principal proven offence and the offender received a term of imprisonment (153 in the higher courts and 192 in the Magistrates' Court). The yearly average total effective sentences in these cases are illustrated in Figure 29 (page 65). The average total effective sentence in the Magistrates' Court was 10 months, ranging from 2 weeks to 3 years and 6 months, and the average total effective sentence in the higher courts was 2 years and 11 months, ranging from 1 week to 12 years.²⁴⁷ The decline in Magistrates' Court prison sentence lengths was statistically significant, with the average sentence stable since about 2015.²⁴⁸
- 7.10 Of the 229 charges of child sexual assault receiving non-aggregate sentences of imprisonment in the higher courts in 2019, 15 were standard sentence offences (in 12 cases), and 214 were not.²⁴⁹ The average prison sentence for the standard sentence offences was 79% higher (2 years and 10 months) than it was for the non-standard sentence offences (1 year and 7 months). Of the 15 charges of standard sentence offences receiving non-aggregate sentences of imprisonment, 3 were longer than the standard sentence, 2 were equal to the standard sentence (4 years) and 10 fell below the standard sentence.²⁵⁰

Average prison sentence imposed for sexual assault of a child aged under 16 (sections 47(1) and 49D) in the higher courts in 2019:

Standard sentence offence (15 offences):
2 years and 10 months

Non-standard sentence offence (214 offences):
1 year and 7 months

243. While the sentencing remarks in these two cases do not appear to be publicly available, a case involving a charge receiving 6 years' imprisonment is: *DPP v Eden (A Pseudonym)* [2019] VCC 459 (4 April 2019). Each of these cases with the longest prison sentences for child sexual assault offences involved other co-sentenced child sex offences.

244. While child sexual assault offences were more likely to be sentenced in the higher courts and more likely to receive an immediate custodial sentence than adult sexual assault offences, the average prison sentence for sexual assaults of adults and children were almost identical (14 months and 15 months in the higher courts, and 6 months and 7 months in the Magistrates' Court).

245. From 2010 to 2019, the average prison sentence increased by 33% in the higher courts (from 1 year and 3 months to 1 year and 8 months) and decreased by 30% in the Magistrates' Court (from 9 months to 7 months). There was no evidence for a statistically significant trend in either court (Pearson's correlation coefficients = 0.487 (higher courts); -0.430 (Magistrates' Court), $p > 0.1$).

246. Excluding the 15 prison sentences imposed for standard sentence offences in the higher courts in 2019, the average prison sentence was 1 year and 7 months.

247. The 12-year total effective sentence was imposed in *DPP v Eden (A Pseudonym)* [2019] VCC 459 (4 April 2019).

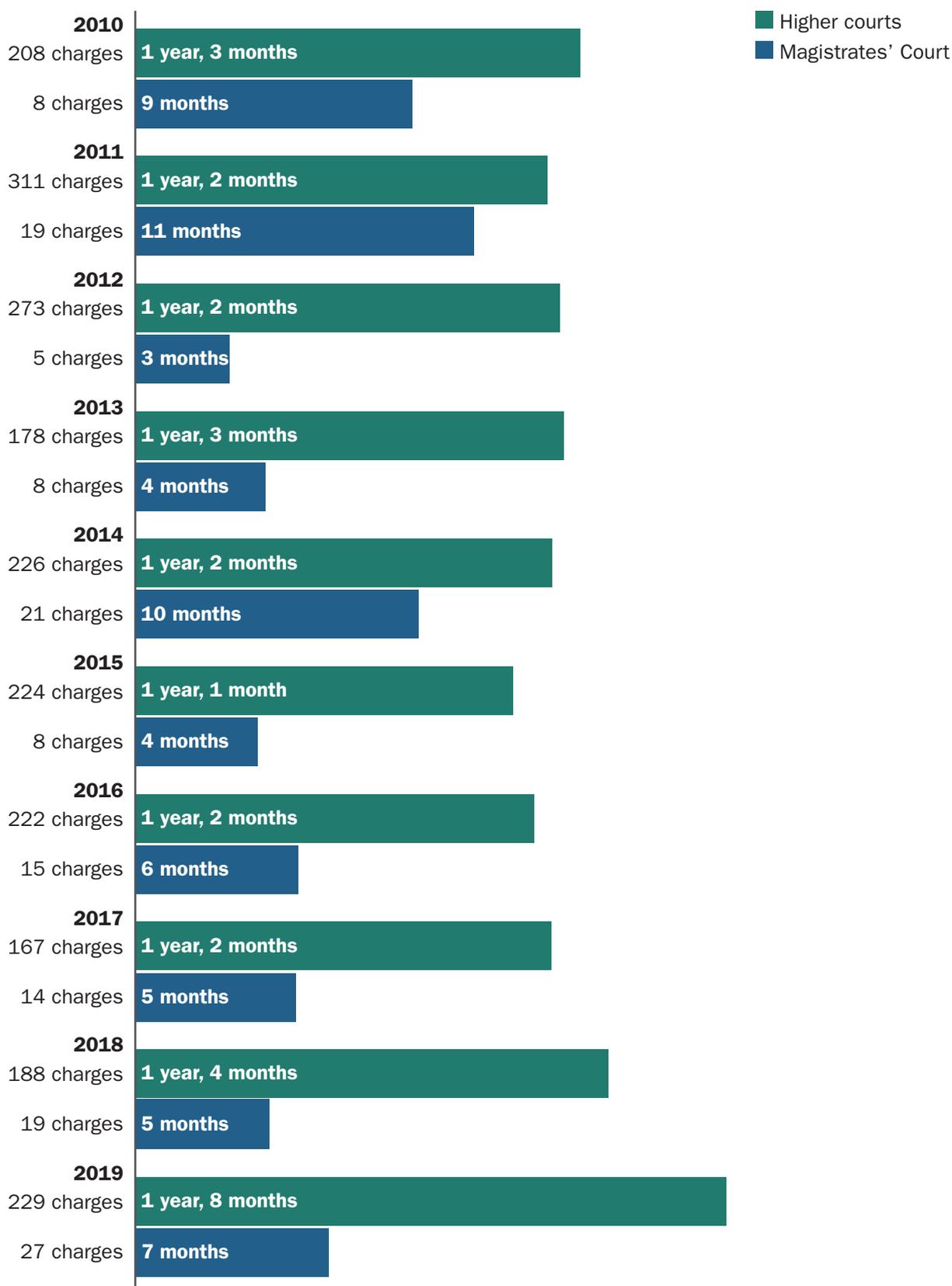
248. From 2010 to 2019 the average total effective sentence increased by 12% in the higher courts (3 years and 5 months to 3 years and 9 months) and decreased by 37% in the Magistrates' Court (1 year to 7 months). There was no evidence for a statistically significant trend in the higher courts (Pearson's correlation coefficient = 0.063, $p > 0.1$). There was evidence for a statistically significant trend in the Magistrates' Court (Pearson's correlation coefficient = -0.731, $p = 0.016$).

249. In addition to the 15 standard sentence offences that received prison sentences, 2 standard sentence offences received community correction orders. Another received a youth justice centre order: *DPP v Aleksy (A Pseudonym)* [2019] VCC 2101 (18 November 2019).

250. Outcomes included the following sentence lengths: 7 months, 8 months, 12 months, 13 months, 14 months, 2 years and 6 months (2 charges), 2 years and 10 months, 3 years (2 charges), 4 years (2 charges), 4 years and 4 months, and 6 years (2 charges).

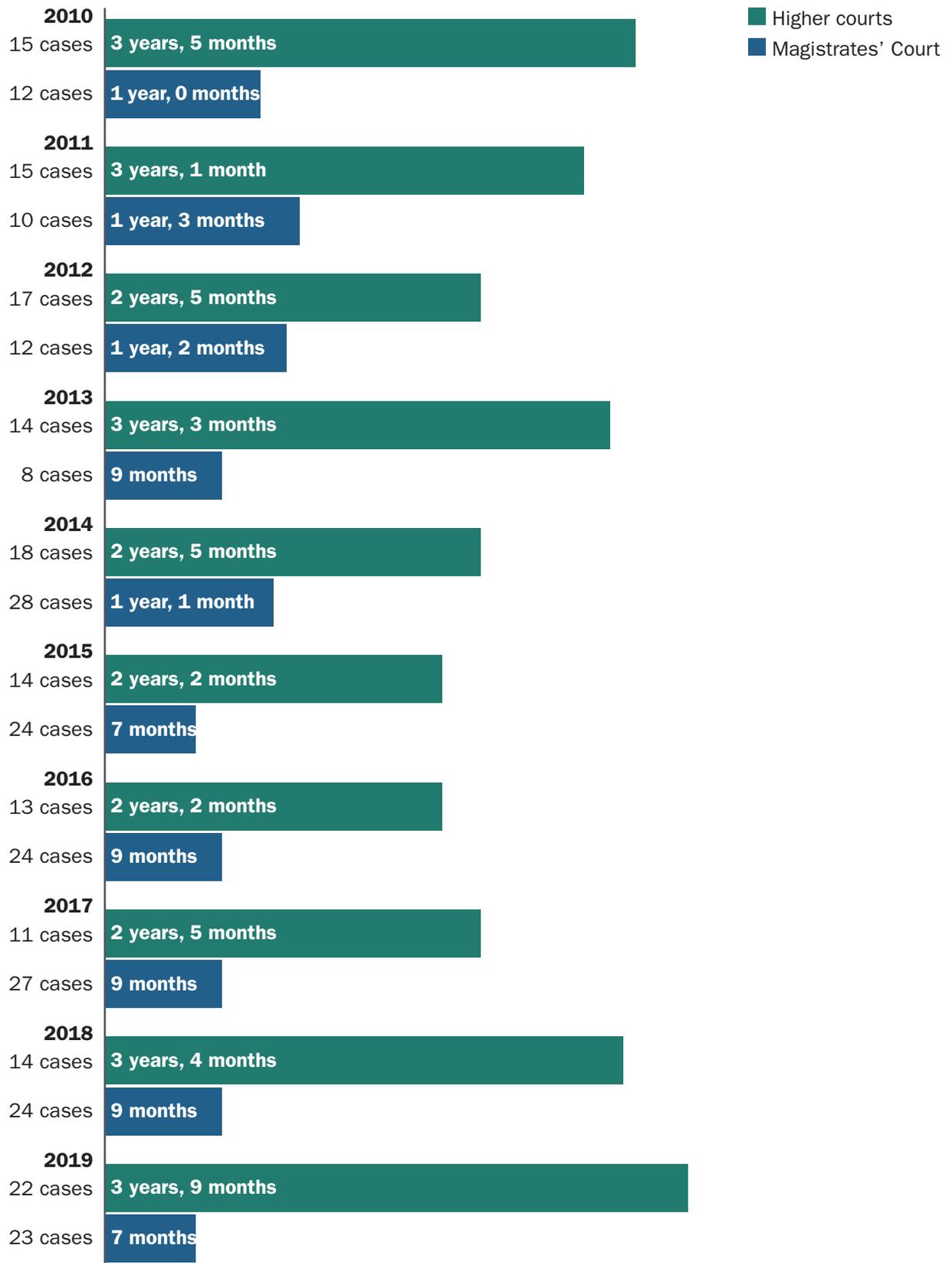
Charge level

Figure 28: Average prison sentences (in years and months) imposed for charges of sexual assault of a child contrary to sections 47(1) and 49D of the *Crimes Act 1958* (Vic), by year and court (2,370 charges: 2,226 charges in the higher courts and 144 in the Magistrates' Court)



Case level

Figure 29: Average total effective sentence (in years and months) imposed in cases involving indecent assault of a child or sexual assault of a child contrary to sections 47(1) and 49D of the *Crimes Act 1958* (Vic) as the principal proven offence, by year and court (345 cases: 153 in the higher courts and 192 in the Magistrates' Court)



- 7.11 Where child sexual assault offences are charged as individual offences, offences preceding 1 February 2018 will need to be sentenced differently from offences that occurred after, because the standard sentence will only apply to the latter.²⁵¹ In contrast, where the behaviours are captured in a course of conduct charge that extends before and after the commencement of standard sentences, the transitional provisions of the legislation clarify that the standard sentence will not apply to the charge.²⁵²
- 7.12 As has been the case with all standard sentence offences analysed in this report, sentences more often fell below than above the standard sentence. In some cases, this was because the objective seriousness of the offending was considered to have ‘fall[en] below the mid-range for the purposes of the standard sentence’.²⁵³ In others, it was because of the weighty influence of subjective mitigating factors, especially guilty pleas.²⁵⁴ Nevertheless, the standard sentence scheme is having an increasing effect on the average prison sentence for this type of offending. This is at least in part because the standard sentence legislation prohibits sentencing courts from referring to previous sentencing practices.²⁵⁵ In one of the first cases in which a child sexual assault offence was sentenced as a standard sentence offence, the court described the standard sentence scheme as being ‘directed to increasing sentences for standard sentence offences and ... ensuring that sentencing outcomes are more consistent with community expectations as expressed through parliament’.²⁵⁶ Accordingly, the judge stated that a ‘fine for a sexual assault upon a 14-year-old child will likely be a rare outcome’.²⁵⁷

251. See, for example, *DPP v Giuseppe (A Pseudonym)* [2020] VCC 786 (5 June 2020); *Lugo (A Pseudonym) v The Queen* [2020] VSCA 75 (30 March 2020).

252. *Sentencing Act 1991* (Vic) s 165A(4). See, for example, *DPP v Moulden (A Pseudonym)* [2019] VCC 386 (28 March 2019). The Council has previously noted that, given that the standard sentence is conceived as relating to a *single charge* of an offence, applying the standard sentence to other forms of charges (course of conduct charges, but also rolled-up or representative charges) may be ‘problematic’: Sentencing Advisory Council (2016), above n 62, 178.

253. *DPP v Becker (A Pseudonym)* [2020] VCC 795 (5 June 2020) [37]. See also *DPP v Hinch (A Pseudonym)* [2020] VCC 403 (8 April 2020). For cases involving child sexual assault as a standard sentence offence since the reference period in this report, see *DPP v Howell (A Pseudonym)* [2020] VCC 1328 (25 August 2020); *DPP v Hooper* [2020] VCC 1065 (17 July 2020); *DPP v Morey (A Pseudonym)* [2020] VCC 320 (30 March 2020).

254. *DPP v Morey (A Pseudonym)* [2020] VCC 320 (30 March 2020). In this case, the offender’s subjective mitigating circumstances also meant that it was found to be in the interests of justice to impose a non-parole period lower than the presumed minimum of 60% of the total effective sentence.

255. *Lugo (A Pseudonym) v The Queen* [2020] VSCA 75 (30 March 2020) [36].

256. *DPP v Greene (A Pseudonym)* [2019] VCC 438 (3 April 2019) [27].

257. *DPP v Greene (A Pseudonym)* [2019] VCC 438 (3 April 2019) [27].

8. Persistent sexual abuse of a child offences

- 8.1 This chapter examines the number of persistent sexual abuse of a child offences²⁵⁸ recorded and sentenced in Victoria between 2010 and 2019, and sentencing outcomes for proven offences, including the duration of prison sentences.
- 8.2 Persistent sexual abuse of a child aged under 16 is by its nature a course of conduct offence, requiring offending on three or more occasions.²⁵⁹ When this offence type was first introduced in 1991, it was described as *maintaining a sexual relationship with a child aged under 16*.²⁶⁰ It originally only applied if the victim was under the offender's care, supervision or authority, but this requirement was removed in January 1998.²⁶¹ In 2006, the offence was renamed *persistent sexual abuse*.²⁶² And in 2015, it became possible to charge this offence as a course of conduct.²⁶³ The current offence carries a maximum penalty of 25 years' imprisonment. It is a Category 1 offence,²⁶⁴ and it has a standard sentence of 10 years' imprisonment.²⁶⁵

258. The term 'persistent sexual abuse of a child offences' refers to the offences listed in Table 12 (see also glossary).

259. *Crimes Act 1958* (Vic) s 49J(1)(a).

260. *Crimes (Sexual Offences) Act 1991* (Vic) s 3, inserting *Crimes Act 1958* (Vic) s 47A (in force from 1 August 1991 to 31 December 1997). The maximum penalty varied based on the alleged offending constituting the sexual abuse, but this was amended in 1997 so that a maximum penalty of 25 years' imprisonment applied regardless of the underlying behaviour: *Sentencing and Other Acts (Amendment) Act 1997* (Vic) sch 1 cl 26.

261. *Crimes (Amendment) Act 1997* (Vic) s 5.

262. *Crimes (Sexual Offences) Act 2006* (Vic) s 11, amending *Crimes Act 1958* (Vic) s 47A.

263. *Criminal Procedure Act 2009* (Vic) sch 1 cl 4A, as inserted by *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) s 13; Victorian Government, *Victoria's New Sexual Offence Laws: An Introduction* (2015) 22–23. Note that it is not possible to charge a course of conduct for other specific sex offences in the same charge sheet or indictment if the offender has been charged with persistent sexual abuse of a child aged under 16: *Criminal Procedure Act 2009* (Vic) sch 1 cl 5(5). While clause 5(5) of Schedule 1 of the *Criminal Procedure Act 2009* (Vic) specifies that the now repealed offence of persistent sexual abuse contrary to section 47A of the *Crimes Act 1958* (Vic) cannot be charged or sentenced alongside a relevant course of conduct offence, it arguably also captures the current offence under section 49J by virtue of section 16(a) of the *Interpretation of Legislation Act 1984* (Vic).

264. *Sentencing Act 1991* (Vic) s 3(g) (definition of *Category 1 offence*), as inserted by *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) s 3.

265. *Crimes Act 1958* (Vic) s 49J(2A), as inserted by *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic) s 32.

Number of recorded and sentenced persistent sexual abuse of a child offences

8.3 Between 2010 and 2019, 134 persistent sexual abuse of a child offences were recorded by police in Victoria. In contrast, 143 charges were sentenced in 123 cases involving 118 offenders, 113 of whom were male, in that same timeframe (Table 12).²⁶⁶ The number of sentenced charges is higher than the number of recorded offences. This is most likely because the offending would have been recorded by police as the single-incident behaviours constituting the pattern of abuse (for example, sexual assault, sexual penetration) and then consolidated to a charge of persistent sexual abuse of a child aged under 16 during either the charging process or plea negotiations.²⁶⁷

Table 12: Number of persistent sexual abuse of a child offences sentenced in Victoria, 2010 to 2019, by operational period (143 charges and 123 cases)

Offence	Statutory reference <i>Crimes Act 1958 (Vic)</i>	Operational period	Maximum penalty	Charges	Cases
Maintaining a sexual relationship with a child aged under 16 under care, supervision or authority	Section 47A	From: 5 August 1991 To: 31 December 1997	Before 1 September 1997 The highest maximum penalty of the type of offending constituting the sexual offending (10 years, 15 years or 25 years) From 1 September 1997 25 years	2	2
Maintaining a sexual relationship with a child aged under 16	Section 47A	From: 1 January 1998 To: 30 November 2006	25 years	50	43
Persistent sexual abuse of a child aged under 16	Section 47A	From: 1 December 2006 To: 30 June 2017	25 years	89	78
Persistent sexual abuse of a child aged under 16	Section 49J	From: 1 July 2017 To: present	25 years	2	2
Total				143	123^a

a. The total number of cases in Table 12 is slightly lower than the sum of the above rows because offences under different periods of operation were sentenced together in 2 cases (namely, maintaining a sexual relationship with a child aged under 16 and persistent sexual abuse of a child aged under 16).

266. Relatively few charges of the contemporary persistent sexual abuse of a child offence (in effect since mid-2017) were sentenced; this is likely a product of the known delay that often occurs in reporting child sexual abuse, the offence being a course of conduct, and the complexity in investigating and prosecuting a charge of this nature.

267. See, for example, Swedish National Council for Crime Prevention, *Gross Violation of a Woman's Integrity: Trends in the Criminal Justice System 1998–2017*, Report no 2019:8 (2019) (in the context of a particular course of conduct offence, police in Sweden 'are now expressly instructed to classify criminal incidents as the individual underlying offences, so that investigators and prosecutors can later aggregate these into a charge of gross violation of a woman's integrity in those cases in which it is relevant').

Sentence types imposed for persistent sexual abuse of a child aged under 16

8.4 Table 13 describes the sentencing outcomes for persistent sexual abuse of a child aged under 16 between 2010 and 2019. All charges were sentenced in the higher courts. The majority (92%) received an immediate custodial sentence,²⁶⁸ one of which was a partially suspended sentence. As at the end of 2019, just one charge of persistent sexual abuse of a child aged under 16 had been sentenced as a Category 1 offence, and it received a 5-year prison sentence.

Table 13: Number and proportion of each sentence type imposed for persistent sexual abuse of a child offences in Victoria, 2010 to 2019 (143 charges)

Outcome	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total
Immediate custodial sentence	12 (92%)	7 (100%)	10 (100%)	10 (91%)	13 (87%)	24 (88%)	20 (100%)	17 (89%)	12 (86%)	7 (88%)	132 (92%)
Other	1 (8%)	–	–	1 (9%)	2 (13%)	2 (8%)	–	2 (11%)	2 (14%)	1 (12%)	11 (8%)
Total	13	7	10	11	15	26	20	19	14	8	143

268. Three prison sentences were combined orders, which are no longer permissible for offending occurring on or after 20 March 2017.

- 8.5 Of the 11 charges (in 10 cases) that received sentences other than an immediate custodial sentence, 8 received a community correction order, 2 received a wholly suspended sentence and 1 received a fine. In most of the cases for which sentencing remarks were available, the offending involved a young offender (aged 17 to 22 years) in a sexual relationship with a child aged 13 years, 14 years or 15 years;²⁶⁹ see, for example, Case Study 5.

Case Study 5: community order for persistent sexual abuse of a child aged under 16

The offender was 19 years of age when he met the victim. The victim told him she was 16 years of age and they started a sexual relationship. They both used drugs on a regular basis, including marijuana and amphetamines. A month later, she informed him that she was actually 15. They continued their sexual relationship for a number of months.

When police became aware of their relationship, they interviewed the offender. He made full admissions and pleaded guilty at the earliest opportunity. At sentencing the judge noted that he suffered from Asperger syndrome, had an IQ of 75, was drug dependent and was on a disability pension. He had no prior convictions and was engaging well with both drug counselling and a psychologist. He was assessed as a low to moderate risk of reoffending.

He received a 2-year community correction order with a judicial monitoring condition, a supervision condition and a requirement to undertake treatment and rehabilitation for his drug use.

Unpublished sentencing remarks provided to the Council

269. See, for example, *DPP v Mackintosh* [2018] VCC 1458 (7 September 2018); *DPP v Wilkinson* [2017] VCC 1560 (27 October 2017); *DPP v Burton (A Pseudonym)* [2015] VCC 641 (11 May 2015); *Contra DPP v Torres (A Pseudonym)* [2019] VCC 1182 (1 August 2019).

How long were prison sentences for persistent sexual abuse of a child aged under 16?

8.6 During the reference period, 130 non-aggregate sentences of imprisonment were imposed for persistent sexual abuse of a child offences.²⁷⁰ Figure 30 shows

Charge level

the yearly average prison sentence for those charges. The average prison sentence over the reference period for these offences was 6 years and 6 months. The shortest prison sentence was 1 year (part of combined orders for a 68-year old offender and an 83-year-old offender)²⁷¹ and the longest prison sentences were 13 years²⁷² and 12 years. While the average yearly prison sentence increased by 30% over the reference period, there was no discernible trend.²⁷³ By the end of 2019, no charges of persistent sexual abuse of a child aged under 16 had yet been sentenced as a standard sentence offence. There were, though, at least three relevant cases sentenced in 2020 (after the reference period); one case received 6 years' imprisonment, one received 6 years and 6 months' imprisonment, and one with 3 charges received 7 years', 8 years' and 8 years' imprisonment.²⁷⁴ This is consistent with the findings in relation to other standard sentence offences, where average prison sentences may approach the standard sentence but they most likely remain below the standard sentence set for each offence, due to the mitigating influence of subjective factors such as guilty pleas (see further [9.8]–[9.10]).

Figure 30: Average prison sentence (in years and months) imposed on charges of persistent sexual abuse of a child aged under 16 contrary to sections 47A and 49J of the Crimes Act 1958 (Vic), by year (130 charges)



270. This excludes one charge of maintaining a sexual relationship with a child aged under 16 where the offending preceded September 1997 because the maximum penalty for that offence was dictated by the underlying offending, rendering it incomparable with subsequent sentencing practices where the maximum penalty has consistently been 25 years' imprisonment.

271. Remarks are publicly available for the latter case: *DPP v Dawson (A Pseudonym)* [2017] VCC 580 (12 May 2017).

272. *DPP v Morgan (A Pseudonym)* [2015] VCC 1668 (20 November 2015).

273. From 2010 to 2019, the average prison sentence increased by 30% from 5 years and 10 months to 7 years and 7 months. There was no evidence for a statistically significant trend (Pearson's correlation coefficient = 0.044, $p > 0.1$).

274. *DPP v Snow (A Pseudonym)* [2020] VCC 146 (25 February 2020); *DPP v Robards (A Pseudonym)* [2020] VCC 1665 (16 October 2020); *DPP v Williams (A Pseudonym)* [2020] VCC 2065 (17 December 2020).

8.7 There were 107 cases in which the principal proven offence was persistent sexual abuse of a child aged under 16 contrary to sections 47A or 49J. The yearly average total effective sentence length for these

Case level cases is shown in Figure 31. Given the fluctuations in the yearly average total effective sentence, there was no discernible trend over the reference period.²⁷⁵ The average total effective sentence over the reference period was 8 years. The shortest total effective sentence was 1 year and the longest was 18 years and 6 months (these were the same 2 cases that received the shortest and longest charge-level prison sentences).²⁷⁶

Figure 31: Average total effective sentence (in years and months) imposed in cases involving persistent sexual abuse of a child aged under 16 contrary to sections 47A and 49J of the *Crimes Act 1958* (Vic) as the principal proven offence, by year (107 cases)



275. From 2010 and 2019, the average total effective sentence increased by 37% from 6 years and 10 months to 9 years and 4 months. There was no evidence for a statistically significant trend (Pearson's correlation coefficient = 0.191, $p > 0.1$).

276. *DPP v Dawson (A Pseudonym)* [2017] VCC 580 (12 May 2017); *DPP v Morgan (A Pseudonym)* [2015] VCC 1668 (20 November 2015)..

9. Concluding remarks

- 9.1 This report has reviewed data on the number and types of sex offences recorded by police and sentenced by courts in Victoria in the 10 years to 2019. It has also identified the sentence types imposed for proven charges of sex offences, and the duration of prison sentences imposed on sex offenders. Key findings include the following:
- while there was some increase in the number of sex offences against *children* recorded by police during the reference period (25%), the increase in the number of recorded sex offences against *adults* was much more significant (107%);
 - despite the significant increase in *recorded sex offences* (63% overall), the number of *sentenced sex offences* actually decreased slightly (-8%);
 - the majority of sentenced sex offences in Victoria were committed against children rather than adults (at least 55%, and probably closer to 64% given that most incest offending involves child victims);
 - sentence types imposed for sex offences changed very little, with the exception of a relatively steady increase in the rate of immediate custodial sentences imposed in the Magistrates' Court for child sexual assaults, especially since 2013 (from 24% to 51%);
 - by the end of the reference period, average prison sentences were longer for most of the standard sentence sex offences (rape, incest, child sexual penetration offences and child sexual assault); and
 - the offence type with the greatest shift in sentence lengths (incest with a child, stepchild or lineal descendant) was also the offence type subject to the most reform: Category I offence classification, standard sentence offence classification, the various *Dalgliesh* decisions, and the permissible prosecution of offending as a course of conduct.
- 9.2 Some of these findings, especially those relating to the effect of the three sentencing reforms, are discussed in more detail below.

There are more sex offences being reported to police, but not more sex offences being sentenced by courts

9.3 As mentioned above, the number of sex offences recorded by police increased significantly between 2010 and 2019, both against adults (increasing 107%) and against children (increasing 25%). Stakeholders consulted by the Council suggested that this was largely driven by an increased community awareness about what constitutes sexual violence coupled with an increased willingness to report it.



“We’ve had very vocal, very consistent messages from police, from leaders in the community, about how these issues are taken seriously, and how people should come forward.”

Participant at Roundtable 1 (30 March 2021)

“There’s an increased recognition of what might constitute sexual assault among the community, and people are more able to name and identify their experience, and may have more confidence that they will be heard if they report. And an increased ability for people to identify that a crime has been committed against them, rather than it being normal behaviour that women can expect in life.”

Participant at Roundtable 1 (30 March 2021)

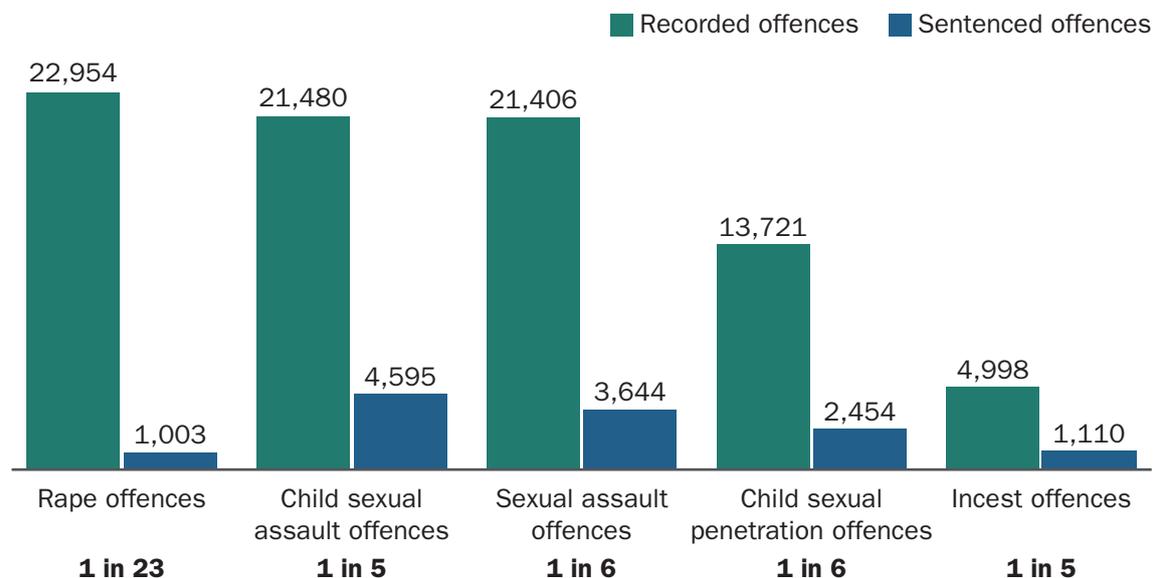
“Across that time period we saw a number of reforms ... and inquiries ... Those kinds of public focuses and shifting attention towards the issue can account for some increase in reporting rates, as well as the fact that we’re starting ... to see a general shift in public understandings about sexual violence, meaning more people are identifying their lived experience as sexual violence ... [and an increased] willingness to report.”

Participant at Roundtable 2 (31 March 2021)



- 9.4 While the number of sex offences recorded by police has increased, the number of sex offences sentenced by Victorian courts has decreased (by 8%). Stakeholders consulted by the Council raised a number of possible reasons behind this increasing discrepancy between recorded and sentenced offences, including:
- increased use of multi-count charging options, such that multiple recorded incidents of a certain offence can be sentenced as a single charge;
 - increased reporting and/or prosecution of historical sex offences but heightened ‘forensic difficulties’ in proving them;²⁷⁷ and
 - potential changes in plea negotiation practices (though there was no corresponding increase in the number of less serious sex offences sentenced).²⁷⁸
- 9.5 Notably, the discrepancy between the number of sex offences recorded by police and the number sentenced by courts is not consistent across each offence category (Figure 32). In particular, in the same timeframe that almost 23,000 rape offences were recorded by police, about 1,000 rape offences were sentenced by courts. As a caveat, this is not a true attrition analysis because the recorded and sentenced offence data cover the same period, whereas a proper attrition analysis would follow the trajectory of offences as they make their way through the system. Nor does this account for what happened to those recorded offences: they may have been not charged at all, rolled up into a single charge, prosecuted at trial and acquitted, reduced to a lesser charge during plea negotiations, prosecuted at trial and proven, or resolved by way of the offender’s plea of guilty. What it does show, though, is that there is a uniquely greater discrepancy between the number of recorded and sentenced rape offences than there is for other types of sex offences.

Figure 32: Number of sex offences recorded by police and sentenced by courts in Victoria, 2010 to 2019, by sex offence type



277. See, for example, *Lucciano (A Pseudonym) v The Queen* [2021] VSCA 12 (9 February 2021) [48] (‘we cannot conclude these reasons without expressing our disquiet at the apparently increasing frequency with which cases involving delays in the order of 40 to 60 years are coming before the Court ... the forensic difficulties which delays of this order of magnitude inflict suggest that such trials should be rare.’)

278. Roundtable 1 (30 March 2021); Roundtable 2 (31 March 2021).

Standard sentences are increasing prison sentence lengths

- 9.6 In 2019, the average prison sentences were uniformly longer for standard sentence offences of the relevant sex offences than for non-standard sentence versions of the same offences (Table 14, page 79). If this difference is attributable to standard sentence legislation,²⁷⁹ which it seems to be, this could be due to the ‘anchoring effect’²⁸⁰ arising from the numerical guidance provided by the standard sentence set for each offence or it could be due to courts being prohibited from considering sentencing practices in cases in which the offence was a non-standard sentence offence – or a combination of the two.
- 9.7 In addition, there were increases in average prison sentences for some child sex offences in 2019, even for non-standard sentence offences (see, for example, [5.12], [6.12]). This is likely, at least in part, due to the requirement that when sentencing non-standard sentence offences, courts consider *all* current sentencing practices (see above at [2.21]), including sentences imposed for standard sentence offences. The standard sentence scheme therefore seems to be influencing the sentencing of offences not directly subject to the scheme.
- 9.8 Of the 56 sex offences attracting standard sentence offence classification in 2019, 80% (45 offences) received prison sentences shorter than the standard sentence (8 sentences were longer than the standard sentence and 3 were equal to the standard sentence). This is not, though, because courts eschewed their obligations under the standard sentence legislation. For one thing, the standard sentence for an offence, like current sentencing practices and the maximum penalty, is ‘simply another factor to be taken into account’,²⁸¹ and it is by no means a controlling factor. For another, the seriousness of cases involving any particular offence dealt with by courts will rarely be normally distributed – more cases may fall above or below the middle of the range of objective seriousness. As one court described:

[y]our offending was not predatory. There was no breach of trust. There was no sustained or enduring exploitation of a relationship or authority, such as [a] teacher with a pupil or an older relative with a younger member of the family. There was no grooming, no wearing down of your victim’s will. It was opportunistic. The objective gravity of your offending as I find it places it in the low range of seriousness. And clearly, in my view, does not call for the imposition of a standard sentence as set by Parliament for these offences.²⁸²

279. It is not possible to exclude the possibility that sentences for standard sentence offences were higher for an extraneous reason. For example, it is possible that there was a considerable delay in the prosecution of some non-standard sentence offences, and that would have acted as a mitigating factor in those cases in a way that it could not have in cases involving standard sentence offences. However, delay is just one factor that sentencing courts must take into account, and comments by sentencing courts suggest that they are intentionally imposing higher sentences as a result of the standard sentence legislation.

280. See, for example, Birte Englich and Thomas Mussweiler, ‘Sentencing Under Uncertainty: Anchoring Effects in the Courtroom’ (2001) 31(7) *Journal of Applied Social Psychology* 1535; Ian Marder and Jose Pina-Sánchez, ‘Nudge the Judge? Theorising the Interaction Between Heuristics, Sentencing Guidelines and Sentence Clustering’ (2020) 20(4) *Criminology & Criminal Justice* 399.

281. *R v Brown* [2018] VSC 742 (29 November 2018) [68]; *Brown v The Queen* [2019] VSCA 286 (10 December 2019) [106]. See also, *R v McNamara* [2020] VSC 705 (22 October 2020) [225]; *DPP v Kirkland (A Pseudonym)* [2020] VCC 1344 (27 August 2020) [131]; *DPP v Kane* [2020] VCC 612 (12 June 2020) [41]; *DPP v Munn* [2020] VSC 251 (5 May 2020); *DPP v Reid* [2019] VCC 1362 (29 August 2019) [74].

282. Unpublished sentencing remarks provided to the Council.

Table 14: The number of charges of contact sex offences sentenced in 2019 as both standard sentence offences and non-standard sentence offences, and the proportional change in average prison sentences

Offence	Statutory reference <i>Crimes Act 1958 (Vic)</i>	Standard sentence	Above/ same/ /below standard sentence	Average prison sentence (charges of non-standard sentence offences)	Average prison sentence (charges of standard sentence offences)	Per cent difference (%)
Rape	Section 38	10 years	3 above 15 below	5 years and 8 months (75 charges)	6 years and 8 months (18 charges)	↑ 18%
Incest with a child, stepchild or lineal descendant	Sections 50C and 50D – current sections 44(1) and 44(2) – repealed	10 years	9 below	6 years and 10 months (92 charges)	7 years and 7 months (9 charges)	↑ 11%
Sexual penetration with a child aged 10/12 to 15	Section 49B – current section 45(1) – repealed	6 years	1 above 1 same 8 below	2 years and 2 months (82 charges)	3 years and 8 months (10 charges)	↑ 69%
Sexual penetration with a child aged under 10/12	Section 49A – current section 45(1) – repealed	10 years	3 below	5 years and 2 months (17 charges)	7 years and 9 months (3 charges)	↑ 50%
Sexual assault of a child aged under 16	Section 49D	4 years	3 above 2 same 10 below	1 year and 7 months (214 charges)	2 years and 10 months (15 charges)	↑ 79%
Persistent sexual abuse of a child aged under 16	Section 49J	10 years	–	7 years and 7 months (7 charges)	–	–

- 9.9 But most importantly, the standard sentence only incorporates factors relevant to the *objective* seriousness of the offence and does not account for subjective circumstances, such as guilty pleas, demonstrated remorse, otherwise good character, delays in bringing proceedings, steps towards rehabilitation, mental impairment or intellectual disability, or a history of trauma, disadvantage or victimisation. Factors such as these are most likely why the average prison sentences for offences attracting standard sentence offence classification in 2019 were between 61% and 78% of the standard sentence for those offences.²⁸³ Many of these subjective factors have a significant effect on the sentence imposed. For instance, previous research has found that most sex offenders plead guilty, and that almost all discounts for guilty pleas (86%) are 20% or more of the total effective sentence that would have otherwise been imposed.²⁸⁴
- 9.10 Therefore, while the findings of this report suggest that standard sentences appear to have increased sentencing practices for relevant offences, as they were intended to, it is likely that average sentence lengths will tend to, but may not necessarily always, gravitate towards a level slightly *below* the standard sentence. In part, this will be because offending is not normally distributed with an equal amount falling below, at or above the middle of the range of objective seriousness. But primarily it will be because the standard sentence does not account for the subjective mitigating circumstances present in many cases, especially discounts for guilty pleas.

Category 1 offence classification will increase imprisonment rates, but it may also have unintended consequences

- 9.11 Category 1 offence classification was introduced in an attempt to ensure serious offenders went to prison (see [2.3]–[2.4]). By the end of 2019, nearly three years since the commencement of the legislation, 72 sex offences had been sentenced as Category 1 offences (49 of which were rape offences). As required, each offence received a sentence of adult (64) or youth (8) detention. Given that there is no mandatory minimum sentence for these offences, there may eventually be some cases in which nominal periods of detention are imposed because a court considers a custodial sentence inappropriate but has no other option.²⁸⁵ It seems unlikely that this has happened yet, though, as the shortest prison sentences for sex offences with Category 1 offence classification were 2 years (2 charges) and 3 years (4 charges). Further, given that Category 1 offence classification is premised on the date of the offence, it is unsurprising that increasing numbers of such offences are sentenced each year: none in 2017, 23 in 2018 and 49 in 2019. As time passes, a growing number of relevant sex offences will invariably attract the consequences of Category 1 offence classification and prison sentences will rise, as intended.

283. As a proportion of the standard sentence, the average prison sentences for relevant offences were: 61% (sexual penetration with a child aged 12 to 15), 69% (rape), 71% (sexual assault of a child aged under 16), 76% (incest) and 78% (sexual penetration with a child aged under 12).

284. Sentencing Advisory Council, *Guilty Pleas in the Higher Courts: Rates, Timing and Discounts* (2015) 28, 66.

285. See, for example, Janine Benedet, 'Sentencing for Sexual Offences Against Children and Youth: Mandatory Minimums, Proportionality and Unintended Consequences' (2019) 44(2) *Queen's Law Journal* 284.

- 9.12 However, in addition to potentially ensuring some serious sex offenders go to prison when they might not have otherwise, a question arises as to whether this legislation might also, and perhaps more frequently, result in people in extraordinary circumstances being imprisoned. In the 10 years to 2019, 77 sex offences now classified as Category 1 offences, in 61 cases, received what would now be impermissible sentences.²⁸⁶ Sentencing remarks in those cases suggest that courts were already limiting the imposition of sentences other than an immediate custodial sentence to extraordinary circumstances (see, for example, Case Studies 1 (page 19), 2 (page 20), 3 (page 37) and 4 (page 51)). These people would now be imprisoned if their offending had attracted Category 1 offence classification.
- 9.13 The Council has previously said that 'mandatory sentences ... are not ... models of sentencing guidance ... are incompatible with the framework of structured discretion for sentencing in Victoria, and are liable to result in inappropriate consistency and, ultimately, injustice'.²⁸⁷ While mandatory sentences may in some limited instances prevent what might rightly be perceived as unwarranted leniency, they also create a very real risk of unjust outcomes for people such as young offenders, people with impaired intellectual functioning, women whose offending is the product of their own victimisation, and other poor targets for deterrence and denunciation.

Prison sentences for incest have increased since the various *Dalglish* decisions

- 9.14 Of all the offences analysed in this report, none received as much effort to increase sentencing practices as incest with a child, stepchild or lineal descendant. The average prison sentence for this offence in the 10 years to 2019 was 4 years and 10 months. This offending now attracts Category 1 offence classification and carries a standard sentence of 10 years; it was also the subject of a judicial call to increase inappropriately low sentencing practices. Moreover, incest offending can now be charged as a course of conduct offence, which will invariably increase the objective seriousness of some individual charges by virtue of the offending having been prolonged or repeated.
- 9.15 Based on the data in this report, prison sentences for incest offences are clearly longer now than they have been previously. In 2019, especially, the average prison sentence increased from 5 years and 4 months in 2018 to 6 years and 10 months. Even excluding the standard sentence offences of incest in 2019 and an anomalous case with numerous incest offences receiving unusually long prison sentences, that average was 6 years and 1 month, 9 months longer than in the previous year. The Council's previous research has found that calls to increase sentencing practices can take time to be reflected in sentencing outcomes.²⁸⁸ Collectively, this all suggests that the various *Dalglish* decisions have increased prison sentences for incest offending in Victoria.

286. This included 38 charges of rape, 29 charges of sexual penetration with a child aged under 12, 9 charges of persistent sexual abuse of a child aged under 16, and one charge of incest with a child aged under 18. Note that this does not include combined orders, which are also now impermissible; however, it is nevertheless still possible to impose a combined order by imposing imprisonment and a community correction order as separate sentences on two separate charges, so long as one of the charges is not a Category 1 offence, as is often the case. This also doesn't include partially suspended sentences given they involve an immediate custodial component.

287. Sentencing Advisory Council (2016), above n 62, 231. See also Sentencing Advisory Council, *Mandatory Sentencing: Information Paper* (2008) 8 ('mandatory and presumptive sentencing schemes ... make the criminal justice process less transparent and less accountable and therefore less just').

288. Sentencing Advisory Council *Sentencing Guidance in Victoria: Report* (2016) 385 (Figure A85).

- 9.16 The overall increase in the average lengths of prison sentences for incest with a child aged under 18 is therefore not attributable to any one reform. Instead, the various reforms seem to have had a compounding effect on one another, each resulting in their own tangible increase in the duration of prison sentences.
- 9.17 Moreover, there have been increases in the average prison sentences for most child sex offences that cannot be attributed to any of the reforms. Stakeholders consulted by the Council suggested that extra-legal factors are likely responsible. In particular these include:
- the increased media scrutiny of child sex offences and responses to it, particularly following the Royal Commission into Institutional Responses to Child Sexual Abuse;
 - the increasing awareness and understanding of the lifelong consequences of child sexual abuse;
 - changing community expectations about how these offences should be sentenced; and
 - the effect of multiple compounding reforms in this space – including commentary by both the Court of Appeal and the High Court about the reduced relevance of past sentencing practices, particularly in the context of child sex offences.

Collectively, these factors have driven a 'self-correcting' increase in the lengths of prison sentences for child sex offences above and beyond what can be measurably attributed to the three sentencing reforms.

Appendix 1: Consultation

Meeting/consultation	Date
County Court of Victoria	11 March 2021 (via Zoom)
Supreme Court of Victoria – Court of Appeal	17 March 2021 (via email)
Roundtable 1 Department of Justice and Community Safety Magistrates' Court of Victoria Office of Public Prosecutions Sexual Assault Services Victoria Victims of Crime Commissioner Victoria Legal Aid	30 March 2021 (via Zoom)
Roundtable 2 Department of Justice and Community Safety Rape & Sexual Assault Research & Advocacy Initiative Victoria Legal Aid Victoria Police Victorian Law Reform Commission	31 March 2021 (via Zoom)

Appendix 2: Methodology

This appendix describes the methodology utilised in this report.

Identifying relevant sex offences

All three sentencing reforms studied in this report related to sex offences that involved physical contact with the victim (penetrative and non-penetrative), and as such, the report limited the dataset only to *contact sex offences*. Contact sex offences have as an element of the offence actual physical contact of a sexual nature with the victim, either done or caused by the offender. Non-contact sex offences (such as offences involving child abuse material or soliciting and procuring persons for sexual activity) were excluded. Attempted contact sex offences were also excluded, as their maximum penalties were invariably lower than their completed counterparts, and they also may not have involved physical contact with the victim.

Recorded offence data

Data on contact sex offences recorded by police in Victoria was provided by the Crimes Statistics Agency. For various reasons – including the often-lengthy time period between an offence being recorded and sentenced, the use of multi-offence charging options to resolve proceedings (bundling numerous recorded offences into a single sentenced charge), and the different standards required for an offence to be recorded by police or found proven in court – the difference in recorded and sentenced charge numbers is not a true attrition analysis.

Sentencing remarks

The Council routinely uses higher courts' sentencing remarks to ascertain further offence and sentence information if discrepancies are noted in sentencing outcomes data, or if offence distinctions are required. Some remarks are publicly available from the Australian Legal Information Institute (AustLII). There were also some non-public remarks reviewed for various purposes. Some were reviewed for statistical purposes (for example, confirming the age of the victim to clarify the applicable maximum penalty²⁸⁹). Others were reviewed for factual details or case studies, some of which have been included in this report. Where factual details of non-public sentencing remarks have been included in this report, permission was sought from, and granted by, the County Court.

Analysing sentencing outcomes

Sentencing outcome data is routinely provided to the Council by Courts Services Victoria. The Council undertakes cleaning and checking of data once it is received. This report relied on sentencing data from Victoria's adult courts: the Magistrates' Court, County Court and Supreme Court. It does not incorporate data from the Children's Court.

In reporting on sentence types in this report, data is presented by the 'most serious penalty' imposed for the charge or in the case. For example, if a charge received a combined order, the sentence

289. The Council was unable to specify whether the offence involved a victim aged under 10/12 or a victim aged 10/12 to 15 for 49 outstanding charges of sexual penetration with a child aged under 16 in 23 cases. These offences were excluded from the analysis of both sentence types and imprisonment durations in Chapter 5.

would be counted as an immediate custodial sentence rather than a community order (for an overview of what is included in *immediate custodial sentence* or *community order*, see glossary).

Where a combined order was imposed, the length of imprisonment that could be imposed was limited by the applicable maximum at the time (3 months, 1 year or 2 years). These prison sentences are included in the analysis of non-aggregate sentences of imprisonment imposed for charges. Where multiple charges received a single aggregate sentence of imprisonment, the duration of that prison sentence was excluded from the analysis of charge-level prison sentence lengths (because the lengths of sentences for each charge are not specified), but it was included in the analysis of case-level prison sentence lengths.

This report does not distinguish types of rape (for example, digital-vaginal, penile-oral) in reporting on recorded and sentenced rape offences and their outcomes. In light of the Court of Appeal's call to uplift sentencing practices for *digital* rape in December 2017,²⁹⁰ it may be useful for an analysis to qualitatively code each charge of rape over a certain period before and after that judgment in order to review whether sentences for digital rapes have increased since then.

The Council utilised simple linear regression to discern and assess the trends in yearly average sentences imposed over the reference period. In this report, linear regression was employed on the short time series of average charge-level and case-level prison sentence lengths each year, for each relevant offence. Simple linear regression gauges the correlation of the average prison sentence in a year to the 10-year reference period. This analysis did not take into account how the prevalence of imprisonment as a sentence changed each year, and it also did not consider any other important factors of sentencing, such as plea of guilty, remorse, good character, prospects of rehabilitation, mental impairment or intellectual disability, history of disadvantage or prior offending. As such, the Council assessed simply whether there were quantifiable and significant trends underlying the shifting averages in yearly sentences.

Where this report discusses and presents 'average sentences', this means average prison sentence lengths, which are quantifiable. It does not mean the average sentence overall, because many sentencing orders are not quantifiable and/or not comparable to one another. When differences in average prison sentence lengths are discussed, they can be described either in absolute terms (by stating the difference in years and months) or as a proportional change (by using a percentage). In the interests of transparency, the Council has, as much as possible, used both methods to describe changes in average sentence lengths.

The report also does not analyse average non-parole periods.²⁹¹ These are another aspect of sentencing outcomes that may have undergone change following the introduction of standard sentences, which require courts to impose a non-parole period that is at least 60% of the total effective sentence, unless the court considers it in the interests of justice to set a shorter period. While that analysis may be useful in the future, it was beyond the scope of this report.

Multi-count charges

Representative charges, rolled-up charges and course of conduct charges are charging options that can validly allege multiple instances and/or an extended period of offending. When a sentencing court considers current sentencing practices for a particular offence, sentencing practices for 'single instance' charges are much less comparable to multi-offence charges, because such charges allege

290. *Shrestha v The Queen* [2017] VSCA 364 (11 December 2017).

291. Non-parole periods for most of these offences are reported in the Council's biennial *Sentencing Snapshots*.

offending that is repeated, varied and/or protracted and are therefore generally more serious.²⁹² Because it is not yet possible to determine whether there are false negatives in court data for course of conduct offences, this report does not distinguish single-incident from multi-count versions of offences (except at [5.20]–[5.22]).

Offence dates

This report identifies which offences were committed and sentenced during periods that various legislative reforms were applicable. For instance, relevant offences only attracted the consequences of Category 1 offence or standard sentence offence classification if they were committed on or after 20 March 2017 or 1 February 2018, respectively. Offence date data was requested and provided by the higher courts for certain offences (Table A1). There were a small number of instances where the recorded offence date conflicted with the operational period of the statutory reference associated with the sentenced offence; in such instances, it was presumed that the sentenced statutory reference was accurate and the offence date was not.

Table A1: The contact sex offences for which the Council sought and received offence date data from the higher courts in order to determine the applicability of the various sentencing reforms

Contact sex offence grouping	Statutory reference <i>Crimes Act 1958 (Vic)</i>	Offence description	Applicable amendment
Rape offences	Section 38	Rape	Standard sentence offence/ Category 1 offence
	Section 39	Rape by compelling sexual penetration	Category 1 offence
Incest offences	Sections 44(1), (2)	Incest with a child, stepchild or lineal descendant	Category 1 offence
	Sections 50C, 50D	Incest with a child, stepchild or lineal descendant	Standard sentence offence/ Category 1 offence
Child sex offences	Sections 47A	Persistent sexual abuse of a child aged under 16	Category 1 offence
	Section 49J	Persistent sexual abuse of a child aged under 16	Standard sentence offence/ Category 1 offence
	Sections 45(1), 49A	Sexual penetration with a child aged under 12	Standard sentence offence/ Category 1 offence
	Section 49B	Sexual penetration with a child aged under 16	Standard sentence offence
	Section 49D	Sexual assault of a child aged under 16	Standard sentence offence

292. *Crouch (A Pseudonym) v The Queen* [2019] VSCA 30 (22 February 2019).

Appendix 3: Charge-level and case-level prison sentences for contact sex offences

Tables A2 and A3 outline the distribution of prison sentences (in 12-month increments in the higher courts and 6-month increments in the Magistrates' Court) imposed for the most common contact sex offences sentenced in Victoria between 2010 and 2019. Table A2 presents Magistrates' Court sentence lengths and Table A3 presents higher courts' sentence lengths. The charge-level data includes all non-aggregate sentences of adult imprisonment imposed for individual charges. The case-level data includes all total effective sentences imposed in cases in which the relevant offence was the principal proven offence in the case.

Table A2: Distribution of charge-level and case-level prison sentence lengths for certain sex offences, Magistrates' Court, 2010 to 2019

Sentence length	Charge-level prison sentence length		Total effective sentence length	
	Sexual assault ^a	Sexual assault of a child ^b	Sexual assault ^c	Sexual assault of a child ^d
Less than 6 months	106	72	146	73
6 months to less than 1 year	34	38	66	54
1 year to less than 1.5 years	19	19	38	26
1.5 years to less than 2 years	6	13	15	12
2 years to less than 2.5 years	3	2	9	3
2.5 years or more	–	–	4	4
Total	168	144	278	192

- The data is based on sentenced charges of, and cases involving as a principal proven offence a charge of, either indecent assault or sexual assault contrary to sections 39(1) and 40(1) of the *Crimes Act 1958* (Vic).
- The data is based on sentenced charges of, and cases involving as a principal proven offence a charge of, indecent act with a child aged under 16 or sexual assault of a child aged under 16 contrary to sections 47(1) and 49D of the *Crimes Act 1958* (Vic).
- The data is based on sentenced charges of, and cases involving as a principal proven offence a charge of, either indecent assault or sexual assault contrary to sections 39(1) and 40(1) of the *Crimes Act 1958* (Vic).
- The data is based on sentenced charges of, and cases involving as a principal proven offence a charge of, indecent act with a child aged under 16 or sexual assault of a child aged under 16 contrary to sections 47(1) and 49D of the *Crimes Act 1958* (Vic).

Table A3: Distribution of charge-level and case-level prison sentence lengths for certain sex offences, higher courts, 2010 to 2019

Sentence length	Charge-level prison sentence length						
	Rape ^a	Sexual assault ^b	Incest ^c	Sexual penetration under 12 ^d	Sexual penetration 12 to 15 ^e	Sexual assault of a child ^f	Persist sexual abuse ^g
Less than 1 year	9	342	3	4	78	779	–
1 year to less than 2 years	12	299	6	9	142	973	6
2 year to less than 3 years	45	123	53	31	238	344	4
3 year to less than 4 years	115	31	170	56	321	104	4
4 year to less than 5 years	182	4	235	55	121	17	8
5 year to less than 6 years	163	2	217	43	48	3	25
6 year to less than 7 years	127	–	129	18	12	5	24
7 year to less than 8 years	96	–	61	11	–	1	18
8 year to less than 9 years	72	–	26	2	–	–	14
9 year to less than 10 years	12	–	6	1	–	–	14
10 year to less than 11 years	23	–	18	1	–	–	8
11 years or more	19	–	4	–	–	–	5
Total	875	800	928	231	960	2,226	130

Table A3: cont.

Sentence length	Total effective sentence length						
	Rape ^a	Sexual assault ^b	Incest ^c	Sexual penetration under 12 ^d	Sexual penetration 12 to 15 ^e	Sexual assault of a child ^f	Persist sexual abuse ^g
Less than 1 year	5	27	–	2	39	32	–
1 year to less than 2 years	8	34	1	2	40	56	4
2 year to less than 3 years	14	16	3	9	81	40	3
3 year to less than 4 years	48	7	44	24	107	16	4
4 year to less than 5 years	85	3	58	24	45	6	7
5 year to less than 6 years	82	–	67	21	16	1	20
6 year to less than 7 years	61	–	43	12	7	2	19
7 year to less than 8 years	38	–	17	5	–	–	15
8 year to less than 9 years	31	–	12	2	–	–	13
9 year to less than 10 years	7	–	5	1	–	–	10
10 year to less than 11 years	7	–	1	1	–	–	7
11 years or more	10	–	3	–	–	–	5
Total	395	87	254	89	335	153	107

a. The data is based on sentenced charges of, and cases involving as a principal proven offence a charge of, rape contrary to section 38 of the *Crimes Act 1958* (Vic).

b. The data is based on sentenced charges of, and cases involving as a principal proven offence a charge of, either indecent assault or sexual assault contrary to sections 39(1) and 40(1) of the *Crimes Act 1958* (Vic).

c. The data is based on sentenced charges of, and cases involving as a principal proven offence a charge of, one of the following: incest with a child, stepchild or lineal descendant contrary to sections 44(1), 44(2), 50C and 50D of the *Crimes Act 1958* (Vic).

d. The data is based on sentenced charges of, and cases involving as a principal proven offence a charge of, sexual penetration with a child aged under 10/12 contrary to sections 45(1) and 49A of the *Crimes Act 1958* (Vic).

e. The data is based on sentenced charges of, and cases involving as a principal proven offence a charge of, sexual penetration with a child aged 10/12 to 15 contrary to sections 45(1) and 49B of the *Crimes Act 1958* (Vic).

f. The data is based on sentenced charges of, and cases involving as a principal proven offence a charge of, indecent act with a child aged under 16 or sexual assault of a child aged under 16 contrary to sections 47(1) and 49D of the *Crimes Act 1958* (Vic).

g. The data is based on sentenced charges of, and cases involving as a principal proven offence a charge of, maintaining a sexual relationship with a child aged under 16 or persistent sexual abuse of a child aged under 16 contrary to sections 47A and 49J of the *Crimes Act 1958* (Vic).

Appendix 4: How long were prison sentences for other contact sex offences?

Within each category of sex offence analysed in this report, multiple historical versions of offences were nevertheless sentenced during the reference period due to a delay, sometimes decades-long, in their prosecution. There were also a handful of offences with so few charges that they did not warrant distinct analysis in the body of the report. Table A4 provides an overview of the shortest, longest and average non-aggregate sentence of imprisonment for those various historical and rarely prosecuted offences.

Table A4: Duration of non-aggregate sentences of imprisonment imposed for all other contact sex offences sentenced in Victoria, 2010 to 2019

Offence	Maximum penalty	Total number of charges	Charges receiving a custodial sentence	Charges receiving a non-aggregate sentence of imprisonment	Shortest prison sentence (months)	Longest prison sentence (months)	Average prison sentence (months)
Rape offences							
Rape Section 44 1 April 1959 to 28 February 1981	10 or 20 years	13	12	12	24	144	82
Rape Sections 45(1) 1 March 1981 to 31 December 1991	10 years	26	26	26	30	72	52
Aggravated rape Sections 45(3) and 41 1 March 1981 to 31 December 1991	20 years	23	23	23	8	180	93
Rape by compelling sexual penetration Sections 38A and 39 1 December 2006 to 31 December 2019	25 years	11	11	11	24	72	38

Offence	Maximum penalty	Total number of charges	Charges receiving a custodial sentence	Charges receiving a non-aggregate sentence of imprisonment	Shortest prison sentence (months)	Longest prison sentence (months)	Average prison sentence (months)
Sexual assault offences							
Indecent assault Section 42 5 August 1991 to 31 December 1991	5 years	5	2	2	1	10	6
Aggravated indecent assault Section 43 5 August 1991 to 31 December 1991	10 years	1	1	1	30		
Assault with intent to rape Section 40(1) 15 August 1993 to 30 June 2015	10 years	25	23	19	3	60	28
Assault with intent to commit a sexual offence Section 42(1) 1 July 2015 to present	15 years	26	18	13	1	60	26
Sexual assault by compelling sexual touching Section 41(1) 1 July 2015 to present	10 years	15	5	3	8	36	19
Incest offences							
Carnal knowledge of mother or sister Section 52(3) 1 April 1959 to 28 February 1981	7 years	8	5	5	12	36	22
Incest with a sibling Sections 44(4), 52(4) and 50F 1 March 1981 to present	5, 7 or 7.5 years	97	40	39	4	36	21
Incest with a parent Sections 44(3), 50E 5 August 1991 to present	5 or 7.5 years	4	2	2	6	24	15
Incest with a child aged 10 years or over Section 52(1) 1 April 1959 to 4 August 1991	20 years	60	60	59	12	114	52

Offence	Maximum penalty	Total number of charges	Charges receiving a custodial sentence	Charges receiving a non-aggregate sentence of imprisonment	Shortest prison sentence (months)	Longest prison sentence (months)	Average prison sentence (months)
Child sexual penetration offences							
Carnal knowledge of a girl aged under 10 Section 46 1 April 1959 to 28 February 1981	20 years	38	37	36	12	120	54
Buggery with a person aged under 14 Section 68(1) 1 April 1959 to 4 August 1991	20 years	44	39	38	12	96	62
Sexual penetration with a child aged under 10 Sections 45(1), 47(1) 1 March 1981 to 22 November 2000	20 or 25 years	123	105	95	9	108	43
Carnal knowledge of a girl aged 10 to 15 Section 48(1) 1 April 1959 to 28 February 1981	10 or 15 years	27	24	21	7	78	40
Sexual penetration with a child aged 10 to 15 Sections 46(1), 48(1) 1 March 1981 to 22 November 2000	10 or 15 years	127	94	91	9	108	37
Carnal knowledge of an unmarried female aged 16 or 17 (by a person aged 21 years or over) Section 50(1) 1 April 1959 to 28 February 1981	1 year	3	0		–		
Sexual penetration with a person aged 16 or 17 Section 49(1) 1 March 1981 to 4 August 1991	2 years	12	12	10	6	30	13

Offence	Maximum penalty	Total number of charges	Charges receiving a custodial sentence	Charges receiving a non-aggregate sentence of imprisonment	Shortest prison sentence (months)	Longest prison sentence (months)	Average prison sentence (months)
Sexual penetration with a person aged 16 or 17 under care, supervision or authority Section 49(3) 1 March 1981 to 22 November 2000	3 years	10	10	10	9	9	9
Sexual penetration with a child aged 16 or 17 under care, supervision or authority Section 48(1) 5 August 1991 to 30 June 2017	3 or 10 years	120	100	86	3	72	29
Sexual penetration with a child aged 16 or 17 under care, supervision or authority Section 49C(1)	10 years	4	3	3	30	36	32
Child sexual assault offences							
Indecent assault of a male aged under 16 Section 68(3) 1 April 1959 to 7 November 1967	10 years	107	85	82	1	42	16
Gross indecency with a girl aged under 16 Section 69(1)(a) 1 April 1959 to 28 February 1981	2 or 3 years	69	46	40	2	18	8
Assault with intent to sexually penetrate a child aged under 10 Section 47(2) 1 January 1981 to 4 August 1991	10 years	2	0		–		
Gross indecency with a person aged under 16 Section 50(1)(a)	2 or 3 years	102	77	66	2	18	8

Offence	Maximum penalty	Total number of charges	Charges receiving a custodial sentence	Charges receiving a non-aggregate sentence of imprisonment	Shortest prison sentence (months)	Longest prison sentence (months)	Average prison sentence (months)
Gross indecency with a person aged under 16 under care, supervision or authority Section 50(2)(a) 1 January 1981 to 4 August 1991	3 years	14	12	12	3	18	9
Indecent act with a child aged 16 under care, supervision or authority Section 49(1) 5 August 1991 to 30 November 2006	2, 3 or 5 years	18	14	13	1	12	7
Indecent act with a child aged 16 or 17 under care, supervision or authority Section 49(1) 1 December 2006 to 30 June 2017	5 years	151	102	77	1	30	10
Sexual assault of a child aged 16 or 17 under care, supervision or authority Section 49E 30 June 2017 to present	5 years	9	1	1		15	
Persistent sexual abuse of a child offences							
Maintaining a sexual relationship with a child aged under 16 under care, supervision or authority Section 47A 5 August 1991 to 31 December 1997	10, 15 or 25 years	2	2	1		72	

Offence	Maximum penalty	Total number of charges	Charges receiving a custodial sentence	Charges receiving a non-aggregate sentence of imprisonment	Shortest prison sentence (months)	Longest prison sentence (months)	Average prison sentence (months)
Sex offences against persons with cognitive impairments							
Sexual penetration with a person with mental illness or intellectual disability by employee of institution Section 51(1)(a) 1 March 1981 to 4 August 1991	5 years	1	0		–		
Sexual penetration with a person with impaired mental functioning by service provider or residential facility worker Sections 51(1), 52(1) 5 August 1991 to 30 November 2006	5 years	0			–		
Indecent act with a person with impaired mental functioning by service provider or residential facility worker Sections 51(2), 52(2) 5 August 1991 to 30 November 2006	3 years	1	0		–		
Sexual penetration with a person with cognitive impairment by service provider or residential facility worker Sections 51(1), 52(1) 1 December 2006 to 30 June 2017	10 years	23	21	21	24	60	39
Indecent act with a person with cognitive impairment by service provider or residential facility worker Sections 51(2), 52(2) 1 December 2006 to 30 June 2017	5 years	20	8	6	6	30	13

Offence	Maximum penalty	Total number of charges	Charges receiving a custodial sentence	Charges receiving a non-aggregate sentence of imprisonment	Shortest prison sentence (months)	Longest prison sentence (months)	Average prison sentence (months)
Sexual penetration with a person with cognitive impairment by treatment or support service provider Section 52B 1 July 2017 to present	10 years	2	2	2	36	42	39
Indecent act with a person with cognitive impairment by treatment or support service provider Section 52C 1 July 2017 to present	5 years	2	2		–		

Glossary

Aggregate sentence	A single sentence imposed for two or more charges in a case, without specifying the individual sentence for each separate charge.
Average prison sentence	The mean length of imprisonment calculated from a selection of cases or charges. Average prison sentences have been reported rather than median prison sentences to better highlight the effect of particularly long sentences.
Case-level prison sentence	The prison sentence imposed for all charges before the non-parole period is set. See total effective sentence.
Category 1 offence	A specified serious offence committed by a person aged 18 years or over that will almost always require the court to impose imprisonment or youth detention. For sex offences classified as Category 1 offences, the court must always sentence the offender to either imprisonment or youth detention, if relevant.
Charge-level prison sentence	The prison sentence imposed for a single count of an offence within a case.
Child sexual assault offences	A term used generally to describe the specific offences listed in Table 10 (page 61).
Child sexual penetration offences	A term used generally to describe the specific offences listed in Table 8 (page 45).
Combined order	In this report, imprisonment combined with a community correction order.
Community order	A non-custodial sentencing order that sits between an immediate custodial sentence and a fine on the sentencing hierarchy. It is served in the community under conditions that may include unpaid community work, alcohol and drug bans, participation in treatment and rehabilitation programs and/or restrictions on where the offender can go or live, or who they can associate with. In this report, community orders include community correction orders, community-based orders (no longer available) and intensive correction orders (no longer available).
Contact sex offence	An offence involving actual physical contact between the victim and offender (or a third person) for the purpose of achieving sexual gratification, including penetrative and non-penetrative acts.
Current sentencing practices	In this report, the types and lengths of sentences imposed in other cases, especially in cases with comparatively similar facts and circumstances.

Dalgliesh	In this report, primarily a reference to the High Court's decision in <i>DPP v Dalgliesh (A Pseudonym)</i> [2017] HCA 41, but also to the Court of Appeal's two decisions in the same proceedings before and after the High Court judgment: <i>DPP v Dalgliesh (A Pseudonym)</i> [2016] VSCA 148; <i>DPP v Dalgliesh (A Pseudonym)</i> [2017] VSCA 360.
Immediate custodial sentence	In this report, a sentence that requires an offender to serve at least some time in custody, including imprisonment, combined orders, partially suspended sentences, youth justice centre orders and youth training centre orders (the predecessor to youth justice centre orders). It does not include wholly suspended sentences, which can result in, but do not necessarily require, the offender spending time in custody.
Incest offences	A term used generally to describe the specific offences listed in Table 6 (page 35).
Non-aggregate sentence of imprisonment	A single prison sentence imposed for one charge in a case, thereby specifying the individual prison sentence for that charge.
Non-parole period	The period an offender must serve before becoming eligible for parole if they received a total effective sentence of one year or more. Non-parole periods are not imposed for sentences under one year. If parole is granted, the offender must serve the remainder of their sentence under supervision in the community. See total effective sentence.
Pearson's correlation coefficient	In this report, a mathematical formula to the measure of the strength of a linear relationship between average sentences and each year of sentence. The strength of that relationship informs whether the changes over time are random or part of a trend.
Persistent sexual abuse of a child offences	A term used generally to describe the specific offences listed in Table 12 (page 70).
Rape offences	A term used generally to describe the specific offences listed in Table 2 (page 17).
Recorded offence	The Crime Statistics Agency defines a recorded offence as 'any criminal act or omission by a person or organisation for which a penalty could be imposed by the Victorian legal system ... An offence is counted and included in the data where it: was reported to, or detected by, Victoria Police; and was first recorded within the reference period.'
Sexual assault offences	A term used generally to describe the specific offences listed in Table 4 (page 27).

- Standard sentence** A guidepost that courts consider when sentencing specified serious offences, including rape and murder. The standard sentence represents the middle of the range of seriousness when just considering the offending and no other factors (such as the offender's circumstances, prior offending history or plea). The standard sentence for most of these offences is set at 40% of the maximum penalty.
- Statistical significance** In this report, the evaluation of a trend in the data (for example, the average sentence each year) as not likely to have occurred randomly, but likely to have occurred due to specific causes. See Pearson's correlation coefficient.
- Suspended sentence** A now abolished prison sentence that the court held back, wholly or partially, for a period. If the offender reoffended during this period, they could be imprisoned for the total duration of the sentence. Suspended sentences are no longer available in the higher courts for offences committed on or after 1 September 2013, or in the Magistrates' Court for offences committed on or after 1 September 2014.
- Total effective sentence** The prison sentence imposed for all charges in a case before the non-parole period is set. In a case with a single charge, the total effective sentence is the sentence imposed for that charge. In a case with multiple charges, the total effective sentence is the total of the sentences imposed for all charges, taking into account whether the sentences are to be served cumulatively or concurrently.

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