



**Justice**  
Sentencing Council

# Sentencing for child sexual assault

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November 2015



## **NSW Sentencing Council**

**November 2015**

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# 1. Introduction

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## Background

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### Report of the Joint Select Committee

- 1.1 This report arose out of concerns expressed in the report of the NSW Parliament's Joint Select Committee on sentencing of child sexual assault offenders (JSC).<sup>1</sup>
- 1.2 In 2013, the JSC was tasked with inquiring into and reporting on whether the current sentencing options for perpetrators of child sexual assault remain effective and whether greater consistency could be achieved through alternative sentencing options.<sup>2</sup> It compiled a comprehensive report and made recommendations for legislative change as well as other recommendations about the availability of information, trial processes and offender management.
- 1.3 The JSC noted the lack of public confidence in the way child sex offenders are currently sentenced and the importance of improved public communication of sentencing decisions, given that community perceptions of sentencing decisions are influenced by limited available information, which may not reflect the complexity of the sentencing task.<sup>3</sup> It made several recommendations aimed at making information and statistics about the sentencing of child sexual assault offenders more accessible to the public and to journalists.<sup>4</sup>

- 
1. Parliament of NSW, Joint Select Committee on Sentencing of Child Sexual Assault Offenders, *Every Sentence Tells a Story — Report on Sentencing of Child Sexual Assault Offenders* (2014).
  2. Parliament of NSW, Joint Select Committee on Sentencing of Child Sexual Assault Offenders, *Every Sentence Tells a Story — Report on Sentencing of Child Sexual Assault Offenders* (2014) v.
  3. Parliament of NSW, Joint Select Committee on Sentencing of Child Sexual Assault Offenders, *Every Sentence Tells a Story — Report on Sentencing of Child Sexual Assault Offenders* (2014) [5.4], [5.20]–[5.25].
  4. Parliament of NSW, Joint Select Committee on Sentencing of Child Sexual Assault Offenders, *Every Sentence Tells a Story — Report on Sentencing of Child Sexual Assault Offenders* (2014) rec 9, 15 and 16.

1.5 Relevantly, the committee recommended:

that the NSW Department of Justice examines strategies to improve available public information on sentencing outcomes for child sexual assault matters by:

- Presenting the information in a clear and concise form that is easy to interpret.
- Describing the limitations of the data for interpretive purposes.
- Providing a more comprehensive measure of the totality of sentences handed down to child sexual assault offenders, in order to overcome perceived claims of judicial leniency.<sup>5</sup>

and that:

the Attorney General investigates publishing all sentencing decisions of child sexual assault cases heard in each jurisdiction as soon as practicable after a decision has been handed down.<sup>6</sup>

### Terms of reference

1.6 On 3 June 2015, the Attorney General wrote to the Chairperson of the Council requesting that we produce a review of sentencing for child sexual assault offences as follows:

The Sentencing Council is to conduct a review of sentencing in child sexual assault matters in New South Wales that:

- provides sentencing statistics for child sexual assault convictions over a two year period (2012 and 2013), with a focus on serious child sexual assault offences,
- provides information on the characteristics of the offenders, sentence type and length, and
- provides background information, including: the key sentencing principles and reasoning employed by sentencing judges; the mitigating subjective features of the offender; and any other significant factors considered in the sentencing decision that explains how courts come to their final decision on sentence. This may be done using case-studies or collation of predominate themes across cases.

1.7 This report, therefore:

- describes the general approach of courts to sentencing (**chapter 2**)
- describes the factors that the courts consider that have a particular relevance to sentencing child sexual offences (**chapters 3-7**)

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5. Parliament of NSW, Joint Select Committee on Sentencing of Child Sexual Assault Offenders, *Every Sentence Tells a Story — Report on Sentencing of Child Sexual Assault Offenders* (2014) rec 9.

6. Parliament of NSW, Joint Select Committee on Sentencing of Child Sexual Assault Offenders, *Every Sentence Tells a Story — Report on Sentencing of Child Sexual Assault Offenders* (2014) rec 16.

- analyses the sentencing remarks for 7 serious child sexual offences sentenced in 2012-2013 (**chapters 8-14**), and
- provides case studies for each of the 7 offences, illustrating the court's approach for a longer sentence, for a mid-range sentence and a shorter or non-custodial sentence (**chapters 8-14**).

## Other relevant reviews and reports

- 1.8 A number of recent reviews and reports are of relevance to this exercise.

### *Victorian Sentencing Advisory Council*

- 1.9 In 2012, the Victorian Sentencing Advisory Council published a report on community attitudes to offence seriousness.
- 1.10 The study asked participants to rank 40 vignettes, each describing a criminal offence. Three child sexual offences were included - sexual penetration with a child under 12 years, indecent act with a child under 16 years, and produce child pornography. The report identified the factors underlying the ranking of the child sexual offences at the top of the scale of seriousness:
- age of victim under 12 (harm and culpability)
  - abuse of trust and power
  - wide-reaching and long lasting harms.<sup>7</sup>

### *Sentencing Council reports on SNPPs*

- 1.11 In 2013, we produced two reports on standard non-parole periods (SNPPs). The reports considered offences currently subject to the SNPP scheme and those that we considered should be included in the scheme.
- 1.12 The first report was an interim report on SNPPs for sexual offences against children,<sup>8</sup> the second was a final report on SNPPs for all offence categories, including sexual offences against children.<sup>9</sup> The interim report was produced to aid the JSC's deliberations.
- 1.13 For these reports, the Judicial Commission of NSW provided us with tables showing in detail the sentencing profile for a number of offences, including sexual offences against children that were currently included in the SNPP scheme and for the additional offences that we considered should be included.<sup>10</sup> These expanded on and updated the data published in a study by the Judicial Commission of NSW in 2010 which compared the proportion of convicted offenders imprisoned specifically

7. Victoria, Sentencing Advisory Council, *Community Attitudes to Offence Seriousness* (2012) 46.

8. NSW Sentencing Council, *Standard non-parole periods: Sexual offences against children*, Interim Report (2013).

9. NSW Sentencing Council, *Standard non-parole periods*, Report (2013).

10. NSW Sentencing Council, *Standard non-parole periods: Sexual offences against children*, Interim Report (2013) Appendix B; NSW Sentencing Council, *Standard non-parole periods*, Report (2013) Appendix B and C.

for SNPP offences by the NSW higher courts before and after the introduction of the SNPP scheme on 1 February 2003.<sup>11</sup>

- 1.14 These indicated, among other things, that, since 2007, non-parole periods had continued to rise for some SNPP offences such as aggravated sexual assault (under s 61J of the *Crimes Act 1900* (NSW) where the victim is a child) and sexual intercourse with a child under 10 years (under s 66A of the *Crimes Act 1900* (NSW)).
- 1.15 The reports recommended that a number of child sexual assault offences should be added to the SNPP scheme, including the offence of sexual intercourse with a child between 10 and 14 years and the aggravated offences of sexual intercourse with a child between 10 and 14 years and between 14 and 16 years.<sup>12</sup> These offences were added to the SNPP scheme on 29 June 2015.<sup>13</sup>

### *Report to the Royal Commission*

- 1.16 In July 2015, the Royal Commission into Institutional Responses to Child Sexual Abuse released a research report that examined sentencing law and practice in Australia as it relates to institutional child sexual abuse.
- 1.17 The report examined the main factors that courts consider in sentencing, giving particular attention to the factors relevant to child sexual offences and, where possible, factors relevant to such offences within an institutional context.<sup>14</sup> The report highlighted the fact that aggravating factors such as breach of trust or abuse of authority are often relevant in the institutional context where the offender may hold a position of authority within the institution, for example, teachers and priests.<sup>15</sup>
- 1.18 The report also drew on a database of 171 institutional child sexual abuse cases that could be identified from around Australia (93 of them from NSW). It provided an analysis of the 84 cases, covering a large number of different sexual offences, that were finalised in the District Court of NSW between 1989 and 2015.<sup>16</sup>
- 1.19 We note that only one of the cases considered in our survey (chapters 8-14) dealt with a case of institutional child sexual abuse. The offender in that case was a childcare assistant and there were 12 victims.

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11. P Poletti and H Donnelly, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Research Monograph 33 (Judicial Commission of NSW, 2010).

12. *Crimes Act 1900* (NSW) s 66C(1), (2), and (4).

13. *Crimes Legislation Amendment (Child Sex Offences) Act 2015* (NSW) Sch 2 [1] [2].

14. A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts* (Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015) ch 3.

15. A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts* (Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015) 63.

16. A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts* (Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015) 121-131.

### *Judicial Commission Report*

- 1.20 In August 2015, the Judicial Commission of NSW released a paper on sentencing for the offence of sexual intercourse with a child under 10 years<sup>17</sup> - that is, the offence under s 66A of the *Crimes Act 1900* (NSW) that was in force between 1986 and 2008 and the redrafted basic and aggravated forms of the offence under s 66A(1) and (2) which came into force in 2009.
- 1.21 It looked at the sentencing for 222 offenders in the 7 year period from 1 January 2008 to 31 December 2014. The study included offences committed under the earlier version of the offence between 1986 and 2008, including those committed before the introduction of the SNPP scheme in February 2003.
- 1.22 The statistical analysis undertaken included offender characteristics, the period between offence and sentence, and offence characteristics.
- 1.23 For the 33 juvenile offenders, the study found that 13 (39.4%) were sentenced to full-time imprisonment and that mitigating factors included whether the offender was under 18 years at the time of sentencing, had no prior criminal record, pleaded guilty and had committed only one s 66A offence.
- 1.24 For the adult offenders, the study found that 98.4% were sentenced to full-time imprisonment.
- 1.25 A bivariate analysis was undertaken for the adult offenders of the association between the offender and offence characteristics and the full term of sentence. Five factors were identified that had a statistically significant association:
- the maximum penalty
  - the type of sexual intercourse
  - the victim's age
  - the offender's relationship to the victim, and
  - delay.
- 1.26 The study found that:
- For each of these factors, the median full term:
- increased as the maximum penalty increased
  - was longest where the sexual intercourse was penile/object penetration
  - was longest for victims under 4 years of age

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17. P Poletti, P Mizzi and H Donnelly, *Sentencing for the offence of sexual intercourse with a child under 10*, Sentencing Trends and Issues No 44 (Judicial Commission of NSW, 2015).

- was longest for those offences committed by strangers
- was shortest where delay was more than 20 years.<sup>18</sup>

## Future directions

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- 1.27 The terms of reference for this review have asked for information about sentencing for serious child sexual offences. This report, in providing this information, has highlighted the complexity and multi-faceted nature of sentencing in this area, in particular the range of circumstances in which such offending occurs. This report has not attempted to develop any policy responses to the trends identified.
- 1.28 We note that the Government is currently reviewing child sexual offences and that this is likely to result in changes to the offences and the ways that the maximum penalties relate across the field. We expect that the information and data set out in this report will be used to inform the review.
- 1.29 In light of this ongoing process of review and also in light of the intent behind the JSR's recommendations about public awareness of sentencing practice, we consider that there should be regular reviews of sentencing for child sexual offences. We would support future reviews of sentencing trends for serious child sexual offences of the type contained in this report. This will build on work already undertaken for this report and help to identify trends over time.

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18. P Poletti, P Mizzi and H Donnelly, *Sentencing for the offence of sexual intercourse with a child under 10*, Sentencing Trends and Issues No 44 (Judicial Commission of NSW, 2015) 27.

## 2. General approach to sentencing

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2.1 A court, when sentencing an offender, must have regard to and be guided by the following:

- the purposes of sentencing
- the principles sentencing
- the requirement that a sentence of imprisonment should be a penalty of last resort
- the factors that courts should take into account, including the aggravating and mitigating circumstances set out in s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA), as well as factors that courts should not take into account, including registration and employment restrictions for child sexual offenders and good character where it assisted the offender to commit the offence
- the “guideposts” of the maximum penalty for the offence and, where relevant, the standard non-parole period (SNPP)
- the requirement, where the court sets a sentence consisting of a non-parole period and an additional term, that the non-parole period should be 75% of the head sentence unless there are special circumstances, and
- the “discounting provisions” of the CSPA relating to guilty pleas, pre-trial and trial co-operation and assistance to the authorities.

2.2 The sentence imposed is the result of the court taking into account all of the relevant considerations through a process of “instinctive synthesis”. In doing so, the court has a wide discretion. As the Law Reform Commission observed in its 2013 report:

Almost every aspect of sentencing concerns the inherent and unavoidable tension between the exercise of individual judicial discretion, and the consistency of approach that is required in order to maintain public confidence in the criminal justice system. This tension lies at the heart of much debate and criticism of sentencing ...

The common law adopts as a fundamental proposition that justice is best served by allowing courts a wide discretion to impose a just and appropriate sentence in each case, taking into account all relevant sentencing factors and excluding any irrelevant factor. However, the courts recognise that in almost every case

there is no single “correct” sentence and courts are permitted to impose a penalty from within a legitimate or permissible range of dispositions. ...

The courts have long recognised that sentencing an offender can involve an extremely complicated weighing of competing considerations, as the purposes or aims of sentencing law do not always “point in the same direction”.<sup>1</sup>

- 2.3 The remainder of this chapter sets out some detail on the framework outlined above. The chapters that follow (chapters 3-7) describe the various factors that the courts take into account with particular relevance to the serious child sexual offences set out and analysed in chapters 8-14.

## Purposes of sentencing

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- 2.4 The purposes for which a court may impose a sentence are set out in the CSPA:

- (a) to ensure that the offender is adequately punished for the offence,
- (b) to prevent crime by deterring the offender and other persons from committing similar offences,
- (c) to protect the community from the offender,
- (d) to promote the rehabilitation of the offender,
- (e) to make the offender accountable for his or her actions,
- (f) to denounce the conduct of the offender,
- (g) to recognise the harm done to the victim of the crime and the community.<sup>2</sup>

- 2.5 In 1989, the NSW Court of Criminal Appeal (CCA) stressed the importance of punishment and deterrence in the sentencing of child sexual offences when it observed:

This Court has said time and again that sexual assaults upon young children, especially by those who stand in a position of trust to them, must be severely punished, and that those who engage in this evil conduct must go to gaol for a long period of time, not only to punish them, but also in an endeavour to deter others who may have similar inclinations.<sup>3</sup>

- 2.6 The courts have emphasised on numerous occasions, the great importance of deterrence in sentencing for child sexual assaults, particularly in cases involving multiple offences.<sup>4</sup>

- 2.7 This general approach can be varied according to the circumstances of individual cases. Some of the circumstances that justify a varying emphasis on punishment, deterrence and rehabilitation are discussed below.

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1. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [1.28]-[1.30].

2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

3. *Fisher v R* (1989) 40 A Crim R 442, 445. See also *R v AEM* [2002] NSWCCA 58 [92]-[102].

4. *Simpson v R* [2009] NSWCCA 297 [48]; *R v Dagwell* [2006] NSWCCA 98 [44]; *R v BJW* [2000] NSWCCA 60; 112 A Crim R 1 [20].

## Principles of sentencing

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- 2.8 A number of key sentencing principles developed by the common law guide sentencing courts. These principles play a part in securing consistency both in the courts' approach and the sentences imposed:
- **Proportionality:** the court must impose a sentence that is proportional to the offence the offender has committed.<sup>5</sup> A sentence should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances.<sup>6</sup>
  - **Parity:** there must be parity (or relativity or due proportionality) between the sentences imposed on co-offenders, such that like conduct is treated as like, and due allowance is made for differences between the offenders.<sup>7</sup>
  - **Sentencing offenders only for the offence of which they are convicted** (the De Simoni principle): A court "in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence".<sup>8</sup> This principle is particularly relevant given the number of aggravated forms of sexual offences against children.
  - **Totality:** When a court sentences an offender for multiple or further offences, the overall sentence (imposed after taking into account the extent to which the individual sentences should be served concurrently, consecutively, or partly currently and consecutively, or imposed as an aggregate) must be "just and appropriate" to the totality of the offending behaviour.<sup>9</sup> The court must also have regard to the effect of the total length of the sentence for all of the offences, and in doing so, avoid a "crushing" sentence that would not accord with an offender's record and prospects of rehabilitation.<sup>10</sup>

## Imprisonment as a last resort

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- 2.9 The requirement that a sentence of imprisonment should be a penalty of last resort is found in s 5 of the CSPA, which provides that a court "must *not* sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate".<sup>11</sup>

5. *Veen v R* [No 1] (1979) 143 CLR 458; *Veen v R* [No 2] (1988) 164 CLR 465.

6. *Hoare v R* (1989) 167 CLR 348, 354.

7. *Lowe v R* (1984) 154 CLR 606; *Green v R* [2011] HCA 49; 244 CLR 462 [28].

8. *R v De Simoni* (1981) 147 CLR 383, 389 (Gibbs CJ).

9. *Mill v R* (1988) 166 CLR 59, 63 citing D A Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (2nd ed, Heinemann, 1979) 56-57.

10. *Postiglione v R* (1997) 189 CLR 295,304 (Dawson and Gaudron JJ), citing D A Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (2nd ed, Heinemann, 1979) 57-58; *Cahyadi v R* [2007] NSWCCA 1; 168 A Crim R 41 [27]; *Smale v R* [2007] NSWCCA 328 [130]-[133].

11. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1) [emphasis added].

## Guideposts – maximum penalties and standard non-parole periods

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- 2.10 The first guidepost is the maximum penalty for the offence, which is reserved for the worst category of offending by reference to objective and subjective factors.
- 2.11 The second guidepost is the SNPP which, for an offence that is part of the SNPP scheme,<sup>12</sup> “represents the non-parole period ... that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness”.<sup>13</sup>
- 2.12 SNPPs were relevant to 3 of the offences that we have considered in this report in 2012-2013 – the offences of sexual intercourse with a child under 10 in s 66A(1) and (2) of the *Crimes Act 1900* (NSW) and the offence of sexual intercourse without consent under s 61J of the *Crimes Act 1900* (NSW). Three others that we considered have been added to the SNPP scheme in the course of 2015.<sup>14</sup>

## Statutory ratio of head sentence to non-parole period

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- 2.13 The CSPA establishes a presumption—commonly referred to as the “statutory ratio”—that the non-parole period must not be less than three-quarters of the head sentence unless the court finds “special circumstances”.<sup>15</sup>
- 2.14 In practice, special circumstances are very frequently found, often by referring to mitigating factors that have already been taken into account. The Judicial Commission of NSW research has demonstrated an increase in special circumstances findings since the introduction of the statutory ratio in 1989, so that by 2002, courts were finding special circumstances in about 87% of cases and non-parole periods were often between a half and two-thirds of the head sentence.<sup>16</sup>

## Factors relevant to sentencing

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- 2.15 Section 21A of the CSPA sets out the factors which a sentencing court is to take into account. These are divided into a list of 22 aggravating factors and a list of 13 mitigating factors.<sup>17</sup> The section further specifies that the court is to take into

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12. The SNPP scheme is set out in *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A. It applies to the offence categories listed in the table to the Division.

13. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A. See *Muldock v R* [2011] HCA 39; 244 CLR 120 [27], [31].

14. *Crimes Act 1900* (NSW) s 66C(1), (2) and (4).

15. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2).

16. Judicial Commission of NSW, “*Special Circumstances*” under the *Sentencing Act 1989* (NSW), Monograph 7 (1993) 3; J Keane, P Poletti and H Donnelly, *Common Offences and the Use of Imprisonment in the District and Supreme Courts in 2002*, Sentencing Trends and Issues No 30 (Judicial Commission of NSW, 2004) cited in *Fidow v R* [2004] NSWCCA 172 [21] (Spigelman CJ); P Poletti and H Donnelly, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (Judicial Commission of NSW, 2010) 55.

17. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)-(3).

account “any other objective or subjective factor that affects the relative seriousness of the offence”<sup>18</sup> and states that the court must not have additional regard to any aggravating factor if it is an element of the offence.<sup>19</sup>

- 2.16 The aggravating and mitigating factors fall into the following broad categories:
- the nature, circumstances and seriousness of the offence
  - the personal circumstances and vulnerability of any victim arising because of the victim’s age, occupation, relationship to the offender, disability or otherwise
  - the extent of any injury, emotional harm, loss or damage resulting from the offence or any significant risk or danger created by the offence, including any risk to national security
  - the offender’s character, general background, offending history, age, and disability
  - the extent of the offender’s remorse for the offence, and
  - the offender’s prospects of rehabilitation.<sup>20</sup>
- 2.17 Section 21A also provides a special rule for child sexual offences in stating that “the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence”.<sup>21</sup>
- 2.18 Section 21A applies to all sentencing exercises irrespective of whether a custodial or non-custodial sentence is imposed. The court determines the weight that is attached to any particular factor in each case.<sup>22</sup>
- 2.19 The CSPA also precludes the court from taking into account the consequences of the sentence in relation to registration and prohibitions on employment that apply to certain sexual offenders.<sup>23</sup>

## Reductions in penalties

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- 2.20 The CSPA confers a power on a court to reduce a sentence by way of a “discount” for:
- **A plea of guilty:** which may reduce the severity of the type of punishment, not just the term of the sentence. The discount for the utilitarian value of the plea to

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18. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1)(c).

19. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).

20. Based on NSW Law Reform Commission, *Sentencing*, Report 139 (2013) rec 4.2.

21. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A).

22. *R v Wickham* [2004] NSWCCA 193 [24].

23. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 24A.

the criminal justice system should generally be in the range of 10-25% depending on the timing of the plea.<sup>24</sup>

- **Assistance to the law enforcement authorities:** the court may impose a lesser penalty on an offender than it would otherwise due to the degree to which the offender has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence concerned or any other offence.<sup>25</sup>
- **Pre-trial and trial assistance:** where an offender is tried on indictment, a court may impose a lesser penalty than it would have otherwise imposed having regard to the degree to which the defence has facilitated the administration of justice (whether by disclosures made pre-trial or during the trial or otherwise). However, the lesser penalty must not be unreasonably disproportionate to the nature and circumstances of the offence.<sup>26</sup>

## Instinctive synthesis

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2.21 The process of “instinctive synthesis” is fundamental to the way in which courts approach sentencing and balance the various purposes, principles, and factors that are to be taken into account.

2.22 The High Court<sup>27</sup> has unanimously endorsed the following statement as to what is involved in the “instinctive synthesis approach”:

By instinctive synthesis, I mean the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.<sup>28</sup>

2.23 This approach relies on the court’s capacity to reconcile all of the relevant factors, and to impose a just and appropriate sentence without needing to disclose the precise manner in which it reconciled all of those factors. The High Court has, however, allowed some scope for arithmetic adjustments, for example, in relation to discounts for a guilty plea or for assistance to the authorities.

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24. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22. *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383 [160].

25. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23.

26. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22A.

27. *Muldock v R* [2011] HCA 39; 244 CLR 120 [26].

28. *Markarian v R* [2005] HCA 25; 228 CLR 357 [51] (McHugh J).

### 3. Assessing the objective seriousness of sexual offending against children

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#### General approach

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3.1 The NSW Court of Criminal Appeal (CCA) has noted that every sexual assault offence is a serious offence, but that “though each case is inherently serious, some are more serious than others”. The CCA has listed the types of matters that courts can take into account in sentencing such an offence, including, in some cases, the duration of the offence, the degree of violence, the physical hurt inflicted, the form of forced intercourse and the circumstances of humiliation and otherwise.<sup>1</sup>

3.2 The CCA has also specifically considered the type of factors that could be taken into account in sentencing for an offence of sexual intercourse with a child aged under 10 years:

Other appropriate areas of inquiry in the consideration of the objective seriousness of a s 66A offence are, for example, how the offences took place, over what period of time, with what degree of force or coercion, the use of threats or pressure before or after the offence to ensure the victim’s compliance with the demands made, and subsequent silence, and any immediately apparent effect on the victim.<sup>2</sup>

3.3 The absence or lesser presence of one of these considerations does not reduce the objective seriousness of the offence. For example, as one CCA judgment observed:

I wish to make it clear that the short duration of a sexual assault would not ordinarily be considered as a factor which reduces the objective seriousness of the offence. Most sexual assaults will not be prolonged as the offender will seek to avoid apprehension. On the other hand, a sexual assault of an extended duration will necessarily add to the seriousness of the offending as the suffering and the humiliation of the victim will be increased. The short duration of the

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1. *R v Gebrail* (Unreported, NSWCCA, 18 November 1994) 10-11 (Mahoney JA); *R v Hibberd* [2009] NSWCCA 20; 194 A Crim R 1 [56]; *Russell v R* [2010] NSWCCA 248 [61].  
2. *R v AJP* [2004] NSWCCA 434; 150 A Crim R 575 [25].

present offence neither mitigated nor magnified the objective seriousness of the offence.<sup>3</sup>

## Particular matters

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### Type of sexual intercourse

- 3.4 The listing of the types of sexual intercourse for the various offences (as set out in the definition in s 61H(1) of the *Crimes Act 1900* (NSW)) does not imply that, prima facie, one type is more or less serious than another.<sup>4</sup>
- 3.5 The CCA has held that it is not possible to establish a hierarchy of the seriousness of the various types of sexual intercourse identified in the *Crimes Act*, and that the courts should consider the type of intercourse “in all the circumstances surrounding the offending” noting that “the type of penetration is simply one factor and by itself does not indicate how serious the particular offence is”.<sup>5</sup>
- 3.6 This is consistent with the approach taken by the CCA in *R v BA* where the court rejected the conclusion that an act of cunnilingus was towards the lower end of seriousness because it did not involve penetration:

Penetration during an act of cunnilingus could be an aggravating factor, but I am unable to accept that the absence of penetration during such an act is a factor which supports an assessment that the conduct falls towards the lower end of the range of seriousness. The Act provides no basis for concluding that cunnilingus is to be considered any more or less serious in itself than an act of fellatio (s 61H(1)(b)) or penetration of the vagina (s 61H(1)(a)). Each case must be assessed according to its own circumstances. I would accept the Crown’s submission that the act of cunnilingus performed by a mature man on a child of six years who is under his authority and within his family involves significant criminality.<sup>6</sup>

### Offence of extended duration

- 3.7 The CCA has observed that “a sexual assault of an extended duration will necessarily add to the seriousness of the offending as the suffering and the humiliation of the victim will be increased”. However, the short duration of a sexual assault will not “ordinarily be considered as a factor which reduces the objective seriousness of the offence”.<sup>7</sup>

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3. *R v Daley* [2010] NSWCCA 223 [48].

4. *Ibbs v R* (1987) 163 CLR 447; 451-452; *R v Hibberd* [2009] NSWCCA 20; 194 A Crim R 1 [20]-[21] (Tobias JA), [55] (Price J).

5. *R v AJP* [2004] NSWCCA 434; 150 A Crim R 575 [24]; *R v King* [2009] NSWCCA 117 [36].

6. *R v BA* [2014] NSWCCA 148 [37].

7. *R v Daley* [2010] NSWCCA 223 [48].

### Offence occurs in victim's home

- 3.8 The aggravating factor that “the offence was committed in the home of the victim or any other person”<sup>8</sup> has generally been narrowly construed by the courts to reflect the previous common law position that this aggravating factor applied only to intruders. However, in *Aktar v R*, the CCA has noted the government’s broader intention at the time the provision was inserted and has observed that:

The destruction of a victim’s sense of security and repose at home is the same whether the offender was lawfully present or not. The right of all citizens to be free from attack or other crime in their own home, regardless of the basis upon which the offender was present, must be recognised and protected.<sup>9</sup>

- 3.9 The Court, however, declined to rule formally on the question in absence of full submission from the parties to the case.<sup>10</sup>

### Breach of trust or authority

- 3.10 Breach of trust is an aggravating feature identified in the *Crimes (Sentencing Procedure) Act 1999* (NSW):

the offender abused a position of trust or authority in relation to the victim.<sup>11</sup>

- 3.11 The courts have taken the view that child sex offenders who abuse a position of trust must be severely dealt with by long terms of imprisonment, not only to punish them, but to deter others.<sup>12</sup>

- 3.12 The abuse of trust may be considered more serious where the offender is the father or other member of the victim’s family. The CCA has recognised that:

children in a family situation are virtually helpless against sexual attack by the male parent and that children have a right to be protected from sexual molestation within the family and that this can only be achieved by the courts imposing sentences of a salutary nature.<sup>13</sup>

- 3.13 In another CCA case it was similarly observed:

Offences by men against children to whom they have access by reason of familial ties and the bonds of friendship with the children’s parents ... are particularly heinous because their commission tends to threaten and abuse the trust that such children are entitled to repose in those who ought reasonably be expected to nurture and protect them.<sup>14</sup>

- 3.14 Offenders in positions of trust not only include family members and others who stand in place of a victim’s parents but may also include professionals such as medical practitioners. The CCA has observed generally of medical practitioners:

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8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(eb).

9. *Aktar v R* [2015] NSWCCA 123 [63].

10. *Aktar v R* [2015] NSWCCA 123 [64].

11. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(k).

12. *Fisher v R* (1989) 40 A Crim R 442, 445; *R v BJW* [2000] NSWCCA 60; 112 A Crim R 1 [20].

13. *R v BJH* (Unreported, NSWCCA, 30 July 1998) 2 (Sully and Ireland JJ).

14. *R v MJB* [2014] NSWCCA 195 [67].

The gravity of the sexual offences committed by the Appellant was magnified by the circumstance that there was involved a breach of trust which the patient reposed in a medical practitioner. The Court should enunciate that criminal interference with the bodies of persons seeking health care will be met with stern retribution. The present case exemplifies the extreme vulnerability of patients and taking advantage of that situation for self gratification attracts general and personal deterrent elements into appropriate sentence.<sup>15</sup>

- 3.15 The courts have also noted the need for deterrent sentences for school teachers and members of religious orders who, because of their positions, enjoyed the trust and confidence of the victims' parents and the institutions for which they worked.<sup>16</sup> Most recently, the CCA has noted that "the system of childcare, now widely utilised in the Australian community, depends upon persons in positions of trust and authority not abusing that position".<sup>17</sup>
- 3.16 In cases where the fact that the victim was "under the authority of" the offender is an element of the aggravated offence,<sup>18</sup> the courts have noted that the two concepts are distinct, but also that there is a certain degree of overlap between them and, in such cases, judges must be careful not to attach undue weight to breach of a position of trust or authority to guard against the possibility of double counting.<sup>19</sup>

### Difference in age

- 3.17 The courts have held that a significant age difference between the victim and the offender will aggravate the objective seriousness of the offence.<sup>20</sup> It has also been noted that, at least in cases where the victim is closer to 16, that a significant age difference will do "little" to mitigate the fact that the victim was consenting or encouraging the offender.<sup>21</sup>
- 3.18 In one case where the victim was 12 years of age and the offender was 22, the CCA noted:

Our community has indicated through the Parliament that such relationships are forbidden and if they occur the older person will be severely punished. It may be that if the offender was of a significantly younger age ... at the time of the offences a more benign attitude would be appropriate.<sup>22</sup>

### Use of Internet chat rooms

- 3.19 The courts' application of the principle of general deterrence, particularly in cases of child sexual assault, has been further emphasised in cases where the offender has used internet chat rooms:

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15. *R v Arvind* (Unreported, NSWCCA, 8 March 1996) 15 (Grove J).

16. *R v AB* [2000] NSWCCA 467; 117 A Crim R 473 [88]; *R v Ryan* (Unreported, NSWCCA, 2 March 1998) 6 (Gleeson CJ).

17. *R v Stoupe* [2015] NSWCCA 175 [93].

18. See, eg, *Crimes Act 1900* (NSW) s 66C(5)(d).

19. *MRW v R* [2011] NSWCCA 260 [77]-[78]; *JRM v R* [2012] NSWCCA 112 [30].

20. *Corby v R* [2010] NSWCCA 146 [77].

21. *R v Dagwell* [2006] NSWCCA 98 [35].

22. *R v Lee* [2010] NSWCCA 88 [31].

Users of Internet chat rooms should be well aware that crimes committed in such circumstances are treated with great concern by the criminal justice system and will be dealt with severely. Children must be protected from themselves and from those who prey on their vulnerability by gaining access to them through means such as that used by the [offender]. The only way this policy can be achieved is by the courts imposing condign punishment upon those convicted of such offences in the hope that others who minded to act in the same way might fear the consequences if they are caught.<sup>23</sup>

### Isolated offence

- 3.20 The fact that an offence is an isolated offence must be given weight depending on the circumstances of the isolation. The CCA has noted that where the offence is subject to an immediate complaint and speedy arrest, the sentencing court cannot “approach the matter upon the basis that there was likely to be a repetition of the offending conduct if the [offender] had not been arrested”. However it has noted that in cases where a significant period of time has passed before arrest, a positive submission can be made that the offence was “a single offence not repeated, despite opportunities to do so”.<sup>24</sup>

### Grooming

- 3.21 The CCA has noted that grooming of victims within a broad range of (escalating) offending conduct, constituted serious criminal conduct warranting a significant term of imprisonment.<sup>25</sup>

### Multiple offences and multiple victims

- 3.22 The CCA has stated on a number of occasions the need to ensure public confidence in the administration by imposing sentences which “do not suggest that multiple offences will be punished in the same way as one or two offences”.<sup>26</sup> One judgment observed:

It needs to be clearly understood by all concerned that a person who commits a deliberate series of discrete offences ... must not be left with the idea that by intoning references to the principle of totality as though it were some magic mantra, he can escape effective punishment for the offences which follow successively one upon another throughout the whole course of a studied and deliberate course of criminal behaviour.<sup>27</sup>

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23. *R v Dagwell* [2006] NSWCCA 98 [41].

24. *R v GWM* [2012] NSWCCA 240 [65].

25. *RLS v R* [2012] NSWCCA 236 [99]-[100].

26. *R v Gommerson* [2014] NSWCCA 159 [113]; *R v Wheeler* [2000] NSWCCA 34 [36]-[37]; *R v Knight* [2005] NSWCCA 253; 155 A Crim R 252 [112]; *R v Hamid* [2006] NSWCCA 302; 165 A Crim R 179 [134].

27. *R v Wheeler* [2000] NSWCCA 34 [37].

- 3.24 This is especially the case where there are also multiple victims. The CCA has noted:

Where there are several victims of crimes of violence (including sexual offences), it is important for the sentences actually imposed to recognise the fact that several individuals have been victimised by the offending conduct. ...

Where there are several victims, there is a special need to ensure a proper level of accumulation to guard against a view that, in reality, there is virtually no penalty at all imposed for sexual offences committed against one or more of the victims.

Those considerations must, of course, be balanced against the statement of principle ... that it is necessary to arrive at an ultimate aggregate sentence that does not exceed what is called for in all the circumstances.<sup>28</sup>

## Consent

- 3.25 The CCA has noted that the issue of consent as a defence is strictly irrelevant to offences of sexual intercourse against children under the age of 16 years such as those in s 66A and s 66C of the *Crimes Act 1900* (NSW).<sup>29</sup> However, it has noted that “circumstances surrounding the commission of the offence, including the existence of consent or not”, may be “taken into account in determining the objective criminality of the offender”:

For example, where the conduct was consensual that might well be taken into account, depending upon the age of the offender and victim, as a circumstance rendering the objective circumstances somewhat less serious.<sup>30</sup>

- 3.26 However, the CCA has also observed that when considering a victim’s willing participation:

one has to bear in mind that the purpose of the law is to protect such a person from that kind of activity. It is to protect her from, in a sense, her willingly participating in such activities. ... The law requires that protection be given to young persons even against their will.<sup>31</sup>

## Use of weapons

- 3.27 The fact that an offender used a weapon could found a charge of aggravated sexual intercourse under s 66C which identifies one of the circumstances of aggravation as:

at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or

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28. *R v Gommeson* [2014] NSWCCA 159 [106], [114]-[115]. [References omitted.]

29. *CTM v R* [2007] NSWCCA 131; 171 A Crim R 371 [34]; *Budrodeen v R* [2014] NSWCCA 332 [19].

30. *R v SG* [2003] NSWCCA 220 [20]-[21]. See also *R v Dagwell* [2006] NSWCCA 98 [28], [35].

31. *R v McClymont* (Unreported, NSWCCA, 17 December 1992) 7 (Mahoney JA). See also *R v Schwenke* [2004] NSWCCA 289 [19], [22].

any other person who is present or nearby by means of an offensive weapon or instrument.<sup>32</sup>

- 3.28 However, other offences do not include such circumstances of aggravation as an element. The courts' attitude to the use of weapons in such cases will, therefore, be relevant. For example, the CCA has observed the following with respect to offenders who use knives in sexual assaults:

Those who use knives for the purpose of carrying through criminal intentions have always been regarded by the courts as attracting a significant degree of disfavour when it comes to sentencing. The use of a knife to cause an intended victim of a sex attack to submit to that attack will, in accordance with this accepted approach of the criminal courts, bring a significant increment in the sentence.<sup>33</sup>

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32. *Crimes Act 1900* (NSW) s 66C(5)(b).

33. *R v Horvath* (Unreported, NSWCCA, 6 February 1986) 5 (Street CJ). See also *Thompson v R* (1987) 37 A Crim R 97, 100.



## 4. Factors related to victims of child sexual assault

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### Age of the victim

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4.1 The *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA) lists as an aggravating factor that “the victim was vulnerable, for example, because the victim was very young”.<sup>1</sup>

4.2 The age of the victim is an element in all of the offences considered in this report.

4.3 The courts have noted the reasons for enacting the age-based offences are essentially protective. In one case, involving a 12 year old victim who was said to have consented to the activity, the NSW Court of Criminal Appeal (CCA) noted:

Sexual offences were committed with a girl of twelve years of age. Taking full account of the extent to which she cooperated willingly in what was taking place, one has to bear in mind that the purpose of the law is to protect such a person from that kind of activity. It is to protect her from, in a sense, her willingly participating in such activities.<sup>2</sup>

4.4 The CCA has highlighted an important question related to the age of the victim in such cases, having referred to English case law that deals with the very wide range of circumstances that may fall to be dealt with by offences of carnal knowledge:

If one tries to draw a line through all of the cases it seems to me that one of the most significant matters and, indeed, probably the most significant of the matters which determine where a particular offence is to be placed in the spectrum of offences of this kind must be expressed in terms of the degree to which the offender is seen to have exploited the youth of the girl.<sup>3</sup>

4.5 The relative youth of the victim within the age spans can be used to assess the seriousness of the offence, as the CCA has noted:

it is also the case that, in terms of the position occupied by a given offence on the spectrum of offences of this kind, the younger the child, the more serious the offence.<sup>4</sup>

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1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(l).  
2. *R v McClymont* (Unreported, NSWCCA, 17 December 1992) 7 (Mahoney JA); *R v Schwenke* [2004] NSWCCA 289 [19].  
3. *R v Sea* (Unreported, NSWCCA, 13 August 1990) 4 (Badgery-Parker J); *Lipchin v R* [2013] NSWCCA 77 [23].  
4. *R v KNL* [2005] NSWCCA 260; 154 A Crim R 268 [42]; *PWB v R* [2011] NSWCCA 84; 216 A Crim R 305 [11]-[12]; *R v Lipchin* [2013] NSWCCA 77 [24]; *Versi v R* [2013] NSWCCA 206 [182].

- 4.6 An English authority sometimes referred to has made the following observation in the context of an age-based incest offence:

It scarcely needs to be stated that the younger the girl when the sexual approach is started, the more likely it will be that the girl's will was overborne and accordingly the more serious would be the crime.<sup>5</sup>

## Child's particular vulnerability

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- 4.7 The CCA has noted that children are particularly vulnerable where the offending occurs within the family:

children in a family situation are virtually helpless against sexual attack by the male parent and that children have a right to be protected from sexual molestation within the family and that this can only be achieved by the courts imposing sentences of a salutary nature.<sup>6</sup>

- 4.8 In a later case, Justice Sheller quoted this with approval and added:

Similarly, a child aged 13 or younger is virtually helpless in the family unit when sexually abused by a step-parent. All too often the child is afraid to inform upon the step-parent.<sup>7</sup>

## Long term effects on victims

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- 4.9 The CCA has long noted the long term psychological effect of sexual assault upon children. In 1993, it considered a statement by a sentencing judge doubting that a victim would suffer long term consequences from an assault and concluded:

when one is talking about the long-term consequences of a sexual assault upon a child of tender years, psychological consequences are likely to be at least as important as physical consequences. There was no evidence one way or the other concerning any psychological harm suffered by the [victim], and it may well be that, at this stage, no-one knows what harm of that kind there will be. It is true that the Crown did not set out to demonstrate ... that the complainant would suffer adverse long-term consequences of a psychological nature, but it is in the nature of an offence of this kind that it is apt to produce such consequences even though they may not manifest themselves until sometime in the future. That is an important aspect of the objective gravity of such offences.<sup>8</sup>

- 4.10 In more recent times, the CCA has again observed:

The fact that the Judge had no evidence of prolonged damage to the child is of no mitigating value. ... No one could know at the date of sentencing what emotional or psychological harm might have been occasioned to the child in the long term. ... It should not be assumed, without evidence to the contrary, that there is no significant damage by way of long-term psychological and emotional injury resulting from a sexual assault of a child who is old enough, as was the

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5. *Attorney-General's Reference (No 1 of 1989)* [1989] 1 WLR 1117, 1123; *R v Sea* (Unreported, NSWCCA, 13 August 1990) 4 (Badgery-Parker J); *Lipchin v R* [2013] NSWCCA 77 [23].

6. *R v BJH* (Unreported, NSWCCA, 30 July 1998) 3 (Sully and Ireland JJ).

7. *R v BJW* [2000] NSWCCA 60; 112 A Crim R 1 [21].

8. *R v Allpass* (1994) 72 A Crim R 561, 565.

complainant, to appreciate the significance of the act committed by the offender. It should be assumed that there is a real risk of some harm of more than a transitory nature occurring. That should be a factor taken into account when sentencing for a child sexual assault offence. It is an inherent part of what makes the offence so serious.<sup>9</sup>

- 4.11 The CCA has also adopted the Victorian Court of Appeal’s observation that the absolute statutory prohibition on sexual activity with a child can be seen as aiming to “protect children from the harms caused by premature sexual activity and – to that end – to protect them from their own immaturity”.<sup>10</sup>

## The use of victim impact statements

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- 4.12 A CCA judgment has recently conducted a thorough review of the case law relating to the use of victim impact statements. The judgment observed:

Although the question has been raised on a number of occasions, this court has yet to reach a consensus on the use to which a victim impact statement may be put. It may be that it is not possible to reach such a consensus, and that each case will depend upon its own facts and circumstances.<sup>11</sup>

- 4.13 The CCA considered the extent to which a victim impact statement could be used to prove an aggravating factor such as the one specified in s 21A(2)(g) of the CSPA – “the injury, emotional harm, loss or damage caused by the offence was substantial” – and reviewed the existing case law on the subject:

In some of the cases considered above, considerable weight was attached to the manner in which the sentencing process was conducted. Where no objection was taken to the victim impact statement, no question raised as to the weight to be attributed to it, and no attempt made to limit its use, the case for its acceptance as evidence of substantial harm has been considered to be strengthened. (It is, perhaps, a little unfair to take into account that no objection to the admission of the statement was taken, given that such statements are admissible by statute, but that does not preclude argument as to the weight to be attributed to them.)

Further, where the statement tends to be confirmatory of other evidence (either in a trial, or in the sentencing proceedings) or where it attests to harm of the kind that might be expected of the offence in question, there is little difficulty with acceptance of its contents.

Difficulties can arise, for example, where:

- the facts to which the victim impact statement attests are in question; or
- the credibility of the victim is in question; or
- the harm which the statement asserts goes well beyond that which might ordinarily be expected of that particular offence; or

9. *R v King* [2009] NSWCCA 117 [40]-[41]. See also *SW v R* [2013] NSWCCA 255 [52]; *R v G* [2008] UKHL 37; [2009] 1 AC 92 [49].

10. *Clarkson v R* [2011] VSCA 157; 32 VR 361 [26]; *R v Gavel* [2014] NSWCCA 56 [110].

11. *R v Tuala* [2015] NSWCCA 8 [51].

- the content of the victim impact statement is the only evidence of harm.

...

In these cases, considerable caution must be exercised before the victim impact statement can be used to establish an aggravating factor to the requisite standard.<sup>12</sup>

- 4.14 Particular problems may arise in cases where a court is sentencing an offender for a basic offence for which there is also an aggravated form. In such cases, the court is constrained by the *De Simoni* principle that it “cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence”.<sup>13</sup> The CCA has considered some of the problems that may arise in such circumstances:

Where a person is charged with a certain offence and the Crown accepts a plea of guilty to a lesser offence, it is often the case that the victim of the crime gives an account of the circumstances which, if true, means that the offender was, in reality, guilty of the more serious offence. That can place the sentencing judge in a very awkward position, as the facts of the present case demonstrate.

...

The consequence is that particular care may need to be exercised where a sentencing judge is invited by the Crown to receive a victim impact statement, and take that victim impact statement into account for the purpose of the sentencing process. As the facts of the present case illustrate, the victim impact statement may well be based upon an account of the facts which includes circumstances of aggravation of the kind referred to in *De Simoni*.

When that occurs, it will often be impossible to separate consideration of the impact upon the victim of the events, as he or she describes them, from consideration of what the impact might have been, absent the aggravating features of the case. Indeed, in many cases, as in the present, any attempt to do that would be hopelessly artificial.

What went wrong in the present case was the tender by the Crown of a victim impact statement in which a psychologist made an assessment, based upon the presence of aggravating circumstances which the judge was not entitled to take into account in the sentencing exercise.<sup>14</sup>

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12. *R v Tuala* [2015] NSWCCA 8 [78]-[81].

13. *R v De Simoni* (1981) 147 CLR 383, 389 (Gibbs CJ).

14. *R v Bakewell* (Unreported, NSWCCA, 27 June 1996) (Gleeson CJ). See also *F v R* [2006] NSWCCA 237 [41]-[43]; *R v MA* [2001] NSWCCA 30 [16]-[21].

## 5. Factors related to child sexual assault offenders

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### Health

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- 5.1 There is a well established line of authority about the effect of the offender’s ill health on the sentencing decision. The NSW Court of Criminal Appeal (CCA) has adopted the decision of Chief Justice King of the Supreme Court South Australia:

The state of health of an offender is always relevant to the consideration of the appropriate sentence for the offender. The courts, however, must be cautious as to the influence which they allow this factor to have upon the sentencing process. Ill health cannot be allowed to become a licence to commit crime, nor can offenders generally expect to escape punishment because of the condition of their health. It is the responsibility of the Correctional Services authorities to provide appropriate care and treatment for sick prisoners. Generally speaking ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender’s health.<sup>1</sup>

- 5.2 This approach is reflected in the more specific considerations of aspects of an offender’s mental health or cognitive impairment and old age outlined in the following paragraphs.

### Mental health or cognitive impairment

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- 5.3 The mental health condition of the offender may be partially covered by s 21A(3)(j) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA) which lists as a mitigating factor that “the offender was not fully aware of the consequences of his or her actions because of ... any disability”. However, such direct connection between the offending and the mental illness or intellectual disability, need not be present for it to be relevant to the sentencing exercise.

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1. *R v Smith* (1987) 44 SASR 587, 589. See also *Dang v R* [2013] NSWCCA 326 [50]; *R v L* (Unreported, NSWCCA, 17 June 1996) 6-7.

5.4 The CCA has held there are three ways in which mental illness may be relevant as a mitigating factor at sentencing:<sup>2</sup>

- Mental illness which contributes materially to the commission of the offence, may reduce the offender's moral culpability and denunciation may not be called for.
- Mental illness may make the offender an inappropriate vehicle for general deterrence.
- A prison sentence may weigh more heavily on a person with a mental illness.

5.5 To the contrary, it noted that it is possible that the level of danger which an offender presents to the community may give rise to greater consideration of special deterrence.<sup>3</sup> However, there is also authority for the proposition that, in particular cases, "mental illness may also lead to the conclusion ... that the element of personal deterrence, not just general deterrence, is also entitled to less weight in the sentencing exercise than it may otherwise have".<sup>4</sup>

5.6 The High Court has recently noted that the principle that general deterrence should often be given little weight in such circumstances is well recognised and has affirmed its application to people with an intellectual disability. The High Court noted that the inability of an offender with an intellectual disability to reason as to the wrongfulness of the conduct will:

in most cases, substantially lessen the offender's moral culpability for the offence. The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and to the needs of the community.<sup>5</sup>

5.7 There will, however, be cases where the mitigation arising from the mental illness will not be great, in the circumstances. For example, the CCA noted in one case:

But the influence of the depression must remain in perspective. In *Wright*, Hunt CJ at CL ... said:

But, if the offender acts with knowledge of what he is doing and with knowledge of the gravity of his actions, the moderation [in sentence] need not be great.

Here, it must be accepted that the applicant, although acting out of depression, also acted with knowledge of what he was doing and of the gravity of his actions. That gives some guide to the extent to which his depression ought to have been taken into account in mitigation of sentence. In the circumstances of this terrible crime, it cannot weigh too heavily.<sup>6</sup>

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2. *R v Hemsley* [2004] NSWCCA 228 [33]-[35] (Sperling J). See also *R v Pham* [2005] NSWCCA 314 [35]; *DPP (Cth) v De La Rosa* [2010] NSWCCA 194; 79 NSWLR 1 [177].

3. *R v Hemsley* [2004] NSWCCA 228 [36].

4. *R v Israil* [2002] NSWCCA 255 [25].

5. *Muldrock v R* [2011] HCA 39; 244 CLR 120 [54]. See also *R v RD* [2014] NSWCCA 103 [22].

6. *Benitez v R* [2006] NSWCCA 21; 160 A Crim R 166 [41]-[42].

## Age

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### Old age

- 5.8 There are at least two considerations that a court may take into account on sentencing related to an offender's old age. One is that the offender's old age at the time of sentencing may make the sentence, particularly a custodial sentence, more onerous because of age-related disability and illness. Another is that the old age of the offender means that the sentence is, in effect, a life sentence. In such cases it may be more accurate to say reduced or short life expectancy. For example, similar considerations might apply to a younger person with a condition that would significantly shorten life expectancy.<sup>7</sup>
- 5.9 The CCA has noted the balancing of considerations that may need to take place for older offenders:
- Inevitably, when imprisonment is to be imposed on an offender who will be of advanced years before eligible for parole pursuant to sentence, a balance must be struck between the most frequently applied of established sentencing principles requiring denunciation, deterrence and punishment and the less commonly encountered but appropriate amelioration for considerations of health and age.<sup>8</sup>
- 5.10 Age, however must not give rise to a situation where the elderly can offend with impunity:
- while the age of a person standing for sentence needs to be taken into account, as do any other circumstances such as the classification of the offender, or illness, that may make imprisonment more onerous, lest a punishment be imposed that is out of proportion to the objective and subjective criminality involved, this cannot give rise to an expectation that the elderly can offend with relative impunity.<sup>9</sup>
- 5.11 With regard to an offender potentially not surviving the minimum term, it has been noted:
- The fact that there is a substantial possibility, and perhaps even a probability, that the appellant will not survive the minimum term imposed by the sentencing judge is a relevant matter for consideration by this Court.<sup>10</sup>
- 5.12 However, in this case it was also noted that there are opportunities for release before the end of a non-parole period if an offender's "medical condition is such that humanitarian grounds so require" through both the Royal Prerogative of Mercy and the provisions for release in exceptional circumstances (currently, s 160(1) of the *Crimes (Administration of Sentences) Act 1999* (NSW)).<sup>11</sup>

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7. See, eg, *R v Jones* (1993) 70 A Crim R 449.

8. *Kidd v R* [2009] NSWCCA 229 [49].

9. *R v McLean* [2001] NSWCCA 58; 121 A Crim R 484 [44]. See also *R v Holyoak* (1995) 82 A Crim R 502, 507; *R v DCM* (Unreported, NSWCCA, 26 October 1993) 3 (Badgery-Parker J); *Kidd v R* [2009] NSWCCA 229 [46].

10. *R v Jones* (1993) 70 A Crim R 449, 456.

11. *R v Jones* (1993) 70 A Crim R 449, 457.

## Youth

- 5.13 In general, when sentencing young offenders, the courts give greater emphasis to rehabilitation in preference to considerations of general deterrence and retribution.<sup>12</sup> The law recognises that where an offender's immaturity contributes significantly to the offending behaviour, the criminality involved will be less than if an adult committed the same offence.<sup>13</sup>
- 5.14 However, this general approach cannot defeat the primary purpose of punishment in cases of serious criminality:

It is well accepted that in the case of youth, general deterrence and public denunciation usually play a subordinate role to the need to have regard to individual treatment aimed at rehabilitation. However, important as that principle is, it cannot defeat the primary purpose of punishment nor, in circumstances where young offenders conduct themselves in a way which an adult does, can it stand in the way of the need to protect society.<sup>14</sup>

## Victim of past abuse

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- 5.15 Generally when noting claims from offenders that they had been sexually abused themselves, the court will note that this may provide some explanation for the offending, but it is not an excuse.
- 5.16 A CCA judgment has observed:

In my opinion, if it is established that a child sexual assault offender was himself sexually abused as a child and that that history of sexual abuse has contributed to the offender's own criminality, that is a matter which can be taken into account by a sentencing judge as a factor in mitigation of penalty as reducing the offender's moral culpability for his acts, although the weight which should be given to it will depend very much on the facts of the individual case and will be subject to a wide discretion in the sentencing judge. Evidence that a child sexual assault offender was himself sexually abused as a child can also be relevant to the offender's prospects of rehabilitation.<sup>15</sup>

- 5.17 The question of an offender being a victim of past abuse arises in the broader context of taking an offender's deprived background into account. The High Court has recently considered the extent to which an offender's deprived background can mitigate that offender's sentence. The High Court considered that the issue in the case before it was "whether the appellant's background of profound childhood deprivation allowed the weight that would ordinarily be given to personal and general deterrence to be moderated in favour of other purposes of punishment, including rehabilitation".<sup>16</sup> The Court<sup>17</sup> also quoted a point made by Chief Justice Gleeson in an earlier case that "in the case of a particular offender, an aspect of the

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12. *R v GDP* (1991) 53 A Crim R 112, 115-116.

13. *R v Hearne* [2001] NSWCCA 37; 124 A Crim R 451 [25].

14. *R v AEM Snr* [2002] NSWCCA 58 [97] [references omitted].

15. *R v AGR* (Unreported, NSWCCA, 24 July 1998) 13 (B M James J; *Henry v R* [2009] NSWCCA 69 [15] (Grove J).

16. *Bugmy v R* [2013] HCA 37; 249 CLR 571 [46].

17. *Bugmy v R* [2013] HCA 37; 249 CLR 571 [45].

case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance”.<sup>18</sup>

- 5.18 For the sentencing court to take a matter of mitigation (in favour of the offender) into account on sentencing, the circumstances must be proved on the balance of probability.<sup>19</sup>

## Remorse

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- 5.19 The CSPA lists as one of the mitigating factors at sentencing:

the remorse shown by the offender for the offence, but only if:

- (i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and
- (ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both).<sup>20</sup>

- 5.20 The CCA has observed on a number of occasions that a plea of guilty alone is not a sufficient or reliable indicator of remorse.<sup>21</sup> A sentencing court may use the strength of the prosecution case to evaluate remorse in the case of a guilty plea and to assess the weight to be given to it in determining the appropriate sentence.<sup>22</sup>

- 5.21 The CCA has also observed that a judge is not obliged to accept an offender's assertions of contrition.<sup>23</sup>

- 5.22 Remorse is also a relevant consideration to other mitigating factors. The CCA has noted that s 21A of the CSPA includes among the mitigating factors to be taken into account that the offender is unlikely to re-offend and has good prospects of rehabilitation and has observed:

it is clear that remorse will be a major factor in determining whether those matters of mitigation exist: without true remorse it is difficult to see how either finding could be made.<sup>24</sup>

## Risk of reoffending

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- 5.23 The CCA has noted that it is an important part of the sentencing judge's task to ascertain an offender's risk of reoffending and prospects of rehabilitation, “especially in cases of child sexual assault”.<sup>25</sup>

18. *Engert* (1995) 84 A Crim R 67, 68.

19. *R v Olbrich* [1999] HCA 54; 199 CLR 270 [24]-[29]; *Henry v R* [2009] NSWCCA 69 [15].

20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(i).

21. *AB v R* [2014] NSWCCA 31 [40]; *TU v R* [2014] NSWCCA 155 [59].

22. *R v Sutton* [2004] NSWCCA 225 [12] (Howie J); *AB v R* [2014] NSWCCA 31 [40].

23. *R v Stafrace* (1997) 96 A Crim R 452, 454 (Hunt CJ at CL); *R v Nguyen* [2004] NSWCCA 438 [21].

24. *R v MAK* [2006] NSWCCA 381; 167 A Crim R 159 [41].

5.24 A number of factors have been shown to affect an offender's risk of reoffending. Some of these factors are "static" and cannot be changed. Examples of static risk factors include the age of first offending and previous criminal record. Other risk factors are "dynamic" and are susceptible to change. Examples of dynamic risk factors include substance abuse, low educational attainment and pro-criminal attitudes and values.

5.25 Pre-sentence reports now commonly include assessments of both static and dynamic risk factors. In the case of sex offenders, a common assessment tool is the Static 99R test.

5.26 The CCA has taken a generally positive, though cautious approach to presentence reports that use statistical analysis to predict an offender's risk of re-offending:

Pre-sentence reports are important. They influence decisions made by busy judges which will have significant impacts upon the lives of offenders, those affected directly by their conduct, and the wider community. There is no reason why statistical analysis need play no part in an assessment of risk, especially if it were shown to be at least moderately predictive, and its limitations were borne in mind. Those limitations may be more or less significant depending on the particular case.<sup>26</sup>

5.27 The CCA has taken a particularly cautious approach to over-reliance on the Static-99R methodology to predict an offender's risk of re-offending:

An assessment of the risk of reoffending by reference to the Static-99 test only must be approached with caution. It is a common tool in risk assessment of sex offenders, although it forms only part of the process: *DCU v State Parole Authority of New South Wales* [2006] NSWSC 526 at [80]. A complete process of risk assessment involves a combination of static (historical and non-changeable) factors and dynamic (changeable) risk factors: *Lee v State Parole Authority of New South Wales* [2006] NSWSC 1225 at [26], [45].<sup>27</sup>

5.28 The CCA concluded that "to the extent that risk assessment is relevant to sentence and the protection of the community, it is appropriate to have regard to all the evidence", including in the case in question, a psychological report that provided "a type of dynamic risk assessment to be considered in conjunction with the Static-99 assessment".<sup>28</sup>

## **Likelihood of serving sentence in protective custody**

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5.29 In the past, sentencing courts tended to accept that offenders who were expected to spend most of their imprisonment in protective custody (for example, child sex offenders) would do so under harsh conditions and allowed this to be a mitigating factor.<sup>29</sup> This approach has changed in recent years, so that the CCA has observed,

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25. *TU v R* [2014] NSWCCA 155 [55].

26. *Cowling v R* [2015] NSWCCA 213 [43].

27. *Corby v R* [2010] NSWCCA 146 [91].

28. *Corby v R* [2010] NSWCCA 146 [91].

29. See *JM v R* [2014] NSWCCA 297 [71].

in relation to what mitigation should be allowed for offenders who might spend all or some of their sentences in protective custody:

It can no longer be assumed that a prisoner, by reason of the fact that he will serve his sentence on protection, will find prison life more difficult or onerous than other prisoners in the general prison population or that the prisoner will be deprived of amenities or opportunities for self improvement courses and education. ... the court is placed in a difficult position. On the one hand, the sentencer should take into account the conditions of the prisoner's custody where it appears that they will be unduly onerous because of some matter particular to that prisoner. This requires that, at the time of sentence, the court make some prediction about the nature of the custody that will be endured by the prisoner. On the other hand, the courts should now be aware that assumptions or predictions, which have been made in the past about the nature of an offender's custody because, for example, the offender has given assistance to the authorities, no longer hold good.<sup>30</sup>

- 5.30 The CCA has observed that the question of the degree to which a particular offender may be deprived of privilege while in protective custody is a question of fact in each case.<sup>31</sup>

## Prior good character

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- 5.31 The CSPA sets out special rules for the use of prior good character in child sexual offence cases:

In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.<sup>32</sup>

- 5.32 While courts are prohibited from taking an offender's good character into account where that good character assisted the offender to commit the offence, there is still a wide scope for good character to be taken into account.

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30. *R v Mosytn* [2004] NSWCCA 97; 145 A Crim R 304 [179]-[180]. See also *R v Durocher-Yvon* [2003] NSWCCA 299; 58 NSWLR 581 [19]; *Clinton v R* [2009] NSWCCA 276 [24]; *JM v R* [2014] NSWCCA 297 [71]-[72].

31. *R v AJP* [2004] NSWCCA 434; 150 A Crim R 575 [32].

32. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A) inserted by *Crimes Amendment (Sexual Offences) Act 2008* (NSW) sch 2.4[1].

- 5.34 Justice McHugh, in a High Court case, has set out the general principles to be applied:

If an offender is of otherwise good character, then the sentencing judge is *bound* to take that into account in the sentence that he or she imposes. The weight that must be given to the prisoner's otherwise good character will vary according to all of the circumstances.<sup>33</sup>

- 5.35 The CCA has noted that cases in which it may be appropriate to give less weight to the offender's prior good character as a mitigating factor will include those where general deterrence is important, the particular offence is serious and the offence is frequently committed by people of good character.<sup>34</sup> They may also include circumstances where there is a "pattern of repeat offending over a significant period of time".<sup>35</sup> The CCA has noted that this will "frequently be the case in child sexual assault offences because such offences are often committed during a period of an ongoing relationship between the offender and the complainant".<sup>36</sup>

- 5.36 A CCA judgment has also previously observed of cases where a family member has abused a vulnerable child over a period of some years:

To give to an applicant's so-called "previous good character" much weight in such circumstances is to give an appearance that the court is conceding to a parent or person in loco parentis or within the family unit some right to use a child for sexual pleasure at will. Of course, when the offence is an isolated one, the matter of the good character of the applicant as a factor in mitigation may be given a much greater degree of significance.<sup>37</sup>

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33. *Ryan v R* [2001] HCA 21; 206 CLR 267 [25], see also [174] (Callinan J); *Versi v R* [2013] NSWCCA 206 [176]-[181].

34. *R v Kennedy* [2000] NSWCCA 527 [21].

35. *R v Kennedy* [2000] NSWCCA 527 [22]. See also *IFG v R* [2007] NSWCCA 6 [28].

36. *R v Kennedy* [2000] NSWCCA 527 [22].

37. *R v Hermann* (1988) 37 A Crim R 440, 448 (Lee J, McInerney J agreeing).

## 6. Other considerations

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### Discounts

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#### Discount for utilitarian value of a guilty plea

- 6.1 The *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA) gives sentencing courts the express power to impose a lesser penalty than they would otherwise have imposed in certain circumstance where offenders have pleaded guilty.<sup>1</sup> One of these reductions in penalty may be for the utilitarian value of the plea.
- 6.2 The discount for the utilitarian value of a guilty plea is justified because of its value to the efficiency of the criminal justice system, “on the pragmatic ground that the community is spared the expense of a contested trial”.<sup>2</sup> A guilty plea can also indicate remorse and spare victims the ordeal of appearing as witnesses in court. The court considers these factors in mitigation separately to the utilitarian value of a guilty plea.
- 6.3 In a guideline judgment, the NSW Court of Criminal Appeal (CCA) has held that the utilitarian value of the pleas should generally be assessed in the range of a 10-25% discount on the sentence, noting that:
- The primary consideration determining where in the range a particular case should fall, is the timing of the plea. What is to be regarded as an early plea will vary according to the circumstances of the case and is a matter for determination by the sentencing judge.<sup>3</sup>
- 6.4 The maximum discount of 25% is generally reserved for guilty pleas that are made at the earliest opportunity. The discount is to be applied after the court has determined the otherwise appropriate sentence.
- 6.5 The CCA has set out the principles that sentencing courts must apply when allowing a discount for the utilitarian value of a guilty plea:

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1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22.  
2. *Signato v R* (1998) 194 CLR 656 [22]; *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383 [3].  
3. *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383 [160].

1. The discount for the utilitarian value of the pleas will be determined largely by the timing of the plea so that the earlier the plea the greater discount.
2. Some allowance may be made in determining the discount where the trial would be particularly complicated or lengthy.
3. The utilitarian discount does not reflect any other consideration arising from the plea, such as saving witnesses from giving evidence but this is relevant to remorse; nor is it affected by post-offending conduct.
4. The utilitarian discount does not take into account the strength of the prosecution case.
5. There is to be no component in the discount for remorse nor is there to be a separate quantified discount for remorse or for the “Ellis discount”.
6. Where there are multiple offences and pleas at different times, the utilitarian value of the plea should be separately considered for each offence.
7. There may be offences that are so serious that no discount should be given; where the protection of the public requires a longer sentence.
8. Generally the reason for the delay in the plea is irrelevant because, if it is not forthcoming, the utilitarian value is reduced.
9. The utilitarian value of a delayed plea is less and consequently the discount is reduced even where there has been a plea bargain; or where the offender is waiting to see what charges are ultimately brought by the Crown; or the offender has delayed the plea to obtain some forensic advantage, such as having matters put on a Form 1.
10. An offer of a plea that is rejected by the Crown but is consistent with a jury verdict after trial can result in a discount even though there is no utilitarian value.
11. The discount can result in a different type of sentence but the resulting sentence should not again be reduced by reason of the discount.
12. The amount of the discount does not depend upon the administrative arrangements or any practice in a particular court or by a particular judge for the management of trials or otherwise.<sup>4</sup>

### **Voluntary disclosure of guilt and assistance to authorities**

- 6.6 The CSPA provides that a court may impose a lesser penalty than it would otherwise impose where an offender has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence concerned or any other offence.<sup>5</sup>
- 6.7 There has been a long established line of authority to give a further element of leniency in cases where an offender has pleaded guilty and the plea is the result of the offender voluntarily disclosing his or her guilt:

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4. *R v Borkowski* [2009] NSWCCA 102; 195 A Crim R 152 [32] [references omitted].

5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23.

Where it was unlikely that guilt would be discovered and established were it not for the disclosure by the person coming forward for sentence, then a considerable element of leniency should properly be extended by the sentencing judge. It is part of the policy of the criminal law to encourage a guilty person to come forward and disclose both the fact of an offence having been committed and confession of guilt of that offence.

... the disclosure of an otherwise unknown guilt of an offence merits a significant added element of leniency, the degree of which will vary according to the degree of likelihood of that guilt being discovered by the law enforcement authorities, as well as guilt being established against the person concerned.<sup>6</sup>

## Setting the non-parole period and special circumstances

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- 6.8 The CSPA requires that when sentencing an offender to a term of imprisonment the court must first set a non-parole period (“the minimum period for which the offender must be kept in detention in relation to the offence”). The balance of the term “must not exceed one-third of the non-parole period”, that is, the non-parole period must not be less than 75% of the head sentence, unless there are “special circumstances” for varying the ratio.<sup>7</sup>
- 6.9 The CCA has set out a number of principles for determining the non-parole period and for varying the statutory ratio following a finding of special circumstances:
- “The non-parole period is the minimum period of actual incarceration that the offender must spend in custody having regard to all the elements of punishment, including rehabilitation, the objective seriousness of the offence and the offender’s subjective circumstances.”<sup>8</sup> The focus should not be solely on the purpose of rehabilitation.<sup>9</sup>
  - The court need not find special circumstances and reduce the non-parole period simply because there are circumstances which could constitute special circumstances.<sup>10</sup>
  - The degree or extent of any adjustment of the statutory ratio is a matter for the court’s discretion.<sup>11</sup>

6. *R v Ellis* (1986) 6 NSWLR 603, 604; *DBW v R* [2007] NSWCCA 236 [14]; *Ryan v R* [2001] HCA 21; 206 CLR 267; *MPB v R* [2013] NSWCCA 213 [124].

7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(1) and (2).

8. *Caristo v R* [2011] NSWCCA 7 [27]; *Power v R* (1974) 131 CLR 623, 627-629; *R v Simpson* [2001] NSWCCA 534; 53 NSWLR 704 [59]; *R v Cramp* [2004] NSWCCA 264 [34].

9. *Hejazi v R* [2009] NSWCCA 282; 217 A Crim R 151 [36].

10. *Caristo v R* [2011] NSWCCA 7 [30]; *R v Fidow* [2004] NSWCCA 172 [22].

11. *Caristo v R* [2011] NSWCCA 7 [31]; *R v Cramp* [2004] NSWCCA 264 [31]; *Trad v R* [2009] NSWCCA 56 194 A Crim R 20 [33].

6.11 The CCA has observed:

The factual situations confronting a judge who has made a finding of special circumstances are so variable that no generalised proposition would suit every situation. To offer an obvious example, a non-parole period that is 50 per cent of the total term might be considered appropriate in a case where the total term is 2 years when it is felt necessary to allow for a 12 month period of parole. But it is almost impossible to imagine 50 per cent being appropriate where the total term is 20 years so as to allow for a 10 year parole period. Further, the total term of the sentence is but one of almost infinite considerations that may potentially be relevant.

... the focus should not be solely upon the percentage proportions that the non-parole and parole periods bear to the total term. The actual periods involved are equally, and probably more, important.<sup>12</sup>

6.12 Another CCA judgment has emphasised the need to take into account all of the subjective circumstances:

In *Kama* [2000] NSWCCA 23, Spigelman CJ questioned whether the age and lack of antecedents of an offender and the fact that the sentence is one involving a first occasion of custody are, of themselves, special circumstances within the meaning of the legislation.

I share that doubt, save to the extent that in an appropriate case, those circumstances may be reasons why, in conjunction with the remaining subjective circumstances, an assessment was justified that the applicant required a longer period than usual subject to a supervised release. Some care does need to be taken to avoid automatically elevating subjective circumstances of this kind, which are properly taken into account when fixing the term of the sentence, into special circumstances ...<sup>13</sup>

6.13 It has long been the case that an accumulation of sentences for multiple offences may require that the court adjust the statutory ratio for some individual sentences in order to ensure that the ratio is preserved for the total sentence imposed.<sup>14</sup>

## **Totality**

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6.14 Totality is a principle of sentencing that requires a court, when sentencing an offender for more than one offence, to impose an overall sentence (whether by imposing an aggregate sentence or making the individual sentences concurrent, consecutive, partly concurrent and partly consecutive) that is “just and appropriate” to the totality of the offending behaviour.<sup>15</sup> The observations of Chief Justice Street are often cited to explain the principle of totality:

The principle of totality is a convenient phrase, descriptive of the significant practical consideration confronting a sentencing judge when sentencing for two or more offences. Not infrequently a straightforward arithmetical addition of sentences appropriate for each individual offence considered separately will

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12. *Caristo v R* [2011] NSWCCA 7 [41]-[42].

13. *R v Kaliti* [2001] NSWCCA 268 [10]-[11].

14. *R v Simpson* (1992) 61 A Crim R 58; *Hejazi v R* [2009] NSWCCA 282; 217 A Crim R 151 [36].

15. *Mill v The Queen* (1988) 166 CLR 59, 63 citing D A Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (2nd ed, Heinemann, 1979) 56-57.

arrive at an ultimate aggregate that exceeds what is called for in the whole of the circumstances. In such a situation the sentencing judge will evaluate, in a broad sense, the overall criminality involved in all of the offences and, having done so, will determine what, if any, downward adjustment is necessary, whether by telescoping or otherwise, in the aggregate sentences in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences.<sup>16</sup>

- 6.15 In another CCA judgment it has been observed that there is no general rule that determines whether sentences should be imposed concurrently or consecutively:

The issue is determined by the application of the principle of totality of criminality: can the sentence for one offence comprehend and reflect the criminality for the other offence? If it can, the sentences ought to be concurrent otherwise there is a risk that the combined sentences will exceed that which is warranted to reflect the total criminality of the two offences. If not, the sentences should be at least partly cumulative otherwise there is a risk that the total sentence will fail to reflect the total criminality of the two offences. This is so regardless of whether the two offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality. Of course it is more likely that, where the offences are discrete and independent criminal acts, the sentence for one offence cannot comprehend the criminality of the other. Similarly, where they are part of a single episode of criminality with common factors, it is more likely that the sentence for one of the offences will reflect the criminality of both.<sup>17</sup>

- 6.16 These observations have particular relevance to sentencing for child sexual assault offences where an offender has committed multiple offences that are part of a course of conduct, sometimes in one interaction or over a short period of time.

## Taking Form 1 matters into account

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- 6.17 The CSPA provides that the court may, when sentencing an offender for a principal offence take into account, “on a Form 1”, one or more further offences for which the offender admits guilt.<sup>18</sup> The further offences are generally of similar or lesser seriousness compared to the principal offence and the court takes them into account with a view to increasing the sentence for the principal offence.<sup>19</sup>
- 6.18 It should be noted, however, that a court cannot take offences into account on a Form 1 where the principal offence is an indictable offence that is punishable with imprisonment for life.<sup>20</sup> This applied to the aggravated offence of sexual intercourse with a child under 10 years under s 66A(2) of the *Crimes Act 1900* (NSW) as in force for the period surveyed by this report. Recent amendments to s 66A applying the penalty of life imprisonment to all offences of sexual intercourse with a child under 10 years now mean that additional offences cannot be taken into account on a Form 1 for such principal offences.

16. *R v Holder* (1983) 3 NSWLR 245, 260; *Doyle v R* [2014] NSWCCA 4 [458].

17. *Cahyadi v R* [2007] NSWCCA 1; 168 A Crim R 41 [27]; *Doyle v R* [2014] NSWCCA 4 [459].

18. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33.

19. *Abbas v R* [2013] NSWCCA 115; 231 A Crim R 413.

20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33(4)(b).

- 6.19 A CCA judgment has cautioned the need to give proper weight to the offences on a Form 1 when sentencing for the principal offence:

There is a considerable advantage to the administration of justice, and to accused persons, for a party facing sentence to clean up the record. For that purpose the Form 1 procedure is beneficial. The objective of individual rehabilitation can be advanced by its use, since the offender does not face the prospect of further trials. There is a utilitarian value in the admission of guilt that is involved so far as there can be a saving of the resources of the law enforcement agencies and the courts concerned. Additionally, the sentencing judge is placed in a position where it is possible to sentence the offender for the totality of his or her outstanding criminality to that point. However, unless proper weight is given to the additional offences that have been disclosed, this procedure fails its true purpose.<sup>21</sup>

## Significance of delay

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- 6.20 In some cases where there is a significant delay between the offence and the sentencing, the circumstances may require the court to give less weight to considerations of special and general deterrence. This might be the case where the passage of time has shown that the offending behaviour was isolated and that there was now no risk of reoffending. The CCA has noted that in one such case:

General deterrence was not a significant matter ... because in light of the very lengthy period that had transpired between the offences and the passing of sentence and [the offender's] reform it was not appropriate to make an example of him to deter others from similar conduct.<sup>22</sup>

## Using statistics

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- 6.21 There are a number of principles that relate to using statistics to assist a sentencing decision. They have been usefully gathered in a recent CCA case:<sup>23</sup>
- Consistency in sentencing is not demonstrated by, and does not require, numerical equivalence. Consistency should involve applying the relevant legal principles.<sup>24</sup>
  - Other cases may establish a range of sentences which have been imposed, but these sentences do not mark the outer bounds of the permissible sentencing discretion. They are a yardstick for assessing a proposed sentence. The unifying principles which such sentences reveal and reflect are what are important.<sup>25</sup>

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21. *R v Bavadra* [2000] NSWCCA 292; 115 A Crim R 152 [31].

22. *AJB v R* [2007] NSWCCA 51; 169 A Crim R 32 [39]. See also *R v Moon* [2000] NSWCCA 534; 117 A Crim R 497 [81].

23. *MLP v R* [2014] NSWCCA 183 [41]-[44].

24. *Hili v R* [2010] HCA 45; 242 CLR 520 [48]-[49].

25. *Barbaro v R* [2014] HCA 2; 253 CLR 58 [41].

- Presenting past sentences in numerical tables and graphs is of limited use because referring only to sentence length says nothing about why the sentences were fixed.<sup>26</sup>
- 6.22 The CCA has emphasised the need for courts to approach statistics carefully, if asked to use them.<sup>27</sup> Care is also required in cases where a court is asked to compare sentences handed down in other cases.<sup>28</sup>
- 6.23 The CCA has observed:
- The need to take care in each instance arises, in part, from the fundamental fact that there will inevitably be differences, both in terms of the objective circumstances of offending and the subjective circumstances of the offender, between one case and another.<sup>29</sup>

## Proof in sentencing proceedings

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- 6.24 There are a number of principles governing how the court approaches fact finding for the purpose of sentencing:
- It is for the court to determine the facts relevant to sentencing. These may arise in evidence at trial or in the course of sentencing proceedings.
  - The court's view of these facts must be consistent with the jury's verdict.
  - Facts found against the offender must be arrived at beyond reasonable doubt.
  - It is sufficient for matters favourable to the offender be proved on the balance of probabilities.
  - There is no general requirement that the court must sentence the offender on the most favourable version of facts, although this may occur because of the requirement to resolve any reasonable doubt in the offender's favour.<sup>30</sup>

## Limiting terms

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- 6.25 The provisions of the *Mental Health (Forensic Provisions) Act 1990* (NSW) apply where an accused is found unfit to be tried and, following a special hearing, the court finds on the limited evidence available, that the accused committed the offence. The court must, where it finds that it would have imposed a sentence of imprisonment after a normal trial, nominate a "limiting term" as the "best estimate of

26. *Hili v R* [2010] HCA 45; 242 CLR 520 [48].

27. *R v Chan* [2010] NSWCCA 153 [116]; *R v Nikolovska* [2010] NSWCCA 169; 209 A Crim R 218 [70]; *JM v R* [2014] NSWCCA 297 [101].

28. *R v Chan* [2010] NSWCCA 153 [117]; *RLS v R* [2012] NSWCCA 236 [132]; *JM v R* [2014] NSWCCA 297 [101].

29. *MLP v R* [2014] NSWCCA 183 [44].

30. *R v Isaacs* (1997) 41 NSWLR 374, 377-380; *Cheung v R* [2001] HCA 67; 209 CLR 1 [14]-[20]; *R v SG* [2003] NSWCCA 220 [24]; *R v Olbrich* [1999] HCA 54; 199 CLR 270 [27].

the sentence the Court would have considered appropriate” if the accused had been convicted after a normal trial.<sup>31</sup>

- 6.26 The CCA has held that the limiting term is “the equivalent of the total term of the sentence that would have been imposed and not simply the minimum period that the person would have been required to spend in custody before being released to parole” and observed:

Clearly, in determining the limiting term for a particular offence the court is to adopt and apply all the principles of sentencing, whether arising under the common law or statute, that apply in sentencing a person convicted of that offence.<sup>32</sup>

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31. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(1).

32. *R v AN* [2005] NSWCCA 239 [13].

## 7. Survey of offences 2012-2013 – introduction

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### Our approach

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#### The offences

7.1 In response to the terms of reference, we have extracted data from and analysed the remarks on sentence handed down in 2012-2013 in the 143 matters where the District Court sentenced one of seven serious child sexual offences as the principal offence. The offences were:

- sexual intercourse with a child under 10 years<sup>1</sup>
- aggravated sexual intercourse with a child under 10 years<sup>2</sup>
- sexual intercourse with a child between 10 and 14 years<sup>3</sup>
- aggravated sexual intercourse with a child between 10 and 14 years<sup>4</sup>
- sexual intercourse with a child between 14 and 16 years<sup>5</sup>
- aggravated sexual intercourse with a child between 14 and 16 years,<sup>6</sup> and
- aggravated sexual intercourse without consent where the circumstances of aggravation were that the victim was under 16 years.<sup>7</sup>

7.2 We chose to study these offences because there were sufficient cases to allow some analysis.

7.3 All but one of these offences were triable on indictment only. The basic offence of sexual intercourse with a child between 14 and 16 years was triable summarily.<sup>8</sup> We

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1. *Crimes Act 1900* (NSW) s 66A(1).  
2. *Crimes Act 1900* (NSW) s 66A(2).  
3. *Crimes Act 1900* (NSW) s 66C(1).  
4. *Crimes Act 1900* (NSW) s 66C(2).  
5. *Crimes Act 1900* (NSW) s 66C(3).  
6. *Crimes Act 1900* (NSW) s 66C(4).  
7. *Crimes Act 1900* (NSW) s 61J.

have included matters where this offence was the principal offence and sentenced in the District Court in order to provide a comparison with the other offences relating to children between the ages of 10 and 16 years which were all sentenced by the District Court.

### The incidence of 'historic' offences

- 7.4 The offences were all in force in 2012-2013, however they commenced at different times and, therefore, have different levels of "historic" offences. The basic and aggravated offences of sexual intercourse with a child under 10 years commenced on 1 January 2009,<sup>9</sup> there are therefore no principal offences in that group that were committed more than 5 years before the date of sentencing.
- 7.5 The basic and aggravated offences of sexual intercourse with a child between 10 and 14 years and between 14 and 16 years, commenced on 13 June 2003,<sup>10</sup> there are therefore a proportion of offenders in each case who were sentenced more than 5 years after they committed the principal offence.
- 7.6 The offence of aggravated sexual intercourse without consent commenced on 17 March 1991,<sup>11</sup> however, we have limited our analysis to matters to which the standard non-parole period (SNPP) scheme applied, that is, where the principal offence was committed after 31 January 2003. There are, therefore, a proportion of offences that were sentenced between 5 and 11 years after the offender committed the principal offence.
- 7.7 The issues that might arise for offences that are prosecuted 20 or 30 years after they were committed, particularly where sentencing practices have changed, as discussed by the NSW Court of Criminal Appeal (CCA) in *R v MJR*,<sup>12</sup> do not arise to any great extent for the offences that we have surveyed in this report.

### Identifying the offences

- 7.8 We identified the cases involving the relevant principal offences through the statistics maintained by the Judicial Commission of NSW in the Judicial Information Research System (JIRS). We used the JusticeLink case numbers and other references to locate the remarks on sentencing and used these as the basis for our data collection.
- 7.9 We received remarks on sentencing for all but 3 matters. In these three cases we relied solely on information published by the Judicial Commission of NSW in JIRS and contained on JusticeLink – an electronic filing and records system that links all NSW courts.

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8. *Criminal Procedure Act 1986* (NSW) sch 1 table 1 Part 1(1).

9. Inserted by *Crimes Amendment (Sexual Offences) Act 2008* (NSW) sch 1[9].

10. Inserted by *Crimes Amendment (Sexual Offences) Act 2003* (NSW) sch 1[9].

11. Inserted by *Crimes (Amendment) Act 1989* (NSW) sch 1[3].

12. *R v MJR* [2002] NSWCCA 129; 54 NSWLR 368.

## Coverage

- 7.10 Our survey does not cover all cases where one of the listed offences was sentenced, if it was not the principal offence.
- 7.11 For example, in the case of the offences we have surveyed, some of the offences with less severe penalties (for example, sexual intercourse with a child between 14 and 16 years) may have been sentenced together with the more serious offences (for example, sexual intercourse with a child under 10 years) and only the penalty for the most serious offence (that is, the one with the longest sentence) has been counted. These are included among the large number of matters surveyed that involved more than one offence – 111 matters (78%) of the 143 matters we considered.
- 7.12 Also, some of these offences could have received a lesser penalty when sentenced alongside a more serious offence that we have not surveyed, for example, the offence of persistent sexual abuse of a child.<sup>13</sup>

## Wider context of our survey

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### Attrition

- 7.13 It is widely acknowledged that child sexual offences that are sentenced by the courts represent only a small proportion of the sexual offences actually committed against children.<sup>14</sup>
- 7.14 A BOCSAR study found that, in 2004, of the 3752 sexual and indecent assault incidents against a victim aged under 16 years that were reported to NSW Police, only about 15% resulted in criminal proceedings being commenced within 6 months. In the same year, of the 547 defendants who appeared in the courts, 243 (44.4%) were found guilty of at least one child sex offence. Of the 243 defendants found guilty, 138 (56.8%) received a sentence of full-time imprisonment.<sup>15</sup>
- 7.15 The study also found that the odds of criminal proceedings being commenced for all sexual assault offences were higher where:
- The victim was aged over five years;
  - Reporting of the incident occurred within ten years of its occurrence;
  - The offender was known to the victim;

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13. *Crimes Act 1900* (NSW) s 66EA.

14. NSW Law Reform Commission, *Family Violence – A National Legal Response*, Report 128 (2010) [26.11]-[26.17]; A Freiberg, H Donnelly, and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts* (Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015) 1-2, 9, 18-19.

15. J Fitzgerald, *The Attrition of Sexual Offences from the New South Wales Criminal Justice System*, Crime and Justice Bulletin No 92 (NSW Bureau of Crime Statistics and Research, 2006) 3.

- The victim was female; or
- Aggravating circumstances were present.<sup>16</sup>

### Statistics of limited use

- 7.16 Statistics are of limited use. The courts in the matters we have surveyed have frequently noted that each case turns on its own facts. The High Court has observed:

Consistency is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were. Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes. But not only is the number of federal offenders sentenced each year very small, the offences for which they are sentenced, the circumstances attending their offending, and their personal circumstances are so varied that it is not possible to make any useful statistical analysis or graphical depiction of the results.<sup>17</sup>

- 7.17 A report to the Royal Commission into Institutional Responses to Child Sexual Abuse has also noted:

The complex interaction between the various and sometimes competing purposes of sentencing, together with use of the sentencing methodology of instinctive synthesis which renders sentencing outcomes somewhat opaque, makes it difficult to determine whether the sentencing purposes and principles discussed above significantly change sentencers' behaviour or have the effect of deterring criminals or protecting the community in themselves.<sup>18</sup>

- 7.18 The data and case studies that we present in the following chapters are the result of a filtering process that has tried to distil the main factors that influence a sentence for serious child sexual assault.

- 7.19 The aggregated statistics, and the raw data that we have included in Appendix A, can identify some common traits but cannot adequately reflect the reasons for each particular sentence. The pictures we present cannot capture the nuances of reasoning, the weight given to particular pieces of evidence or the unstated influences that may come from receiving the whole of the evidence available. Even the full remarks on sentencing from which we extracted the data will not always clearly indicate the precise impact of each factor. These remarks are themselves influenced by the statements, evidence at trial and the full sentencing reports and references presented at the sentencing hearing.

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16. J Fitzgerald, *The Attrition of Sexual Offences from the New South Wales Criminal Justice System*, Crime and Justice Bulletin No 92 (NSW Bureau of Crime Statistics and Research, 2006) 7.

17. *Hili v R* [2010] HCA 45; 242 CLR 520 [48].

18. A Freiberg, H Donnelly and K Gelb, *Sentencing for Child Sexual Abuse in Institutional Contexts* (Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, 2015) 50.

7.20 This is one reason why the CCA is generally unwilling to interfere with a sentencing judge's decision.

## General observations

7.21 Some offences present quite different profiles, reflecting, perhaps, the different circumstances in which the different offences apply.

Table 7.1: Serious child sexual offences, sentenced for principal offence, 2012-2013

	s 66A(2) Agg SI <10	s 66A(1) SI <10	s 61J SA <16 SNPP	s 66C(2) Agg SI 10<14	s 66C(1) SI 10<14	s 66C(4) Agg SI 14<16	s 66C(3) SI 14<16	Total
Max Penalty	Life	25	20	20	16	12	10	
SNPP	15	15	10	N/A	N/A	N/A	N/A	
<b>Total in 20112-2013</b>								
	18	23	23	11	31	10	16	143
<b>Principal offence</b>								
Average Head sentence (median)	9.7 years (9.1 yrs)	6.2 years (4.5 yrs)	7.4 years (8 yrs)	5.5 years (4.8 yrs)	2.6 years (2.3 yrs)	2.6 years (2.3 yrs)	2.7 years (2.9 yrs)	
Average non-parole period (median)	6.2 years (6 yrs)	3.8 years (3 yrs)	4.4 years (4.8 yrs)	2.9 years (3 yrs)	1.5 years (1.4 yrs)	N/A	N/A	
<b>Total/aggregate</b>								
Average head sentence (median)	12.3 yrs (10.6 yrs)	7.5 years (6 yrs)	8.6 years (8.0 yrs)	6.7 years (5.6 yrs)	3.1 years (2.5 yrs)	3.3 years (3.4 yrs)	3.2 years (3.1 yrs)	
Average non-parole period (median)	8.4 years (7.8 yrs)	4.7 years (3.5 yrs)	5.6 years (5 yrs)	4 years (3.8 yrs)	1.7 years (1.4 yrs)	1.9 years (2.3 yrs)	1.9 years (1.4 yrs)	
<b>Non custodial</b>								
	0	6 (26%)	2 (9%)	0	14 (45%)	1 (10%)	4 (25%)	27 (19%)
<b>More than one offence</b>								
	18 (100%)	16 (70%)	19 (83%)	10 (91%)	20 (65%)	7 (70%)	11 (69%)	111 (78%)
<b>Form 1 matters</b>								
	9 (50%)	10 (43%)	6 (26%)	7 (64%)	12 (39%)	4 (40%)	7 (44%)	60 (42%)
<b>No priors</b>								
	7 (39%)	13 (57%)	9 (39%)	5 (45%)	14 (45%)	6 (60%)	6 (37%)	66 (47%)
<b>Priors (different type only)</b>								
	11 (61%)	6 (26%)	11 (48%)	5 (45%)	15 (48%)	3 (30%)	6 (37%)	59 (41%)
<b>Priors (same type)</b>								
	0	2 (9%)	3 (13%)	1 (9%)	1 (3%)	1 (10%)	4 (25%)	15 (10%)

	s 66A(2) Agg SI <10	s 66A(1) SI <10	s 61J SA <16 SNPP	s 66C(2) Agg SI 10<14	s 66C(1) SI 10<14	s 66C(4) Agg SI 14<16	s 66C(3) SI 14<16	Total
<b>Guilty plea</b> (% of offenders sentenced)	15 (83%)	19 (83%)	14 (61%)	10 (91%)	27 (87%)	7 (70%)	13 (81%)	<b>111</b> <b>78%</b>
<b>Offender Male</b>	18 (100%)	23 (100%)	23 (100%)	11 (100%)	30 (97%)	8 (80%)	16 (100%)	<b>139</b> <b>(97%)</b>
<b>Offender Female</b>	0	0	0	0	1 (3%)	2 (20%)	0	<b>4</b> <b>(3%)</b>
<b>Offender</b> Average age at offence (median)	38.9 yrs (37 yrs)	35.3 yrs (33 yrs)	40.7 yrs (44 yrs)	48.3 yrs (51 yrs)	24 years (20 yrs)	41.1 yrs (40.5 yrs)	27.9 yrs (25 yrs)	
<b>Offender</b> Age range at offence	20-72 years	14-64 years	16-65 years	18-64 years	15-50 years	23-69 years	18-48 years	<b>14-72</b>
<b>Victim Female</b>	17 (94%)	19 (83%)	22 (96%)	8 (73%)	29 (94%)	8 (80%)	15 (94%)	<b>127</b> <b>(89%)</b>
<b>Victim Male</b>	1 (6%)	4 (17%)	1 (4%)	3 (28%)	0	2 (20%)	0	<b>12</b> <b>(8%)</b>
<b>Victim</b> Average age at offence	7 years	7 years	12 years	11.6 years	12.6 years	14.7 years	14.5 years	
<b>Victim</b> Age range at offence	2-9 years	2-9 years	6-15 years	10-13 years	10-13 years	14-15 years	14-15 years	
<b>Age difference</b> Average	32 years	29 years	29.6 years	36.7 years	11.5 years	26.4 years	13.4 years	
<b>Age difference</b> Range	12-66 years	5-56 years	5-55 years	5-53 years	2-68 years	8-54 years	3-34 years	<b>2-68</b> <b>years</b>
<b>Victim impact statement</b> noted	13 (72%)	13 (57%)	13 (38%)	5 (45%)	12 (39%)	1 (10%)	7 (44%)	<b>64</b> <b>(45%)</b>

- 7.22 For example, for the aggravated offences against children under 10 years (s 66A(2)) and against children between 10 and 14 years (s 66C(2)), the aggravating feature was that the victim was “under authority” in 89% of cases for the under 10 year olds and in 91% of cases for the 10-14 year olds.
- 7.23 Consistent with the circumstances of such offending, these two offences also involved the highest proportion of offenders who committed more than one offence – 100% in the case of victims under 10 years and 91% in the case of victims between 10 and 14 years. Likewise, there was a high proportion of offenders who were members of the victim’s family – 83% in the case of 10 year olds and 73% in the case of the 10-14 year olds.
- 7.24 By contrast, the aggravated offence for the victims aged 14-16 years showed a greater mix of aggravating circumstances, with the fact that the victim was under the offender’s authority being an aggravating circumstance in only 50% of cases. The other circumstances of aggravation (not present for the other aggravated offences)

were that the offender committed the offence in company (30%) and the victim was under the influence of alcohol (20%).

- 7.25 In the case of the basic offences (s 66A(1), s 66C(1) and s 66C(3)) the offenders had a lower age profile than the offenders for the aggravated offences (s 66A(2), s 66C(2), s 66C(4) and s 61J).
- 7.26 The lowest average age for an offender (24 years) applies to the basic offence against 10-14 year olds. The slightly higher average age (29 years) for an offender in relation to the basic offence against 14-16 year olds may be explained by the fact that some of the younger offenders may have been dealt with summarily in the Local Court or in the Children's Court.
- 7.27 The younger age profile of offenders in these cases and the lack of aggravating circumstances suggests that there may be some confused (albeit inappropriate and abusive) relationships involved. The basic offences against 10-14 year olds involved an apparently high proportion of communication by Facebook - in 48% of cases - a much greater proportion than for any of the other offences, including s 66C(3) (the less serious cases under s 66C(3) would have been dealt with summarily by the Local Court or in the Children's Court).
- 7.28 It may also be observed that the courts noted victim impact statement in a greater proportion of cases involving victims under 10 years. In some of these cases the statements were prepared by family members or counsellors, rather than the victims themselves.
- 7.29 There is some limited indication that younger offenders generally receive a shorter term or a non-custodial sentence. The two offences with the youngest offender profiles (and the smallest age difference) were the basic forms of the offences of sexual intercourse with a child aged 10-14 years and 14-16 years. These offences also had 2 of the 3 lowest average sentences for the principal offence and the largest proportion of non-custodial sentences. However, these two offences also had 2 of the 3 lowest maximum penalties (16 years and 10 years imprisonment).
- 7.30 Some correlation between youth and non-custodial sentences can be seen in offences against s 66A(1) but only for juveniles 16 years and under who received suspended sentences. Some correlation was also apparent for offences against s 61J. An assessment could not be made of the offences against s 66C(2) and s 66C(4) – the aggravated forms of the offences against children aged 10-14 years and 14-16 years – because of the small numbers and the much older age profile of the offenders.
- 7.31 There is some limited indication that offenders who were sentenced for a single offence tended to receive sentences in the lower range. This was also the case where the court identified that the offender had an intellectual disability or cognitive impairment or had a mental health issue either at the time of sentencing or at the time of the offence.
- 7.32 There is also some evidence that offenders with prior criminal records tend to receive longer sentences of imprisonment, while offenders with no prior criminal records tend to receive shorter sentences of imprisonment or non-custodial penalties. The chief exception to this trend would appear to be sentences for the

aggravated offence of sexual intercourse with a child under 10 years. As the aggravated form of the most serious offence, it is possible that the purposes of punishment and general deterrence may have taken primacy in the sentencing court's decision. Of the 26 non-custodial sentences handed down for all offences, 17 (65%) were imposed on offenders who had no prior criminal record. Non-custodial sentences were not imposed on any offenders against the two most serious aggravated offences – aggravated sexual intercourse with a child under 10 years and with a child between 10 and 14 years.

- 7.33 There is a large proportion of guilty pleas among those sentenced for almost all of the offences, however, those who pleaded guilty are only compared with those who pleaded not guilty and were subsequently convicted. For example, BOCSAR found that, in 2004, 55.6% of those prosecuted for a sexual offence against a child were found not guilty on all counts.<sup>19</sup>
- 7.34 Not guilty pleas tend to result in longer sentences, most probably because of the discounts that are applied for the utilitarian value of each plea. It should also be noted that the SNPP scheme does not apply to guilty pleas.
- 7.35 The vast majority of offenders were male (97%) and a considerable majority of victims were female (89%).

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19. J Fitzgerald, *The Attrition of Sexual Offences from the New South Wales Criminal Justice System*, Crime and Justice Bulletin No 92 (NSW Bureau of Crime Statistics and Research, 2006) 3.

## 8. Sexual intercourse, child under 10 years – s 66A(1)

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### Background

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- 8.1 Under s 66A(1) of the *Crimes Act 1900* (NSW) it was an offence to have sexual intercourse with a child who was under the age of 10 years.
- 8.2 The maximum penalty was 25 years imprisonment and the standard non-parole period (SNPP) was 15 years.
- 8.3 This offence has been repealed together with the aggravated form of the offence and replaced with a provision – s 66A – that imposes a maximum penalty of life imprisonment for the offence of sexual intercourse with a child under 10 years and does not specify any circumstances of aggravation.<sup>1</sup>
- 8.4 For the 6 years between January 2009 and December 2014, the Judicial Information Research System records 40 cases where an offence against s 66A(1) was sentenced as the principal offence. 10 offenders were sentenced to a suspended sentence, while the remaining 30 received sentences of imprisonment.
- 8.5 The midpoint sentence in the period was 5 years with sentences ranging between 3 years and 18 years. In only one case was a sentence of more than 15 years handed down.

### Trends in 2012-2013

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- 8.6 In the period 2012-2013, there were 23 cases where an offence against s 66A(1) was sentenced as the principal offence.

### The sentences

- 8.7 In the period 2012-2013, 17 offenders (74%) received a sentence of imprisonment. The remaining 6 received suspended sentences ranging from 18 to 24 months.

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1. *Crimes Legislation Amendment (Child Sex Offences) Act 2015* (NSW) Sch 1 [1].

- 8.8 For the principal offence, offenders who received a sentence of imprisonment, received an average head sentence of 6.2 years and an average non-parole period of 3.8 years. The average total/aggregate sentence was 7.5 years with an average non-parole period of 4.7 years.
- 8.9 The longest sentence was 18 years, with a non-parole period of 13 years and 6 months, and the shortest sentence of imprisonment was a fixed term of 12 months (served as part of a total head sentence of 6 years with a 3 year non-parole period).
- 8.10 6 offenders (26%) received a suspended sentence. All of these were juveniles at the time of the offence, pleaded guilty and had no prior convictions.

### **Victim and offender characteristics**

- 8.11 19 victims (83%) were female, 4 victims (17%) were male. The victims had an average age of 7 years (median: 7 years). The age range was from 2 to 9 years.
- 8.12 All offenders were male. The average age at the time of the principal offence was 35 years. 9 offenders (39%) were over 50 years old and 8 offenders (35%) were under 18 years of age. 12 cases (52%) had an age difference of 25 years or more. Apart from the offenders who received suspended sentences (all of whom were 16 or younger at the time of the offence), there was no strong correlation between age and sentence duration.
- 8.13 9 offenders (39%) were family members (including brother, step brother, foster brother, uncle, grandfather and “extended family”) and 9 were either family friends or neighbours. 2 were not previously known to the victim or the victim’s family, one being an intruder and one being a stranger.
- 8.14 The remarks on sentence referred to mental health issues in 7 cases (30%), although in only 2 cases did the court note that the mental health issues related to the offending behaviour. In 6 cases (26%), the remarks on sentence referred to intellectual disability or cognitive impairment. In all but one of these 10 cases, the offenders received sentences of less than 7 years, including 3 suspended sentences. The 4 offenders who were also convicted of child abuse material offences were identified as having an intellectual disability or mental health issue.
- 8.15 Alcohol and drug problems were mentioned in 9 cases (39%). All of these received a sentence of imprisonment.

### **Offence characteristics/other factors**

- 8.16 16 offenders (70%) were sentenced for more than 1 offence. Of these, 3 received suspended sentences and the remainder were sentenced to terms of imprisonment ranging from 1 year to 18 years. Of the 7 offenders who committed one offence, 3 also received suspended sentences and the remainder terms of imprisonment ranging from 3 years to 6 years and 6 months.
- 8.17 19 offenders (82% of those sentenced) pleaded guilty, with 13 offenders (57%) receiving a discount of 25% for pleading at the earliest available opportunity. The offender with the longest total sentence (24 years) received the 25% discount.

- 8.18 13 offenders (57%) had no prior record. 6 of these offenders received a non-custodial sentence. 6 of the remaining 7 received head sentences ranging from 1 year to 6 years. The seventh offender received the longest head sentence of 18 years.
- 8.19 10 offenders (43%) had prior records. All received a sentence of imprisonment. The head sentences ranged from 3 years to 14 years.
- 8.20 12 offences (52%) took place in the victim's home or foster home and a further 5 offences (22%) took place in the offender's home.
- 8.21 In 6 cases (26%), abuse of a position of trust was raised. All of these received a sentence of imprisonment.
- 8.22 In 6 cases (26%), the principal offence involved cunnilingus, 4 involved penile vaginal intercourse and 4 involved digital vaginal penetration. There is no apparent correlation between the type of sexual activity and the length of sentence.
- 8.23 In 13 cases (57%), the court noted a victim impact statement in the remarks on sentence. These statements were received in cases across the range of sentencing outcomes.
- 8.24 6 offenders (26%) were sentenced within less than 1 year of the offence, 7 offenders (30%) were sentenced between 1 and 2 years of the offence and 8 offenders (67%) were sentenced between 2 and 3 years of the offence. 2 offenders were sentenced between 4 and 5 years of the offence.

## Case studies

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### Longer sentence

Maximum penalty: **25 years imprisonment**; SNPP: **15 years**

Head sentence: **10 years**; Non-parole period: **6 years 6 months**

- 8.25 The offender was 33 years old at the time of the principal offence. The victim, whose stepfather was a friend of the offender's brother, was aged 8 years.
- 8.26 The offender pleaded guilty to one count of sexual intercourse with a child under 10 years (principal offence) and one count of aggravated indecent assault against the victim. He also pleaded guilty to another count of aggravated indecent assault with another child. Two matters were taken into account on a Form 1 – a further count of aggravated indecent assault against the victim and one count of an act of indecency against a third child under 10 years.
- 8.27 The offender had become 'friends' with the victim when helping the family to move in. He played with the offender and his friends at their house. The family had noted the offender was slow and immature and accepted he was comfortable playing with children despite being 25 years older than the victim.

- 8.28 One afternoon, while playing pool at the victim's house, the offender suggested a penis measuring competition, and measured the victim's penis with a ruler, in front of the victim's friends (form 1 aggravated indecent assault). The victim then had a shower, for part of which the offender was present. The victim and the offender then wrestled, before the offender removed the boy's pants and sucked on his penis (principal offence). He then placed the victim's hand on his own penis and moved it up and down until he ejaculated (aggravated indecent assault).
- 8.29 One month after the incident, the victim told his brother, who told their mother, and she reported the matter to the police. The offender pleaded guilty after the trial had been listed and received a 10% discount for the late plea.
- 8.30 The offender had been raised by his father and a succession of step mothers. He had been diagnosed with a learning disability and did not complete high school. He left home at 17 and had difficulty finding employment and occasionally slept on the streets. He was sexually assaulted once when in custody and again when living on the street. He had abused cannabis in his early 20s, but no longer did so.
- 8.31 The offender had been in custody a number of times in his life and completed anger management and CUBIT sex offender courses. He had been convicted of aggravated indecent assault of a boy under 10 in 1995, and of a girl under 16 in 2004. The offender was on the NSW Child Protection Register at the time of the offences.
- 8.32 The court found that the offender had, eventually, acknowledged that he had a problem with sexual arousal with children and that he needed help. However, he had also previously tried to downplay the nature of his offending. In the circumstances, the court was unable to make a finding that the offender had shown remorse. The offender was assessed as having a high risk of re-offending.
- 8.33 The offender's verbal skills were assessed as far below those expected for someone his age. He was depressed at the time of sentencing, at least partially as a result of his incarceration. The court acknowledged the significant impact on the victims.
- 8.34 The court noted the offences were committed in the victim's home – a place where the victim should have been able to feel safe and secure, that the offender's conduct had involved grooming and planning and that there had been an abuse of a position of trust and friendship. The court also noted that the offender was a serial offender. In the court's view protection of the community was an important consideration as well as general and specific deterrence.
- 8.35 For the principal offence the offender received a head sentence of 10 years, with a non-parole period of 6 years and 6 months. His total term was a sentence of 10 years and 6 months, with a non-parole period of 7 years.

### **Mid range sentence**

Maximum penalty: **25 years imprisonment**; SNPP: **15 years**

Head sentence: **4 years 6 months**; Non-parole period: **2 years 3 months**

- 8.36 The offender was 18 years old at the time of the offences. The victim, a 5 year old girl, was part of the offender's extended family.
- 8.37 The offender pleaded guilty to one count of sexual intercourse with a child under 10 years as well as one charge of indecent assault, one charge of using a child to produce child abuse material, and one charge of possessing child abuse material.
- 8.38 The offences took place during a family gathering for Christmas. The offender first used his friendship and relationship to encourage the victim to allow him to touch her vagina on the outside of her underwear and then on the skin after she pulled her underwear down. Despite the victim's requests to desist, this activity occurred a number of times, stopping whenever other family members entered the lounge room. The offender then inserted his finger into the victim's vagina (principal offence). The offender stopped after she asked him to stop and told him she felt sore. The offender also took a number of photographs of the activity. He subsequently admitted to the police that he had child abuse material on his computer.
- 8.39 The victim told her mother about what had happened when they were driving home. The mother returned and confronted the offender. A listening device warrant was obtained and the police recorded the offender's admissions to his mother during a telephone conversation. He made full and frank admissions to the police. The plea was at the earliest opportunity, entitling the offender to a 25% discount for the utility of the plea. The court took into account the offender's cooperation with the police and his willingness to accept responsibility.
- 8.40 The offender lived with his father and grandmother. The offender supported his father following a work injury and supported his grandmother who could not speak fluent English. The court did not give much weight to the impact of the offender's imprisonment on the family. The offender had no prior criminal history.
- 8.41 The offender had significant problems at school and had problems forming relationships arising from Asperger's disorder. The court took the offender's immaturity into account. The court also noted that the Asperger's disorder would make his conditions of imprisonment harsher.
- 8.42 The court noted a risk of re-offending given the offender's mental condition, which included paedophilia, and the need to address static and dynamic factors both in custody and on parole. The court found special circumstances to vary the statutory ratio between the head sentence and the non-parole period to allow for supervision in the community.
- 8.43 The court noted that a non-custodial sentence might have been possible but for the sexual intercourse which demanded a custodial sentence. The court imposed a head sentence for the principal offence of 4 years and 6 months with a non-parole period of 2 years and 3 months. Because the offences were part of the course of conduct, the sentences for the other offences were entirely concurrent, resulting in a total sentence of the same length as the sentence for the principal offence.

### Shorter sentence

Maximum penalty: **25 years imprisonment**; SNPP: **15 years**

Sentence: **21 month suspended sentence**

- 8.44 The offender was aged 16 at the time of the principal offence. The victim was his 7-year-old half sister.
- 8.45 The offender pleaded guilty to a charge of sexual intercourse with a child under 10 years. A similar offence, committed in the previous month, was also taken into account in a Form 1.
- 8.46 The offender and the victim were on the offender's bed playing cards. There was a hole in the victim's stockings, and the offender inserted his pinkie into the victim's anus. He removed it when she told him it hurt.
- 8.47 Their mother questioned the victim at the time, and immediately contacted the Department of Community Services. Police questioned the offender a short time later. He admitted the incident, and disclosed another that occurred a month before. He received a discount of 25% for the early guilty plea.
- 8.48 The offender had a dysfunctional childhood which included sexual abuse by at least one adult and his older brother, emotional abuse by a previous step-father, witnessing domestic violence against his mother and a difficult relationship with his current step-father. He had also been diagnosed with ADHD as well as oppositional defiance disorder and conduct disorder before he turned 10.
- 8.49 He had started drinking alcohol and smoking tobacco and cannabis at 16, although he had apparently quit at the time of sentencing. He had not been able to complete secondary education, nor secure employment. The court found that he was not depressed at the time of the offence, but was at the time of sentencing.
- 8.50 At the time of sentencing, the offender was living in out-of-home care, and had received cigarette burns from others living at the facility. He had some limited contact with his mother and brother.
- 8.51 The offender had no prior convictions, and the court assessed his prospects for rehabilitation and not re-offending as good, noting that he had not offended since the incident.
- 8.52 Since the offender was a juvenile, the standard non-parole period did not apply. The principles of the *Children (Criminal Proceedings) Act 1987* (NSW) applied – meaning the court was to give greater weight to the offender's prospects for rehabilitation and less weight to the principle of deterrence.
- 8.53 The offender was given a suspended sentence of 21 months, subject to a good behaviour bond. He was also required to follow the reasonable directions of Juvenile Justice officers.

## 9. Aggravated sexual intercourse, child under 10 years – s 66A(2)

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### Background

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- 9.1 Under s 66A(2) of the *Crimes Act 1900* (NSW) it was an offence to have sexual intercourse with another person under the age of 10 years in circumstances of aggravation.
- 9.2 This offence has been repealed together with the basic form of the offence and replaced with a provision – s 66A – that imposes a maximum penalty of life imprisonment for the offence of sexual intercourse with a child under 10 years and does not specify any circumstances of aggravation.<sup>1</sup>
- 9.3 Prior to these changes, the circumstances of aggravation were:
- (a) at the time of, or immediately before or after, the commission of the offence, the alleged offender intentionally or recklessly inflicts actual bodily harm on the alleged victim or any other person who is present or nearby, or
  - (b) at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument, or
  - (c) the alleged offender is in the company of another person or persons, or
  - (d) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender, or
  - (e) the alleged victim has a serious physical disability, or
  - (f) the alleged victim has a cognitive impairment, or
  - (g) the alleged offender took advantage of the alleged victim being under the influence of alcohol or a drug in order to commit the offence, or

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1. *Crimes Legislation Amendment (Child Sex Offences) Act 2015* (NSW) Sch 1 [1].

- (h) the alleged offender deprives the alleged victim of his or her liberty for a period before or after the commission of the offence, or
- (i) the alleged offender breaks and enters into any dwelling-house or other building with the intention of committing the offence or any other serious indictable offence.<sup>2</sup>

9.4 The maximum penalty was life imprisonment with a standard non-parole period (SNPP) of 15 years imprisonment.

9.5 For the 6 years between January 2009 and December 2014, the Judicial Information Research System records 37 cases where an offence against s 66A(2) was sentenced as the principal offence. The midpoint sentence in the period was 9 years with sentences ranging between 2 years and 20 years. In only 4 cases were sentences of more than 16 years handed down.

### Trends in 2012-2013

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9.6 In the period 2012-2013, there were 18 cases where an offence against s 66A(2) was sentenced as the principal offence. In 16 cases (89%), the aggravating feature charged was that the victim was “under authority”. In one case the aggravating feature was inflicting actual bodily harm, and in the other it was deprivation of liberty.

9.7 Highlights for this offence in 2012-13 are:

- Longest average sentences – average head sentence of 9.7 years for principal offence and 12.3 years for the aggregate/total head sentence.
- No non-custodial sentences.
- Second highest average age difference between offender and victim (32 years).
- All offenders committed more than one offence.

### The sentences

9.8 In the period 2012-2013, all offenders received a sentence of imprisonment.

9.9 For the principal offence, offenders received an average head sentence of 9.7 years imprisonment (median: 9.1 years) with a range of 6.3 years to 17 years imprisonment. The average non-parole period was 6.2 years imprisonment (median: 6 years) with a range of 3 years to 11 years. The longest sentence for the principal offence was 17 years, with a non-parole period of 11 years. The shortest sentence was 6 years and 3 months, with a non-parole period of 3 years and 6 months.

9.10 For all offences sentenced, the total or aggregate sentence involved an average head sentence of 12.3 years (median: 10.6 years) with a range of 8 years to 19

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2. *Crimes Act 1900* (NSW) s 66A(3) (repealed).

years. The average non-parole period was 8.4 years (median: 7.8 years) with a range of 5 years to 13.5 years.

- 9.11 The 7 shortest total or aggregate sentences had the greatest variance from the statutory ratio of non-parole period to head sentence, possibly allowing a greater opportunity for supervised rehabilitation if released to parole.

### Victim and offender characteristics

- 9.12 17 of the victims (94%) were female with an average age of 7 years (median: 8 years). The age range was from 2 to 9 years.
- 9.13 All of the offenders were male with an average age of 39 years (median: 37 years). The age range at the time of offending was from 20 to 72, with 13 offenders (72%) being over 30.
- 9.14 The average age difference between offenders and victims was 32 years (median: 28 years). The age difference ranged from 12 to 66 years. This is consistent with "under authority" being charged as the aggravating factor. There is no correlation between the age difference and sentence length for offences against s 66A(2).
- 9.15 15 offenders (83%) were family members (including extended family). 7 (39%) were the victim's father, 5 (28%) were the current or former partner of the victim's mother, and 3 (17%) were the grandfather. The remaining 3 were known to the family, a childcare assistant and a stranger. The stranger and the person known to the family received the longest sentences.
- 9.16 The remarks on sentence for 11 offenders (61%) referred to mental health issues. 5 of these, however, had arisen only after the offence was committed. Only one offender was identified as having an intellectual disability or cognitive impairment. 7 offenders (39%) were identified as having problems with alcohol and/or drugs. Six of these were among the 10 longest sentences for the principal offence.

### Offence characteristics/other factors

- 9.17 All offenders had more than one offence dealt with at sentencing. There was no correlation between number of offences and sentence length. Although slightly longer sentences appeared to result where some of the other offences involved child abuse material.
- 9.18 15 offenders (83%) pleaded guilty, with 9 (50%) receiving a discount of 25% for pleading guilty at the earliest available opportunity. The longest sentence received a 10% discount for a late guilty plea.
- 9.19 13 of the offences (72%) took place inside the victim's home and a further 2 inside the offender's home. Of the 3 offences that attracted the longest head sentences, 2 took place outdoors.
- 9.20 2 offences were sentenced between 3 and 4 years after they were committed, 5 between 2 and 3 years, 10 between 1 and 2 years, and one in less than one year

after it was committed. There appears to be no correlation between delay and sentence length, probably because there were no “historic” offences.

- 9.21 There was no hierarchy of seriousness evident in type of assault. 6 offences (33%) involved digital-vaginal penetration, 4 (22%) involved cunnilingus, and 3 involved oral penetration of the victim.
- 9.22 7 offenders (39%) had no prior offences on their record. 11 offenders (61%) had prior offences that were not child sexual offences. No offenders had prior offences that involved child sexual offences. There was no strong correlation between offence history and sentence, although it should be noted that the offenders with the 6 shortest head sentences all had prior offences.
- 9.23 In 13 cases (72%), across the range of sentencing outcomes, the court noted a victim impact statement in the remarks on sentence.
- 9.24 In 7 cases (39%), the court found the offender to be of otherwise good character. 6 of these findings were made in cases with 6 out of the 7 shortest sentences.
- 9.25 In 2 cases the offender committed the offence while on conditional liberty. A s 9 bond in one case and bail in the other.
- 9.26 The remarks on sentence for 14 cases (78%) referred to a breach of trust.

## Case studies

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### Longer sentence

Maximum penalty: **Life imprisonment**; SNPP: **15 years**

Head sentence: **17 years imprisonment**; Non-parole period: **11 years**

- 9.27 The offender was 20 years old at the time of the offences. He was known to the family of the victim, who was 8 years old.
- 9.28 The offender pleaded guilty to one count of attempted sexual intercourse with the victim (s 66B), and two counts of aggravated sexual intercourse (s 66A(2)). Two further offences were added on a Form 1 – aggravated enter premises with intent and detain for advantage.
- 9.29 One evening, a number of people were staying the night at the victim’s family home. The victim was sleeping in the lounge room with a friend. Her mother was asleep in the main bedroom. The offender had called at the house around midnight, but on finding the victim’s mother was asleep and her brother was at a nearby house, went away. Sometime after midnight he entered the home and the victim woke to find him sitting in the lounge room. She asked him where her mother was. The offender advised her that she might be at “Belinda’s” and told her to come with him, dragging her by the shirt from the house. Upon reaching a nearby house, the offender advised that Belinda was not there and told the victim they would go into the bush and try to find her. Once in bushland, the offender pulled down the victim’s pants and tried to lick her, threatening to kill her if she did not comply. He rolled the victim

onto her back and unsuccessfully attempted penile-vaginal intercourse (count 1) before inserting his finger into her vagina and moving it around for about a minute, causing some pain to the victim (principal offence). He then pulled her head down forcing her mouth onto his penis and ejaculated in her mouth. The offender returned the victim home and told her not to tell her mother.

- 9.30 The next day, blood discharged from the victim's vagina and she complained to her mother. She continued to complain about pain and a medical examination found physical harm and bruising to her genitalia and mouth, and irregular scratch marks on her buttocks. These injuries amounted to the actual bodily harm required for a circumstance of aggravation.
- 9.31 The police were called and the offender was arrested after some attempts to evade capture. He denied the offence until DNA evidence implicated him. He was committed for trial, but the initial trial was vacated at his request. He pleaded guilty in the weeks leading up to the second trial. The court allowed a discount of 10% for the utility of the late plea. The court did not accept evidence of remorse.
- 9.32 The offender was of Aboriginal heritage and completed his HSC while in juvenile detention. After a period of full-time employment, he was unemployed at the time of the offence. His background was found to be dysfunctional. His early childhood was marred by his father's aggression and alcohol abuse. He claimed to have been sexually abused as a young person and lacked maternal support and affection. The court found that his background did not assist as a mitigating factor.
- 9.33 He had long-term problems of drug and alcohol abuse and had been taking drugs that week and had been drinking on the night of the offence. There were no relevant issues of mental illness or intellectual disability.
- 9.34 The offender's criminal record involved property crime, including break and enter offences and a stalk and intimidate offence. At the time of the offence, he was on bail for an assault occasioning actual bodily harm. A warrant had been issued for his arrest following a failure to appear. At the time of sentencing he was already serving a sentence for matters dealt with by the Local Court.
- 9.35 The court noted that the offender's risk of reoffending was "deemed to be high and would only reduce with the reduction and control of his drug and alcohol related behaviour", but also noted that the offender's youth provided some hope for rehabilitation. A finding of special circumstances allowed for an appropriate period of lengthy supervision in the community if he were released to parole.
- 9.36 For the principal offence, the court sentenced the offender to a head sentence of 22 years and 6 months with a non-parole period of 15 years and 2 months. His overall sentence was 23 years and 6 months with a non-parole period of 16 years and 2 months.
- 9.37 On appeal, this was reduced for the principal offence to a head sentence of 17 years with a non-parole period of 11 years. His overall sentence was reduced to 19 years with a non-parole period of 13 years. The Court of Criminal Appeal considered the original sentence would have been appropriate for an older adult but observed the potential of the total sentence to "crush ... expectations of a normal life and destroy any prospect of rehabilitation" in a young person.

### Mid range sentence

Maximum penalty: **Life imprisonment**; SNPP: **15 years**

Sentence: **9 years imprisonment**; Non-parole period: **6 years**

- 9.38 The offender was 50 years old at the time of the principal offence. The victim was the offender's 9 year old granddaughter and lived with him, her mother and siblings.
- 9.39 The offender pleaded guilty to three charges of aggravated sexual intercourse with a child under 10 years, the aggravation being that the child was under authority. He also pleaded guilty to one charge of possessing child abuse material, and one charge of using a child under 14 years to make child abuse material. A further two offences of possessing child abuse material were taken into account on a Form 1.
- 9.40 One night, the offender insisted that the victim go to his bed. They lay on the bed and, after watching a movie, the offender licked the victim's vagina. The victim's mother walked in while this was happening and confronted the offender, who left the house. The victim's mother reported the matter to the police 4 days later. On the same day, the offender reported to another police station alleging self harm and received treatment at a mental health facility. The police interviewed the complainant the next day and, over the course of two weeks, received the offender's laptop computer, arrested the offender, and seized further electronic devices under a crime scene warrant.
- 9.41 A video on one of the devices revealed 2 further offences against the victim, that is, the offender inserting a candle and inserting his fingers in the victim's vagina (one of these acts was the principal offence). On this video, the offender could be seen in a mirror operating the camera.
- 9.42 The offender's devices contained numerous images and videos of child abuse material, including children engaging in explicit sexual activity.
- 9.43 The offender pleaded guilty at the earliest opportunity, entitling him to a discount for the utility of the plea of 25%. The court also noted, in addition to the utilitarian value, the plea had spared the victim and her mother the trauma of a trial. The offender's expressions of remorse were balanced against the strength of the prosecution case.
- 9.44 The court noted that the offender had a "limited/relatively minor" prior criminal record involving non-custodial sentences for firearms, prohibited weapons and personal violence.
- 9.45 The offender was diagnosed as having major depression at the time of the offences, possibly contributed to by learning problems and bullying during childhood, the breakdown of his marriage and the effect of the recent deaths of his mother and stepfather.
- 9.46 In the circumstances, the court noted the offender had a low to moderate risk of recidivism and formed the view that there were positive signs that the offender would not re-offend and had good prospects of rehabilitation.
- 9.47 The court considered the acts of penetration to be more objectively serious than the act of cunnilingus. The court also noted that video recording the offence increased

the degree to which the offender breached the victim's trust, and that obtaining and operating the video equipment indicated a degree of planning. The court found that the offences involved a gross abuse of trust and protection that the victim was entitled to expect from her grandfather, underlined by the fact that they occurred in the victim's home where she was entitled to be safe. The offences were also committed while the offender was on conditional liberty – a good behaviour bond for common assault.

- 9.48 The court imposed an aggregate sentence of 12 years imprisonment with a non-parole period of 8 years, noting that it was appropriate to give more weight to general and specific deterrence, protection of the community, denunciation and retribution. The court set indicative head sentences for the two acts of penetration (including the principal offence) of 9 years imprisonment, with a non-parole period of 6 years. The court found special circumstances to vary the statutory ratio, namely that it was the offender's first time in prison and his age (53 years) and nature of the offences would mean greater isolation from the general prison population. A significant period was also allowed for supervised rehabilitation.

### Shorter sentence

Maximum penalty: **Life imprisonment**; SNPP: **15 years**

Head sentence: **6 years 3 months**; Non-parole period: **3 years 6 months**

- 9.49 The offender was aged 39 at the time of the principal offence. The victim was his daughter.
- 9.50 The offender pleaded guilty to three counts. One of indecent assault when the victim was 5 years old and two counts of sexual intercourse in circumstances of aggravation (that the victim was under authority) when the victim was 8 years old. An indecent assault was also taken into account on a Form 1.
- 9.51 The offences when the victim was 8 years old occurred while her mother was spending 2 months in hospital. One evening the offender, wearing only boxer shorts, and the victim, wearing bed clothes and underwear, were lying on a mattress watching television. The offender pulled down his shorts to expose his penis, told the victim to stand up, parted her legs, removed her underwear and touched her anus with his hand (Form 1). He then inserted a finger into her vagina and moved it around before removing it on the victim's request (principal offence). He said "we're going to do it again tomorrow". The victim noted some blood around her vaginal area. The next evening, on the same mattress, the offender removed the victim's pants and underpants and inserted a finger into her anus. The court found each offence was premeditated.
- 9.52 The victim reported the events to her sisters a short time later. Police interviewed the offender, but he denied the allegations. The offender pleaded guilty when the trial was due to begin, having foreshadowed the plea to the prosecution on the preceding weekend. He received a discount of 10% to reflect the utility of the plea. The court found no evidence of remorse.

- 9.53 The offender reported an upbringing involving corporal punishment and frequent relocations because of his father's work, but the court found that this did not adversely affect him. He had had no contact with his mentally ill mother since she attacked him some years previously and no contact with his three younger siblings since the death of his father (for whom he had been the carer).
- 9.54 He finished school in year 10 and had a sound work history. He had a heart condition, treated by medication, giving rise to anxiety that was likely to increase upon entering custody. He had a longstanding substance abuse problem with cannabis and other drugs, but this did not contribute to his offending behaviour. Since the offence was detected, the offender experienced symptoms of depression.
- 9.55 The offender's prior offences included a large number of traffic offences, including drive while disqualified, and some drug offences. His record also included a breach of a CSO and a conviction for failing to appear. He was on a bond for intimidation when he committed the first offence against the victim.
- 9.56 The court was satisfied that each offence was premeditated and committed for the purpose of sexual gratification. The court took the view that, at best, his "prospects of rehabilitation and not re-offending are reasonable" and found special circumstances to vary the NPP ratio to allow for an extended period of supervised parole. The court also noted the possibility that the offender might serve the sentence in protective custody.
- 9.57 The court imposed an indicative sentence for the principal offence (including the Form 1 matter) of 6 years and 3 months, with a non-parole period of 3 years and 6 months. The total sentence for all the offences was a head sentence of 9 years, with a non-parole period of 5 years and 6 months.

## 10. Aggravated sexual intercourse without consent – s 61J

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### Background

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- 10.1 Under s 61J(1) of the *Crimes Act 1900* (NSW) it is an offence to have sexual intercourse with another person without the consent of the other person and in circumstance of aggravation and to know that the other person does not consent to the sexual intercourse.
- 10.2 One of the circumstances of aggravation listed in s 61J(2) is that “the alleged victim is under the age of 16 years”.<sup>1</sup>
- 10.3 The maximum penalty is 20 years imprisonment and the standard non-parole period (SNPP) is 10 years.

### Trends in 2012-2013

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- 10.4 In 2012-2013, there were 34 cases where an offence against s 61J(2)(d) was sentenced as the principal offence. 11 of these were offences committed before the introduction of the SNPP scheme. We have removed these 11 offences from the analysis, since sentences for this offence increased after the introduction of SNPPs and they may reflect what happens with historic cases and consequently cannot be compared with the data for some of the other offences which only relates to offences committed after the SNPP scheme was introduced.
- 10.5 It should also be noted that for the 23 cases we have surveyed, the aggravating circumstance was charged as being that the victim was under the age of 16 years. It is possible that there were cases where another aggravating circumstance was charged and the victim was also under 16 years. We have not attempted to identify these cases.

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1. *Crimes Act 1900* (NSW) s 61J(2)(d).

10.6 Highlights for this offence in 2012-2013 are:

- Lowest proportion of guilty pleas among those sentenced (61%).
- second longest average head sentence for principal offence (7.4 years).

### The sentences

10.7 In the period 2012-2013, 21 offenders (91%) received a sentence of imprisonment. One offender received a suspended sentence of 2 years and one offender received a good behaviour bond of 3 years.

10.8 The average head sentence for the principal offence was 7.4 years (median: 8 years) and the average non-parole period was 4.4 years (median: 4.8 years).

10.9 The longest sentence for the principal offence was 10 years and 4 months, with a non-parole period of 7 years. The shortest sentence was 1 year and 9 months, with a non-parole period of 10 months.

10.10 The average total or aggregate sentence was 8.6 years imprisonment (median: 8 years) and the average non-parole period was 5.6 years. The longest aggregate sentence was 17 years with a non-parole period of 12 years.

### Victim and offender characteristics

10.11 22 victims (96%) were female. All of the offenders were male.

10.12 The average age of offenders at the time of offending was 40.7 years (median: 44 years). The age range was from 16 to 65 years, with 29 offenders being over 30. Those aged 25 or less received 5 of the lowest 9 sentences.

10.13 The average difference in age between victim and offender was 29.6 years. The largest age difference was 55 years, with 17 cases (74%) involving an age gap of more than 20 years.

10.14 17 offenders (74%) were family members (including extended family), 4 offenders (17%) were either family friends, family of friends or neighbours, only 1 offender was identified as not previously known by the victim.

10.15 The remarks on sentence identified mental health issues for 8 offenders (35%). There is no apparent correlation between this identification and sentence length.

10.16 2 offenders (9%) were identified as having an intellectual disability or cognitive impairment. These offenders received 2 of the 4 shortest sentences.

### Offence characteristics/other factors

10.17 19 offenders (83%) were sentenced for more than 1 sex offence. There was no correlation between number of offences and sentence length.

- 10.18 14 offenders (61%) pleaded guilty, with 8 offenders (35%) receiving a discount of 25% for pleading at the earliest available opportunity. This offence had a lower proportion of guilty pleas among those sentences than the other offences.
- 10.19 12 of the offences (52%) are recorded as taking place in the victim's home and a further 5 offences (22%) in the offender's home.
- 10.20 The remarks on sentencing for 11 offenders (48%) referred to a breach of a position of trust.
- 10.21 9 offenders (39%) had no prior criminal record. There was no strong correlation between criminal record and length of sentence.
- 10.22 In 13 cases (38%) the court noted a victim impact statement in the remarks on sentence.

## Case studies

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### Longer sentence

Maximum penalty: **20 years imprisonment**; SNPP: **10 years**

Head sentence: **10 years**; Non-parole period: **7 years**

- 10.23 The offender was 39 years old at the time of the offence. The victim, the daughter of the offender's intermittent partner, was aged 11 years.
- 10.24 The offender was found guilty, after a trial, of sexual intercourse without consent in circumstances of aggravation, namely that the victim was under the age of 16 years.
- 10.25 The offender had had an "on again, off again" relationship with the victim's mother for 2 and a half years. He had access to the victim and her mother's house, but was not living there at the time of the offence.
- 10.26 The offender entered the house and the victim's room, while she was asleep, and had penile vaginal intercourse with the victim, during which she objected and was restrained by the offender. The offender ejaculated during the sexual intercourse. The noises in the victim's room woke her mother, who entered and screamed at the offender to leave. He did so. The mother complained to the police the next day and the offender was arrested a week later.
- 10.27 The offender pleaded not guilty and claimed he was elsewhere at the time of the assault, but DNA evidence connected him and the jury convicted him.
- 10.28 The offender's mother had been an alcoholic, and two years after her death he discovered that he was not his father's biological child. He had been sexually assaulted at age 11 by a friend of his brother and began 'self-medicating' with cannabis and alcohol to cope with the stress of his upbringing. He left school after year 8.

- 10.29 He had held a number of jobs, but not for any great length of time. He was assessed as having below average intelligence with some anti-social personality traits, and a pattern of problematic interpersonal relationships.
- 10.30 The offender had a history of offending, including driving, personal violence, and malicious damage offences. At the time of the offence he was subject to a good behaviour bond for breaching an apprehended violence order in relation to the victim's mother. However, he had no prior history of sexual offending and was assessed as a low to moderate risk of sexual offence recidivism.
- 10.31 The court found that the sentence needed to reflect the need for general and specific deterrence and a significant amount of denunciation, noting that there had been a significant breach of trust. The court also noted that the offence took place in the victim's home.
- 10.32 The offender was sentenced to a head sentence of 10 years imprisonment, with a non-parole period of 7 years.
- 10.33 The court allowed a slightly longer than usual parole period to facilitate alcohol rehabilitation and the need for employment guidance upon his return to the community.

### Mid range sentence

Maximum penalty: **20 years imprisonment**; SNPP: **10 years**

Head sentence: **8 years**; Non-parole period: **5 years**

- 10.34 The offender was 45 years old at the time of the principal offence. The victim of the principal offence, a 13 year old girl, was the daughter of the offender's partner.
- 10.35 The offender was found guilty, after trial by jury, of 7 sexual offences against two children (a stepdaughter and the victim), 4 aggravated indecent assaults, one aggravated act of indecency and 2 aggravated sexual intercourse without consent (victim under 16).
- 10.36 The first range of offences was committed against the offender's stepdaughter in 2002, the second range of offences was committed against the victim 8 years later in 2010.
- 10.37 The first range of offences occurred, after the offender's marriage with his stepdaughter's mother had ended, at times when the stepdaughter was visiting the offender and her step-siblings. The indecent assaults involved the offender, while driving, grabbing his stepdaughter's breasts over her clothing, and, on two other occasions, touching her breasts through her clothes. The act of indecency involved him exposing his penis and masturbating in front of his stepdaughter. The intercourse involved the offender turning on a pornographic video and putting his hand down his stepdaughter's pants and underpants and inserting his fingers in her vagina.
- 10.38 The second range of offences occurred while the offender was in a relationship with the victim's mother. The victim had gone to the offender's house to help him bury

his dog. The two had a conversation in which the victim tried to console the offender. The offender introduced female orgasms into the conversation and, when the victim said she did not know what he meant, he showed her a pornographic video on his mobile telephone. Subsequently, the offender put his hand down the victim's top and grabbed her breasts, then, against the victim's resistance, pulled down her pants and moved his fingers in and out of her vagina, while she tried to push him off (principal offence).

- 10.39 The court noted that the offender had a relatively stable work history and no problems in his family background.
- 10.40 The offender had a prior criminal history involving convictions for assault, assault occasioning actual bodily harm and contravening an apprehended domestic violence order.
- 10.41 The court noted that, given the separate but similar offending episodes, there was a risk that the offender would re-offend. It was also noted that the offender had continued to deny the offences and lacked insight into his offending.
- 10.42 All of the offences involved a gross breach of trust being committed while the victims were in the offender's care. The court noted the increase in penalties for sexual offences against children arising from a recognition of a change in community attitudes and in response to greater understanding about the long-term effects of such abuse. The court also noted that a degree of force was involved in the principal offence.
- 10.43 For the principal offence, the court imposed a sentence of 8 years imprisonment with a non-parole period of 5 years. The total sentence was 9 years and 11 months imprisonment with a non-parole period of 6 years and 11 months. Because it was the offender's first term of imprisonment, the court found special circumstances to justify a slight variation of the statutory ratio between the head sentence and the non-parole period.

### Shorter sentence

Maximum penalty: **20 years imprisonment**; SNPP: **10 years**

Head sentence: **21 months imprisonment**; Non-parole period: **10 months**

- 10.44 The offender was aged 17 years at the time of the offence. The victim, a next-door neighbour, was aged 12 years.
- 10.45 The offender pleaded guilty to one count of sexual intercourse without consent in circumstances of aggravation, namely that the victim had a cognitive impairment. An offence of aggravated indecent assault was added to a Form 1.
- 10.46 The victim had severe epilepsy and a cognitive impairment that meant she had the capacity of a 5 year old. She had been playing under a new sprinkler in her swimming costume and came round to ask to play with the offender's 15 year old sister. The offender was the only person home. He took her to a games room at the back of the house and inserted his penis into her anus. He did not withdraw when the victim indicated she was in pain. He then had her masturbate him until he

ejaculated. The victim went back to her house and told her mother who contacted the police. The offender was arrested shortly afterwards.

- 10.47 The offender was a ward of the state, since he and his sister had been removed from their parents' care at age 15 due to domestic violence. He was of well below average intelligence with a learning disability, and a diagnosis of ADHD and oppositional defiance disorder.
- 10.48 He had one prior conviction for aggravated break and enter, which had resulted in a 9-month probation order under the *Children's (Criminal Proceedings) Act 1987* (NSW).
- 10.49 The court noted the youth of offender, and suggested that he would have received a significantly longer sentence had he been an adult and without his cognitive deficits. The court accepted that he was remorseful "according to his limited insight and intellect".
- 10.50 Given he was not an adult, and had pleaded guilty, the standard non-parole period did not apply. The court gave a discount of 12.5% for his late guilty plea.
- 10.51 The offender was sentenced to 21 months imprisonment, with a non-parole period of 10 months. The court varied the standard ratio of non-parole period to head sentence, noting his age, the fact that it was his first sentence of imprisonment, and that he needed an extended period of supervision to deal with sexual matters and any other relevant psychological issues.

## 11. Sexual intercourse, child between 10 and 14 years – s 66C(1)

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### Background

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- 11.1 Under s 66C(1) of the *Crimes Act 1900* (NSW) it is an offence to have sexual intercourse with a person who is of or above the age of 10 years and under the age of 14 years.
- 11.2 The maximum penalty is 16 years imprisonment. At the time the offences under consideration were committed the offence did not have a standard non-parole period (SNPP). From 29 June 2015, an SNPP of 7 years has been added for this offence. A potential outcome of this may be a general increase in the sentences handed down for this offence.<sup>1</sup>
- 11.3 For the 7 years between January 2008 and December 2014, the Judicial Information Research System records 94 cases where an offence against s 66C(1) was sentenced as the principal offence. 8 offenders (9%) received bonds, 23 offenders (24%) received suspended sentences, and the remaining 63 offenders (67%) received sentences of imprisonment.
- 11.4 The midpoint sentence in the period was 3 years with sentences ranging between 6 months and 10 years. In only 2 cases were sentences of more than 8 years handed down.

### Trends in 2012-2013

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- 11.5 In the period 2012-2013, there were 31 cases where an offence against s 66C(1) was sentenced as the principal offence.
- 11.6 Highlights for this offence are:
- Highest proportion of non-custodial penalties (45%).

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1. See para [1.13]-[1.14]; and also P Poletti and H Donnelly, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Research Monograph 33 (Judicial Commission of NSW, 2010).

- Lowest average age of offender (24 years).
- Lowest average age difference between offender and victim (11.5 years).

### The sentences

- 11.7 In the period 2012-2013, 17 offenders (55%) received a sentence of imprisonment.
- 11.8 The remaining 14 offenders (45%) received non-custodial sentences. 11 offenders (35%) received a suspended sentence, and 3 offenders (10%) received a good behaviour bond. Of these 14, all pleaded guilty, at least 9 were involved in some sort of ongoing relationship with the victim and 11 were aged 20 years or younger at the time of offending. Of the 11 offenders who received a suspended sentence, 5 had the bonds revoked at a later date and one had a breach proved but no action was taken.
- 11.9 The average head sentence for the principal offence was 2 years and 7 months and the average non-parole period was 1 year and 6 months. The longest sentence for the principal offence was 7 years, with a non-parole period of 4 years and 9 months. The shortest sentence of imprisonment for the principal offence was 1 year and 2 months, with a non-parole period of 4 months.
- 11.10 The average total head sentence for all offences was 3 years and 1 month. The longest total sentence for all offences was 9 years, with a non-parole period of 6 years and 9 months.

### Victim and offender characteristics

- 11.11 At least 29 of the victims (94%) were female. The sex of the remaining 2 victims is unknown. 21 victims (68%) were aged 13.
- 11.12 30 offenders were male and 1 was female.
- 11.13 The average age of offenders at the time of the offence was 24 years. The age range was from 15 to 80 years, and only 5 offenders (16%) were aged 26 or over. 18 offenders (58%) were aged 18-20 years at the time of the offence.
- 11.14 The average age difference between offender and victim was 11.5 years. The largest age difference between the offender and victim was 68 years, with 22 cases (71%) involving an age gap of less than 10 years.
- 11.15 There was some correlation between age of the offender and sentence. Four of the 7 longest sentences were imposed on the 4 oldest offenders. Five of the 6 youngest offenders (aged 21 years or less) received non-custodial sentences.
- 11.16 2 offenders were identified as relatives: a cousin and a “distant relative”. 7 offenders were identified as “boyfriends” or former boyfriends (3 of these received suspended sentences). 4 offenders met their victims on Facebook (3 of these received non-custodial sentences). Only one offender was identified as having no prior connection with the victim.

- 11.17 The remarks on sentence for 9 offenders (29%) mentioned mental health issues (4 of these received non-custodial sentences). The remarks for 5 offenders (16%) mentioned intellectual disability or cognitive impairment (2 of these received non-custodial sentences).

### Offence characteristics/other factors

- 11.18 19 offenders (61%) were sentenced for more than one sex offence. Of the 17 longest sentences (by head sentence for principal offence) 14 offenders were sentenced for more than one offence.
- 11.19 24 matters (77%) involved penile-vaginal intercourse.
- 11.20 27 offenders (87%) pleaded guilty, with 17 receiving a discount of 25% for pleading at the earliest available opportunity. The 3 offenders who pleaded not guilty received 3 of the 9 longest sentences (by head sentence for principal offence).
- 11.21 In 15 cases (48%), the victim and offender had communicated by Facebook.
- 11.22 Of the 14 offenders (45%) who had no prior offences, 8 offenders (26%) received non-custodial sentences. The 6 offenders (19%) who received sentences of imprisonment received head sentences ranging from 1 year and 2 months to 3 years and 9 months.
- 11.23 Of the 17 offenders (55%) who had prior offences, 6 offenders (19%) received non-custodial sentences. The 11 offenders (35%) who received sentences of imprisonment received head sentences ranging from 1 year and 3 months to 7 years. The one offender who previously served a sentence of imprisonment for child sex offences received the longest sentence of 7 years for the principal offence and a total sentence of 9 years.
- 11.24 8 offenders (26%) were identified as being of “good character”, 5 of these received non-custodial sentences.
- 11.25 In 12 cases (39%) the court noted a victim impact statement in the remarks on sentence.
- 11.26 For 10 matters (32%), the time between the offence and sentencing was under 12 months. A further 13 matters (42%) were sentenced between 1 and 2 years of the offence. 6 matters (19%) were sentenced between 2 and 5 years of the offence. The remaining 2 were sentenced between 9 and 11 years of the offence.

## Case studies

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### Longer sentence

Maximum penalty: **16 years imprisonment**

Head sentence: **7 years**; Non-parole period: **4 years 9 months**

- 11.27 The offender, an acquaintance of the victim's mother, was aged 50 at the time of the principal offence. The victim was aged 11 years. One of the victim's sisters, then aged 7, was also a victim of the offender.
- 11.28 The offender pleaded guilty to 4 counts of aggravated indecent assault and 2 counts of sexual intercourse with a child between the ages of 10 and 14 years. He also pleaded guilty to a charge of failing to comply with reporting conditions under the *Child Protection Offenders Registration Act 2000* (NSW). Two other offences were included on a Form 1 – another count of aggravated indecent assault and another count of failing to comply with reporting conditions.
- 11.29 The offender met the victim's family when they were helping a friend and the offender move. At some stage on the moving day the offender lay on a couch next to the victim and rubbed her thigh and vagina through her clothes while at the same time placing the victim's hand on his penis on the outside of his jeans. On the next day, the victim was on the same couch playing a Game Boy the offender had given her. The offender lay next to the victim and touched her vagina both outside and inside of her clothes for 5-10 minutes before he was disturbed by the victim's brother. Later that night at the warehouse, the offender pulled down the victim's sister's pants and underpants and rubbed her vagina, telling her that it was a secret and not to tell anyone.
- 11.30 On the next day, the offender took the victim to an isolated room at the back of the warehouse, told her to lie down with him on a curtain, and began touching her vagina on the inside of her underwear. The offender then kissed and licked her vagina before placing his penis in the victim's vagina (principal offence). The victim was scared and remained still throughout the episode, which lasted 1-2 minutes. The offender ejaculated between the victim's thighs. Upon returning to the warehouse, the offender told the victim not to tell anyone and that he would give her Game Boy games and other presents and build her a cubby house.
- 11.31 The court noted that, while the first three offences were "somewhat opportunistic", the final two offences (including the principal offence) involved "a significant degree of premeditation and planning".
- 11.32 The victim reported the incident immediately to her mother. Upon being confronted, the offender denied the allegation. Her mother took all of her children to a hospital protection unit and the offences were disclosed to a Joint Investigation Response Team who found the offender had 3 outstanding warrants and was on the Child Protection Register.

- 11.33 The offender was arrested 2 weeks later and declined to answer questions. DNA testing linked him to the offence. His pleas were entered at the earliest opportunity, entitling him to a 25% discount.
- 11.34 The offender's childhood was marked by a lack of parental care and he was sexually abused as a child.
- 11.35 The offender's criminal history was extensive, covering nearly every State in Australia, and included many convictions for sexual offences against children, including sexual intercourse without consent of a child under 16 years and attempted sexual intercourse without consent. He was registered under the *Child Protection Offenders Registration Act 2000* (NSW) and, at the time of the offence, was on bail.
- 11.36 The court did not inform itself of the offender's prospects for rehabilitation, but simply observed his criminal history as an indicator of likely future conduct.
- 11.37 For the principal offence, the court imposed a head sentence of 7 years with a non-parole period of 4 years and 9 months. The total sentence imposed was 9 years with a non-parole period of 6 years and 9 months.

### Mid range sentence

Maximum penalty: **16 years imprisonment**

Head sentence: **2 years**; Non-parole period: **8 months**

- 11.38 The offender was 15 years old at the time of the principal offence. The victim was a 13 year old school friend of the offender.
- 11.39 The offender was found guilty at a judge alone trial of 2 counts of sexual intercourse with a child between 10 and 14 years and 2 counts of sexual intercourse with a child between 14 and 16 years. The offences were found in the alternative to charges of aggravated sexual intercourse without consent. The circumstances of aggravation were alleged to be that the offender intentionally inflicted actual bodily harm on the victims.
- 11.40 The offences established were not serious children's indictable offences so the court determined, on the basis of the seriousness of the offending, the maximum penalties and the offender's role, that the matters were of such gravity that the court should sentence the offender according to law rather than according to Part 4 of the *Children's (Criminal Proceedings) Act 1987* (NSW).
- 11.41 The offences against the victim involved one instance of digital penetration and one instance of penile-vaginal intercourse (principal offence). The other two offences, against a girl aged 14 years, took place some months later and also involved one instance of digital penetration and one instance of penile-vaginal intercourse. In each case, the age difference between the offender and the victims was 18 months.
- 11.42 The offender was a school student and had no prior criminal record.

- 11.43 The offender was prepared to engage in a recommended sex offenders' program. The court also noted that some mental health issues that arose for the offender during custody had ameliorated and that his relationship with his mother had improved because of a changed attitude and abstention from illicit substances. This was reason to conclude that the offender was unlikely to re-offend.
- 11.44 The court concluded that no sentence other than a sentence of imprisonment was appropriate and imposed a head sentence of 2 years imprisonment for the principal offence, with a non-parole period of 8 months. The total sentence was 2 years and 3 months imprisonment with a non-parole period of 11 months. The offender had been remanded in custody for about 10 months before being released to bail before the trial. The court considered that the time already spent in custody was sufficient and that a further period of 12 months in custody to allow him to complete a program would be too severe in all the circumstances.
- 11.45 The court found special circumstances justifying a change to the statutory ratio to allow him to complete the sex offenders' program in the community.

### Shorter sentence

Maximum penalty: **16 years imprisonment**

Sentence: **3 year good behaviour bond**

- 11.46 The offender was 20 years old at the time of the offence. The victim, the daughter of the offender's older brother's partner, was aged 12 years.
- 11.47 The offender pleaded guilty to one count of sexual intercourse with a child above the age of 10 years and under the age of 14 years. A similar offence was included on a Form 1.
- 11.48 The victim was staying with her mother. She usually resided interstate with her father. The offender was staying in the same house. The victim and the offender were sleeping in the same bedroom. One night after drinking some beer and watching a movie, they began to kiss and had penile vaginal intercourse. A similar incident occurred a few nights later (Form 1).
- 11.49 The victim and the offender remained in affectionate contact via text messages when the victim returned home interstate. She reported the incident to a friend, who told the victim's father, who confiscated her phone, confirmed the relationship and reported the matter to police. Two years later, the offender was charged. No explanation for the delay is present in the sentencing remarks. As the offender had pleaded guilty after committal for trial, he received a 10% discount on his sentence.
- 11.50 The offender had suffered hypoxia at birth and had a very low IQ and was significantly less emotionally mature than others of his age. At school he was unable to read or write properly and did not have many friends. He left school at the age of 15. At sentencing it was suggested that at the time of the offence he would have had the emotional maturity of an early teenager.
- 11.51 The offender received positive references from his employers. He had two children and was the sole bread winner in the family. He was diagnosed as suffering from

paranoia and anxiety. There was a history of mental illness in his family and two of his brothers had been diagnosed with mental illness (including schizophrenia and bipolar disorder). Suicide was assessed as a real risk were he to enter custody.

- 11.52 Bearing in mind the lack of an exploitative relationship and the offender's level of intellectual capacity being closer to that of an early teen, the court sentenced the offender to a 3 year good behaviour bond, subject to supervision by the Probation and Parole Service.



## 12. Aggravated sexual intercourse, child between 10 and 14 years – s 66C(2)

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### Background

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- 12.1 Under s 66C(2) of the *Crimes Act 1900* (NSW) it is an offence to have sexual intercourse with a person of or above the age of 10 years and under the age of 14 years in circumstances of aggravation.
- 12.2 “Circumstances of aggravation” means circumstances in which:
- (a) at the time of, or immediately before or after, the commission of the offence, the alleged offender intentionally or recklessly inflicts actual bodily harm on the alleged victim or any other person who is present or nearby, or
  - (b) at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument, or
  - (c) the alleged offender is in the company of another person or persons, or
  - (d) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender, or
  - (e) the alleged victim has a serious physical disability, or
  - (f) the alleged victim has a cognitive impairment, or
  - (g) the alleged offender took advantage of the alleged victim being under the influence of alcohol or a drug in order to commit the offence, or
  - (h) the alleged offender deprives the alleged victim of his or her liberty for a period before or after the commission of the offence, or
  - (i) the alleged offender breaks and enters into any dwelling-house or other building with the intention of committing the offence or any other serious indictable offence.<sup>1</sup>

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1. *Crimes Act 1900* (NSW) s 66C(5).

- 12.3 The maximum penalty is 20 years imprisonment. At the time the offences under consideration were committed the offence did not have a standard non-parole period (SNPP). From 29 June 2015 an SNPP of 9 years has been added for this offence. A potential outcome of this may be a general increase in the sentences handed down for this offence.<sup>2</sup>
- 12.4 For the 7 years between January 2008 and December 2014, the Judicial Information Research System records 50 cases where an offence against s 66C(2) was sentenced as the principal offence. One offender (2%) received a good behaviour bond, 5 offenders (10%) received a suspended sentence, and the remaining 44 offenders (88%) received a sentence of imprisonment.
- 12.5 The midpoint sentence in the period was 5 years with sentences ranging between 1 year and 12 years. In only 3 cases were sentences of more than 9 years handed down.

### Trends in 2012-2013

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- 12.6 In 2012-2013, there were 11 cases where an offence against s 66C(2) was sentenced as the principal offence. In 10 cases (91%), the circumstance of aggravation was that the victim was “under the authority” of the offender. In 1 case, the circumstance of aggravation was that the victim had a cognitive impairment.
- 12.7 Highlights in 2012-2013 are:
- All offenders received a sentence of imprisonment.
  - Largest proportion of Form 1 matters taken into consideration (64%).
  - Highest proportion of guilty pleas among those sentenced (91%).
  - Oldest average age of offender (48 years).
  - Greatest average age difference between victim and offender (36.7 years).

### The sentences

- 12.8 In the period 2012-2013, all offenders received a sentence of imprisonment.
- 12.9 The average head sentence for the principal offence was 5.5 years with an average non-parole period of 2.9 years. The longest sentence was 11 years, with a non-parole period of 5 years and 6 months. The shortest sentence of imprisonment was 18 months (fixed term), where the offender was unfit to plead and received a limiting term.
- 12.10 The average total head sentence for all offences was 6.7 years.

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2. See para [1.13]-[1.14]; and also P Poletti and H Donnelly, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Research Monograph 33 (Judicial Commission of NSW, 2010).

### Victim and offender characteristics

- 12.11 8 victims (73%) were female. All of the offenders were male.
- 12.12 The average age for offenders at the time offending was 48 years. The age range was from 18 to 68 years, with 10 offenders (91%) being 41 or over. The youngest offender, aged 18 years, received the second shortest sentence.
- 12.13 The average age difference between the offender and the victim was 36.7 years. The largest age difference between the offender and victim was 53 years, with 10 cases (91%) involving an age gap of 29 years or more.
- 12.14 8 offenders (73%) were identified as members of the victim's family, 3 of them were the partner of the victim's mother, other family members included grandfather, step grandfather and brother. 1 offender was a family friend.
- 12.15 Remarks on sentence noted mental health issues for 5 offenders (45%) and intellectual disability issues for 4 offenders (36%). Alcohol was also identified as an issue for 2 offenders. None of these factors correlated to greater or lesser sentences.

### Offence characteristics/other factors

- 12.16 10 offenders (91%) were sentenced for more than one offence.
- 12.17 10 offenders (91%) pleaded guilty, with 6 offenders (55%) receiving a discount of 25% for pleading at the earliest available opportunity. The remaining offender was unfit to plead and received a limiting term.
- 12.18 The 5 offenders (45%) with no prior offences received head sentences ranging from 1 year and 6 months to 6 years. The 6 offenders (55%) with prior offences (only one of which included sexual offences) received head sentences ranging from 2 years and 9 months to 11 years.
- 12.19 In 5 cases (45%) the court noted a victim impact statement in the remarks on sentence.
- 12.20 Only 2 matters (18%) were sentenced within 2 years of the offence. 5 matters (45%) were sentenced within 2-4 years of the offence. 3 matters (27%) were sentenced within 5-8 years of the offence. 1 matter was sentenced 10 years after the offence.

## Case studies

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### Longer sentence

Maximum penalty: **20 years imprisonment**

Head sentence: **11 years**; Non-parole period: **5 years 6 months**

- 12.21 The offender was aged 59 years at the time of the principal offence. The victim, his stepdaughter, was aged 12 years.
- 12.22 The offender pleaded guilty to 5 offences: one of aggravated indecent assault on a child under 16 years, 2 offences of sexual intercourse with a child between 10 and 14 years in circumstances of aggravation, two offences of aggravated sexual intercourse with a child between 14 and 16. In each case the aggravation was that the victim was under the authority of the offender. Four further offences were taken into account on a Form 1: one of each of the offences already listed and one count of sexual intercourse with a child between 16 and 18 years under special care.
- 12.23 The offending came to light when the victim became distressed while visiting a friend and revealed to her friend's father that the offender had been sexually assaulting her for the previous 4 years. Court observed that the offending in the five offences charged and the matters taken into account on a Form 1 was part of a pattern of behaviour.
- 12.24 The first offence, when the victim was 12 and suffering a fever, involved the offender wiping her breasts and genital area with a wet cloth. The second offence involved the offender wiping the victim's naked body and inserted his finger into her vagina, advising her that it would "help her when she used tampons". The third offence (principal offence) also involved the offender wiping the victim's naked body, requiring the victim to be blindfolded and having penile vaginal intercourse, only stopping when she said it hurt. For the fourth offence, when the victim was 15, the offender had penile anal intercourse because the victim was menstruating, he also pushed his penis between her breasts and ejaculated on her face. For the fifth offence, the offender arranged to be home with the victim when she returned early from a school excursion, made her dress in a little Red Riding Hood costume and fondled her breast and repeatedly inserted a finger into her vagina.
- 12.25 The offender co-operated with police when arrested and entered an early guilty plea entitling him to a 25% discount.
- 12.26 The court had before it letters from the offender's wife and natural daughter speaking of him in warm terms as a good and devoted husband and father.
- 12.27 The court found that the offender had no psychological or mental health issues that impacted on his offending.
- 12.28 The offender committed the sexual offences while on a s 10 bond for possessing and failing to keep safely a firearm but the court considered this a relatively minor matter when compared to the serious offending before it. The court considered him

to be a person of prior good character, although this was subject to substantially reduced weight in the circumstances.

- 12.29 The court was satisfied that he expressed genuine contrition for the offences. The court assessed his prospects of re-offending as being low and his prospects of rehabilitation as being fair, particularly if he continued to advance to a point where he fully accepted that the blame for the offending was completely his.
- 12.30 The court noted the statements of principle about the objective seriousness of such offences and the pattern of increasing sentences that has responded to greater understanding about the long term effects of child sexual abuse and incest. The court also noted the emphasis on the need for deterrent sentences of significant duration particularly in cases where the offender is in authority over the victim.
- 12.31 The court imposed a head sentence of 11 years imprisonment for the principal offence, with a non-parole period of 5 years and 6 months. The total sentence was 12 years imprisonment with a non-parole period of 6 years and 6 months. In setting the total sentence, the court was careful to accumulate the sentences in a way that responded to the totality of objective criminality without producing an excessively crushing sentence. The court made a finding of special circumstances to vary the non-parole period because of the partial accumulation of sentences, the offender's first exposure to a custodial sentence and the offender's age, which was 65 at the time of sentencing.

### Mid range sentence

Maximum penalty: **20 years imprisonment**

Sentence: **4 years 9 months**; Non-parole period: **3 years**

- 12.32 The offender was 40 years old at the time of the principal offence. The victim of the principal offence was the offender's 10 year old daughter.
- 12.33 The offender pleaded guilty to three counts of aggravated sexual intercourse with children between 10 and 14 years – namely the victim and her friend. The circumstance of aggravation in each case was that each child was under the offender's authority.
- 12.34 The victim had her 11 year old friend over for a sleepover. The offender had consumed around 14 full strength beers in the course of the afternoon and evening. The friend, who had been talking in a "dirty" manner with the victim, twice asked the offender if she could view a pornographic movie. The offender replied on the second occasion "only if you suck my penis". The friend then convinced the victim to enter the offender's bedroom and asked the offender how to put a condom on. The offender demonstrated by placing a condom on his penis and the victim watched pornography while the friend fellated the offender for about 15 minutes. The friend then convinced the victim to do likewise and the victim sucked the offender's penis once or twice. The victim left the room after being pushed away and the friend continued fellating the offender. About a year later, the victim's friend again slept over and the girls again talked "dirty". The friend entered the offender's bedroom to

show him some draft text messages with sexual content. The friend fellated the offender for about 15 minutes.

- 12.35 Later that year, the friend disclosed the offences against her. The offender was arrested, but declined an interview. About 2 months later, the victim disclosed the offence against her and was interviewed. An AVO was granted in relation to the victim and she was placed in the care of the offender's mother. The offender was arrested and made full admission in a recorded interview. The offender pleaded guilty at the earliest opportunity, entitling him to a 25% discount
- 12.36 The offender left school at 15 because of bullying and poor grades, but despite this he had a good employment history. The offender gained custody of the victim when she was 3 years old and raised her himself. The offender had a longstanding problem with alcohol. The court found he had taken no steps to address this problem and that it provided no excuse for his conduct.
- 12.37 The offender had a criminal record, arising from his longstanding problem with alcohol. The court found it not sufficiently relevant to deny him leniency.
- 12.38 The offender was assessed as having a low to moderate risk of re-offending. The offender was willing to participate in recommended sex offender and alcohol detoxification programs. The court accepted the offender's expression of remorse.
- 12.39 The court noted some aspects of the offending that made the offences of lesser seriousness, including that the offender did not initiate the activity, the sexual activity was less serious, and did not involve physical pain or violence. However, other factors increased the objective seriousness of the offences including the relatively younger age of the victims, the offender encouraged the first offence and did nothing to stop the subsequent activities, the first two offences took place in the presence of both victims while a pornographic movie was playing, and the two offences involving the friend were of relatively long duration. The court also noted the offence involved a breach of trust and that the relationship of father and natural daughter served to elevate the offence against the victim to a level of seriousness comparable to the offences against the victim's friend.
- 12.40 The court took the impact of separating the family (where the offender was close to, and had sole care of, the victim) into account in a general sense but did not give it significant weight in mitigating the sentence.
- 12.41 The court took into account the need for general deterrence and imposed a head sentence for each offence of 4 years and 9 months imprisonment with a non-parole period of 3 years. The court noted that some partial accumulation of sentences was called for, resulting in a total sentence of 5 years and 7 months imprisonment with a non-parole period of 3 years and 10 months. The court found special circumstances to vary the statutory ratio because there was a degree of accumulation of the sentences, and the offender would be imprisoned for the first time and would need an extended period of supervision to deal with the problems that gave rise to the offending.

### Shorter sentence

Maximum penalty: **20 years imprisonment**

Head sentence: **2 years 3 months**; Non-parole period: **9 months**

- 12.42 The offender was 18 years of age at the time of the offences. The victim, the offender's brother, was aged 13 years and had a form of cerebral palsy.
- 12.43 The offender pleaded guilty to 2 counts of aggravated sexual intercourse with a child between 10 and 14. There was also a charge of intimidation against his mother and offences on Form 1 of aggravated sexual intercourse with a child between 10 and 14 and assault (against his mother).
- 12.44 The first offences occurred at home while their mother was at work. The offender stripped and the victim (after some cajoling) sat on his face. The victim, at the offender's request, also licked and sucked the offender's penis. The offender also licked and sucked the victim's penis (Form 1). He stopped when the victim said he did not want to do it any more.
- 12.45 The next day, while their mother was asleep, the victim asked the offender for cigarettes. The offender agreed provided the victim performed oral sex on him. He removed his clothes and the victim performed oral sex for about 6 minutes before saying that he no longer wanted to do it and stopped.
- 12.46 The following day, the offender became angry and abusive to his mother because the victim was apparently not at home. When the victim arrived home the offender threw a chair at him and tried to stab the victim in the throat. The victim escaped and contacted the police who took the offender into custody. Because of threats of self-harm while in custody, the offender was scheduled to a mental health unit.
- 12.47 The offender entered pleas at the earliest opportunity entitling him to a discount of 25%.
- 12.48 His parents had separated and the offender had experienced/witnessed domestic violence. At seventeen he commenced working with a charity one day a week, making rags and emptying donation bins.
- 12.49 The offender had become fixated on sex, including some unconventional sexual interests. There was evidence before the court of potentially serious mental health disorders in the offender.
- 12.50 The offender had no prior criminal history. The court accepted that he had expressed remorse for his conduct against his brother. He was assessed as posing a moderate to high risk of re-offending.
- 12.51 The court noted that the offences were serious, but that the level of criminal culpability was towards the lower end of the scale. The court imposed concurrent head sentences of 2 years and 3 months, with a non-parole period of 9 months. The court made a finding of special circumstances to allow for an extended period of supervision to undertake programs to assist in the offender's rehabilitation.



## 13. Sexual intercourse, child between 14 and 16 years – s 66C(3)

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### Background

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- 13.1 Under s 66C(3) of the *Crimes Act 1900* (NSW) it is an offence to have sexual intercourse with another person who is of or above the age of 14 years and under the age of 16 years.
- 13.2 The maximum penalty is 10 years imprisonment. There is no standard non-parole period.
- 13.3 This is the only offence in our analysis that was triable summarily.<sup>1</sup> We have included matters where this offence was the principal offence and sentenced in the District Court in order to provide a comparison with the other offences relating to children between the ages of 10 and 16 years all of which were sentenced by the District Court.

### District Court matters

- 13.4 For the 7 years between January 2008 and December 2014, the Judicial Information Research System (JIRS) records 92 cases where the District Court sentenced an offence against s 66C(3) as the principal offence. 13 offenders (14%) received a good behaviour bond, 21 offenders (23%) received a suspended sentence and the remaining 58 offenders (63%) received a sentence of imprisonment.
- 13.5 The midpoint sentence in the period was 3 years with sentences ranging between 6 months and 6 years. In only 5 cases were sentences of more than 4 years and six months handed down.

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1. *Criminal Procedure Act 1986* (NSW) sch 1 table 1 Part 1(1).

### Local Court matters

- 13.6 We note that in the 4-year period between July 2011 and June 2015, there were 65 matters where this offence was sentenced as the principal offence in the Local Court. According to JIRS, 19 of these (29%) received a sentence of imprisonment. 17 offenders (26%) received a suspended sentence, 3 offenders (5%) received a community service order, 21 offenders (32%) received a good behaviour bond and 5 offenders (8%) had charges dismissed upon entering a bond.
- 13.7 Almost half of the offenders (32 offenders, or 49%) were aged between 18 and 20 years. A further 23 offenders (35%) were aged between 21 and 25 years.
- 13.8 More than half of the offenders (40 offenders, or 62%) had no prior criminal record. A further 21 offenders (32%) had a prior criminal record that did not involve sexual offences.

### Trends in 2012-2013

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- 13.9 In the period 2012-2013, there were 16 cases where the District Court sentenced an offence against s 66C(3) as the principal offence.
- 13.10 Highlights for this offence in 2012-2013 are :
- Highest proportion of offenders with priors of the same type (25%).
  - Second lowest average age for offender (28 years).
  - Second lowest average age difference between offender and victim (13.4 years).

### The sentences

- 13.11 In the period 2012-2013, 12 cases (75%) received a sentence of imprisonment. 2 offenders received a suspended sentence, and 2 offenders received a good behaviour bond.
- 13.12 For the 12 offenders who received a term of imprisonment, the average head sentence was approximately 2 years and 8 months (median: 2 years and 11 months) with a range of 1 year to 4 years and 9 months.
- 13.13 The longest sentence for the principal offence was 4 years and 9 months, with a non-parole period of 2 years and 9 months. The shortest sentence of imprisonment for the principal offence was 12 months, with a non-parole period of 6 months.
- 13.14 10 of the 12 offenders who received a term of imprisonment were sentenced for more than one offence. The average total or aggregate sentence for all 14 offenders was approximately 3 years and 3 months (median: 3 years and 1 month).

### Victim and offender characteristics

- 13.15 15 of the victims (94%) were female.

- 13.16 All of the offenders were male, with an average age of 28 years (median: 25 years). This is the second lowest average age of offender for any of the offences considered.
- 13.17 The age range at the time of offending was from 18 to 48, with 11 offenders (69%) being 30 years old or less.
- 13.18 The average age difference between offenders and victims was 13.4 years (median 10 years). The age difference ranged from 3 years to 34 years. There is no apparent correlation between age difference and sentences of imprisonment or length of sentence.
- 13.19 One offender was identified as Indigenous.
- 13.20 Of the 14 cases where we know the offender's relationship to the victim, only 2 were family members (1 defacto partner of the victim's mother and 1 brother of the victim), the remainder were known to the victim being friends, acquaintances, friends of relatives, or relatives of friends.
- 13.21 7 offenders (44%) were identified as having a mental health issue at the time of the offence and/or at sentencing. 4 of these 7 were also recorded as having an intellectual disability or cognitive impairment. The 3 longest sentences involved offenders with mental health issues.

### Offence characteristics/other factors

- 13.22 9 offenders (56%) were sentenced for more than 1 sex offence. There was some correlation between the number of additional sex offences and total sentence. The 4 longest total sentences (4-5 years) were each for the principal offence and 4 or more others. The next 4 longest total sentences (2.5-3.6 years) were each for the principal offence and 2-4 others. Those offenders with only one offence received a head sentence of 2.5 years or less, or a suspended sentence or bond.
- 13.23 13 offenders (81%) pleaded guilty, with 5 offenders (31%) receiving a discount of 25% for pleading at the earliest available opportunity. The longest sentence received a 20% discount for a late guilty plea.
- 13.24 In 3 cases, the court noted that the intercourse was "consensual". One of these received the shortest term of imprisonment of 14 months, the other two received non-custodial sentences.
- 13.25 14 of the principal offences (87%) involved penile-vaginal intercourse. This is consistent with the age profile of the victims who would have been either 14 or 15 years old at the time of the offence.
- 13.26 6 offenders (37%) had no prior offences on their record. 6 offenders (37%) had prior offences that were not child sex offences. 4 offenders (25%) had prior offences that involved child sex offences, 2 of them involving prison terms. There was no strong correlation between offence history and sentence.
- 13.27 In 2 cases the offender committed the offence while on conditional liberty. A bond in one case and parole in relation to an interstate offence in the other.

- 13.28 In 7 cases (44%) the court noted a victim impact statement in the remarks on sentence.
- 13.29 The remarks on sentence for 2 cases (12%) referred to a breach of trust.
- 13.30 Half of the offences were sentenced between 1 and 2 years after they were committed, 4 (25%) between 2 and 3 years, and the remaining 4 (25%) between 5 and 8 years.

## Case studies

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### Longer sentence

Maximum penalty: **10 years imprisonment**

Head sentence: **4 years 9 months**; Non-parole period: **2 years 9 months**

- 13.31 The offender was 25 years old at the time of the principal offence. The victim, then aged 15, encountered the offender while seeking employment.
- 13.32 The offender pleaded guilty to 8 charges: 6 counts of sexual intercourse with a child between 14 and 16 years and one count of using a child above the age of 14 for pornographic purposes and another of producing child pornography.
- 13.33 The offender replied to an advertisement the victim placed that she was a high school student looking for a part time job, saying that he could employ women aged 18-32 years for work that included nude modelling. In a subsequent email, the offender acknowledged that the victim was under the age of 16 years.
- 13.34 Upon first attending the offender's premises, the victim was instructed to undress, and the offender inserted a finger in her vagina. The offender indicated that he would take a video of their activity and also took photos of the victim. The offender then removed his pants and inserted his penis in the victim's vagina. On subsequent occasions the offender had penile vaginal intercourse (twice) and penile anal intercourse (twice). The offender recorded much of the sexual activity on video.
- 13.35 The offender entered a late guilty plea, on the day of the trial, entitling him to a 12.5% discount.
- 13.36 The offender was of Indigenous background, and had suffered cerebral damage at birth giving rise to attention deficit hyperactivity disorder. The court noted that, although literate, the offender had a significant intellectual deficit. His upbringing, in a violent environment, was difficult with both parents being heroin addicts. He attended 18 schools, made no friends and was bullied. The court noted that the offender had been subject to bullying while on remand in strict protection.
- 13.37 The offender had previously committed offences of the same type against another victim, in Queensland, involving 11 charges of indecent treatment of a child under 16 years, 6 charges of carnal knowledge of child under 16 years and attempted sodomy of a person under 18 years. For these offences he received a sentence of 12 months imprisonment to be served by way of an intensive corrections order.

- 13.38 The court noted that his past offending removed any possibility of leniency for a first offence and impacted upon his prospects of rehabilitation. However, the court also noted that the offender's moral culpability was reduced by his mental health disorders. His mental condition also reduced the need for general deterrence and would make his term in prison more onerous. The court considered that the protection of the community was not so great a factor given the 8 years of non-offending between the Queensland and NSW offences.
- 13.39 The court imposed a total sentence of 4 years and 9 months with a non-parole period of 2 years and 10 months. This consisted of a concurrent sentence for the pornography offences of 2 years and a non-parole period of 2 years partially accumulated with concurrent sentences for the sexual offences of 4 years and 9 months, with a non-parole period of 2 years and 9 months.
- 13.40 The court made a finding of special circumstances to vary the non-parole period, noting that this was the offender's first sentence that he would spend in custody, that there was a partial accumulation, and that he would need ongoing rehabilitation in the community (which he then intended to spend with his mother in Queensland).

### Mid range sentence

Maximum penalty: **10 years imprisonment**

Head sentence: **2 years 10 months**; Non-parole period: **10 months**

- 13.41 The offender was 48 years old at the time of the principal offence. The victim, a 14 year old girl, was the daughter of the offender's defacto partner.
- 13.42 The offender pleaded guilty to 5 counts of sexual intercourse with a child between 14 and 16 years. A number of offences of indecent assault of a child under 16 years were included on a Form 1.
- 13.43 Shortly after he moved into the victim's family home, when the victim was 12 years old, the offender commenced kissing and touching the victim (Form 1). By the time the victim was 14 years old, the activity also included sexual intercourse. Intercourse took place on four occasions – the first involved digital penetration while the two cuddled, the second involved digital penetration and cunnilingus, the third (principal offence) involved penile-vaginal intercourse. The fourth occasion involved digital penetration and kissing. All of the offences took place in the family home, including in the victim's bedroom and indecent assaults were included in the conduct (Form 1).
- 13.44 On the fifth occasion, the victim's mother walked in and saw what they were doing. Her mother yelled at her and later told her "Get your own boyfriend, he's mine not yours". The offender and victim remained in a sexual relationship until the victim was 19 years old. When the relationship ended the offender wrote a letter to the victim apologising for stripping her of her childhood. The victim complained to the police who arrested the offender. The offender declined to be interviewed. He entered a late guilty plea, at around the time the trial was listed, entitling him to a 10% discount. Seven years had passed between the principal offence and the offender's sentencing.

- 13.45 The offender had a difficult relationship with his parents. His father was aggressive and had an alcohol problem and his mother had psychological problems. He nursed his mother in the 18 months before she died from cancer. The offending commenced at a time when the offender was unemployed (ultimately receiving a disability support pension because of back problems) and was consuming too many illicit drugs.
- 13.46 The court noted that the offender had no criminal record and that references indicated that he was “a person of strength of character and honour”. The court noted that the escalation of activity over time, while not premeditated grooming, was “grooming behaviour of a kind”. The fact that the offences were not isolated went to objective seriousness. The offender’s drug use while perhaps explaining his conduct did not excuse it or reduce his objective culpability. The court accepted his expression of remorse, although noting his reluctance to take complete responsibility as the much older adult he was.
- 13.47 The court considered his prospects of rehabilitation to be good and his risk of re-offending assessed as low, given his record, his capacity for positive social networks, his preparedness to commit to treatment for his sexual offending and substance misuse and the contextual nature of the offending that was unlikely to be repeated.
- 13.48 For the principal offence, the court imposed a sentence of 2 years and 10 months imprisonment with a non-parole period of 10 months. The court imposed a total sentence of 3 years and 2 months with a non-parole period of 1 year and 2 months. The court found special circumstances to vary the statutory ratio because he had not committed prior offences, it was his first time in custody, and he would need an extended period of supervision.

### **Shorter sentence**

Maximum penalty: **10 years imprisonment**

Sentence: **10 month good behaviour bond**

- 13.49 The offender was 18 years old at the time of the offence. The victim, then aged 15 years, was the offender’s girlfriend.
- 13.50 The offender pleaded guilty to one count of sexual intercourse with a child between 14 and 16 years.
- 13.51 The offender entered into a sexual relationship with the victim when she was living with her parents. They had consensual sex a number of times. He used a condom on the first occasion, but subsequently deceived the victim into believing that he was unable to have children. She fell pregnant as a result and gave birth to a daughter. He tried to convince her to abort the child, but she refused.
- 13.52 When the victim reported the offending to the police, the offender declined a police interview. He pleaded guilty, but not at the earliest opportunity, entitling him to a 20% discount.

- 13.53 The court noted that the offender had no prior record. The court also accepted that the child's birth would have "lifelong repercussions" for the offender and the victim.
- 13.54 The court imposed a 10 month good behaviour bond without a supervision condition.



## 14. Aggravated sexual intercourse, child between 14 and 16 years – s 66C(4)

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### Background

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- 14.1 Under s 66C(4) of the *Crimes Act 1900* (NSW) it is an offence to have sexual intercourse with another person who is of or above the aged of 14 years and under the age of 16 years in circumstances of aggravation. The circumstances of aggravation are the same as those that apply for s 66C(2).<sup>1</sup>
- 14.2 The maximum penalty is 12 years imprisonment. At the time the offences under consideration were committed the offence did not have a standard non-parole period (SNPP). From 29 June 2015 an SNPP of 5 years has been added for this offence. A potential outcome of this may be a general increase in the sentences handed down for this offence.<sup>2</sup>
- 14.3 For the 7 years between January 2008 and December 2014, the Judicial Information Research System records 33 cases where an offence against s 66C(4) was sentenced as the principal offence. 5 offenders (15%) received suspended sentences. The remaining 28 offenders (85%) were sentenced to imprisonment. The midpoint sentence in the period was 3 years with sentences ranging between 1 year and 9 years. In only 3 cases were sentences of more than 6 years handed down.

### Trends in 2012-2013

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- 14.4 In 2012-2013, there were 10 cases where an offence against s 66C(4) was sentenced as the principal offence. The aggravating features were charged as follows: 5 offenders (50%) – the victim was under authority; 3 offenders (30%) – the offender was in the company of one or more other people; 2 offenders (20%) – the offender took advantage of the victim being under the influence of alcohol.

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1. *Crimes Act 1900* (NSW) s 66C(5). See para [12.2].

2. See para [1.13]-[1.14]; and also P Poletti and H Donnelly, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Research Monograph 33 (Judicial Commission of NSW, 2010).

14.5 Highlights for this offence 2012-13 are:

- Least number of offenders (10).
- Largest proportion of offenders with no priors (60%).
- Second highest average age of offender (41 years).

### The sentences

14.6 In the period 2012-2013, 9 offenders (90%) received a sentence of imprisonment. One offender received a suspended sentence of 2 years.

14.7 The average head sentence for the principal offence was 2.6 years imprisonment.

14.8 The longest sentence of imprisonment was 4 years, with a non-parole period of 2 years and 6 months. The shortest sentence of imprisonment was 7 months (fixed term).

### Victim and offender characteristics

14.9 8 victims (80%) were female. 8 offenders (80%) were male.

14.10 The average age at the time of offence was 41 years. The age range was from 23 to 69, with 8 offenders (80%) being over 30. The average difference in age between offender and victim was 26 years. The largest age difference between the offender and victim was 54 years, the smallest 8 years.

14.11 3 of the offenders (40%) were family members (1 father, 2 stepfathers), 4 offenders (40%) were friends of the victim's family or family of the victim's friends, one was a teacher, one a shopkeeper and one was not previously known to the victim.

14.12 In 5 cases (50%) the court noted mental health issues (only 2 were relevant to the commission of the offence). In 4 separate cases (40%) the court noted the offender had an intellectual disability or cognitive impairment. In the former, 4 of the head sentences ranged from 3 years to 4 years. In the latter, 3 of the head sentences ranged from 1 year 11 months to 2 years 3 months, with one receiving a suspended sentence. 8 of the 9 offenders who were sentenced to imprisonment met one of these categories and special circumstances were found in each case justifying a substantial variation from the standard ratio between head sentence and non-parole period.

### Offence characteristics/other factors

14.13 7 offenders (70%) were sentenced for more than 1 sex offence. The 3 who committed only one offence received a suspended sentence or a relatively short sentence of imprisonment.

14.14 7 offenders (70%) pleaded guilty, with 4 receiving a discount of 25% for pleading at the earliest available opportunity. The offender with the longest total sentence (6 years 6 months) received a 10% discount for a late guilty plea.

- 14.15 6 of the offences took place in the offender's home, or a home to which the offender had access.
- 14.16 6 offenders (60%) had no prior criminal record. The offender whose prior criminal record included sex offences received the longest sentence for the principal offence of 4 years. One of the offenders without a prior criminal record received the only non-custodial sentence.
- 14.17 In one case (10%) the court noted a victim impact statement in the remarks on sentence.
- 14.18 4 offences (40%) were sentenced between 1 and 2 years of the offence. 3 offences (30%) were sentenced between 8 and 10 years of the offence.

## Case studies

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### Longer sentence

Maximum penalty: **12 years imprisonment**

Head sentence: **4 years**; Non-parole period: **2 years 6 months**

- 14.19 The offender was aged 52 years at the time of the principal offence. The victim, then aged 14 years, was the offender's stepdaughter.
- 14.20 The offender pleaded guilty to 6 counts against the victim including indecent assault of a child under 16, sexual intercourse with a child between 14 and 16 years and sexual intercourse with a child between 16 and 18 years under special care. The offender also pleaded guilty to one count of aggravated indecent assault against the victim's younger sister. A large number of similar matters were included on a Form 1 with respect to both children.
- 14.21 The offences involved an escalation in offending behaviour and in control of the victim. The court also noted that the charges were representative of a continuing series of assaults. The first offence, when the victim was aged 10 or 11 years, involved the offender touching the victim's genital area under her underpants. The next (Form 1), involved rubbing the victim's clitoris with his fingers. Next, when the victim was 14 or 15 years, he induced her into his bedroom and performed cunnilingus on her. When on a school exchange trip when she was 15, the victim determined to avoid further assaults, however, when she returned home, the offender convinced her to continue having sex. Such manipulation continued through the course of subsequent offending, including digital penetration (Form 1), inserting his penis in the victim's vagina and causing pain (principal offence), and subsequent acts of sexual intercourse, culminating in the offender ejaculating inside the victim's vagina.
- 14.22 After the last incident, the victim broke down in class and disclosed the offender's conduct to two school counsellors. She also disclosed the offences to her mother who confronted the offender. He sought to make excuses for his behaviour, but she

reported him to the police. The offender entered a late guilty plea, entitling him to a 10% discount.

- 14.23 The offender came to Australia with his family when he was 17. He was an accomplished musician and was employed as a baker. The offender had no prior criminal history.
- 14.24 The court emphasised the need for general deterrence in cases where a person in a position of trust takes advantage of his stepdaughters. The court also noted the need for specific deterrence in the case of an offender with paedophilic tendencies. The court noted that the offender had expressed remorse and appeared motivated to engage in rehabilitation.
- 14.25 The court imposed a head sentence of 4 years with a non-parole period of 2 years and 6 months for the principal offence. The total head sentence was 6 years and 6 months with a non-parole period of 5 years. The court found special circumstances to vary the non-parole period on the basis that the offender would most likely be in protective custody and the need to undertake psychiatric therapy for his condition.

### Mid range sentence

Maximum penalty: **12 years imprisonment**

Head sentence: **2 years**; Non-parole period: **1 year**

- 14.26 The offender was 26 years old at the time of the offence. The victim, a 15 year old girl, was a friend of the offender's foster brother.
- 14.27 The offender pleaded guilty to one count of aggravated sexual intercourse with a child aged 14-16 years. The circumstance of aggravation was that the offender took advantage of the victim being under the influence of alcohol or a drug in order to commit the offence.
- 14.28 The victim had communicated with the offender on Facebook, but only met him in person the day before the offence. The victim and a friend were out late and dropped by the offender's foster brother's house in the early hours of the morning. The foster brother was asleep, but the offender invited the girls into his caravan which was at the front of the house. The offender gave the girls bourbon and coke. The victim's friend was unwell and lay down on the bed. After tending to her, the victim, feeling the effects of the alcohol, lay down on the lounge and the offender started kissing her. She said no, but he started undoing her pants, she said no again, but he continued removing her clothing before having penile-vaginal intercourse with her. The offender stopped after he asked if the victim wanted him to stop and she said "yes". The victim subsequently needed her mother to help her get home.
- 14.29 Weeks later the victim started a conversation with the offender on Facebook accusing him of taking advantage of her while drunk. The victim's mother became aware of the exchanges on Facebook. The police became involved and charged the offender after he declined to be interviewed. The offender entered a late guilty plea on the day fixed for his trial, entitling him to a 10% discount.

- 14.30 The offender's childhood was marred by drugs, violence and appalling circumstances. The offender was found to be of extremely low intelligence and may have had trouble understanding the victim's initial refusals.
- 14.31 The offender had a criminal record, but for unrelated offences involving dishonesty and breaking and entering.
- 14.32 The court considered that because of the offender's intellectual disability, the case was not appropriate for achieving general deterrence, but that the purposes of specific deterrence and punishment were still relevant. The prosecution did not assert that there were any additional aggravating circumstances other than the elements of the offence charged.
- 14.33 The court imposed a sentence of 2 years imprisonment with a non-parole period of 1 year. The court found special circumstances to vary the statutory ratio on the basis that the offender would have problems adjusting back into the community upon release from prison and would require supervision.

### Shorter sentence

Maximum penalty: **12 years imprisonment**

Sentence: **2 year suspended sentence**

- 14.34 The offender was 42 years old at the time of the offence, living in a remote regional area. The victim, then 14 years old, had no previous connection with the offender.
- 14.35 The offender pleaded guilty to the offence of aggravated sexual intercourse with a child aged between 14 and 16 years. The circumstance of aggravation was that the offender committed the offence in company with a co-offender. A matter was also taken into account on a Form 1.
- 14.36 The victim and the co-offender lived with the victim's grandparents. The co-offender invited the victim to go with him to a public lavatory in order to engage in sexual activity with other men. The co-offender met the offender in the vicinity of the lavatory, advised him that the victim was 14 and all three went behind a building some distance from the lavatory block. All three then removed their pants and the offender and co-offender rubbed the victim's penis. On instructions from the co-offender, the victim fellated the offender (principal offence) and then the co-offender. The co-offender then fellated the victim and the offender. The offender then masturbated the victim until he ejaculated (Form 1). There was also some other sexual activity within this one incident.
- 14.37 Some 7 years later, the victim made a complaint to the police who arrested and interviewed the offender just over 2 months later. The offender entered an early guilty plea at the committal hearing entitling him to a 25% discount. He also undertook to give evidence against the co-offender at the co-offender's trial, gaining a further 15% discount for assistance to the authorities.
- 14.38 The offender's cognitive functioning was assessed as within the borderline to low average range. He struggled at school and left in year 8, had no employment history and had been sexually abused by a youth worker at the age of 15. He had limited

family contacts, and lived mostly in social isolation. He had never had an intimate relationship, apart from fleeting anonymous sexual encounters in public lavatories.

- 14.39 The court found that the offence had not been planned and that it was the co-offender who had been grooming the victim for some time before the incident.
- 14.40 The court noted the offender had no prior criminal history and was entitled to be dealt with as a person of prior good character. The court noted there was no evidence of remorse and the offender had little insight into his offending, however, this was to be expected given his limited intellectual capacity.
- 14.41 The court noted an assessment that he had a low to moderate risk of re-offending and that participation in a sex offender's program might not be possible in his region of residence. However, given his lack of criminal record, the court found on balance that there was little likelihood of re-offending.
- 14.42 The court imposed a suspended sentence of 2 years, taking into account the offender's limited intellectual capacity (making the sentence unsuitable for general deterrence), his assistance to the authorities and his potential vulnerability in prison. A condition of his bond was that he undertake any course that the Probation and Parole Service might recommend.

## Appendix A: Data tables

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- a.1 The following tables set out some of the data extracted from the remarks on sentence for the offences surveyed. They include only data that can be described, objectively coded and displayed simply.
- a.2 As the case studies in Chapters 8-14 show, there are a wide variety of victims, offenders and circumstances in which the offences are committed. Tables of the sort that follow can never adequately explain all of the factors that a court takes into account or precisely how that court has arrived at a particular sentence.
- a.3 As with the surveys and case studies set out in Chapters 8-14, these tables illustrate the complexity of the sentencing process.

**Section 66A(1)**

	1	2	3	4	5	6	7	8	9	10	11
No of offences convicted	1+	1+	1+	1+	1	1+	1+	1+	1	1+	1
Matters on Form 1	Y			Y	Y	Y	Y	Y			
No Priors	Y						Y			Y	
Priors - Different type only		Y			Y				Y		Y
Priors – Different type only (gaol)		Y									
Priors - Same type						Y		Y			
Priors - Same type (gaol)			Y	Y							
Plea - Guilty/not guilty (G/N)	G	G	G	G	G	G	G	G	N	G	G
Guilty - early/late (E/L)	E	L	L	L	E	E	E			E	E
Discount (%)	25	15	15	10	35	25	-			25	25
Principal offence - Head (months)	216	153	132	120	78	72	72	60	54	54	48
NPP (months)	162	90	92	78	42	48	36	36	54	27	30
Total sentence - Head (months)	288	201	141	126	78	84	84	75	54	54	48
NPP (months)	216	138	101	84	42	48	48	51	54	27	30
Suspended sentence (months)											
Offender - Gender	M	M	M	M	M	M	M	M	M	M	M
Indigenous		Y									
Intellectual disability/ Cognitive impairment				Y	Y		Y		Y		
Mental health issues					Y				Y	Y	
Alcohol and/or drug	Y	Y			Y				Y		Y
Good character			Y								
Offender - Age at offence (years)	57	17	54	33	40	61	20	46	52	18	59
Offender - Age at sentence (years)	60	22	56	36	41	62	25	48	55	19	60
Victim - Gender	F	F	F	M	F	F	M	F	F	F	F
Victim - Age (years)	2	5	8	8	6	7	7	6	4	5	7
Age difference (years)	55	12	46	25	34	54	13	40	48	13	52
Offender's relationship	fam	oth	fr	fr	fam	fr	fam		oth	fam	fr
Location	H	Oth	Oth	H	H	O	H		Oth	O	H

12	13	14	15	16	17	18	19	20	21	22	23	
1+	1+	1+	1+	1	1+	1+	1	1+	1+	1	1	No of offences convicted
	Y					Y	Y	Y				Matters on Form 1
Y	Y	Y			Y	Y	Y	Y	Y	Y	Y	No Priors
			Y	Y								Priors - Different type only
												Priors – Different type only (gaol)
												Priors - Same type
												Priors - Same type (gaol)
N	G	G	N	G	N	G	G	G	G	G	G	Plea - Guilty/not guilty (G/N)
	E	E		E		E	E	E	L	L	E	Guilty - early/late (E/L)
	25	25		25		25	25	25	25	10-15	25	Discount (%)
48	39	39	36	36	12							Principal offence - Head (months)
12	18	12	21	12	12							NPP (months)
56	42	45	36	36	72							Total sentence - Head (months)
20	21	18	21	12	36							NPP (months)
						24	21	19	18	18	18	Suspended sentence (months)
M	M	M	M	M	M	M	M	M	M	M	M	Offender - Gender
												Indigenous
	Y			Y				Y	Y			Intellectual disability/ Cognitive impairment
Y	Y	Y					Y					Mental health issues
	Y		Y	Y	Y							Alcohol and/or drug
Y				Y	Y		Y					Good character
14	60	17	64	59	51	14	14	17	16	15	14	Offender - Age at offence (years)
16	61	18	66	61	53	16	16	19	17	16	14	Offender - Age at sentence (years)
F	M	M	F	F	F	F	F	F	F	F	F	Victim - Gender
9	9	8	8	8	7	7	7	4	8	9	6	Victim - Age (years)
5	51	9	56	51	44	7	7	13	8	6	8	Age difference (years)
fam	fr	fam	fr	fam	fr	oth	fam	fr	fr	fam	fam	Offender's relationship
H	O	H	H	O	O	Oth	H	H	H		H	Location

*fam – includes extended family; fr – friend, friend of family or family of friend; oth – includes intruder, stranger, visitor*

*O – offender's home; H – Victim's home; Oth – includes outdoor, other house, on property.*

**Section 66A(2)**

	1	2	3	4	5	6	7	8	9
No of offences convicted	1+	1+	1+	1+	1+	1+	1+	1+	1+
Matters on Form 1	Y	Y				Y	Y	Y	
No priors			Y	Y		Y	Y	Y	
Priors - Different type only	Y	Y			Y				Y
Priors – Different type only (gaol)									
Plea – Guilty/not guilty (G/N)	G	G	G	G	N	G	G	G	G
Guilty – early/late (E//L)	L	L	E	E		L	E	E	L
Discount (%)	10	10-15	25	25		25	25	25	8
Principal offence - Head (months)	204	156	151	144	132	126	120	117	110
NPP (months)	132	108	65	108	96	76	88	86	79
Total sentence - Head (months)	228	216	225	216	132	144	168	123	122
NPP (months)	156	156	160	162	96	96	114	92	91
Offender - Gender	M	M	M	M	M	M	M	M	M
Indigenous	Y					Y			
Intellectual disability/ Cognitive impairment								Y	
Mental health issues	Y		Y	Y	Y		Y		Y
Alcohol and/or drug	Y			Y		Y	Y		Y
Good character		Y							
Offender - Age at offence (years)	20	41	27	40	29	42	32	35	56
Offender - Age at sentence (years)	22	43	29	44	31	44	33	36	58
Victim - Gender	F	F	F	F	F	F	F	F	F
Victim - Age at offence (years)	8	2	6	9	5	5	8	9	8
Age difference (years)	12	39	21	31	24	37	24	26	48
Offender's relationship	fr	fam	oth	fam	fam	fam	fam	fam	fam
Location	Oth	H	Oth	H	H	H	H	H	O

10	11	12	13	14	15	16	17	18	
1+	1+	1+	1+	1+	1+	1+	1+	1+	No of offences convicted
Y		Y	Y				Y	Y	Mattes on Form 1
		Y					Y		No Priors
Y	Y		Y	Y	Y	Y		Y	Priors - Different type only
									Priors – Different type only (gaol)
G	G	G	G	G	N	N	G	G	Plea – Guilty/not guilty (G/N)
E	E	E	E	L			E	L	Guilty – early/late (E//L)
25	25	25	25	15			25	10	Discount (%)
108	108	96	96	94	90	84	84	75	Principal offence - Head (months)
72	54	72	60	60	54	48	36	42	NPP (months)
144	180	120	108	100	96	96	120	108	Total sentence - Head (months)
96	120	78	72	66	60	60	72	66	NPP (months)
M	M	M	M	M	M	M	M	M	Offender - Gender
									Indigenous
									Intellectual disability/ Cognitive impairment
Y	Y	Y			Y		Y		Mental health issues
	Y							Y	Alcohol and/or drug
		Y	Y	Y	Y	Y	Y		Good character
50	31	39	33	72	28	62	24	39	Offender - Age at offence (years)
51	33	41	34	75	29	65	26	41	Offender - Age at sentence (years)
F	F	F	F	F	F	F	M	F	Victim - Gender
9	9	9	8	6	5	8	8	8	Victim - Age at offence (years)
41	22	30	25	66	23	54	16	31	Age difference (years)
fam	oth	fam	Offender's relationship						
H	H	H	H	O	H	H	Oth	H	Location

*fam – includes extended family; fr – friend, friend of family, family of friend or neighbour; oth – includes stranger, childcare assistant  
O – offender's home; H – Victim's home; Oth – includes outdoors, excursion.*

**Section 61J (SNPP)**

	1	2	3	4	5	6	7	8	9	10	11	12
No of offences convicted	1+	1+	1	1+	1+	1+	1+	1+	1+	1+	1+	1+
Matters on Form 1	Y	Y									Y	
No Priors					Y						Y	Y
Priors - Different type only							Y	Y	Y	Y		
Priors - Different type only (gaol)		Y	Y	Y		Y						
Priors – Same type												
Priors - Same type (gaol)	Y											
Plea - Guilty/not guilty (G/N)	G	G	N	N	N	G	N	N	N	N	G	G
Guilty - early/late (E/L)	L	L				E					L	E
Discount (%)	12.5	10				25					15	25
Principal offence - Head (months)	124	120	120	120	120	120	108	96	96	96	96	96
NPP (months)	84	90	84	78	72	60	60	60	60	60	48	48
Total sentence - Head (months)	160	180	120	120	126	204	120	114	96	119	114	96
NPP (months)	120	135	84	78	90	144	72	78	60	83	66	48
Suspended sentence (months)												
Good behaviour bond (months)												
Offender - gender	M	M	M	M	M	M	M	M	M	M	M	M
Indigenous							Y					
Intellectual disability/ Cognitive impairment												
Mental health issues			Y		Y	Y	Y	Y				
Alcohol and/or drug		Y	Y	Y		Y	Y	Y	Y			
Good character					Y							
Offender - Age at offence (years)	38	46	39	44	36	39	49	53	40	45	44	65
Offender - Age at sentence (years)	42	49	40	46	41	46	59	63	46	48	48	67
Victim - gender	F	F	F	F	F	F	F	F	F	F	F	F
Victim - Age at offence (years)	13	13	11	13	13	10	15	11	12	13	14	10
Age difference (years)	25	33	28	31	23	29	34	42	28	32	30	55
Offender's relationship	fam	fam	fam	fam	fam	fam	fam	fam	fr	fam	fam	fam
Location	H	H	H	H	Oth	H	H	Oth	O	O	H	O

13	14	15	16	17	18	19	20	21	22	23	
1	1	1+	1+	1+	1+	1+	1+	1	1+	1+	No of offences convicted
			Y		Y		Y	Y			Matters on Form 1
Y		Y		Y	Y		Y		Y		No Priors
			Y			Y		Y			Priors - Different type only
						Y					Priors - Different type only (Gaol)
										Y	Priors - Same type
	Y										Priors - Same type (gaol)
G	G	G	G	G	G	N	G	G	N	G	Plea - Guilty/not guilty (G/N)
E	E	E	E	E	E		L	L			Guilty - early/late (E/L)
25	25	25	25	25	25		15	12		-	Discount (%)
90	72	72	72	72	66	48	40	21			Principal offence - Head (months)
58	45	36	36	30	42	30	20	10			NPP (months)
90	72	72	84	84	69	63	40	21			Total sentence - Head (months)
58	45	36	48	42	45	39	20	10			NPP (months)
									24		Suspended sentence (months)
										36	Good behaviour bond (months)
M	M	M	M	M	M	M	M	M	M	M	Offender - gender
											Indigenous
					Y			Y			Intellectual disability/ Cognitive impairment
		Y	Y			Y					Mental health issues
Y			Y			Y					Alcohol and/or drug
		Y	Y	Y					Y		Good character
27	52	26	61	60	16	48	24	17	19	47	Offender - Age at offence (years)
28	55	27	63	62	17	50	26	18	21	55	Offender - Age at sentence (years)
F	F	F	F	M	F	F	F	F	F	F	Victim - gender
11	6	15	12	15	-	10	14	12	14	11	Victim - Age at offence (years)
16	46	11	49	45	-	38	10	5	5	36	Age difference (years)
fam	fam	fr	fam	-	oth	fam	fr	fr	fam	fam	Offender's relationship
H	H	O	H	-	Oth	H	H	O	-	-	Location

*fam – includes extended family; fr – friend, friend of family, family of friend or neighbour; oth – includes stranger  
O – offender's home; H – Victim's home; Oth – includes hotel, outdoors, park.*

**Section 66C(1)**

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
No of offences convicted	1+	1+	1+	1+	1+	1+	1+	1+	1	1+	1+	1+	1	1+	1+
Matters on Form 1	Y					Y	Y				Y				Y
No priors				Y			Y		Y	Y		Y			
Priors - Different type only		Y	Y		Y			Y			Y				Y
Priors - Different type only (Gaol)						Y							Y	Y	
Priors - Same type (gaol)	Y														
Plea - Guilty/not guilty(G/N)	G	G	N	N	G	G	G	G	N	N	G	G	G	G	G
Guilty - Early/late (E/L)	E	L			E	E	L	E			E	E	L	E	E
Discount (%)	25	20			25	25	20	25			25	25	15	25	25
Principal offence - Head (months)	84	48	48	45	36	36	36	30	27	24	18	18	18	18	18
NPP (months)	57	24	24	45	24	18	17	21	9	8	18	9	7	6	4
Total sentence - Head (months)	108	66	48	51	60	39	36	30	27	27	36	18	18	19	20
NPP (months)	81	33	24	30	36	21	17	21	9	11	18	9	7	7	6
Suspended sentence															
Good behaviour bond															
Offender - gender	M	M	M	M	M	M	M	M	M	M	M	M	M	M	M
Indigenous								Y							
Intellectual disability/ Cognitive impairment							Y							Y	
Mental health issues					Y		Y	Y							
Alcohol and/or drug		Y				Y	Y	Y						Y	Y
Good character				Y											Y
Offender - Age at offence (years)	50	21	39	36	80	22	19	22	20	15	20	24	20	18	19
Offender - Age at sentence (years)	51	22	49	38	84	24	21	23	21	16	22	25	21	21	20
Victim - Gender	F	F		F	F	F		F	F	F	F	F	F	F	F
Victim - Age at offence (years)	11	13	10	13	12	13	13	12	13	13	12	13	13	13	13
Age difference (years)	39	8	29	23	68	9	6	10	7	2	8	11	7	5	6
Offender's relationship	fr	fr		fr	fr	fr		oth	fr	fr	fr	fam	fr	fr	fr
Location	Oth	H		H	O	Oth		Oth			O	H	O	H	Oth

16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	
1	1+	1+	1	1+	1+	1+	1	1+	1	1	1+	1	1	1	1	No of offences convicted
Y					Y	Y		Y	Y	Y			Y			Matters on Form 1
	Y	Y					Y		Y		Y	Y	Y	Y	Y	No priors
Y			Y	Y	Y	Y		Y		Y						Priors - Different type only
																Priors - Different type only (Gaol)
																Priors - Same type (gaol)
G	G	G	G	G	G	G	G	G	G	G	G	G	G	G	G	Plea - Guilty/not guilty(G/N)
E	E	E	L	E		E	L	E		L		E	L	E	E	Guilty - Early/late (E/L)
25	25	25		25	25	25	15	35	-	10	-	25	10	25	-	Discount (%)
15	14															Principal offence - Head (months)
8	5															NPP (months)
15	15															Total sentence - Head (months)
8	6															NPP (months)
		24	24	24	24	24	20	19	18	16	16	15				Suspended sentence
													36	24	18	Good behaviour bond
M	M	M	M	M	F	M	M	M	M	M	M	M	M	M	M	Offender - gender
										Y						Indigenous
Y			Y			Y										Intellectual disability/ Cognitive impairment
Y					Y			Y					Y	Y		Mental health issues
Y			Y	Y				Y		Y		Y		Y		Alcohol and/or drug
	Y		Y		Y		Y							Y	Y	Good character
27	20	22	20	25	18	19	18	20	21	18	18	18	20	18	18	Offender - Age at offence (years)
37	20	23	21	25	21	20	19	22	22	20	19	18	24	19	18	Offender - Age at sentence (years)
F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	Victim - Gender
13	13	13	11	13	13	12	13	13	12	13	13	12	12	13	13	Victim - Age at offence (years)
14	7	9	9	12	5	7	5	7	9	5	5	6	8	5	5	Age difference (years)
fr	fr	fr	fr	fam	fr	fr	fr	fr	fr	fr	fr	fr	fam	fr	fr	Offender's relationship
H	H	Oth	Oth	H	O	Oth	Oth	H	H	O		Oth	O	H	Oth	Location

*fam – includes extended family; fr – friend, friend of family, family of friend or neighbour; oth – includes stranger  
O – offender's home; H – Victim's home; Oth – includes warehouse, park, friend's house, hotel.*



## Section 66C(2)

	1	2	3	4	5	6	7	8	9	10	11
No of offences	1+	1+	1+	1+	1+	1+	1+	1+	1	1+	1+
Matters on Form 1	Y	Y	Y	Y			Y		Y	Y	
No Priors				Y	Y		Y			Y	Y
Priors - Different type only	Y	Y				Y		Y	Y		
Priors - Different type only (Gaol)											
Priors - Same type			Y								
Priors - Same type (gaol)											
Plea - Guilty/not guilty (G/N)	G	G	G	G	G	G	G	G	G	G	Unfit
Guilty - Early/late plea (E/L)	E	L	L	E		E	E	E	L	E	
Discount (%)	25	10		25		25	25	25	12.5	25	
Principal offence - Head (months)	132	130	99	72	72	57	45	36	33	27	18
NPP (months)	66	90	51	36	45	36	0	36	9	9	0
Total sentence - Head (months)	144	134	135	108	72	67	51	60	33	27	48
NPP (months)	78	96	87	72	45	46	27	54	9	9	0
Offender - Gender	M	M	M	M	M	M	M	M	M	M	M
Intellectual disability/ Cognitive impairment		Y	Y							Y	Y
Mental health issues						Y	Y		Y	Y	Y
Alcohol and/or drug		Y				Y					
Good character	Y						Y				
Age at offence	59	47	51	49	51	40	55	54	43	18	64
Age at sentence	65	49	58	51	59	43	57	64	46	19	68
Victim - Gender	F	F	F	M	F	F	F	M	F	M	F
Victim - Age (years)	12	10	10	13	10	10	12	12	13	13	11
Age difference (years)	47	37	41	36	41	30	43	42	30	5	53
Offender's relationship	fam	fam	fr	fam		fam	fam	fam	fam	fam	
Location		H	O			H	Oth	O	O	H	H

*fam – includes extended family; fr – friend, friend of family, family of friend or neighbour.  
O – offender's home; H – Victim's home; Oth – includes offender's car.*

**Section 66C(3)**

	1	2	3	4	5	6	7	8
No of offences convicted	1+	1+	1+	1+	1+	1+	1+	1
Matters on Form 1			Y			Y	Y	
No priors		Y			Y	Y	Y	
Priors - Different type only			Y	Y				Y
Priors - Different type only (gaol)				Y				Y
Priors - Same type	Y							
Priors - Same type (gaol)								
Plea - Guilty/not guilty (G/N)	G	Unfit	G	G	G	G	G	N
Guilty - early/late plea (E/L)	L		E	L	E	L	L	
Discount (%)	12.5		25	20	25	10	10	
Principal offence - Head (months)	57	48	36	36	36	36	34	30
NPP (months)	33	48	15	12			10	15
Total sentence - Head (months)	57	60	48	60	36	43	38	30
NPP (months)	34	60	27	36	9	26	14	15
Suspended sentence (months)								
Good behaviour bond (months)								
Offender - Gender	M	M	M	M	M	M	M	M
Male	1	1	1	1	1	1	1	1
Indigenous	Y							
Intellectual disability/ Cognitive impairment	Y	Y						Y
Mental health issues	Y	Y	Y	Y				Y
Alcohol and/or drug			Y	Y			Y	
Good character					Y	Y	Y	
Offender - Age at offence	25	48	33	27	19	23	48	22
Offender - Age at sentence	27	54	34	30	21	25	56	27
Victim - Gender	F	F	M	F	F	F	F	F
Victim - Age (years)	15	14	15	15	14	14	14	15
Age difference (years)	10	34	18	12	5	9	34	7
Offender's relationship	oth		fr	fam	fr	fr	fam	fr
Location	O	H	O	H	O	Oth		O

9	10	11	12	13	14	15	16	
1+	1+	1	1+	1	1	1+	1	No of offences convicted
	Y	Y		Y	Y			Matters on Form 1
	Y				Y		Y	No priors
			Y			Y		Priors - Different type only
								Priors - Different type only (gaol)
				Y				Priors - Same type
Y		Y						Priors - Same type (gaol)
G	G	G	N	G	G	G	G	Plea - Guilty/not guilty (G/N)
E	E	L		E	L		E	Guilty - early/late plea (E/L)
25	25	13		25	10		20	Discount (%)
24	24	21	12					Principal offence - Head (months)
15	12	8	6					NPP (months)
30	30	21	14					Total sentence - Head (months)
15	18	8	8					NPP (months)
				24	22			Suspended sentence (months)
						24	10	Good behaviour bond (months)
M	M	M	M	M	M	M	M	Offender - Gender
1	1	1	1	1	1	1	1	Male
								Indigenous
Y								Intellectual disability/ Cognitive impairment
Y				Y				Mental health issues
		Y	Y					Alcohol and/or drug
	Y							Good character
20	25	33	20	20	40	26	18	Offender - Age at offence (years)
21	26	34	21	21	45	29	19	Offender - Age at sentence (years)
F	F	F	F	F	F	F	F	Victim - Gender
14	15	15	14	14	14	15	15	Victim – Age at offence (years)
6	10	18	6	6	26	11	3	Age difference (years)
fr	fr	fr	fr	fam	fr	fr	fr	Offender's relationship
H	Oth	Oth	Oth	Oth	O	H		Location

*fam – includes extended family; fr – friend, friend of family, family of friend or neighbour; oth – includes potential employer.*

*O – offender's home; H – Victim's home; Oth – includes offender's car, outdoors, party, park.*



## Section 66C(4)

	1	2	3	4	5	6	7	8	9	10
No of offences convicted	1+	1+	1+	1+	1	1	1+	1+	1+	1
Matters on Form 1	Y						Y	Y		Y
No Priors	Y			Y	Y		Y	Y		Y
Priors - Different type only		Y				Y			Y	
Priors - Same type (gaol)			Y							
Plea - Guilty/not guilty (G/N)	G	N	N	N	G	G	G	G	G	G
Guilty - Early/late plea (E/L)	L				L	L	E	E	E	E
Discount - Utilitarian value (%)	10				10	10	25	25	25	25
Discount - Assist authorities (%)					15					15
Principal offence - Head (months)	48	48	48	36	27	24	23	21	7	
NPP (months)	30				14	12	8			
Total sentence - Head (months)	78	60	72	42	27	24	25	27	7	
NPP (months)	60	36	36	21	14	12	10	12	7	
Suspended (months)										24
Offender - Gender	M	M	M	M	F	M	M	F	M	M
Mental health issues	Y	Y	Y	Y				Y		
Intellectual disability/ Cognitive impairment					Y	Y	Y			Y
Alcohol and/or drug					Y				Y	
Good character		Y		Y				Y		Y
Age at offence	52	69	31	52	31	26	39	46	23	42
Age at sentence	59	70	40	61	33	28	41	51	24	51
Victim - Gender	F	F	F	F	F	F	F	M	F	M
Victim - Age (years)	14	15	14	15	15	15	15	15	15	14
Age difference (years)	38	54	17	37	16	11	24	31	8	28
Offender's relationship	Fam	Fr	Oth	Fam	Fr	Fr	Fam	Oth	Fr	Oth
Location		H	Oth		O	O	O	Oth		Oth

*Fam – includes extended family; Fr – friend, friend of family, family of friend or neighbour; Oth – includes shopkeeper, teacher, stranger*

*O – offender's home; H – Victim's home; Oth – includes vicinity of public toilet.*