

Major Drug Offences Current Sentencing Practices

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

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

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Major Drug Offences Current Sentencing Practices

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Glossary

Case	A collection of one or more proven charges against a person sentenced at the one hearing.
Charge	A single proven allegation of an offence.
Cohen's Kappa	Provides one statistical measure of the extent to which inter-rater concordance is not just attributable to chance. Kappa values generally range between 0.0 and 1.0 and can be interpreted as follows: <ul style="list-style-type: none"> • to 0.20 – slight agreement; • 0.21 to 0.40 – fair agreement; • 0.41 to 0.60 – moderate agreement; • 0.61 to 0.80 – substantial agreement; and • 0.81 or above – almost perfect agreement.
House-sitter	An offender convicted of cultivating a commercial quantity of narcotic plants who managed cultivation premises on behalf of more senior personnel.
Inter-rater reliability	Examines the extent to which two raters agree on coding elements of a case into a categorical variable. This measures the extent to which multiple observers agree when interpreting subjective information.
Median	The middle value in a set or a distribution of values. For example, in the following set of values: 1, 2, 2, 3, 3, 4, 5, 5, 6, 6, 7 4 is the median value. It represents a statistical midpoint, where half of the values (1, 2, 2, 3, 3) are below the median, and half of the values (5, 5, 6, 6, 7) are above the median. If a set has an even number of values, the two middle values (sometimes defined as the lower median and the upper median) are averaged to find the median.
Median total effective term of imprisonment	The middle value in a set of total effective sentences.
Principal/proprietor	The owner or operator of a drug trafficking operation or a narcotic plant cultivation operation.
Reference offences	The offences of cultivating a commercial quantity of narcotic plants (<i>Drugs, Poisons and Controlled Substances Act 1981</i> (Vic) s 72A), trafficking in a drug of dependence in a commercial quantity (<i>Drugs, Poisons and Controlled Substances Act 1981</i> (Vic) s 71AA), and trafficking in a drug of dependence in a large commercial quantity (<i>Drugs, Poisons and Controlled Substances Act 1981</i> (Vic) s 71).
Reference period	The five-year period examined in this report: 2008–09 to 2012–13.
Statistical significance	A statistical measure of the likelihood that the difference between two numbers has not occurred by chance. The most widely used threshold of statistical significance, and the threshold used in this report, is 0.05, which means there is a 5% likelihood that the observed difference occurred by chance alone.
Total effective sentence	In a case involving a single charge, the sentence imposed for that charge. In a case involving multiple charges, the total sentence resulting from all charges in the case, following orders for concurrency and/or cumulation.

1. Main findings

- I.1 This report examines current sentencing practices from 2008–09 to 2012–13 (the *reference period*) for three major drug offences (the *reference offences*):
- cultivating a commercial quantity of narcotic plants;
 - trafficking in a drug of dependence in a commercial quantity; and
 - trafficking in a drug of dependence in a large commercial quantity.
- I.2 Through the use of a research tool called cluster analysis (which identifies groups of cases with common characteristics), the Council has uncovered two major findings of the analysis:
- with respect to major drug offences, high-level statistical analysis of sentencing outcomes (for example, the identification of median terms of imprisonment for an offence) has obscured meaningful sub-groups of cases within an offence; and
 - the synthesis of offender and offence factors that defines each sub-group has resulted in different sentencing outcomes between sub-groups during the reference period.
- I.3 Within each sub-group, certain sentencing factors predominate. The characteristics of the sub-groups described in this report are statistically significant (that is, the characteristics are not a product of random chance events). The analysis takes into account differences in sample size between sub-groups, finding that there are statistically significant differences between sub-groups even when relatively small samples have been analysed.

Cultivating a commercial quantity of narcotic plants

- I.4 During the reference period, the offence of cultivating a commercial quantity of narcotic plants (403 cases) had the following features:
- cannabis was the only type of narcotic plant cultivated in a commercial quantity;
 - 68% of charges involved a quantity from 25 kg to 80 kg or 100 to 320 plants, while 27% of charges involved quantities in excess of 80 kg or 320 plants;
 - the most common period of offending was 1 month to less than 3 months (25% of charges), followed by a period of offending of 3 months to less than 6 months (24% of charges);
 - 51% of offenders had a house-sitter role or an ancillary role, while 39% of offenders had a principal/proprietor role;
 - guilty pleas were entered for 93% of charges;
 - 31% of offenders had a history of prior offending;
 - 37% of offenders had a history of substance abuse; and
 - 20% of offenders had gambling problems.

- 1.5 At the case level (as opposed to the individual charge level), a total effective sentence of imprisonment was imposed in 60% of cases (n = 241) during the reference period. A partially suspended sentence was imposed in 22% of cases (n = 90), and a wholly suspended sentence was imposed in 17% of cases (n = 69). The median total effective term of imprisonment was 2 years and 6 months.
- 1.6 Within this offence during the reference period, the cluster analysis identified two sub-groups of cases (Cluster 1 and Cluster 2 – see [4.34]–[4.36] for a full description of each cluster).
- 1.7 Cluster 1 (201 cases) comprised cases in which the offender had a house-sitter role or an ancillary role. Offenders in Cluster 1 tended to display more positive sentencing factors than offenders in Cluster 2. For cases in Cluster 1, the median total effective term of imprisonment was 2 years.
- 1.8 Cluster 2 (202 cases) predominantly comprised cases in which the offender had a principal/ proprietor role. Offenders in Cluster 2 tended to display more negative sentencing factors than offenders in Cluster 1. For cases in Cluster 2, the median total effective term of imprisonment was 3 years.

Trafficking in a commercial quantity

- 1.9 During the reference period, the offence of trafficking in a commercial quantity (138 cases) had the following features:
- methylamphetamine (ice) was the most common type of drug trafficked (42% of charges);
 - with respect to drugs other than cannabis, 36% of charges involved trafficking in 1 to less than 1.8 times the threshold quantity, and 40% of charges involved trafficking in 1.8 times the threshold quantity or higher;
 - the most common period of offending was 3 months to less than 6 months (23% of charges);
 - guilty pleas were entered for 94% of charges;
 - 61% of offenders had a history of prior offending; and
 - 74% of offenders had a history of substance abuse.
- 1.10 At the case level (as opposed to the individual charge level), a total effective sentence of imprisonment was imposed in 86% of cases (n = 119) during the reference period. A partially suspended sentence was imposed in 7% of cases (n = 9), and a wholly suspended sentence was imposed in 7% of cases (n = 10). The median total effective term of imprisonment was 4 years and 6 months.
- 1.11 Within this offence during the reference period, the cluster analysis identified three sub-groups of cases (Cluster 1, Cluster 2, and Cluster 3 – see [5.29]–[5.31] for a full description of each cluster).
- 1.12 Relative to Clusters 2 and 3, Cluster 1 (68 cases) comprised fewer cases where the offender had a history of prior offending or imprisonment and more cases where the offender received a positive assessment in relation to remorse and prospects of rehabilitation. For cases in Cluster 1, the median total effective term of imprisonment was 3 years and 9 months.

I.13 Relative to Cluster 1, Cluster 2 (44 cases) and Cluster 3 (26 cases) comprised a high percentage of cases where the offender had a history of prior offending or imprisonment and fewer cases where the offender received a positive assessment in relation to remorse. In addition to this, in comparison with Cluster 2, Cluster 3 was more likely to include cases where the offender had prospects of rehabilitation described in contingent or negative terms and less likely to include cases where offenders assisted law enforcement authorities. For cases in Clusters 2 and 3, the median total effective term of imprisonment was 5 years.

Trafficking in a large commercial quantity

I.14 During the reference period, the offence of trafficking in a large commercial quantity (72 cases) had the following features:

- MDMA (ecstasy) was the most common type of drug trafficked (42% of charges);
- 41% of charges involved trafficking in 2 to less than 10 times the threshold quantity, 23% of charges involved trafficking in 1 to less than 2 times the threshold quantity, and 19% of charges involved trafficking in 10 times the threshold quantity or higher;
- the most common period of offending was 6 months to less than 12 months (24% of charges);
- 42% of offenders had a 'significant role' such as being a close associate of the principal/ proprietor or organising key steps in the supply chain, 24% of offenders were principals/ proprietors of a trafficking operation, and 11% of offenders had a minor role;
- guilty pleas were entered for 94% of charges;
- 56% of offenders had a history of prior offending;
- 15% of offenders committed the offence while subject to an existing court order;
- 75% of offenders had a history of substance abuse;
- 24% of offenders had gambling problems; and
- 21% of offenders were sentenced as serious drug offenders.

I.15 At the case level (as opposed to the individual charge level), a total effective sentence of imprisonment was imposed in 97% of cases (n = 70) during the reference period. Suspended sentences were imposed in 3% of cases (n = 2). The median total effective term of imprisonment was 7 years and 10 months.

I.16 Within this offence during the reference period, the cluster analysis identified two sub-groups of cases (Cluster 1 and Cluster 2 – see [6.29]–[6.30] for a full description of each cluster).

I.17 Relative to Cluster 2, Cluster 1 (43 cases) comprised fewer cases involving methylamphetamine/ice, fewer cases of trafficking in a quantity of 10 or more times the large commercial threshold, and more cases where the offender displayed positive sentencing factors (such as remorse, positive prospects of rehabilitation, and assistance to law enforcement authorities). For cases in Cluster 1, the median total effective term of imprisonment was 6 years and 6 months.

I.18 Relative to Cluster 1, Cluster 2 (29 cases) comprised more cases involving methylamphetamine/ice, more cases of trafficking in a quantity of 10 or more times the large commercial threshold, and fewer cases where the offender displayed positive sentencing factors (such as remorse and positive prospects of rehabilitation). For cases in Cluster 2, the median total effective term of imprisonment was 10 years.

2. Focus of report and overview of offences

- 2.1 This report examines current sentencing practices for the three reference offences:
- cultivating a commercial quantity of narcotic plants;¹
 - trafficking in a drug of dependence in a commercial quantity;² and
 - trafficking in a drug of dependence in a large commercial quantity.³
- 2.2 The report covers the five-year reference period from 2008–09 to 2012–13. In total, over 600 cases have been analysed in order to present the following information for each of the reference offences:
- a profile of sentencing factors (for example, plea entered, prospects of rehabilitation);
 - high-level sentencing outcomes for the offence as a whole; and
 - profiles of particular sub-groups of cases and their sentencing outcomes.
- 2.3 This report is the Council's third on current sentencing practices. The Council is also examining current sentencing practices for major driving offences in an upcoming report. Previous current sentencing practices reports have examined aggravated burglary and causing serious injury offences.⁴

Current sentencing practices

The use of statistics in sentencing

- 2.4 A court must have regard to current sentencing practices in sentencing an offender.⁵ One of the Council's statutory functions is to provide the courts with statistical information about current sentencing practices.⁶ The main sources of statistical information about current sentencing practices for Victorian courts are the Council's Sentencing Snapshots series and SACStat online statistics database, which provide data on sentence types and distribution of sentence lengths.⁷
- 2.5 Sentencing statistics can assist a court in determining current sentencing practices, but statistics by themselves do not establish a sentencing practice.⁸ Rather, statistics such as median sentence lengths are a 'valuable yardstick in indicating whether a sentence is manifestly inadequate or excessive, and in ensuring consistency in sentencing'.⁹

1. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 72A.

2. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71AA.

3. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71.

4. Sentencing Advisory Council, *Aggravated Burglary: Current Sentencing Practices* (2011); Sentencing Advisory Council, *Causing Serious Injury – Recklessly and Intentionally: Current Sentencing Practices* (2011).

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

6. *Sentencing Act 1991* (Vic) s 108C(1)(b).

7. Sentencing Advisory Council, *Sentencing Snapshots* (Sentencing Advisory Council, 2015) <<http://www.sentencingcouncil.vic.gov.au/statistics/sentencing-snapshots>>. The SACStat databases cover the Magistrates' Court and the higher courts (County Court and Supreme Court): Sentencing Advisory Council, *SACStat* (Sentencing Advisory Council, 2014) <<http://www.sentencingcouncil.vic.gov.au/sacstat/home.html>>.

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

9. *Director of Public Prosecutions v Hill* (2012) 223 A Crim R 285, 298.

- 2.6 The Victorian Court of Appeal has noted the limitations of sentencing statistics and cautioned against their misuse. In *Russell v The Queen*, Kaye AJA stated that sentencing statistics are:

at best, only a very crude guide as to the appropriate sentence in a case. The only information, on which such statistics are based, are, firstly, the relevant offence, and, secondly, the sentence. The statistics do not reveal anything about the underlying factors influencing the sentences in the cases comprised in the statistics, including the gravity of the offending, and the nature of the mitigating circumstances. In that way, the median statistic is, at best, a particularly rough cross check for a sentencing judge, in the event that a sentence determined by that judge might be significantly more, or less, than the median figure. To give statistics any greater weight than that would, necessarily, compromise the proper exercise of the instinctive synthesis, which lies at the heart of just and fair sentencing.¹⁰

- 2.7 Similar comments were made in some of the sentencing remarks analysed for this report.

Sentencing in comparable cases

- 2.8 Given the limitations of sentencing statistics, it is increasingly common for judges to compile tables of comparable cases in order to take account of current sentencing practices, including for major drug offences.¹¹ As Neave JA stated in *Director of Public Prosecutions (Cth) & Director of Public Prosecutions (Vic) v Edge*, these comparative tables:

usually contain more information than simply the nature of the offence and the particular sentence imposed. Frequently, they indicate a range of matters relevant to the exercise of the sentencing discretion, including the age of the offender; whether or not the offender pleaded guilty, whether or not he or she had prior convictions, and whether or not there were other mitigating or aggravating features.¹²

- 2.9 Following the High Court of Australia's decision in *Barbaro v The Queen* ('*Barbaro*'), practitioners and the courts will continue to require comparative sentencing information. In *Barbaro*, the majority held that a judge should not take into account a prosecutor's submission about the bounds of an available range of sentences, nor should the prosecution provide such a submission.¹³ This practice, however, is to be distinguished from 'the proper and ordinary use of sentencing statistics and other material indicating what sentences have been imposed in other (more or less) comparable cases'.¹⁴ The majority stated that these comparable cases provide a yardstick against which to measure a proposed sentence, rather than marking 'the outer bounds of the permissible [sentencing] discretion'.¹⁵

- 2.10 The Court of Appeal considered *Barbaro* in the 2014 case of *Matthews v The Queen*.¹⁶ The majority held that, following *Barbaro*, the Crown still has 'a duty to assist the sentencing judge to avoid appealable error', which, among a number of other considerations:

also extends to making appropriate submissions on relevant questions of law, including statutorily prescribed maximum penalties, principles of sentencing reasonably thought to be applicable and *comparable and other relevant cases*.¹⁷

10. *Russell v The Queen* (2011) 212 A Crim R 57, 70.

11. For example, the Commonwealth importation cases of *Nguyen v The Queen*; *Phommalsack v The Queen* (2011) 31 VR 673 and *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1.

12. *Director of Public Prosecutions (Cth) & Director of Public Prosecutions (Vic) v Edge* [2012] VSCA 289 (5 December 2012) [5].

13. *Barbaro v The Queen* (2014) 88 ALJR 372, 375, 379, 380. The majority thereby overturned the practice established by the Victorian Court of Appeal in *R v MacNeil-Brown* (2008) 20 VR 677.

14. *Barbaro v The Queen* (2014) 88 ALJR 372, 379.

15. *Barbaro v The Queen* (2014) 88 ALJR 372, 379.

16. *Matthews v The Queen*; *Yu v The Queen*; *Hashmi v The Queen* [2014] VSCA 291 (19 November 2014).

17. *Matthews v The Queen*; *Yu v The Queen*; *Hashmi v The Queen* [2014] VSCA 291 (19 November 2014) [27] (emphasis added).

2.11 Further, the majority held that defence counsel were not prevented from submitting a quantified sentencing range, and that the Crown should be in a position to respond to that range and:

be able to tell the judge whether in the Crown's submission it would be open to impose a sentence within that range; or, if not, to draw to the judge's attention the *comparable and other cases, current sentencing practices* and other relevant considerations which in the Crown's submission support that conclusion.¹⁸

2.12 Guided by these judicial observations, the Council has sought to address some of the limitations of sentencing statistics by:

- consulting with courts and practitioners about the statistical information that would assist them in preparing sentencing submissions and determining sentences;¹⁹
- undertaking new analysis of sentencing factors such as drug quantity (particularly the extent to which the drug quantity exceeds the threshold quantity), the role of the offender in the trafficking or cultivation activity, and the offender's remorse and prospects of rehabilitation; and
- using a method known as *cluster analysis* to identify particular groups of cases within an offence (based on the features of the offender and the offending) and to examine whether sentencing outcomes differ among these groups.²⁰

Overview of offences

2.13 The reference offences are three of the most serious offences under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). In terms of its maximum penalty, trafficking in a drug of dependence in a large commercial quantity is one of the most serious offences in Victoria. The maximum penalty for each of the reference offences is as follows:

- cultivating a commercial quantity of narcotic plants – Level 2 imprisonment (25 years);
- trafficking in a drug of dependence in a commercial quantity – Level 2 imprisonment (25 years); and
- trafficking in a drug of dependence in a large commercial quantity – Level 1 imprisonment (life) and a fine of not more than 5,000 penalty units.

Cultivating a commercial quantity of narcotic plants

2.14 Cultivating a commercial quantity of narcotic plants is one of three cultivation offences under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic).²¹ The other two offences, which are not examined in this report, are cultivating narcotic plants (the least serious cultivation offence)²² and cultivating a large commercial quantity of narcotic plants (the most serious cultivation offence).²³ The latter offence has a maximum penalty of life imprisonment²⁴ and is rarely prosecuted (there were only three cases of the offence during the reference period).

18. *Matthews v The Queen; Vu v The Queen; Hashmi v The Queen* [2014] VSCA 291 (19 November 2014) [25] (emphasis added).

19. The Council consulted with representatives of the Court of Appeal, the County Court, the Office of Public Prosecutions, and Victoria Legal Aid.

20. The cluster analysis method is discussed at [3.4]–[3.6].

21. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 72A.

22. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 72B.

23. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 72.

24. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 72.

- 2.15 *Narcotic plants* are listed in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic).²⁵ The specified plants include cannabis, coca, and opium poppy plants. In the analysed cases, cannabis was the only plant cultivated. *Cultivate* is defined broadly to include:
- sowing a seed of a narcotic plant;
 - planting, growing, tending, nurturing, or harvesting a narcotic plant; or
 - grafting, dividing, or transplanting a narcotic plant.²⁶
- 2.16 A commercial quantity of cannabis plants is 25 kg or 100 plants.²⁷ In order to be convicted of cultivating a commercial quantity of narcotic plants (where the plant in question is cannabis), a person must have intended to cultivate at least 25 kg of cannabis plants or 100 cannabis plants.²⁸
- 2.17 The cultivation offences encompass attempts to cultivate and completed acts of cultivation. A person who is charged with attempting to cultivate a commercial quantity of narcotic plants is liable to the same maximum penalty as a person charged with the completed form of the offence. The law in relation to attempted cultivation offences is different from the usual practice under Victorian law, which provides lower maximum penalties for attempted indictable offences than for completed indictable offences.²⁹ During the reference period, there was only one case of an attempt to cultivate a commercial quantity of narcotic plants.

Trafficking in a commercial quantity and trafficking in a large commercial quantity

- 2.18 There are four trafficking offences under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic):
- trafficking in a drug of dependence, which is otherwise known as trafficking simpliciter and is the least serious form of trafficking (not examined in this report);³⁰
 - trafficking in a drug of dependence to a child (not examined in this report);³¹
 - trafficking in a drug of dependence in a commercial quantity;³² and
 - trafficking in a drug of dependence in a large commercial quantity.³³
- 2.19 *Drugs of dependence* are listed in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic).³⁴ The list includes drugs such as cannabis, heroin, cocaine, amphetamine-type drugs (including MDMA/ecstasy and methylamphetamine/ice), precursor substances (which are used to make final drug products), and steroids.

25. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 70(1) (definition of 'narcotic plant'), sch 11 pt 2.

26. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 70(1) (definition of 'cultivate').

27. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 70(1) (definition of 'commercial quantity'), sch 11 pt 2.

28. See *R v Bui* [2005] VSCA 300 (5 May 2005) [62]–[65].

29. *Crimes Act 1958* (Vic) s 321P.

30. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71AC. The maximum penalty for this offence is Level 4 imprisonment (15 years).

31. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71AB. The maximum penalty for this offence is Level 3 imprisonment (20 years).

32. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71AA.

33. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71.

34. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 4(1) (definition of 'drug of dependence'), sch 11.

Meaning of ‘traffick’

2.20 *Traffick* is defined broadly to include:

- preparing a drug of dependence for trafficking;
- manufacturing a drug of dependence; or
- selling, exchanging, agreeing to sell, offering for sale, or having in possession for sale a drug of dependence.³⁵

2.21 A drug does not need to reach the market in order to constitute trafficking. The broad definition of *traffick* reflects the legislative policy that the potential harm of a manufactured drug is equally serious as the actual harm of a distributed drug.³⁶

Quantity thresholds and intent of offender

2.22 Victoria has a quantity-based trafficking regime, which means that the trafficking offences are distinguished by both the amount of drugs trafficked and the amount in which the offender intended to traffick.

2.23 The thresholds for a *commercial quantity* or a *large commercial quantity* depend on the type of drug trafficked and whether the drug is in pure form or mixed with other substances. Table 1 sets out the relevant thresholds.³⁷

2.24 In order to be convicted of trafficking in a commercial quantity or trafficking in a large commercial quantity, a person must have intended to traffick in at least the threshold quantity of the particular drug.³⁸ For example, a person charged with trafficking in a large commercial quantity of MDMA must have intended to traffick in at least 1.0 kg of MDMA in mixed form or 750 g in pure form in order to be convicted of the offence.

Table 1: Drug quantity thresholds for the reference offences under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic)

Drug type	Commercial quantity (pure amount)	Commercial quantity (mixed amount)	Large commercial quantity (pure amount)	Large commercial quantity (mixed amount)
Cannabis	25.0 kg or 100 plants	–	250 kg or 1,000 plants	–
Cocaine	250 g	500 g	750 g	1.0 kg
Heroin	250 g	500 g	750 g	1.0 kg
Amphetamine	100 g	500 g	750 g	1.0 kg
Methylamphetamine (ice)	100 g	500 g	750 g	1.0 kg
MDMA (ecstasy)	100 g	500 g	750 g	1.0 kg

35. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 70(1) (definition of ‘traffick’). The definitions of ‘manufacture’ and ‘sell’ in section 4 of the Act do not apply to trafficking offences: *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 70(2).

36. *Chandler v The Queen; Paksoy v The Queen* [2010] VSCA 338 (9 December 2010) [25].

37. See *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 70(1) (definition of ‘commercial quantity’, ‘large commercial quantity’), sch 11 pts 2–3.

38. See *Mustica v The Queen* (2011) 31 VR 367, 376–377, applying *Director of Public Prosecutions Reference No 1 of 2004; R v Nguyen* (2005) 12 VR 299.

Attempted versus completed offences

- 2.25 Like the cultivation offences, the trafficking offences under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) encompass attempts to traffick and completed acts of trafficking. This means, for example, that if a person is charged with attempted trafficking in a commercial quantity of drugs under section 71AA of the Act, that person is liable to the same maximum penalty as a person charged with the completed form of the offence.³⁹
- 2.26 Trafficking offences are most likely treated in this manner because the definition of *traffick* is so broad that ‘the distinction between a completed offence and an attempt may be difficult to discern on occasions’.⁴⁰ Further, trafficking offences are intended to deal with the potential harm caused by drug trafficking, and therefore the culpability of a person who attempts to traffick may be as great as the culpability of a person who completes a trafficking offence.⁴¹
- 2.27 During the reference period, there were only four charges of attempt to traffick in a commercial quantity, and there was only one charge of attempt to traffick in a large commercial quantity. The limited number of attempt charges may reflect the broad definition of *traffick*.

Jurisdiction

- 2.28 The reference offences may be heard in either the County Court or the Supreme Court.⁴² The majority of cases analysed were heard in the County Court. The reference offences are not able to be heard and determined summarily in the Magistrates’ Court.⁴³
- 2.29 This report does not examine sentencing practices for any Commonwealth drug offences. Of all cases analysed, in only four cases the total effective sentence comprised charges for a combination of Victorian drug offences under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) and Commonwealth drug offences under the *Criminal Code Act 1995* (Cth).

Baseline sentencing

- 2.30 The baseline sentencing scheme applies to offences of trafficking in a large commercial quantity committed on or after 2 November 2014.⁴⁴ None of the cases analysed in this report was affected by baseline sentencing, because all cases were sentenced prior to July 2013. Baseline sentencing is the subject of another Council report⁴⁵ and is not examined here.

39. *R v Mihalo* (2002) 136 A Crim R 588, 595–596.

40. *R v Mihalo* (2002) 136 A Crim R 588, 596.

41. *Mokbel v The Queen* (2011) 211 A Crim R 37, 47.

42. *Criminal Procedure Act 2009* (Vic) s 160; *County Court Act 1958* (Vic) s 36A. In deciding whether to prosecute a matter in the County or Supreme Court, the Director of Public Prosecutions must consider the complexity of the case, the seriousness of the alleged offence, any particular importance attaching to the case, and any other relevant consideration (*Criminal Procedure Act 2009* (Vic) s 160(2)).

43. *Criminal Procedure Act 2009* (Vic) s 28(1), sch 2 item 6.1.

44. *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic). For the offence of trafficking in a large commercial quantity, this Act prescribes a baseline sentence of 14 years. Where the nature and characteristics of a charge of trafficking in a large commercial quantity before the court are equal to the nature and characteristics of the charge that, prior to the introduction of baseline sentencing, received the median sentence (being the median that is calculated using the rules prescribed under the Act), the court is expected to impose the baseline sentence of 14 years. See Sentencing Advisory Council, *Calculating the Baseline Offence Median: Report* (2014).

45. Sentencing Advisory Council (2014), above n 44.

3. Sampling, method of analysis, and coding of sentencing factors

Number of cases and charges

3.1 Table 2 sets out the number of cases and charges for the reference offences and the percentage of cases with available sentencing remarks.

Table 2: Number of cases and charges and available sentencing remarks for the reference offences

Offence	Total number of cases (2008–09 to 2012–13)^a	Total number of charges (2008–09 to 2012–13)	Percentage of cases with available sentencing remarks
Cultivating a commercial quantity of narcotic plants	403	428	99.5%
Trafficking in a drug of dependence in a commercial quantity	138	152	97.2%
Trafficking in a drug of dependence in a large commercial quantity	72	79	93.7%

a The total counts of cases comprise cases for which sentencing remarks were successfully located. Sentencing remarks were not found for a total of 35 cases involving the reference offences in the Higher Courts Conviction Returns database. Offence descriptions for cases in the Higher Courts Conviction Returns database do not always match the offences described in the sentencing remarks. For cases where sentencing remarks were not available to verify the offence, it was assumed that the offence description in the Higher Courts Conviction Returns database was correct, and these cases were used to calculate the percentage of cases with available sentencing remarks for each offence.

Alteration of sentences on appeal

3.2 The dataset in this report takes account of any sentences altered on appeal. Excluded from the dataset was:

- one case of cultivating a commercial quantity of narcotic plants resented on appeal as a conviction for cultivating narcotic plants (that is, cultivation simpliciter);
- one case of trafficking in a commercial quantity remitted for retrial; and
- one case of trafficking in a large commercial quantity remitted for retrial.

The dataset also takes account of one case that was resented on appeal as a conviction for trafficking in a commercial quantity, rather than the original conviction for trafficking in a large commercial quantity.

3.3 Where an offender was resented on appeal, the coding of the sentencing factors in the case generally remained the same. In five cases, the coding was altered to a limited extent due to fresh evidence being taken into account on resentencing.

Method of analysis

- 3.4 The cluster analysis method has been used to examine whether there are meaningful sub-groups of cases within each reference offence. Cluster analysis is a way of 'organizing observed data (e.g., people, things, events, brands, companies) into meaningful taxonomies, groups, or clusters based on combinations of [variables]'.⁴⁶ A cluster analysis identifies groups of variables without any preconceived notion of how certain variables may be interrelated. The cluster analysis technique:
- provides no explanation as to why the clusters exist nor is any interpretation made. Each cluster thus describes, in terms of the data collected, the class to which its members belong. Items in each cluster are similar in some ways to each other and dissimilar to those in other clusters.⁴⁷
- 3.5 Applied to sentencing, cluster analysis is a methodologically rigorous way of examining all available sentencing factors in parallel and determining whether particular combinations of sentencing factors are interrelated (for example, the analysis may discover a group of cases in which offenders were more likely than in other cases to have pleaded guilty, shown remorse, and demonstrated good prospects of rehabilitation). Once the total sample of cases is separated into groups based on these combinations of sentencing factors, other statistical tools can be used to analyse sentencing outcomes and determine whether sentencing differs between groups.
- 3.6 A cluster analysis therefore respects the *instinctive synthesis* performed by sentencing judges – it recognises that sentencing results from the weighing up of many factors, and it does not test the effect of any individual factor on sentencing.

Sentencing factors

- 3.7 The analysis examines 28 sentencing factors (or variables) relating to the circumstances of the offence and the offender. The selection of factors for analysis has been informed by stakeholder consultation, judicial commentary, and an examination of prior research in the area.⁴⁸ The factors analysed in relation to the offence are:
- drug type;
 - drug quantity (according to the quantity ranges set out in Table 3); and
 - the duration of offending.

46. Robert Burns and Richard Burns, 'Additional Advanced Chapter: Cluster Analysis', *Business Research Methods and Statistics Using SPSS* (2008) 553.

47. *Ibid.*

48. Ivan Potas and Patrizia Poletti, *Sentencing Drug Offenders: An Analysis of Sentences Imposed in the Higher Courts of New South Wales: 1 January 1992 to 31 December 1997* (1999); Pierrette Mizzi, Zeinab Baghizadeh, and Patrizia Poletti, *Sentencing Commonwealth Drug Offenders*, Research Monograph 38 (2014); Rosalyn Harper and Rachel Murphy, 'An Analysis of Drug Trafficking' (2000) 40(4) *The British Journal of Criminology* 746; Rosalyn Harper and Rachel Murphy, *Drug Smuggling: An Analysis of the Traffickers 1991–1997* (1999).

3.8 The factors analysed in relation to the offender are as follows:

- gender;
- age;
- whether the offender committed the offence while serving an existing court order;
- history of prior imprisonment;
- history of prior offending, including whether the offender had been previously sentenced for (a) violent offences, (b) dishonesty or property offences, (c) drug offences, (d) driving offences, (e) firearm offences, or (f) sex offences;
- history of (a) mental illness, (b) cognitive impairment, (c) substance abuse, (d) childhood sexual abuse, (e) childhood abuse, neglect, or severe disruption, (f) adult trauma or health problems, or (g) gambling problems;
- the role of the offender in the trafficking offence – whether the offender had (a) a principal/proprietor role, (b) a significant role, or (c) a minor role;
- the role of the offender in the cultivation offence – whether the offender had (a) a principal/proprietor role, (b) a house-sitter role, or (c) an ancillary role;
- whether the offender assisted law enforcement authorities;
- whether a forfeiture or confiscation order was taken into account in sentencing;
- whether the offender's prospects of rehabilitation were (a) positive, (b) contingent (for example, dependent on the successful completion of substance abuse treatment), or (c) negative;
- whether the judge's assessment of remorse was (a) positive or (b) negative;
- whether the offender was sentenced as a serious drug offender; and
- whether the offender pleaded guilty or not guilty.

3.9 Most factors had binary values of *yes* or *no*. Some factors had multiple values; for example, prospects of rehabilitation had values of positive, negative, contingent, or not stated. Where one of the factors was referred to by the judge in the sentencing remarks, it was coded accordingly, regardless of the weight or degree of relevance attached to the particular factor by the judge.

3.10 The coding of subjective sentencing factors (the role of the offender, the offender's prospects of rehabilitation, and the judge's assessment of remorse) was tested for reliability by conducting an inter-rater reliability review.⁴⁹ The outcomes of the inter-rater reliability analysis are included in the discussion of each offence (Chapters 4–6).

3.11 Some of the factors analysed are common to all cases of sentencing in Victoria, such as plea type and prospects of rehabilitation. Other factors that are unique to drug offences or have a particular meaning in relation to drug offences are explained below. These factors are (a) drug type, (b) drug quantity, (c) duration of offending, (d) the role of the offender, (e) prior offending, and (f) forfeiture and confiscation orders.

49. For the offence of trafficking in a commercial quantity and the offence of cultivating a commercial quantity of narcotic plants, 10% of the cases were sampled for the inter-rater reliability review. Each sample was selected at random. A larger sample of 25% was drawn for cases of trafficking in a large commercial quantity to ensure that an adequate number of cases were reviewed, due to the low number of cases for this offence.

Drug type

3.12 Victorian drug trafficking offences do not distinguish between different types of drugs. The relative harmfulness of a particular drug is irrelevant in sentencing, and trafficking in one type of drug is not viewed more seriously than trafficking in another type of drug.⁵⁰ In response to community interest,⁵¹ drug type was analysed in order to determine which types of drugs were most commonly trafficked in a commercial or large commercial quantity during the reference period. The selection of drug types for coding was informed by research on the most common types of drugs trafficked in Australia, and in Victoria in particular.⁵²

Drug quantity

3.13 Drug quantity is a factor of the 'utmost significance' in sentencing for trafficking and cultivation offences.⁵³ While quantity is not necessarily determinative of seriousness, the court considers the extent to which the particular quantity in the case exceeds the relevant statutory threshold in assessing the seriousness of the offence.⁵⁴ Drug quantity ranges were adopted for the analysis, as set out in Table 3.

Table 3: Drug quantity ranges adopted for the analysis of sentencing remarks based on the statutory thresholds in Table 1

Offence	Range 1	Range 2	Range 3
Cultivating a commercial quantity of narcotic plants (cannabis plants)	25 kg to 80 kg or 100 to 320 plants	More than 80 kg or more than 320 plants	–
Trafficking in a drug of dependence in a commercial quantity (all drug types except cannabis) ^a	1 to less than 1.8 times the threshold quantity	1.8 times the threshold quantity or higher (including amounts that meet the large commercial quantity threshold)	–
Trafficking in a drug of dependence in a large commercial quantity (all drug types except cannabis) ^b	1 to less than 2 times the threshold quantity	2 to less than 10 times the threshold quantity	10 times the threshold quantity or higher

a Where cannabis was trafficked in a commercial quantity, the analysis adopted the same drug quantity ranges that were used for the offence of cultivating a commercial quantity of narcotic plants.

b There was only one case of cannabis trafficking in a large commercial quantity.

50. *R v Pidoto & O'Dea* (2006) 14 VR 269, 278, 282–283.

51. Insofar as methylamphetamine is concerned, see Parliament of Victoria, Law Reform, Drugs and Crime Prevention Committee, *Inquiry into the Supply and Use of Methamphetamines, Particularly Ice, in Victoria*, Final Report vol. 1 (2014) x-xiii.

52. Australian Crime Commission, *Illicit Drug Data Report 2012–13* (2014) 7–14.

53. *Dao v The Queen; Tran v The Queen* [2014] VSCA 93 (14 May 2014) [14].

54. *R v Clohesy* [2000] VSCA 206 (18 October 2000) [11]; *Chandler v The Queen; Paksoy v The Queen* [2010] VSCA 338 (9 December 2010) [23]; *Director of Public Prosecutions v Holder* [2014] VSCA 61 (8 April 2014) [10].

- 3.14 The formulation of quantity ranges is inherently subjective, in that each judge has an individual view of what constitutes a *low*, *medium* or *high* range. Further, these views shift over time, as drug volumes increase or decrease in response to market conditions and other factors.⁵⁵ The formulation of the quantity ranges was informed by stakeholder consultation and by judicial references to *lower end* and *upper end* or *higher end* commercial quantities or large commercial quantities.⁵⁶ The ranges for the offence of cultivating a commercial quantity of narcotic plants seek to distinguish between relatively wide-scale cultivation (Range 2) and less extensive forms of cultivation (Range 1).
- 3.15 Only two, short ranges were used for the offence of trafficking in a commercial quantity, given that there is a narrow range of only 500 g between the commercial quantity threshold (500 g, mixed) and the large commercial quantity threshold (1 kg, mixed) for the most common drugs trafficked, other than cannabis.
- 3.16 The analysis of drug quantity ranges adopted several assumptions, primarily in relation to the trafficking offences. First, the thresholds for mixed, rather than pure, quantities of drugs were the most common thresholds applied in the analysis. Prior research has shown that most drugs are trafficked in mixed, rather than pure, form.⁵⁷ For example, a quantity of MDMA may include substances other than MDMA. To the extent possible, pure quantities of drugs were identified and the relevant thresholds were applied.⁵⁸
- 3.17 Second, the analysis identified *aggregated quantities* of drugs, which is different from a drug in mixed form. An aggregated quantity involves ‘tallying’ two or more drug types in order to form a commercial or large commercial quantity.⁵⁹
- 3.18 Third, the analysis of drug quantity ranges took into account the higher thresholds that applied for amphetamine and methylamphetamine trafficking prior to 1 May 2007.⁶⁰

55. Between 2003–04 and 2012–13, the weight of national illicit drug seizures fluctuated between 6.4 tonnes in 2005–06 and 23.8 tonnes in 2011–12. The 19.6 tonnes seized in 2012–13 are the second highest amount on record. See Australian Crime Commission (2014), above n 52, 6–7, 11.

56. *Mustica v The Queen* (2011) 31 VR 367, 383–384; *Taleb v The Queen* [2014] VSCA 96 (22 May 2014) [8], [12], [30]–[38]; *Dao v The Queen*; *Tran v The Queen* [2014] VSCA 93 (14 May 2014) [15] (more than 30 times the large commercial quantity threshold, described as an ‘enormous quantity’). See also the quantity ranges adopted by the Judicial Commission of New South Wales in its analysis of sentencing for Commonwealth commercial trafficking offences. The ranges were a *low range* of less than twice the minimum commercial quantity, a *high range* of at least 10 times the minimum commercial quantity, and a *mid range* that fell between the *low range* and *high range* amounts: Mizzi, Baghizadeh, and Poletti (2014), above n 48, 80.

57. Caitlin Hughes, Alison Ritter, Nicholas Cowdery, and Benjamin Phillips, *Evaluating Australian Drug Trafficking Thresholds: Proportionate, Equitable and Just?* Report to the Criminology Research Advisory Council (2014) 13.

58. For example, if a person trafficks in a pure commercial quantity of 200 g of MDMA (which is two times the commercial quantity threshold of 100 g, pure form), then that case falls within Range 2 (at least 1.8 times the threshold quantity).

59. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 70(1) (definition of ‘commercial quantity’, ‘aggregated commercial quantity’, ‘large commercial quantity’, ‘aggregated large commercial quantity’).

60. For offences committed prior to 1 May 2007, the threshold for trafficking a commercial quantity of amphetamine or methylamphetamine was 1.25 kg (mixed) or 250 g (pure), while the threshold for trafficking a large commercial quantity of amphetamine or methylamphetamine was 2.5 kg (mixed) or 750 g (pure): see *Drugs, Poisons and Controlled Substances (Amendment) Act 2001* (Vic) s 8. The thresholds for these drugs were amended to their current amounts under the *Drugs, Poisons and Controlled Substances (Amendment) Act 2006* (Vic) ss 16(1), 20.

Duration of offending

3.19 *Trafficking* may be established by proving that the accused committed a single, isolated act or by proving that the accused carried on a relatively continuous trade or business over a specified period of time ('*Giretti* trafficking').⁶¹ In the sentencing remarks analysed, the duration of the offending does not necessarily indicate whether the accused has been convicted of a *Giretti* trafficking charge. However, duration does indicate whether the act of trafficking was an isolated instance, or whether it involved activity over an extended period of time. Each of these factors is relevant to sentencing.⁶²

Role of offender in trafficking or cultivation offence

3.20 An offender may have a particular role in a trafficking or cultivation offence, such as principal or courier in the case of trafficking or house-sitter in the case of cultivation. The role of the offender may be relevant in assessing culpability and in determining any basis for disparity of sentences between co-offenders.⁶³ Evidence of a low-level or limited role may be regarded as a mitigating factor, while evidence of a high-level role may be regarded as an aggravating factor.⁶⁴ However, it is not essential in sentencing to identify the precise role of the offender in the offence.⁶⁵ The courts have cautioned that categorisations of role should not obscure an assessment of the offender's conduct as a whole.⁶⁶

3.21 There is no strict hierarchy of roles in the sentencing of trafficking or cultivation cases; any determination of role is on a case-by-case basis. As with drug quantity ranges, the classification of offender roles is inherently subjective. Consequently, the Council formulated its own role classification schemes for the purpose of coding the sentencing remarks. The schemes were developed through consultation with stakeholders and Council members, a review of sentencing remarks (which show certain consistencies in how roles are defined, particularly high-level roles), and consideration of role classifications in previous analyses.⁶⁷

3.22 The roles of offenders who cultivate a commercial quantity of narcotic plants were generally well defined in the sentencing remarks. The following role classification scheme was used for this offence:

- principal/proprietor;
- house-sitter – an offender who managed cultivation premises on behalf of more senior personnel; and
- ancillary role – an offender who performed menial tasks such as plant watering and rubbish removal but was not described as a house-sitter.

61. *R v Giretti* (1986) 24 A Crim R 112; *Mustica v The Queen* (2011) 31 VR 367, 374. A person may be convicted of trafficking if found to have engaged in this kind of trade or business for a significant part of the specified period. The reference to a 'trade or business' is to continuous trafficking activity, rather than a business- or corporate-like structure: *Mustica v The Queen* (2011) 31 VR 367, 374.

62. *Dao v The Queen*; *Tran v The Queen* [2014] VSCA 93 (14 May 2014) [11]; *Mustica v The Queen* (2011) 31 VR 367, 384.

63. *R v Olbrich* (1999) 199 CLR 270, 277–278, 279–280; *Director of Public Prosecutions v Downing* [2007] VSCA 154 (7 August 2007); *Bernath v The Queen* [2014] VSCA 195 (3 September 2014) [42], [75].

64. *Dao v The Queen*; *Tran v The Queen* [2014] VSCA 93 (14 May 2014) [16], citing *Wong v The Queen* (2001) 207 CLR 584, 609.

65. *R v Olbrich* (1999) 199 CLR 270, 277–278.

66. *R v Olbrich* (1999) 199 CLR 270, 279; *R v Nicholas* (2000) 1 VR 356, 404–405.

67. Potas and Poletti (1999), above n 48, 32–33; Mizzi, Baghizadeh, and Poletti (2014), above n 48 (this report was considered insofar as the role classifications related to trafficking offences). In relation to role classifications in England and Wales, see Sentencing Council, *Drug Offences: Definitive Guideline* (2012) 11.

- 3.23 The identification of trafficking roles was more complex and nuanced than the identification of cultivation roles. Table 4 sets out the role classification scheme for the offences of trafficking in a commercial quantity and trafficking in a large commercial quantity. Each classification contains a list of characteristics. The offender did not need to be described as having every characteristic in order to be coded as having a particular role.⁶⁸
- 3.24 The role-coding methodology included several features. First, the description of an offender's functional role (for example, *courier*) or position in the supply chain (for example, *wholesaler*) did not necessarily determine how the offender's role was coded. These descriptions provided a starting point for classification. The sentencing judge sometimes observed that such labels understated the significance of an offender's role.⁶⁹ Particular attention was paid to how the roles of *couriers* were described, as couriers may occupy very low-level positions in a trafficking organisation, or alternatively they may have responsibilities that elevate them to a significant role (the sentencing judge may describe an offender as 'more than a mere courier').

Table 4: Role classification scheme adopted for the coding of sentencing remarks, trafficking in a drug of dependence in a commercial quantity and trafficking in a drug of dependence in a large commercial quantity

Role	Examples
<p>Principal/co-principal or proprietor/co-proprietor</p> <ul style="list-style-type: none"> operator/co-operator or owner/co-owner of business; owner of drugs; substantial financial reward (actual or expected). 	<ul style="list-style-type: none"> Offenders described as principals, operators of trafficking businesses, and 'Mr Bigs'. Includes operators of trafficking businesses that deal in only one aspect of the supply chain (for example, wholesaling).
<p>Significant role</p> <ul style="list-style-type: none"> close associate of principal/proprietor, including a lieutenant or 'right-hand man'; member of middle management; director or organiser of key steps in supply chain, such as input supply, production/manufacturing, wholesale supply, or distribution; preparer of drugs, including cooks; financial reward (actual or expected). 	<ul style="list-style-type: none"> Mid- or high-level suppliers of finished or semi-finished drugs. Manager of one aspect of business (for example, wholesaling) within a vertically integrated trafficking syndicate with a principal at its head. Manufacturer of final drug product or involvement in a particular stage of drug production. Providers of specialist skills, expertise and/or inputs (for example, an industrial chemist). Wholesalers to distributors or retailers. Close confidant entrusted with handling large amounts of drugs and money for a principal. Persons responsible for sourcing drugs, with knowledge of pricing, quality, and availability. Overseers of manufacturing process.
<p>Minor role</p> <ul style="list-style-type: none"> performed a limited function or a menial role under direction; performed role for a limited period of time; little or no financial reward (actual or expected) or reward limited to drug supply. 	<ul style="list-style-type: none"> Gofer who moved drugs between safe-houses. Single, amateurish, and 'shambolic' attempt at cooking methylamphetamine. Courier responsible for collecting chemicals and precursor substances. Safe-guarder of drugs. Agent for a principal on a single day transporting drugs.

68. In rare instances, different roles were coded for each charge in the case. Where this occurred, the most senior role was coded as the overall role for the case (with principal/proprietor at the top and minor role at the bottom).

69. See *Chandler v The Queen*; *Paksoy v The Queen* [2010] VSCA 338 (9 December 2010) [24].

- 3.25 The second feature of the coding methodology was that drug quantity was not taken into account in assessing roles. In a quantity-based trafficking regime like Victoria's, there is a perverse incentive for principals to distance themselves from large quantities of drugs in order to avoid a severe sanction. Offenders in more subordinate roles (such as low-level couriers) may instead be responsible for trafficking large quantities of drugs and thereby assume greater risk.⁷⁰ As such, drug quantity may not reliably indicate an offender's role.
- 3.26 The third feature of the coding methodology was that, although examined, the extent of actual or expected financial gain was never determinative of role. In some cases, the offender clearly occupied a significant role, but there was no evidence of financial gain. Alternatively, offenders in clearly minor roles in large and highly profitable trafficking operations sometimes received considerable financial rewards.

Prior offending

- 3.27 Any history of prior offending may be considered by the court in assessing the offender's character.⁷¹ Not all prior offences are relevant to sentencing – a prior offence that is very different from the offence being sentenced may be given little or no weight, unless a general history of prior offending shows contempt for the law.⁷²
- 3.28 An *absence* of prior offending is of less-than-usual significance in the sentencing of drug offences, because 'very frequently, those selected to place themselves in the chain of drug trafficking ... are selected because their records, their past and their lifestyles are not such as to attract suspicion'.⁷³ In other words, the absence of prior offending aids the commission of the offence.

Forfeiture and confiscation orders

- 3.29 The property of an offender may be forfeited, or it may be confiscated via a pecuniary penalty order.⁷⁴ A forfeiture or confiscation order is not relevant to sentencing if it simply 'neutralises' the gains of the offending by placing offenders in the position that they would have been in had they not offended. However, a forfeiture or confiscation order is relevant to sentencing if it imposes an additional punishment on the offender.⁷⁵ Section 5(2A) of the *Sentencing Act 1991* (Vic) sets out the specific circumstances in which an order for forfeiture or confiscation may be taken into account in sentencing.

70. Caitlin Hughes, Alison Ritter, Nicholas Cowdery, and Benjamin Phillips, 'Australian Threshold Quantities for "Drug Trafficking": Are They Placing Drug Users at Risk of Unjustified Sanction?' *Trends & Issues in Crime and Criminal Justice* 467 (2014) 2; Sentencing Advisory Panel, *Advice to the Sentencing Guidelines Council: Sentencing for Drug Offences* (2010) 17.

71. *Sentencing Act 1991* (Vic) ss 5(2)(f), 6(a).

72. *Veen v The Queen [No 2]* (1988) 164 CLR 465, 477–478.

73. *R v Berisha* [1999] VSCA 112 (23 July 1999) [27], citing *R v Leroy* (1984) 13 A Crim R 469, 474.

74. These orders are generally made under the *Confiscation Act 1997* (Vic). See Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (3rd ed., 2014) [9.210]–[9.215].

75. *R v McLeod* (2007) 16 VR 682. Rather than simply neutralising the gains from the offending, these types of orders place offenders in a worse position than they were in prior to the offending.

4. Cultivating a commercial quantity of narcotic plants

4.1 This section presents:

- a profile of sentencing factors for the offence of cultivating a commercial quantity of narcotic plants;
- the high-level sentencing outcomes for this offence; and
- a profile of case sub-groups and the sentencing outcomes for each sub-group.

Profile of sentencing factors

4.2 There were 403 cases (428 charges) of cultivating a commercial quantity of narcotic plants during the reference period.

4.3 Table 5 lists the number and percentage of cases in which a particular sentencing factor was referred to in the judge's sentencing remarks for offenders sentenced during the reference period.

Table 5: Number and percentage of cases containing a particular sentencing factor, cultivating a commercial quantity of narcotic plants, 2008–09 to 2012–13⁷⁶

Sentencing factor	No. of cases	% of cases
Factors relating to the offence		
Narcotic plant type – cannabis plants*	428	100%
Quantity – 25 kg to 80 kg or 100 to 320 plants*	292	68%
Quantity – more than 80 kg or more than 320 plants*	115	27%
Quantity – not stated or uncertain*	21	5%
Duration of offending – 1 day*	32	7%
Duration of offending – more than 1 day to less than 1 month*	49	11%
Duration of offending – 1 month to less than 3 months*	107	25%
Duration of offending – 3 months to less than 6 months*	101	24%
Duration of offending – 6 months to less than 12 months*	37	9%
Duration of offending – 12 months or more*	18	4%
Duration of offending – not stated*	84	20%
Factors relating to the offender		
Male	359	89%
18–24 years	37	9%
25–34 years	132	33%
35–44 years	110	27%
45–54 years	78	19%
55 years and over	46	11%

76. The percentages in relation to the age of the offender do not sum to 100% due to rounding. The numbers and percentages for specific types of prior offending total more than the numbers and percentages for 'prior offending – any offences' because some offenders had more than one type of prior offending.

Sentencing factor	No. of cases	% of cases
Role – principal/proprietor	156	39%
Role – house-sitter	146	36%
Role – ancillary	59	15%
Role – not stated	42	10%
Pleaded guilty*	400	93%
Pleaded not guilty*	28	7%
Assisted law enforcement authorities	221	55%
Prior offending – any offences	123	31%
Prior offending – violent offences	20	5%
Prior offending – dishonesty/property offences	51	13%
Prior offending – drug offences	78	19%
Prior offending – driving offences	30	7%
Prior offending – firearm offences	10	2%
Prior offending – sexual offences	1	0%
Prior offending – other offences	20	5%
Previously imprisoned	27	7%
Committed offence while on existing court order	15	4%
Sentenced as a serious drug offender	17	4%
Mental illness	140	35%
Cognitive impairment	17	4%
Substance abuse	148	37%
Childhood sexual abuse	7	2%
Childhood abuse/neglect/severe disruption	86	21%
Adult trauma/health problems	102	25%
Gambling problems	82	20%
Prospects of rehabilitation – positive	243	60%
Prospects of rehabilitation – contingent	35	9%
Prospects of rehabilitation – negative	15	4%
Prospects of rehabilitation – not stated	110	27%
Assessment of remorse – positive	230	57%
Assessment of remorse – negative	25	6%
Assessment of remorse – not stated	148	37%
Forfeiture or confiscation order taken into account in sentencing	24	6%

*The data in relation to this sentencing factor refer to the number and percentage of charges having this particular factor.

Drug type, drug quantity range, and duration of offending

- 4.4 Cannabis plants were the only type of narcotic plant cultivated in a commercial quantity during the reference period.⁷⁷
- 4.5 The large majority (68%) of charges involved a quantity between 25 kg and 80 kg or between 100 and 320 plants. A smaller percentage of charges (27%) involved quantities in excess of 80 kg or 320 plants.
- 4.6 The most common period of offending was 1 month to less than 3 months (25% of charges), followed closely by a period of offending of 3 months to less than 6 months (24% of charges).

Factors relating to the offender

Role in offence⁷⁸

- 4.7 The majority (51%) of offenders had a house-sitter role or, less commonly, an ancillary role that involved menial tasks such as watering plants, other basic plant care, or removal of rubbish from cultivation premises. House-sitters often lived on site and managed the production of crops in return for payment upon harvest and/or board and lodging.
- 4.8 House-sitters were often described as having been recruited by senior personnel in order to repay gambling, study, and/or migration-related debts (for example, foreign student debts),⁷⁹ which may partly explain the peak offending age of 25–34 years for this offence. House-sitters help to shield the principal/proprietor from detection, as Mullaly J explained in *Director of Public Prosecutions v Vu*:

The entrepreneurial cultivators have, for some time, sought to avoid their own detection by having vulnerable individuals mind the crops. These crop sitters, as they have become known, ensure that the equipment continues to operate. They provide it would seem, from time to time, a degree of security against thefts of the crop, but most importantly they keep the entrepreneurs at arms-length from the crop while it grows to a saleable product. When the sitter is arrested with the crop, as is the case here, the entrepreneur often avoids detection.⁸⁰

- 4.9 Despite the difficulties in detecting more senior personnel, 39% of offenders had the role of principal/proprietor. The nature of that role varied among the cases analysed – some offenders ran highly commercial operations in factories or across multiple houses, other offenders ran single-house but nonetheless profitable operations, while others cultivated cannabis in relatively unsophisticated circumstances, submitting that it was for the purpose of personal medical use.

Plea and assistance to authorities

- 4.10 The overwhelming majority of offenders pleaded guilty, with guilty pleas entered for 93% of charges. A plea of guilty ordinarily, though not necessarily, results in a sentence discount.⁸¹

77. The other types of narcotic plants specified in the Act are opium poppy plants and coca plants: see *Drugs, Poisons and Controlled Substances Act 1981* (Vic) sch 11 pt 2.

78. With respect to the inter-rater reliability review, the analysis demonstrated substantial agreement regarding coding of the role of the offender: Kappa = 0.78, $p < 0.001$.

79. In relation to the financial problems of offenders, the Council only coded gambling problems when analysing the sentencing remarks. The more general financial problems of commercial cultivators may be worthy of future study, as financial problems appear to be a key pathway into this type of offending.

80. *Director of Public Prosecutions v Vu* (Unpublished, County Court of Victoria, 18 March 2013).

81. *Sentencing Act 1991* (Vic) s 5(2)(e); *Phillips v The Queen* (2012) 37 VR 594, 604–605.

- 4.11 Assistance to law enforcement authorities may also reduce the sentence imposed, particularly where an offender undertakes to assist in the investigation or the prosecution of an offence.⁸² Just over half (55%) of offenders assisted law enforcement authorities by cooperating upon arrest, making full and frank admissions, and/or undertaking to assist in the investigation or the prosecution of an offence. Analysis of the sentencing remarks suggests that the assistance tended to be in the nature of cooperation upon arrest and the making of full and frank admissions, rather than in the nature of an undertaking to assist.
- 4.12 The very high rate of guilty pleas and the relatively high rate of assistance to authorities (in the form of cooperation upon arrest and the making of a full and frank statement) may be partly explained by the large percentage of offenders in house-sitter roles, which, by their nature, tend to entail assuming the blame for offending in order to protect principals/proprietors.

Prior offending

- 4.13 Just under one-third (31%) of all offenders had a history of prior offending. The most common type of prior offending was related to drug offences (19% of all offenders), followed by dishonesty or property offences (13% of all offenders).
- 4.14 It was rare for an offender convicted of cultivating a commercial quantity of narcotic plants to be sentenced as a serious drug offender (4% of cases) within the meaning of Part 2A of the *Sentencing Act 1991* (Vic). This is consistent with the relatively low rate of prior drug offences and the low rate of prior imprisonment (7%) among offenders convicted of cultivating a commercial quantity of narcotic plants.⁸³
- 4.15 Overall, 4% of offenders committed the offence while subject to an existing order, such as a bail order, a parole order, or a sentence for a prior offence.

Personal circumstances of offender

- 4.16 Over one-third (37%) of offenders were described as having a history of substance abuse.
- 4.17 Gambling problems were identified in relation to 20% of offenders. Where gambling problems existed, the offender was often described as having been recruited into a cultivation operation in order to repay gambling debts. The recruitment would often occur at gambling venues. Consequently, it is reasonable to suggest that problem gambling may constitute a pathway to offending, which is being exploited by principals/proprietors of cultivation operations in a targeted manner.⁸⁴
- 4.18 Just over one-third (35%) of offenders were described as having a history of mental illness,⁸⁵ while 25% of offenders had a history of adult trauma or health problems,⁸⁶ and 21% of offenders had a history of childhood abuse, neglect, or severe disruption.⁸⁷

82. *R v Gallagher* (1991) 23 NSWLR 220; *Sentencing Act 1991* (Vic) s 5(2AB).

83. In considering whether an offender should be sentenced as a serious drug offender, the court has regard to any other conviction/s for a drug offence for which the offender received a term of imprisonment, regardless of whether these convictions are recorded at the current trial or at an earlier trial: *Sentencing Act 1991* (Vic) ss 6B(2) (definition of 'serious drug offender'), 6C.

84. See Roslyn Le and Michael Gilding, 'Gambling and Drugs: The Role of Gambling among Vietnamese Women Incarcerated for Drug Crimes in Australia' (9 December 2014) *Australian & New Zealand Journal of Criminology*.

85. The mental illnesses described in the sentencing remarks included mental illnesses (such as depression) that developed as a result of detention on remand; that is, the offender's mental illness did not necessarily pre-date the offending.

86. Adult trauma includes the loss of a partner or a child or a similarly traumatic experience.

87. For the purpose of coding the sentencing remarks, 'childhood abuse, neglect, or severe disruption' included an interrupted or incomplete childhood education. In future studies, the Council intends to separate out 'limited childhood education' so data can be obtained on that factor alone.

- 4.19 The court's assessment of rehabilitation prospects and remorse was positive for the majority of offenders (60% and 57% of cases respectively).⁸⁸

Forfeiture and confiscation orders

- 4.20 Forfeiture or confiscation orders were taken into account in sentencing in 6% of cases.

High-level sentencing outcomes

- 4.21 The data below relate to the sentencing outcomes for all charges and cases of cultivating a commercial quantity of narcotic plants during the reference period.⁸⁹

Sentences for individual charges

- 4.22 Imprisonment was imposed for 62% of charges (n = 264) during the reference period.
- 4.23 A partially suspended sentence was imposed for 21% of charges (n = 91), and a wholly suspended sentence was imposed for 16% of charges (n = 68). Combined, suspended sentences were imposed for 37% of charges.⁹⁰
- 4.24 The median term of imprisonment for a charge of cultivating a commercial quantity of narcotic plants was 2 years and 3 months.

Total effective sentences and non-parole periods

- 4.25 During the reference period, cases that included a proven charge of cultivating a commercial quantity of narcotic plants had:
- an average of 2.5 proven charges of any kind per case; and
 - an average of 1.06 proven charges of cultivating a commercial quantity of narcotic plants per case.
- 4.26 Total effective sentences of imprisonment were imposed in 60% of cases (n = 241) during the reference period. Partially suspended sentences were imposed in 22% of cases (n = 90), and wholly suspended sentences were imposed in 17% of cases (n = 69).⁹¹
- 4.27 The median total effective term of imprisonment was 2 years and 6 months, which is only 3 months higher than the median imprisonment term for individual charges of cultivating a commercial quantity of narcotic plants.
- 4.28 During the reference period, the median non-parole period was 1 year and 3 months, which represents 50% of the median total effective imprisonment term of 2 years and 6 months.

88. With respect to the inter-rater reliability review, the analysis demonstrated substantial agreement regarding coding of the judge's assessment of remorse: Kappa = 0.71, $p < 0.001$, and almost perfect agreement regarding coding of the judge's assessment of prospects of rehabilitation: Kappa = 0.81, $p < 0.001$.

89. The sentencing statistics discussed in this section are based on the most up-to-date data available from the Higher Courts Conviction Returns database provided by Court Services Victoria for the period 2008–09 to 2012–13. The Council performs quality assurance checks on these data. As sentencing statistics are always subject to revision due to quality assurance checks and the provision of additional data, the statistics in this section may differ somewhat from the statistics that the Council presents elsewhere in relation to the reference offences (for example, in the Council's SACStat Higher Courts database and Sentencing Snapshots).

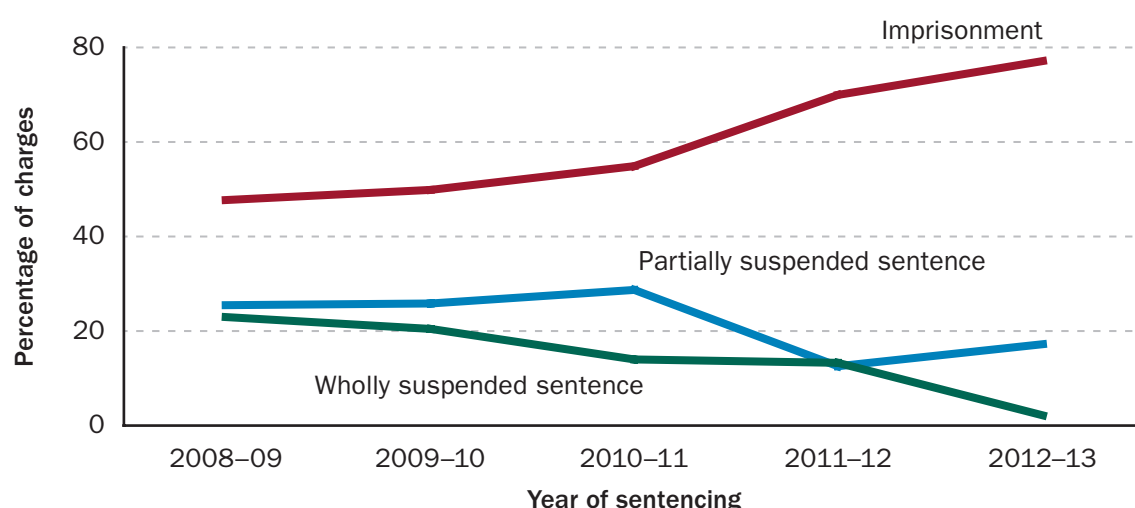
90. The other sentences imposed were a wholly suspended sentence combined with a fine (0.5% of charges, n = 2), a youth justice centre order (0.5% of charges, n = 2), and a community correction order (0.2% of charges, n = 1).

91. The other sentences imposed were a youth justice centre order (0.5% of cases, n = 2) and a community correction order (0.2% of cases, n = 1).

Abolition of suspended sentences

- 4.29 Suspended sentences have been abolished in the higher courts for all offences committed on or after 1 September 2013 and in the Magistrates' Court for all offences committed on or after 1 September 2014.⁹² However, suspended sentences were available for the offence of cultivating a commercial quantity of narcotic plants during the reference period.⁹³
- 4.30 Future research will determine which types of sentences replace suspended sentences for this offence. In the meantime, recent data may provide some indication of future sentencing trends. Figure 1 displays the distribution of sentence types for individual charges of cultivating a commercial quantity of narcotic plants by financial year.
- 4.31 Even prior to the abolition of suspended sentences, there was a shift away from suspended sentences. During the beginning of the reference period, imprisonment and suspended sentences (wholly and partially) were imposed at approximately equal rates (approximately 50% of charges respectively). However, by 2012–13 almost 80% of charges received imprisonment, and approximately 20% of charges received a suspended sentence. There is no indication of community correction orders replacing suspended sentences for this offence. It remains to be seen whether this will change following an amendment to the *Sentencing Act 1991* (Vic) in 2014 stipulating that a community correction order may be used where a wholly suspended sentence would have otherwise been imposed prior to the abolition of suspended sentences.⁹⁴
- 4.32 It is notable that suspended sentences comprised 39% of total effective sentences imposed for this offence during the reference period, given that the Court of Appeal has stated that cultivating a commercial quantity of narcotic plants ordinarily requires the imposition of an immediate custodial sentence unless exceptional circumstances can be shown.⁹⁵

Figure 1: Sentence types for cultivating a commercial quantity of narcotic plants charges (%) by financial year, 2008–09 to 2012–13⁹⁶



92. *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic) s 2.

93. The use of suspended sentences was restricted in the higher courts for *serious or significant* offences committed between 1 November 2006 and 30 April 2011 and then abolished in the higher courts for offences committed on or after 1 May 2011. The offence of cultivating a commercial quantity of narcotic plants was not a serious or significant offence in relation to these restrictions. See Sentencing Advisory Council, *Community Correction Orders: Monitoring Report* (2014) 3.

94. *Sentencing Act 1991* (Vic) s 36(2).

95. *R v Tabone* (2006) 167 A Crim R 18, 23–24.

96. Three sentence types were excluded from Figure 1 as they were very rarely used during the reference period: a youth justice centre order imposed for two charges, a wholly suspended sentence combined with a fine imposed for two charges, and a community correction order imposed for one charge. Collectively, these sentences were imposed for 1.2% of charges.

Case sub-groups

4.33 The cluster analysis identified two sub-groups of cases within this offence.⁹⁷ The case characteristics within each sub-group are displayed in Appendix I, along with the outcomes of relevant tests for differences in frequencies. The distinguishing characteristics of these sub-groups (referred to as *clusters*) are described below.

Cluster 1

4.34 Cluster 1 contains 201 cases (49.9% of all cases of cultivating a commercial quantity of narcotic plants). The defining characteristics of Cluster 1 are based on statistical testing (as detailed in Appendix I). Relative to Cluster 2, Cluster 1 has:

- more cases where offenders had a house-sitter role or an ancillary role (100%);
- more cases involving offending over a relatively short period of time (less than 3 months);
- more cases involving younger offenders (52% of cases involved offenders aged 18 to 34 years);
- fewer cases involving offenders who had previously been imprisoned (1%);
- fewer cases involving offenders who had a history of prior offending, both generally (12%) and in relation to each type of prior offending examined;
- fewer cases involving a history of mental illness (28%), adult trauma or health problems (16%), or substance abuse (18%);
- more cases involving gambling problems (24%);
- fewer cases where a forfeiture or confiscation order was taken into account in sentencing (3%); and
- more cases where the offender pleaded guilty to all charges of the reference offences (97%, keeping in mind that over 90% of all offenders convicted of cultivating a commercial quantity of narcotic plants pleaded guilty to all charges).

4.35 The profile of Cluster 1 (house-sitter or ancillary role, younger offenders, less likelihood of prior criminality) is consistent with the circumstances often described in the sentencing remarks – house-sitting was a response to migration and/or study-related debts, and/or unlawful residency and associated unemployment. The greater likelihood of gambling problems among offenders in Cluster 1 may indicate a pathway to offending for people in house-sitter and ancillary roles.⁹⁸

97. The case clusters were identified using the cluster analysis technique described at [3.4]–[3.6].

98. See Le and Gilding (2014), above n 84.

Cluster 2

- 4.36 Cluster 2 contains 202 cases (50.1% of all cases of cultivating a commercial quantity of narcotic plants). The defining characteristics of Cluster 2 are based on statistical testing (as detailed in Appendix 1). Relative to Cluster 1, Cluster 2 has:
- more cases where offenders had a principal/proprietor role (77%);
 - more cases involving offending over a relatively long period of time (3 months or more);
 - more cases involving older offenders (68% aged 35 years or older);
 - more cases involving offenders who had previously been imprisoned (12%);
 - more cases involving offenders who had a history of prior offending, both generally (49%) and in relation to each type of prior offending examined;
 - more cases involving a history of mental illness (42%), adult trauma or health problems (35%), or substance abuse (55%);
 - fewer cases involving gambling problems (16%);
 - more cases where a forfeiture or confiscation order was taken into account in sentencing (9%); and
 - fewer cases where the offender pleaded guilty to all charges of the reference offences (91%).

The relationship between drug quantity and each cluster

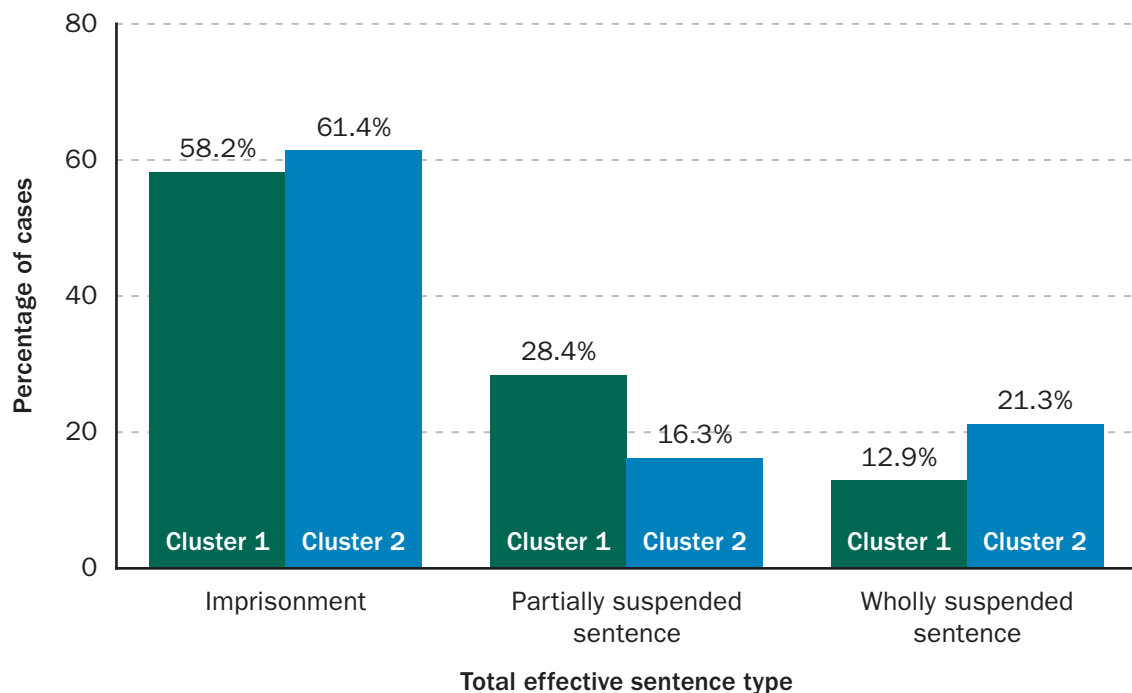
- 4.37 There was very little difference between the clusters with respect to drug quantity ranges:
- 70% of cases in Cluster 1 and 68% of cases in Cluster 2 involved quantities of 25 kg to 80 kg/100 to 320 plants; and
 - 25% of cases in Cluster 1 and 29% of cases in Cluster 2 involved quantities of more than 80 kg/more than 320 plants.
- 4.38 This means that drug quantity was not the defining characteristic that helped separate the cases into the two clusters.
- 4.39 The finding that offenders in house-sitter and ancillary roles were responsible for cultivating similar quantities of cannabis plants as principals/proprietors is consistent with judicial observations about the role of a house-sitter in carrying out the business of senior personnel and helping to shield them from detection. There is a particular incentive for this kind of business structure where the statutory offence categories and the relevant maximum penalties are based on the quantity of narcotic plants cultivated.⁹⁹

99. The offences and their respective maximum penalties are: cultivation of narcotic plants (maximum penalty of 1 year's imprisonment and/or a fine of not more than 20 penalty units if the judge is satisfied that the offence is not for any purpose related to trafficking; in any other case, there is a maximum penalty of 15 years' imprisonment), cultivation of a commercial quantity of narcotic plants (maximum penalty of 25 years' imprisonment), and cultivation of a large commercial quantity of narcotic plants (maximum penalty of life imprisonment and a fine of not more than 5,000 penalty units). See *Drugs, Poisons and Controlled Substances Act 1981 (Vic)* ss 72, 72A, 72B.

Sentencing outcomes in each cluster

- 4.40 Total effective sentences, rather than sentences at the individual charge level, are described in this section because the cluster analysis has been performed at the case (total effective sentence) level. There are clear differences in sentencing outcomes between the two clusters. Sentencing outcomes were not taken into account when the cluster analysis was performed, meaning that the differences in sentencing outcomes emerged after the sub-groups were identified.
- 4.41 Figure 2 shows the types of sentences imposed in cases in Cluster 1 and Cluster 2 for the offence of cultivating a commercial quantity of narcotic plants during the reference period.
- 4.42 Sentence types were similar between the two clusters. Imprisonment was imposed in the majority of cases in Cluster 1 (58% of cases) and Cluster 2 (61% of cases). Suspended sentences were imposed in 41% of cases in Cluster 1 and 38% of cases in Cluster 2; however, there was some variation in the use of suspended sentences – a wholly suspended sentence was more common for cases in Cluster 2 than for cases in Cluster 1.
- 4.43 It is likely that there is little difference in sentence types between the two clusters because imprisonment is the presumptive sentence for cultivating a commercial quantity of narcotic plants.¹⁰⁰

Figure 2: Sentence types for cultivating a commercial quantity of narcotic plants cases (%), Cluster 1 and Cluster 2, 2008–09 to 2012–13¹⁰¹

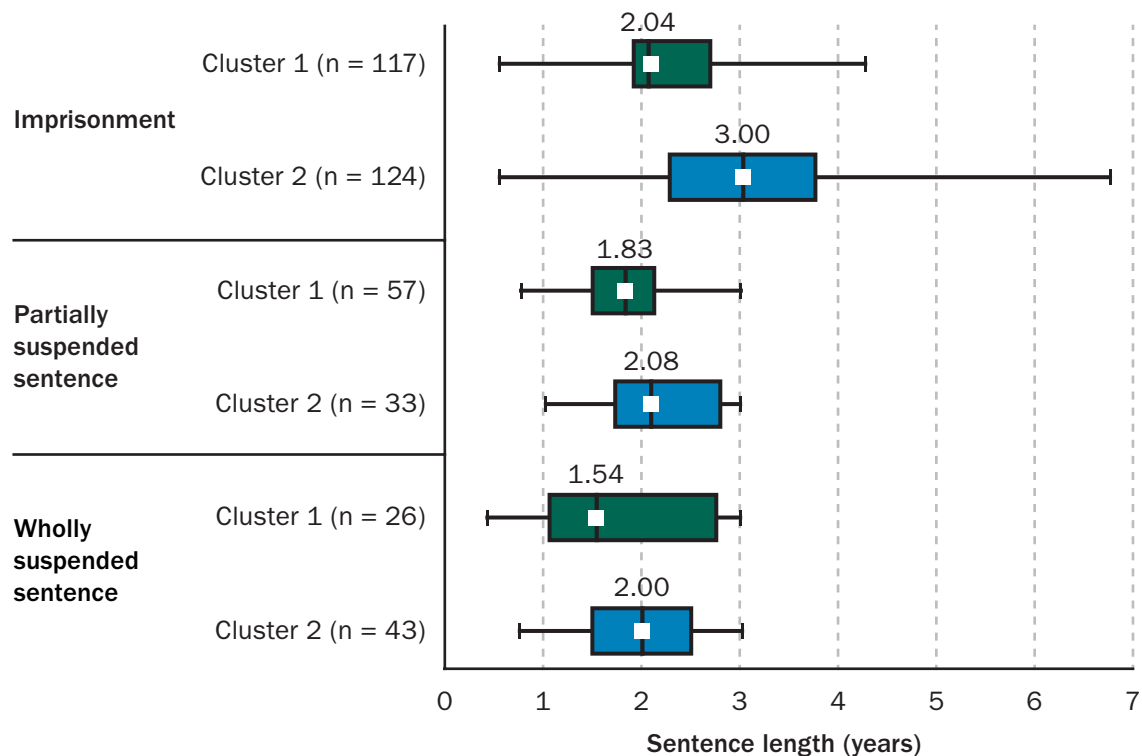


100. *R v Tabone* (2006) 167 A Crim R 18, 23–24.

101. The within-cluster percentages in Figure 2 do not sum to 100%. In addition to the sentence types displayed in Figure 2, a youth justice centre order was imposed in 0.5% of cases in Cluster 1 and 0.5% of cases in Cluster 2. A community correction order was imposed in 0.5% of cases in Cluster 2.

- 4.44 The main differences in sentencing outcomes relate to the length of sentences. Figure 3 displays the sentence ranges and median sentences for cases in Cluster 1 and Cluster 2 during the reference period. Appendix 4 explains how to interpret the box-and-whiskers-plots used in Figure 3.
- 4.45 For cases in Cluster 1 (offenders in house-sitter and ancillary roles), the median term of imprisonment was 2 years. For cases in Cluster 2 (principals/proprietors), the median term of imprisonment was 3 years, which is 50% higher than the median term of imprisonment for cases in Cluster 1.¹⁰²
- 4.46 While the shortest term of imprisonment for cases in both clusters was 6 months, the longest term of imprisonment for cases in Cluster 1 was 4 years and 3 months, and the longest term of imprisonment for cases in Cluster 2 was 6 years and 9 months.
- 4.47 For cases in Cluster 1, the shortest partially suspended sentence was 9 months, and the shortest wholly suspended sentence was 5 months. For cases in Cluster 2, the shortest partially suspended sentence was 1 year, and the shortest wholly suspended sentence was 9 months. The longest suspended sentence was 3 years for each cluster, which was the maximum length of a suspended sentence in the higher courts during the reference period.¹⁰³

Figure 3: Sentence ranges and median sentence lengths (years), cultivating a commercial quantity of narcotic plants, Cluster 1 and Cluster 2, 2008–09 to 2012–13



102. The differences in median imprisonment terms are statistically significant.

103. *Sentencing Act 1991 (Vic)* ss 27(2), 27(2A) prior to repeal by the *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013 (Vic)* s 11.

5. Trafficking in a commercial quantity

5.1 This section presents:

- a profile of sentencing factors for the offence of trafficking in a drug of dependence in a commercial quantity (*trafficking in a commercial quantity*);
- the high-level sentencing outcomes for this offence; and
- a profile of case sub-groups and the sentencing outcomes for each sub-group.

Profile of sentencing factors

5.2 There were 138 cases (152 charges) of trafficking in a commercial quantity during the reference period.

5.3 Table 6 lists the number and percentage of cases in which a particular sentencing factor was referred to in the judge's sentencing remarks for offenders sentenced during the reference period.

Table 6: Number and percentage of cases containing a particular sentencing factor, trafficking in a commercial quantity, 2008–09 to 2012–13¹⁰⁴

Sentencing factor	No. of cases	% of cases
Factors relating to the offence		
Drug type – cannabis*	26	17%
Drug type – methylamphetamine/ice*	64	42%
Drug type – MDMA/ecstasy*	30	20%
Drug type – heroin*	8	5%
Drug type – amphetamine*	6	4%
Drug type – cocaine*	6	4%
Drug type – precursor substances (pseudoephedrine, 1P2N, and MDP2P)*	8	5%
Drug type – steroids*	1	1%
Drug type – not stated*	3	2%
Quantity (all drug types except cannabis) – 1 to less than 1.8 times threshold quantity*	45	36%
Quantity (all drug types except cannabis) – 1.8 times threshold quantity or higher*	50	40%
Quantity (all drug types except cannabis) – not stated or uncertain*	31	25%
Quantity (cannabis) – 25 kg to 80 kg or 100 to 320 plants*	10	38%
Quantity (cannabis) – more than 80 kg or more than 320 plants*	14	54%
Quantity (cannabis) – not stated or uncertain*	2	8%
Duration of offending – 1 day*	24	16%
Duration of offending – more than 1 day to less than 1 month*	17	11%

104. For drug quantity (all drug types except cannabis), the percentages are expressed as a percentage of total charges involving drugs except cannabis (n = 126). For drug quantity (cannabis), the percentages are expressed as a percentage of total charges involving cannabis (n = 26). The percentages in relation to quantity of drug (all drug types except cannabis) and duration of offending do not sum to 100% due to rounding. The numbers and percentages for specific types of prior offending total more than the numbers and percentages for 'prior offending – any offences' because some offenders had more than one type of prior offending.

Sentencing factor	No. of cases	% of cases
Duration of offending – 1 month to less than 3 months*	30	20%
Duration of offending – 3 months to less than 6 months*	35	23%
Duration of offending – 6 months to less than 12 months*	23	15%
Duration of offending – 12 months or more*	7	5%
Duration of offending – not stated*	16	11%
Factors relating to the offender		
Male	126	91%
18–24 years	13	9%
25–34 years	46	33%
35–44 years	47	34%
45–54 years	23	17%
55 years and over	9	7%
Pleaded guilty*	143	94%
Pleaded not guilty*	9	6%
Assisted law enforcement authorities	33	24%
Prior offending – any offences	84	61%
Prior offending – violent offences	23	17%
Prior offending – dishonesty/property offences	44	32%
Prior offending – drug offences	50	36%
Prior offending – driving offences	30	22%
Prior offending – firearm offences	13	9%
Prior offending – sexual offences	0	0%
Prior offending – other offences	20	14%
Previously imprisoned	31	22%
Committed offence while on existing court order	13	9%
Sentenced as a serious drug offender	21	15%
Mental illness	55	40%
Cognitive impairment	5	4%
Substance abuse	102	74%
Childhood sexual abuse	4	3%
Childhood abuse/neglect/severe disruption	38	28%
Adult trauma/health problems	40	29%
Gambling problems	21	15%
Prospects of rehabilitation – positive	90	65%
Prospects of rehabilitation – contingent	14	10%
Prospects of rehabilitation – negative	9	7%
Prospects of rehabilitation – not stated	25	18%
Assessment of remorse – positive	87	63%
Assessment of remorse – negative	9	7%
Assessment of remorse – not stated	42	30%
Forfeiture or confiscation order taken into account in sentencing	15	11%

*The data in relation to this sentencing factor refer to the number and percentage of charges having this particular factor.

Drug type, drug quantity range, and duration of offending

- 5.4 Methylamphetamine/ice was the most common type of drug trafficked in a commercial quantity during the reference period (42% of charges), followed by MDMA/ecstasy (20% of charges) and cannabis (17% of charges). The trafficking of heroin and cocaine in commercial quantities was rarely sentenced (5% and 4% of charges respectively), as was the trafficking of precursor substances (5% of charges) and amphetamine (4% of charges).
- 5.5 To the extent that drug quantity was identified in the sentencing remarks,¹⁰⁵ 40% of charges of commercial trafficking in drugs other than cannabis involved trafficking in 1.8 times the threshold quantity or higher. For drugs such as methylamphetamine/ice and MDMA/ecstasy, this range equates to 900 g of the drug or more (using the mixed form quantities adopted for the analysis).¹⁰⁶ A substantial percentage (36%) of charges of commercial trafficking in drugs other than cannabis involved trafficking in the lesser range of 1 to less than 1.8 times the threshold quantity.
- 5.6 The most common period of offending was 3 months to less than 6 months (23% of charges).

Factors relating to the offender

Role in offence

- 5.7 The role of the offender could not be reliably coded for trafficking in a commercial quantity.¹⁰⁷ The sentencing remarks were sometimes ambiguous about the role of the offender, or they noted that the offender's role could not be determined. In this respect, the Victorian Court of Appeal has observed that 'a court will often have a limited and imperfect knowledge about the circumstances in which an offender came to commit the offence'.¹⁰⁸ A similar situation has been encountered in the United Kingdom, with research by the Sentencing Council for England and Wales revealing disagreement among judges about how offender role categories should be defined and where to place offenders in a hierarchy of roles.¹⁰⁹
- 5.8 The lack of certainty around the roles of commercial traffickers is consistent with criminological research on drug trafficking, which shows variation and ambiguity in the structure of drug trafficking organisations and in role delineation. Numerous studies have challenged the assumption that drug trafficking typically involves strictly hierarchical organisations; instead, trafficking operations range from 'a loosely structured network of all groups or cliques, with little or no hierarchy'¹¹⁰ to 'large, highly structured and centrally controlled operations'.¹¹¹

105. Drug quantity was not stated or was described in uncertain terms (for example, 'at least a commercial quantity') in relation to 25% of charges of non-cannabis trafficking and 8% of charges of cannabis trafficking.

106. See *Drugs, Poisons and Controlled Substances Act 1981* (Vic) sch 11 pt 3.

107. The inter-rater reliability review found slight agreement regarding coding for the role of the offender: Kappa = 0.20, $p > 0.05$, not significant.

108. *Dao v The Queen; Tran v The Queen* [2014] VSCA 93 (14 May 2014) [39]; see also *Nguyen v The Queen; Phommalysock v The Queen* (2011) 31 VR 673, 681–682, applying *R v Nguyen; R v Pham* (2010) 205 A Crim R 106.

109. Sentencing Council, *Research into the Effects of the Draft Drug Offences Guideline on Sentencing Practice*, Analysis and Research Bulletins (2012) 5–8.

110. Mangai Natarajan, 'Understanding the Structure of a Large Heroin Distribution Network: A Quantitative Analysis of Qualitative Data' (2006) 22(2) *Journal of Quantitative Criminology* 171, 189.

111. Aili Malm, Gisela Bichler, and Stephanie Van De Walle, 'Comparing the Ties That Bind Criminal Networks: Is Blood Thicker Than Water?' (2010) 23(1) *Security Journal* 52, 52–53. See also Mangai Natarajan and Mathieu Belanger, 'Varieties of Drug Trafficking Organizations: A Typology of Cases Prosecuted in New York City' (1998) 28(4) *Journal of Drug Issues* 1005; Frederick Desroches, 'Research on Upper Level Drug Trafficking: A Review' (2007) 37(4) *Journal of Drug Issues* 827; David Bright, Caitlin Hughes, and Jenny Chalmers, 'Illuminating Dark Networks: A Social Network Analysis of an Australian Drug Trafficking Syndicate' (2012) 57(2) *Crime, Law and Social Change* 151, 164–166.

Further, some research has found that roles change over time within the one network, or multiple roles may be held by the one person; for example, suppliers and buyers may interchange roles.¹¹²

- 5.9 It is possible that sentencing remarks, in their current form, are not the optimal source of information for examining the roles of commercial traffickers. Alternative methodologies could use other sources of case information, such as police files, to try to bring additional clarity to an analysis of offender roles. However, any analysis of sentencing practices is necessarily restricted to what the sentencing judge records in his or her sentencing remarks.

Plea and assistance to authorities

- 5.10 The overwhelming majority of offenders pleaded guilty, with guilty pleas entered for 94% of charges.
- 5.11 Twenty-four percent of offenders assisted law enforcement authorities in some way – assistance included cooperation upon arrest, the making of full and frank admissions, and/or an undertaking to assist authorities in the investigation or the prosecution of an offence. Accordingly, the percentage of offenders specifically undertaking to assist authorities (that is, give evidence and/or act as an informant) was less than 24%.
- 5.12 Where a person did undertake to assist authorities, on rare occasions this was a key reason for the imposition of a suspended sentence rather than an immediate term of imprisonment. Judges commented that such discounts reflected the personal risks to the offender in giving this type of undertaking and/or the particular value of information about inherently clandestine activities.¹¹³ It is otherwise very difficult to quantify the exact reductions to sentence for an undertaking to assist authorities, as this discount was ordinarily intertwined with any discount for a guilty plea.

Prior offending

- 5.13 More than half (61%) of all offenders had a history of prior offending. The most common type of prior offending was related to drug offences (36% of all offenders), followed by dishonesty or property offences (32% of all offenders). It was less common for offenders to have a history of violent offending (17% of all offenders), which is consistent with international research showing that, contrary to some public perceptions, violent offending does not commonly form part of a drug trafficker's profile.¹¹⁴

112. Vy Le and Mark Lauchs, 'Models of South-East Asian Organised Crime Drug Operations in Queensland' (2013) 8(2) *Asian Criminology* 69, 73.

113. County Court of Victoria, Unpublished Sentencing Remarks (provided to the Council for the purpose of research and analysis).

114. See Desroches (2007), above n 111, 837–838. The research summarised by Desroches indicates that many traffickers in the United States, Britain, and Canada regard violence as 'bad for business' and instead use ordinary competitive business techniques to manage trafficking operations (e.g. product innovation in order to acquire greater market share). Violence may be 'most usefully understood as a consequence of market dysfunction and disorganisation': *ibid* 837. However, Desroches notes there is some scepticism around these findings, with some researchers believing that the level of violence among traffickers is underreported or under-detected.

- 5.14 Fifteen percent of offenders were sentenced as a serious drug offender within the meaning of Part 2A of the *Sentencing Act 1991* (Vic).
- 5.15 Nine percent of offenders committed the offence while subject to an existing order, such as a bail order, a parole order, or a sentence for a prior offence.

Personal circumstances of offender

- 5.16 The large majority (74%) of offenders were described as having a history of substance abuse. This was taken into account in various ways in sentencing. For example, in one case an offender's drug addiction provided a context to, or an explanation for, the trafficking (as opposed to an excuse).¹¹⁵ In another case, the sentence was moderated because the offender trafficked in order to satisfy an addiction, rather than for 'greed'.¹¹⁶ In several other cases, the fact of substance abuse had no observed effect on sentence, as the offender was motivated by both the making of profits and the satisfaction of the drug addiction.¹¹⁷
- 5.17 There may be a causal link between the high percentage of offenders with a history of substance abuse and the percentage of offenders with a history of property offending.¹¹⁸
- 5.18 A considerable percentage of offenders were described as having a history of mental illness (40%),¹¹⁹ adult trauma or health problems (29%),¹²⁰ or childhood abuse, neglect, or severe disruption (28%).¹²¹ It appears from analysis of the sentencing remarks that the principles in *R v Verdins* ('*Verdins*') were only occasionally invoked for the offence of trafficking in a commercial quantity (and the offence of trafficking in a large commercial quantity).¹²² However, satisfaction of any of the *Verdins* principles was not expressly coded as a sentencing factor.
- 5.19 The court's assessment of rehabilitation prospects and remorse was positive for the majority of offenders (65% and 63% of cases respectively).¹²³

Forfeiture and confiscation orders

- 5.20 Forfeiture or confiscation orders were taken into account in sentencing in 11% of cases.

115. County Court of Victoria, Unpublished Sentencing Remarks (provided to the Council for the purpose of research and analysis).

116. County Court of Victoria, Unpublished Sentencing Remarks (provided to the Council for the purpose of research and analysis).

117. County Court of Victoria, Unpublished Sentencing Remarks (provided to the Council for the purpose of research and analysis).

118. A national study of police detainees between 2008 and 2010 found that heavy drug use of either amphetamines or opioids in the 30 days prior to arrest was associated with frequency of property offending. See Deborah Bradford and Jason Payne, 'Illicit Drug Use and Property Offending among Police Detainees' *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* 157 (2012).

119. The mental illnesses described in the sentencing remarks included mental illnesses (such as depression) that developed as a result of detention on remand; that is, the offender's mental illness did not necessarily pre-date the offending.

120. Adult trauma includes the loss of a partner or a child or a similarly traumatic experience.

121. For the purpose of coding the sentencing remarks, 'childhood abuse, neglect, or severe disruption' included an interrupted or incomplete childhood education. In future studies, the Council intends to separate out 'limited childhood education' so data can be obtained on that factor alone.

122. *R v Verdins* (2007) 16 VR 269, 276. In that case, the Court of Appeal stated that mental impairment could be relevant to sentencing in at least five ways. Mental impairment could reduce the offender's moral culpability, influence the type of sentence imposed, reduce the weight given to deterrence in sentencing, increase the hardship experienced by the offender in prison, and justify a less severe sentence where there is a serious risk that imprisonment could have a significant adverse effect on the offender's mental health.

123. With respect to the inter-rater reliability review, the analysis demonstrated substantial agreement regarding coding of the judge's assessment of remorse: Kappa = 0.65, $p < 0.002$, and substantial agreement regarding coding of the judge's assessment of prospects of rehabilitation: Kappa = 0.79, $p < 0.001$.

High-level sentencing outcomes

5.21 The data below relate to the sentencing outcomes for all charges and cases of trafficking in a commercial quantity during the reference period.¹²⁴

Sentences for individual charges

- 5.22 Imprisonment was imposed for 87% of charges (n = 132) during the reference period. Suspended sentences of imprisonment were rarely imposed, with 6% of charges receiving a partially suspended sentence (n = 9) and 5% of charges receiving a wholly suspended sentence (n = 8).¹²⁵
- 5.23 The median term of imprisonment for a charge of trafficking in a commercial quantity was 4 years. The shortest term of imprisonment was 9 months, and the longest term of imprisonment was 7 years.

Total effective sentences and non-parole periods

- 5.24 During the reference period, cases that included a proven charge of trafficking in a commercial quantity had:
- an average of 3.2 proven charges of any kind per case; and
 - an average of 1.1 proven charges of trafficking in a commercial quantity per case.
- 5.25 A total effective sentence of imprisonment was imposed in 86% of cases (n = 119). A partially suspended sentence was imposed in 7% of cases (n = 9), and a wholly suspended sentence was imposed in 7% of cases (n = 10).
- 5.26 The median total effective term of imprisonment was 4 years and 6 months, which is only 6 months higher than the median imprisonment term for individual charges of trafficking in a commercial quantity.
- 5.27 During the reference period, the median non-parole period was 2 years and 6 months, which represents 56% of the median total effective imprisonment term of 4 years and 6 months.

Case sub-groups

5.28 The cluster analysis identified three sub-groups of cases within this offence.¹²⁶ The case characteristics within each sub-group are displayed in Appendix 2, along with the outcomes of relevant tests for differences in frequencies. The distinguishing characteristics of these sub-groups (referred to as *clusters*) are described below.

124. The sentencing statistics discussed in this section are based on the most up-to-date data available from the Higher Courts Conviction Returns database provided by Court Services Victoria for the period 2008–09 to 2012–13. The Council performs quality assurance checks on these data. As sentencing statistics are always subject to revision due to quality assurance checks and the provision of additional data, the statistics in this section may differ somewhat from the statistics that the Council presents elsewhere in relation to the reference offences (for example, in the Council's SACStat Higher Courts database and Sentencing Snapshots).

125. The other sentences imposed were a combined imprisonment and community correction order (0.7% of charges, n = 1) and a wholly suspended sentence combined with a fine (1.3% of charges, n = 2).

126. The case clusters were identified using the cluster analysis technique described at [3.4]–[3.6].

Cluster 1

5.29 Cluster 1 contains 68 cases (49% of all cases of trafficking in a commercial quantity). The defining characteristics of Cluster 1 are based on statistical testing (as detailed in Appendix 2). Relative to Clusters 2 and 3, Cluster 1 has:

- more cases involving younger offenders (16% aged 18 to 24 years);
- fewer cases involving offenders who had previously been imprisoned (7%);
- fewer cases involving offenders who had a history of prior offending, both generally (38%) and in relation to each type of prior offending examined;
- more cases involving offenders who received a positive assessment in relation to remorse (81%); and
- more cases involving offenders who received a positive assessment in relation to prospects of rehabilitation (90%).

Clusters 2 and 3

5.30 Relative to Cluster 1, Cluster 2 (44 cases or 32% of all cases of trafficking in a commercial quantity) and Cluster 3 (26 cases or 19% of all cases of trafficking in a commercial quantity) have some important similarities, including:

- a high percentage of cases involving offenders who had previously been imprisoned (Cluster 2 = 39% and Cluster 3 = 35%);
- a high percentage of cases involving offenders with histories of prior offending both generally (Cluster 2 = 84% and Cluster 3 = 81%) and in relation to each type of prior offending examined; and
- fewer cases involving offenders who received a positive assessment in relation to remorse (Cluster 2 = 48% and Cluster 3 = 42%).

5.31 In addition to this, in comparison with cases in Cluster 2, Cluster 3 was:

- more likely to include cases where the offender had prospects of rehabilitation described in contingent (54%) or negative (31%) terms;
- less likely to include cases where offenders assisted law enforcement authorities (8%); and
- more likely to include cases where the offender pleaded guilty to all charges of the reference offences (100%).

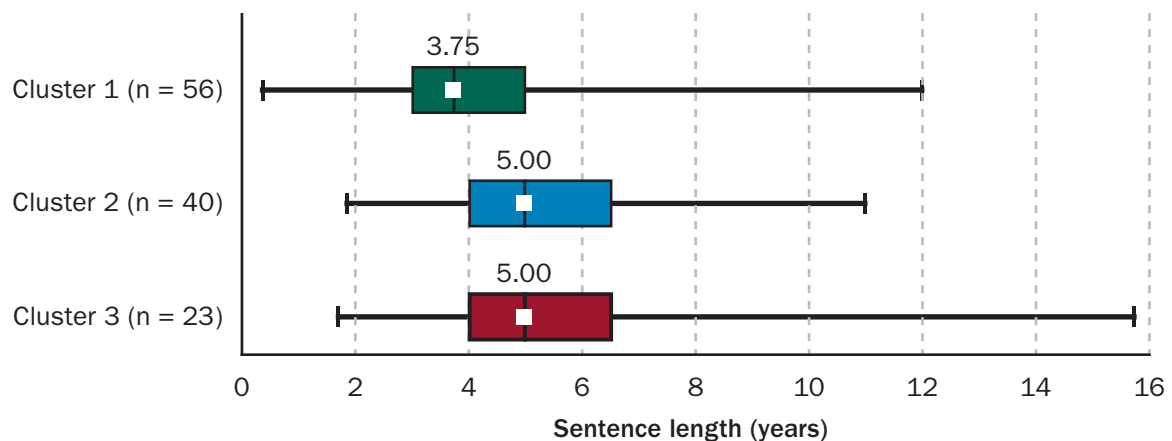
The relationship between drug quantity and each cluster

5.32 There were no significant differences between the three clusters in respect of the quantities of drugs that were trafficked (see Appendix 2). This means that drug quantity was not the defining characteristic that helped separate the cases into the three clusters.

Sentencing outcomes in each cluster

- 5.33 Total effective sentences, rather than sentences at the individual charge level, are described in this section because the cluster analysis has been performed at the case (total effective sentence) level.
- 5.34 The large majority of offenders (86% of cases) during the reference period received a term of imprisonment for trafficking in a commercial quantity. Accordingly, there were few differences in sentence types between the three clusters.¹²⁷ Imprisonment was imposed in 82% of cases in Cluster 1,¹²⁸ 91% of cases in Cluster 2,¹²⁹ and 88% of cases in Cluster 3.¹³⁰
- 5.35 The main differences in sentencing outcomes relate to the length of terms of imprisonment. Figure 4 displays the range of imprisonment terms and median imprisonment terms for cases in Clusters 1, 2, and 3 during the reference period.¹³¹ Appendix 4 explains how to interpret the box-and-whiskers-plots used in Figure 4.
- 5.36 For cases in Cluster 1, the median term of imprisonment was 3 years and 9 months. The shortest term of imprisonment was 4 months, and the longest term of imprisonment was 12 years. These outcomes are consistent with the features of offenders in Cluster 1, who were much less likely to have a history of prior offending or imprisonment and were more likely to have received positive assessments in relation to remorse and rehabilitation than offenders in Clusters 2 and 3.
- 5.37 For cases in Clusters 2 and 3, the median term of imprisonment was identical at 5 years. However, the longest term of imprisonment for cases in Cluster 2 was 11 years, compared with 15 years and 9 months for cases in Cluster 3.¹³²
- 5.38 The shortest term of imprisonment for cases in Cluster 2 was 1 year and 10 months, while the shortest term of imprisonment for cases in Cluster 3 was 1 year and 8 months.

Figure 4: Imprisonment term ranges and median imprisonment terms (years), trafficking in a commercial quantity, Cluster 1, Cluster 2, and Cluster 3, 2008–09 to 2012–13



127. Nine offenders received a partially suspended sentence, and 10 offenders received a wholly suspended sentence.

128. The other sentence types in Cluster 1 were a partially suspended sentence (6% of cases) and a wholly suspended sentence (12% of cases).

129. The other sentence types in Cluster 2 were a partially suspended sentence (4.5% of cases) and a wholly suspended sentence (4.5% of cases).

130. The only other sentence type in Cluster 3 was a partially suspended sentence (12% of cases).

131. The distributions of suspended sentence lengths are not shown, because suspended sentences were only imposed for exceptional reasons (such as significant informer discounts and very ill health) over the reference period. It would therefore be misleading to suggest that there is any kind of sentencing pattern among cases that received a suspended sentence, particularly in light of the few cases overall (19) that received a suspended sentence for the offence of trafficking in a commercial quantity during the reference period.

132. While the data showed differences in median imprisonment terms between Cluster 1 and Clusters 2 and 3, these differences were not found to be statistically significant, possibly due to the small sample sizes of each cluster.

6. Trafficking in a large commercial quantity

6.1 This section presents:

- a profile of sentencing factors for the offence of trafficking in a drug of dependence in a large commercial quantity (*trafficking in a large commercial quantity*);
- the high-level sentencing outcomes for this offence; and
- a profile of case sub-groups and the sentencing outcomes for each sub-group.

Profile of sentencing factors

6.2 There were 72 cases (79 charges) of trafficking in a large commercial quantity during the reference period.

6.3 Table 7 lists the number and percentage of cases in which a particular sentencing factor was referred to in the judge's sentencing remarks for offenders sentenced during the reference period.

Table 7: Number and percentage of cases containing a particular sentencing factor, trafficking in a large commercial quantity, 2008–09 to 2012–13¹³³

Sentencing factor	No. of cases	% of cases
Factors relating to the offence		
Drug type – cannabis*	1	1%
Drug type – methylamphetamine/ice*	23	29%
Drug type – MDMA/ecstasy*	33	42%
Drug type – heroin*	8	10%
Drug type – amphetamine*	2	3%
Drug type – cocaine*	2	3%
Drug type – precursor substances (pseudoephedrine and P2P)*	2	3%
Drug type – aggregated drug types*	7	9%
Drug type – not stated*	1	1%
Quantity (all drug types except cannabis) – 1 to less than 2 times threshold quantity*	18	23%
Quantity (all drug types except cannabis) – 2 to less than 10 times threshold quantity*	32	41%
Quantity (all drug types except cannabis) – 10 times threshold quantity or higher*	15	19%
Quantity (all drug types except cannabis) – not stated or uncertain*	13	17%
Duration of offending – 1 day*	11	14%
Duration of offending – more than 1 day to less than 1 month*	7	9%
Duration of offending – 1 month to less than 3 months*	15	19%

133. The percentages in relation to drug type, duration of offending, offender role, and prospects of rehabilitation do not sum to 100% due to rounding. Table 7 does not include quantity ranges in relation to cannabis because there was only one charge of trafficking in a large commercial quantity of cannabis (which involved a quantity of more than 80 kg/more than 320 plants) during the reference period. For drug quantity (all drug types except cannabis), the percentages are expressed as a percentage of total charges involving drugs except cannabis (n = 78). The numbers and percentages for specific types of prior offending total more than the numbers and percentages for 'prior offending – any offences' because some offenders had more than one type of prior offending.

Sentencing factor	No. of cases	% of cases
Duration of offending – 3 months to less than 6 months*	14	18%
Duration of offending – 6 months to less than 12 months*	19	24%
Duration of offending – 12 months or more*	6	8%
Duration of offending – not stated*	7	9%
Factors relating to the offender		
Male	71	99%
18–24 years	6	8%
25–34 years	27	38%
35–44 years	24	33%
45–54 years	12	17%
55 years and over	3	4%
Role – principal/proprietor	17	24%
Role – significant	30	42%
Role – minor	8	11%
Role – not stated	17	24%
Pleaded guilty*	74	94%
Pleaded not guilty*	5	6%
Assisted law enforcement authorities	17	24%
Prior offending – any offences	40	56%
Prior offending – violent offences	6	8%
Prior offending – dishonesty/property offences	16	22%
Prior offending – drug offences	21	29%
Prior offending – driving offences	10	14%
Prior offending – firearm offences	3	4%
Prior offending – sexual offences	0	0%
Prior offending – other offences	5	7%
Previously imprisoned	15	21%
Committed offence while on existing court order	11	15%
Sentenced as a serious drug offender	15	21%
Mental illness	39	54%
Cognitive impairment	1	1%
Substance abuse	54	75%
Childhood sexual abuse	1	1%
Childhood abuse/neglect/severe disruption	19	26%
Adult trauma/health problems	15	21%
Gambling problems	17	24%
Prospects of rehabilitation – positive	41	57%
Prospects of rehabilitation – contingent	9	13%
Prospects of rehabilitation – negative	5	7%
Prospects of rehabilitation – not stated	17	24%
Assessment of remorse – positive	45	63%
Assessment of remorse – negative	11	15%
Assessment of remorse – not stated	16	22%
Forfeiture or confiscation order taken into account in sentencing	4	6%

*The data in relation to this sentencing factor refer to the number and percentage of charges having this particular factor.

Drug type, drug quantity range, and duration of offending

- 6.4 During the reference period, MDMA/ecstasy was the most common type of drug trafficked in a large commercial quantity (42% of charges), followed by methylamphetamine/ice (29% of charges) and heroin (10% of charges). The trafficking of cocaine in a large commercial quantity was rare (3% of charges), and there was only one charge of trafficking in a large commercial quantity of cannabis. In 9% of charges, an aggregated quantity of various drug types was trafficked.
- 6.5 To the extent that drug quantity was identified in the sentencing remarks,¹³⁴ most large commercial quantities fell within the range of 2 to less than 10 times the threshold quantity (41% of charges). For drugs such as MDMA/ecstasy, methylamphetamine/ice, and heroin, that range equates to 2 kg to less than 10 kg of the drug (using the mixed form quantities adopted for the analysis).¹³⁵ Quantities of less than 2 times the threshold quantity were trafficked in 23% of charges. Almost one-fifth (19%) of charges involved quantities of 10 times the threshold quantity or higher.
- 6.6 The most common period of offending was 6 months to less than 12 months (24% of charges).

Factors relating to the offender

Role in offence¹³⁶

- 6.7 To the extent that the offender's role was identified in the sentencing remarks,¹³⁷ most offenders who trafficked in a large commercial quantity had a *significant role* (42% of all cases), such as being a close associate of the principal (including a lieutenant or 'right-hand man'), directing or organising key steps in the supply chain, manufacturing drugs, sourcing drugs, or providing critical skills/expertise. A smaller percentage of offenders (24% of cases) had the role of principal/proprietor, while 11% of offenders had a minor role, which included couriers who moved drugs between safe-houses, agents who performed menial tasks for principals, and safe-guarders of drugs.
- 6.8 By introducing the offence of trafficking in a large commercial quantity and its maximum penalty of life imprisonment,¹³⁸ parliament intended to:
- attack the Mr Bigs of the drug trade, who operate at the top of the manufacturing and distribution hierarchy and who make large profits from trafficking in drugs. It is not directed at drug addicts who peddle drugs in order to obtain money to feed their own drug addiction.¹³⁹

134. Drug quantity was not stated or was described in uncertain terms (for example, 'at least a large commercial quantity') in relation to 17% of charges.

135. See *Drugs, Poisons and Controlled Substances Act 1981* (Vic) sch 11 pt 3.

136. With respect to the inter-rater reliability review, the analysis demonstrated fair-to-moderate agreement regarding coding of the role of the offender: Kappa = 0.40, $p < 0.003$.

137. In 24% of cases, the role of the offender was not stated in the sentencing remarks, or the way in which the role was described was too ambiguous to confidently categorise the role.

138. *Drugs, Poisons and Controlled Substances (Amendment) Act 2001* (Vic) s 5.

139. Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 16 August 2001, 29 (Robert Hulls, Attorney-General).

- 6.9 The findings about role indicate that prosecutions of this offence are capturing not only the principals of trafficking operations but also, more commonly, offenders in significant roles. Offenders in these mid-level roles have important responsibilities in trafficking operations but may be regarded as deserving of a less severe sentence than offenders in a principal role.¹⁴⁰

Plea and assistance to authorities

- 6.10 The overwhelming majority of offenders pleaded guilty, with guilty pleas entered for 94% of charges.
- 6.11 Among traffickers of large commercial quantities, the rate of assistance to law enforcement authorities was the same as the rate of assistance among traffickers of commercial quantities (24% of cases respectively). Twenty-four percent of offenders assisted authorities in some manner. The Council defined *assistance* to include cooperation upon arrest, the making of full and frank admissions, and/or an undertaking to assist in the investigation or the prosecution of an offence. As such, the percentage of offenders specifically undertaking to give evidence or act as informants was less than 24%.¹⁴¹

Prior offending

- 6.12 Over half (56%) of all offenders had a history of prior offending. The most common type of prior offending was related to drug offences (29% of all offenders), followed by dishonesty or property offences (22% of all offenders), and driving offences (14% of all offenders). Only 8% of offenders had a history of violent offending, which is lower than the rate of prior violent offending among traffickers in a commercial quantity (17% of all offenders convicted of that offence). Consistent with prior research, this finding further demonstrates that serious drug traffickers are unlikely to have a criminal history involving violent offending.¹⁴²
- 6.13 Twenty-one percent of offenders were sentenced as serious drug offenders within the meaning of Part 2A of the *Sentencing Act 1991* (Vic) (versus 15% of offenders who were convicted of trafficking in a commercial quantity). This suggests that, in comparison with traffickers in a commercial quantity, traffickers in a large commercial quantity were more likely to have a history of drug offending for which they were imprisoned, or they were more likely to be sentenced for several drug offence charges at the one trial.¹⁴³
- 6.14 Fifteen percent of offenders committed the offence while subject to an existing order.

140. *R v Olbrich* (1999) 199 CLR 270, 277–278, 279–280; *Director of Public Prosecutions v Downing* [2007] VSCA 154 (7 August 2007); *Bernath v The Queen* [2014] VSCA 195 (3 September 2014) [42], [75]; *Dao v The Queen*; *Tran v The Queen* [2014] VSCA 93 (14 May 2014) [16], citing *Wong v The Queen* (2001) 207 CLR 584, 609.

141. It was almost impossible to quantify the exact reductions to sentence for an undertaking to assist authorities, as the reduction was ordinarily intertwined with any discount for a guilty plea.

142. See *Desroches* (2007), above n 111, 837–838.

143. In considering whether an offender should be sentenced as a serious drug offender, the court has regard to any other conviction/s for a drug offence for which the offender received a term of imprisonment, regardless of whether these convictions are recorded at the current trial or at an earlier trial: *Sentencing Act 1991* (Vic) ss 6B(2) (definition of ‘serious drug offender’), 6C. Accordingly, in the sentencing remarks analysed for this report, a person was sometimes sentenced as a serious drug offender for second and subsequent charges of trafficking determined at the one hearing.

Personal circumstances of offender

- 6.15 The large majority (75%) of offenders were described as having a history of substance abuse. Substance abuse was dealt with in various ways in sentencing, as it was for the offence of trafficking in a commercial quantity. For example, in one case, the offender's drug addiction was not mitigatory in itself, but it placed the offending in context and demanded a less severe sentence than a case of trafficking for 'greed'.¹⁴⁴ In another case, the offender's drug addiction resulted in sentence moderation because he had trafficked in order to satisfy his addiction, and he was under the influence and direction of a more senior co-accused due to his young age and heavy addiction.¹⁴⁵ In several other cases, drug addiction did not moderate the sentence in any manner because, for example, the amount trafficked had far exceeded what was necessary to satisfy the addiction, or the offender was motivated by both addiction and the making of profits.¹⁴⁶ Often the judge noted a history of substance abuse but made no further remarks about this fact.
- 6.16 As noted in relation to the offence of trafficking in a commercial quantity, there may be a causal link between the high percentage of offenders with a history of substance abuse and the percentage of offenders with a history of property offending.¹⁴⁷
- 6.17 A considerable percentage of offenders were described as having a history of mental illness (54%),¹⁴⁸ adult trauma or health problems (21%),¹⁴⁹ or childhood abuse, neglect, or severe disruption (26%).¹⁵⁰
- 6.18 The court's assessment of rehabilitation prospects and remorse was positive for the majority of offenders (57% and 63% of cases respectively).¹⁵¹

Forfeiture and confiscation orders

- 6.19 Forfeiture or confiscation orders were taken into account in sentencing in 6% of cases.

144. County Court of Victoria, Unpublished Sentencing Remarks (provided to the Council for the purpose of research and analysis).

145. County Court of Victoria, Unpublished Sentencing Remarks (provided to the Council for the purpose of research and analysis).

146. County Court of Victoria, Unpublished Sentencing Remarks (provided to the Council for the purpose of research and analysis).

147. See Bradford and Payne (2012), above n 118.

148. The mental illnesses described in the sentencing remarks included mental illnesses (such as depression) that developed as a result of detention on remand; that is, the offender's mental illness did not necessarily pre-date the offending.

149. Adult trauma includes the loss of a partner or a child or a similarly traumatic experience.

150. For the purpose of coding the sentencing remarks, 'childhood abuse, neglect, or severe disruption' included an interrupted or incomplete childhood education. In future studies, the Council intends to separate out 'limited childhood education' so data can be obtained on that factor alone.

151. With respect to the inter-rater reliability review, the analysis demonstrated substantial agreement regarding coding of the judge's assessment of remorse: Kappa = 0.69, $p < 0.001$, and almost perfect agreement regarding coding of the judge's assessment of prospects of rehabilitation: Kappa = 0.83, $p < 0.001$.

High-level sentencing outcomes

6.20 The data below relate to the sentencing outcomes for all charges and cases of trafficking in a large commercial quantity during the reference period.¹⁵²

Sentences for individual charges

- 6.21 Imprisonment was imposed for 97% of charges (n = 77) during the reference period.
- 6.22 Suspended sentences of imprisonment were very rarely imposed for trafficking in a large commercial quantity (3% of charges, n = 2). Of the suspended sentences, a partially suspended sentence was imposed for unusual offending – a highly drug-addicted offender was manufacturing methylamphetamine in his shed, in very amateurish circumstances without any element of commerciality.¹⁵³ Another offender was given a ‘very high’ discount for undertaking to assist authorities, which seemed to be the key reason for the imposition of a wholly suspended sentence.¹⁵⁴
- 6.23 The median term of imprisonment for a charge of trafficking in a large commercial quantity was 7 years. The shortest term of imprisonment was 3 years, and the longest term of imprisonment was 20 years.

Total effective sentences and non-parole periods

- 6.24 During the reference period, cases that included a proven charge of trafficking in a large commercial quantity had:
- an average of 3.6 proven charges of any kind per case; and
 - an average of 1.10 proven charges of trafficking in a large commercial quantity per case.
- 6.25 Imprisonment was imposed as a total effective sentence in 97% of cases (n = 70), and suspended sentences were imposed in 3% of cases (n = 2).
- 6.26 The median total effective term of imprisonment was 7 years and 10 months, which is only 10 months longer than the median imprisonment term for individual charges of trafficking in a large commercial quantity.
- 6.27 During the reference period, the median non-parole period was 5 years, which represents 64% of the median total effective imprisonment term of 7 years and 10 months.

Case sub-groups

6.28 The cluster analysis identified two sub-groups of cases within this offence.¹⁵⁵ The case characteristics within each sub-group are displayed in Appendix 3, along with the outcomes of relevant tests for differences in frequencies. The distinguishing characteristics of these sub-groups (referred to as *clusters*) are described below.

152. The sentencing statistics discussed in this section are based on the most up-to-date data available from the Higher Courts Conviction Returns database provided by Court Services Victoria for the period 2008–09 to 2012–13. The Council performs quality assurance checks on these data. As sentencing statistics are always subject to revision due to quality assurance checks and the provision of additional data, the statistics in this section may differ somewhat from the statistics that the Council presents elsewhere in relation to the reference offences (for example, in the Council’s SACStat Higher Courts database and Sentencing Snapshots).

153. County Court of Victoria, Unpublished Sentencing Remarks (provided to the Council for the purpose of research and analysis).

154. County Court of Victoria, Unpublished Sentencing Remarks (provided to the Council for the purpose of research and analysis).

155. The case clusters were identified using the cluster analysis technique described at [3.4]–[3.6].

Cluster 1

6.29 Cluster 1 contains 43 cases (60% of all cases of trafficking in a large commercial quantity). The defining characteristics of Cluster 1 are based on statistical significance testing (as detailed in Appendix 3). Relative to Cluster 2, Cluster 1 has:

- fewer cases involving methylamphetamine/ice (28%);
- fewer cases involving trafficking in a quantity of 10 or more times the large commercial threshold (9%);
- more cases involving younger offenders (14% aged 18 to 24 years);
- fewer cases involving offenders who had a history of dishonesty/property offending (9%);
- more cases where the offender received a positive assessment in relation to remorse (86%);
- more cases where the offender received a positive assessment in relation to prospects of rehabilitation (88%);
- more cases where the offender assisted law enforcement authorities (35%); and
- more cases where the offender pleaded guilty to all charges of the reference offences (100%).

Cluster 2

6.30 Cluster 2 contains 29 cases (40% of all cases of trafficking in a large commercial quantity). The defining characteristics of Cluster 2 are based on statistical significance testing (as detailed in Appendix 3). Relative to Cluster 1, Cluster 2 has:

- more cases involving methylamphetamine/ice (52%);
- more cases involving trafficking in a quantity of 10 or more times the large commercial threshold (34%);
- more cases involving offenders who had a history of dishonesty/property offending (41%);
- fewer cases where the offender received a positive assessment in relation to remorse (28%);
- fewer cases where the offender received a positive assessment in relation to prospects of rehabilitation (10%);
- fewer cases where the offender assisted law enforcement authorities (7%); and
- cases with far fewer guilty pleas – in 79% of cases the offender pleaded guilty to all charges of the reference offences, and in 17% of cases the offender pleaded guilty to none of the charges of the reference offences.

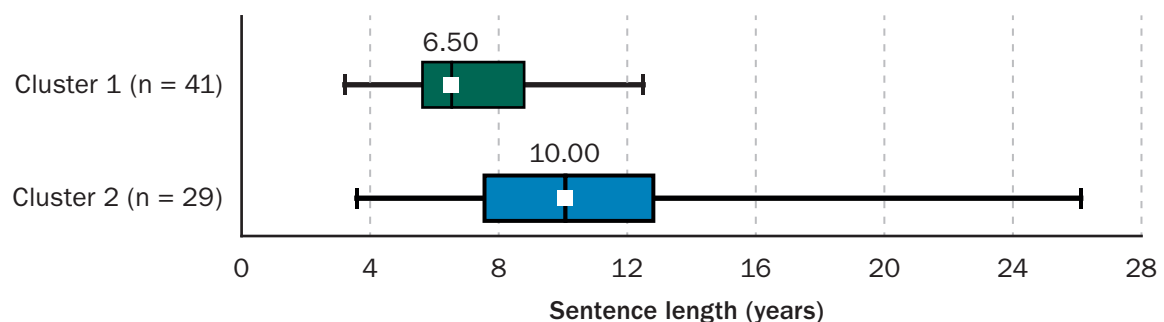
Differences between sub-groups that were not statistically significant

6.31 There were several differences between Cluster 1 and Cluster 2 that were not statistically significant; that is, testing showed that the differences may have occurred by chance. This is most likely due to the smaller sample sizes for the offence of trafficking in a large commercial quantity in comparison with the other reference offences. The sentencing factors that did not result in statistically significant differences between the two clusters (and therefore did not contribute to the definitions of either cluster) included the role of the offender, the duration of offending, and the offender's general history of prior offending.

Sentencing outcomes in each cluster

- 6.32 Total effective sentences, rather than sentences at the individual charge level, are described in this section because the cluster analysis has been performed at the case (total effective sentence) level.
- 6.33 Almost all offenders (97% of cases) received a term of imprisonment for trafficking in a large commercial quantity during the reference period. Accordingly, there is essentially no difference in sentence types between the two clusters.¹⁵⁶
- 6.34 The differences in sentencing outcomes relate to the length of imprisonment terms. Figure 5 displays the range of imprisonment terms and median imprisonment terms for cases in Cluster 1 and Cluster 2 during the reference period. Appendix 4 explains how to interpret the box-and-whiskers-plots used in Figure 5.
- 6.35 The differences in imprisonment terms are consistent with the profiles of each cluster. The analysis shows that there are meaningful case sub-groups that received substantially different sentences for trafficking in a large commercial quantity.
- 6.36 For cases in Cluster 1, the median term of imprisonment was 6 years and 6 months. By contrast, for cases in Cluster 2, the median term of imprisonment was 10 years.¹⁵⁷
- 6.37 For cases in Cluster 1, the shortest term of imprisonment was 3 years and 2 months, and the longest term of imprisonment was 12 years and 6 months. For cases in Cluster 2, the shortest term of imprisonment was 3 years and 6 months, and the longest term of imprisonment was 26 years. In 25% of cases in Cluster 2, an imprisonment term of between 12 years and 9 months and 26 years was imposed.

Figure 5: Imprisonment term ranges and median imprisonment terms (years), trafficking in a large commercial quantity, Cluster 1 and Cluster 2, 2008-09 to 2012-13



¹⁵⁶. Only one offender received a partially suspended sentence, and only one offender received a wholly suspended sentence. These offenders were found in Cluster 1.

¹⁵⁷. The differences in median imprisonment terms are statistically significant.

7. Conclusions and future research

New insights into current sentencing practices

- 7.1 High-level sentencing statistics are a valuable tool for assessing the proportionality of a proposed sentence. However, where the nature of offending behaviour varies significantly within an offence – as is the case for each of the three reference offences – a deeper analysis of sentencing statistics is warranted. The analysis in this report reveals that each of the reference offences has distinct sub-groups of cases in which certain sentencing factors predominate, and sentencing outcomes differ among these sub-groups.
- 7.2 Table 8 displays the differences in median total effective imprisonment terms between sub-groups during the reference period.
- 7.3 The differences summarised in Table 8 reinforce the view that high-level sentencing statistics offer only a general yardstick against which to measure a proposed sentence.¹⁵⁸

Table 8: Median total effective imprisonment terms for the reference offences, overall offence level and case sub-groups, 2008–09 to 2012–13

Offence	Median total effective imprisonment term			
	All cases	Cluster 1	Cluster 2	Cluster 3
Cultivating a commercial quantity of narcotic plants	2 years and 6 months	2 years	3 years	n.a.
Trafficking in a drug of dependence in a commercial quantity	4 years and 6 months	3 years and 9 months	5 years	5 years
Trafficking in a drug of dependence in a large commercial quantity	7 years and 10 months	6 years and 6 months	10 years	n.a.

158. *Director of Public Prosecutions v Hill* (2012) 223 A Crim R 285, 298–299; *Russell v The Queen* (2011) 212 A Crim R 57, 70.

Baseline sentencing

- 7.4 Baseline sentencing is premised on consideration of a single median value, derived from all sentences imposed for the particular baseline offence.¹⁵⁹ Baseline sentencing does not account for any meaningful sub-groups that may be present, as revealed by the cluster analysis.
- 7.5 Baseline sentencing requires a court to sentence charges of trafficking in a large commercial quantity consistent with parliament's intent that the type of charges that received the median sentence of 6 years and 6 months prior to baseline sentencing¹⁶⁰ should now receive the prescribed baseline sentence of 14 years,¹⁶¹ irrespective of whether those charges fall within the different sub-groups identified in this report.

The relevance of drug quantity

- 7.6 In sentencing major drug offences, the particular quantity of drugs cultivated or trafficked is a key consideration as a matter of law and practice.¹⁶² However, based on the findings in this report, drug quantity does not necessarily distinguish sentencing outcomes.
- 7.7 The sub-groups identified for trafficking in a large commercial quantity were partly defined by the particular quantity of drugs trafficked (Cluster 1 had fewer cases involving a quantity of 10 or more times the large commercial threshold, whereas Cluster 2 had more cases involving a quantity of 10 or more times the large commercial threshold).
- 7.8 By contrast, the sub-groups identified for cultivating a commercial quantity of narcotic plants and trafficking in a commercial quantity were not defined by the particular quantity of drugs involved in the offence. Accordingly, factors other than drug quantity appear to be driving the different sentencing outcomes between sub-groups (for example, the different personal characteristics of house-sitters versus principals/proprietors in respect of the cultivation offence).
- 7.9 These findings are consistent with the High Court of Australia's judgment in *Wong v The Queen* (a Commonwealth drug importation case).¹⁶³ In that case, the New South Wales Court of Criminal Appeal had earlier handed down sentencing guidelines that attached chief significance to the quantity of narcotics imported and provided quantified sentencing guidance in relation to narcotic weight ranges of the court's own formulation. The High Court stated that the selection of drug quantity 'as the chief factor to be taken into account in fixing a sentence represents a departure from fundamental principle', because 'there are many conflicting and contradictory elements which bear upon sentencing an offender'.¹⁶⁴ Further, to prescribe drug quantity as a starting point for sentencing is 'based on the false premise that gravity of the offence can usually (perhaps even always) be assessed by reference to the weight of narcotic involved' and may also lead to an erroneous 'two-stage' sentencing process.¹⁶⁵

159. *Sentencing Act 1991* (Vic) s 5B.

160. The baseline offence median value for trafficking in a large commercial quantity was 6 years and 6 months for 2009–10 to 2013–14, as calculated in accordance with the methodology described in Sentencing Advisory Council, *Calculating the Baseline Offence Median: Report* (2014).

161. *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71(2).

162. *Dao v The Queen; Tran v The Queen* [2014] VSCA 93 (14 May 2014) [14]; *R v Clohesy* [2000] VSCA 206 (18 October 2000) [11]; *Chandler v The Queen; Paksoy v The Queen* [2010] VSCA 338 (9 December 2010) [23]; *Director of Public Prosecutions v Holder* [2014] VSCA 61 (8 April 2014) [10].

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

164. *Wong v The Queen* (2001) 207 CLR 584, 609, 611.

165. *Wong v The Queen* (2001) 207 CLR 584, 610–611.

Offence comparisons

7.10 The analysis also reveals differences and similarities among the profiles of each of the reference offences. Some of the key points of comparison are set out in Table 9.

7.11 Among other things, these findings indicate:

- very high rates of guilty pleas among persons convicted of the reference offences, which exceed the already high guilty plea rates in the Victorian higher courts overall (approximately 84% of all offenders pleaded guilty in the Victorian higher courts between 2009–10 and 2013–14, regardless of the offence);¹⁶⁶
- lower levels of general criminality among cultivation offenders than among trafficking offenders (based on rates of prior offending, prior imprisonment, and offending while subject to an existing court order); and
- gender differences among offenders – more women cultivate a commercial quantity of narcotic plants than traffick in a large commercial quantity (the latter offence is almost exclusively committed by male offenders).

Table 9: Percentage of cases with a particular sentencing factor, all reference offences, 2008–09 to 2012–13

Sentencing factor	% of cases		
	Cultivating a commercial quantity of narcotic plants	Trafficking in a drug of dependence in a commercial quantity	Trafficking in a drug of dependence in a large commercial quantity
Offending duration of 3 months or more (% of charges)	36%	43%	49%
Gender – male	89%	91%	99%
Age – 18–34 years	42%	43%	46%
Assisted law enforcement authorities	55%	24%	24%
Guilty plea (% of charges)	93%	94%	94%
Prior offending (any offences)	31%	61%	56%
Prior drug offences	19%	36%	29%
Prior dishonesty/property offences	13%	32%	22%
Previously imprisoned	7%	22%	21%
Committed offence while on existing court order	4%	9%	15%
Gambling problems	20%	15%	24%
Substance abuse	37%	74%	75%
Positive assessment of prospects of rehabilitation	60%	65%	57%
Positive assessment of remorse	57%	63%	63%

166. This finding is consistent with New South Wales research showing a high percentage of guilty pleas, particularly early guilty pleas, among persons charged with drug offences. Of the drug offences sample in the New South Wales study, 68% of offenders entered an early guilty plea, 23.2% of offenders entered a late guilty plea, and 8.8% of offenders entered a not guilty plea: see Clare Ringland and Lucy Snowball, 'Predictors of Guilty Pleas in the NSW District Court', *Crime and Justice Statistics: Bureau Brief*, Issue Paper 96 (2014) 3.

Future research

7.12 There is scope for further research on the basis of the findings in this report, including on the following:

- an analysis, undertaken within sub-groups, of whether any one sentencing factor is predictive of sentencing outcomes, examining the factors influencing the variations in duration of imprisonment between sub-groups;
- an analysis of predictors of immediate custodial sentences and suspended sentences of imprisonment/community sentences among offenders convicted of cultivating a commercial quantity of narcotic plants;
- an analysis of whether sentencing outcomes differ according to drug type when all other variables are controlled for. Such an analysis might test whether there is a greater propensity to general criminality and aggravating factors among traffickers in certain types of drug in comparison with traffickers in other types of drug;
- an analysis of the drivers of very high guilty plea rates among offenders convicted of the reference offences;
- a further analysis of offender roles among traffickers in a commercial quantity; and
- an analysis of whether gambling is a specific pathway to any of the reference offences or is associated with offending in other ways (for example, whether there is a particular relationship between trafficking in a large commercial quantity and the substantial proportion of offenders in this category with a history of gambling problems).

Appendix 1

Cultivating a commercial quantity of narcotic plants

Table A1: Percentage of cases containing a particular sentencing factor, cultivating a commercial quantity of narcotic plants, Cluster 1 and Cluster 2, 2008–09 to 2012–13

Sentencing factor	% Cluster 1 (n = 201)	% Cluster 2 (n = 202)	Significant differences
Factors relating to the offence^a			
Quantity – 25 kg to 80 kg or 100 to 320 cannabis plants	70.1%	68.3%	
Quantity – more than 80 kg or more than 320 cannabis plants	25.4%	28.7%	
Quantity – not stated or uncertain	5.0%	5.4%	
Quantity (other non-cannabis drugs in the case) – 1.8 times the commercial quantity threshold or higher ^b	0.0%	0.5%	
Duration of offending – 1 day	12.9%	4.0%	*
Duration of offending – more than 1 day to less than 1 month	16.9%	6.4%	*
Duration of offending – 1 month to less than 3 months	30.8%	20.3%	*
Duration of offending – 3 months to less than 6 months	17.4%	31.2%	*
Duration of offending – 6 months to less than 12 months	6.5%	11.9%	
Duration of offending – 12 months or more	1.5%	7.4%	*
Duration of offending – not stated	14.9%	21.3%	
Factors relating to the offender			
Male	85.1%	93.1%	*
18–24 years	14.9%	3.5%	*
25–34 years	37.3%	28.2%	
35–44 years	23.4%	31.2%	
45–54 years	17.9%	20.8%	
55 years and over	6.5%	16.3%	*
Role – principal/proprietor	0.0%	77.2%	*
Role – house-sitter	71.1%	1.5%	*
Role – ancillary	28.9%	0.5%	*
Role – not stated	0.0%	20.8%	*
Pleaded guilty – all charges of reference offences in case	97.0%	91.1%	*
Assisted law enforcement authorities	53.7%	55.9%	
Prior offending – any offences [†]	11.9%	49.0%	*
Prior offending – violent offences [†]	1.5%	8.4%	*
Prior offending – dishonesty/property offences [†]	4.0%	21.3%	*
Prior offending – drug offences [†]	7.0%	31.7%	*
Prior offending – driving offences [†]	2.0%	12.9%	*
Prior offending – firearm offences [†]	0.0%	5.0%	*
Prior offending – sexual offences [†]	0.0%	0.5%	
Prior offending – other offences [†]	1.0%	8.9%	*
Previously imprisoned	1.5%	11.9%	*

Sentencing factor	% Cluster 1 (n = 201)	% Cluster 2 (n = 202)	Significant differences
Committed offence while on existing court order	3.0%	4.5%	
Sentenced as a serious drug offender	3.0%	5.4%	
Mental illness	27.9%	41.6%	*
Cognitive impairment	4.5%	4.0%	
Substance abuse	18.4%	55.0%	*
Childhood sexual abuse	0.5%	3.0%	
Childhood abuse/neglect/severe disruption	21.9%	20.8%	
Adult trauma/health problems	15.9%	34.7%	*
Gambling problems	24.4%	16.3%	*
Other	13.4%	10.9%	
Prospects of rehabilitation – positive	62.7%	57.9%	
Prospects of rehabilitation – contingent	2.5%	14.9%	*
Prospects of rehabilitation – negative	2.0%	5.4%	
Prospects of rehabilitation – not stated	32.8%	21.8%	*
Assessment of remorse – positive	58.2%	55.9%	
Assessment of remorse – negative	4.0%	8.4%	
Assessment of remorse – not stated	37.8%	35.6%	
Forfeiture or confiscation order taken into account in sentencing	3.0%	8.9%	*

a For 'factors relating to the offence', percentages will not add to 100% because some cases may contain charges that fall into multiple categories.

b This is due to both cultivation and commercial trafficking (in a drug other than cannabis) charges appearing in the same case.

† The numbers and percentages for specific types of prior offending total more than the numbers and percentages for 'prior offending – any offences' because some offenders had more than one type of prior offending.

Appendix 2

Trafficking in a drug of dependence in a commercial quantity

With respect to drug quantity, the ranges described in Table A2 include both commercial quantity drug ranges and large commercial quantity drug ranges, because a case of trafficking in a commercial quantity sometimes included a charge of trafficking in a large commercial quantity.

Table A2: Percentage of cases containing a particular sentencing factor, trafficking in a drug of dependence in a commercial quantity, Cluster 1, Cluster 2, and Cluster 3, 2008–09 to 2012–13

Sentencing factor	%	%	%	Significant differences		
	Cluster 1 (n = 68)	Cluster 2 (n = 44)	Cluster 3 (n = 26)	1 vs 2	1 vs 3	2 vs 3
Factors relating to the offence^a						
Drug type – 1P2N	0.0%	2.3%	0.0%			
Drug type – amphetamine	4.4%	4.5%	3.8%			
Drug type – cannabis	25.0%	11.4%	19.2%			
Drug type – cocaine	5.9%	4.5%	3.8%			
Drug type – MDMA/ecstasy	25.0%	22.7%	30.8%			
Drug type – heroin	4.4%	6.8%	11.5%			
Drug type – methylamphetamine/ice	45.6%	56.8%	34.6%			
Drug type – MDP2P	0.0%	2.3%	0.0%			
Drug type – pseudoephedrine	0.0%	6.8%	11.5%			
Drug type – steroids	1.5%	0.0%	0.0%			
Drug type – not stated	2.9%	0.0%	3.8%			
Quantity (all drug types except cannabis) – 1 to less than 1.8 times commercial threshold	27.9%	29.5%	42.3%			
Quantity (all drug types except cannabis) – 1.8 times commercial threshold or higher	39.7%	36.4%	23.1%			
Quantity (all drug types except cannabis) – 1 to less than 2 times large commercial threshold	0.0%	4.5%	0.0%			
Quantity (all drug types except cannabis) – 2 to less than 10 times large commercial threshold	2.9%	4.5%	3.8%			
Quantity (all drug types except cannabis) – 10 times large commercial threshold or higher	1.5%	0.0%	3.8%			
Quantity (all drug types including cannabis) – not stated	19.1%	27.3%	23.1%			
Quantity (cannabis) – 25 kg to 80 kg or 100 to 320 plants	10.3%	4.5%	7.7%			
Quantity (cannabis) – more than 80 kg or more than 320 plants	13.2%	4.5%	11.5%			
Duration of offending – 1 day	20.6%	15.9%	11.5%			
Duration of offending – more than 1 day to less than 1 month	5.9%	15.9%	19.2%			
Duration of offending – 1 month to less than 3 months	20.6%	9.1%	38.5%			*
Duration of offending – 3 months to less than 6 months	10.3%	38.6%	26.9%	*		
Duration of offending – 6 months to less than 12 months	26.5%	9.1%	0.0%	*	*	*
Duration of offending – 12 months or more	5.9%	4.5%	3.8%			
Duration of offending – not stated	13.2%	11.4%	11.5%			

Sentencing factor	%	%	%	Significant differences		
	Cluster 1 (n = 68)	Cluster 2 (n = 44)	Cluster 3 (n = 26)	1 vs 2	1 vs 3	2 vs 3
Factors relating to the offender						
Male	91.2%	95.5%	84.6%			
18–24 years	16.2%	2.3%	3.8%	*	*	
25–34 years	45.6%	13.6%	34.6%	*		*
35–44 years	33.8%	31.8%	38.5%			
45–54 years	4.4%	34.1%	19.2%	*		
55 years and over	0.0%	18.2%	3.8%	*		*
Pleaded guilty – all charges of reference offences in case	100.0%	81.8%	100.0%	*		*
Pleaded guilty – some charges of reference offences in case	0.0%	2.3%	0.0%			
Pleaded guilty – no charges of reference offences in case	0.0%	15.9%	0.0%	*		*
Assisted law enforcement authorities	27.9%	27.3%	7.7%		*	*
Prior offending – any offences [†]	38.2%	84.1%	80.8%	*	*	
Prior offending – violent offences [†]	7.4%	22.7%	30.8%	*	*	
Prior offending – dishonesty/property offences [†]	4.4%	63.6%	50.0%	*	*	
Prior offending – drug offences [†]	17.6%	50.0%	61.5%	*	*	
Prior offending – driving offences [†]	10.3%	31.8%	34.6%	*	*	
Prior offending – firearm offences [†]	0.0%	20.5%	15.4%	*	*	
Prior offending – sexual offences [†]	0.0%	0.0%	0.0%			
Prior offending – other offences [†]	2.9%	27.3%	23.1%	*	*	
Previously imprisoned	7.4%	38.6%	34.6%	*	*	
Committed offence while on existing court order	5.9%	9.1%	19.2%			
Sentenced as a serious drug offender	11.8%	22.7%	11.5%			
Mental illness	41.2%	43.2%	30.8%			
Cognitive impairment	4.4%	4.5%	0.0%			
Substance abuse	73.5%	61.4%	96.2%		*	*
Childhood sexual abuse	1.5%	4.5%	3.8%			
Childhood abuse/neglect/severe disruption	23.5%	31.8%	30.8%			
Adult trauma/health problems	17.6%	43.2%	34.6%	*		
Gambling problems	17.6%	6.8%	23.1%			
Other	11.8%	4.5%	11.5%			
Prospects of rehabilitation – positive	89.7%	65.9%	0.0%	*	*	*
Prospects of rehabilitation – contingent	0.0%	0.0%	53.8%		*	*
Prospects of rehabilitation – negative	0.0%	2.3%	30.8%		*	*
Prospects of rehabilitation – not stated	10.3%	31.8%	15.4%	*		
Assessment of remorse – positive	80.9%	47.7%	42.3%	*	*	
Assessment of remorse – negative	0.0%	13.6%	11.5%	*		
Assessment of remorse – not stated	19.1%	38.6%	46.2%	*	*	
Forfeiture or confiscation order taken into account in sentencing	13.2%	11.4%	7.7%			

a For 'factors relating to the offence', percentages will not add to 100% because some cases may contain charges that fall into multiple categories.

† The numbers and percentages for specific types of prior offending total more than the numbers and percentages for 'prior offending – any offences' because some offenders had more than one type of prior offending.

Appendix 3

Trafficking in a drug of dependence in a large commercial quantity

With respect to drug quantity, the ranges described in Table A3 include both commercial quantity drug ranges and large commercial quantity drug ranges, because a case of trafficking in a large commercial quantity sometimes included a charge of trafficking in a commercial quantity.

Table A3: Percentage of cases containing a particular sentencing factor, trafficking in a drug of dependence in a large commercial quantity, Cluster 1 and Cluster 2, 2008–09 to 2012–13

Sentencing factor	% Cluster 1 (n = 43)	% Cluster 2 (n = 29)	Significant differences
Factors relating to the offence^a			
Drug type – amphetamine	7.0%	0.0%	
Drug type – cannabis	2.3%	0.0%	
Drug type – cocaine	4.7%	6.9%	
Drug type – MDMA/ecstasy	46.5%	44.8%	
Drug type – heroin	9.3%	13.8%	
Drug type – methylamphetamine/ice	27.9%	51.7%	*
Drug type – P2P	2.3%	0.0%	
Drug type – pseudoephedrine	2.3%	0.0%	
Drug type – aggregated drug types	7.0%	10.3%	
Drug type – not stated	2.3%	0.0%	
Quantity (all drug types except cannabis) – 1 to less than 1.8 times commercial threshold	4.7%	13.8%	
Quantity (all drug types except cannabis) – 1.8 times commercial threshold or higher	2.3%	0.0%	
Quantity (all drug types except cannabis) – 1 to less than 2 times large commercial threshold	20.9%	31.0%	
Quantity (all drug types except cannabis) – 2 to less than 10 times large commercial threshold	48.8%	37.9%	
Quantity (all drug types except cannabis) – 10 times large commercial threshold or higher	9.3%	34.5%	*
Quantity (cannabis) – more than 80 kg or more than 320 plants	2.3%	0.0%	
Quantity – not stated	25.6%	13.8%	
Duration of offending – 1 day	11.6%	13.8%	
Duration of offending – more than 1 day to less than 1 month	9.3%	10.3%	
Duration of offending – 1 month to less than 3 months	16.3%	31.0%	
Duration of offending – 3 months to less than 6 months	18.6%	24.1%	
Duration of offending – 6 months to less than 12 months	20.9%	20.7%	
Duration of offending – 12 months or more	9.3%	6.9%	
Duration of offending – not stated	14.0%	3.4%	

Sentencing factor	% Cluster 1 (n = 43)	% Cluster 2 (n = 29)	Significant differences
Factors relating to the offender			
Male	97.7%	100.0%	
18–24 years	14.0%	0.0%	*
25–34 years	32.6%	44.8%	
35–44 years	34.9%	31.0%	
45–54 years	14.0%	20.7%	
55 years and over	4.7%	3.4%	
Role – principal/proprietor	18.6%	31.0%	
Role – significant	41.9%	41.4%	
Role – minor	14.0%	6.9%	
Role – not stated	25.6%	20.7%	
Pleaded guilty – all charges of reference offences in case	100.0%	79.3%	*
Pleaded guilty – some charges of reference offences in case	0.0%	3.4%	
Pleaded guilty – no charges of reference offences in case	0.0%	17.2%	*
Assisted law enforcement authorities	34.9%	6.9%	*
Prior offending – any offences [†]	46.5%	69.0%	
Prior offending – violent offences [†]	11.6%	3.4%	
Prior offending – dishonesty/property offences [†]	9.3%	41.4%	*
Prior offending – drug offences [†]	20.9%	41.4%	
Prior offending – driving offences [†]	7.0%	24.1%	
Prior offending – firearm offences [†]	2.3%	6.9%	
Prior offending – sexual offences [†]	0.0%	0.0%	
Prior offending – other offences [†]	4.7%	10.3%	
Previously imprisoned	16.3%	27.6%	
Committed offence while on existing court order	9.3%	24.1%	
Sentenced as a serious drug offender	14.0%	31.0%	
Mental illness	48.8%	62.1%	
Cognitive impairment	2.3%	0.0%	
Substance abuse	79.1%	69.0%	
Childhood sexual abuse	2.3%	0.0%	
Childhood abuse/neglect/severe disruption	25.6%	27.6%	
Adult trauma/health problems	16.3%	27.6%	
Gambling problems	27.9%	17.2%	
Other	11.6%	0.0%	*
Prospects of rehabilitation – positive	88.4%	10.3%	*
Prospects of rehabilitation – contingent	0.0%	31.0%	*
Prospects of rehabilitation – negative	0.0%	17.2%	*
Prospects of rehabilitation – not stated	11.6%	41.4%	*
Assessment of remorse – positive	86.0%	27.6%	*
Assessment of remorse – negative	0.0%	37.9%	*
Assessment of remorse – not stated	14.0%	34.5%	*
Forfeiture or confiscation order taken into account in sentencing	7.0%	3.4%	

a For 'factors relating to the offence', percentages will not add to 100% because some cases may contain charges that fall into multiple categories.

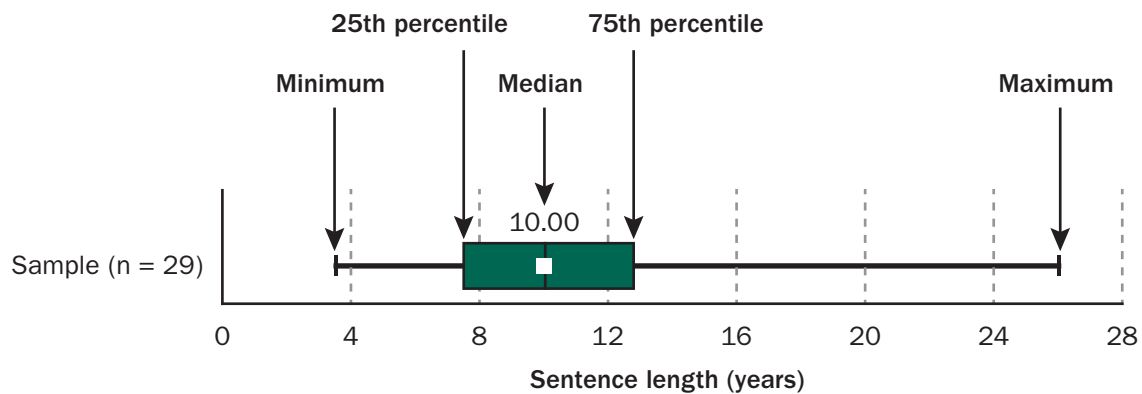
† The numbers and percentages for specific types of prior offending total more than the numbers and percentages for 'prior offending – any offences' because some offenders had more than one type of prior offending.

Appendix 4

Box-and-whiskers-plots display the minimum value, the range for the middle 50% of the values in the distribution, the median value, and the maximum value. Figure A1 shows a labelled example using a sample of large commercial trafficking cases analysed within this report.

Figure A1 demonstrates that the 29 total effective imprisonment sentences imposed for large commercial trafficking ranged from a minimum of 3 years and 6 months to a maximum of 26 years. Fifty percent of the sentences fell between 7 years and 6 months (25th percentile) and 12 years and 9 months (75th percentile), and the median sentence length was 10 years.

Figure A1: Sample box-and-whiskers-plot showing a group of large commercial trafficking cases, 2008–09 to 2012–13



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