

**PENALTIES RELATING TO SEXUAL
ASSAULT OFFENCES IN
NEW SOUTH WALES**

Volume 2

Statistics

NSW SENTENCING COUNCIL

August 2008

A report of the NSW Sentencing Council

The views expressed in this report do not necessarily reflect the private or professional views of individual Council members or the views of their individual organisations. A decision of the majority is a decision of the Council, Schedule 1A, clause 12 of the *Crimes (Sentencing Procedure) Act 1999*.

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-
1. Assistant Commissioner Paul Carey was appointed to the Council on 2 June 2008, and attended as an observer prior to this date.
 2. Ms Jennifer Mason became Director General of the Department of Community Services in March 2008. Prior to this appointment, she was the Director General of the Department of Juvenile Justice
 3. Ms Penny Musgrave was appointed to the Council on 25 February 2008

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4. Ms Laura Wells was appointed to the Council from 12 March 2007 to 25 December 2007

5. Assistant Commissioner Catherine Burn was appointed to the Council from 23 July to 7 December 2007.

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MLP v R [2006] NSWCCA 271
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Chapter 1

Statistical Analysis

INTRODUCTION

This volume is to be read as a companion to Volume 1 of the Council's review of sexual offence penalties in NSW.

It contains a statistical analysis of sentencing outcomes for sexual offences contained in the *Crimes Act 1900* (NSW).

The material was prepared with the assistance of the Judicial Commission of New South Wales.

Methodology

The Council undertook this examination in order to determine sentencing trends and issues arising out of the treatment of sexual offences in NSW by the Local Court and the higher courts.

There are 69 indictable sexual offences contained in the *Crimes Act 1900* (NSW).⁶ The Council constrained its examination of sexual offences data to the 49 offences which featured at least one conviction, imposed by either the higher courts or the Local Court, during the reporting period.

The Local Court data covers the period from January 2003 to September 2007.⁷

Due to the impact of the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*, which introduced standard non-parole periods (SNPPs) for certain offences, the higher courts' data represents a mix of measuring periods. For the offences to which SNPPs do not apply, the data generally covers the period from October 2000 to September 2007. For the offences to which SNPPs apply, the data generally covers the period from February 2003 to September 2007.

Analysis was conducted using the published data on the JIRS database, and was verified by the Judicial Commission before inclusion.

-
6. The Council has counted as a separate offence all sub-sections of sexual offences listed in the Crimes Act. Incite and attempt offences have been counted as separate offences for the purposes of this analysis. However s61P Attempt to commit offence under ss61I-61O, has been counted as 1 offence only.
 7. Some offences were only introduced in their current forms after February 2003, for example, s91H Crimes Act 1900 – Produce /disseminate child porn (from 1 January 2005); and ss21G - Film for indecent purposes, and 21H - Install device to facilitate filming for indecent purposes, Summary Offences Act 1988 (from 24 March 2004).

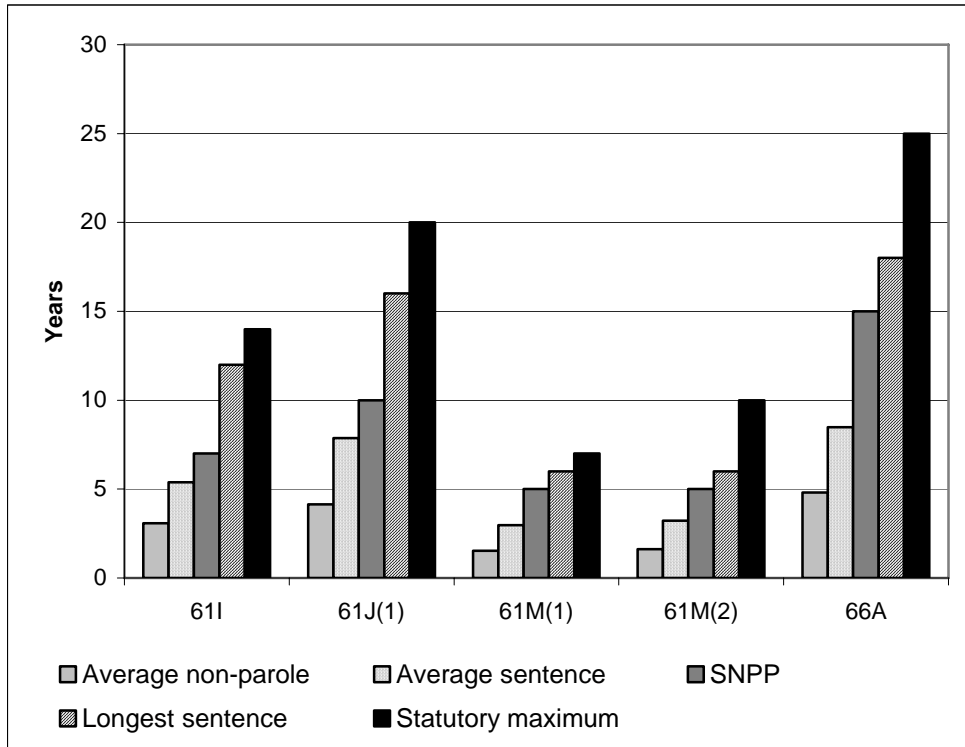
Sentencing outcomes for each relevant offence examined include:

- Total number of cases and dispositions;
- Percentage of cases where a sentence of imprisonment was imposed;
- Average sentences and statutory maximum periods;
- Longest / shortest sentences and statutory maxima;
- Average non-parole periods imposed and the standard non-parole period (where applicable); and
- Longest non-parole periods imposed and the standard non-parole periods (where applicable).

Examination of these factors allowed for conclusions to be made regarding the relationship between the statutory maxima and average sentences; and the relationship between the standard non-parole scheme and average non-parole periods imposed.

The impact of pleas on average sentences and the effect of juvenile offenders were also considered where there was a sufficient number of cases to allow for such analysis to be undertaken.

Chart 1: Overview of offences⁸ - Higher Courts



Observations

Sentences of imprisonment

There were 46 sexual offences for which 725 offenders were sentenced to imprisonment during the measuring periods. In fact, there were only three offences for which a sentence of imprisonment was *not* imposed in at least 1 matter: the sole s61O(1A)⁹ offender received a sentence of periodic detention for 12 months; the sole s73(1)¹⁰ offender received a suspended sentence; and the sole s91H(3)¹¹ offender received a s9bond.

Many of the offences for which a sentence of imprisonment was imposed during the relevant measuring period however, featured less

8. This is an overview of average non-parole periods, average sentences, SNPPs, longest sentences, and statutory maxima for the 5 offences for which SNPPs are in place and for which more than 10 non-parole periods were recorded.

9. Aggravated act of indecency with/toward a person aged 16 years or above (incite).

10. Sexual intercourse with child between 16 and 18 under special care

11. *Crimes Act 1900* (NSW) s91H(3) Possess child pornography

than 10 matters. The small number of cases renders statistical analysis deeply problematic and subject to error.¹²

Restricting further analysis to instances where in excess of 10 sentences of imprisonment had been imposed limited the review to 15 offences overall.¹³ Three such offences¹⁴ featured sentences of imprisonment imposed in both the higher courts and in the Local Court.

The higher courts imposed sentences of imprisonment on more than 10 offenders for 10 offences. The percentage of offenders who received a sentence of imprisonment for a sexual offence ranged from 28%¹⁵ to 100%.¹⁶ The Local Court imposed sentences of imprisonment on more than 10 offenders for 8 offences. The percentage of offenders who received a sentence of imprisonment for a sexual offence ranged from 19.64¹⁷ to 47.69%¹⁸

Average sentences of imprisonment⁹

Average prison sentences imposed in the higher courts for sexual offences, expressed as a percentage of the statutory maximum sentence applicable to each offence, ranged from 17.2% to 75%.²⁰ However, the offences that occupied the top end of that scale were offences for which one or two offenders had been imprisoned, and are

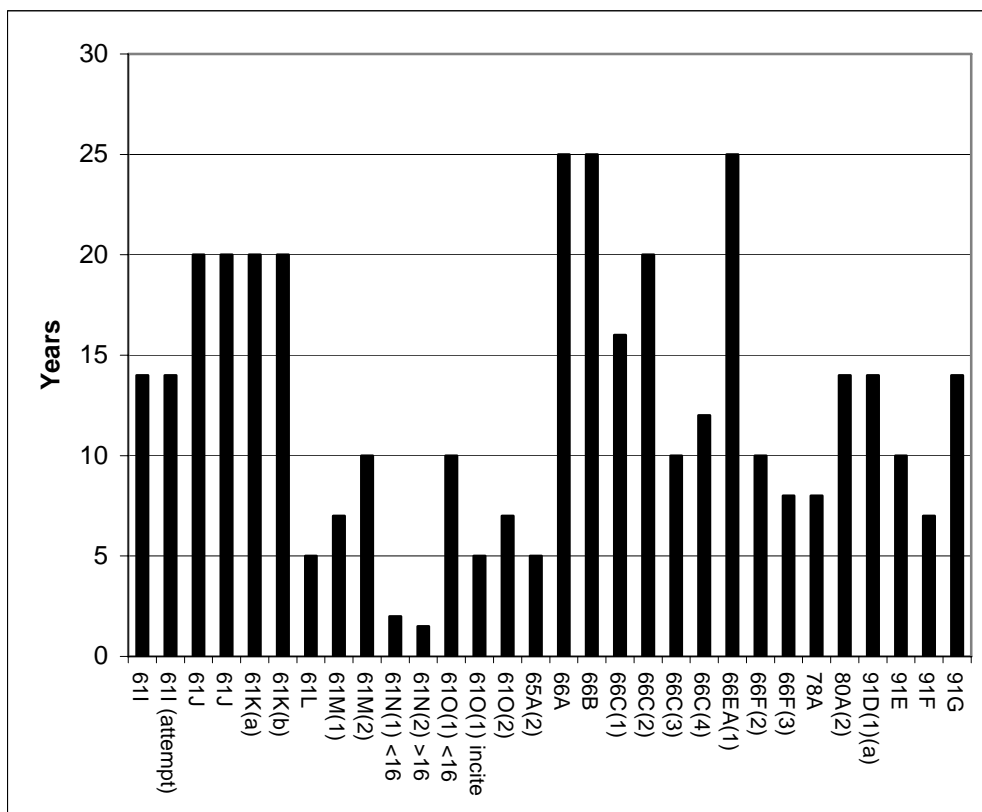
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12. One could go as far as to say that only two of the offences reviewed (s61I - sexual assault and 61J - aggravated sexual assault, with 82 and 80 imprisoned offenders, respectively) yielded a sufficient sample size of offenders as to minimise the possibility of a handful of outliers giving a misleading impression of trends and average prison terms, and even in those two offences the possibility could by no means be said to be insignificant.
 13. Due to such data limitations, charts (such as those illustrating average sentences against statutory maxima) as a general rule have been provided only where more than 10 sentences of imprisonment were recorded for the offence in the higher courts.
 14. *Crimes Act*1900 (NSW) ss61L Indecent Assault; 61M(1) Aggravated indecent assault; and s61M(2) Aggravated indecent assault, victim under 10 years of age.
 15. *Crimes Act*1900 (NSW) s61L Indecent Assault
 16. *Crimes Act* 1900 (NSW) s66EA Persistent sexual abuse of a child
 17. *Crimes Act* 1900 (NSW) s61N(2) Act of indecency - person over 16 years
 18. *Crimes Act* 1900 (NSW) s61M(2) Aggravated indecent assault, victim under 10 years
 19. The range of average prison sentences depends on whether all offences are counted, or only those offences where at least two prison sentences have been imposed. An average cannot be derived from a single sentence.
 20. It is noted that section 61JA (with 12 prison sentences – when aggregated) attracted the longest average sentence of 14.167 years. As the statutory maximum is life imprisonment, a figure representing a percentage of the maximum cannot be calculated.

thus unlikely to give an accurate impression of typical sentences for those offences.²¹

When restricted to offences for which a more significant²² number of prison sentences were recorded, the average sentences ranged from 17.2% to 42.4% of the applicable statutory maxima.

Statutory maximums

Chart 2: Range of statutory maximums - Crimes Act 1900 (NSW)



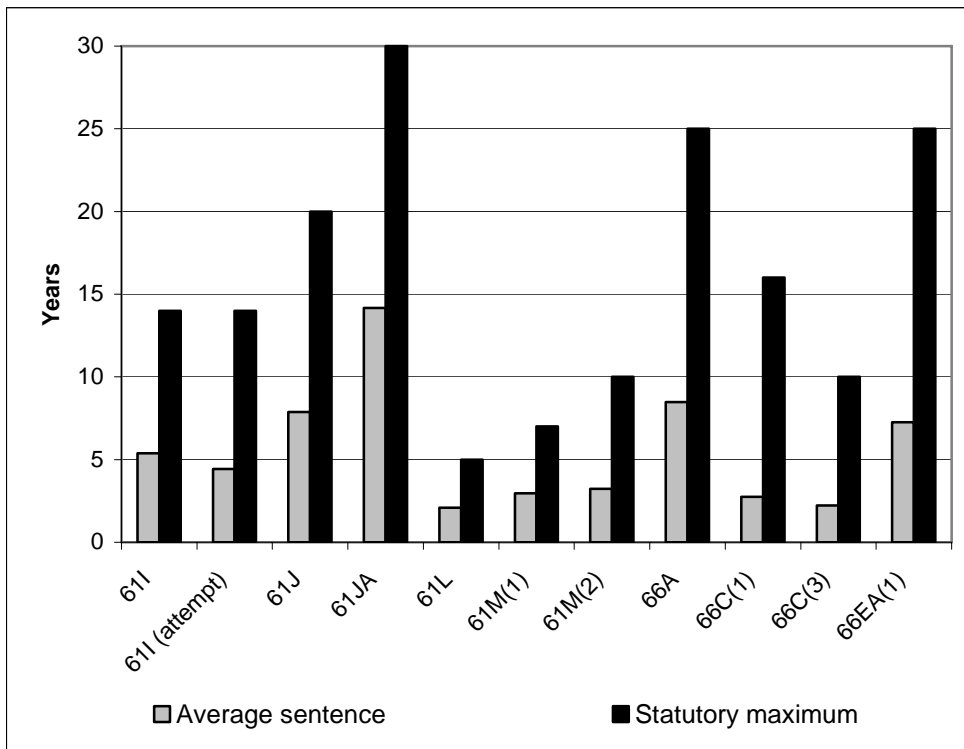
It must be noted that the data underlying many of the average sentences is limited (due to the small sample sizes), and the

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21. s65A(2) - Sexual intercourse procured by non-violent threat; 61O(1) - inciting person under the age of 16 to committing an aggravated act of indecency; 80A(2) – Sexual assault by forced self-manipulation; and 61N(1) – Act of indecency towards a person under 16.
 22. ‘Significant’ here is used in its everyday sense, and not in its statistical sense. Offences for which fewer than 10 prison sentences were recorded were excluded here.

correlation itself is less than conclusive,²³ so no firm inferences can be drawn from it.

However, from the clear positive correlation between statutory maximum sentences and average sentences expressed in years, and what may be a slight negative correlation between statutory maximum sentences and average sentences as expressed as a percentage of the statutory maximum, one could posit that the courts agree in general with the legislation in terms of the relative gravity of each offence in the hierarchy of sexual offences²⁴, but agree less strongly with the appropriateness of the statutory maximum sentences themselves.

Chart 3: Average sentences and statutory maximum periods - Crimes Act 1900 (NSW)

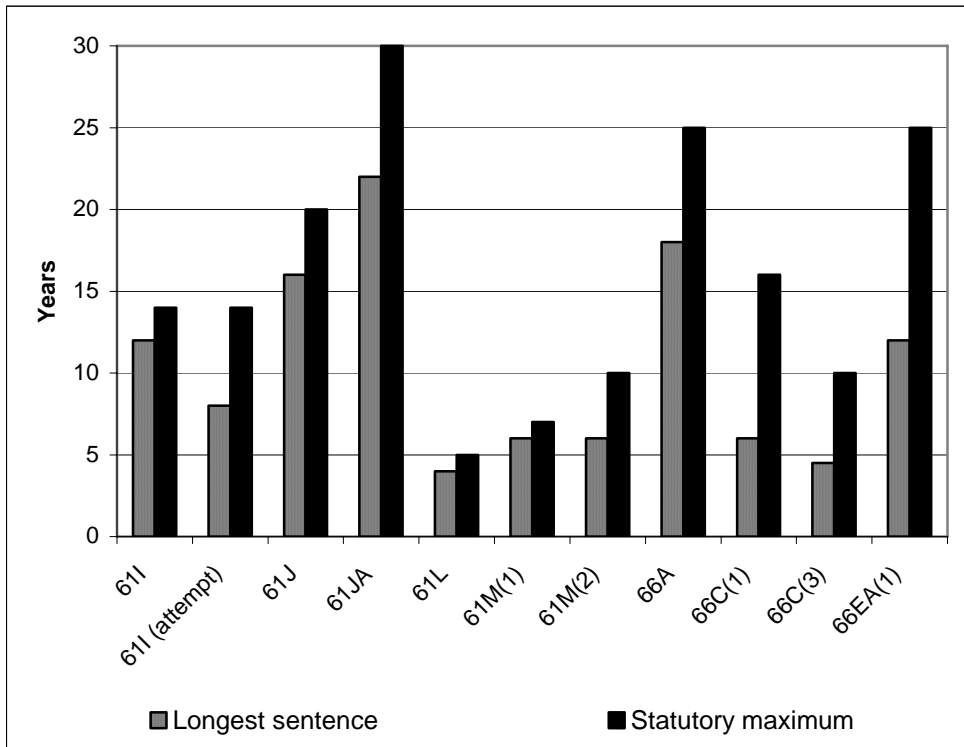


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23. While the negative relationship between the statutory maxima and the average sentence is statistically significant (significantly different to zero), regression analysis suggests that only 14% of the variance in the average sentences is explained by the variance in statutory maximum period.
24. As ranked by the statutory maximum sentences

Longest sentences and the statutory maximum

The longest sentence imposed for each offence, expressed as a percentage of the statutory maximum applicable to each offence, ranged from 21.43%²⁵ to 90%.²⁶

Chart 4: Longest sentences and statutory maxima - Crimes Act 1900 (NSW)



Non-parole periods

Average non-parole periods imposed for the sexual offences examined ranged from approximately 1 year 2 months to 8 years.

For the five offences for which an SNPP is specified in the legislation and for which there were more than 10 non-parole periods recorded by JIRS²⁷, the average non-parole periods expressed as a percentage of the SNPP ranged from 32.07% to 44%.

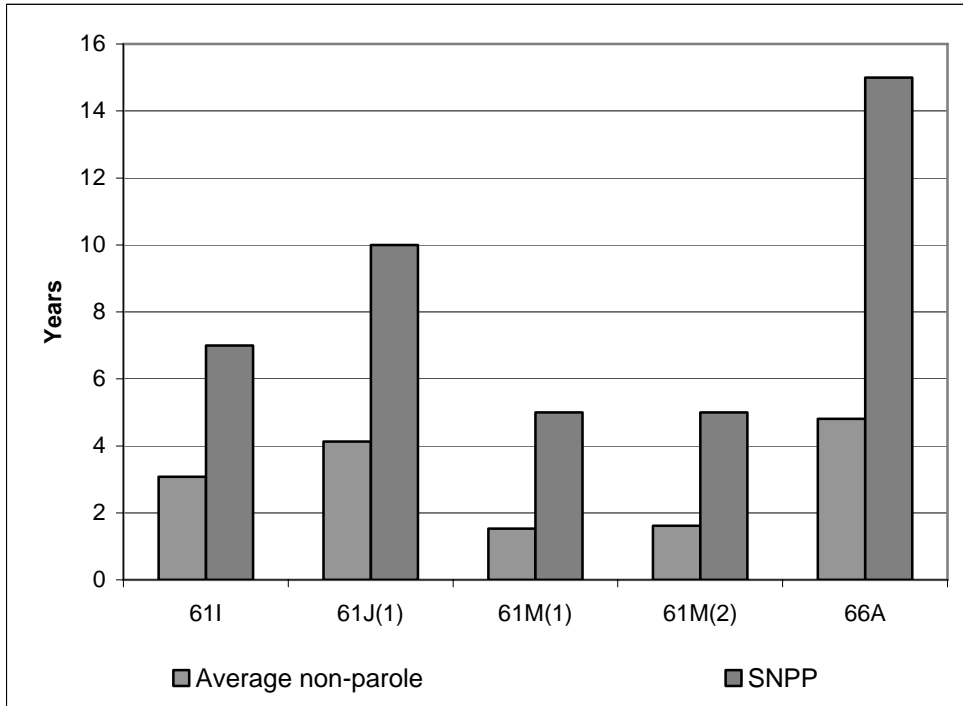
25. *Crimes Act 1900 (NSW)* s91G – Use child for pornographic purposes

26. *Crimes Act 1900 (NSW)* s66A – sexual intercourse with a child under 10

27. s61I – sexual assault; s61J(1) – aggravated sexual assault; s61M(1) – aggravated indecent assault; s61M(2) – aggravated sexual assault against a person under the age of 10; 66A – sexual intercourse with a child under 10.

Only two offenders received non-parole periods on their sentences which exceeded the applicable SNPP; both of those offenders were sentenced for offences under s 61I (sexual assault), and both received non-parole periods of 8 years.²⁸

Chart 5: Average non-parole periods imposed and SNPPs – Higher Courts



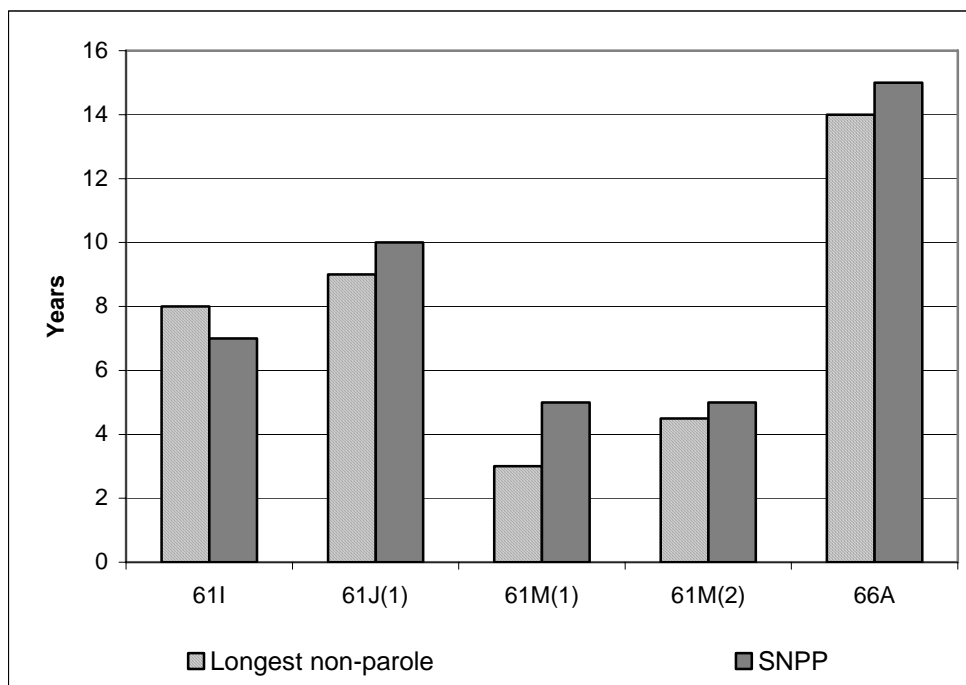
Average non-parole periods imposed, expressed as a percentage of the average sentences ranged from 32% to 68.33%. Excluding offences for which there were fewer than ten non-parole periods were recorded,²⁹ average non-parole periods ranged from 49.85% to 63.33% of the average sentences.

This excludes 61JA (aggravated sexual assault in company) offences, for which 4 non-parole periods were recorded.

28. The SNPP for a s61I offence is 8 years.

29. This limited the data to offences falling under s 61I – sexual assault; 61J – aggravated sexual assault; 61L - indecent assault; 61M(1) – aggravated indecent assault; 61M(2) – aggravated indecent assault on a child under 10; 66A – sexual intercourse with a child under 10; and 66C(3) – sexual intercourse with a child between 14 and 16.

Chart 6: Longest non-parole periods imposed and SNPPs – Higher Courts



The divergence in the proportionality of the SNPPs for mid range offences to the maximum penalties and their proximity to the NPP that could be expected for a worst case led to a closer examination, in Chapter 3, of the following offences:

- s66A - Offences of sexual intercourse – child under 10 years;
- s61M (1) – aggravated indecent assault;
- s61M (2) - aggravated indecent assault, child under 10 years; and
- s61I - sexual intercourse without consent.

Special circumstances

When imposing a sentence of imprisonment in the ‘term of sentence including non-parole period’ format, the *Crimes (Sentencing Procedure) Act 1999*³⁰ states that the balance of the term of the sentence must not exceed one third of the non-parole period unless the court decides that there are special circumstances, and the reasons for that decision are recorded.

From the range of non-parole periods imposed for the sexual offences examined, it appears courts are more often than not finding special circumstances that warrant the imposition of a longer balance of term

30. ss44(2)

than one third of the non-parole period, or are simply not meeting the s 44(2) requirement.³¹

In the Local Court, average non-parole periods ranged from 3months 3weeks to 9months 3weeks. Expressed as a percentage of the average sentences for each offence, average non-parole periods ranged from 59.8% to 70.26%. Taking a weighted average of these figures,³² it appears that non-parole periods recorded in the Local Court for sexual offences are in the vicinity of 66% of the average terms of sentence.

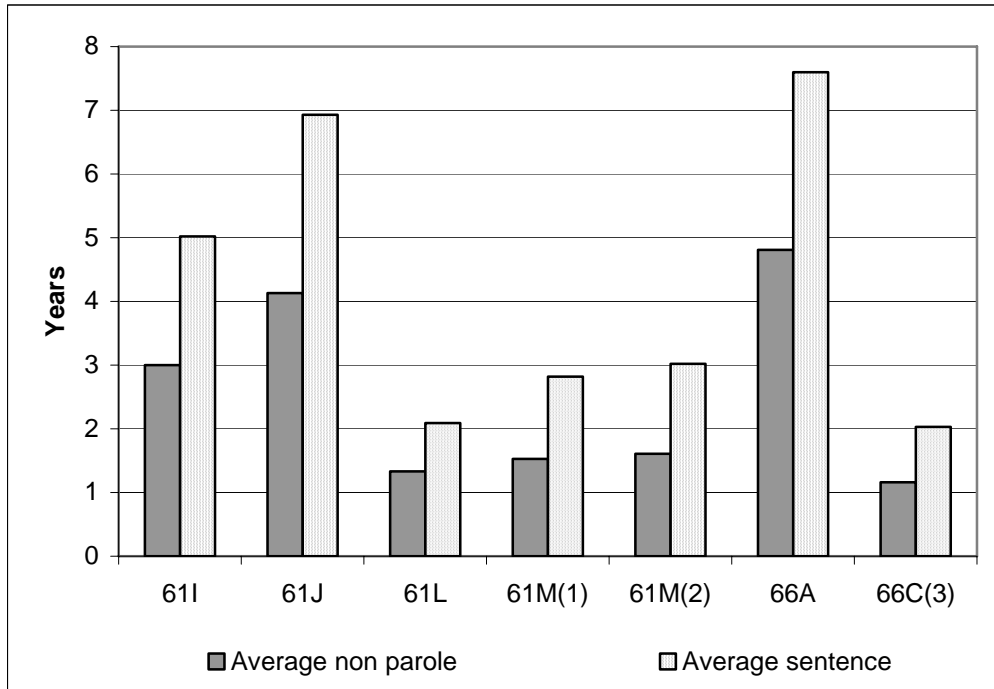
It is noted however that there are significant data limitations and different methods employed to calculate this aspect of sentencing. In the higher courts, the measure was derived by comparing average non-parole periods for non-consecutive sentences with average sentences for non-consecutive and consecutive sentences combined.

When the measure is restricted to non-consecutive sentences for both the numerator and the denominator, the relationship is closer than the figures suggest in the report on the higher courts. Furthermore, the figures in the higher courts have not been weighted by offence in order to give a single figure comparable with the Local Court.

31. s44(3) makes it clear that this does not, in and of itself, invalidate the sentence.

32. Weight given by the number of non-parole periods recorded for each offence

Chart 7: Average non-parole periods and average sentences



Pleas

Due to the small number of cases, caution should be exercised when comparing average sentences by plea. Unfortunately, it is impossible to gain an accurate view of the effect of pleading guilty or not guilty on the duration of sentences. This is because the plea is only one of several factors taken into account by the judge. The results may be attributable to other important sentencing factors (such as assistance to authorities) that have not been controlled for.

The small sample sizes and the resulting limitations on data analysis are no more evident than in this area. For instance, while one would expect that the average sentences would be lower for offenders pleading guilty, in almost half the offences for which more than 10 offenders received prison terms in the higher courts,³³ the offenders

33. s61I – sexual assault, 61J – aggravated sexual assault, 61L – indecent assault, 61M(1) aggravated indecent assault & 61M(2) – aggravated indecent assault on a child under 10, 66A – sexual intercourse with a child under 10, 66C(3) – sexual intercourse with a child between 14 and 16, 66EA(1) – persistent sexual assault of a child. Note that offences in which more than 10 offenders were imprisoned were chosen as an arbitrary line to facilitate what little analysis was possible, and not based on any inherent significance.

that pleaded *not guilty* received lower average sentences.³⁴ In each of these offences, the number of offenders that pleaded not guilty ranged from three to six, and the overall sample sizes were such that a few offenders receiving very large or low sentences could affect the averages.

In many of these offences, it was possible to identify individual sentences which had the effect of skewing the averages in the opposite direction to the direction one would expect. For example, a lengthy prison term may have been imposed upon an offender who pleaded guilty for an offence which fell into the worst possible category of offences, resulting in a significant increase in the average sentence for offenders pleading guilty to that offence.

Further restricting the data to those offences in which more than ten offenders pleaded not guilty to the offence³⁵ left only two offences for consideration³⁶, but the data from these two offences does tend to support the assumption that the average sentences for offenders pleading guilty will be shorter.

For s 61I offences (sexual assault), where 47 offenders pleaded guilty and 34 offenders pleaded not guilty, the average sentence for the offenders who pleaded not guilty was 45% longer than for those pleading guilty.³⁷ For s 61J offences (aggravated sexual assault) where 57 offenders pleaded guilty and 23 pleaded not guilty, the average sentence for those offenders that pleaded not guilty was 3.6% longer than for those that pleaded guilty.³⁸

34. s61I – sexual assault (attempt), 61L – indecent assault, 61M(1) & (2) – aggravated sexual assault.

35. Once again, 10 has been chosen as an arbitrary line.

36. s61I and 61J

37. 4.5 years for a plea of guilty, vs. 6.53 years for a plea of not guilty.

38. 7.79 years for a plea of guilty vs. 8.07 years for a plea of not guilty.

Table 1: Higher Courts: Average sentences: Plea guilty vs. not guilty

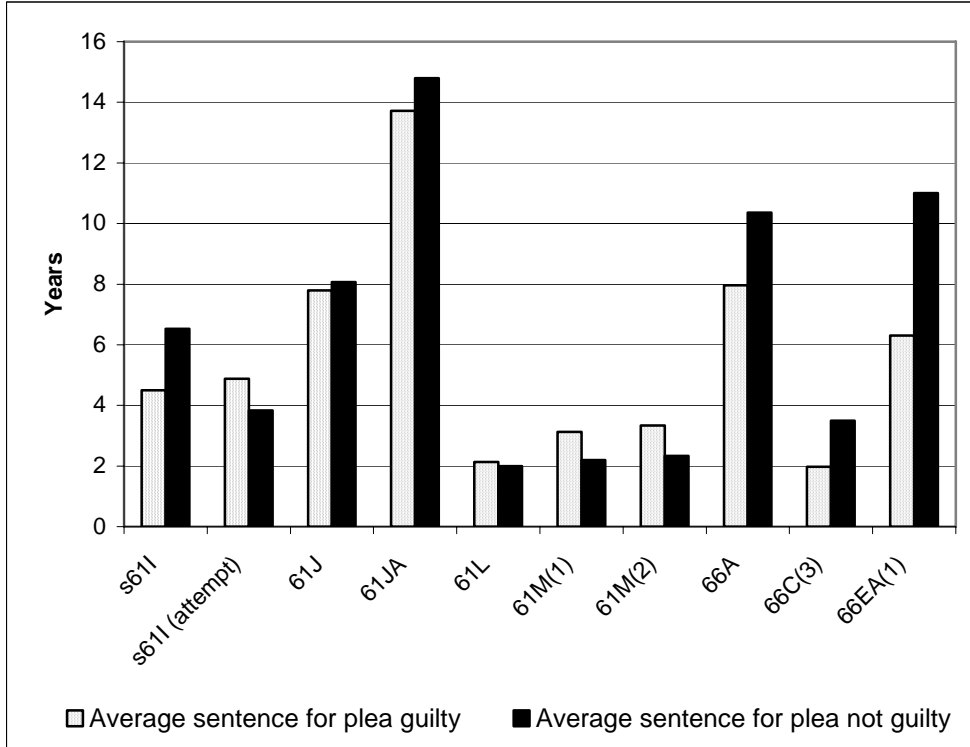
Section	Average sentence for plea guilty ³⁹	Number of matters	Average sentence for plea not guilty	Number of matters
s61I – Sexual assault ⁴⁰	4 ½ y	47	6y 6 ½ m	34
s61I – Sexual assault (attempt)	4y 10 ½ m	8	3y 10m	6
61J – Aggravated sexual assault	7y 9 ½ m	57	8y 1m	23
S61JA (aggregated) – Aggravated sexual assault in company	13y 8 ½ m	7	14y 9 ½ m	4
61L – Indecent assault	2y 1 ½ m	20	2	5
61M(1) – Aggravated indecent assault	3y 1 ½ m	24	2y 2 ½ m	5
61M(2) – Aggravated indecent assault of a child under 10	3y 4m	25	2y 4m	3
66A – Sexual intercourse with a child under 10	7y 11 ½ m	25	10y 4 ½ m	7
66C(1) – Sexual intercourse with a child between 10 – 14 ⁴¹	----	---	----	-----
66C(3) – Sexual intercourse with a child between 14 - 16	1y 11 ½ m	16	3y 5	3
66EA(1) – Persistent sexual abuse of a child	6y 3 ½ m	8	11y	2

39. Rounded to the nearest ½ month

40. There were 82 offenders convicted of this offence however, for one offender the plea is unknown. That offender pleaded not guilty to a s61J charge but was found guilty in the alternative on s61I, therefore he has not been assigned to the plea of guilty or the please of not guilty.

41. All pleaded guilty

Chart 8: Higher Courts: Average sentences based on plea



The significance of the statistics on plea is diminished for the Local Court as JIRS data combines not guilty plea and no plea entered.

Because of the small number of cases, caution should be exercised when comparing average sentences by plea. Any results may be attributable to more important sentencing factors that have not been controlled for.

With this caveat, it is noted that in two of the offences,⁴² the average sentence for those offenders that pleaded guilty were lower than for those who pleaded not guilty or entered no plea. For the remaining four offences, the reverse held true.

42. s61M(1) – aggravated indecent assault and 91H(3) – possession of child pornography

Penalties Relating to Sexual Assault Offences in New South Wales

Table 2: Local Court: Average sentences for plea guilty and plea not guilty/no plea – Crimes Act 1900 (NSW)

Section	Offence	Average sentence for plea guilty (months/weeks)	Number of cases	Average sentence for plea of not-guilty / no plea (months/weeks)	No of cases
61L	Indecent assault	9m 3w	62	9m 1w	32
61M(1)	Aggravated indecent assault	12m 1w	61	13m 2w	42
61M(2)	Aggravated indecent assault (victim < 10 years)	15m 3w	20	13m 3w	11
61N(1) (not incite)	Act of indecency (victim < 16 years)	12m 1w	12	7m	2
61N(2) excluding incite	Act of indecency (victim > 16 years)	7m 3w	16	6m 3w	6
91H(3)	Possess child pornography	14m 1w	27	16	4

Juvenile offenders

Table 3: Juveniles matters in the Children's Court and Higher Courts

Crimes Act 1900 (NSW)	Children's Court	Higher Courts
61 I ⁴³	10	3
61J(1) ⁴⁴	15	29
61JA(1) ⁴⁵		5
61L	30	
61M(1) ⁴⁶	40	
61M(2)	18	
61N(1) ⁴⁷	9	
61N(2)	6	
61O(1)		1
61O(2) ⁴⁸	8	
66A ⁴⁹		23
66B		3
66C(1)	10	1
66C(2)	5	
66C(3)	13	1
66C(4)	10	1
91H(3)	1	
Summary Offences Act		
5	10	
TOTAL	185	67

-
43. All 3 cases in the higher courts were standard non-parole period (SNPP) offences.
 44. The aggravating feature in the offence in all 15 cases in the Children's Court was that the victim was under the age of 16 years. Currently, the statistics in the higher courts do not differentiate between aggravating features for this offence. Five cases in the higher courts were SNPP offences. The offence in one case in the higher courts was an attempt. The offence in one case in the higher courts was an accessory before the fact.
 45. The aggravating feature in the offence in three cases in the higher courts was threaten actual bodily harm by weapon. In one case, the offender inflicted actual bodily harm and in one case there was deprivation of liberty. Three cases in the higher courts were SNPP offences.
 46. The aggravating feature in the offence in 37 cases in the Children's Court was that the victim was under the age of 16 years. In three cases, the offender was in company. Currently, the statistics in the higher courts do not differentiate between aggravating features for this offence.
 47. In three cases in the Children's Court the offence was incite.
 48. In two cases in the Children's Court the offence was incite.
 49. Eleven cases in the higher courts were SNPP offences.

There were 252 offenders under the age of 18 years sentenced for sexual offences in the higher courts.⁵⁰ The JIRS statistics did not record any offenders under the age of 18 as having been sentenced for the offences considered in the Local Court.

For the offences for which more than one offender under the age of 18 was sentenced to imprisonment in the higher courts,⁵¹ basic analysis was repeated excluding the juvenile offenders, in order to determine whether sentencing considerations relating to age may have affected figures such as average sentences.

For all but s66A (sexual intercourse with a child under 10), and s61JA (aggravated sexual assault in company) the differences in average sentences when the juvenile offenders were excluded from the data were negligible.

For example, the average prison sentence for a s61I offence was 5.378 years. Once the juvenile offender data was excluded, the average prison sentence was 5.399 years. The difference between these two terms is measurable in days, and similarly insignificant differences were found for the other offences. For s66A offences, the exclusion of juvenile offender data resulted in a significant increase in the average sentence figures, as illustrated in the table below.

Table 4: Effect of juvenile offender data on s66A sentencing statistics

	Including <18 data	Excluding <18 data
Average sentence ⁵²	8 ½y	9y 3m
Average sentence, plea guilty (years)	7y 11 ½ m	8y 10 ½ m
Average non-parole period	4y 9 ½ m	5y 8m
Average non-parole, plea guilty	4y 5 ½ m	5 ½y

The probable cause for the difference being more pronounced for s66A is that juvenile offenders made up a greater proportion of the overall offender numbers for this offence (4 of 32) than for the other offences.⁵³ It is reasonable to assume that shorter sentences were imposed on

50. This includes one case of bestiality under s79, heard in the Children’s Court.
 51. ss61I – sexual assault, 61J – aggravated sexual assault, 61M(2) – aggravated indecent assault on a child under 10, 661A – sexual intercourse with a child under 10
 52. Rounded to the nearest ½ month
 53. s61I – 3 of 82, s61J – 5 of 80, s61M(2) 2 of 28

offenders under the age of 18⁵⁴, and the proportion of offenders under the age of 18 being greater for s66A offences, this led to a significant increase in the average sentences when the young offender data was excluded. Juveniles are less likely to receive a sentence of imprisonment compared to adult offenders. For example, seven of the eight offenders not given a custodial sentence for a s66A offence were juveniles.

Data limitations

Data analysis, and more specifically, the ability to draw conclusions from this process, has been severely hampered by the limited sample size in most of the offences, particularly in relation to imprisonment rates.

Consecutive and non-consecutive terms and average sentences

Prior to 1999, JIRS data excluded consecutive terms, as these tended to be imposed in a way which reflected the overall criminality of a case. This often involved reducing the otherwise appropriate sentence for the principal offence, and thus their inclusion in the statistics may have given an inaccurate impression of sentencing patterns for that offence.

Since *Pearce v The Queen* (1998) 194 CLR 610, sentencing judges have been required to record an appropriate sentence for each offence before considering how they will be accumulated into an overall sentence. Consequently, statistics from January 1999 onwards on JIRS include both consecutive and non-consecutive terms, as they are directly comparable. However, JIRS maintains a distinction between the two forms of sentences. Non-parole periods on consecutive sentences tend to be influenced by the aggregate sentence rather than the sentence for the principal offence, and thus are excluded from the statistics for similar reasons to the exclusion of pre-1999 consecutive sentences.⁵⁵

For the above reasons, when dealing with average sentences this report will be referring to both consecutive and non-consecutive sentences, as not only are they directly comparable, but the increased sample size may give a more accurate idea of sentencing figures. However, all discussion of non-parole periods will be restricted to non-consecutive sentences. This does not mean that non-parole periods

54. This is borne out by the fact that in three of the four offences considered, exclusion of offenders under the age of 18 resulted in a slight increase in average sentences.

55. The above information is taken from the explanatory notes to the JIRS statistics.

were not recorded for consecutive sentences, only that the JIRS data does not record them.

In the Local Court, JIRS data does not differentiate between consecutive and non-consecutive sentences, although consecutive sentences of up to 5 years can be imposed in the Local Court.

Twenty-two of the 295 prison sentences (or 7.46%) are recorded on JIRS as receiving a “fixed” term of 2 years. It is more likely than not that such sentences are a result of consecutive sentences being imposed.

At the other end of the scale, the Court may decline to set a non-parole period if the term of imprisonment is 6 months or less. Without examining the raw data, it is not possible to determine the sentences where a non-parole period was not set and the reasons why.⁵⁶

Non-parole periods

The JIRS data is presented under the assumption that the primary interest in non-parole period statistics will stem from an interest in discovering the length of time in custody to which the offender was sentenced. Accordingly, JIRS combines the data on non-parole periods and fixed-terms under one heading.

The term ‘fixed-term’ has not been used in the sentencing legislation since the *Sentencing Act 1989* was replaced by the *Crimes (Sentencing Procedure) Act 1999*. However, the concept still exists under s45 of the more recent Act. Under s45, courts may decline to record a non-parole period for a sentence.

While the combination of non-parole periods and fixed-term data makes it impossible to gain a precise view of non-parole statistics, for the purposes of this report it has been assumed that few such fixed-terms are included in the data, and that a reasonably accurate impression of non-parole periods can be gained by treating the combined fixed-term/non-parole period data as non-parole period data only. This assumption has been made on two grounds.

First, the average non-parole period statistics are *always* substantially lower than the average sentence statistics. If a significant number of fixed-term sentences appeared in the combined fixed-term/non-parole data recorded, the differences between the average sentence and average non-parole period statistics would be less pronounced.⁵⁷

56. Correspondence, the Judicial Commission of NSW, 21 May 2008

57. A fixed-term sentence is represented by the same value in both the terms of sentence data and the fixed term/non parole data. A sentence in the more common ‘sentence including a non-parole period’ format is represented by a

Secondly, for offences where there were very few non-consecutive sentences and fixed-term/non-parole periods recorded by JIRS,⁵⁸ it is possible to identify individual fixed-term/non-parole statistics which represent counterparts to statistics recorded under the terms of sentence.

For example, for s 61K(a) offences⁵⁹ there were two non-consecutive sentences recorded, one of 4 years and one of 4 ½ years, and two fixed-term/non-parole periods of 2 years and 3 years, respectively. From this data it is apparent that the two shorter periods represent non-parole periods imposed on the sentences of imprisonment.

Again, for s61J offences⁶⁰ there were five offenders under the age of 18, who received sentences of 3, 4 ½, 8, 9 and 12 years, respectively. Data under the fixed-term/non-parole heading for the same offenders records periods of 1, 2 ½, 5, 6 and 7 years, respectively. A comparison of the two records of figures suggests that each of the terms recorded under the fixed-term/non-parole heading represents a non-parole period, not a fixed-term sentence.

While it is not always this clear-cut for other offences, it is nevertheless apparent that the vast majority of statistics recorded under the heading of fixed-term/non-parole periods represent non-parole period statistics, only.

Finally, the JIRS statistics relied upon include a significant degree of 'rounding up'. For example, it is the Council's understanding that a fine of \$1,001 would be rounded up to \$2,000 as presented by the statistics, which will have a significant impact on average fine levels, particularly if there were a relatively small number of fines.⁶¹ Similar rounding occurs with prison terms, although it is likely to be less problematic in these cases, as prison sentences handed down in the higher courts frequently increase by increments of 6 months and 12 months, particularly with longer sentences.

higher value in the terms of sentence data, and a lower value in the fixed-term non-parole data. If there were a substantial number of fixed-term sentences included in the data, then the average fixed-term/non-parole period figures would still be lower than the average sentence figures, but not to such a significant a degree as evinced in the available statistics.

58. Ironically, such data was generally excluded from analysis due to the limitations of sample size.
59. Malicious infliction of actual bodily harm with intent to have sexual intercourse
60. Aggravated sexual assault
61. Although it is noted that fines are rarely imposed for sexual offences in either the higher courts or the Local Court.

It is advised that these data limitations be kept in mind when considering the statistics presented in the following pages:

- The data below includes data from offenders under the age of 18, as for the most part, their impact on statistics such as average sentences was negligible.
- The way the JIRS statistics are presented does not make it possible to distinguish offenders by gender or ethnicity.
- JIRS does not record the length of suspended sentences.
- Unless otherwise indicated, where ‘sentence’ or ‘term’ is used in reference to a period of imprisonment, it indicates the overall sentence. That is, it indicates the non-parole period (where applicable) plus the balance of the term. As such, where a sentence is described as “x years with a non-parole period of y years”, the non-parole period of y years forms part of the sentence, and is not added to the sentence. Any reference to ‘term’, ‘sentence’ or ‘average sentence’ should be interpreted with the above in mind.
- Although it has been held that attempted sexual intercourse without consent does not carry the standard non-parole period (*DAC v R* [2006] NSWCCA 265), this may not be the case for accessory offences (see *R v Merrin* [2007] NSWCCA 255, with respect to offenders under s112(2).
- Standard non-parole periods do not apply in the Local Court.
- Terms of imprisonment are presented in years, months and weeks. For the purposes of this report, each month has been treated as being composed of 4 weeks, and figures on sentences have been rounded to the nearest week. e.g. an average sentence of 14.55 months will be represented as 14months and 2weeks. However, this is merely how the sentences are presented for this report. All underlying calculations have been performed to 2 decimal places.

CRIMES ACT 1900 (NSW)

S61I – SEXUAL ASSAULT

Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse commits an offence under this section.

The statutory maximum sentence for an offence under this section is imprisonment for 14 years, and the SNPP is imprisonment for 7 years.

Higher Courts

Between February 2003 and September 2007, 88 offenders were sentenced for sexual assault in the higher courts, of whom 82 (93%)⁶² were sentenced to a period of imprisonment. The remaining 6 offenders were all given a suspended sentence, 4 of those with supervision.

Terms of Imprisonment

The average sentence was approximately 5y 4½m, and the median sentence was 5 years.⁶³

A sentence of 5-6 years was by far the most common, with 31 offenders (almost 38% of all offenders) being sentenced to this period of imprisonment.

Distribution

No offenders received the statutory maximum of 14 years. Twelve years was the longest sentence imposed (on 2 offenders). The shortest term imposed was 1½ years (two offenders).

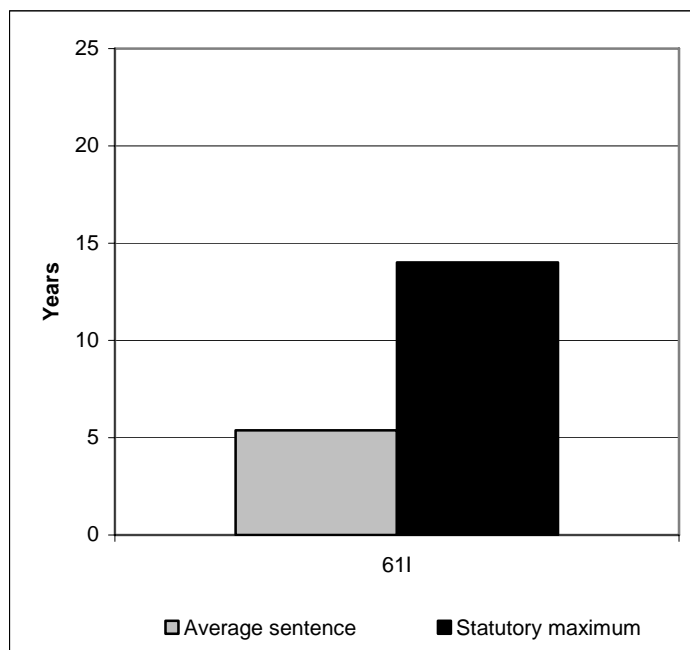
Almost 85% of offenders received sentences representing 50% or less of the statutory maximum of 14 years. Only 13 offenders received sentences in excess of 7 years.

The middle 80% range was between 3 and 9 years imprisonment.

62. There were 82 offenders convicted of this offence and sentenced to a term of imprisonment however, for one offender the plea is unknown. That offender pleaded not guilty to a s61J charge but was found guilty in the alternative on s61I, therefore he has not been assigned to the plea of guilty or the plea of not guilty.

63. Note: These sentences are only approximations. It is impossible to give exact figures as JIRS statistics round up all sentences to the nearest 6 months / year.

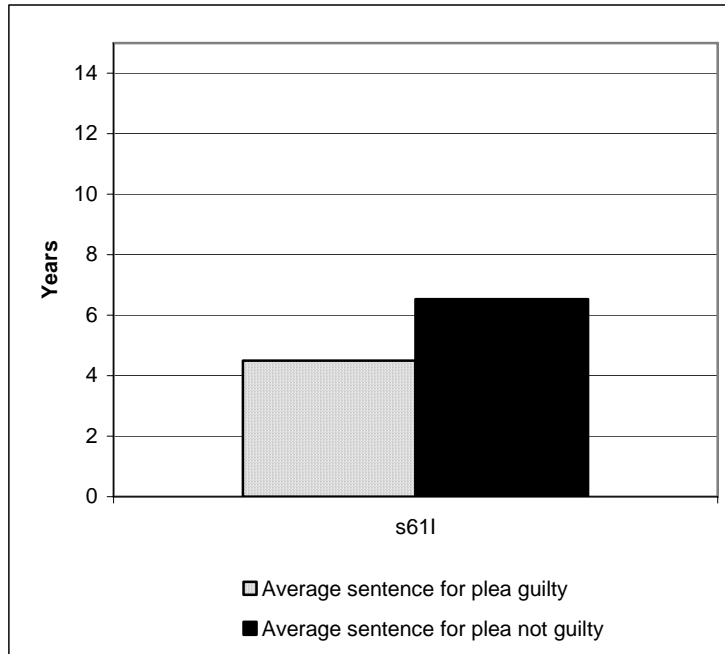
Chart 9: s61I Average sentence and statutory maximum



Plea

Of the 82 offenders sentenced to imprisonment, 47 offenders entered a plea of guilty. Both the average and median sentences for these offenders were 4½ years. For the 34 offenders that pleaded not guilty, the average sentence was 6y 6½m, and the median sentence was 6 years.⁶⁴

64. There were 82 offenders convicted of this offence however, for one offender the plea is unknown. That offender pleaded not guilty to a s61J charge but was found guilty in the alternative on s61I, therefore he has not been assigned to the plea of guilty or the please of not guilty.

Chart 10: Average sentence, guilty plea v not guilty plea

Non-parole periods

Sixty-five of the 82 sentences recorded by JIRS were non-consecutive sentences, for which non-parole periods were recorded.

Distribution

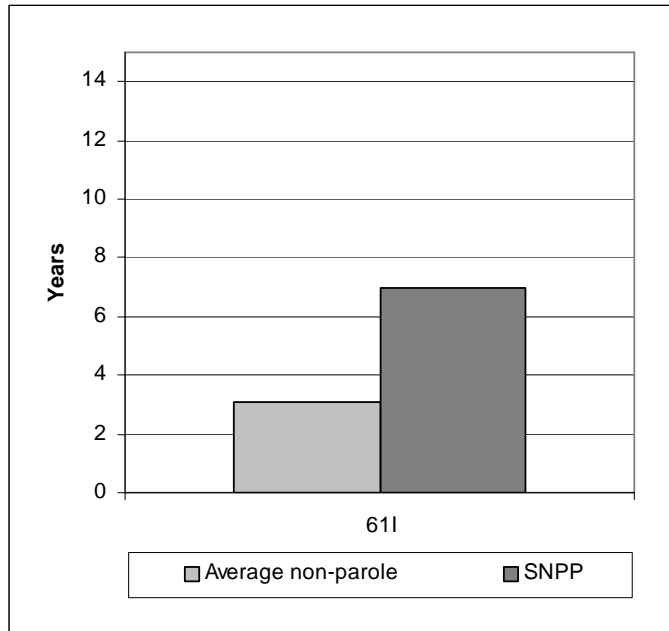
The longest non-parole period was 8 years (two offenders) and the shortest was 6 months (two offenders). The average non-parole period was 3y 1m, and the median period was 3 years.

Ninety percent of offenders received a non-parole period of 5 years or less, with only 7 offenders receiving more.⁶⁵

The middle 80% range for non-parole periods was between 18 months and 6 years.

65. 3 offenders received 6 years, and 2 offenders each received 7 and 8 years.

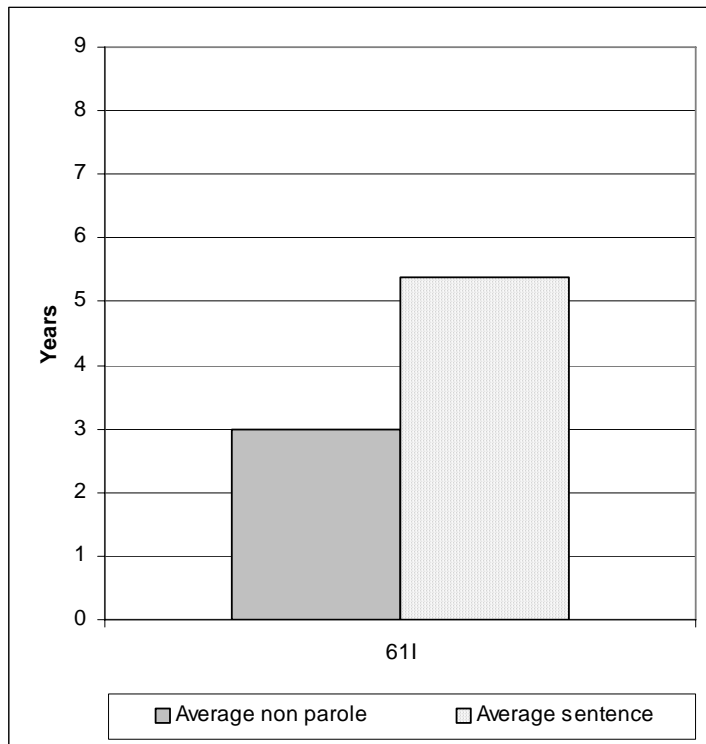
Chart 11: s61I Average NPP imposed and SNPP



There were only two matters in which the non-parole period/fixed-term exceeded the 7 year SNPP recorded out in the *Crimes (Sentencing Procedure) Act*. The non-parole period in those two cases was 8 years.

The fact that the average non-parole period is significantly less than 7 years may indicate that the sentencing judges in these cases did not consider the offences in question to be middle-range offences as referred to in the Act, or that mitigating factors under s21A are being applied significantly in most cases, or that special circumstances exist (for example, the need for a longer periods of supervision, first time in custody, age, lack of prior convictions).

Chart 12: s611 Average NPP and average sentence



Plea

Of the 65 offenders, 39 pleaded guilty. The average non-parole period for these offenders was 2y 5½ m, and the median non-parole period was 2½ years. For the 25 offenders that pleaded not guilty, the average and median non-parole periods were both 4 years.

Age

There were three offenders under the age of 18. They all pleaded guilty and were sentenced to between 4½ years and 5 years imprisonment. Two of the three sentences imposed were non-consecutive sentences, for which non-parole periods were recorded by JIRS. Both non-parole periods were of 3 years duration.

S61I – SEXUAL ASSAULT (ATTEMPT)⁶⁶

The statutory maximum sentence for a s61I (attempt) offence is imprisonment for 14 years.

Higher Courts

Between October 2000 and September 2007, there were 16 offenders sentenced in the higher courts for attempted sexual assault. Of these, 14 (87.5%) were sentenced to imprisonment.

The other two received suspended sentences, one with supervision.

Terms of Imprisonment

The average term imposed was 4y 5m, and the median term was 4 years.

Distribution

The shortest term was 2 ½ years, and 8 years the longest.

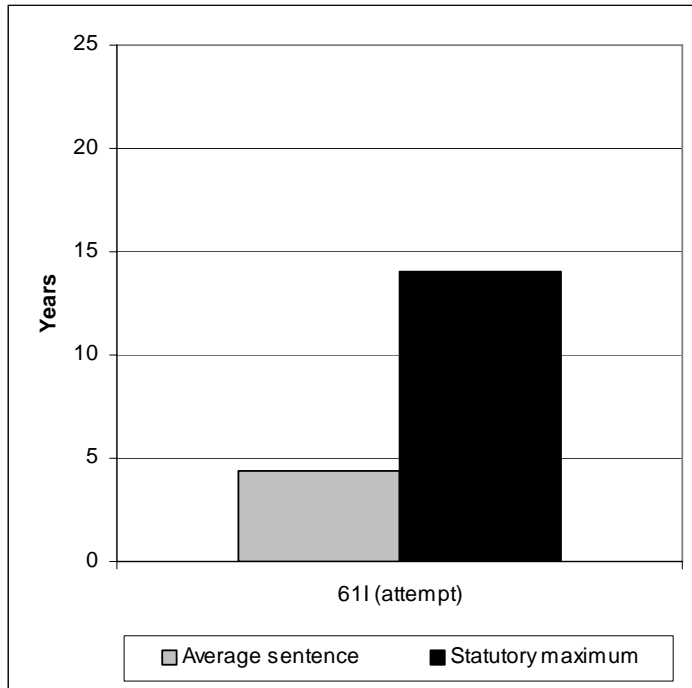
Almost 93% of offenders received less than 50% of the maximum sentence, with only one offender receiving more than 6 years.⁶⁷ However, as noted previously, the sample size is very limited, and it should also be noted that the statutory maximum sentence for *attempted* sexual assault is the same as for actual sexual assault.

A sentence of 4 years was the most common, with six offenders (43%) being given this sentence.

66. The separate treatment of attempt, accessory, inciting etc. offences has been prompted primarily by the way that JIRS has presented data, and not by the structure of the legislation.

67. 8 years.

Chart 13: s61I (attempt) Average sentence and statutory maximum

*Age*

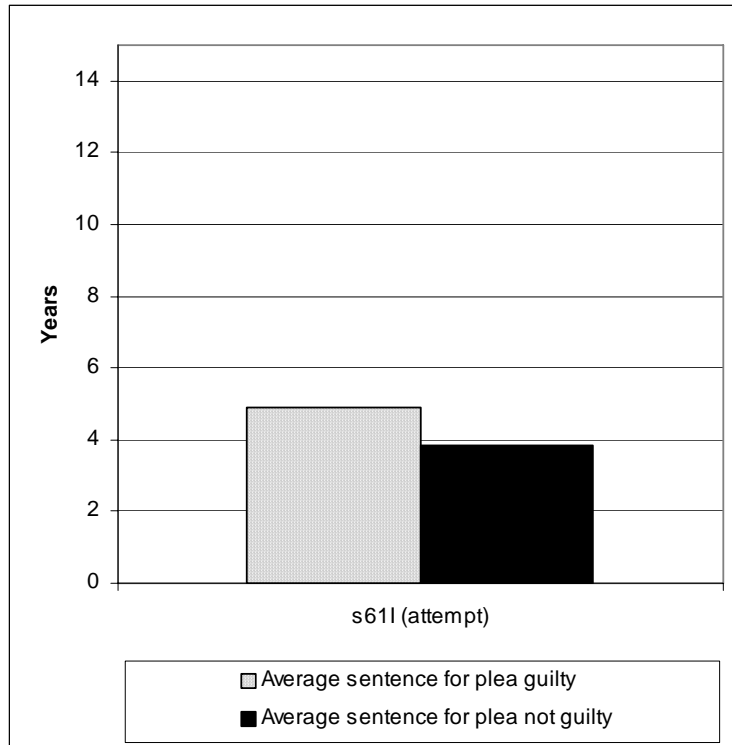
There were no offenders under the age of 18.

Plea

Of the 14 offenders sentenced to imprisonment, eight entered a plea of guilty. The average sentence for these eight offenders was 4y 10½ m, and the median sentence was 4½ years. For the six that pleaded not guilty, the average sentence was 3y 10m, and the median sentence was 4 years.⁶⁸

68. While it may seem unusual that the average sentence for the offenders who pleaded not guilty should be higher than for those who pleaded guilty, the sample size for s61I(attempt) is sufficiently small that one outlier could skew the data, and this is the case here, with the highest sentence (8 years) having been imposed on one of the 8 offenders who entered a plea of guilty.

Chart 14: s61I (Attempt) Average sentence, guilty plea v plea not guilty



Non-parole periods

Twelve of the 14 sentences recorded by JIRS were non-consecutive sentences, for which non-parole periods were recorded.

Distribution

The longest non-parole period was 5 years, and the shortest was 1 year. The average non-parole period was 2y 10m and the median was 2y 9months.

Eight of the 12 offenders for whom non-parole periods were recorded pleaded guilty. The average non-parole period for these offenders was 2y 7 ½ months, and the median non-parole period was 2y 3months. For the remaining 4 offenders, the average non-parole period was 3years 3months.

s61J – Aggravated sexual assault

Any person who has sexual intercourse with another person without the consent of the other person and in circumstances of aggravation and who knows that the other person does not consent to the sexual intercourse commits an offence under this section.

Circumstances of aggravation include:

- Intentionally or recklessly inflict actual bodily harm on victim or other person present/nearby; or
- Threaten to inflict actual bodily harm on victim or other person present/nearby with offensive weapon or instrument; or
- Offender in company; or
- Victim under 16; or
- Victim under authority of offender; or
- Victim has serious physical disability; or
- Victim has serious intellectual disability

The statutory maximum sentence is imprisonment for 20 years, and the applicable SNPP is imprisonment for 10 years.

Higher Courts

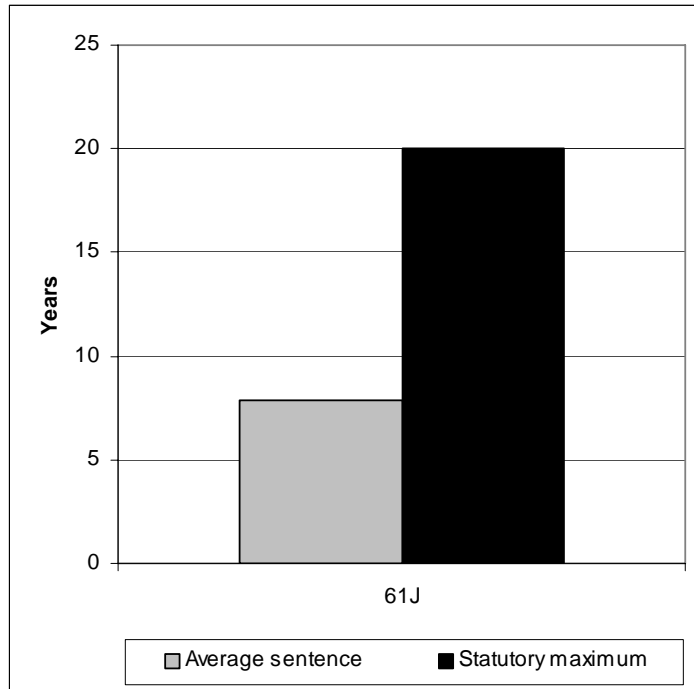
Between February 2003 and September 2007, there were a total of 81 offenders sentenced for this offence in the higher courts, of whom 80 (98.76%) were sentenced to a period of imprisonment.

The remaining offender received a suspended sentence.

Terms of Imprisonment

The average sentence duration was approximately 7y 10½ months, and the median sentence was 8 years.

Chart 15: s6J Average sentence and statutory maximum



Distribution

The shortest sentence imposed was 2 years, and the longest was 16 years.

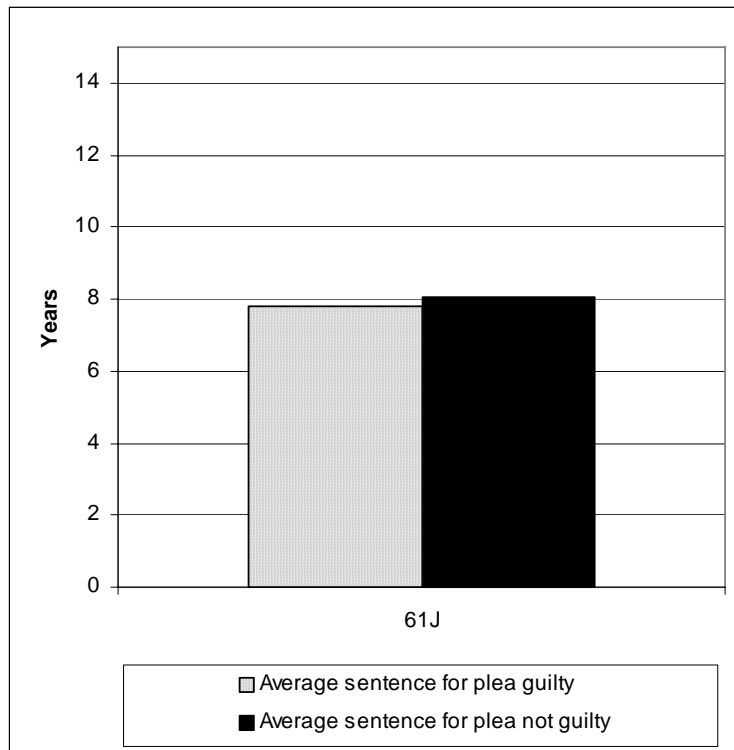
Approximately 84% of all offenders received 50% or less of the statutory maximum of 20 years. While no one period of imprisonment can be identified as being the most common, over 76% of all offenders were sentenced to between 5 –12 years imprisonment. Six offenders received more than 12 years, and one offender received in excess of 14 years imprisonment.⁶⁹

Plea

Of the 80 offenders that were sentenced to imprisonment, 57 entered a plea of guilty. The average and median sentences for these offenders were 7y 9½ m and 8 years, respectively. For the 23 offenders that pleaded not guilty, the average and median sentences were 8y 1m and 7 years, respectively.

69. That offender received 16 years imprisonment.

Chart 16: s6J Average sentence, guilty plea v not guilty plea



Non-parole periods

Forty-five (45) of the sentences recorded by JIRS were non-consecutive sentences, for which non-parole periods were recorded.

Distribution

The longest non-parole period was 9 years (one offender) and the shortest was 6 months (one offender). The average non-parole period was 4y 1½ m, and the median was 3½ years.

Almost 74% (33) of offenders received a non-parole period that was 50% or less of the ten year SNPP, with the longest non-parole period imposed being 9 years (one offender).

Plea

Of the 45 offenders, 31 entered a plea of guilty. The average and median non-parole periods for these offenders were 3y 11m and 3½ years, respectively. For the 14 offenders who pleaded not guilty, the average and median non-parole periods were 4y 7½ m and 4 years, respectively.

Age

There were five offenders under the age of 18. Their sentences are fairly evenly distributed among the full range, at 3, 4 ½, 8, 9 and 12 years.

Non-parole periods were recorded for all five offenders, of 1, 2 ½, 5, 6 and 7 years.

Chart 17: Average NPP and SNPP

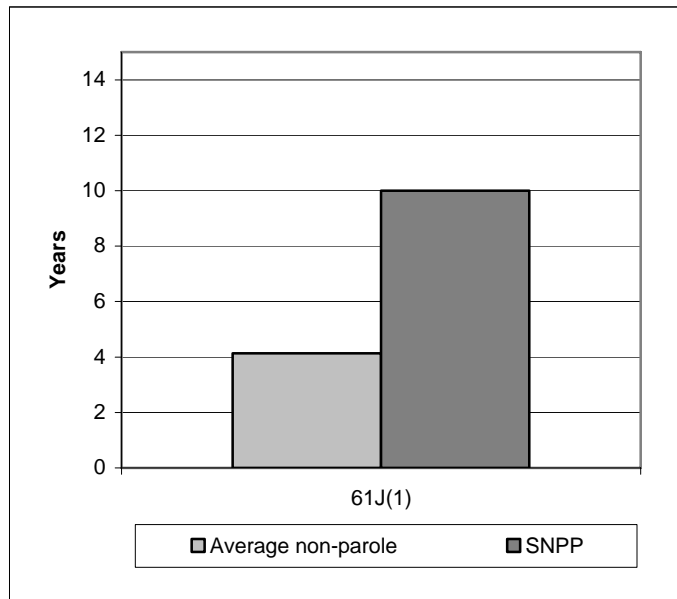
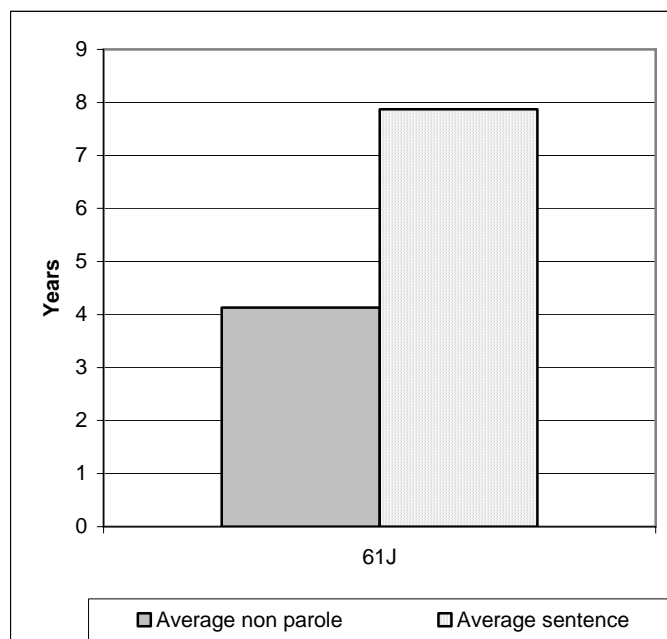


Chart 18: Average NPP and average sentence



S61J – RELATED OFFENCES

The statutory maximum sentence for the following related offences is imprisonment for 20 years. All of the following matters were dealt with in the Higher Courts.

s61J – Aggravated sexual assault (attempt)

Between October 2000 and September 2007 there were a total of seven offenders sentenced for this offence.

Of these seven, 4 (57.1%) received a sentence of imprisonment.

Of the remainder, two received suspended sentences with supervision, and one received periodic detention for 2 years.

Looking at both consecutive and non-consecutive terms, the four offenders receiving imprisonment received sentences between 3 and 9 years, and non-parole periods between 18 months and 6 years. None pleaded guilty. One of the 4 offenders was under the age of 18, and received a sentence of 7 years, with a non-parole period of 4 years.

s61J – Aggravated sexual assault (aiding and abetting)

Between October 2000 and September 2007, two offenders were sentenced for this offence. One offender (50%) received a sentence of imprisonment of 3 years;⁷⁰ the other received a suspended sentence.

s61J – Aggravated sexual assault (accessory before the fact)

One offender was sentenced for this offence. He received a sentence of imprisonment for 16 years, including a non-parole period of 8 years. The offender was under the age of 18.

70. No non-parole period recorded.

S61JA(1) – AGGRAVATED SEXUAL ASSAULT IN COMPANY

Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse, and

- is in the company of another person(s), and;
 - intentionally or recklessly inflicts actual bodily harm on victim or other person present/nearby; or
 - threatens to inflict actual bodily harm on victim or other person present/nearby; or
 - deprives the victim of liberty before or after the offence,
- commits an offence under this section.

The statutory maximum for this offence is imprisonment for life. The SNPP is imprisonment for 15 years.

All of the following matters were dealt with in the Higher Courts.

Inflict ABH

Between February 2003 and September 2007, 4 people were sentenced for this offence. All 4 (100%) received sentences of imprisonment.

The shortest sentence was 10 years, imposed upon an offender under the age of 18. The other sentences were of 12 and 14 years (2 offenders). All 4 entered a plea of guilty.

Only one non-parole period was recorded, (4 years for the juvenile offender).

Threaten ABH by weapon

One offender was sentenced for this offence in the same period, receiving 12 years imprisonment with a non-parole period of 4½ years. The offender was under the age of 18 and pleaded guilty.

Deprive liberty

Seven people were sentenced for this offence in the same period.

All (100%) received sentences of imprisonment. The shortest sentence imposed (upon the only juvenile) was imprisonment for 10 years. One offender received a sentence greater than 20 years (21y 4m with a non-parole period of 16 years). Four offenders received 14 years, and one received 20 years.

Two non-parole periods were recorded, of 5 years (for a juvenile offender) and 10 years.

S61K ASSAULT WITH INTENT TO HAVE SEXUAL INTERCOURSE

Any person who, with intent to have sexual intercourse with another person:

- Intentionally or recklessly inflicts actual bodily harm on the victim or on other person present/nearby; or
- Threatens to inflict actual bodily harm on victim or other person present/nearby with offensive weapon or instrument

is guilty of an offence under this section.

The statutory maximum sentence for an offence against this section is imprisonment for 20 years. There is no SNPP for this offence.

All of the following matters were dealt with in the Higher Courts.

s61K(a) Intentionally or recklessly inflict actual bodily harm with intent to have sexual intercourse

Between October 2000 and September 2007, six people were sentenced for this offence. All (100%) received a sentence of imprisonment, ranging from 3 years to 7 years. The average sentence was 4y 10m, and the median was 4½ years.

Four offenders pleaded guilty to the offence: the average sentence for these offenders was 5 years. For the two offenders who pleaded not guilty, the average sentence was 4½ years.

Two of the six sentences recorded by JIRS were non-consecutive sentences, for which non-parole periods were recorded of 24 months and 36 months respectively.

s61K(b) Threaten actual bodily harm with intent to have sexual intercourse

Between October 2000 and September 2007, five people were sentenced for this offence.

Four (80%) offenders received custodial sentences ranging from 4 years to 10 years. The other offender received a suspended sentence with supervision.

Three non-parole periods were recorded, ranging from 24 months to 7 years.

S61L INDECENT ASSAULT

Any person who assaults another person, and at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, commits an offence under this section.

The statutory maximum sentence for an offence under this section is imprisonment for 5 years. There is no applicable SNPP for this offence.

An offence under the section is a Table 2 offence under the *Criminal Procedure Act 1986* and is to be dealt with in the Local Court unless an election is made for a trial on indictment by the prosecutor. If no such election is made, the maximum penalty which can be imposed is 2 years imprisonment or a fine of 50 penalty units or both.

Higher Courts

Between October 2000 and September 2007, 87 people were sentenced for indecent assault in the higher courts.

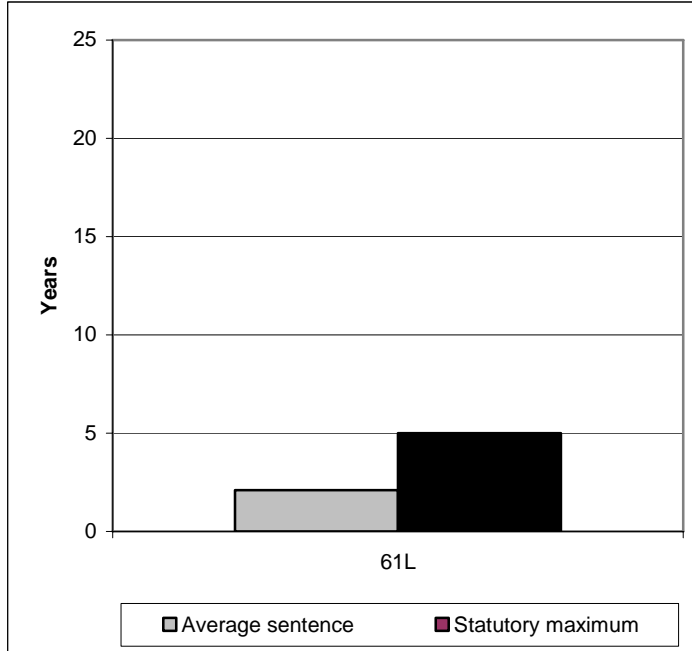
Twenty-four offenders (28%) were sentenced to a term of imprisonment. Other sentences imposed were:

- 13 received suspended sentences (9 with supervision);
- 5 received periodic detention orders (from 9 to 24 months); and
- 7 received community service orders, (ranging from 150 hours to 500 hours (500 hours were imposed on 3 of the 7 offenders);
- 35 dealt with under s9 (13 bonds, 22 bonds with supervision); and
- 3 were dealt with under s10 (1 dismissal, 2 bonds)

Terms of Imprisonment

The average sentence was 2y 1m, and the median was 2 years. Imprisonment for 1½ years and 2 years were the most common custodial sentences imposed, with 29% and 25% of offenders, respectively being sentenced to those terms.

Chart 19: s61L Average sentence and statutory maximum



Distribution

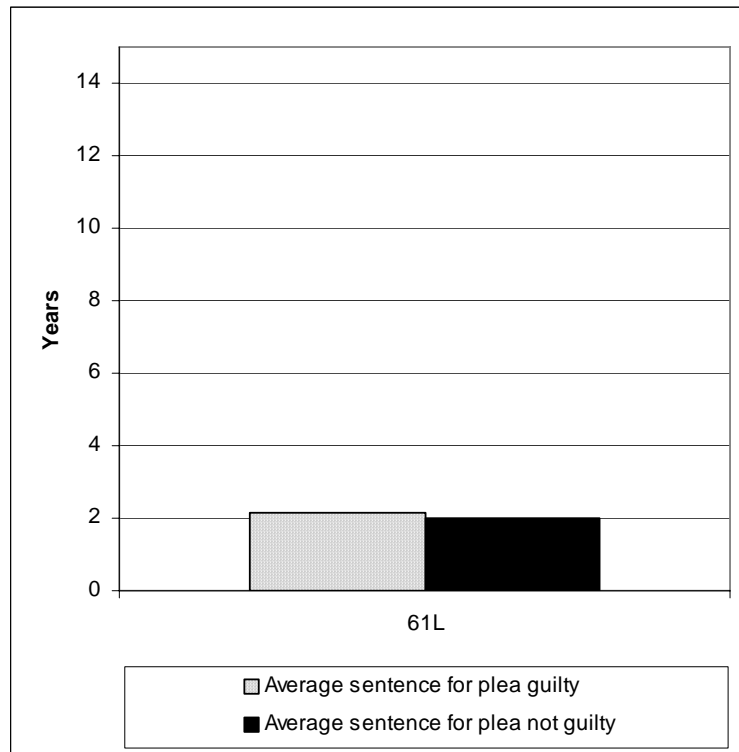
The shortest prison sentence imposed was 1 year and the longest was 4 years. 92% of offenders were sentenced to 50% or less of the statutory maximum, with only two offenders receiving longer sentences.⁷¹

Plea

Of the 24 offenders sentenced to prison, 20 pleaded guilty. The average term imposed on those that pleaded guilty was 2y 1½ m and the median was 2 years. The average (and median) term for those that pleaded not guilty was 2 years.

71. Both received 4 years.

Chart 20: s61L Average sentence guilty plea vs not guilty plea



Age

There were no offenders under the age of 18.

Non-parole periods

Twenty-three of the 24 sentences recorded by JIRS were non-consecutive sentences, for which non-parole periods were also recorded.

Distribution

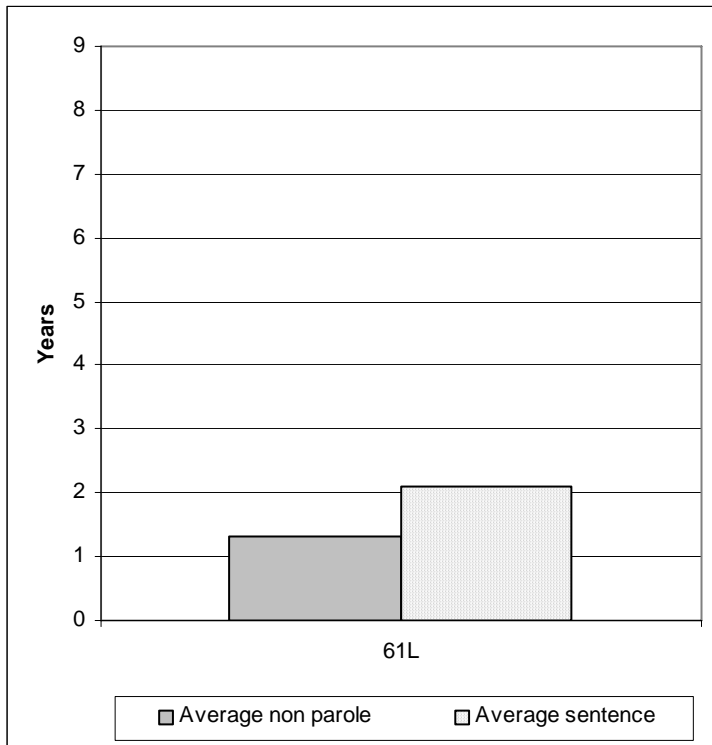
The longest non-parole period imposed was 3 years, and the shortest was 6 months. The average non-parole period was 1y 4m and the median was 1 year.

Plea

Twenty of the 23 offenders pleaded guilty to their offence. The average non-parole period for both those that pleaded guilty and not guilty was the same as the average non-parole period overall, of 1y

4m.⁷² The median non-parole for both groups was also the same, at 1 year.

Chart 21: s61L Average NPP and Average sentence



Local Court

Between January 2003 and September 2007, 467 people were sentenced in the Local Court for offences against this section.

Ninety-four people (20.1%) received sentences of full-time imprisonment.

Other sentences imposed were:

- periodic detention orders - 13;
- suspended sentences - 80 (48 with supervision);
- community service orders – 46;
- fines (fine only) – 39;
- s9 bonds – 170 (58 with supervision);
- s10 bonds – 23; and

72. Once rounded to 2 decimal places. Actual figures were 1.326 (overall), 1.325 (guilty) and 1.333 (not guilty), so the non-parole period for those that pleaded not guilty was 0.008 years, or approximately 3 days, higher.

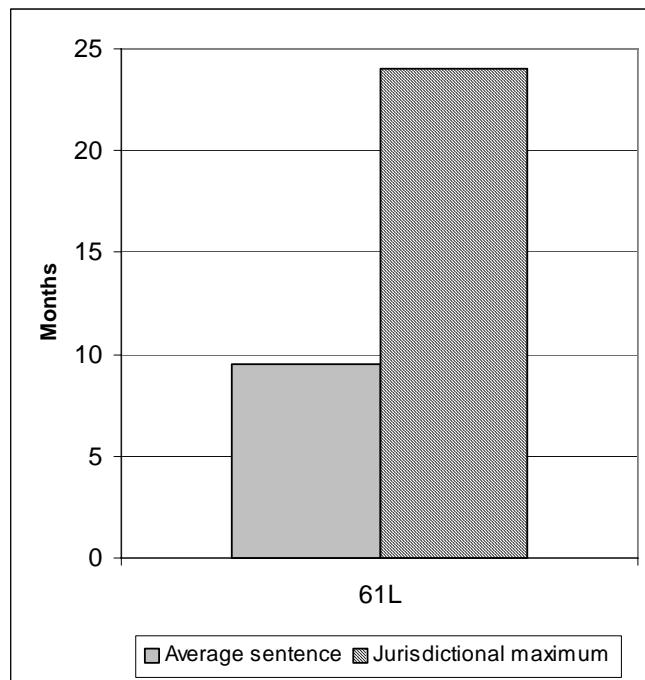
- s10 dismissals – 2

Terms of imprisonment

The terms of sentence spanned the full range available to the Local Court, ranging from one-month imprisonment (five offenders) to 24 months (three offenders). The average sentence imposed was 9months 2weeks, and the median sentence was 9 months.

Almost 80% of offenders received sentences of 1 year or less, representing half of the jurisdictional maximum sentence available in the Local Court. A sentence of 1 year was by far the most common, with almost 25% of offenders who were sentenced to a term of imprisonment receiving this sentence.

Chart 22: s61L Average sentence and jurisdictional maximum



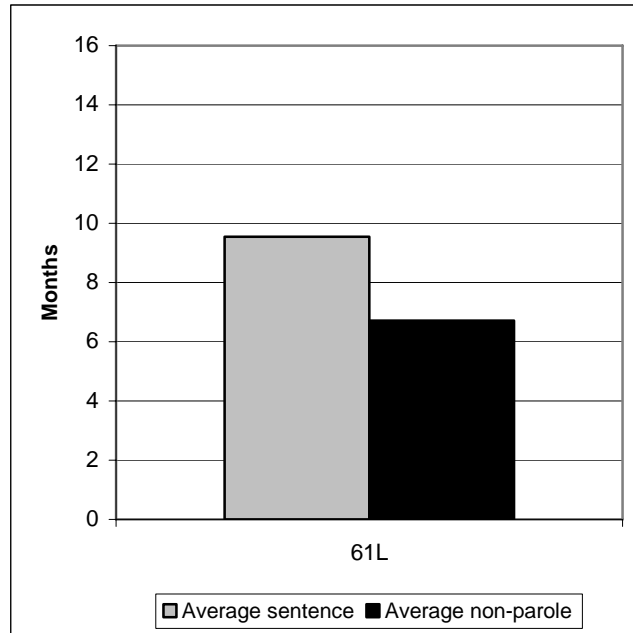
Plea

Of the 94 offenders who were sentenced to a term of imprisonment, 62 pleaded guilty to their offence. The average sentence for these offenders was 9months 3weeks. For the remaining 32 offenders who pleaded not guilty or entered no plea, the average sentence was 9months and 1week.

Non-parole periods

The average non-parole period was 6months 3weeks and the median non-parole period was 6 months. The average non-parole period for offenders who pleaded guilty was 7months and for those who pleaded not guilty or entered no plea, it was 6months 2weeks.

Chart 23: s61L Average sentence and average NPP



Periodic detention orders

The terms of the periodic detention orders ranged from 6 months (three offenders) to 24 months (one offender). The average term of a periodic detention order for an offence under this section was 10 months 1week.

Of the 13 offenders who received periodic detention orders, seven pleaded guilty to their offence. The average sentence for these offenders was 10 months. For the remaining six offenders who pleaded not guilty or entered no plea, the average sentence was 10 months 3 weeks.

Community service orders

The CSOs ranged from a minimum of 50 hours (one offender) to a maximum of 400 hours (one offender). The average number of hours imposed under a CSO for this offence was 173 hours.

Of the 46 offenders against whom CSOs were imposed, 26 pleaded guilty to their offence. The average duration of a CSO for these offenders was 161.5 hours. For the remaining 20 offenders who either pleaded not guilty or entered no plea, the average duration of a CSO was 187.5 hours.

Fines

The fines imposed ranged from \$100 (one offender) to \$4000 (one offender). The average fine imposed was \$1160.26, and the median fine was \$1000.

Of the 39 offenders who were fined, 12 pleaded guilty to their offence. The average fine for those offenders who pleaded guilty was \$983. For the remaining 27 offenders who pleaded not guilty or entered no plea, the average fine was \$1239.

S61L INDECENT ASSAULT (ATTEMPT)

One offender was sentenced in the Higher Courts for attempted indecent assault. He received 21 months of periodic detention.

S61M(1) AGGRAVATED INDECENT ASSAULT

Any person who assaults another person in circumstances of aggravation, and at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, commits an offence under this section.

Circumstances of aggravation include:

- Offender in company; or
- victim under 16; or
- Victim under authority of offender; or
- Victim has serious physical disability; or
- Victim has serious intellectual disability

The statutory maximum penalty for an offence under this section is imprisonment for 7 years. The SNPP for this offence is imprisonment for 5 years.

An offence under the section is a Table 1 offence under the *Criminal Procedure Act 1986* and is to be dealt with in the Local Court unless an election is made for trial by indictment. If no such election is made, the maximum sentence which can be imposed is imprisonment for 2 years.

Higher Courts

Between February 2003 and September 2007, 52 people were sentenced in the higher courts for offences against this section.

Twenty-nine offenders (56%) were sentenced to a term of imprisonment.

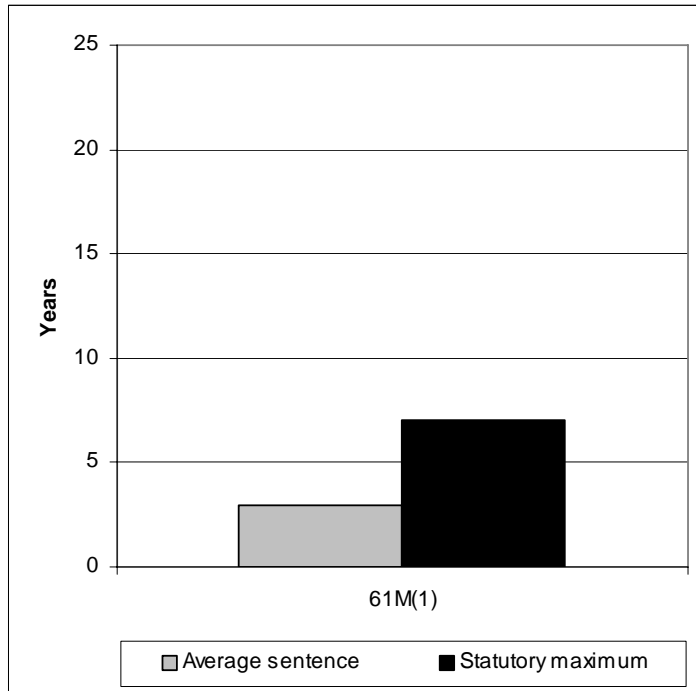
Of the remaining offenders:

- 15 received suspended sentences (14 of those with supervision);
- 1 was sentenced to 400 hours of community service;
- 5 received s 9 bonds, 3 of those with supervision; and
- 2 received s 10 bonds.

Terms of Imprisonment

- For the 29 offenders who received custodial sentences, the average sentence duration was 2y 11½ m, and the median term was 3 years.

Chart 24: s61M(1) Average sentence and statutory maximum



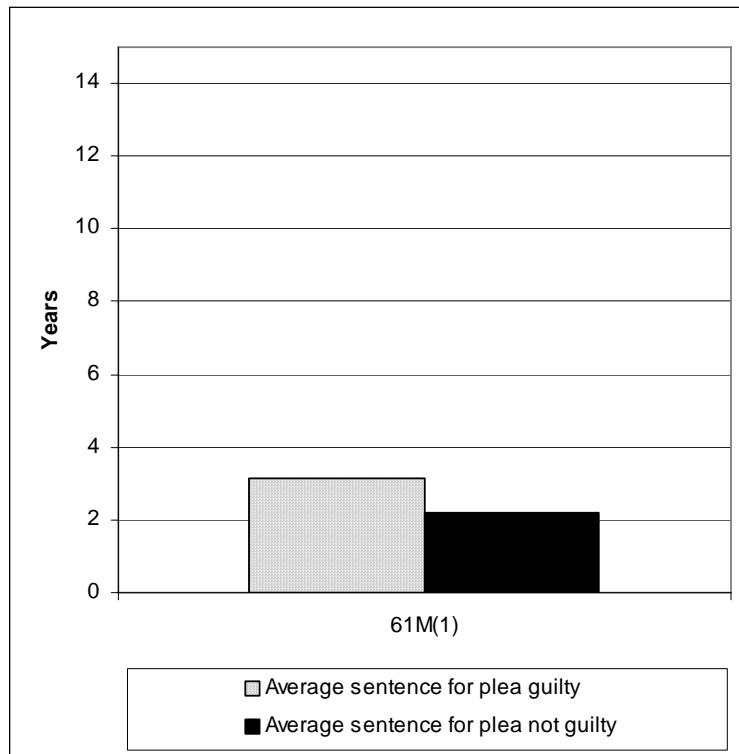
Distribution

The shortest sentence imposed was 12 months (two offenders) and the longest was 6 years (two offenders). Sixty-six percent of prisoners were sentenced to between 2 and 3½ years imprisonment. The middle 80% range lay between 1½ years and 4½ years. Two offenders received more than 4½ years (6 years each).

Plea

Of the 29 offenders who received custodial sentences, 24 pleaded guilty to the offence. The average sentence length for these offenders was 3y 1½m, and the median was 3 year. For the five offenders who pleaded not guilty, the average sentence duration was 2y 2½m and the median was 2 years.

Chart 25: s61M(1) Average sentence guilty plea vs not guilty plea



Age

No offenders were under the age of 18.

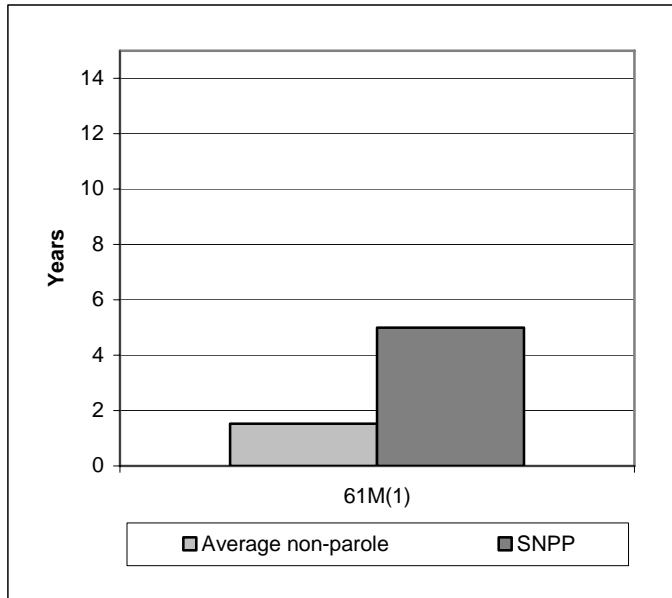
Non-parole periods

Nineteen of the 29 sentences recorded by JIRS were non-consecutive sentences, for which non-parole periods were recorded. The average sentence imposed was 2y 10m, and the median was 2½ years.

Distribution

The shortest non-parole period was 6 months, and the longest was 3 years (2 offenders). The average and median non-parole periods were 1y 6½m and 1 ½ years.

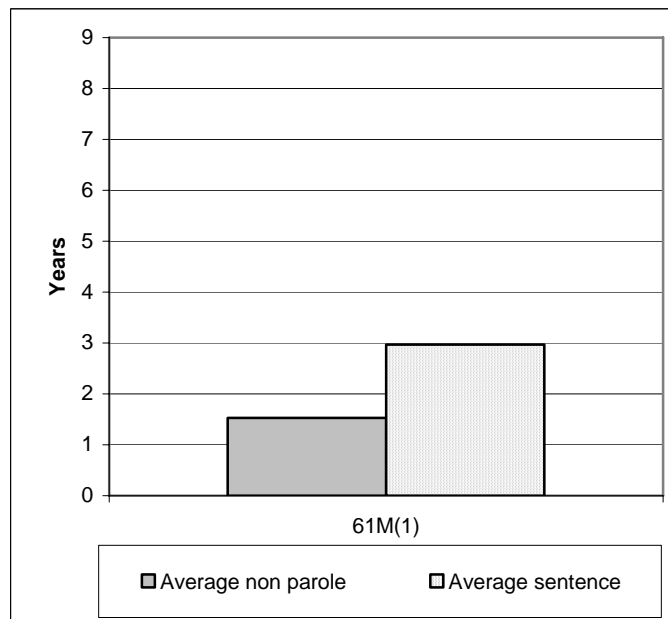
Chart 26: s61M(1) Average NPP and SNPP



Plea

Of the 19 offenders, 15 pleaded guilty to the offence. The non-parole period for these offenders was 1y 8m and the median was 1½ years. For the four offenders who pleaded not guilty, the average and the median non-parole period was 1 year.

Chart 27: s61M(1) Average NPP and average sentence



Local Court

Between January 2003 and September 2007, 256 offenders were sentenced in the Local Court for an offence against this section.

One hundred and three offenders (40.2%) received sentences of imprisonment.

Other sentences imposed were:

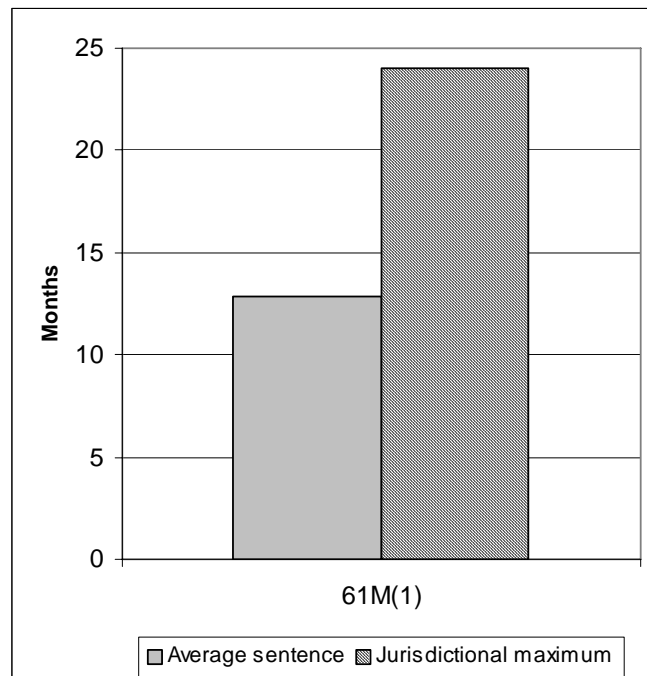
- periodic detention orders – 7;
- suspended sentences – 84 (50 with supervision).
- community service orders – 9;
- s9 bonds – 49 (25 with supervision);
- fines only – 3 (one fine of \$750 and two fines of \$2000); and
- s10 bond – 1

Terms of Imprisonment

The lowest term of imprisonment imposed was three months (six offenders) and the highest was 24 months (seven offenders). The average sentence was 12 m 3w, and the median sentence was 12months.

A sentence of 12months was by far the most common, with almost 37% of offenders being sentenced to this period of imprisonment.

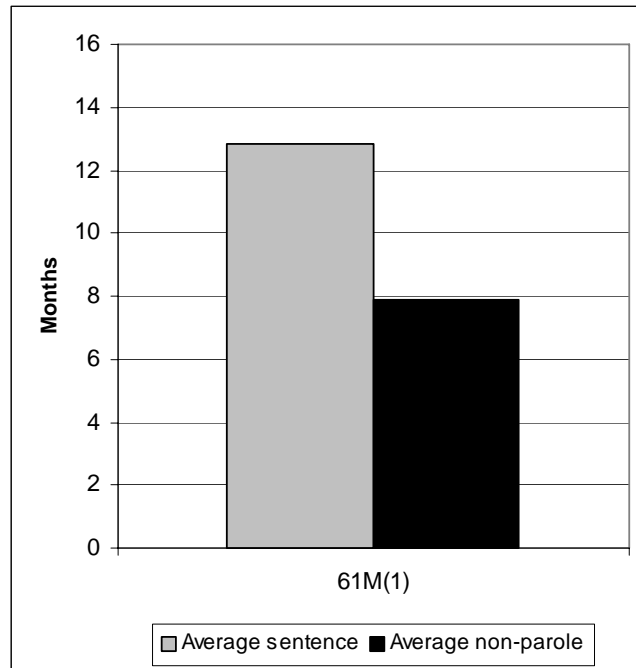
Chart 28: s61M(1) Average sentence and jurisdictional maximum



Non parole period

The average non-parole period imposed was 8 months, and the median was 7 months.

Chart 29: s61M(1) Average sentence and average non-parole



Plea

Of the 103 offenders, 61 pleaded guilty to their offence. The average sentence and non-parole period for these offenders were 12m 1w and 7m 2w, respectively.

For the remaining 42 who pleaded not guilty or entered no plea, the average sentence and non-parole period were 13m 2w and 8m 3w, respectively.

Periodic detention orders

The terms of periodic detention imposed ranged from 6 months (two offenders) to 24 months (one offender). The average term was 11 months 2 weeks.

Of the seven offenders who were sentenced to a term of periodic detention, five pleaded guilty to their offence. The average term for these offenders was 11 months 3 weeks. For the remaining two offenders who pleaded not guilty or entered no plea, the average term was 11 months.

Community service orders

The CSOs ranged from a minimum of 50 hours (one offender) to a maximum of 400 hours (one offender). The average duration of a CSO for this offence was 205.6 hours.

Of the nine offenders who were sentenced to community service, six pleaded guilty to their offence. The average number of hours for these offenders was 158 hours. For the remaining three who pleaded not guilty or did not enter a plea, the average CSO imposed was 300 hours.

S61M(1) AGGRAVATED INDECENT ASSAULT (ATTEMPT)

Higher Courts

One person was sentenced for attempted indecent assault between October 2000 and September 2007. He received 3 years imprisonment, with 18 months non-parole.

S61M(2) AGGRAVATED INDECENT ASSAULT, VICTIM UNDER 10 YEARS OF AGE

Any person who assaults another person and at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person...if the other person is under the age of 10 years, commits an offence under this section.

The statutory maximum penalty for an offence under this section is imprisonment for 10 years. The applicable SNPP is imprisonment for 5 years.⁷³

An offence under the section is a Table 1 offence under the *Criminal Procedure Act* 1986 and is to be dealt with in the Local Court unless an election is made for trial by indictment. If no such is made, the maximum sentence which can be imposed is imprisonment for 2 years.

Higher Courts

Between February 2003 and September 2007, 34 people were sentenced in the higher courts for an offence under this section.

Twenty-eight offenders (82.35%) were sentenced to a term of imprisonment.

Of the remainder, four received suspended sentences with supervision and two offenders were dealt with under s9 (with supervision).

Terms of imprisonment

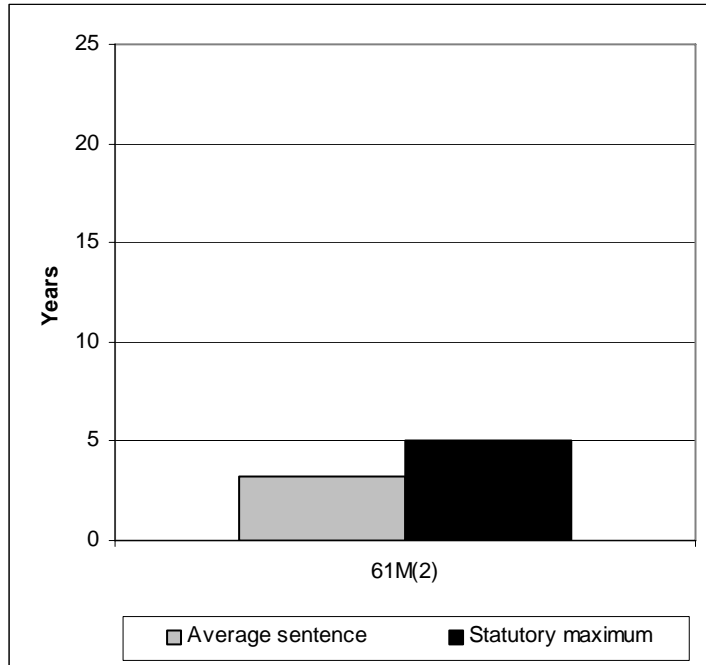
Distribution

The shortest sentence of imprisonment was 1 year and the longest was 6 years imprisonment. The average sentence was 3y 3m and the median sentence was 3 years.

The most common sentence was 3 years, with over 35% (ten offenders) sentenced to this term of imprisonment. The middle 80% range was between 18 months and 5 years.

73. The SNPP was increased to 8 years, effective 01/01/08, however these statistics reflect the data from the previous legislative period.

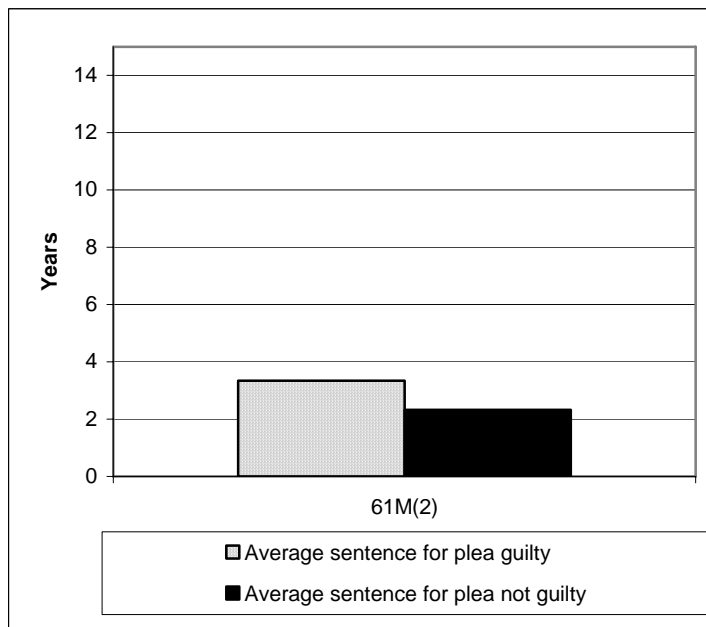
Chart 30: s61M(2) Average sentence and statutory maximum



Plea

Of the 28 offenders sentenced to imprisonment, 25 pleaded guilty. The average term imposed on these offenders was 3y 4m, the median was 3 years. For the three offenders that pleaded not guilty, the average sentence was 2y 4m and the median was 2years 6months.

Chart 31: s61M(2) Average sentence guilty plea vs not guilty plea



Non-parole periods

Twenty-two of the 28 sentences recorded by JIRS were non-consecutive sentences, for which non-parole periods were recorded.

Distribution

The longest non-parole period was 4½ years (one offender), the shortest was 6 months (one offender). The average and median non-parole periods were 1y 7 ½m and 1 ½ years respectively. These are significantly less than the applicable SNPP for the offence, of five years.

More than 90% of offenders received non-parole periods that were 50% or less than the SNPP.

Chart 32: s61M(2) Average NPP and SNPP

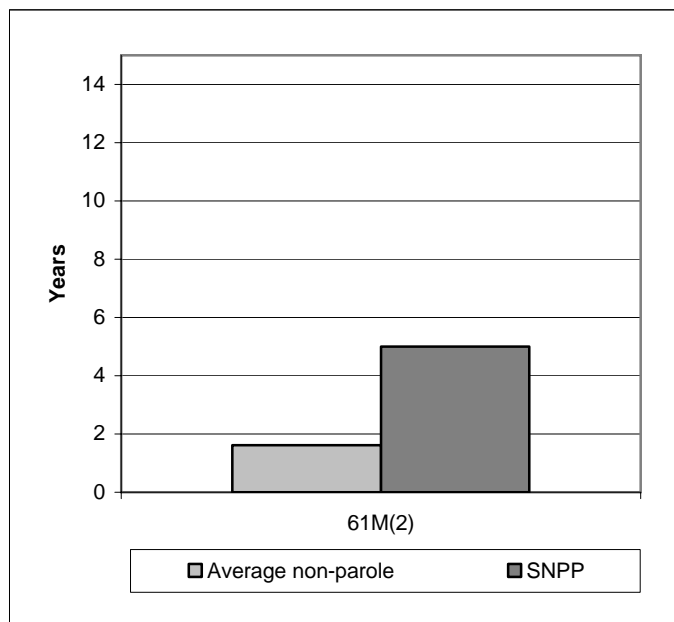
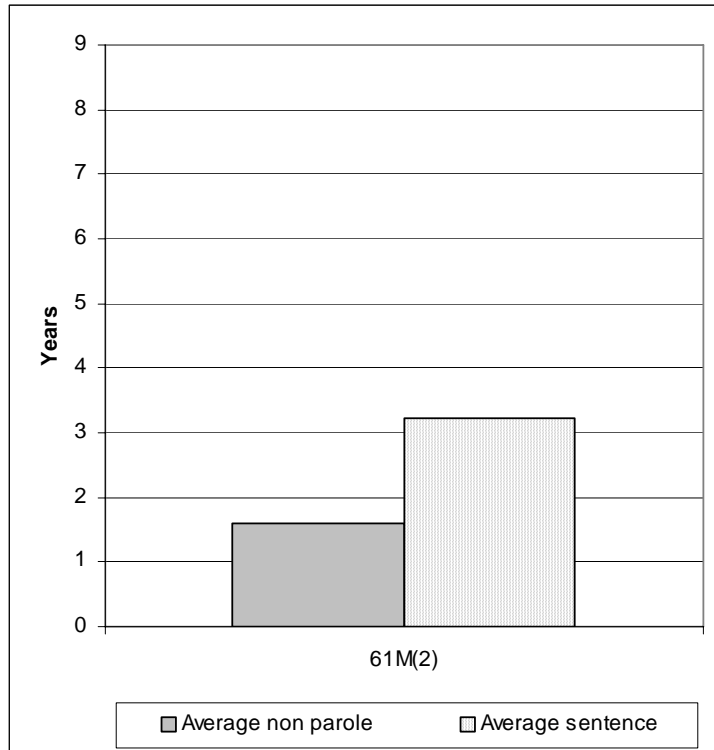


Chart 33: s61M(2) Average NPP and Average sentence



Plea

Of the 22 offenders, 20 pleaded guilty. The average non-parole period for these offenders was 1y 7m and the median was 1year 3months. For the other two offenders, the average non-parole period was 1year 9months.

Age

There were two offenders under the age of 18; they received 3 and 4 years imprisonment with a non-parole period of 1 and 2 years respectively. Both pleaded guilty.

Local Court

Between January 2003 and September 2007, 65 people were sentenced in the Local Court for an offence under this section.

Thirty-one offenders (47.69%) received sentences of full-time imprisonment.

Other sentences imposed were:

- periodic detention orders - 2 (of 8 months and 12 months);
- suspended sentences - 21 (17 with supervision);
- s9 bonds – 10 (four with supervision); and

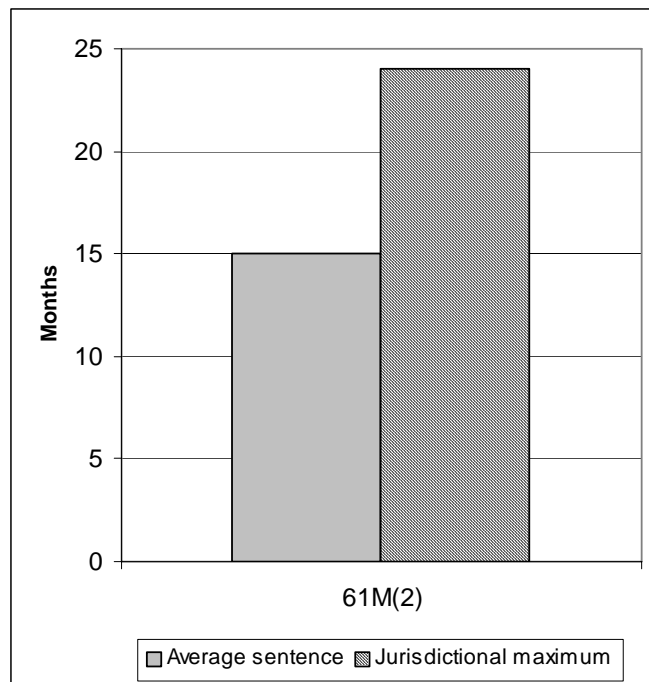
- s10 dismissal – 1

Terms of imprisonment

The term of imprisonment imposed ranged from 6 months (one offender) to 24 months (six offenders). The average term of imprisonment was 15 months, and the median was 12 months.

Eighty-four percent of offenders received prison sentences of 1 year or more. Twelve months was the most common term of imprisonment, with almost 39% of offenders who received a prison term receiving this sentence.

Chart 34: s61M(2) Average sentence and jurisdictional maximum



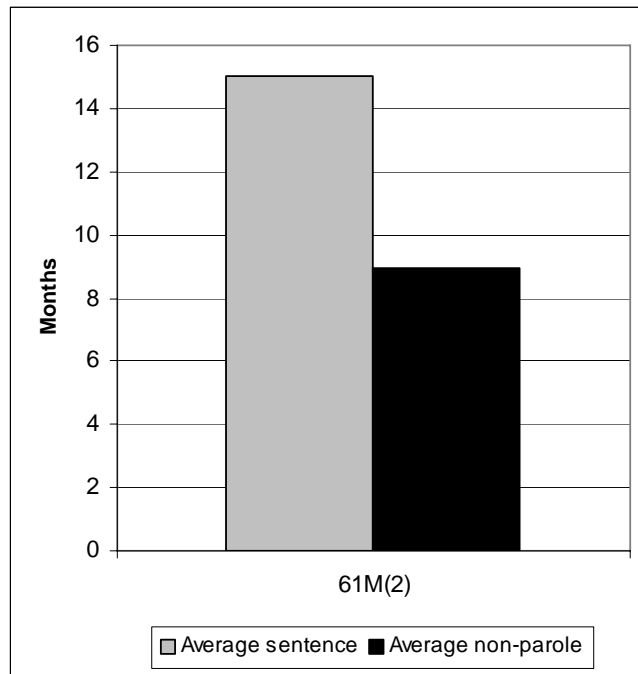
Plea

Twenty of the 31 offenders pleaded guilty. The average sentence and non-parole period for these offenders were 15m 3w and 9m 1w, respectively. For the remaining 11 offenders who pleaded not guilty or entered no plea, the average sentence and non-parole period were 13m 3w and 8m 1w, respectively.

Non-parole period

The average non-parole period was 9 months and the median was 9 months.

Chart 35: s61M(2) Average sentence and average NPP



S61N(1) ACT OF INDECENCY - PERSON < 16

A person who commits an act of indecency with or towards a person under the age of 16 years, or incites a person under that age to an act of indecency with or towards that or another person, commits an offence under this section.

The statutory maximum for an offence under this section is imprisonment for 2 years. There is no applicable SNPP for this offence.

An offence under the section is a Table 2 offence under the *Criminal Procedure Act 1986* and is to be dealt with in the Local Court unless an election is made for trial on indictment by the prosecutor. If no such election is made, the maximum penalty which can be imposed is imprisonment for 12 months or a fine of 20 penalty units, or both.

Higher Courts

Between October 2000 and September 2007, seven people were sentenced for offences under this section.

One offender (14.2%) received a sentence of imprisonment, in this case of 18 months.

Of the remainder, one offender was sentenced to periodic detention for a period of 18 months, and five offenders received s9 bonds with supervision.

Local Court

Between January 2003 and September 2007, 60 people were sentenced in the Local Court for an offence against this section.

Fourteen offenders (23.33%) received sentences of imprisonment.

The other sentences imposed were:

- suspended sentences – 17 (16 with supervision);
- community service orders - 2 (150 hours and 200 hours);
- s9 bonds - 25 (17 with supervision);
- fine only – 1 (\$1000); and
- s10 bond – 1.

Terms of imprisonment⁷⁴

The term of imprisonment imposed ranged from three months (one offender) to 20 months (one offender). The average sentence was 11m 2w imprisonment, and the median was 12 months.

The middle 80% range was between four months and 18 months imprisonment.

Non parole period

The average non-parole period imposed was 7months 3weeks, and the median was 7 months 2 weeks.

Plea

Of the 14 offenders, 12 pleaded guilty to an offence under this section.

The average sentence and non-parole period for these offenders were 12m 1w and 8 months respectively. For the remaining two offenders, the average sentence and non-parole period were 7 months and 6 months, respectively.

74. The data includes five matters where the term of sentence imposed exceeded the legislative maximum of 12 months applicable for a Table 2 offence. For example, there was sentence of 20 months, 3 of 18 months imprisonment and 1 of 15 months imprisonment. The Sentencing Council has requested further information from the Judicial Commission regarding this apparent discrepancy. Possible explanations could arise from JIRS data not being corrected for appeals / corrections arising from the Local Court; or data entry errors.

Chart 36: s61N(1) Average sentence and jurisdictional maximum

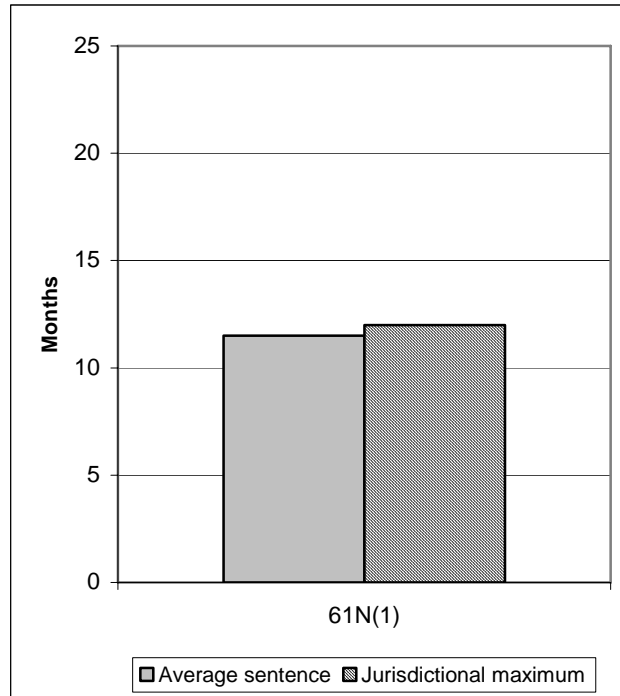
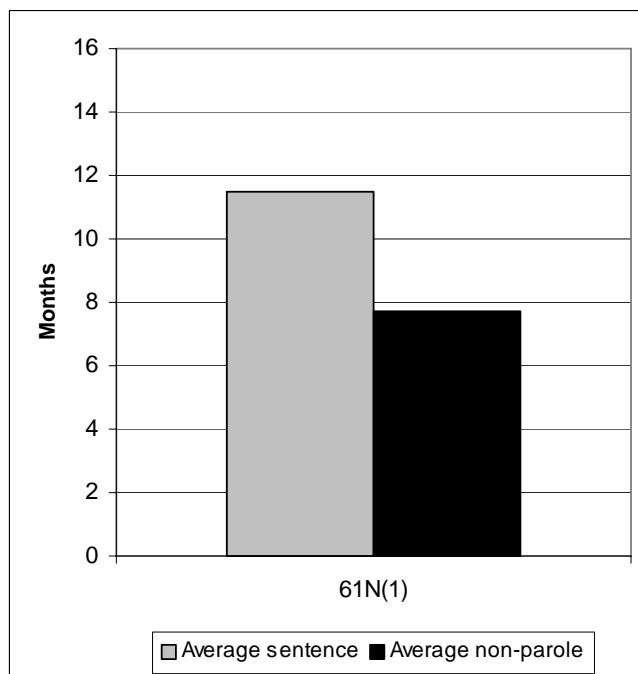


Chart 37: s61N(1) Average sentence and average NPP



S61N(1) ACT OF INDECENCY - PERSON < 16 (INCITE)

Higher Courts

Three people were sentenced for inciting a person under the age of 16 to commit an act of indecency.

One offender (33%) received a sentence of imprisonment, in this case an 18 month term.

The two remaining offenders received a suspended sentence with supervision and a s10 bond, respectively.

Local Court

Eleven offenders were sentenced for inciting a person under the age of 16 to commit an act of indecency.

Three offenders (27.27%) received sentences of imprisonment. The remaining offenders received:

- suspended sentence - 1 (with supervision);
- community service orders – 2; and
- s9 bonds - 5 (2 with supervision)

Terms of imprisonment

The terms of the prison sentences were 4 months, 16 months, and 18 months, respectively.

Non-parole periods of 4 months, 10 months, and 14 months were imposed.

S61N(2) ACT OF INDECENCY - PERSON >= 16

A person who commits an act of indecency with or towards a person of the age of 16 years or above, or incites a person under that age to an act of indecency with or towards that or another person, commits an offence under this section.

The statutory maximum for an offence under this section is imprisonment for 18 months. There is no applicable SNPP for this offence.

An offence under the section is a Table 2 offence under the *Criminal Procedure Act 1986* and is to be dealt with in the Local Court unless an election is made for trial on indictment by the prosecutor. If no such election is made, the maximum penalty which can be then imposed is imprisonment for 2 years.

No matters were dealt with the higher courts in the period under examination.

Local Court

Between January 2003 and September 2007, 112 people were sentenced for an offence under this section.

Twenty-two (19.64%) offenders received sentences of imprisonment.

Other sentences imposed were:

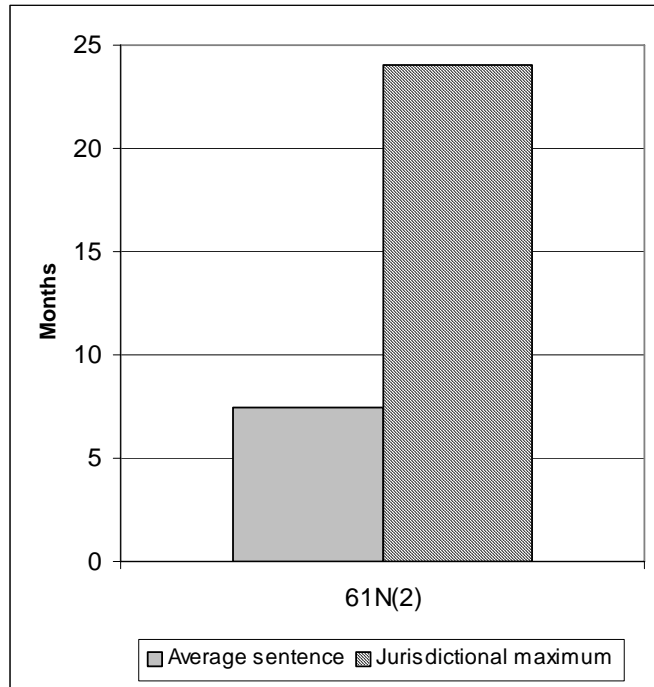
- periodic detention orders - 2 (3 months and 4 months);
- suspended sentences - 11 (6 with supervision);
- community service order - 1 (100 hours);
- s9 bonds - 62 (28 with supervision);
- fine only – 7; and
- s10 bonds – 7

Terms of imprisonment

The term of imprisonment imposed ranged from one month (one offender) to 24 months (one offender). The average sentence was 7m 2w, and the median was 6 months.

Over 95% of offenders received sentences representing 50% or less of the Local Court's jurisdictional maximum of 2 years.

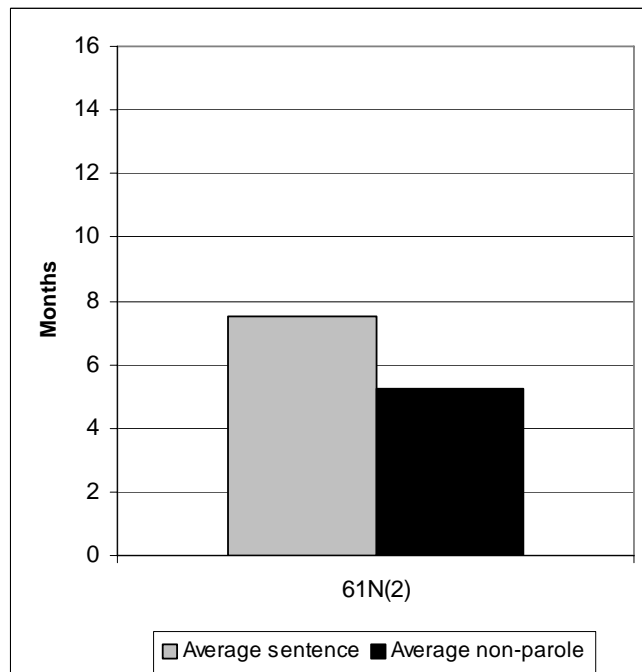
Chart 38: s61N(2) Average sentence and jurisdictional maximum



Non-parole period

The average and median non-parole periods were 5m 1w and 5 months, respectively.

Chart 39: s61N(2) Average sentence and average NPP



Plea

Of the 22 offenders, 16 pleaded guilty.

The average sentence and non-parole period for these offenders were 7m 3w and 5months 2weeks, respectively. For the remaining six offenders who pleaded not guilty or entered no plea, the average sentence and non-parole periods were 6m 3w and 4months 3weeks, respectively.

Fines

The average fine was \$842.86. Of the seven offenders, three entered a plea of guilty. The average fine for these offenders was \$516.67. For the remaining 4 offenders who pleaded not guilty or entered no plea, the average fine was \$1087.50.

S61N(2) ACT OF INDECENCY - PERSON >= 16 (INCITE)

Higher Courts

One person was sentenced in the higher courts between October 2000 and September 2007 for an offence under this section. The offender received a prison sentence of 6 months.

Local Court

One person was sentenced for inciting a person over the age of 16 to commit an act of indecency. The offender was fined \$1000.

S610(1) AGGRAVATED ACT OF INDECENCY - PERSON < 16

A person who commits an act of indecency with or towards a person under the age of 16 years, or incites a person under that age to an act of indecency with or towards that or another person, in either case in circumstances of aggravation, commits an offence under this section.

Circumstances of aggravation include:

- Offender in company; or
- Victim under authority of offender; or
- Victim has serious physical disability; or
- Victim has serious intellectual disability

The statutory maximum for this offence is imprisonment for 5 years. There is no applicable SNPP for this offence.

An offence under the section is a Table 2 offence under the *Criminal Procedure Act 1986* and is to be dealt with in the Local Court unless an election is made for trial on indictment by the prosecutor. If no such election is made, the maximum penalty which can be imposed is imprisonment for 2 years or 50 penalty units or both.

Higher Courts

Between October 2000 and September 2007 four people were sentenced for an offence under this section.

One offender, (25%) who was under the age of 18, received a sentence of imprisonment for 24 months, with a non-parole period of 6 months.

Three people received suspended sentences with supervision.

Local Court

Between January 2003 and September 2007, three people were sentenced in the Local Court.

One offender (33%) received 12 months imprisonment, with a non-parole period of 9 months. Two offenders received suspended sentences.

S610(1) AGGRAVATED ACT OF INDECENCY - PERSON < 16 (INCITE)

Higher Courts

One person was sentenced for inciting a person under the age of 16 to commit an act of indecency. The offender received 2½ years imprisonment with a non-parole period of 1½ years.

Local Court

One person was sentenced for inciting an aggravated act of indecency, receiving a fine of \$50.

S610 (1A) AGGRAVATED ACT OF INDECENCY - PERSON >= 16

A person who commits an act of indecency with or towards a person of the age of 16 years or above, or incites a person of the age of 16 years or above to an act of indecency with or towards that or another person, in either case in circumstances of aggravation, commits an offence under this section.

Circumstances of aggravation include:

- Offender in company; or
- Victim under authority of offender; or
- Victim has serious physical disability; or
- Victim has serious intellectual disability

The statutory maximum for an offence against this section is imprisonment for 3 years. There is no applicable SNPP for this offence.

An offence under the section is a Table 2 offence under the *Criminal Procedure Act* 1986 and is to be dealt with in the Local Court unless an election is made for trial on indictment by the prosecutor. If no such election is made, the maximum penalty which can be imposed is imprisonment for 2 years or a fine of 50 penalty units, or both.

Higher Courts

Between October 2000 and September 2007, two people were sentenced in the higher courts for offences against this section.

One person (50%) received a sentence of imprisonment for 3 years, with a non-parole period of 12 months. The other offender received a s9 bond.

Local Court

Between January 2003 and September 2007, one person was sentenced in the Local Court for an offence under this section, receiving a fine of \$500.

S610 (1A) AGGRAVATED ACT OF INDECENCY - PERSON >= 16 (INCITE)

Higher Courts

Between October 2000 and September 2007, one person was sentenced in the higher courts to 12 months periodic detention for this offence.

S610(2) AGGRAVATED ACT OF INDECENCY - CHILD < 10

A person who commits an act of indecency with or towards a person under the age of 10 years, or incites a person to an act of indecency with or towards that or another person, commits an offence under this section.

The statutory maximum for an offence under this section is imprisonment for 7 years. There is no applicable SNPP for this offence.

An offence under the section is a Table 1 offence under the *Criminal Procedure Act* 1986 and is to be dealt with in the Local Court unless an election is made for trial on indictment. If no such election is made, maximum penalty which can be imposed is imprisonment for 2 years or a fine of 50 penalty units, or both.

Higher Courts

Between October 2000 and September 2007, five people were sentenced in the higher courts for offences against this section.

Two offenders (40%) received sentences of imprisonment.

One offender received a suspended sentence, and two offenders received s9 bonds (one with supervision).

Terms of imprisonment

Two offenders received prison sentences of 2 years and 3½ years respectively. A non-parole period of 18 months was imposed on both offenders.

Local Court

Between January 2003 and September 2007, 13 people were sentenced for offences under this section. Four people (30.76%) received sentences of imprisonment.

The remaining sentences imposed were:

- suspended sentences - 6 (5 with supervision);
- community service order - 1 (200 hours); and
- s9 bonds with supervision – 2

Terms of imprisonment

The four offenders sentenced to imprisonment received terms of: 9 months, 16 months, and 18 months (2 offenders).

Non-parole periods imposed ranged from 6 months (one offender) to 12 months (three offenders).

S610(2) AGGRAVATED ACT OF INDECENCY - CHILD < 10 (INCITE)

Higher Courts

Between October 2000 and September 2007, one offender was sentenced for inciting a child under 10 to commit an act of indecency.

The offender was sentenced to imprisonment for 2 years, with a non-parole period of 12 months.

Local Court

Between January 2003 and September 2007, four people were sentenced for inciting a person under the age of 10 to commit an act of indecency.

One offender (25%) received a sentence of full-time imprisonment, comprising 16 months with 6 months non-parole.

One offender received a suspended sentence and two were placed on s9 bonds with supervision.

S65A(2) SEXUAL INTERCOURSE PROCURED BY NON-VIOLENT THREAT⁷⁵

Any person who has sexual intercourse with another person shall, if the other person submits to the sexual intercourse as a result of a non-violent threat and could not in the circumstances be reasonably expected to resist the threat, commit an offence under this section.

The statutory maximum for this offence is imprisonment for 6 years. There is no applicable SNPP for this offence.

Higher Courts

Between October 2000 and September 2007 four people were sentenced for an offence under this section.

Two offenders (50%) received prison terms of 2½ years and 3 years respectively. A non-parole period of 18 months was recorded for both offenders.

The remaining two offenders received suspended sentences.

75. This offence was repealed as of 1 January 2008.

S66A SEXUAL INTERCOURSE - CHILD < 10

Any person who has sexual intercourse with another person who is under the age of 10 years, commits an offence under this section.

The statutory maximum for an offence under this section is imprisonment for 25 years. The SNPP is imprisonment for 15 years.

Higher Courts

Between February 2003 and September 2007, 40 people were sentenced for an offence under this section in the higher courts.

Thirty-two offenders (80%) were sentenced to a term of imprisonment. Four received suspended sentences with supervision, and four received s9 bonds with supervision.

Terms of Imprisonment

The average sentence duration was 8½ years, and the median was 6 years.

Distribution

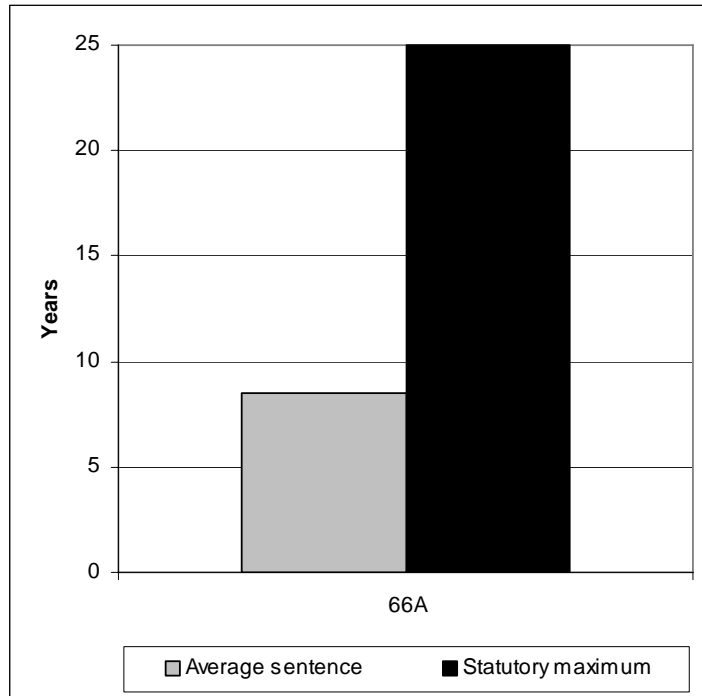
The sentences were distributed fairly evenly between the shortest sentence of 2 ½ years (one offender), and the longest of 18 years (four offenders). The middle 80% range fell between 3 years and 18 years. Three-quarters of offenders received 48% or less of the statutory maximum.

Age

There were 11 offenders under the age of 18. Four received s9 bonds with supervision, and three received suspended sentences with supervision. This indicates that only one offender over the age of 18 received a sentence other than imprisonment.

The other four offenders under the age of 18 received prison terms of 2½, 3, 3½, and 4 years respectively. In three of the cases a non-parole period of 12 months was recorded, in the other, 24 months. All four of these juvenile offenders pleaded guilty.

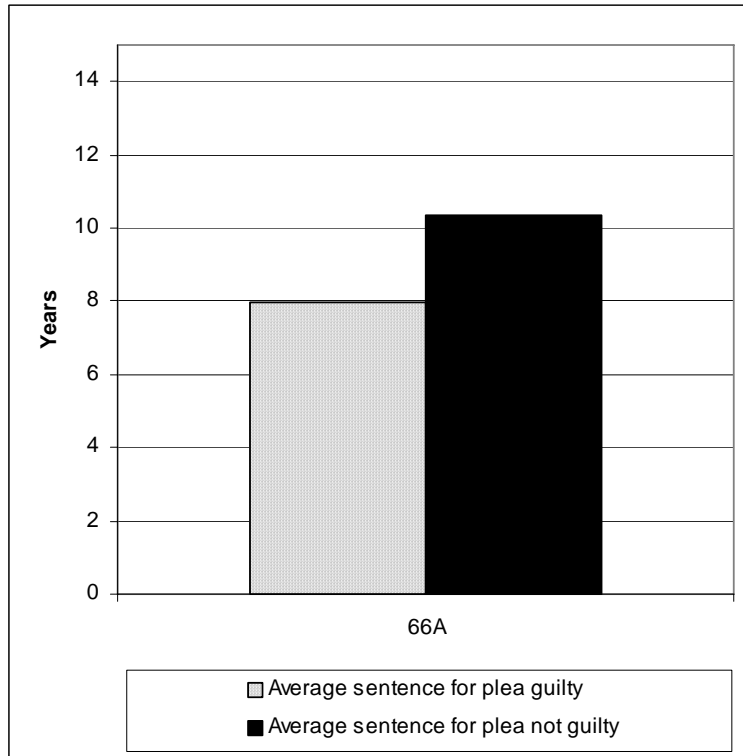
Chart 40: s66A Average sentence and statutory maximum



Plea

Of the 32 offenders, 25 pleaded guilty to their offence. The average prison sentence for these offenders was 7y 11½m, and the median sentence was 5 years. For the seven offenders who pleaded not guilty, the average sentence was 10y 4½m, and the median was 10 years.

Chart 41: s66A Average sentence guilty plea vs not guilty plea



Non-parole periods

Twenty-one of the 32 sentences recorded by JIRS were non-consecutive sentences, for which non-parole periods were recorded.

Distribution

The shortest non-parole period imposed was 1 year (five offenders) and the longest was 14 years (one offender). The average non-parole period was 4y 9½m, and the median was 2 ½ years.

Eighty-five percent of offenders received non-parole periods representing 50% or less of the SNPP of 15 years. All offenders received non-parole periods less than 15 years.

Chart 42: s66A Average NPP and SNPP

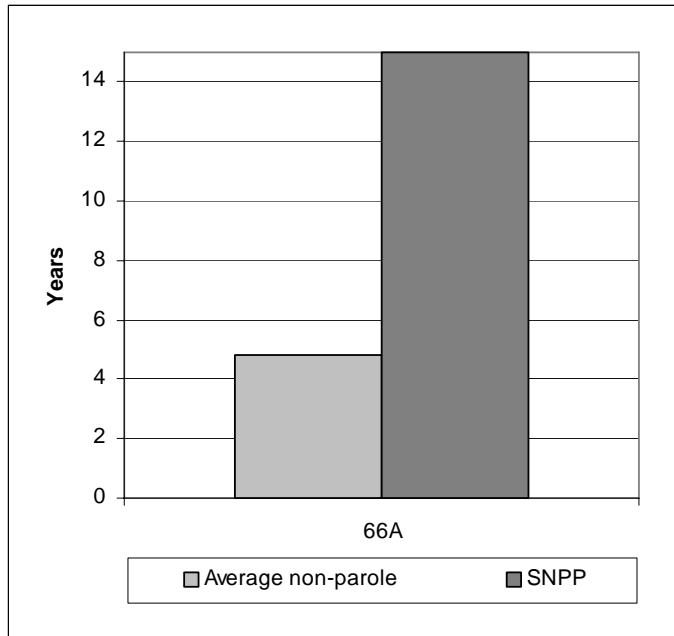
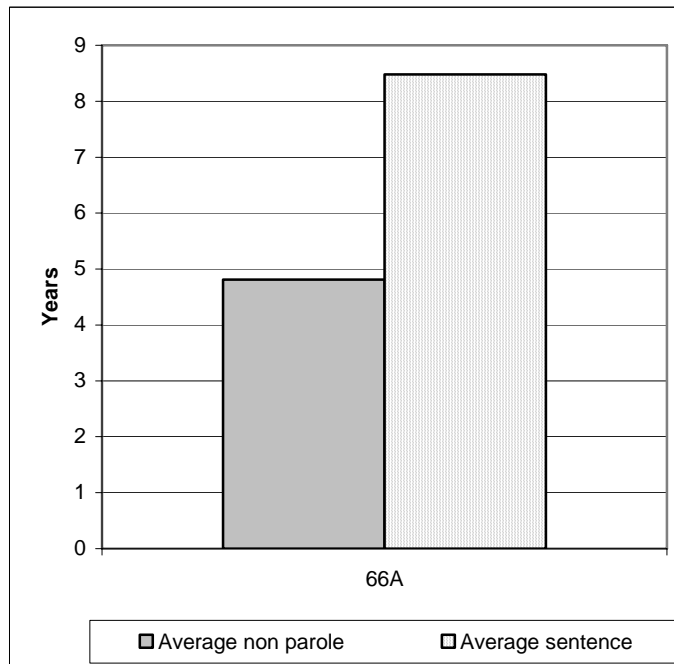


Chart 43: s66A Average NPP and average sentence



Plea

Of these 21 offenders, 16 pleaded guilty to the offence. The average non-parole period imposed was 4y 5½m and the median was 2y 3m. For the remaining 5 offenders who pleaded not guilty, the average non-parole period was 6 years, and the median was 4 years.

S66B ATTEMPT SEXUAL INTERCOURSE WITH CHILD < 10

Any person who has sexual intercourse with another person who is under the age of 10 years, or assaults any such person with intent to have sexual intercourse, commits an offence under this section.

The statutory maximum for an offence against this section is imprisonment for 20 years.⁷⁶ There is no applicable SNPP for this offence.

Higher Courts

Between October 2000 and September 2007, seven people were sentenced for offences under this section, three of whom were under the age of 18.

Four offenders (57.14%) received sentences of imprisonment for 2, 3 ½, 10 and 12 years respectively. The shortest term of imprisonment (2 years) was imposed upon an offender under the age of 18.

Two offenders received suspended sentences (one with supervision, imposed upon an offender under the age of 18). One (juvenile) offender received a s9 bond (with supervision).

Non-parole periods

Two of the four prison sentences recorded by JIRS (the sentences of 2 and 3½ years) were non-consecutive sentences, for which non-parole periods of 6 months and 2 years respectively were also recorded.

76. The statutory maximum was increased to 25 years for offences committed after 01/02/08.

S66C(1) SEXUAL INTERCOURSE WITH CHILD BETWEEN 10 AND 14

Any person who has sexual intercourse with another person who is of or above the age of 10 years and under the age of 14 years, commits an offence under this section.

The statutory maximum sentence for an offence against this section is imprisonment for 16 years. There is no applicable SNPP for this offence.

Between June 2003 and September 2007, 17 people were sentenced for an offence under this section.

Ten offenders (58.82%) received sentences of imprisonment.

Six offenders received suspended sentences with supervision, and one (juvenile) offender received a s9 bond.

Terms of Imprisonment

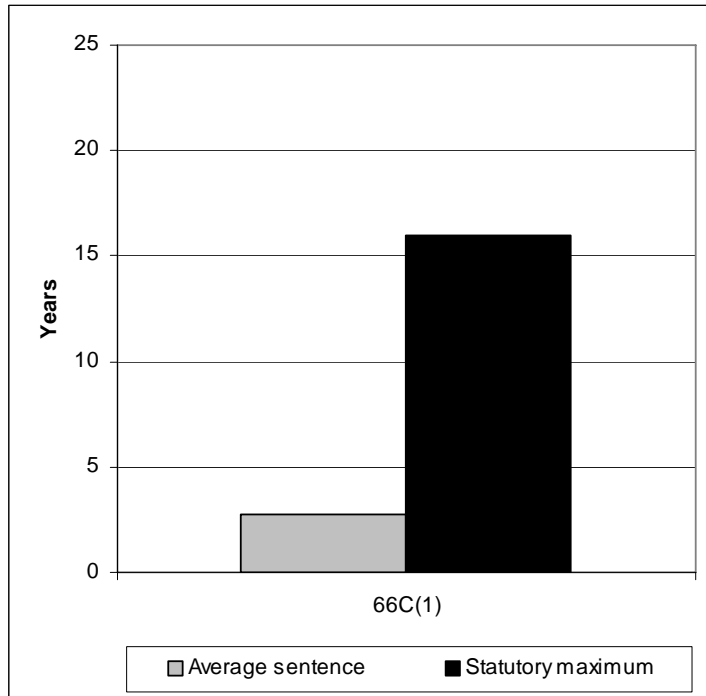
Distribution

The shortest sentence was 1 year (one offender) and the longest was 6 years (one offender). The average sentence was 2y 9m and the median sentence was 2½ years.

Ninety percent of offenders received sentences representing 22% or less of the statutory maximum of 16 years. The longest sentence of 6 years represents 37.5% of the statutory maximum.

Plea

All ten of the offenders sentenced to terms of imprisonment pleaded guilty to the offence.

Chart 44: s66C(1) Average sentence and statutory maximum

Non-parole periods

Five of the ten sentences recorded by JIRS were non-consecutive sentences, for which non-parole periods were recorded. As mentioned above, all offenders receiving prison sentences pleaded guilty. The average non-parole period imposed was 1y 2½m and the median was 1 year.

S66C(2) AGGRAVATED SEXUAL INTERCOURSE WITH CHILD BETWEEN 10 AND 14

Any person who has sexual intercourse with another person who is of or above the age of 10 years and under the age of 14 years, in circumstances of aggravation, commits an offence under this section.

Circumstances of aggravation include:

- Intentionally or recklessly inflict actual bodily harm on victim or other person present/nearby; or
- Threaten to inflict actual bodily harm on victim or other person present/nearby with offensive weapon or instrument; or
- Offender in company; or
- Victim under authority; or
- Victim has serious physical disability; or
- Victim has serious intellectual disability; or
- Offender took advantage of victim being under the influence of alcohol or a drug in order to commit the offence.

The statutory maximum for an offence under this section is imprisonment for 20 years. There is no applicable SNPP for this offence.

Higher Courts

Between June 2003 and September 2007, ten offenders were sentenced for an offence under this section.

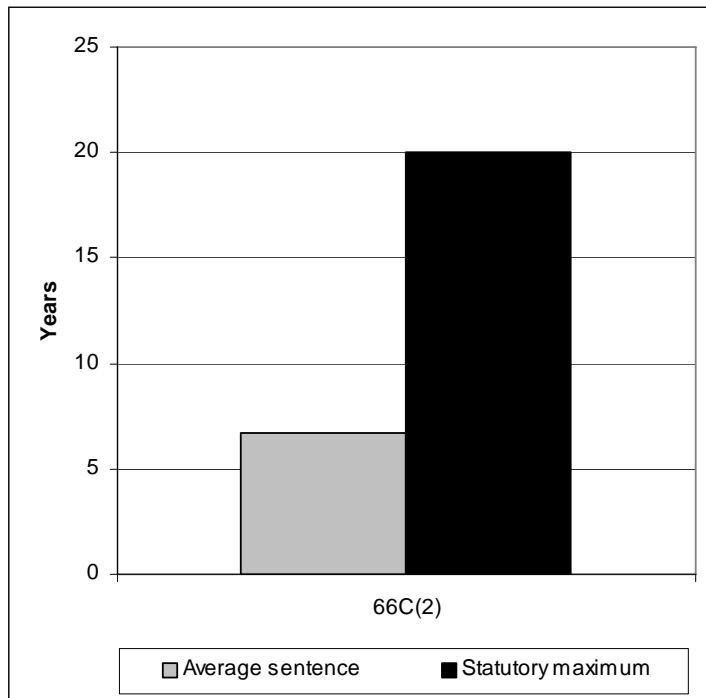
Nine offenders (90%) were sentenced to a term of imprisonment. One offender received a s9 bond with supervision.

Terms of Imprisonment

Distribution

The shortest sentence imposed was 4 years (one offender) and the longest sentence imposed was 12 years, representing 60% of the statutory maximum. The average sentence was 6y 8m and the median sentence was 6 years.

Chart 45: s66C(2) Average sentence and statutory maximum



Plea

As all but one offender pleaded guilty, there is no value in comparing sentences for guilty and not guilty pleas.

Non-parole periods

Four of the nine sentences recorded by JIRS were non-consecutive sentences, for which non-parole periods were recorded.

The average non-parole period was 3y 3m and the median was 3½ years.

S66C(3) SEXUAL INTERCOURSE WITH CHILD BETWEEN 14 AND 16

Any person who has sexual intercourse with another person who is of or above the age of 14 years and under the age of 16 years, commits an offence under this section.

The statutory maximum sentence for an offence under this section is imprisonment for 10 years. There is no applicable SNPP for this offence.

An offence under the section is a Table 1 offence under the *Criminal Procedure Act 1986* and is to be dealt with in the Local Court unless an election is made for a trial on indictment by the prosecutor. If such an election is not made, the maximum penalty which can be imposed is 2 years imprisonment or a fine of 50 penalty units or both.

Higher Courts

Between June 2003 and September 2007, 33⁷⁷ people were sentenced for offences under this section.

Twenty offenders (60.6%) received a sentence of imprisonment. Of the remainder:

- 9 received a suspended sentence, 6 with supervision
- 2 received s 9 bonds, 1 with supervision; and
- 2 received s 10 bonds (one of the two was the only offender under the age of 18).

Terms of Imprisonment

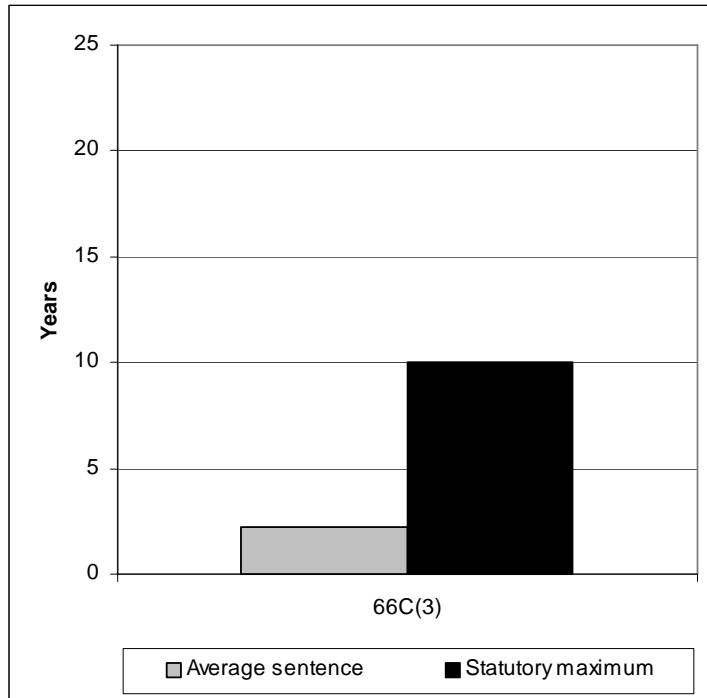
Distribution

The shortest prison sentence was 6 months (one offender) and the longest was 4½ years (one offender). The average sentence was 2y 3m, and the median sentence was 2y 3months.

Fifty percent of offenders received sentences representing 20% or less of the statutory maximum. All offenders received sentences representing 45% or less of the statutory maximum.

77. The apparent discrepancy in the JIRS figures is due to the fact that the offender pleaded not guilty to a more serious charge on the indictment (s61J(1)) but after trial was found guilty of the lesser charge (which was not part of the indictment and no plea was entered).

Chart 46: s66C(3) Average sentence and statutory maximum

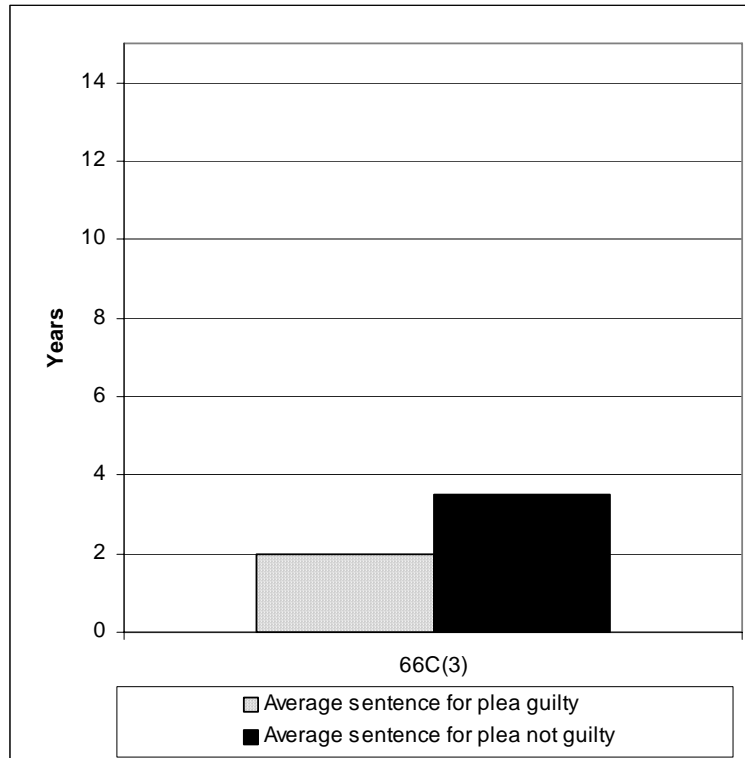


Plea

Of the 20 offenders, 16 entered a plea of guilty. The average and median sentences imposed on these offenders were 1y 11½m and 1y 9 months, respectively. For the three remaining offenders who pleaded not guilty, the average and median sentences were 3½ years and 4 years respectively.⁷⁸

78. The JIRS statistics on pleas do not add up to 20 offenders, but to 19, despite recording an overall number of imprisoned offenders of 20.

Chart 47: s66C(3) Average sentence guilty plea v not guilty plea



Non-parole periods

Sixteen of the 20 sentences recorded by JIRS were non-consecutive sentences, for which non-parole periods were recorded.

Distribution

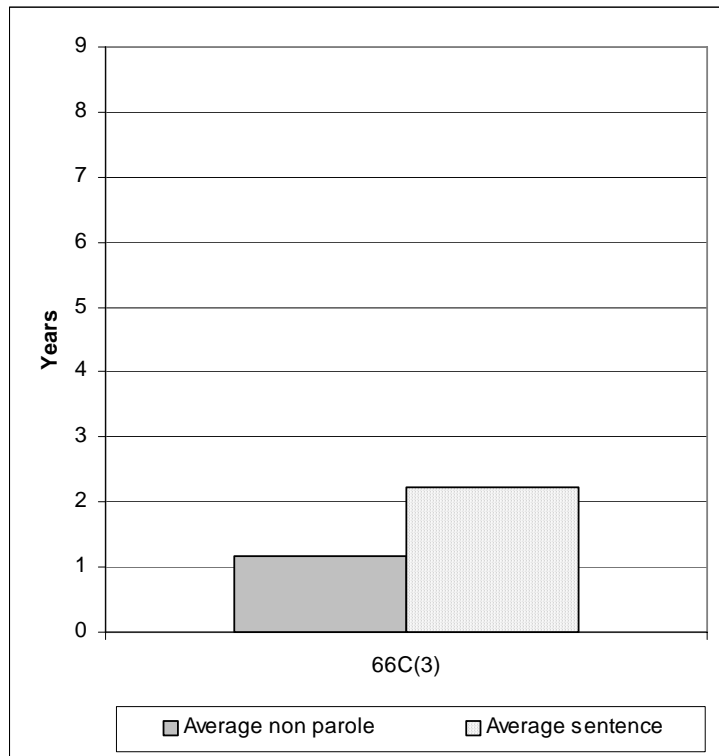
The shortest non-parole period was 6 months (five offenders) and the longest was 3 years (one offender). The average and median non-parole periods were 1y 2m and 1 year, respectively.

Plea

Of the 16 offenders for whom non-parole periods were recorded, 13 pleaded guilty. The average and median non-parole period for these offenders was 1 year. For the two remaining offenders,⁷⁹ the average non-parole period was 2 years.

79. Note once again that the JIRS statistics do not add up correctly for this section.

Chart 48: s66C(3) Average NPP and average sentence



LOCAL COURTS

Between January 2003 and September 2007, twenty-five people were sentenced for an offence under this section.

Five offenders (20%) received sentences of imprisonment.

The remainder received:

- suspended sentences – 7 (3 with supervision);
- community service order - 1 (for 50 hours);
- s9 bonds - 9 (4 with supervision); and
- s10 bonds – 3

Terms of imprisonment

The five offenders sentenced to imprisonment received terms of 5 months, 9 months, 12 months, 15 months and 16 months respectively.

Non-parole periods

Non-parole periods recorded in the matters ranged from 3 months to 8 months.

S66C(4) AGGRAVATED SEXUAL INTERCOURSE WITH CHILD BETWEEN 14 AND 16

Any person who has sexual intercourse with another person who is of or above the age of 14 years and under the age of 16 years, in circumstances of aggravation, commits an offence under this section.

Circumstances of aggravation include:

- Intentionally or recklessly inflict actual bodily harm on victim or other person present/nearby; or
- Threaten to inflict actual bodily harm on victim or other person present/nearby with offensive weapon or instrument; or
- Offender in company; or
- Victim under authority of offender; or
- Victim has serious physical disability; or
- Victim has serious intellectual disability; or
- Offender took advantage of the victim being under the influence of alcohol or a drug in order to commit the offence.

The statutory maximum for a sentence against this section is imprisonment for 12 years. There is no applicable SNPP for this offence.

Between June 2003 and September 2007, eight people were sentenced for offences under this section.

Six offenders (75%) were sentenced to a term of imprisonment.

Two people received suspended sentences with supervision.

Terms of Imprisonment

Of the six offenders sentenced to a term of imprisonment, three received a sentence of 3 years (one of whom was under the age of 18); two received a sentence of 4 years, and one offender received a sentence of 8 years imprisonment.

Plea

Four of the six offenders pleaded guilty, and while the sample size is far too small to make any meaningful comparison, the average sentence for those that pleaded guilty was 3½ years. For the two offenders who pleaded not guilty, the average sentence was 5½ years.

Non-parole period

Four of the eight sentences recorded by JIRS were non-consecutive sentences, for which non-parole periods were also recorded. Non-

parole periods of 1 year, 2 years (2 offenders) and 5 years were recorded.

Plea

The average non-parole period for those that pleaded guilty was 2 years, for those that pleaded not guilty the average was 3 years.

S66D SEXUAL INTERCOURSE WITH CHILD BETWEEN 10 AND 16 (ATTEMPT)

Higher Courts

Between June 2003 and September 2007, one person was sentenced in the higher courts for attempt sexual intercourse with a child aged between 14 and 16 years.⁸⁰

The offender received a sentence of imprisonment for 2 years, with a non-parole period of 12 months.

80. An offence against s66C, this offence carries a statutory maximum of 10 years.

S66EA(1) PERSISTENT SEXUAL ABUSE OF A CHILD

Any person who, on 3 or more separate occasions occurring on separate days during any period, engages in conduct in relation to a particular child that constitutes a sexual offence commits an offence under this section.

The statutory maximum penalty for an offence under this section is imprisonment for 25 years. There is no applicable SNPP for this offence.

Higher Courts

Terms of Imprisonment

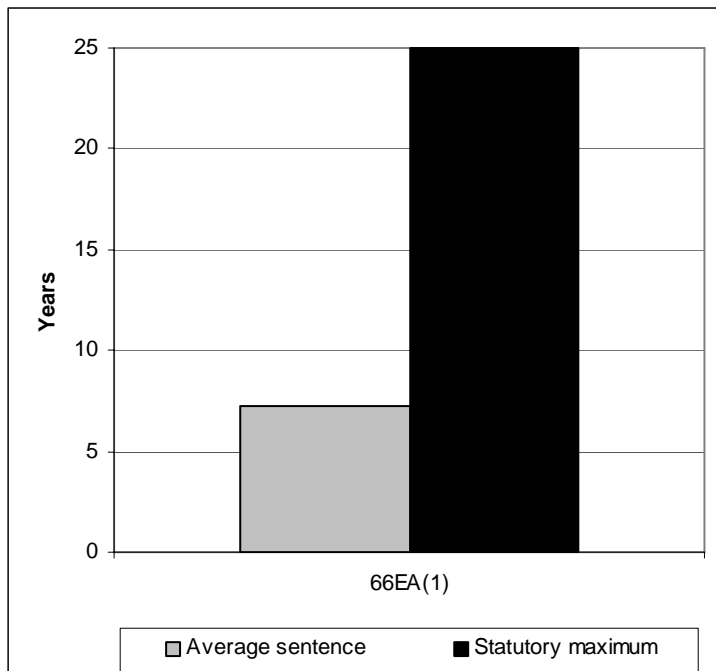
Between October 2000 and September 2007, ten people were sentenced for an offence under this section.

All (100%) received terms of imprisonment.

Distribution

All received sentences less than 50% of the statutory maximum. The shortest sentence was 4 years (one offender) and the longest was 12 years (one offender). The average sentence was 7y 3m and the median was 7 years. The average sentence imposed represents 29% of the statutory maximum.

Chart 49: s66EA Average sentence and statutory maximum



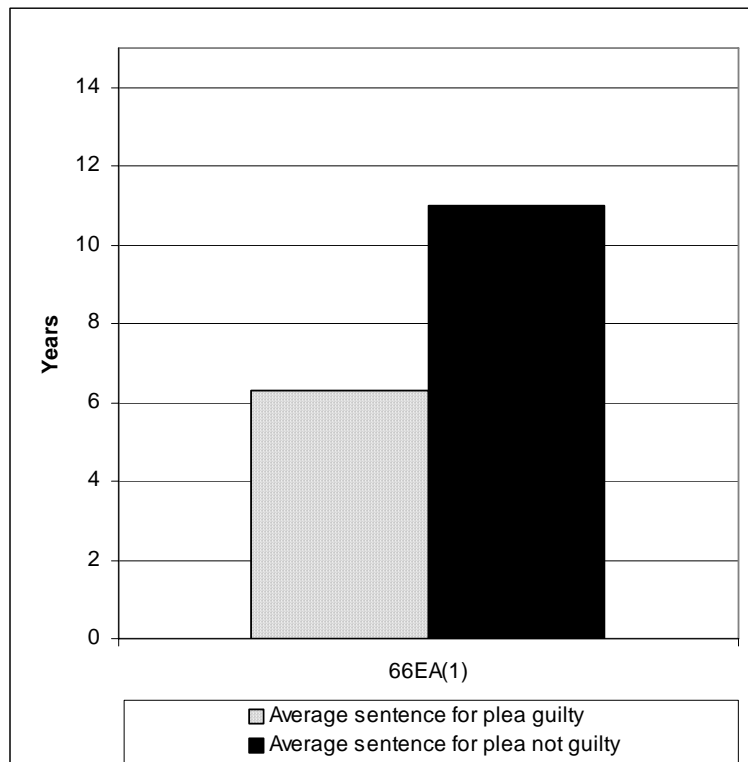
Non-parole periods

Four of the ten sentences recorded by JIRS were non-consecutive sentences, for which non-parole periods were recorded. The longest non-parole period was 8 years, and the shortest was 2 years. The average non-parole period was 4½ years and the median was 4 years.

Plea

Of the ten offenders, eight pleaded guilty. The average sentence for these offenders was 6y 3½m. For the other two offenders, the average sentence was 11 years.

Chart 50: s66EA Average sentence for guilty plea vs not guilty plea



S66F(2) SEXUAL INTERCOURSE WITH INTELLECTUALLY DISABLED PERSON BY PERSON IN AUTHORITY.

Any person who has sexual intercourse with another person who:

- (a) has an intellectual disability, and
- (b) is (whether generally or at the time of the sexual intercourse only) under the authority of the person in connection with any facility or programme providing services to persons who have intellectual disabilities,

commits an offence under this section.

The statutory maximum for this offence is imprisonment for 10 years. There is no applicable SNPP for this offence.

Higher Courts

Between October 2000 and September 2007, one person was sentenced for an offence under this section.

That offender received a sentence of imprisonment for 4 years with a non-parole period of 2½ years.

S66F(3) SEXUAL INTERCOURSE WITH INTELLECTUALLY DISABLED PERSON WITH INTENT TO TAKE ADVANTAGE OF VULNERABILITY.

Any person who has sexual intercourse with another person who has an intellectual disability, with the intention of taking advantage of the other person's vulnerability to sexual exploitation, commits an offence under this section.

The statutory maximum for an offence under this section is imprisonment for 8 years. There is no applicable SNPP.

Higher Courts

Between October 2000 and September 2007, thirteen people⁸¹ were sentenced for an offence under this section.

Seven people (53.84%) were sentenced to a period of imprisonment.

Of the remainder:

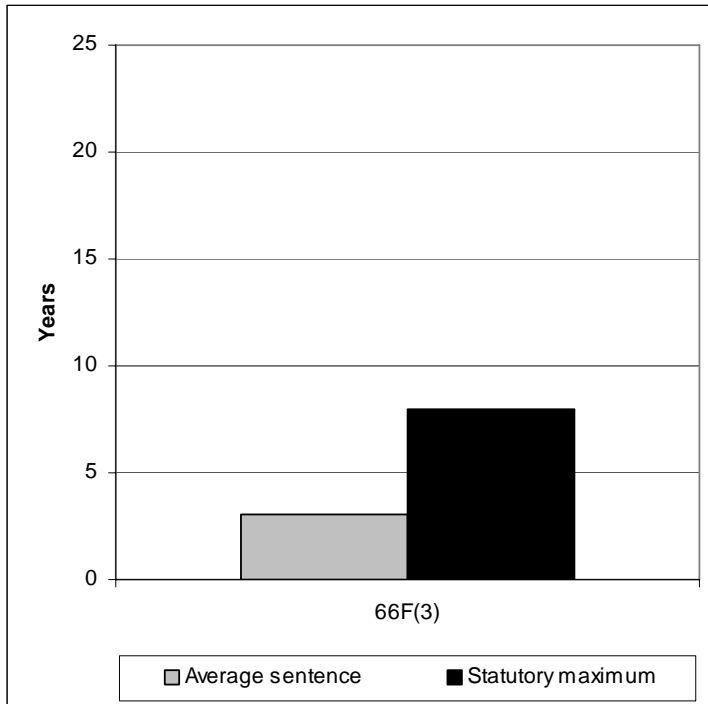
- 2 received periodic detention (for 2 ½ years and 3 years, respectively);
- One received a suspended sentence with supervision
- One was sentenced to 400 hours of community service; and
- One received a s 9 bond with supervision

Terms of Imprisonment

The shortest sentence imposed was 1½ years (one offender) and the longest was 4½ years (one offender). The average sentence was 3y 1m, and the median sentence was 3years. The middle 80% range received a sentence representing 50% or less of the statutory maximum.

81. There were no offenders under the age of 18.

Chart 51: s66F Average sentence and statutory maximum



Plea

Of the seven offenders, five pleaded guilty and two pleaded not guilty. The average and median sentences for those pleading guilty were 2y 11m and 2½ years, respectively. For those that pleaded not guilty, the average sentence was 3½ years and the median was 3years.

Non-parole periods⁸²

Six of the seven sentences recorded by JIRS were non-consecutive sentences, for which non-parole periods were recorded. The shortest non-parole period was 6months and the longest was 3 years. The average non-parole period was 1y 8m and the median was 1y 3½ months.

82. As only one of the six offenders pleaded not guilty, there was no value in comparing non-parole periods based on plea.

S73(1) SEXUAL INTERCOURSE WITH CHILD BETWEEN 16 AND 18 UNDER SPECIAL CARE

Any person who has sexual intercourse with another person who:

- a) is under his or her special care, and
- b) is of or above the age of 16 years and under the age of 17 years,

commits an offence under this section. In these circumstances, ‘special care’ includes an offender who:

- is a step-parent, guardian or foster parent of the victim;
- is a school teacher and victim is a pupil of the offender;
- has established a personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim;
- is a custodial officer of an institution of which the victim is an inmate; or
- is a health professional and the victim is a patient of the health professional.

The statutory maximum for an offence under this section is imprisonment for 8 years. There is no applicable SNPP for this offence.

One⁸³ person was sentenced for an offence under this section in the higher courts, receiving a suspended sentence with supervision.

83. The Judicial Commission has advised that there is a missing measuring period, from June 2003 to September 2007, may have resulted in an understating of the actual number of offences under this section.

S78A INCEST

Any person who has sexual intercourse with a close family member who is of or above the age of 16 years commits an offence under this section.

The statutory maximum for an offence under this section is imprisonment for 8 years. There is no applicable SNPP for this offence.

Higher Courts

Three people were sentenced for an offence under this section between June 2003 and September 2007.

All (100%) were sentenced to a period of imprisonment for 2, 3 and 4 years respectively.

Non-parole periods were recorded in two of the matters, of 1 year and 2½ years.

S80A(2) SEXUAL ASSAULT BY FORCED SELF-MANIPULATION

Any person who compels another person to engage in self-manipulation, by means of a threat that the other person could not reasonably be expected to resist, commits an offence under this section.

The statutory maximum for an offence under this section is imprisonment for 14 years. There is no applicable SNPP for this offence.

Higher Courts

Between October 2000 and September 2007 one person was sentenced for an offence under this section, receiving eight years imprisonment with a non-parole period of five years.

S91D(1)(A) PROMOTE OR ENGAGE IN ACTS OF CHILD PROSTITUTION

Any person who:

- a) by any means, causes or induces a child to participate in an act of child prostitution , or
- b) participates as a client with a child in an act of child prostitution, commits an offence under this section.

The statutory maximum for an offence under this section is imprisonment for 10 years, or, if the child is under the age of 14 years, imprisonment for 14 years. There is no applicable SNPP for this offence.

Higher Courts

Between October 2000 and September 2007, four people were sentenced for an offence under this section.

All (100%) offenders received sentences of imprisonment, for 2 ½, 3, 3 ½, and 9 years, respectively.

The non-parole periods for the two non-consecutive sentences recorded on JIRS were 1 and 1½ years.

S91D(1)(A) INDUCE CHILD TO PARTICIPATE IN PROSTITUTION (ATTEMPT)

Higher Courts

Between October 2000 and September 2007, three people were sentenced in the higher courts for attempting to induce a child to participate in prostitution.

Two offenders (60%) received sentences of imprisonment, for 1 year and 4 years respectively. Non-parole periods of 6 months and 24 months were recorded.

One offender received periodic detention for a period of 24 months.

S91E OBTAIN BENEFIT FROM CHILD PROSTITUTION

Any person who receives money or any other material benefit knowing that it is derived directly or indirectly from an act of child prostitution, commits an offence under this section.

The statutory maximum penalty for an offence under this section is imprisonment for 10 years. There is no applicable SNPP for this offence.

Higher Courts

Between October 2000 and September 2007 two people were sentenced for this offence.

One offender (50%) received a sentence of imprisonment for three years with an 18 month non-parole period.

One offender received a suspended sentence.

S91F PREMISES NOT TO BE USED FOR CHILD PROSTITUTION

Any person who is capable of exercising lawful control over premises in which a child participates in an act of child prostitution commits an offence under this section.

The statutory maximum for an offence under this section is imprisonment for 7 years. There is no applicable SNPP for this offence.

Higher Courts

Between October 2000 and September 2007 two people were sentenced for an offence under this section.

One offender (50%) received a sentence of imprisonment of 2 years. As the sentence was a consecutive sentence, no non-parole period was recorded by JIRS.

One offender received a suspended sentence.

S91G CHILDREN NOT TO BE USED FOR PORNOGRAPHIC PURPOSES

Any person who, for pornographic purposes, uses, causes or procures a child or, having the care of a child, consents to the child being so used or allows the child to be so used, commits an offence under this section.

The statutory maximum for an offence under this section is imprisonment for 14 years if the child is under the age of 14 years; or imprisonment for 10 years if the child is of or above the age of 14 years. There is no applicable SNPP for this offence.

Higher Courts

Between October 2000 and September 2007 three people were sentenced for an offence under this section.

All (100%) received a period of imprisonment, for 2, 2½ and 3 years respectively.

All three sentences were non-consecutive sentences, for which non-parole periods were recorded of 1 year and 1½ years (two offenders).

S91G CHILDREN NOT TO BE USED FOR PORNOGRAPHIC PURPOSES (ATTEMPT)

Higher Courts

One person was sentenced for attempting to commit an offence under this section.

The offender received 4 years imprisonment, with a non-parole period of 2 years.

S91H(2) PRODUCE / DISSEMINATE CHILD PORNOGRAPHY

A person who produces or disseminates child pornography commits an offence under this section.

The statutory maximum for an offence under this section is imprisonment for 10 years. There is no applicable SNPP for this offence.

Higher Courts

Between January 2005 and September 2007, one person was sentenced for an offence under this section, receiving a s 9 bond with supervision.

Local Court

Between January 2005 and September 2007, eight people were sentenced in the Local Court for offences under this section.

Two people (25%) received sentences of imprisonment (of 18 months and 24 months, with non-parole periods of 9 months and 18 months respectively).

Five offenders received a suspended sentence (4 with supervision) and one offender received a s9 bond.

S91H(3) POSSESS CHILD PORNOGRAPHY

A person who has child pornography in his or her possession commits an offence under this section.

The statutory maximum for an offence under this section is imprisonment for 5 years. There is no applicable SNPP for this offence.

Higher Courts

Between January 2005 and September 2007,⁸⁴ one person was sentenced for an offence under this section. The offender received a s9 bond with supervision.

Local Court

Between January 2005 and September 2007, 74 people were sentenced in the Local Court for an offence against this section.

Thirty one people (41.89%) received sentences of imprisonment.

Other sentences imposed were:

- periodic detention orders - 3 (of 6, 12 and 16 months);
- suspended sentences - 15 (12 with supervision);
- community service orders – 8;
- s9 bonds - 14 (8 with supervision); and
- fine – 3(\$2000 in each case).

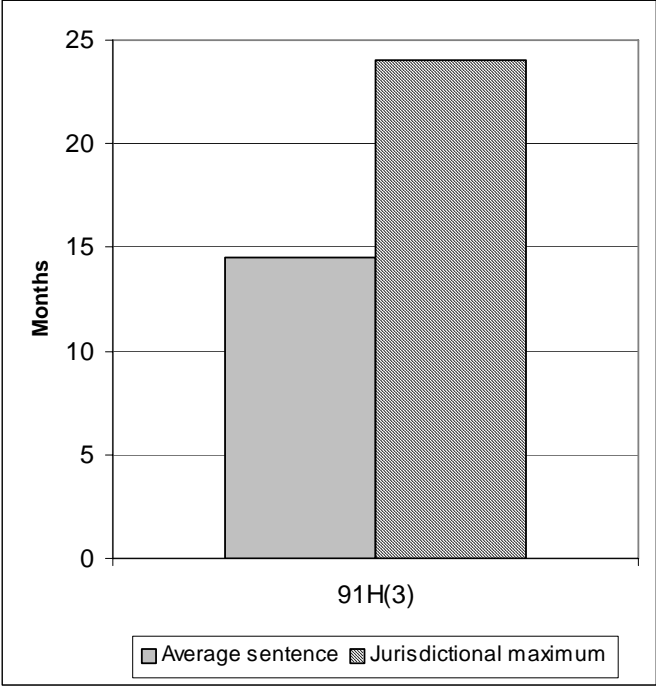
Term of imprisonment

The term of imprisonment imposed ranged from 7 months (one offender) to 24 months (five offenders). The average sentence was 14m 2w, and the median sentence was 12 months.

Twelve months was the most common prison sentence for this offence, with almost 26% of offenders who were sentenced to prison receiving this term.

84. When the offence was introduced in this form

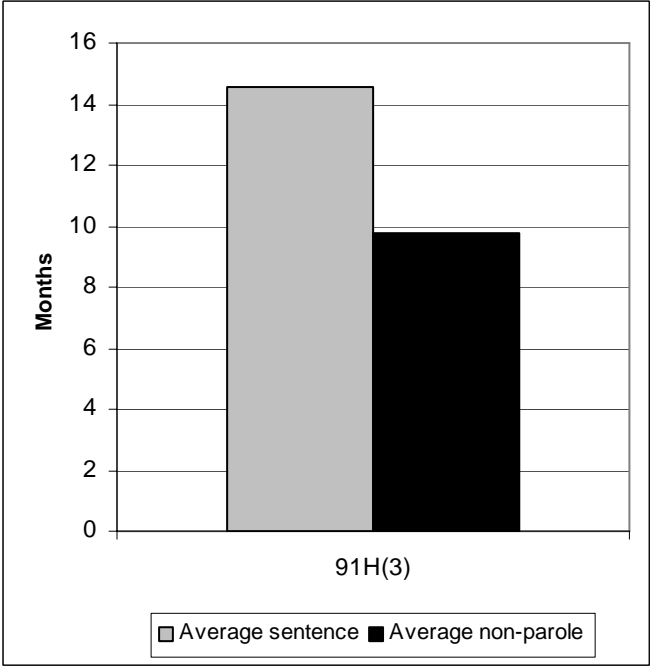
Chart 52: s91H(3) Average sentence and jurisdictional maximum



Non-parole period

The average non-parole period was 9m 3w and the median non-parole period was nine months.

Chart 53: s91H(3) Average sentence and average NPP



Plea

Of the 31 offenders, 27 pleaded guilty.

The average sentence and non-parole period for these offenders were 14m 1w and 9m 2w, respectively.

For the remaining four offenders who pleaded not guilty or entered no plea, the average sentence was 16 months and the non-parole period was 12 months.

Community service orders

The duration of CSOs imposed ranged from 100 hours (one offender) to 300 hours (one offender). The average sentence was 193.75 hours.

Chapter 2

Case Summaries

STANDARD NON PAROLE PERIOD SCHEME SEXUAL OFFENCES⁸⁵

ITEM 7 - S 61I CRIMES ACT

Sexual assault - SNPP 7 years

LM v R [2006] NSWCCA 322

Rothman J, with whom Tobias and Howie JJ agreed, dismissing the appeal – 10 October 2006.

Sentence appeal. Pleas of guilty to three counts of sexual intercourse without consent: s 61I *Crimes Act*.

Orders

Appeal dismissed.

Sentence

Imprisonment, non-parole period 3 years, balance of term 2 years on each count to be served concurrently in a juvenile detention centre.

Held

The trial judge was entitled to exercise his discretion to treat the applicant as a child under the *Children (Criminal Proceedings) Act 1987*. In considering whether to treat the applicant as a child under the *Children (Criminal Proceedings) Act 1987* or in accordance with the law the sentencing judge’s discretion did not miscarry. at [14]

“His Honour did not take into account any irrelevant matter, he took into account all relevant matters, there was no error of law or principle, nor is the exercise of discretion manifestly wrong.”
at [14]

The sentencing judge’s exercise of his discretion pursuant to s18 of the *Children (Criminal Proceedings) Act 1987* demonstrated that His Honour carefully considered the applicant’s youth and the need to determine whether he should be treated as a child or an adult.

The sentence imposed was within the sentencing range available. It ensured “the applicant will complete his sentence in a juvenile facility,” undergo counselling whilst in detention and continue counselling thereafter. at [19]. It was not necessary for the NSWCCA to find that it would have imposed the same sentence. It was sufficient for the court to find that the sentencing judge’s discretion did not miscarry.

85. The following cases have been extracted from the *Sentencing Trends and Practices 2006-2007* and the *Report on Sentencing Trends and Practices 2005-2006* reports, and have been reviewed by the Research Unit of the Office of the Director of Public Prosecutions.

***Dean v R* [2006] NSWCCA 341**

Tobias JA with whom Grove and Bell JJ agreed, allowing the appeal – 26 October 2006

Conviction and sentence appeal. Conviction following trial of one count of sexual intercourse without consent: s 61I *Crimes Act*.

Orders

Appeal allowed. Applicant re-sentenced.

Sentence

Imprisonment non-parole period 7 years, balance of term 3 years

New sentence

Imprisonment non-parole period 7 years, balance of term 2 years 4 months

Held

The sentencing judge's reference to the applicant's plea of not guilty as an aggravating factor did not cause the sentence discretion to miscarry. Although His Honour's comments conflict with the holding in *Siganto v The Queen* (1998) 194 CLR 656, the error was irrelevant. The standard non-parole period was imposed and it was accepted that the offence lay in the mid-range of objective seriousness. at [54] – [56]

Consideration of the applicant's plea of not guilty as an aggravating factor would have become relevant had His Honour used it to find that the offence lay beyond the mid-range of objective seriousness, and on that basis, provided a justification for a longer than standard non-parole period. at [54] – [55]

To impose a non-parole period less than the standard non-parole period applicable to the offence, it is necessary for a sentencing judge to find one or more mitigating factors set out in s 21A(3) of the *Crimes (Sentencing Procedure) Act* or some other objective or subjective factor relevant to the seriousness of the offence pursuant to *R v Way* (2004) 60 NSWLR 168. at [66]

There were no special circumstances justifying the setting of a balance of term which exceeded the statutory ratio. at [71]

***Gallant v R* [2006] NSWCCA 339**

Howie J with whom McClellan CJ at CL and Adams J agreed, dismissing the appeal – 26 October 2006

Conviction and sentence appeal. Conviction following trial of two counts of sexual assault: s 61I *Crimes Act*.

Orders

Appeal dismissed

Sentence

Imprisonment non-parole period 3 years 9 months, balance of term 1 year 3 months on each count. Sentences to be served concurrently.

Held

Defence counsel’s failure to submit the full array of witness testimonials as to the appellant’s good character, or to call witnesses to give evidence on this matter, did not cause the sentence proceedings to miscarry. Defence counsel could not be criticised for “not over-egging the pudding”. at [62]

The sentence proceedings did not miscarry on account of defence counsel’s failure to refer to special circumstances as a basis for adjusting the statutory ratio between the non-parole period and the parole period. There was very little on which to base a submission, and those factors that could be put forth had already been adumbrated. at [67]

The judge’s remarks on sentence were brief and did not adequately deal with the issue of the standard non-parole period. Notably, the remarks did not set out an assessment of the objective seriousness of the offence. at [69]

The sentencing judge erred by reducing the standard non-parole period by almost half on the apparent basis of the applicant’s subjective circumstances. The resultant sentence was unduly lenient. at [71]

***R v JRB* [2006] NSWCCA 371**

James J with whom Hidden and Hislop JJ agreed, allowing the appeal
– 29 November 2006

Crown appeal. Conviction following trial of one count of sexual intercourse without consent: s 61I *Crimes Act*.

Orders

Appeal allowed. Respondent re-sentenced.

Sentence

Imprisonment non-parole period 3 months, balance of term 2 years 9 months

New Sentence

Imprisonment non-parole period 1 year 3 months, balance of term 1 year 9 months

Held

The sentencing judge did not err by failing to have regard to the maximum sentence applicable to s 61I *Crimes Act* offences or the standard non-parole period for that offence. at [32]

There was no error in the sentencing judge’s consideration of his own experience of the care received by diabetic prisoners in gaol. His Honour had put his intention to consider this on notice, and had used his experience in the area as a basis for finding that there was a risk of the respondent’s health being endangered if imprisoned. at [40] – [45]

Whilst, pursuant to s 44(2) of the *Crimes (Sentencing Procedure) Act*, the sentencing judge was entitled to find special circumstances and set a proportionally less than usual non-parole period, the period of three months which was set was manifestly inadequate in light of the offence; sexual intercourse without consent. at [47] This inadequacy was so despite His Honour’s findings regarding the threat a term of imprisonment could pose to the respondent’s health. at [48]

***R v Smith* [2006] NSWCCA 353**

Bell J with whom Hidden and Johnson JJ agreed, allowing the appeal – 10 November 2006

Crown appeal. Plea of guilty to one count of aggravated indecent assault upon a person under 10 years (count 1): s 61M(2) *Crimes Act*; three counts of aggravated sexual intercourse without consent with a child under 16 years (counts 2, 3 and 4): s 61J *Crimes Act*; one count of aggravated indecent assault, victim under 16 (count 5); s 61M(1) *Crimes Act*; and one count of sexual intercourse without consent (count 6): s 61I *Crimes Act*. A form 1 was attached to count 2. This contained one charge of aggravated indecent assault; s 61M(1) *Crimes Act*; one charge of act of indecency: s 61N(2) *Crimes Act*; and one charge of indecent assault: s 61L *Crimes Act*.

Orders

Appeal allowed. Respondent re-sentenced.

Sentence

Count 1, fixed term 18 months, concurrent with count 2

Count 2, Imprisonment non-parole period 3 years 3 months, balance of term 2 years 9 months

Count 3, fixed term 2 years 9 months, concurrent on count 2

Count 4, fixed term 2 years 9 months, concurrent on count 2

Count 5, fixed term 18 months, concurrent on count 2

Count 6, fixed term 2 years concurrent on count 2

Total, Imprisonment non-parole period 3 years 3 months, balance of term 2 years 9 months

New Sentence

Count 1, Confirmed

Count 2, Confirmed, but made partially consecutive on count 6

Count 3, Confirmed, but made partially consecutive on count 2

Count 4, Confirmed, but made partially consecutive on count 3

Count 5, Confirmed, but made partially consecutive with count 4

Count 6, Imprisonment non-parole period 3 years, balance of term 2 years partially consecutive on count 2

Total, Imprisonment, non-parole period 5 years, balance of term 2 years 9 months

Held

The sentencing judge erred in finding that the sentences should be served concurrently. The offences were each discrete incidents and the principle of totality did not require this. at [23] – [24]

Section 45(1) of the *Crimes (Sentencing Procedure) Act* does not authorise a sentencing judge to decline to set a non-parole period for an offence which is subject to a standard non-parole period. at [27]

The overall sentence did not reflect the criminality of the six offences and was manifestly inadequate. at [24]. Whilst the respondent's subjective case was favourable, he was not entitled to a degree of mitigation that might be afforded to an offender for whom the offence was an isolated incident. at [27]

R v Perrin [2006] NSWCCA 64 – 15 March 2006

Judgment of: McClellan CJ at CL; Rothman J; Smart AJ

Conviction after trial or guilty plea: Guilty plea.

Decision: Appeal upheld. Sentence reduced to a non-parole period of 2 years with a balance of term of 2 years (from a non-parole period of 4 years with a balance of term of 2 years).

Held: The sentencing judge erred by elevating the criminality of the offender by sentencing on the basis of material not in evidence against that offender (contents of three records of interview). As the factual basis for sentencing was inaccurate "... the sentence imposed was manifestly excessive as to the full term and the non-parole period" (Smart AJ at [41]). Special circumstances existed, "... principally to ensure a longer period on parole so as to provide adequate supervision and assistance in the applicant's rehabilitation and re-integration back into the community." (Smart AJ at [24]).

ITEM 8 – S 61J CRIMES ACT

Aggravated sexual assault - SNPP 10 years

R v BWS [2007] NSWCCA 59

Sully J, with whom Bell and Hoeben JJ agreed, allowing the appeal – 9 March 2007.

Crown appeal. Convicted of two counts of aggravated sexual assault (under authority) (counts 1 and 2): s 61J(1) *Crimes Act*; and one count of assault occasioning actual bodily harm (count 3): s 59 *Crimes Act*.

Orders

Appeal allowed. Respondent re-sentenced.

Sentence

Count 1, Imprisonment non-parole period 6 years, balance of term 4 years

Count 2, Imprisonment non-parole period 6 years, balance of term 4 years, concurrent with count 1

Count 3, Imprisonment fixed term 4 months

Total Imprisonment non-parole period 6 years, balance of term 4 years

New Sentence

Count 1, Imprisonment non-parole period 6 years 6 months, balance of term 3 years

Count 2, Imprisonment non-parole period 6 years 6 months, balance of term 3 years, partly consecutive on count 1

Count 3, Imprisonment 4 months fixed term

Total Imprisonment non-parole period 7 years 6 months, balance of term 3 years

Held

The sentencing judge failed to give proper effect to the principle of totality as set out in *Pearce v The Queen* (1998) 194 CLR 610. Since the offences arose out of separate criminal enterprises on separate dates, wholly concurrent sentences were inappropriate, and did not reflect the overall criminality of the offences.

The sentencing judge also misapplied *R v Way* (2004) 60 NSWLR 168 in failing to balance the objective and subjective circumstances of the offence to make a determination as to its objective seriousness. Further, no reference was made to the reasons for departing from the standard non-parole period despite a finding that the offence was in the mid range of objective seriousness. A departure of 40 per cent from

the standard non-parole period for an offence in the mid range of objective seriousness is unreasonable.

***Reaburn v R* [2007] NSWCCA 60**

Hoeben J, with whom Sully and Bell JJ agreed, allowing the appeal – 16 March 2007.

*Note this matter also features an **Item 7** under s 61I Crimes Act.*

Sentence appeal. Plea of guilty to one count of aggravated sexual assault (threaten actual bodily harm with an offensive weapon, namely a knife) (count 1): s 61J(1) *Crimes Act*; and one count of sexual assault (count 2): s 61I *Crimes Act*. One count of assault occasioning actual bodily harm was taken into account of a Form 1.

Orders

Leave to appeal granted. Applicant re-sentenced.

Sentence

Count 1, Imprisonment non-parole period 9 years, balance of term 3 years (taking into account the Form 1)

Count 2, Imprisonment non-parole period 4 years 4 months, balance of term 3 years 8 months, partially cumulative on count 1

Total Imprisonment non-parole period 11 years, balance of term 3 years 8 months

New sentence

Count 1, Imprisonment non-parole period 6 years 9 months, balance of term 2 years 3 months (taking into account the Form 1)

Count 2, Imprisonment non-parole period 4 years 4 months, balance of term 2 years 8 months, partially cumulative on count 1

Total Imprisonment non-parole period 7 years 6 months, balance of term 2 years 8 months

Held

The sentencing judge erred by placing undue weight on the standard non-parole period, using it as the “starting point” rather than as a reference point, thereby misapplying *R v Way* (2004) 60 NSWLR 168. Additionally, the sentencing judge failed to apply the 25 per cent discount to the sentence for an early plea of guilty.

The sentencing judge also fell into error by failing to give proper consideration to the applicant’s mental state, as a result of his sad and traumatic upbringing.

Further, His Honour misinterpreted the aggravating factor under s 21A(2)(n) of the *Crimes (Sentencing Procedure) Act 1999*, that “the

offence was part of a planned or organised criminal activity”. While some level of planning was involved, the court commented that the period in which the applicant formed the intention to commit the offences was “likely to have been relatively short”. at [42]. Noting this, the court held that pursuant to *Fahs v R* [2007] NSWCCA 26 the low level of planning involved in the commission of the offences did not activate the s 21A(2)(n) aggravating feature. at [44]

Musgrove v R [2007] NSWCCA 21

Simpson J, with whom McClellan CJ at CL and Price J agreed, dismissing the appeal – 12 February 2007.

Sentence appeal. Plea of guilty to one count of aggravated sexual assault (threaten actual bodily harm with an offensive weapon, namely a knife): s 61J *Crimes Act*.

Orders

Leave to appeal granted. Appeal dismissed.

Sentence

Imprisonment non-parole period 8 years, balance of term 2 years 6 months

Held

The sentencing judge was entitled to make a finding that no special circumstances existed to justify reducing the sentence. The determination of whether or not special circumstances exist is a discretionary finding of the sentencing judge and error will only be found where it can be shown that such a finding was not open. at [24]

Section 44(1) of the *Crimes (Sentencing Procedure) Act 1999* as it currently stands first requires the court to set the non-parole period and then to set the balance of term. This requirement however does not mean that the non-parole period must first be determined. at [44]. See *R v Moffitt* (1990) 20 NSWLR 114 at 122; *R v P* [2004] NSWCCA 218; and *R v Tobar* [2004] NSWCCA 391; 150 A Crim R 104.

Simpson J commented that –

“...To determine, initially, the non-parole period, before determining the total sentence, would, in my opinion, (where special circumstances are then found) be conducive to error of the kind exposed in *Huynh*. A finding of special circumstances, after the determination of the non-parole period, would provoke an extension, beyond proper limits, of the balance of term. Sentencing judges need to be wary of taking a course that might lead to that error. Yet, on too literal an application of the section, that kind of error is rendered likely...”

The course of legislative amendment has, in my opinion, been apt to create confusion in the sentencing process.” at [44] –[45]

Whilst a parole period must not exceed one-third of the non-parole period in the absence of special circumstances (s 44(2) of the *Crimes (Sentencing Procedure) Act 1999*), the converse is not true. That is, it is not an error for a parole period of less than one third of the non-parole period to be imposed. at [27]

***NT v R* [2007] NSWCCA 143**

Harrison J, with whom James and Rothman JJ agreed, dismissing the appeal — 24 May 2007.

*Note this matter also features an **Item 9A s 61M(1) Crimes Act** offence.*

Sentence appeal. Pleas of guilty to five counts of aggravated indecent assault (child under the age of 16 years) (counts 1, 2, 3, 7 and 8): s 61M(1) of the *Crimes Act*; two counts of aggravated sexual assault (child under the age of 16 years) (counts 5 and 6): s 61J(1) *Crimes Act*; and one count of attempted aggravated sexual assault (child under the age of 16 years) (count 4): ss 61J(1)/61P *Crimes Act*.

Orders

Leave to appeal granted. Appeal dismissed.

Sentence

Count 1, Imprisonment 12 months fixed term

Count 2, Imprisonment 9 months fixed term, partially cumulative on count 1
Count 3, Imprisonment 1 year 6 months fixed term, partly cumulative on count 2

Count 4, Imprisonment 3 years fixed term, concurrent with count 3

Count 5, Imprisonment 3 years fixed term, party cumulative on count 8

Count 6, Imprisonment non-parole period 2 years, balance of term 4 years, partly cumulative on count 5

Count 7, Imprisonment 9 months fixed term, concurrent with count 4

Count 8, Imprisonment 12 months fixed term, concurrent with count 7

Total Imprisonment non-parole period 5 years 9 months, balance of term 4 years

Held

Despite the “exceptional features” of the case, the applicant failed to establish that there had been an error that warranted the court’s intervention.

The CCA referred to *R v Sangalang* [2005] NSWCCA 171 where it was held that offences committed before 1 February 2003 are of limited assistance in determining the appropriate sentence for an offence committed after the date. at [34]. Caution must also be exercised when comparing cases under the same offence, due to the different facts and circumstances of the case. at [30]

R v Oloitoa [2007] NSWCCA 177

McClellan CJ at CL, with whom Hoeben and Hall JJ agreed, allowing the appeal – 4 April 2007.

Crown appeal. Plea of guilty to one count of aggravated entry with intent to commit serious indictable offence (count 1): s 111(2) *Crimes Act*; and one count of aggravated sexual assault without consent (threaten actual bodily harm with an offensive weapon, namely a knife) (count 2): s 61J(1) *Crimes Act*.

Orders

Appeal allowed. Respondent re-sentenced.

Sentence

Count 1, Imprisonment non-parole period 3 years, balance of term 3 years

Count 2, Imprisonment non-parole period 6 years, balance of term 6 years, partly consecutive on count 1

Total Imprisonment non-parole period 6 years 6 months, balance of term 6 years

New sentence

Count 1, Imprisonment non-parole period 3 years, balance of term 3 years

Count 2, Imprisonment non-parole period 8 years 9 months, balance of term 3 years 9 months, partly consecutive on count 1

Total Imprisonment non-parole period 9 years 9 months, balance of term 3 years 9 months

Held

The CCA held that an act of fellatio may not necessarily fall below the middle of the range of offences under s 61J of the *Crimes Act*, and is to be determined based on the circumstances of the offence. at [41] – [43]

In the present case, the invasion of the victim's home, coupled with the use of arms, threats and the presence of young children justified a finding that the offence was above the middle of the range of objective seriousness.

The CCA also found that the degree of concurrency in the sentences for the two offences were unnecessarily lenient. Although the offences were part of a sequence of offending, they were separate offences requiring separate sentences.

The sentencing judge also failed to give reasons as required by s 54B(4) of the *Crimes (Sentencing Procedure) Act 1999* for departing from the standard non-parole period.

[Nguyen v R \[2007\] NSWCCA 14](#)

Howie J, with whom Sully and Price JJ agreed, allowing the appeal - 7 February 2007.

Sentence appeal. The applicant was convicted of one count of aggravated sexual assault: s 61J(1) **Crimes Act**; and one count of armed robbery: s 97(1) **Crimes Act**.

Orders

Appeal allowed to correct a formal error.

Sentence

Imprisonment, non-parole period 6 years, balance of term 2 years each count to be served concurrently and to be wholly accumulated on the sentence imposed by Morgan DCJ.

Total Imprisonment 12 years, non-parole period 10 years

New Sentence

Sentences imposed by Hughes DCJ quashed as they did not comply with s 44 *Crimes (Sentencing Procedure) Act 1999* as it stood when the offences occurred.

New sentence, Imprisonment 8 years, non-parole period 6 years on each count to be served concurrently.

Held

There was a failure to consider the principle of totality in relation to accumulating the current sentences with a previous sentence. The sentencing judge should have taken into account the criminality involved in the offence that the applicant was sentenced for by Morgan DCJ and the fact that that offence was committed three weeks after the offences that Hughes DCJ was sentencing the applicant for. at [17]

The sentencing judge was obliged to consider that the accumulation of sentences constituted special circumstances. The judge should also have considered the overall non-parole period the applicant was to serve as a result of the accumulation of sentences and how that should affect a finding of special circumstances for the purposes of arriving at an appropriate parole period. at [17]. The parole period imposed was

out of proportion to the non-parole period, especially as the applicant was a young person with some issues that could be addressed by assistance on parole.

In addition to the grounds of the appeal, Howie J identified three significant errors in the exercise of the sentencing discretion which operated in favour of the applicant. at [9]. These errors were held to be: (a) the judge's assessment of the seriousness of the offence; (b) making the sentences for both offences totally concurrent; and (c) sentencing the applicant on the bases of having no prior offences and of being of good character.

The offences could not be described as being "at the lower mid range" of objective seriousness. at [10]. The armed robbery was aggravated by planning, being committed in company, being committed in the victim's home and by the way in which the victim was treated. at [10]. The sexual assault was aggravated by the threat to inflict actual bodily harm, its commission in the victim's home and the blindfolding and binding of the victim. at [10]

It was an error of principle to make both offences totally concurrent. This decision was based on both offences having been committed on the same day. at [11]. Howie J said that it was obvious from a number of recent matters before the court that the principles of totality are not sufficiently understood.

"...There is no rule that sentences for offences committed on the same day or in the same criminal enterprise should be served concurrently. The issue has been considered in a number of decisions of this Court that should make it plain that the question to be asked is whether the criminality of one offence can be encompassed in the criminality of the other offence: see generally *R v MMK* [2006] NSWCCA 272. The position was explained in *Cahyadi v R* [2007] NSWCCA 1...". at [12]

Howie J questioned why the applicant should receive the same sentence as he would have received had he left the premises after committing the robbery, and without committing the sexual assault. at [13]

The offender's good character before he committed the offences was irrelevant. In *R v MAK and MSK* [2006] NSWCCA 381 the court held that where, after the offences for which sentence was being passed, the offender had committed other serious offences of a similar nature, "... little or no significance could be given to the fact that the offender had no prior convictions as the time of the commission of the offences for which he was being sentenced". at [14]. In that matter the offender's absence of prior offences could not be considered to be a mitigating factor. at [14]

Howie J observed that the applicant's commission of another serious home invasion three weeks after these offences meant that the offender's prior good character before committing the current offences was irrelevant. at [15]

A less severe sentence was not warranted. The sentencing discretion miscarried in a number of ways, but overall the errors operated significantly in favour of the applicant. A sentence of eight years with a non-parole period of six years was "probably inadequate". at [16]. This was notwithstanding the applicant's age and delay in the matter being dealt with. That delay caused no prejudice to the applicant. The applicant displayed no remorse and any steps made toward rehabilitation had to be viewed in the context of the applicant's refusal to accept responsibility for his offending. at [16]. There were no relevant mitigating personal circumstances to explain the offences, particularly the sexual assault. at [16]

Thorne v Regina [2007] NSWCCA 10

Howie J, with whom Sully and Hall JJ agreed, dismissing the conviction appeal and allowing the sentence appeal – 7 February 2007

Conviction and sentence appeal. Conviction following trial of one count of aggravated sexual assault (maliciously inflict actual bodily harm) (count 1), s 61J *Crimes Act*; and two counts of sexual intercourse without consent (counts 2 and 3), s 61I *Crimes Act*.

Orders

Conviction appeal dismissed. Sentence appeal allowed.

Sentence

Count 1, Imprisonment non-parole period 10 years, balance of term 3 years 4 months

Counts 2, 3, Imprisonment non-parole period 7 years, balance of term 2 years 4 months on each count, concurrent with count 1

Total, Imprisonment non-parole period 10 years, balance of term 3 years 4 months

Held

The judge erred in treating the appellant's conviction for sexual assault over 14 years before the present matters as an aggravating factor under s 21A(2)(d) of the *Crimes (Sentencing Procedure) Act* 1999. The application of s 21A(2)(d) is governed by common law principles confining it to situations where there is a demonstrative need for retribution, deterrence or protection of the community, none of which applied in this case: *R v Johnson* [2004] NSWCCA 76; *R v Wickham* [2004] NSWCCA 193.

The judge failed to consider the appellant’s mental state at the time he committed the offences. While there was no psychiatric or psychological report before the sentencing judge, it was clear that as well as being intoxicated and in a state of despair the appellant had an abnormal state of mind. at [77]

The appellant’s mental state was demonstrably a relevant factor in determining whether his offending fell within the mid-range of objective seriousness, yet the judge made no reference to it. at [78]. The sentencing discretion miscarried because of the judge’s failure to take into account the relevant factor of the appellant’s mental health. In re-sentencing it was appropriate to consider the psychological report tendered on appeal. at [79]

It could not be said that the offences were in the mid-range of objective seriousness. Count 1 “fell significantly below the mid-range of seriousness.” The aggravating feature of inflicting actual bodily harm was not particularly serious. at [85]

Similarly, counts 2 and 3 fell short of mid-range objective seriousness. No consideration was given to what might constitute a mid-range offence under s 61I. This exercise is complicated by assessing the range of offending “without taking into account matters that would give rise to aggravating factors under the more serious offence under s 61J.” at [86]

It was a misrepresentation to categorise the appellant’s conduct as a breach of trust within s 21A (2)(l). The judge should have given less weight to the element of general deterrence. at [84], [87]

Imposing concurrent sentences inadequately addressed the criminality of the conduct. The sentence for count 1 did not reflect the total criminality of the conduct. The sentences should have been partially accumulated. There was an interval between the commission of count 1 and counts 2 and 3. at [89]

New Sentence

Count 1, Imprisonment non-parole period 6 years, balance of term 3 years 6 months

Counts 2 and 3, Imprisonment non-parole period 3 years 6 months, balance of term 3 years 6 months on each count partly consecutive on count 1

Total, Imprisonment non-parole period 7 years 6 months, balance of term 3 years 6 months

R v Brooks [2006] NSWCCA 169 – 9 August 2006

Conviction after trial or guilty plea: Guilty plea

Judgment of: Hulme J; Hidden J; Hall J

Decision: Appeal against sentence allowed. Non-parole period of 13 years with balance of term 4 years reduced to non parole period of 10 years and 6 months with balance of term 3 years and 6 months.

Held: Three counts of sexual assault on elderly woman. Sentencing judge erred by determining them as the worst category of offence for offences of that kind.

ITEM 9: CRIMES ACT SEC 61JA

Aggravated sexual assault in company – SNPP 15 years⁸⁶

R v Stephen Aslett [2006] NSWCCA 48 - 24 March 2006

Note that this matter also featured an Item 13 *Crimes Act* section 112(3) offence.

Conviction after trial or guilty plea: Guilty plea.

Judgment of: Spigelman CJ; Barr J; Howie J

Decision: Appeal upheld. Sentence comprising a non-parole period of 13 years and a balance of term of 7 years imposed (reduced from a non-parole period of 17 years and a balance of term of 7 years).

Held: The CCA determined that “[t]he reason for departing from the prima facie ratio of 3:1 between non-parole period and balance of term is to recognise the applicant’s youth and to foster his prospects of rehabilitation ...” (Barr J at [19]).

R v Dudley Aslett [2006] NSWCCA 49 - 24 March 2006

Note that this matter also featured an Item 13 *Crimes Act* section 112(3) offence

Conviction after trial or guilty plea: Conviction after trial.

Judgment of: Spigelman CJ; Barr J; Howie J

Decision: Appeal against conviction dismissed. Appeal against sentence upheld.

Sentence of imprisonment with a total non-parole period of 22 ½ years imposed with a balance of term of 7 ½ years (reduced from a total non-parole period of 30 years with a balance of term of 10 years).

Held: The sentencing judge was entitled to find that the offences under s 61JA *Crimes Act* were more serious than those in the mid range of objective seriousness and that a non-parole period exceeding the standard was

⁸⁶ Note: In the Sentencing Trends and Practices 2006-2007 Report cases falling under sec 61JA were included together with other aggravated sexual assault cases under sec 61J.

justified. His Honour was also entitled to conclude the offence the subject of the first count merited a non-parole period exceeding the standard non-parole period.

The CCA departed from the standard non-parole period due to "... the seriousness, ... of the appellant's criminality in the first and second counts and the need, in imposing sentence on counts 5, 6 and 7, to provide a proper opportunity for parole" (Barr J at [145]).

**ITEM 9A – S 61M(1) CRIMES ACT
AGGRAVATED INDECENT ASSAULT – SNPP 5 YEARS**

***AIS v Regina* [2006] NSWCCA 355**

Hislop J, with whom Beazley JA and Sully J agreed, dismissing the appeal – 20 November 2006.

Sentence appeal. Plea of guilty to one count of aggravated indecent assault (child under 16 years), s 61M(1) *Crimes Act*.

Orders

Appeal dismissed.

Sentence

Imprisonment non-parole period 9 months, balance of term 2 years, 2 weeks and 4 days

Held

The sentencing judge did not err in determining that a custodial sentence was appropriate in this case. Her Honour was mindful that the appellant was aged 19 years at the time of the offence and this reduced an otherwise mid-range offence to one at the lower end of the mid-range of objective seriousness. at [12]

The submission that the judge considered herself bound to impose a prison sentence was without foundation. Her Honour said no more than that the absence of a prior criminal record and the fact that the offence occurred spontaneously were not sufficient reasons alone to prevent the imposition of a full time custodial sentence. In this case prior good character carried little weight and general deterrence needed to be emphasised. Her Honour did not advance a proposition that in all cases of sexual assault by adults on children a custodial sentence had to be imposed. at [13]-[16]

The sentence imposed was “at the upper and outer limit...” of the relevant range available to the sentencing judge, with a starting point of three years and six months discounted by 20 per cent for the guilty plea. at [26]. Her Honour’s finding of special circumstances resulted in a non-parole period of nine months. There was no justification for adjusting this further. No error was established warranting a less severe sentence. at [27]-[29]

GAT v R [2007] NSWCCA 208

Adams J, with whom Howie and Price JJ agreed, allowing the appeal – 17 July 2007.

Sentence appeal. Pleas of guilty to one count of carnal knowledge of a girl between 10 and 16 years (count 1): s 71 *Crimes Act* (now repealed); one count of indecent assault of a child under 16 years (count 2): s 61E(1) *Crimes Act* (now repealed); one count of aggravated indecent assault (child under 16 years) (count 3): s 61M(1) *Crimes Act*; one count of aggravated act of indecency (under authority) (count 4): s 61O(1) *Crimes Act*; one count of aggravated sexual intercourse with a child between 14 and 16 years (under authority) (count 5): s 66C(4) *Crimes Act*; and one count of aggravated sexual intercourse with a child between 10 and 14 years (under authority) (count 6): s 66C(2) *Crimes Act*.

Orders

Leave to appeal granted. Applicant resentenced.

Sentence

Count 1, Imprisonment non-parole period 4 years, balance of term 2 years

Count 2, Imprisonment 3 years fixed term, concurrent with count 1

Count 3, Imprisonment non-parole period 3 years, balance of term 2 years, partially cumulative on count 1

Count 4, Imprisonment 1 year 6 months fixed term, concurrent with count 3
Count 5, Imprisonment non-parole period 3 years, balance of term 1 year 6 months, partially cumulative on count 3

Count 6, Imprisonment non-parole period 4 years, balance of term 3 years 6 months, partially cumulative on count 5

Total Imprisonment non-parole period 9 years 6 months, balance of term 3 years 6 months

New sentence

Count 1, Imprisonment non-parole period 4 years, balance of term 2 years

Count 2, Imprisonment 3 years fixed term, concurrent with count 1

Count 3, Imprisonment non-parole period 1 year 6 months, balance of term 1 year 1 month, concurrent with count 1

Count 4, Imprisonment 1 year fixed term, concurrent with count 1

Count 5, Imprisonment non-parole period 3 years, balance of term 1 year 6 months, partially cumulative on count 3

Count 6, Imprisonment non-parole period 3 years, balance of term of 2 years, partially cumulative on count 5

Total Imprisonment non-parole period 7 years, balance of term 3 years 6 months

Held

The sentencing judge erred in referring to the applicant as having “avoided the automatic application” of the standard non-parole period, contrary to the law in *R v Way* (2004) 60 NSWLR 168, on the basis of his plea of guilty. Adams J noted at [23] that –

“... it is especially important not to use the standard non-parole period as a starting point or as a fulcrum around which the various relevant features – objective and subjective – oscillate. Rather, all the objective and subjective features of the case must be brought together in a synthesis giving rise to the ultimate appropriate sentence. For the purpose of undertaking this exercise, the standard non-parole period is one of a number of matters to be considered, bearing in mind the ways in which the objective features of the case differ from an abstract case in the middle of the range.”

Further error occurred in making a finding of special circumstances but failing to adjust the statutory ratio accordingly.

The sentencing judge also omitted to properly apply the principle of totality by considering the overall sentence. The sentence was found to be manifestly excessive, given the strong subjective circumstances of the offender.

R v Tidona [2005] NSWCCA 410 - 2 December 2005.

Conviction after trial or guilty plea: Guilty plea.

Judgment of: Simpson J; Adams J; Hoeben J

Decision: Appeal upheld - applicant re-sentenced to a non-parole period of 3 years and a balance term of 2 years and 2 months (reduced from a non-parole period of 3 years and 11 months, and a balance of term of 1 year and 3 months).

Held: The total sentence of 5 years and 2 months was not excessive, given the aggravating features identified by the sentencing judge, the objective seriousness of the offence and issues of general and specific deterrence.

However, by beginning with the standard non-parole period and then crafting the structure of the sentence around it, Her Honour failed to stand back and look at the appropriate balance between the term of sentence and non-parole period.

There were a number of factors which amounted to special circumstances and which required that the statutory ratio between the term of sentence and non-parole period be adjusted so as to increase the period of supervision on parole for the applicant. These matters included his age; poor state of mental and physical health, the fact that he had commenced his first period of imprisonment at an advanced age and the need for some psychiatric intervention.

R v Sharwood [2006] NSWCCA 157 - 24 May 2006

Conviction after trial or guilty plea: Conviction after trial.

Judgment of: McClellan CJ at CL; Hoeben J; Johnson J

Decision: Sentence appeal allowed. Applicant re-sentenced to a total non-parole period of 1 year and 3 weeks with a balance of term of 11 months and 1 week (reduced from a non-parole period of imprisonment of 5 years and 4 months, with a balance of sentence of 2 years and 2 months).

Held: The 7 years 6 months imposed for count 5 exceeded the maximum penalty (which the sentencing judge incorrectly believed to be ten years). Errors were made in characterising the offences as being “in the middle of the range of objective seriousness” (at [64]); applying the principles of totality and proportionality; and the findings on accumulation.

The five year standard non-parole period should serve as a reference point or guidepost “... however, the comparatively low level of objective criminality, together with the very significant subjective matters, should be given greater weight” (Hoeben J at [73]).

R v Dagwell [2006] NSWCCA 98 – 5 April 2006

Conviction after trial or guilty plea: Guilty plea

Judgment of: Beazley JA; Adams J; Howie J

Decision: Crown appeal allowed. Non-parole period of 9 months with balance of term 12 months increased to non-parole period of 2 yrs 11 months with balance of term 1 year and 5 months

Held: The sentences were manifestly inadequate to a very significant degree. The sentences did not reflect the judge’s findings that the offences were very serious. Given the considerable age gap between the victim and the defendant there was little mitigation in the victim having consented and encouraged the defendant.

[*R v LJG* \[2006\] NSWCCA 216 – 20 July 2006](#)

Conviction after trial or guilty plea: Guilty plea

Judgment of: McClellan AJA; Hulme J; Hall J

Decision: Appeal against severity of sentence dismissed.

Held: The sentencing judge erred in respect of the application of the standard non-parole period in that his Honour commenced with the standard five-year non-parole period, then reduced it by 25% for the plea and then considered a further reduction for the subjective features. This approach was incorrect as expressed in *Way*. Despite error there was no lesser sentence warranted.

ITEM 9B – S 61M(2) CRIMES ACT

Aggravated indecent assault – child under 10 years - SNPP 5 years

Darrigo v R [2007] NSWCCA 9

Price J, with whom Hodgson JA and Howie J agreed, allowing the appeal – 5 February 2007.

Sentence appeal. Plea of guilty to one count of aggravated indecent assault (child under 10 years): s 61M(2) *Crimes Act*.

Orders

Leave to appeal granted. Appeal allowed.

Sentence

Imprisonment non-parole period 5 years, balance of term 2 years

New sentence

Imprisonment non-parole period 4 years 6 months, balance of term 1 year 6 months

Held

The sentencing judge did not err in translating the applicant's prior criminal history into an aggravating factor. Criminal history is relevant insofar as it reflects the applicant's failure in respect of rehabilitation and treatment and the need to protect the community. at [33]. However, His Honour fell into error by suggesting that prior criminal convictions go to the objective seriousness of the offence. Further, the starting point of the sentence was excessive and the case was not one where the maximum penalty should be imposed.

The court characterised the offence as "beyond the mid-range of objective seriousness." at [57]. Despite the plea of guilty, the standard non-parole period was still to be used as a reference point: *R v AJP* (2004) 150 A Crim R 575; *MLP v R* [2006] NSWCCA 271. When imposing a custodial sentence for a standard non-parole period offence the principal issues to be addressed, as set by Kirby J in *MLP v R* [2006] NSWCCA 271, are –

- "(i) What term of imprisonment is appropriate having regard to the offence and the circumstances of the offender?
- (ii) Should the offence be characterised as being in the mid-range of objective seriousness?
- (iii) Are there other reasons in the matters identified in s 21A (relating to the offender) for departing from the standard non-parole period?

(iv) Are there special circumstances?" at [54]

The court noted that these issues do not need to be addressed in any particular order: *MLP* [at 34]; *R v Moffit* (1990) 20 NSWLR 114. at [55]

The sentencing judge also failed to comply with s 44(2) of the *Crimes (Sentencing Procedure) Act 1999* in fixing the balance of the term of sentence, as the balance of term exceeded one third of the non-parole period and His Honour had declined to find special circumstances.

[R v Blinco \[2006\] NSWCCA 105 – 5 April 2006](#)

Conviction after trial or guilty plea: Guilty plea.

Judgment of: Grove J; Simpson J; Howie J

Decision: Appeal upheld. Applicant re-sentenced to a non-parole period of 1 year 6 months with a balance of term of 1 year 6 months (reduced from a non-parole period of 2 years and 9 months with a balance of term of 2 years).

Held: The offence carries a prescribed maximum penalty of ten years imprisonment; the standard non-parole period is five years. "Somewhat surprisingly, a consequence of this prescription is, if it is applicable, the total term for an offence in the middle of the range of objective seriousness (an expression in s 54A(2) of that Act) would necessarily be more than half the available maximum term." (Grove J at [5]).

Error occurred when the non-parole period was set independently of a consideration of the total sentence. The CCA accepted that the offence fell below the mid range of objective seriousness. However, the sentencing judge's finding was reached, at least in part, by impermissible reasoning – mainly, the emphasis placed on the applicant's plea of guilty. (Grove J at [13]).

Special circumstances (relating to the need for alcohol counselling and rehabilitation prospects) warranted a departure from the statutory ratio.

ITEM 10 – S 66A CRIMES ACT

Sexual intercourse – child under 10 - SNPP 15 years

MLP v R [2006] NSWCCA 271

Kirby J, with whom Grove and Hislop JJ agreed, allowing the appeal – 6 September 2007.

Sentence appeal. Convicted of one count of sexual intercourse with a child under ten years: s 66A *Crimes Act*.

Orders

Leave to appeal granted. Appeal allowed.

Sentence

Imprisonment non-parole period 12 years, balance of term 4 years

New sentence

Imprisonment non-parole period 11 years, balance of term 5 years

Held

The sentencing judge misapplied *R v Way* (2004) 60 NSWLR 168 by treating the offender's subjective circumstances as indicia of the objective seriousness of the offence.

The sentencing judge also fell into error by placing the offence above the mid range of objective seriousness. Although it was found to be in the mid range, the CCA held that there were circumstances that warranted a departure from the standard non-parole period, namely the applicant's health problems and the need for the sentence to be served on protection. at [55]

With respect to age, Kirby J said at [22] –

“...it does not follow that, because age is relevant and because the section contemplates a range of ages, an offence against a child approaching the age of 10 cannot be regarded, or should not be regarded, as being within the mid range. The section is concerned with the protection of the vulnerable from sexual exploitation and violation. No doubt, as a generalisation, the younger the child the more defenceless and vulnerable. However, the entire class of children under the age of 10 years is vulnerable. ...”

In relation to the fact that the offence was an isolated act, Kirby J said at [26] that –

“... The fact that conduct is an isolated act does not determine, however, whether the offence is within the mid range. It may be in the mid range, even though an isolated act, depending upon the nature of the act.”

***DBW v R* [2007] NSWCCA 236**

Spigelman CJ, with whom Simpson and Harrison JJ agreed, dismissing the appeal – 27 July 2007.

*Note: This matter also features an **Item 9B** s 61M(2) Crimes Act offence.*

Sentence appeal. Plea of guilty to two counts of aggravated act of indecency (counts 1 and 10): s 61O(2) *Crimes Act*; one count of aggravated indecent assault (count 4): s 61M(2) *Crimes Act*; and two counts of sexual intercourse with child under 10 years (counts 6 and 11): s 66A *Crimes Act*.

Two counts of aggravated act of indecency were taken into account on a Form 1 in relation to count 1: s 61O(2) *Crimes Act*; one count of aggravated indecent assault was taken into account in relation to count 4: s 61M(2) *Crimes Act*; three counts of sexual intercourse with a child under 10 years were taken into account in relation to count 6: s 66A *Crimes Act*; and three counts of sexual intercourse with child under 10 years were taken into account in relation to count 11: s 66A *Crimes Act*.

Orders

Leave to appeal granted. Appeal dismissed.

Sentence

Count 1, Imprisonment non-parole period 2 years, balance of term 2 years, taking into account Form 1 (concurrent with counts 6 and 11)

Count 4, Imprisonment non-parole period 1 year 9 months, balance of term 1 year 9 months, taking into account Form 1 (concurrent with counts 6 and 11)

Count 6 and 11, Imprisonment non-parole period 3 years, balance of term 3 years, taking into account Form 1's (partially cumulative on count 10)

Count 10 Imprisonment non-parole period 1 year 6 months, balance of term 1 year 6 months

Total Imprisonment non-parole period 3 years 6 months, balance of term 3 years

Held

The sentencing judge failed to identify which matters under s 21A of the *Crimes (Sentencing Procedure) Act 1999* were taken into account. Spigelman CJ found that it could not be inferred that the sentencing judge accepted the Crown submission that there was substantial emotional harm for the purposes of s 21A(2)(g) of the *Crimes*

(Sentencing Procedure) Act 1999 although such a finding was open. at [37] and [40]. *R v Wilson* [2005] NSWCCA 20 not followed.

While not expressly referred to, the term of the sentence indicates that substantial weight was placed on the applicant's confession to the authorities. The potential to be discovered through other means did not detract from this discount.

The sentencing judge however was correct in observing that the applicant's conduct adversely affected the young victim. This inference can be made in the absence of expert evidence on the basis of common sense. The observations by

Hunt J (as he then was) in *R v Muldoon* (unrep, 13/12/1990, NSWCCA) as to —

"the kind of evidence that should be adduced in order to conclude what impact there would be by way of future harm to very young children who had been subject to sexual abuse" are no longer of assistance in light of the increased knowledge of the effects of child sexual abuse. at [39]

