sentencing ADVISORY COUNCIL

SEX OFFENCE SENTENCING

RESEARCH PAPER

April 2013

Tasmanian Government

Contents

Terms of Reference

In May 2012 the Attorney-General requested the Sentencing Advisory Council to provide:

1. A report of the type and length of sentences for sex offences by reference to sentences imposed by the Tasmanian Supreme Court in the period 1978-2011
2. A comparison with sentencing in other jurisdictions building on the analysis in the Tasmanian Law Reform Institute's Report on Sentencing (June 2008) for the offence of rape against a comparator offence such as armed robbery or grievous bodily harm.
3. Analysis of and commentary on any published statistics on sentences for sex offences in Tasmania compared with other Australian jurisdictions.
4. Preliminary advice on whether current sentence type and length for sex offences are appropriate based on:

   Selected key Tasmanian stakeholder opinion on sentencing for sex offenders;

   Further analysis of the data collected for the Tasmanian Jury Study;

   Further analysis of the interviews with jurors in sex offence trials conducted as part of that study; and

   Review of national and international research on public opinion in relation to sentencing for sex offences.
5. A proposal for a second stage of the Project to include but not necessarily be limited to:

   Gauging public opinion on sentencing for sex offences;

   Extending previous research to include more sex offence trials to increase the reliability of findings;

   Exploring alternative ways of gauging public opinion on sentencing for sex offences;

   Opportunities for partnering with other funders to pursue this research; and

   If current sentence type and length for sex offences are not considered appropriate, advice on how this should be addressed.

1. *The type and length of sentences for sex offences in Tasmania*

THE LEGISLATIVE FRAMEWORK FOR SEX OFFENDERS IN TASMANIA

In Tasmania, almost all sex offences are indictable offences in the Criminal Code. The crimes of rape (s 185) and abduction (s 186) are contained in Chapter XX of the Code. All other sex offences are contained in Chapter XIV (entitled Crimes Against Morality). These offences include child specific sexual offences such as sexual intercourse with a young person, maintaining a sexual relationship with a young person (called persistent child sexual abuse in some jurisdictions), indecent act with a young person and child pornography offences (such as production and possession of child exploitation material). The offences of aggravated sexual assault (s 127A) and indecent assault (s 127) can be committed against adults and children. Where the victim is an adult, absence of consent is an ingredient. Where the victim is a young person under the age of 17, absence of consent is not an element and it follows that consent is not a 'defence' although the similar age consent defences which apply to sexual intercourse with a young person also apply to these offences. If a person under the age of 17 is sexually assaulted, absence of consent, although not an ingredient, is an aggravating factor. This is not the case for sexual intercourse with a young person.[1] The law in relation to child sexual offences has recently been explained in the Tasmania Law Reform Institute's (TLRI) report, *Sexual Offences Against Young People*.[2]

TASMANIAN SENTENCING DATA

There are a number of databases which contain sentencing information. The Supreme Court maintains its own sentencing database that contains comments on passing sentence (COPS) for all offenders sentenced in the Supreme Court since 1989. Searches can be refined to retrieve all offences of a particular type with certain variables for example, judge, offender age, or prior convictions. But the database does not provide quantitative data such as the proportion of custodial

[1] This is because of the rule in *De Simoni* ((1981) 147 CLR 283.
[2] Final Report No 18 (2012).

sentences, sentencing ranges or median or mean sentences. The Supreme Court's sentencing database can only be accessed by judges and their staff.[3]

Other government databases contain sentencing information. Magistrates Court data is stored in the CRIMES database. This records data by means of principal proven offence and principal sentence. Sentencing data cannot be accessed from this database by magistrates, court staff or legal practitioners. Nor can it be accessed directly by the Sentencing Advisory Council. Specific requests for data can be made to the Justice Department but responding to such requests is resource intensive for their staff.

The Tasmania Law Reform Institute (TLRI) has a database of sentences imposed in the Supreme Court. The database covers the years 2001-11. Data is entered from the Supreme Court judges' Comments on Passing Sentence, hard copies of which are held in the Law Library at UTAS. The database was created for the purposes of the Institute's sentencing reference and initially covered all sentences imposed between 2001-06. With funds from a Criminology Research Council grant (Jury Sentencing Survey, CRC 04/06-07) cases from 2007 and 2008 were added for the purposes of providing up-to date sentencing data for the information booklet used in the project. For this current Sentencing Advisory Council project, cases for the three years 2009 to 2011 have been added. There are now 4,574 cases in the database. The fields included in the database are listed in Appendix A. The database makes it possible to produce sentencing data for each of the most common sexual offences. The tables below up-date the sentencing information provided in the TLRI's Sentencing Report.[4] They also include data on aggravated sexual assault.[5]

Rape

Table 1 shows that the median sentence for one count of rape has dropped from four years in the 1978-89 period to three years in the 2001-11 period. However, this change may not necessarily be due to more lenient sentences over the last two decades but could be due to changes in the definition of rape at the end of 1987 which now encompasses cases of penetration of the mouth by the penis that formerly would have been categorised as indecent assault.

The apparent trend for shorter sentences for single counts of rape since 2001, which was noted in the TLRI's Sentencing Report, is no longer apparent for sentences which involve only one count of rape.[6]

[3] A version of this database, Tasinlaw, was available for some years to legal practitioners by subscription and in some libraries including the Law Library at UTAS but it has not been updated for many years and has been removed from the electronic databases.
[4] Tasmania Law Reform Institute, *Sentencing*, Final Report No 11 (2008), Appendix A, Table 2, and see discussion on p 81.
[5] Note that in this section of the paper, a custodial sentence includes a wholly suspended sentence of imprisonment. This definition is necessary to allow comparison with the two earlier periods which used this counting rule.
[6] TLRI, above n 2, 81: in the 01-06 period showing a median of 2 years 1 month.

Table 1: Rape: Supreme Court Sentences 1978-2011

Counts*	Years	Median (months)	Max	Min	Custodial (no)	Total (no)	Custodial %
1	1978-1989	48	84	18	27	27	100.00
	1990-2000	36	96	6	27	27	100.00
	2001-2011	36	60	6	26	26	100.00[7]
2	1978-1989	60	96	30	17	17	100.00
	1990-2000	45	120	9	21	21	100.00
	2001-2011	48	84	30	17	18	88.89
3-4	1978-1989	48	72	30	10	10	100.00
	1990-2000	60	84	27	18	18	100.00
	2001-2011	48	90	30	9	10	90.00
5 &<	1978-1989	72	240	48	8	8	100.00
	1990-2000	84	144	36	23	23	100.00
	2001-2011	72	108	36	13	13	100.00

Table 2 combines single and global sentences to compare sentencing patterns for the periods when the definition of rape is comparable, namely 1990-2000 and 2001-11. It shows that the median sentence has declined from 4 years 6 months to 3 years 10.5 months. Non-custodial sentences for rape are rare but not impossible.

Table 2: Rape: Supreme Court sentences 1990-2000 compared with 2001-2011

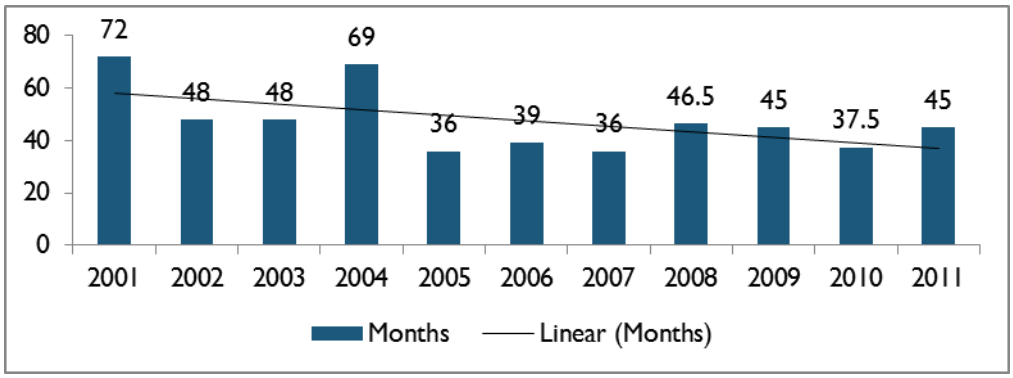
Years	Median (months)	Max	Min	Custodial (no)	Total (no)	Custodial %
1990-2000	54*	144	6	89	89	100.00
2001-2011	46.5	108	6	65	67	97.01[8]

*This is an estimate based on Tables 13 and 14 of *Sentencing in Tasmania*, 2001, 287.

[7] This includes three wholly suspended and three partly suspended sentences.
[8] This included three wholly suspended sentences and 4 partly suspended sentences.

Fig 1 shows the median sentence for rape for the period 2001-2011. It supports the conclusion that sentences for rape have declined over this period. However, the number of rapes each year is too small for statistical tests of significance to be useful or valid. A possible explanation for the apparent decline is an increased willingness to prosecute cases of rape that would not have been prosecuted previously.

Fig 1: Rape: Median sentence 2001-2011



Other Sexual Offences

Table 3 shows sentences for the crime of maintaining a sexual relationship with a young person.[9] It requires proof of an unlawful act involving a young person (a person under the age of 17) on at least three occasions. The unlawful act can be sexual intercourse, an indecent act, an indecent assault or an aggravated sexual assault, incest or rape or any combination of these acts. This crime was introduced into the Code in 1994 and came into force on 9 December of that year. The median sentence length in these two periods suggests that sentence lengths have been stable. There were comparatively few convictions in the first period. This makes comment on trends somewhat speculative.

[9] Criminal Code s 125A. A young person is a person under the age of 17 years (s25A(2).

Table 3: Maintaining a sexual relationship with a young person: 1995- 2011

Counts*	Years	Median (months)	Max	Min	Custodial (no)	Total (no)	Custodial %
1 count	1995-2000	18	60	3	15	15	100.00
	2001-2011	21	96	2	104	107	97.20
2	1995-2000	30	96	6	4	4	100.00
	2001-2011	30	150	9	24	24	100.00
3-4	1995-2000	-	-	-	2	2	100.00
	2001-2011	48	144	9	17	17	100.00
5 &<	2001-2011	72	96	8	15	15	100.00

Table 4 shows sentencing patterns for sexual intercourse with a young person.[10] It suggests that while the median custodial sentence for one count has remained stable at 3 months, the proportion of custodial sentences has increased in the most recent period. For global sentences this pattern is repeated; the proportion of custodial sentences although the median custodial sentence has fluctuated. Across all counts (i.e single counts as well as global sentences) there has been a substantial increase in the proportion of custodial sentences, rising from 50% (1978-89), to 57% (1990-2000), to 78% (2001-2011). The increase from 57% in 1990-2000 to 78% in 2001-2011 was statistically significant, X^2 (1, N = 132) = 6.44, p = .01.

[10] Criminal Code, s 124 – again a young person is person under the age of 17 years.

Table 4: Sexual intercourse with a young person: Supreme Court Sentences 1978-2011

Counts*	Years	Median (months)	Max	Min	Custodial (no)	Total (no)	Custodial %
1 count	1978-1989	3	6	1	13	34	38.24
	1990-2000	3	12	2	12	31	38.71
	2001-2011	3	18	1	27	37	72.97
2	1978-1989	3	3	1	5	12	41.67
	1990-2000	6	21	3	8	11	72.73
	2001-2011	4.5	24	3	12	16	75.00
3-4	1978-1989	6	12	2	5	8	62.50
	1990-2000	12	36	2	5	9	55.56
	2001-2011	6	18	3	9	12	75
5 &<	1978-1989	6	12	3	10	12	83.33
	1990-2000	18	54	6	9	9	100.00
	2001-2011	9	30	3	16	17	94.12

Global sentences for two counts or more counts include sentences for multiple counts of sexual intercourse with a young person or at least one count of sexual intercourse with a young person and other less serious offences.

Aggravated sexual assault[11] was added to the range of sexual offences in the Code in 1987 as part of the 1987 revision of sexual offences. It covers indecent assaults where the assault involves penetration of vagina or anus of a person by an inanimate object or a part of the defendant's body other than the penis (typically a finger). As explained above, both this crime and indecent assault do not require proof of absence of consent in cases where the alleged victim is under the age of 17 years. Table 5 shows that there are relatively few cases where this crime is an offender's principal offence. While the trend seems to be towards more lenient sentences in 2001-11 compared with 1987-2000, the numbers are too small to draw this conclusion with confidence.

[11] Criminal Code, s 127A.

Table 5: Aggravated Sexual Assault: Supreme Court Sentences 1987-2011

Count*	Years	Median (months)	Max	Min	Custodial (no)	Total (no)	Custodial %
1 count	1987-2000	8	18	2	10	11	90.90
	2001-2011	6	15	1	10	12	83.33
2	1987-2000	9	18	1	9	11	81.81
	2001-2011	5.5	18	3	15	16	88.24
3-4	1987-2000	6	36	3	12	13	92.31
	2001-2011	6	24	3	8	9	88.89
5 &<	1987-2000	18	60	12	10	10	100
	2001-2011	16	60	6	6	8	75.00

Sentences for two or more counts cover global sentence for multiple counts of aggravated sexual assault or global sentences for at least one count of aggravated sexual assault and other less serious offences.

The sexual offence revision in 1987 expanded the definition of sexual intercourse as well as introducing the new crime of aggravated sexual assault. These two changes resulted in drawing more serious kinds of indecent assault from the scope of the crime of indecent assault in s 127. A reduction in sentencing severity in the second and third periods compared with the first would therefore be expected. Table 6 shows that this was the case for the median sentence. However, the trend noted above for an increased proportion of custodial sentences for the crime of sexual intercourse with a young person is also apparent for the crime of indecent assault.

Table 6: Indecent Assault: Supreme Court Sentences 1978-2011

Counts*	Years	Median (months)	Max	Min	Custodial (no)	Total (no)	Custodial %
1 count	1978-1989	6	60	1	60	72	83.33
	1990-2000	3	12	1	41	47	87.23
	2001-2011	3	15	2	23	27	85.19
2	1978-1989	9	24	3	24	26	92.31
	1990-2000	6	15	2	16	17	94.12
	2001-2011	5	30	2	20	23	86.96
3-4	1978-1989	9	36	2	21	24	87.50
	1990-2000	6	18	5	16	16	100.00
	2001-2011	9	30	3	15	16	93.75
5 &<	1978-1989	12	30	6	19	20	95.00
	1990-2000	12	96	9	14	14	100.00
	2001-2011	10.5	48	2	16	16	100.00

Sentences for two or more counts include global sentences for multiple counts of indecent assault or global sentences for at least one count of indecent assault and other less serious offences.

HAS SENTENCING FOR SEX OFFENCES BECOME MORE LENIENT?

Analysis of the sentencing patterns for sexual offences does not reveal a clear answer to this question. For rape there is some evidence that sentencing has become more lenient when the median sentence for the principal offence of rape is examined. The proportion of custodial sentences for rape also points in the same direction. The data regarding the crime of indecent assault and aggravated sexual assault are unclear. However, with respect to sexual intercourse with a young person, the data suggest an increase in the severity of sentencing reflected in the proportion of custodial sentences.

Has the severity of sentences changed for non-sexual offences? The analyses presented below indicate that sentences have remained stable for serious crimes against the person. Four offences were selected for comparison: armed robbery and aggravated armed robbery (s 240(3) and (4)); wounding and grievous bodily harm (s 172); and causing death by dangerous driving (Code s 167A). In the TLRI's Sentencing Report, all of these offences were found to be quite stable in terms of the

median sentence and proportion of custodial sentences over the 1978 to 2006 period. Table 7 shows that sentencing patterns for armed robbery are stable with a marginal decrease in the median and in the proportion of custodial sentences. For wounding and grievous bodily harm the median was stable for single counts. For global counts it fluctuated – the decline in the last decade from 18 months to 12 months was still above the 9 month median in the first decade and the proportion of custodial sentences increased. For causing death by dangerous driving both the median custodial sentence and the proportion of custodial sentences have increased.

Table 7: Comparator crimes, Supreme Court sentences, 1978-2011

Section	Crime	Years	Median	Custodial (no)	Total (no)	Custodial %
240(3) and (4) single count	Armed robbery*	1990-2001	18	202	215	93.95
		2002-2011	17.25	137	153	89.54[12]
172 single count	Wounding or GBH	1978-1989	6	66	77	85.71
		1990-2000	9	97	110	88.18
		2001-2011	9	152	165	92.12[13]
172 (global)	Wounding or GBH	1978-1989	9	35	39	89.74
		1990-2000	18	32	34	94.12
		2001-2011	12	63	66	95.45[14]
167A	Cause death by dang. driving	1978-1989	9	30	32	93.75
		1990-2000	9	14	15	93.33
		2001-2011	12	18	18	100.00

Includes aggravated armed robbery

OVERVIEW OF CURRENT SENTENCING PRACTICES FOR SEX OFFENCES

The following table gives an overview of current sentencing practices for one count (offence) of rape, maintaining a sexual relationship with a young person, sexual intercourse with a young person, aggravated sexual assault and indecent assault. Different counting rules were used in preparing this table to conform with the cross-jurisdictional comparative data in Tables 12 to 18 in Part 2 of the paper. In this table:

[12] Around one third of sentences were wholly suspended and one third were partly suspended.
[13] Around one third of sentences were wholly suspended and one quarter partly suspended.
[14] 12% were wholly suspended and about a quarter partly suspended.

- sentences for juveniles sentenced under the *Youth Justice Act 1997* are excluded;
- custodial % excludes wholly suspended sentences;
- sentence length is calculated excluding wholly and partly suspended sentences.

Table 8: Principal sentence for one count of most common sexual offences: Supreme Court 2001-2011.

Offence	Total (no)	Custodial % [a]	Min[b]	Med[b]	Mean[b]	Max[b]
Rape	24	91.6	12m	3y 3m	3y 2m	5y
MSR	107	76.6	4m	2y 6m	3y 1m	8y
Unlawful SI	37	24.3	2m	5m	5m 12days	9m
Agg sexual assault	10	60	6m	7.5m	9m	15m
Indecent Assault	26	50	2m	4.5m	5m 24days	15m

a. Excludes wholly suspended sentences of imprisonment but includes partly suspended sentences of imprisonment
b. Excludes both wholly and partly suspended sentences of imprisonment

2. *A comparison of sex offence sentences between Tasmania and other Australian states*

One way of attempting to assess the appropriateness of current sentencing ranges for rape and sexual offences is to compare sentencing practices across jurisdictions. There are problems with inter-jurisdictional comparisons. Australian criminal laws are not uniform and offence definitions vary between jurisdictions. For example, the definition of rape is narrower in Tasmania than it is in Victoria.[15] In New South Wales there are three separate offences with different maximum penalties which cover what is commonly considered 'rape': aggravated sexual assault, aggravated sexual assault in company and sexual assault.[16] In relation to child sexual offences involving penetration, in Tasmania the relevant crime is sexual intercourse with a young person under the age of 17; Victoria has separate crimes for sexual penetration of child under 12 and penetration of a child between the ages of 12 and 16 and New South Wales has separate crimes for sexual intercourse with a child under 10 and sexual intercourse with a child between the ages of 10 and 16. For child sexual offences there are differences between jurisdictions in the availability of similar age consent defences.

Another complexity with cross-jurisdictional comparisons is that sentencing laws are not uniform. Apart from differences in sentencing options, non-parole periods and parole eligibility provisions, there is particular difficulty in comparing Tasmanian sentences with those in other jurisdictions because global sentences are not used in most other jurisdictions.[17] In Tasmania, where an offender is convicted of multiple offences, a judge or magistrate has the power to impose one sentence for all offences (a global sentence).[18] Without such a power, courts are required to impose a separate sentence for each offence and where an offender is convicted of multiple offences the court must make an order that the sentences are to be imposed either concurrently (at the same time) or cumulatively. If prison sentences are imposed, the total effective sentence imposed on a person is the aggregate of the sentences handed down for each charge taking into account the orders for concurrency or accumulation. Tasmanian courts also have the power to impose separate sentences

[15] It only covers penile penetration of vagina, anus or mouth. In Victoria rape also includes sexual penetration of the vagina or anus by an inanimate object or part of the body (Crimes Act 1958 (Vic) s 35); In New South Wales; the definition of sexual intercourse for the purposes of the relevant NSW offences is similar: *Crimes Act 1900* (NSW) s 61H.
[16] *Crimes Act 1900* (NSW) s 61: sexual assault (sexual intercourse without consent); s 61J: aggravated sexual assault (sexual intercourse without consent in one nine listed circumstance of aggravation); s 61JA: aggravated sexual assault in company (in company and one of three circumstances of aggravation).
[17] Victoria has a provision for aggregate sentences, but it is rarely used for such offences, see *Sentencing Act 1991* (Vic), s 9(1).
[18] *Sentencing Act 1997* (Tas) s 11.

for each offence but in practice, where an offender is convicted of multiple offences, a global order is usually made.

A third problem is that not only are there differences between offences and sentencing laws, there are differences with respect to which offences are dealt with summarily and in higher courts. This leads to problems as most sentencing data is collected separately for summary and higher courts.

Finally, there may be differences between jurisdictions between prosecution practices. Some jurisdictions may be more or less willing to prosecute 'less serious' sex offences or those cases in which a conviction is less likely. When convictions are obtained, these cases may attract less severe sentences. There may also be differences in the willingness to plea bargain and accept a guilty plea for a less serious sex offence or to proceed on an agreed set of facts. These differences may also distort sentencing levels.

ABS NATIONAL DATA

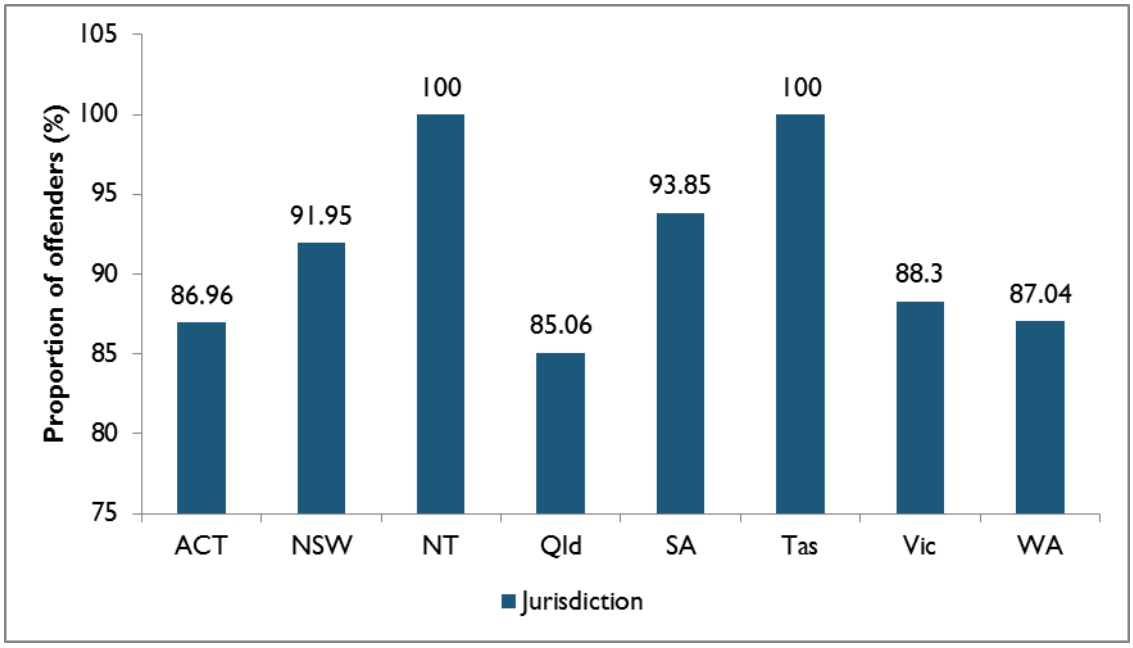
The starting point for an inter-jurisdictional comparison is the Australian Bureau of Statistics (ABS) data collection. The ABS has two statistical series or catalogues that are relevant to this project: National Criminal Court Statistics, *Criminal Court*s Cat 4513.0 and *Prisoners in Australia*, Cat 4517.0. The National Criminal Court statistics are based on data extracted from administrative records held by state and territory agencies. They are compiled according to national standards and classifications.[19] *Prisoners in Australia* presents information on prisoners in custody on 30 June each year. Data are supplied by corrective services agencies in each state and territory and is also compiled according to national standards and classifications.

Criminal Courts, Australia 2010-11, provides figures on the numbers of offenders sentenced in higher courts to custodial and non-custodial orders by principal offence.[20] Offence categories are broad but include a category 'sexual assault and related offences'.[21] The term 'custodial order' is defined. It includes fully suspended sentences and 'custody in the community'. The latter term includes home detention and intensive correction orders.[22]

[19] Australian Bureau of Statistics 2012, *Criminal Courts, Australia*, *2010-11*, explanatory notes, cat. no. 4513.0, ABS Canberra, pp. 128-129.
[20] *Criminal Courts, Australia, 2010-11*, 'Table 5: Defendants Proven Guilty – Higher Courts, States and territories and principal offence by principal sentence'.
[21] The glossary defines the category as: 'Acts, or intent of acts, of a sexual nature against another person which are non-consensual or consent is proscribed. This is a Division of ANZOC which includes the following Subdivisions: sexual assault (031) and non-assaultive sexual offences (032)': *Criminal Courts, Australia, 2010-11*, glossary, p. 158.
[22] *Criminal Courts, Australia, 2010-11*, glossary, p.151.

Figure 2 is prepared from Table 5 in the supplementary data cubes.[23]. It shows that Tasmania and the Northern Territory have the highest proportion of 'custodial sentences', each with 100%.

Fig 2: Proportion of offenders sentenced to a custodial sentence for sexual assault and related offences in higher courts 2010-2011



[Source: ABS 2012, 'Table 5: Defendants Proven Guilty – Higher Courts', data cube: Excel spreadsheet, cat no 4513.0.]

ABS also publishes a data cube for defendants sentenced to a custodial order in higher courts for selected states and territories showing sentence length for custodial sentences by principal proven offence.[24] It shows the mean and median sentences and so is useful for cross-jurisdictional comparisons. However, Tasmania is not included in this data cube.[25]).

The ABS dataset *Prisoners in Australia* is more useful. This includes data on most serious offence by sentence length for all states and territories. Unlike the *Criminal Courts* data, this is a snapshot of prisoners on a particular day. It should be noted that this has the effect of producing higher mean and median sentences because short sentences of imprisonment are under-represented in stock snapshot (or stock) data compared with flow data (all prisoners for a particular period).[26] However, it remains useful for comparative purposes. Table 9 is produced from *Prisoners in Australia* data for

[23] This is an extension of the data available in the main publication (cat.no. 4513.0) and can be accessed from the downloads in the catalogue.
[24] Australian Bureau of Statistics 2012, *Criminal Courts, Australia, 2010-11*, 'Tables 1– 5: Defendants Sentenced to a Custodial Order – Higher Courts, Sentence length by principal proven offence', data cube: Excel spreadsheet, cat. no. 4513.0, ABS Canberra.
[25] ABS has explained that this is because the data are not supplied by the Justice Department. There is also a data cube with the same information for all courts combined (higher courts, magistrates' courts and children's courts: *Criminal Courts, Australia, 2010-11*, 'Tables 1– 5: Defendants Sentenced to a Custodial Order – Combined All Courts, Sentence length by principal proven offence'. However, perusal of this table suggests that it does not include higher court data for Tasmania. First, there are no homicides (but Table 5 suggests there were 7 defendants convicted of homicide in the same period in the higher courts and sentenced to a custodial order). Secondly, there were only 17 defendants convicted of sexual assault and related offences and sentenced to a custodial order (whereas Table 5 suggests there were 35 in the higher courts alone).
[26] Australian Bureau of Statistics 2011, *Prisoners in Australia, 2011*, overview, cat. no. 4517.0, ABS Canberra.

2011.[27] It shows that for prisoners sentenced for sexual assault and related offences, aggregate sentences lengths[28] were lower in Tasmania than any other jurisdiction in terms of the mean and median sentence. [29] The mean aggregate sentence was 56.3 months for Tasmanian prisoners serving sentences for sexual assault and related offences compared with 91.8 months for Australia as a whole – a difference of three years. However, it must be emphasised that the disparity between Tasmania and Australia as a whole is not nearly so marked in the expected time to serve data; on average Australian prisoners spend 14 months longer incarcerated for sexual assault and related offences. This means that although Tasmanian inmates tend to receive shorter sentences than their Australian counterparts, they tend to serve most of their sentence before being released.

Table 9: Sentenced prisoners for sexual assault and related offences by jurisdiction and sentence length, 2011.

Jurisdiction	Total	Aggregate sentence length	
		Mean (mths)	Median (mths)
NSW	764	107.2	96.1
Vic	662	90.2	78.0
Qld	711	84.4	84.0
SA	241	112.3	96.1
WA	529	73.9	60.1
Tas	**61**	**56.3**	**48.0**
NT	130	91.5	90.0
ACT	19	124.5	93.1
Australia	3,117	91.8	84.0

[Source: ABS 2011, 'Table 5: Sentenced Prisoners, most serious offence by sentence length', see note 15 above]

The data were also scrutinised for other offences for which there were at least 50 prisoners in Tasmania. There were two offences in this category; homicide and related offences and acts intended to cause injury. The offences with the next highest number of offenders were robbery and unlawful entry with intent.

'Homicide' includes unlawful killing, attempted unlawful killing or conspiracy to kill another person.[30] Table 10 shows the sentence lengths for homicide extracted from ABS's Table 5. Aggregate

[27] *Prisoners in Australia, 2011*, 'Table 5: Sentenced Prisoners, most serious offence by sentence length', supplementary data cube: Excel spreadsheet, cat. no. 4517.0, ABS Canberra.
[28] The aggregate sentence is the longest period the convicted prisoner may be detained for the current sentenced offences in the current episode: *Prisoners in Australia, 2011*, glossary, p. 87.
[29] Expected time to serve means the earliest release date: *Prisoners in Australia, 2011*, glossary, p. 87.
[30] *Prisoners in Australia, 2011*, glossary, p.88.

sentence lengths in terms of both the mean and median sentence were higher in Tasmania than any other jurisdiction. The mean aggregate sentence length in Tasmania was 219.3 months compared with 176.8 months for Australia as a whole. The same applies to expected time to serve; it was higher in Tasmania than in all other jurisdictions.

Table 10: Sentenced prisoners for homicide and related offences by jurisdiction and sentence length

Jurisdiction	Total	Aggregate sentence length	
		Mean (mths)	Median (mths)
NSW	706	207.7	216.1
Vic	464	181.8	201.1
Qld	473	127.1	120.1
SA	223	116.9	102.0
WA	302	80.7	72.0
Tas	**68**	**219.3**	**228.1**
NT	89	110.1	108.0
Australia	2,333	176.8	180.1

[Source: ABS 2011, 'Table 5: Sentenced Prisoners, most serious offence by sentence length' see note 15 above].
ACT is omitted from the table as there were only 8 homicide prisoners.

Table 11 shows the same information as Table 9 and Table 10 for an additional two comparator crime groups: acts intended to cause injury[31] (assault) and robbery, extortion and related offences[32] (robbery). This shows that the mean aggregate sentence length sentence in Tasmania for prisoners serving sentences for robbery and extortion is the lowest in Australia with the exception of the Northern Territory and the median is the lowest of all jurisdictions. This is not the case for acts intended to cause injury (assault) – the mean sentences in Western Australia, the Northern Territory and the Australian Capital Territory are lower and the median sentences in Western Australia and the Northern Territory are lower.

[31] This covers acts which are intended to include non-fatal injury or harm to another where there is not sexual or acquisitive element (ANZSOC 021 and 029).
[32] This is a division of ANZSOC which includes robbery (061) and blackmail and extortion (062).

Table 11: Sentenced prisoners for acts intended to cause injury (assault) and robbery, extortion and related offences (robbery) by jurisdiction and sentence length

Jurisdiction	Offence	Total	Aggregate sentence length	
			Mean (mths)	Median (mths)
NSW	Assault	1,124	42.6	23.0
	Robbery	803	76.2	66.0
Vic	Assault	464	45.7	40.5
	Robbery	289	65.9	59.0
QLD	Assault	821	40.0	30.0
	Robbery	431	67.0	57.1
SA	Assault	124	51.5	39.4
	Robbery	132	102.6	84.0
WA	Assault	655	25.6	18.0
	Robbery	466	74.5	56.2
Tas	**Assault**	**64**	**29.0**	**18.2**
	Robbery	**35**	**55.1**	**36.0**
NT	Assault	361	19.6	9.0
	Robbery	16	48.6	54.0
ACT	Assault	39	28.6	28.5
	Robbery	13	70.2	60.0
Australia	Assault	3,652	37.0	24.0
	Robbery	2,185	73.6	60.1

[Source: ABS 2011, 'Table 5: Sentenced Prisoners, most serious offence by sentence length, see note 15 above]

Using the data from Tables 8-11, Figure 3 presents the mean aggregate sentence length of the offence categories by jurisdiction.

Fig 3: Mean aggregate sentence length by jurisdiction for sexual assault and related offences, homicide and related offences, assault and robbery.

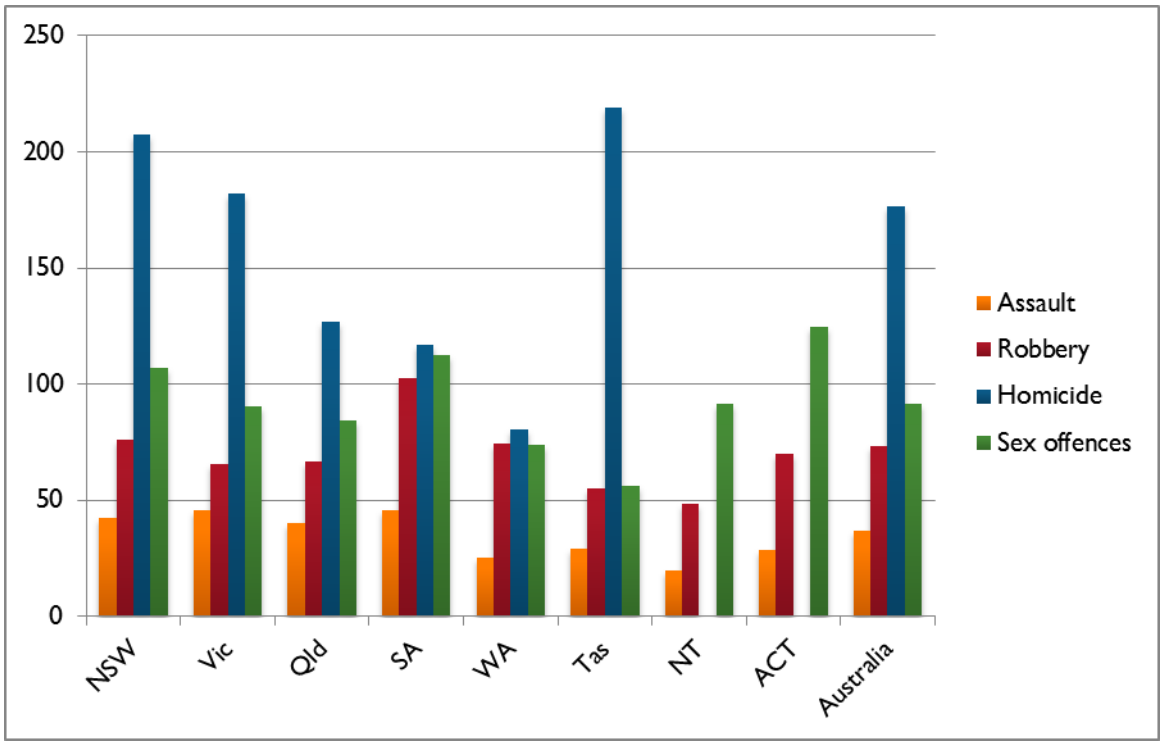


Figure 3 shows that Tasmania's mean aggregate sentence is lower than the national average for assault, robbery and sexual assault, but higher for homicide.

RELATIVITIES BETWEEN SEXUAL OFFENCES AND OTHER OFFENCES

The comparison with assault sentences shows that for all jurisdictions except Tasmania, the mean sentence for sex offences is more than double that for acts intended to cause injury. In the Territories it is more than four times the mean sentence for acts intended to cause injury. In relation to robbery, the mean sentences for robbery and sexual offences in Tasmania are similar (55.1 months and 56.3 months). In all other jurisdictions excepting Western Australia, the mean sentence for sexual offences is significantly higher than for robbery.

The picture is quite different for homicide. In Tasmania, prison data suggests homicide is punished more severely than in other jurisdictions and that in comparison with sexual offences it is punished much more severely. Because this comparison is based on point of time or census data it should be

treated with some caution. There may be particular risks with comparing homicide with other offences. If, as the ABS suggest, prison census data under-represents shorter sentences,[33] then this effect might be stronger for homicide – when sentence lengths can span five to 25 years – than it is for sexual assault, assault and robbery, which have much shorter sentence spans. It is also worth noting that since Tasmania has a low number of homicide prisoners (N=68), its sentence data may be more subject to fluctuation. For example, it is feasible that relatively small numbers of very brutal murders (or multiple murders) could skew the mean sentence lengths upwards.

CROSS-JURISDICTIONAL COMPARISONS: LOCAL DATA

In this section comparison will be made between the sentences imposed for rape in Tasmania with those imposed in Victoria and New South Wales. These jurisdictions have been chosen on the basis of the accessibility of data. Throughout this section of the report, the comparison variable, 'immediate custodial percentage', is calculated on the basis of all sentences which entail some element of immediate (as opposed to wholly suspended) imprisonment. It therefore includes cases where a partially suspended sentence was imposed. The data relating to minimum, maximum, median and mean sentence lengths and non-parole periods exclude sentences with some element of suspended imprisonment. This has been done to achieve consistency with the Victorian and New South Wales data. The inclusion of partially suspended sentences in the data on sentence length also distorts the level of punitiveness that sentence length calculations measure.

Tasmania

Tables 12 and 13 show Tasmanian sentencing data for rape for the period 2001-11. The tables exclude cases which were dealt with under the *Youth Justice Act 1997* (Tas) because different rules and considerations affect the determination of sentences and non-parole periods when a youth is sentenced to a detention order. Table 12 shows sentences for a single count of rape. It includes those sentences where an offender has been convicted of at least one count of rape and the judge has imposed a separate sentence for that one count. Table 13 includes all sentences where rape is the principal crime. It includes sentences for one count of rape and global sentences for multiple counts which include at least one of rape. For example an offender may be convicted of one count of rape and one count of aggravated sexual assault and the judge may have imposed a global sentence in respect of both crimes without indicating the proportion of the sentence that relates to each offence. The data are displayed in this way so that it can be compared with sentencing patterns in Victoria and New South Wales.

Table 12 shows that sentences of immediate custody for one count of rape were imposed in 91.67% of cases. As noted above, an immediate custodial sentence excludes cases where a wholly suspended sentence was imposed.[34] The median for a single count of rape was 3 years and 3 months and sentences ranged from a minimum of 12 months to a maximum of 5 years.[35]

[33] Australian Bureau of Statistics 2011, *Prisoners in Australia, 2011*, overview, cat. no. 4517.0, ABS Canberra.
[34] Compare Table 1 above, where in order to facilitate comparison with data from the TLRI's Sentencing Report, wholly suspended sentences are categorised as custodial sentences. There were two cases where a wholly suspended sentence of imprisonment was imposed.
[35] Note calculation of sentence lengths excludes partially suspended sentences.

Table 12: Principal sentence for one count of rape 2001-2011: Tasmania

Total No	% immediate custodial	Minimum	Median	Mean	Maximum
24	91.67	12m	3y 3m	3y 2m	5y

Table 13 shows all sentences for rape where this was the principal offence. As noted above, since the table also provides information in relation to non-parole periods, three cases which were dealt with under the *Youth Justice Act 1997* (Tas) have been excluded because different rules affect the determination of non-parole periods when a youth is sentenced to a detention order. The table includes both single count sentences and global sentences for rape and other offences (such as aggravated sexual assault) where rape is the most serious offence. Of these, 95.24% received an immediate custodial sentence (n = 60). Two offenders received a wholly suspended sentence (3.13%) and 1 case was adjourned without recording a conviction. The median sentence was 4 years; the minimum 12 months; and the maximum 9 years. Table 13 also includes data on non-parole periods (NPP). Of the 60 people sentenced to an immediate term of imprisonment, 59 were eligible for parole. In 56 of these cases, a minimum non-parole period was imposed.

Table 13: Total effective sentence (TES) and minimum term for rape for the period 2001-2011: Tasmania

TES/NPP	Total No	% immediate custodial	Minimum	Median	Mean	Maximum
TES	63	95.24	12m	4y	4y2m	9y
NPP	56		9m	2y	2y 4m	7y

Victoria

Statistics from Victoria have been taken from the Sentencing Advisory Council's *Sentencing Snapshot No 117* which describes sentencing outcomes for the principal offence of rape for the period 2005-06 to 2009-10. Over the 5 year period 93% of people sentenced for the principal offence of rape were given an immediate custodial sentence.[36] Table 14 shows that individual sentences of imprisonment for a single charge of rape ranged from 2 years to 16 years and the median length of imprisonment was 5 years.[37]

[36] Sentencing Advisory Council (Vic), *Sentencing Snapshot No 117: Rape* (2011) 1.
[37] Note that calculation of sentence lengths excludes partially suspended sentences.

Table 14: Principal sentence for rape 2005-06 to 2009-10: Victoria

Total No	% immediate custodial	Minimum	Median	Mean	Maximum
259	93	2 y	5 y	5y 2m	16 y

Table 15 shows the total effective sentence of imprisonment for rape. The total effective sentence aggregates the principal sentences handed down on an offender for each charge when the principal offence is rape. As expected the median and maximum total effective sentences are longer than the individual sentences for rape shown in Table 14. This is because many of the offenders were sentenced for more than one offence and the median number of sentenced offences per person was three.[38]

Table 15: Total effective sentence (TES) and non-parole periods (NPP) for rape 2005-06 to 2009-10: Victoria

TES/ non-parole	Total No	% imprisonment*	Minimum	Median	Mean	Maximum
TES	259	88	2 y	6 y	7y 3m	28 y
NPP	220	88	6 m	4 y	4y 9m	22 y

Excludes partially suspended sentences

New South Wales

Table 16 shows the sentencing patterns for sexual assault without consent (*Crimes Act* 1900 (NSW), s 61I) and aggravated sexual assault (s 61J) and for the two offences combined. These two offences are the New South Wales equivalent of rape. The table shows that for sexual assault and aggravated sexual assault combined, the proportion of full-time imprisonment was 94.6% and the median term was 6 years.

[38] Ibid 5.

Table 16: Sentences of imprisonment for sexual assault (s 61I and aggravated sexual assault (s 61J) April 2005 to 31 March 2012, New South Wales (as at December 2012).

Offence	Total No	% custodial	Minimum	Median	Mean	Max
Sexual assault	240	92.1	16 months	5 years	5 years 3 months	12 years
Agg sexual assault	293	96.6	18 months	7 years 6 months	7 years 7 months	13 years 6 months
Total	533	94.6	16 months	6 years	6 years 7 months	13 years 6 months

[Source: Judicial Commission of New South Wales, Judicial Information Research System.]

DISCUSSION

For the crime of rape in Victoria the median principal sentence for one count in the periods in Table 14 was 5 years. For New South Wales the median for sexual assault and aggravated sexual assault combined was 6 years (Table 16). This compares with a median sentence of 3 years 3 months in Tasmania (see Table 12). The proportion of immediate custodial sentences in Tasmania (91.67%) was comparable to Victoria (93%) and New South Wales (95%)

Victoria publishes the minimum non-parole period for the total effective sentence whereas New South Wales only collects data on the principal offence and so the minimum term is the minimum term for the principal offence. There are other problems with comparing the non-parole period data for Victoria with the New South Wales data.[39] For comparison with Victoria, the median non-parole period for Tasmania was calculated for the total effective sentence. Comparing tables 13 and 15 shows that the median non-parole period for aggregate sentences for rape in Tasmania was half that in Victoria.

Previous research has acknowledged the limitations in measuring sentencing severity solely through length of imprisonment terms and ways of marrying this with the proportion of an offence that receives imprisonment suggested.[40] One possibility is to use to multiply the median imprisonment term by the imprisonment sentence rate.[41] This is referred to as the 'Fisher formula'. Using this formula, New South Wales imposes the heaviest sentences for 'rape' (5.68), followed by Victoria (4.65) and Tasmania (2.98). Clearly sentences for rape are much lower in Tasmania than in New South Wales and Victoria and this is consistent with the prison census data on sexual assault discussed above.

[39] Note that in Table 14, 220 of the 228 people sentenced to imprisonment for rape are included in the analysis of non-parole period length, so the non-parole period data are not exactly equivalent to the minimum term. See Sentencing Advisory Council, above n 22, 11, n 12.

[40] For a discussion see Geoff Fisher, Sentencing Advisory Council (Vic), *Sentencing Severity for 'Serious' and 'Significant' Offences: A Statistical Report* (2011) 7–8.

[41] Ibid.

COMPARATOR CRIMES

Three comparator crimes have been selected: causing grievous bodily harm, armed robbery and causing death by dangerous driving. Here the problems with inter-jurisdictional comparisons are exemplified because there are not precisely equivalent crimes in each jurisdiction. Tasmania has the crime of grievous bodily harm (contrary to s 172 of the Criminal Code which requires proof of at least recklessness (foresight of grievous bodily harm) but there is no precise equivalent in Victoria. Victoria has the following separate crimes: causing serious injury intentionally (s 16 of the *Crimes Act 1958*), causing serious injury recklessly (s 17) and causing injury intentionally or recklessly (s 18). Tasmania has the crime of causing death by dangerous driving (s 167A of the Code). Victoria has the crime of culpable driving causing death (s 318 of the *Crimes Act 1958*) and a separate crime of causing death by dangerous driving (s 319(1)). New South Wales has two crimes covering armed robbery. Table 17 shows the crimes that have been selected as comparator crimes and Table 18 sets out the sentencing data for each offence.

Table 17: Comparator Crimes

Tasmania	Victoria	New South Wales
Cause grievous bodily harm (Code s 172)	Causing serious injury recklessly (*Crimes Act 1958* s 17)	Reckless grievous bodily harm (*Crimes Act 1900* s 35(2)) and reckless gbh in company (s 35(1))
Causing death by dangerous driving (s 167A)	Culpable driving causing death (s 318)	Dangerous driving occasioning death (s 52A(1)) and aggravated (s 52A(2))
Armed robbery (s 240(3))	Armed robbery (s 75A)	Armed robbery with offensive weapon (s 97(1)) and with dangerous weapon (s 97(2))

Table 18 shows that the percentage of custodial sentences and sentencing ranges and median sentence for the comparator crimes of armed robbery, causing death by dangerous driving and causing serious injury recklessly. Using the Fisher formula for each of these crimes shows that New South Wales treats armed robbery the most severely, Victoria treats causing death by dangerous driving the most severely and Tasmania treats causing serious injury recklessly the most severely.

Table 18: Custodial sentences for armed robbery, causing death by dangerous driving and grievous bodily harm, Tasmania, Victoria and New South Wales[42]

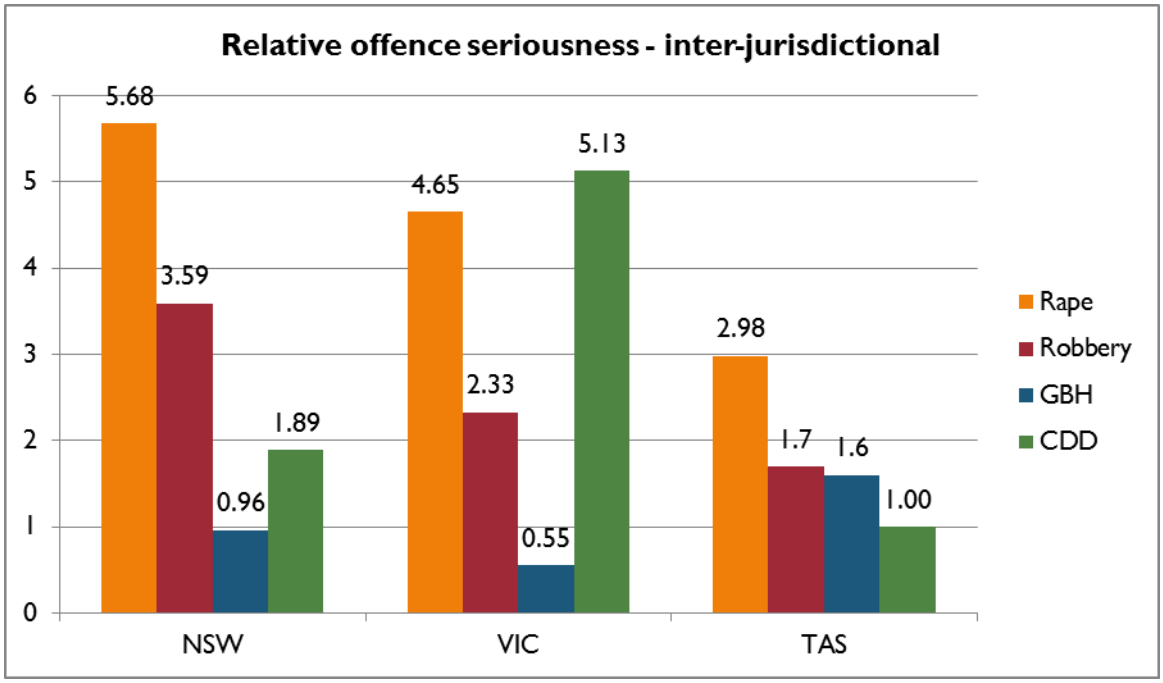
Offence	Juris-diction	Total	% custodial	Min	Median	Max	Fisher formula
Armed Robbery	Vic	943	77.62	3m	3y	14y	2.33
	NSW	1307	89.7	15m	4y	18y	3.59
	Tas	**54**	**85.19**	**2m 3 weeks**	**2y**	**6y**	**1.70**
Cause death by dang driving	Vic	105	93.33	2y	5y 6m	10y	5.13
	NSW	259	62.9	16m	3y	9y	1.89
	Tas	**12**	**100**	**8m**	**12m**	**4y**	**1.00**
Cause serious injury recklessly	Vic	908	36.70	11days	1y 6m	10y	0.55
	NSW	820	48.2	2m	2y	8y	0.96
	Tas	**45**	**80.00**	**3m**	**2y**	**5y**	**1.60**

Figure 4 presents the data from the final column of Table 18 as a diagram to compare the relative severity with which the courts in the three jurisdictions treat rape in comparison with armed robbery, death by dangerous driving and causing serious injury recklessly (gbh). In New South Wales and Tasmania, rape is treated the most severely of the four comparator crimes. However, in Victoria, culpable driving causing death is treated more seriously than rape.[43] The relativities between rape and armed robbery are similar in each jurisdiction. However, as between rape and causing serious injury recklessly, rape is treated relatively more seriously in New South Wales and Victoria than it is in Tasmania. As between rape and causing death by dangerous driving, the relativities are similar in New South Wales and Tasmania.

[42] Sources: Victoria: Sentencing Snapshots, *Armed robbery*, No. 122 June 2012, data for 2006-07 to 2010-2011; *Culpable driving causing death*, No. 111 May 2011, data for 2006-06 to 2009-10; Causing serious injury recklessly, data for 2007-08 to 2011-12 for higher and lower courts supplied by Sentencing Advisory Commission; NSW: Judicial Commission of NSW, sentences for selected offences from JIRS data base (1 April 2005 to 31 March 2012, as at February 2013; Tasmania: TLRI Sentencing Database, 2001-2011.

[43] This could possibly be explained by the separate offence of dangerous driving causing death which is a less serious offence than culpable driving. There is no published snapshot for this offence.

Figure 4: Comparative offence seriousness using Fisher formula: rape, grievous bodily harm, death by dangerous driving and armed robbery in New South Wales, Victoria and Tasmania.



[Source: Compiled from Tables 12, 14, 16 and 18.]

3. *Public opinion on sentencing for sex offences – a review of the research*

In the abstract, people believe that sentences are too lenient.[44] Public opinion surveys across the world for the last forty years have asked variations of the question are sentences 'too harsh, about right or too lenient'. Between 70 and 80 percent of respondents have consistently reported the sentences are too lenient. On the basis of these surveys policy makers and the media commonly conclude that the public support more punitive sentencing practices and penal policies. In recent years, however, this conclusion has been questioned and the problems with using a single abstract question to measure complex public attitudes have been exposed. It has been shown that the suggestion that the public demands much harsher and more punitive sentencing outcomes is largely a 'methodological artefact – a result of the way in which public opinion is measured'.[45]

A consistent result of many studies is that people have little accurate knowledge about crime and the criminal justice system. Many people have the misperception that crime is constantly increasing; they over-estimate the proportion of crime that involves violence and they under-estimate the severity of sentencing practices. Those who are the least informed on these issues are the most likely to say that sentences are too lenient. It follows that much of what is described as 'public opinion' about sentencing is not based upon a proper understanding of policy and practice and much policy and practice is not based upon a proper understanding of public opinion.[46]

Another flaw with the single abstract general question about sentencing levels is that studies which ask people about the kind of offender they were thinking of when answering the question about perceived leniency show that most people were thinking about a violent or repeat offender when stating that sentences are too lenient. In fact violent offences account for no more than 10% of crimes recorded by the police and violent repeat offenders account for even less.

In contrast to responses to abstract questions about sentencing severity, when respondents are given a detailed case vignette, they are much less likely to say that a particular sentence is too lenient

[44] The following summary of public opinion surveys is taken from Karen Gelb, Sentencing Advisory Council (Vic), *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing* (2006) and Karen Gelb, Sentencing Advisory Council (Vic), *More Myths and Misconceptions* (2008).
[45] Gelb, *More Myths and Misconceptions*, above n 27, 4.
[46] A situation which Allen refers to as a 'comedy of errors': R Allen, 'What Does the Public Think about Sentencing' (2002) 49 *Criminal Justice Matters* 6.

and the difference between judicial practice and public preferences diminishes. This finding has been replicated many times since the seminal study by Doob and Roberts in 1983[47].

WHAT DOES THE PUBLIC OPINION RESEARCH TELL US ABOUT PUBLIC ATTITUDES TO SEX OFFENCE SENTENCING?

While research suggests public opinion surveys exaggerate the punitiveness of the public and the differences between judicial attitudes to punishment and those of the public, the position in relation to sex and violent offences is less clear. In a recent Australian national public confidence in sentencing survey, respondents were most dissatisfied with sentences for sex and violent offences, with just 17% saying sentences were about right 'for violent crimes like armed robbery or rape' compared with 34% for sentences overall.[48] The greater dissatisfaction with sentencing in sex and violent offence cases is supported by survey findings which have found that most people were thinking of a violent or repeat offender when stating that sentences were too lenient.[49]

In the Tasmanian Jury Study, [50] the abstract question 'are sentences much too tough, a little too tough, about right or a little too lenient or much too lenient' was asked in relation to sex, violent, drug and property crimes.[51] For sex crimes, respondents were less likely to say that sentences were about right and much more likely to say they were much too lenient than for any other type of offence including non-sexual crimes of violence.

Table 19: Are current sentencing practices too tough/lenient

Opinion on sentence*	Type of Crime			
	Sex	Violence	Drugs	Property
Much too tough	1	0	2	0
A little bit too tough	1	1	6	4
About right	18	23	36	42
A little too lenient	39	53	35	39
Much too lenient	41	23	21	15
Total	100	100	100	100

*n= 674 (sex), 681 (violence), 677 (drugs) and 674 (property)
[Source: Warner et al, *Jury Sentencing Survey*, Report to the Criminology Research Council (2010) 43]

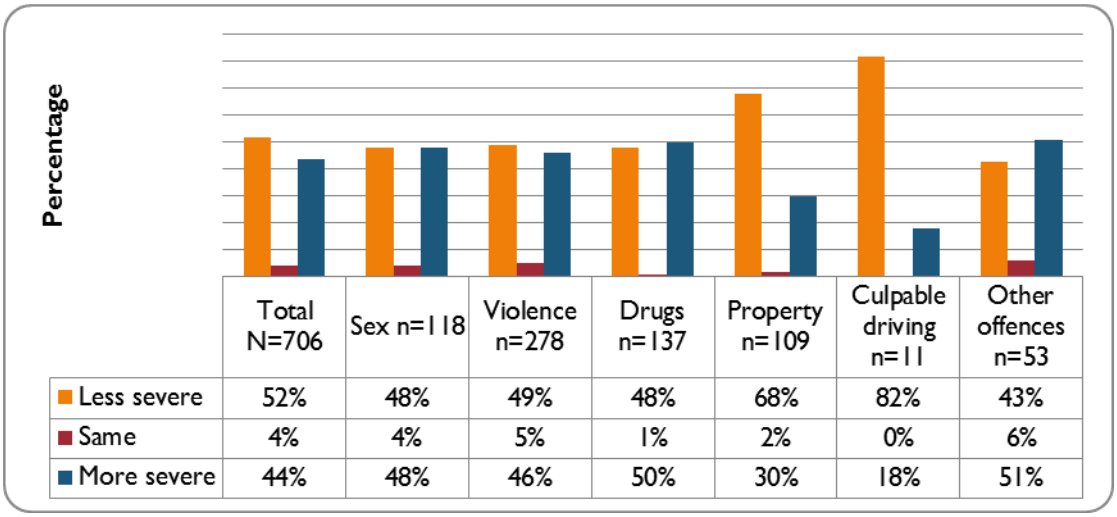
[47] Insert reference
[48] Geraldine Mackenzie et al, 'Sentencing and Public Confidence: Results from a National Australian Survey on Public Opinions towards Sentencing' (2012) 45 *Australian and New Zealand Journal of Criminology* 45.
[49] A Doob and J Roberts, Department of Justice Canada (Ottawa), *Sentencing: An Analysis of the Public's View of Sentencing* (1983).
[50] The discussion of the Tasmanian Jury Study is based upon the following publications: Kate Warner et al, 'Public Judgement on Sentencing: Final Results from the Tasmanian Jury Study' (2011) 407 *Trends & Issues in Crime and Criminal Justice*; Kate Warner and Julia Davis, 'Using Jurors to Explore Public Attitudes to Sentencing' (2012) 52 *British Journal of Criminology* 93; Kate Warner et al, *Jury Sentencing Survey*, Report to the Criminology Research Council (2010). In addition the sex offence trials have been further analysed for the purpose of this paper.
[51] K Warner et al, above n 32.

The error of treating 'top of the head' responses to abstract questions about sentencing severity as representing *informed* public opinion has been explained. However, that there is less satisfaction with sex offence sentencing is supported by research which goes beyond abstract questions about sentencing severity. Using vignettes describing a variety of sexual offences, a recent UK study for the Sentencing Council for England and Wales found sentences imposed by the study participants for most of the offences were considerably longer than the starting points in the sentencing guidelines promulgated by the Sentencing Council for the guidance of judges.[52] Also using vignettes, the Sentencing Advisory Council in Victoria found rape was ranked above reckless murder and intentionally causing serious injury in terms of offence seriousness.[53] Even some appellate judges have questioned whether current sentencing practices are sufficiently severe for sex offences.[54] And feminist scholars have long argued that some kinds of sexual offending are not taken seriously enough by the courts and this is masked by law and order rhetoric.

THE TASMANIAN JURY STUDY

In the Tasmanian Jury Study, jurors in sex offence trials were less satisfied with the sentence imposed than jurors in other trials. The study adopted a three stage mixed method design. In Stage 1, after returning a verdict of guilty, jurors were asked to specify the sentence that should be imposed on the offender. More than half of the jurors who responded suggested a sentence that was more lenient than the judge. As Fig 5 shows, even for sex offences the jurors were evenly split between more lenient and more severe sentence suggestions.

Figure 5: Judge and Juror's sentence compared by type of offence

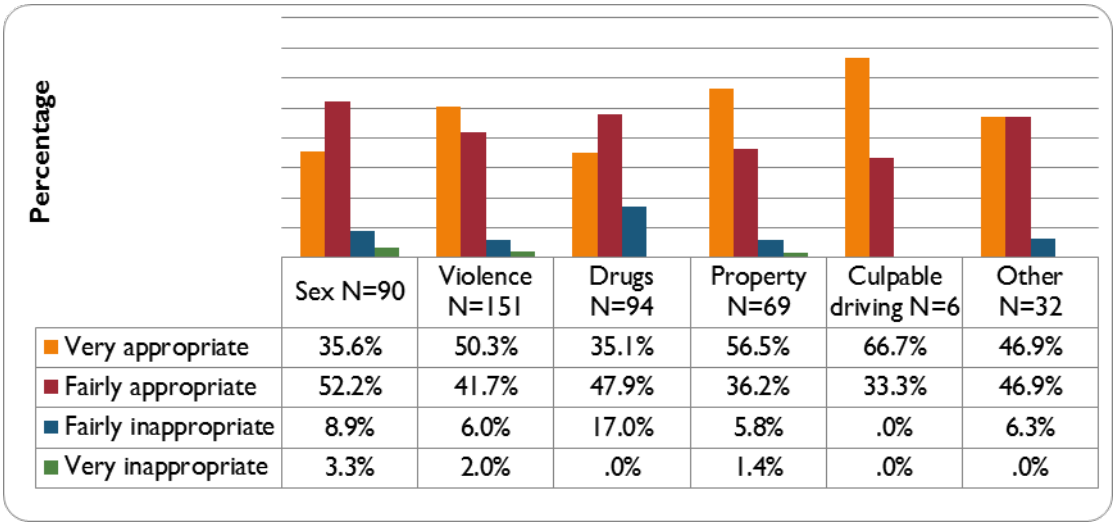


	Total N=706	Sex n=118	Violence n=278	Drugs n=137	Property n=109	Culpable driving n=11	Other offences n=53
Less severe	52%	48%	49%	48%	68%	82%	43%
Same	4%	4%	5%	1%	2%	0%	6%
More severe	44%	48%	46%	50%	30%	18%	51%

[52] McNaughton Nicholls, C., M. Mitchel, et al. (2012). Attitudes to Sentencing Sexual Offences. Sentencing Council Research Series, Sentencing Council.
[53] Sentencing Advisory Council, Victoria, *Community Attitudes to Offence Seriousness* (2012).
[54] See *DPP v DDJ* [2009] VSCA 115 [72].

In Stage 2, after the judge had imposed sentence, participating jurors were sent details of the sentence and asked whether it was appropriate (using a four point scale: very appropriate, fairly appropriate, fairly inappropriate and very inappropriate). While overall 90% of respondents said that the sentences were appropriate (evenly split between very and fairly appropriate), Figure 6 shows that jurors were least likely to say sentences for sex and drug offences were very appropriate.

Figure 6: How appropriate was the sentence for each crime type?

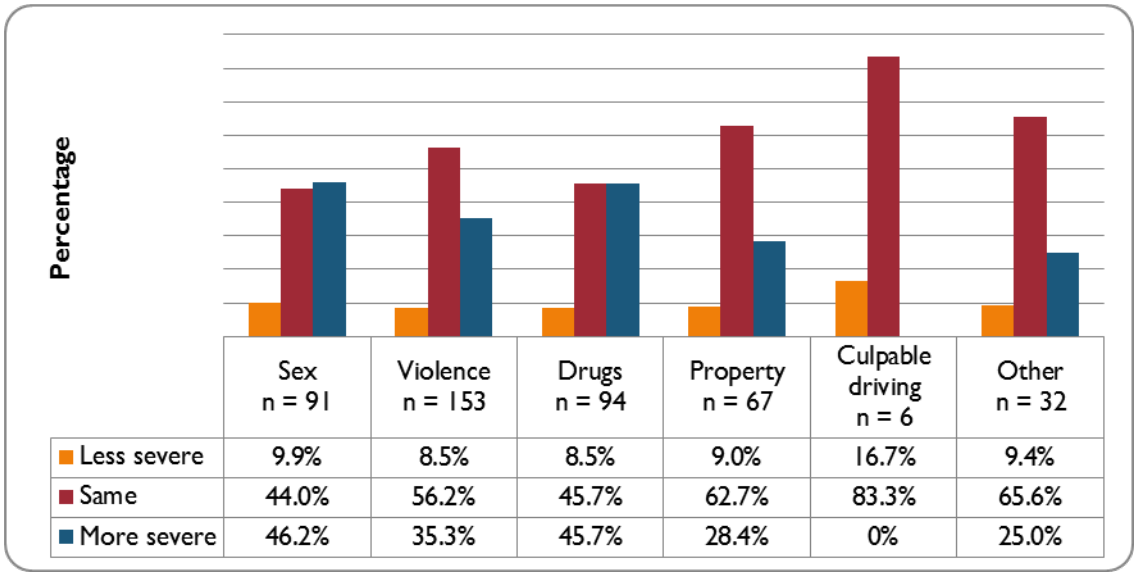


	Sex N=90	Violence N=151	Drugs N=94	Property N=69	Culpable driving N=6	Other N=32
Very appropriate	35.6%	50.3%	35.1%	56.5%	66.7%	46.9%
Fairly appropriate	52.2%	41.7%	47.9%	36.2%	33.3%	46.9%
Fairly inappropriate	8.9%	6.0%	17.0%	5.8%	.0%	6.3%
Very inappropriate	3.3%	2.0%	.0%	1.4%	.0%	.0%

[Source: Warner et al (2011), above 32, 3.

As a follow-on from the question about the appropriateness of the sentence, jurors were asked to indicate what the sentence should have been (unless they thought the sentence was very appropriate). As Figure 7 shows, jurors in sex offence cases and drug offence cases were most likely to have preferred a more severe sentence (46%) in contrast with jurors in property offence cases (28%).

Figure 7: Stage 2 comparative sentence severity by offence type



	Sex n = 91	Violence n = 153	Drugs n = 94	Property n = 67	Culpable driving n = 6	Other n = 32
Less severe	9.9%	8.5%	8.5%	9.0%	16.7%	9.4%
Same	44.0%	56.2%	45.7%	62.7%	83.3%	65.6%
More severe	46.2%	35.3%	45.7%	28.4%	0%	25.0%

[Source: Warner and Davis, above n 32, 6]

The other relevant finding from the Tasmanian Jury Study related to the 'perception gap'. The study found that there was a difference between jurors' abstract views of sentencing severity and the views in the particular case. Even after being informed about sentencing patterns and of the judge's sentence (which was often more lenient than the juror suggested) a majority of jurors still said sentences were too lenient for sex and violent offences.[55] Table 20 shows the general perceptions of sentencing leniency by juror's trial type. It shows that 70% of sex offence jurors and 62% of violent offence jurors still said sentences for the offence type of their trial were too lenient even though, as Figure 4 shows, only 46% of sex offender jurors preferred a more severe sentence than the judge and only 35% of jurors in violent offence trials preferred a more severe sentence.

[55] Warner and Davis, above n 32.

Table 20: General perceptions of sentencing leniency by respondent's trial type

Juror trial type (Q2 respondents only)	Too tough %	About right %	Too lenient %	Total %
Sex offence N = 428				
Jurors on sexual offence trial n = 89	1	29	70	100
Other jurors	1	29	70	100
Total	1	29	70	429
Violent offence (not sexual) N = 434				
Jurors on violence trial n = 151	1	37	62	100
Other jurors	1	31	68	100
Total	1	33	66	100
Drug offence N = 431				
Jurors on drug trial n = 90	11	41	48	100
Other jurors	10	41	49	100
Total	10	41	49	100
Property offence N = 432				
Jurors on property trial n = 67	3	61	36	100
Other jurors	4	49	47	100
Total	4	50	46	100

[Source: Warner and Davis, above n 32, 101]

The interviews (Stage 3) provided the opportunity to explore the contrast between general attitudes to sentencing levels and the juror's judgement of the appropriate sentence in the individual case.[56] Many responses resonated with the suggestion of researchers who claim that members of the public who respond in opinion polls that sentences are too lenient tend to construct stereotypical pictures

[56] Fifty jurors were selected for interview, 15 of these from ten of the sex offence trials in the study.

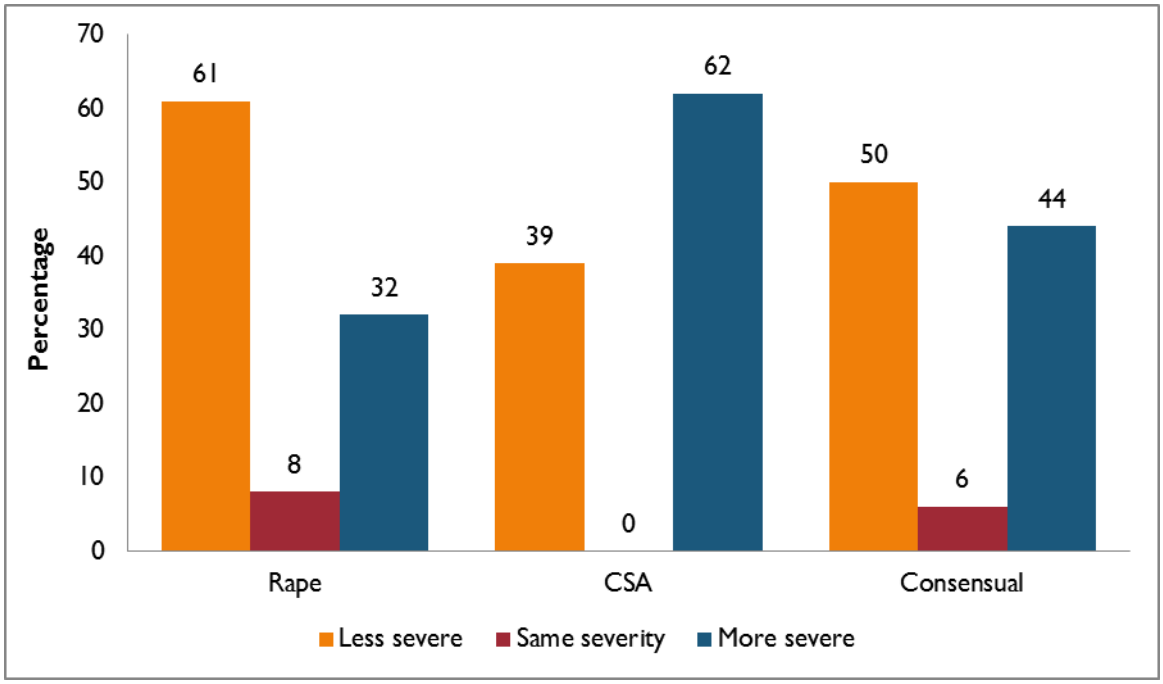
of the worst kinds of offenders that reflect the images in the media and popular culture of violent, ruthless pathological evil predators who are sick, mad or bad.[57]

ARE SENTENCES FOR CERTAIN TYPES OF SEX OFFENDER MORE LIKELY TO BE SEEN AS TOO LENIENT?

Of the 162 trials in the Tasmanian Jury Study, 31 were sex offence trials and responses were received from 25 trials. Sex offenders are not a homogeneous class. The term covers the classic rapist who assaults a stranger in a dark alley and date or relationship rape. Sexual offences against children include sexual abuse of prepubescent and pubescent children and consensual sexual intercourse or sexual acts with teenagers under the age of 17. And child pornography offences include young people under the age of 18. It cannot be assumed that the public response to sex offending will be consistent across different types of sex offences. It could be that there is greater dissatisfaction with sentences for sex offences involving young children than consensual offences with under-age teenagers, and with those sexual offences which cause physical injury compared with those which are an invasion of autonomy only. The sex offence trials were classified into three groups: rape and aggravated sexual assault (9 trials); child sexual assault (8 trials) and consensual sex with a teenager (5 trials). Rape and aggravated sexual assault includes all cases of non-consensual penetration with an adult or teenager; child sexual assault includes all sexual offences committed against pre-pubescent children (i.e. age 13 or younger) as well as sexual offences committed against pubescent teenagers by a person in authority (such as father, uncle, carer or priest). Consensual sex with a teenager included all cases of sexual contact with a post-pubescent teenager (i.e. aged 13 – 16 years) excluding cases where the perpetrator was in a position of authority. There were two trials involving possession of child exploitation material. These were omitted. Figure 8 compares the juror's suggested sentence with the judge's sentence for the three categories of sex offence. It shows quite striking differences between child sexual assault and other offences. Jurors were much less likely to suggest a more lenient sentence for child sexual assault and much more likely to suggest a more severe sentence than the judge than for other sex offences, with 62 percent suggesting a more severe sentence compared with 32 percent doing so for rape.[58]

[57] See Julian Roberts and L J Stalans, *Public Opinion, Crime and Criminal Justice* (Westview Press,1997) 113 and other sources and theoretical explanations for the perception gap discussed in Warner and Davis above 32, 16.
[58] If the child exploitation material trial responses had been included under child sex offences the pattern of more severe sentences would have been more pronounced.

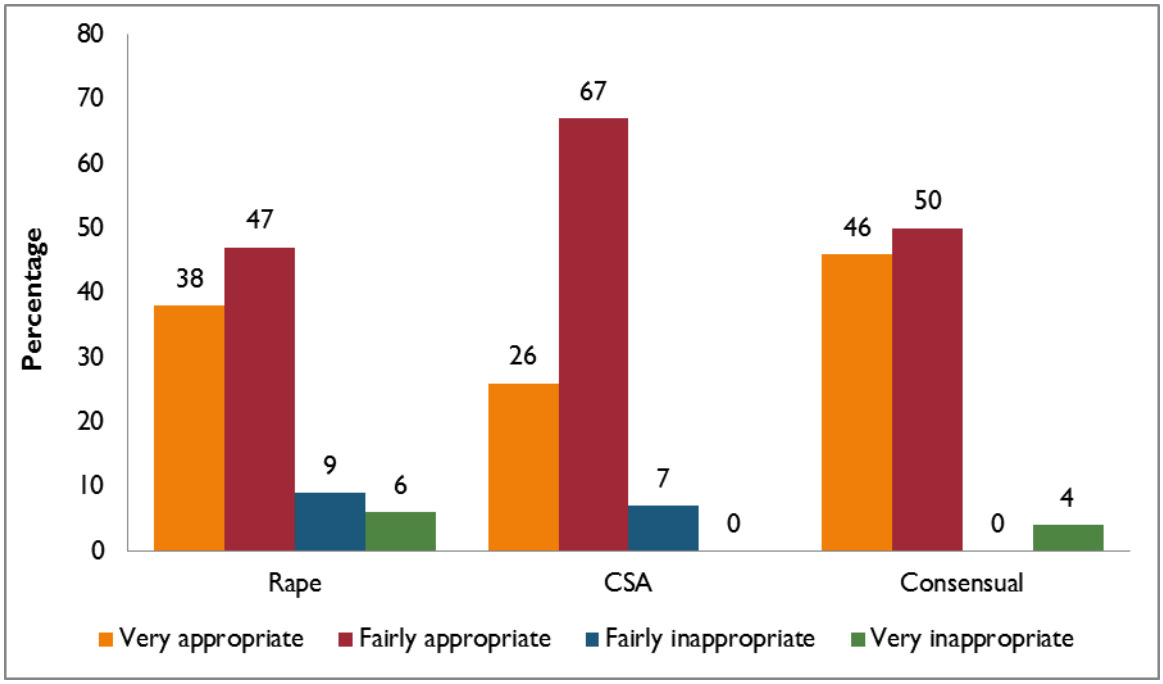
Figure 8: Judge and juror's sentence compared by type of sex offence



Rape and aggravated sexual assault n=38, child sexual assault n= 39; consensual sex with a teenager n= 32.

As explained above, at Stage 2 jurors were sent the judge's sentence and sentencing comments and asked in the Stage 2 survey whether the judge's sentence was appropriate. Figure 9 shows their responses in the three categories of sex offences. In contrast with the general pattern of responses where most jurors thought that the judge's sentence was appropriate and 45 percent responded that it was 'very appropriate' (see Figure 5), for child sex assault only 26 percent said that the judge's sentence was very appropriate.

Figure 9: How appropriate was the sentence for each sex offence type?



Rape and aggravated sexual assault n=32, child sexual assault n= 27; consensual sex with a teenager n= 24.

At stage 3 of the study, 50 jurors were selected for interview. Jurors were interviewed from three trials in of each of the three categories of sex offences. This provides some qualitative data to illustrate the differences between the types of sex offence in terms of juror response and why it was that jurors viewed these cases differently from the judge.

Consensual Sex with a Teenager

Figure 7 shows that jurors were more likely to suggest a more lenient sentence than the judge than a more severe sentence for this kind of case. And as Figure 8 shows jurors were more likely to say the sentence was very appropriate for this kind of sex offence. One of the trials in this group involved a 39 year-old man who was convicted of sexual intercourse with a 13 year-old girl. The judge imposed a sentence of 2 months imprisonment. Five jurors completed the survey in Stage 1 with two recommending non-custodial sentences, two recommending sentences of imprisonment longer than the judge's sentence and one (Hotel 2 who was interviewed) recommending a wholly suspended sentence. In other words in this trial jurors were more likely to be more lenient than the judge than more severe. Hotel 2 said that he did not want to see the offender go to gaol because of the impact of imprisonment on the offender and his family and because the relationship was consensual. These themes were evident in other interviews in cases of consensual sex with a teenager. Yankee 1, in a trial where all seven respondents suggested a more lenient sentence than the judge said that some of the jurors did not want to be responsible for sending a married man to prison. And X-ray 1, a juror from the same trial, thought the judge should have been more lenient because the offender 'seemed a very harmless sort of guy' and the girl 'came across to me as if she

was quite happy to have the relationship'. In the third trial Foxtrot 2 said that concern about the offender going to prison led the jury to ask the judge what would happen to the offender if they found him guilty. It seems that in these cases, contrary to the views of the judge, a majority of jurors did not think the gravity of the offence demanded an immediate prison sentence.

Rape and Aggravated Sexual Assault

Figure 7 shows that in rape and aggravated sexual assault cases jurors were much more likely to suggest a more lenient sentence than in sex offences cases as a whole (see Figure 4). This pattern is illustrated by two of the rape trials in which jurors were interviewed. In *M*, the defendant was convicted of raping a sleeping woman when he was drunk. The victim was staying In M's cousin's flat, seeking refuge from a violent relationship. M was sentenced to 3 years 6 months imprisonment. All of the ten jurors who participated in the study suggested less severe sentence than the judge. Victor 1 and Whisky 1 were interviewed. Victor 1's view at Stage 1 that sentences for sex offences were too lenient changed at Stage 2 to sentences for these offences were 'about right'. When explaining her change of view in the interview she said:

> *Well, I wasn't aware, really, what they were. That is, I think, a common community view is, or I've certainly read and heard, was that rape sentences tended to be light, but having sat through a case and having seen the judge's sentence and so on, and seen the booklet and so on, I thought it was a reasonable result for that particular case.*

Whisky 1 indicated she would have preferred a shorter sentence than the judge imposed. She said she was surprised by the judge's sentence and expected the he would get quite a lot less which she said was based on:

> *.. just hearing things about victims of rape and things and how – the thing that they actually go through but then comes to the point that nothing – you know, they don't get their just deserts.*

In R the defendant, a 48 year-old male, was convicted of raping a 16 year-old girl. He was a horse trainer; the victim was a schoolgirl who had just started doing work experience for him. Her mother was away for the weekend and he went around to her house. He denied sexual intercourse until the DNA results showed otherwise. And then he said it was consensual. She had scratches on her body and vaginal injuries and made an immediate complaint. He was sentenced to imprisonment for 4 years and 6 months with parole after half the sentence. Seven jurors returned Questionnaire 1. Of these only one suggested a more severe sentence than the judge. India 2 was interviewed. She had suggested a more lenient sentence than the judge at Stage 1 (2 years) but said the sentence was 'very appropriate' at Stage 2. She explained the reaction of friends and family with whom she discussed the case:

> *… because I mean as soon as I told people what it was about, afterwards, it was like a 49-year-old and a 17- year-old [?] "He should have been castrated," and, you know, all this sort of stuff people had said. … They didn't hear the full facts and I've only told them a brief story and what they read in the paper afterwards and that sort of thing.*

Her own view of the case was quite different. She described the offender as 'just an average Joe' and a 'hard working man'. Later she said:

> *In the end, I felt sorry for him …. Because he changed his story and the reason he said he changed his story was to protect his family. And basically, at the end of the day, not only has he wrecked the*

girl's life but he's also wrecked his own family's life, you know. He had his own business. Obviously, I'm just guessing here that the wife was part of that business. So now, he's gone off to jail. She, you know, if she lived off that income and they had a mortgage and stuff, he's totally stuffed her life too.

These cases illustrate the point that when informed of the facts and of the sentences imposed by the courts, most informed members of the public do not think that sentences for rape are too lenient.

Child Sexual Assault

Figures 7 shows that jurors tended to be harsher than the judge in child sexual assault cases with 62 percent suggesting a more severe sentence than the judge imposed. At Stage 2 jurors were less likely to say the sentence was very appropriate (26%) compared with jurors trials involving consensual sexual with a teenager (46%). This category of sexual offence is illustrated by one of the paedophile priest cases in the study. F (the defendant) was found guilty of maintaining a sexual relationship with a teenage boy on the basis of seven unlawful acts in 1970 at a boys' boarding school. Kilo 2 was interviewed. He suggested a sentence of 5 years, the median sentence of the nine suggested sentences in this trial the majority of which were more severe than the judge's sentence of 3 years imprisonment. In interview Kilo 2 said of the judge's sentence:

I felt that it didn't give enough example for people who are in his position now, in schools and things like that, having the responsibility of looking after these people, it didn't send a message to them that, "Well, if I molest this fellow, I could get five, ten years jail because of it." There was no clear cut message.

Concluding Comments

Based upon their sentence choice in a particular case it appears that jurors, as representatives of informed public opinion, do not consistently think sentences for sex offences are too lenient - in fact they are just as likely to suggest a more lenient sentence than the judge than a more severe one (see Fig 3 above). However, it appears that there are differences between types of sex offences. Whilst the numbers in this study were too small to test for statistical significance, it appears that for child sexual assault offences there may be differences between the judiciary and public opinion about sentencing severity and sentences may be perceived to be too lenient. In contrast, sentences for consensual sex with teenagers are about right and sentences for rape too harsh if the views of jurors are to be accepted. Further research using the jury method in sex offence trials would allow these preliminary findings to be tested.

4. *Preliminary advice on the appropriateness of the sentences for sex offences in Tasmania*

Analysis of Tasmanian Supreme Court data indicated that sentences for rape have reduced on average by nine months from between the 1990-2000 period and the 2001-2011 period. However, there has been a corresponding increase in the severity with which sexual intercourse with a young person is treated. Notably, in the 2001-2011 period there was a 26% increase in the custodial sentences for this crime. While recidivism and deterrent effects are notoriously difficult to measure, it is worth noting that reductions in the severity of sentences in 2001-2011 have not corresponded with an increase in successful prosecutions for rape. On the contrary, 27% less people were sentenced for rape in the 2001-2011 period than in the 1990-2001 period.

A comparison with sentencing patterns for sex offences in other jurisdictions is one way of testing the appropriateness of sentences for sex offences in Tasmania. In Part 2 the problems with cross-jurisdictional comparisons were explained. Because of differences between jurisdictions in offences, differences in the jurisdiction of higher courts, sentencing provisions including parole, and in the counting rules used in recording sentencing data, comparisons need to be treated with caution. However, it appears that Tasmania treats at least some categories of offender more leniently than other Australian jurisdictions. This is clearly the case for the sex offenders. Prison data suggests that prison sentences for sex offences are shorter than in other jurisdictions and that for robbery and acts intended to cause injury they are shorter than the national means and medians. But for homicide they are longer. Whilst ABS Criminal Courts data suggest that the proportion of offenders sentenced to immediate imprisonment in the higher courts for sexual assault is higher in Tasmania than in other states and territories (except the Northern Territory), the comparison of 'rape' sentences between Tasmania and Victoria and New South Wales suggests that any higher proportion of immediate custodial sentences for sex offences is unlikely to compensate for the lower median sentences. In Tasmania, sentences for rape are considerably lower than they are in those two States taking into account both the proportion of custodial sentences and the median sentence. In theory this could be because Victoria and New South Wales filter out the less serious rapes, but arguably this is unlikely to account for such wide differences.

The fact that sentencing levels in Tasmanian courts for sexual offences are lower than they are in other Australian jurisdictions does not necessarily mean that sentencing should become harsher for these crimes. Not all countries have the same imprisonment rates. Many European countries have lower imprisonment rates than Australia, the United Kingdom, Canada and New Zealand. The

United States has very high rates of imprisonment and Scandinavian countries have low rates of imprisonment. Countries with lower crime rates tend to have lower imprisonment rates, and higher imprisonment rates do not guarantee lower crime rates. Within Australia, even similar jurisdictions have different imprisonment rates – the New South Wales imprisonment rate, for example, is almost twice the Victorian rate.[59] And different imprisonment rates do not affect public confidence levels in the criminal justice system or in sentencing.[60]

The question of whether current sentencing practices for sex offences in Tasmania are appropriate is not susceptible to an easy answer. The problems of relying upon public opinion surveys which ask general questions about sentencing severity have been canvassed. Such top-of-the-head opinions tend to be based upon misconceptions about crime and sentencing patterns. This is illustrated in the Tasmanian jury study where 71% of respondents underestimated the imprisonment rate for rape.[61] Moreover, these top-of-the-head opinions seem to be unaffected by differences in imprisonment rates so increasing the severity of sentences for sex offences is unlikely to decrease the proportion of the public who think sentences are too lenient as measured by public opinion polls. The Tasmanian Jury Study provides support for the claim that *informed* public opinion does not consider sentences for sex offences in general are too lenient. If there are differences between the judicial approach to sex offender sentencing and the views of a properly informed public, it does not necessarily mean that one view or the other is right. What is important in this context is that those differences are examined and debated. As scholars such as Hogg has argue, populism needs to be taken seriously.[62] Or as Indermaur, puts it, public opinion cannot simply be dismissed as uninformed, there is a need to 'deal the public in' in the debate about sentencing and punishment.

The question that this advice is required to address is: *Are sentences for sex offences appropriate?* That begs the question, appropriate to what? Although the *Sentencing Act 1997* does not specifically state the purposes of sentences, section 3 provides that the purposes of the Act include promoting the protection of the community, helping to prevent crime and promoting respect for the law by imposing sentences that aim to deter offenders and others, rehabilitating offenders and denouncing the offender's conduct. Unlike acts in some other jurisdictions, the *Sentencing Act 1997* does not state that one of the purposes of sentencing is the imposition of just or appropriate punishments. This means that the question of what does an offence 'deserve' in terms of a sentence that is proportionate and appropriate to the harm caused and to the circumstances of the offender is not one that is required by the legislation, but it is, nonetheless, fundamental to common law approaches to sentencing. The answer to the question of how appropriate sentencing practises are therefore requires consideration of all of the purposes of sentencing.

Further, it cannot be answered independently of considering what sentences are appropriate for other crimes. How severely should rape be treated compared with other crimes? It is generally agreed that punishment for crimes should be proportionate to the severity of the offence and the culpability of the offender. This means that there should be scale of offence severity with the most serious offence (presumably murder) at the top of the scale and the least serious at the bottom.

[59] See Don Weatherburn et al, Why does NSW have a higher imprisonment rate than Victoria?' (2010) *Contemporary Issues in Crime and Justice*, Number 145: this is partly explained by a higher likelihood of imprisonment but it is not entirely due to harsher sentencing; NSW has a higher court appearance rate, a higher conviction rate and a higher remand rate.
[60] Lynne Roberts, Caroline Spiranovic and David Indermaur, 'A country not divided: A comparison of public punitiveness and confidence in sentencing across Australia' (2011) 44 *ANZ J Crim* 370-386.
[61] Warner et al (2011) above 32, 3.
[62] Russell Hogg, 'Punishment and "the people": Rescuing populism from its critics' (Paper presented at ANZSOC 2012 Conference, Auckland, 28 November 2012).

Once this rank ordering is done the next step is to work out the spacing, intervals or anchor points on the scale for each type of offence.

The final step is to give a number to these anchor points in terms of sentence type and sentence length. While the overall rank ordering is not radically different between Tasmania, Victoria and New South Wales, the spacing is different and, the numbers given to the anchor points are very different. This requires consideration of relative offence seriousness as well as the purposes of sentence.

If the penalties require adjustment, how this can be achieved in Tasmania, where the legislation does not provide maximum penalties for each offence or, indeed, any other indicator of Parliament's view of the individual offence severity is a problem. How this may be achieved in a system without a system of sentencing guidelines is also problematic.

APPENDIX A: TLRI SENTENCING DATABASE FIELDS

- name of offender
- judge
- date of sentence
- sex of offender
- age of offender
- crime type (Aviation; Burglary; Commonwealth; Drug Offences; Homicide; Non-sexual offences against the person; Offences against good order; Fraud and dishonesty; Property damage; Robbery and Sexual Offences;
- number of counts
- number of counts of major crime
- major crime (the most serious offence)
- other crimes
- amount value stolen/taken
- amount of damage
- prior convictions (yes/no; Supreme Court/ Magistrates Court; similar/not similar)
- imprisonment (and length of head sentence)
- suspension (wholly or partly)
- parole (non-parole period)
- minimum non-parole period as % of sentence
- good behaviour bond
- probation (length)
- community service order (hours)
- fine
- other (eg compensation order)
- plant/narcotic
- type of offence
- offence details