

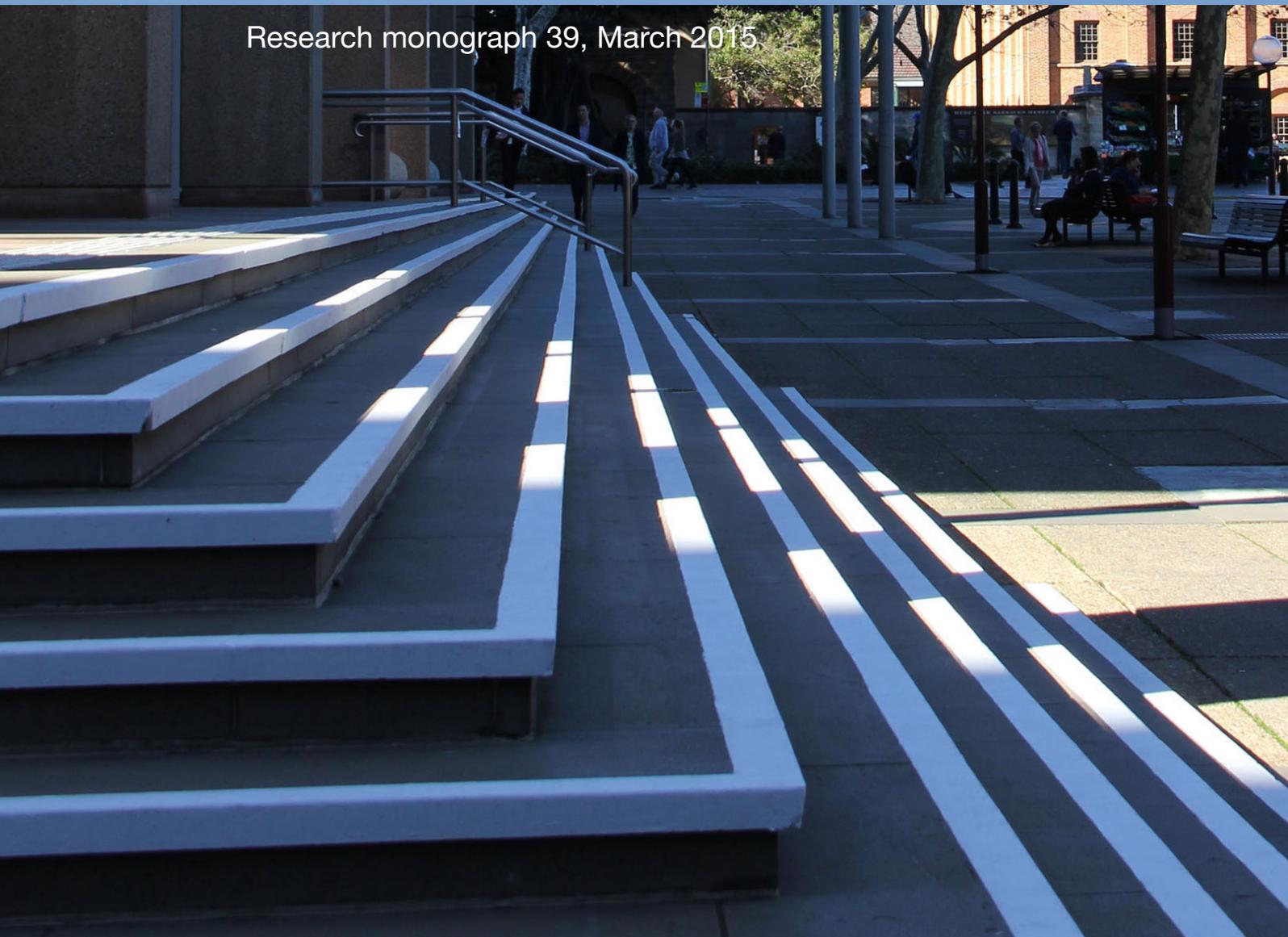


Judicial Commission of NSW

Sentencing in NSW

A cross-jurisdictional comparison of
full-time imprisonment

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Sentencing in **NSW**

A cross-jurisdictional comparison of full-time imprisonment

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Executive summary

It is common for participants in debates about sentencing in NSW (and elsewhere) to assert that sentencing by the courts is either too lenient or too harsh. Severity and leniency are, however, relative concepts. This study examines how sentences of imprisonment imposed in NSW for offences dealt with on indictment compare with interstate jurisdictions. The sentences imposed in jurisdictions such as Queensland and Victoria serve as a yardstick against which sentences in NSW can be judged. The study also compares NSW prison statistics against interstate and international (common law) jurisdictions. The analysis shows that, comparatively speaking, NSW is one of the harshest jurisdictions in Australia.

Sentencing is an area of law largely regulated by State and Territory governments. The respective Parliaments of each jurisdiction define the ingredients of offences and set maximum penalties. Sentencing law is the same across Australian jurisdictions in two important respects: first, in determining a sentence the court must apply the principle of proportionality — the sentence imposed should neither exceed nor be less than the gravity of the crime having regard to the objective circumstances; and secondly, full-time imprisonment is a sanction of last resort — 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.ⁱ

The study overcomes differences between jurisdictions by carefully aligning offences and further coding sentencing data. The analysis also takes into account custodial options which require an offender to serve part of his or her sentence in a prison, such as partially suspended sentences. The latter sentencing option is available in Queensland and until very recently in Victoria.

The head sentence (that is, the non-parole period and parole period of a term of imprisonment) imposed for the principal offence has been used for the purposes of comparing the length of sentences in each jurisdiction. The sentence for the principal offence does not, however, reflect how long an offender actually spends in prison in cases where more than one offence has been committed. Nevertheless, it is the best measure of sentencing levels for a given offence.

The study focuses on serious cases dealt with on indictment in NSW, Queensland and Victoria. Five categories of offence are examined: sexual assault, child sexual assault, dangerous/culpable driving causing death, robbery, and break and enter/burglary. Statutory maximum penalties, full-time imprisonment rates and median head sentences are reported for these five categories of offence. The study also compares the imprisonment rate per 100,000 in the adult population in NSW with a number of Australian and international jurisdictions.

Key findings

Full-time imprisonment rates

Of the three eastern seaboard states, NSW had the highest rate of full-time imprisonment for all five offence categories examined — sexual assault (92.6%), child sexual assault (89.0%), dangerous/culpable driving causing death (66.8%), robbery (80.2%), and break and enter/burglary (69.0%). However, when partially suspended sentences are included, Queensland had higher rates of imprisonment than NSW for all five categories. Full-time imprisonment rates in Victoria remained below NSW even with the inclusion of partially suspended sentences.

The study also compares imprisonment rates for NSW against those in Victoria and Queensland for particular offences within the five offence categories where it was possible to closely align offences. This permitted a more refined analysis of sentencing levels. New South Wales had a higher rate of imprisonment than Victoria and Queensland for sexual assault of a child under 10 years of age (89.0%, 76.1% and 70.0% respectively) and dangerous/culpable driving causing death (66.8%, 54.8% and 35.7% respectively). For offences where the relevant offence provisions could only be sufficiently aligned with one other jurisdiction, NSW had a higher imprisonment rate than Victoria for armed robbery (89.7% and 67.1% respectively) and aggravated break and enter/burglary (66.4% and 52.3% respectively).

ⁱ It is to be noted that the latter principle was abolished in Queensland by the *Youth Justice and Other Legislation Amendment Act 2014*, which commenced on 28 March 2014.

Median head sentences

The term “median” refers to the sentence that lies in the middle of the range of sentences (the 50th percentile). Overall, NSW had longer median head sentences (for the principal offence) than Victoria for sexual assault, child sexual assault, robbery, and break and enter/burglary offences. Victoria had a longer median head sentence for dangerous/culpable driving causing death offences.

Overall, NSW had longer median head sentences than Queensland for child sexual assault, robbery, and break and enter/burglary offences. Queensland had a longer median head sentence for sexual assault and dangerous/culpable driving causing death.

The median head sentence in NSW for sexual assault offences was 72 months compared with 60 months in Victoria and 84 months in Queensland.

The median head sentence in NSW for sexual assault of a child under 10 was 84 months compared with 48 months in Victoria and 72 months in Queensland.

The median head sentence in NSW for dangerous/culpable driving causing death was 36 months compared with 66 months in Queensland. In Victoria, the median head sentence for culpable driving causing death and dangerous driving causing death was 66 months and 36 months respectively.

For all robbery offences the median head sentence for NSW was 44 months, for Victoria 36 months, and Queensland 36 months. These offences were further delineated for the purposes of analysis. For non-aggravated robbery, the median head sentence for both NSW and Queensland was 30 months compared with 20.5 months in Victoria. Serious robbery offences in NSW and Queensland were examined separately. NSW had a higher median head sentence of 45 months compared with 36 months in Queensland. For the prevalent offence of armed robbery, NSW had a median head sentence of 49 months compared with 36 months in Victoria.

The median head sentence in NSW for break and enter/burglary was 36 months compared with 24 months in both Victoria and Queensland.

Statutory maximum penalties

Statutory maximum penalties for a range of offences were compared across five Australian jurisdictions and two overseas jurisdictions. New South Wales, Victoria and Queensland have very similar maximum penalties for the offences analysed. The maximum penalty for sexual assault of a child under 10 in NSW (natural life without parole for the aggravated offence) is higher than Queensland (life with a possibility of parole) and Victoria (25 years). However, South Australia has the highest maximum penalty (life) for the most aggravated form of dangerous/culpable driving causing death, followed by Victoria (20 years). South Australia has a maximum penalty of life for offences falling within all five offence categories, while Queensland has a maximum penalty of life for offences falling in all but one of the categories (dangerous/culpable driving causing death).

Imprisonment rates per 100,000 population

In 2014, the NSW imprisonment rate per 100,000 adult population (181.7) was slightly lower than the Australian average (185.6). New South Wales had a higher rate than Victoria (134.4), the Australian Capital Territory (130.4), and Tasmania (112.0). However, the rate in NSW was lower than the Northern Territory (829.4), Western Australia (264.6), Queensland (192.9) and South Australia (187.9). Internationally, Australia had a lower imprisonment rate per 100,000 population than New Zealand, England (including Wales) and the United States, but had a higher rate than Canada.

Indigenous offenders

As at 30 June 2014, the age standardised imprisonment rate for Aboriginal and Torres Strait Islander prisoners in Australia was 1,857.2 per 100,000 adult Aboriginal and Torres Strait Islander population. This is just under 13 times higher than non-Indigenous prisoners who had an age standardised imprisonment rate of 144 per 100,000 adult non-Indigenous population. The median age of Aboriginal and Torres Strait Islander prisoners was 31.0 years, which is 4.3 years lower than the median age of non-Indigenous offenders (35.3 years).



Chapter 1

Introduction

The purpose of this study is twofold: first, to report NSW sentencing outcomes across a range of offences; and secondly, to compare sentencing levels in NSW with those in other jurisdictions in Australia and overseas.

The overarching approach of this study is to make the best comparisons possible given the state of the sentencing data and the ingredients of the specific offences. This study applies the fundamental principle of sentencing law that an offender convicted following a trial, or after a guilty plea, is sentenced only for the crime charged. In practical terms, this means the offender is sentenced for the ingredients of the crime. Any additional aggravating facts taken into account by the court cannot effectively sentence the offender for a more serious charge.¹ The strength of any cross-jurisdictional sentencing comparison for an offence depends upon the degree to which the ingredients of the offence can be aligned. This study focuses on five specific offence categories that permitted robust comparison, namely, sexual assault, child sexual assault, dangerous/culpable driving causing death, robbery, and break and enter/burglary. These offences were also selected because they are some of the most common offences, and they are usually dealt with on indictment. To further refine the comparison process, this study focuses, where relevant, on the three eastern seaboard States — NSW, Victoria and Queensland.

In a climate where public debate is often focused on whether sentencing patterns are too lenient, it is timely to pose the question: how do sentencing patterns in NSW compare with other jurisdictions? In 2004, the Honourable AM Gleeson AC, then Chief Justice of Australia, observed that there “is one topic on which the Australian public are given practically no information at all, and that is the way in which sentences in Australia compare with sentences imposed in similar places overseas”.² This observation is as relevant as ever a decade later. The sentences imposed in other relevant common law jurisdictions serve as a yardstick against which those imposed in NSW can be judged.

Media commentary and criticism about sentencing decisions has become common.³ The perceived leniency by the public of sentencing is partly caused by a lack of information about the sentencing process and sentencing outcomes. To address these issues, in 2014, the Honourable TF Bathurst AC, Chief Justice of NSW, hosted a number of criminal sentencing symposiums with the aim of facilitating “a better understanding of the judiciary’s work, particularly in relation to the process of sentencing offenders”.⁴ Representatives from a wide range of community groups were invited to attend the symposiums and members of the judiciary and legal profession presented sentencing information.⁵

Numerous studies have examined whether sentences imposed by the courts are generally regarded by the public as too lenient.⁶ Some of these studies suggest that the more information members of the public (whether they be jurors or randomly selected respondents) have about a case, the more likely it is that they

1 This sentencing principle is usually described as the *De Simoni* principle from the High Court case: *The Queen v De Simoni* (1981) 147 CLR 383.

2 AM Gleeson, “Out of touch or out of reach?” (2005) 7(3) *TJR* 241 at 245.

3 TF Bathurst, “Community confidence in the justice system: the role of public opinion” (2014) 12(1) *TJR* 27. His Honour observed, at 27, that “in the last 40 years or so there has been a sharp increase in both the quantity and the stridency of criticism aimed at the courts”; the Honourable JJ Spigelman AC QC, “Fairness in criminal justice: the sentencing debate”, Opening of Law Term Address, 29 January 2002, Sydney, p 1.

4 Supreme Court of NSW website at www.supremecourt.justice.nsw.gov.au/supremecourt/SCO2_judicialspeeches/sentencing_symposiums_2014.html, accessed 15 January 2015.

5 *ibid.*

6 D Indermaur et al, “A matter of judgment: the effect of information and deliberation on public attitudes to punishment” (2012) 14(2) *Punishment & Society* 147; G Mackenzie et al, “Sentencing and public confidence: results from a national Australian survey on public opinions towards sentencing” (2012) 45(1) *ANZJ Crim* 45; L Roberts, C Spiranovic and D Indermaur, “A country not divided: a comparison of public punitiveness and confidence in sentencing across Australia” (2011) 44(3) *ANZJ Crim* 370; K Gelb, “Myths and misconceptions: public opinion versus public judgment about sentencing” in A Freiberg and K Gelb (eds), *Penal populism, sentencing councils and sentencing policy*, Hawkins Press, 2008, p 68.

will hypothetically impose a more lenient sentence than the court, or at least agree with the sentence imposed by the court.⁷ In one Victorian study,⁸ members of the public were given the facts of several cases that had already been decided in the courts. The author found that for three offence categories, the sentences imposed by the courts were harsher than those suggested by respondents. For one of those categories, rape, there was a marked difference between the sentence suggested by respondents and the sentence imposed by the court, with almost two-thirds of respondents suggesting a lower sentence less than that imposed by the court.⁹ A national study is currently underway which involves a survey of jurors' attitudes to the sentencing of sex offenders.¹⁰ The aim of the national study is:

to provide informed public opinion for policy makers and judges on matters relevant to sentencing to counter the effects of mass-media reactions to crime which call for more severe sentences and which purport to be representative of community sentiment.¹¹

The present study provides further useful information comparing sentencing in NSW with other jurisdictions (particularly Victoria and Queensland), and in that regard, informs the public debate about sentencing. It follows and expands upon previous studies conducted by the Judicial Commission of NSW.¹² Since the previous studies conducted by the Judicial Commission, access to sentencing data has significantly improved in Queensland and Victoria. The Queensland Sentencing Information System (QIS) is a sentencing database designed to promote consistency in sentencing by providing information and statistics to the legal profession. It commenced in 2006 as a joint project of the Queensland Department of Justice and Attorney-General and the Judicial Commission. In 2013, the Supreme Court Library Queensland (SCLQ) took over the role of the Department. The database is currently maintained by the SCLQ and hosted by the Judicial Commission of NSW. At the time of the previous comparative studies, the Sentencing Advisory Council (Vic) was in its infancy. Since 2007, the Sentencing Advisory Council (Vic) has published numerous reports about sentencing levels in Victoria. These two interstate developments, and the continued existence of the Judicial Information Research System (JIRS) in NSW, enable targeted comparisons to be made between sentencing levels in the eastern seaboard States.

Although access to data has improved, a study of this kind nevertheless faced statistical and legal challenges. There are conceptual and methodological difficulties in measuring the punitiveness of a jurisdiction using comparisons of imprisonment.¹³ Despite many similarities between jurisdictions there are differences in offence ingredients, penalty options and sentencing practices. There are also differences in the collection and collation of statistics. These issues are ventilated throughout this study where necessary. Even where data are available, extra analysis and coding of the data were required in some cases to enable legitimate comparisons to be made. One example will suffice here to illustrate the difficulties faced. In Queensland, sentencing statistics from QIS showed that the offence of rape (which has a maximum penalty of life) is widely utilised by the prosecution regardless of whether the victim is a child or an adult. A valid comparison between sentences imposed in Queensland and other jurisdictions which have enacted specific child sexual assault offences (such as Victoria and NSW) could only be made by classifying and separating the 581 Queensland rape cases according to the age of the victim. Needless to say that task was an onerous one.

7 K Warner et al, "Gauging public opinion on sentencing: can asking jurors help?", *Trends & issues in crime and criminal justice*, No 371, Australian Institute of Criminology, March, 2009; A Lovegrove, "Public opinion, sentencing and lenience: an empirical study involving judges consulting the community" (2007) *Crim LR* 769; Indermaur et al, *ibid*.

8 Lovegrove, *ibid*.

9 *ibid* at 776.

10 K Warner, "The Australian national jury sex offence sentencing study" (2014) 11(4) *TJR* 459; L Bartels, K Warner and G Zdenkowski, "National research with jurors on sentences for sexual offenders" (2014) 26(2) *JOB* 9.

11 Bartels, Warner and Zdenkowski, *ibid* at 9.

12 S Indyk and H Donnelly, *Full-time imprisonment in New South Wales and other jurisdictions — a national and international comparison*, Research Monograph No 29, Judicial Commission of NSW, 2007 (Judicial Commission 2007 study); and S Indyk and H Donnelly, "Trends in the use of full-time imprisonment 2006–2007", *Sentencing Trends & Issues*, No 36, Judicial Commission of NSW, 2007.

13 See eg, A Freiberg, "What's it worth? A cross-jurisdictional comparison of sentence severity" in C Tata and N Hutton (eds), *Sentencing and society: international perspectives*, Ashgate Publishing Ltd, 2002, p 237; K Pease, "Cross-national imprisonment rates: limitations of method and possible conclusions" (1994) 34 (Special Issue) *British Journal of Criminology* 116.

There have been other comparative studies which have examined sentencing patterns and the use of imprisonment generally for offences in NSW and other jurisdictions. While some of the information is useful, the analysis is general rather than offence-specific.¹⁴

The *Australian and New Zealand Standard Offence Classification (ANZSOC)*¹⁵ is a classification system which divides all criminal offences into 16 “Divisions”, and within each Division there are one or more “Subdivisions” which are further divided into “Groups”. Its objective is to provide a uniform national statistical framework for classifying criminal offences. ANZSOC codes have been used for reporting sentencing levels across Australia and for the purpose of making cross-jurisdictional comparisons of crime rates and imprisonment rates.¹⁶ However, ANZSOC has not been utilised in this study because it is not a satisfactory classification system to measure sentencing levels within a specific jurisdiction, across jurisdictions or even as a national measure of sentencing patterns.

Although the categories used in ANZSOC, may be useful for some research purposes,¹⁷ they are too general for the aims of this study and cannot give an accurate picture of sentencing levels for specific offences. ANZSOC classifications typically include several offences with a wide degree of seriousness. There are also vast differences in maximum penalties for offences within the groups. A median sentence calculated using ANZSOC classifications must be treated with caution. Suffice to state that there is limited utility in reporting median sentences (either non-parole periods or head sentences) using the ANZSOC subdivisions “manslaughter and dangerous driving causing death”,¹⁸ “sexual assault”,¹⁹ “assault”²⁰ and “unlawful entry with intent/burglary, break and enter”.²¹

14 See eg, NSW Law Reform Commission (NSWLRC), *Sentencing — patterns and statistics*, Companion Report 139-A, 2013; Australian Bureau of Statistics (ABS), *Criminal Courts, Australia, 2012–2013*, cat no 4513.0, at www.abs.gov.au/ausstats/abs@.nsf/mf/4513.0, accessed 16 February 2015; ABS, *Prisoners in Australia, 2014*, cat no 4517.0, at www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0/, accessed 16 February 2015; Sentencing Advisory Council (Tas), *Sex offence sentencing*, Research Paper, April 2013.

15 ABS, *Australian and New Zealand Standard Offence Classification (ANZSOC)*, 2011, 3rd edn, cat no 1234.0, at www.abs.gov.au/ausstats/abs@.nsf/mf/1234.0, accessed 16 February 2015.

16 See eg, ABS, *Prisoners in Australia, 2014*, above n 14; Bureau of Crime Statistics and Research (BOCSAR) (NSW) series: *NSW custody statistics*, at www.bocsar.nsw.gov.au/bocsar/bocsar_custody_stats.html,c=y, accessed 16 February 2015, *NSW criminal court statistics*, at www.bocsar.nsw.gov.au/bocsar/bocsar_court_stats/bocsar_court_stats_archived.html, accessed 16 February 2015, and *Recorded crimes statistics* at www.bocsar.nsw.gov.au/bocsar/bocsar_crime_stats/bocsar_crime_stats_archived.html, accessed 16 February 2015; Sentencing Advisory Council (Tas), above n 14.

17 For example, NSW Sentencing Council, *Sentencing trends and practices*, Annual Report 2013, June 2014, at www.sentencingcouncil.justice.nsw.gov.au/Documents/annual_reports/annual_report_2013.pdf, accessed 13 February 2015, pp 30–31 (analysis of the most common offences for which intensive correction orders (ICOs) were imposed).

18 This ANZSOC subdivision includes all driving offences where a death has occurred (see s 52A of the *Crimes Act 1900* (NSW)) and the offence of manslaughter. The crime of manslaughter falls into two broad categories: voluntary manslaughter and involuntary manslaughter. Voluntary manslaughter includes crimes where the offender intended to kill or cause grievous bodily harm but is not liable for murder on the basis of provocation, substantial impairment or excessive self-defence. Involuntary manslaughter includes crimes where the offender either committed an unlawful and dangerous act which caused death or manslaughter by gross criminal negligence. See Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 2nd edn, 2002–, “Manslaughter” at [5-950]ff.

19 ANZSOC Division 03 is entitled “Sexual assault and related offences”. Subdivision 031 “Sexual assault” includes at least 23 offences under the *Crimes Act 1900* (NSW): committing an act of indecency (non-aggravated and aggravated forms, ss 61N, and 61O: maximum penalties range from 18 months–10 years); indecent assault (non-aggravated and aggravated forms, ss 61L and 61M: maximum penalties range from 5–10 years); sexual intercourse without consent (non-aggravated and aggravated forms, ss 61I, 61J: maximum penalties range from 14–20 years); aggravated sexual assault in company (s 61JA: maximum penalty is natural life); sexual intercourse with a child under 10 years (non-aggravated and aggravated forms, s 66A(1), (2) and (3): maximum penalties are 25 years and natural life, respectively); sexual intercourse with a child between 10 and 14 years (non-aggravated and aggravated forms, ss 66C(1), (2): maximum penalties are 16 and 20 years, respectively); sexual intercourse with a child between 14 and 16 years (non-aggravated and aggravated forms, s 66C(3), (4): maximum penalties are 10 and 12 years, respectively). It also covers attempt and “assault with intent” offences including assault with intent to have sexual intercourse (s 61K: maximum penalty 20 years); attempting, or assaulting with intent, to have sexual intercourse with child under 10 (s 66B: maximum penalty is 25 years); attempting, or assaulting with intent, to have sexual intercourse with child between 10 and 16 years (s 66D: maximum penalty 10–20 years); and, attempt to commit an offence under ss 61I–61O (s 61P: maximum penalties range from 18 months – natural life). Even the groups within Subdivision 031 (0311 “Aggravated sexual assault” and 0312 “Non-aggravated sexual assault”) have wide variations. ANZSOC group 0311 “Aggravated sexual assault” requires the presence of one of the following aggravating features: sexual intercourse, infliction of injury or violence, possession/use of a weapon, consent proscribed/committed against a child; or the commission of the offence in company. NSW sexual offences, which do not involve penetration, such as indecent assault would fall within ANZSOC group 0311 if an aggravating circumstance such as infliction of injury was present. ANZSOC group 0312 “Non-aggravated sexual assault” includes the threat of sexual assault, and indecent assault that does not involve any aggravating circumstances.

Footnotes 20 and 21 on p 4.

Bearing in mind these statistical and legal issues, Chapter 2, “Methodology for comparison of specific offences”, sets out the methodology used to measure the punitiveness or leniency of NSW sentencing courts relative to other jurisdictions. It explains the three indicators of severity utilised in this study. Chapter 3, “A comparison of specific offences”, examines five serious offence categories. The maximum penalties for offences are compared across a range of common law jurisdictions, while full-time imprisonment rates and median head sentences for offences are compared across the three eastern seaboard States of NSW, Victoria and Queensland. Chapter 4, “Imprisonment rates per 100,000 population”, compares imprisonment rates per 100,000 population across Australian and international jurisdictions, and Chapter 5, “Prison populations”, presents prisoner numbers across a range of jurisdictions and examines the Indigenous prison population in Australia.

From p 3.

- 20 Assault falls within ANZSOC Division 02 “Acts intended to cause injury”. The Division covers a broad range of offences under the *Crimes Act 1900* (NSW), including choking, suffocation and strangulation (s 37: maximum penalties range from 10–25 years); wound with intent to cause grievous bodily harm (s 33(1)(a): maximum penalty is 25 years); reckless grievous bodily harm or wounding (s 35: maximum penalties range from 7–14 years); and common assault (s 61: maximum penalty is 2 years).
- 21 ANZSOC Division 07 “Unlawful entry with intent/burglary, break and enter” has no subdivision for basic, aggravated or other forms of the offence. The maximum penalty for offences falling into this Division ranges from 10–25 years. ANZSOC classifies the NSW offences of aggravated and specially aggravated break and enter/enter dwelling-house and commit serious indictable offence (ss 111(2), (3), 112(2), (3) and 113(2), (3) of the *Crimes Act 1900* (NSW)) in accordance with the indictable offence specified or the aggravating feature of the offence rather than classifying them under Division 07 “Unlawful entry with intent/burglary, break and enter” on each occasion. For example, where the break and enter offence involves the infliction of actual bodily harm or wounding, the offence is coded under Division 02 “Acts intended to cause injury”. Where the aggravating feature of the break and enter involves deprivation of liberty, the offence is coded under Division 05 “Abduction and kidnapping”.

Methodology for comparison of specific offences

2.1 Full-time imprisonment as a measure of punitiveness

Common law jurisdictions are very similar in terms of the range of penalty options available to their courts. Most provide for full-time imprisonment and alternative forms of imprisonment, including community service orders and good behaviour bonds.²² To compare the severity or leniency of sentences imposed in NSW with those imposed in other Australian and international jurisdictions, this study focuses primarily on the penalty option of full-time imprisonment.

In most of the jurisdictions analysed in this study, the court decides an appropriate sentence having regard to the maximum penalty prescribed for the offence together with any other relevant statutory provisions and common law principles of sentencing. Generally, sentencing in Australia is governed by the “firmly established” common law principle that a sentence of imprisonment must not exceed what is appropriate or proportionate to the gravity of the crime.²³

The frequency with which the courts impose sentences of full-time imprisonment is a reliable measure of the punitiveness of any criminal justice system. It is the most severe form of punishment available in Australia and in all but one of the overseas jurisdictions examined.²⁴ In NSW, s 5(1) of the *Crimes (Sentencing Procedure) Act 1999* enshrines the common law principle that imprisonment, whatever its form, is a punishment of last resort.²⁵ It 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.

There are equivalent provisions in most other common law jurisdictions subject to some statutory exceptions.²⁶ For example, the principle cannot apply where the offence attracts a mandatory minimum sentence.

2.2 Comparison of sentencing for specific offences

As discussed in Chapter 1, “Introduction”, ANZSOC classifications have not been utilised in this study to compare offences across jurisdictions. The classifications are too broad, with offences in even the most specific ANZSOC classification having varying degrees of offence seriousness, and attracting different maximum penalties.

Instead, for the purposes of comparing the severity or leniency of sentencing in NSW relative to other jurisdictions, five specific offence categories have been selected: sexual assault, child sexual assault, dangerous/culpable

22 NSW is the only Australian jurisdiction which provides for home detention: *Crimes (Sentencing Procedure) Act 1999* (NSW), s 6. Both Victoria and NSW provide for compulsory drug treatment orders: *Crimes (Sentencing Procedure) Act 1999* (NSW), s 5A, and *Sentencing Act 1991* (Vic), Pt 3, Div 2, Subdiv (1C). Victoria provides for youth justice centre orders and youth residential centre orders: *Sentencing Act 1991* (Vic), s 32. In NSW and Queensland, ICOs are available as a penalty option. In NSW, ICOs were introduced by the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010*, which commenced on 1 October 2010. ICOs are limited to a maximum of 2 years in duration (*Crimes (Sentencing Procedure) Act 1999* (NSW), s 7(1)) and effectively replaced the penalty option of periodic detention orders. In Queensland, Pt 6 of the *Penalties and Sentences Act 1992* (Qld) provides for ICOs, which are limited to a maximum of one year in duration: s 112. In Victoria, ICOs were available before 16 January 2012 when s 15 of the *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic) repealed, inter alia, Pt 3, Div 2, Subdiv (2), the provisions in the *Sentencing Act 1991* (Vic) dealing with ICOs (ss 19–26). The amending Act introduced an alternative sentencing option: community correction orders (Pt 3A (ss 36–48Q) of the *Sentencing Act 1991* (Vic)), which may be added to the list of penalty options available during part of the Victorian data period examined in this study (see 2.2.2).

23 *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472 (joint judgment); *Hoare v The Queen* (1989) 167 CLR 348 at 354.

24 With the exception of capital punishment in some parts of the US.

25 *Dinsdale v The Queen* (2000) 202 CLR 321 at [14]; *R v Way* (2004) 60 NSWLR 168 at [115].

26 *Sentencing Act 1991* (Vic), s 5(4); *Criminal Law (Sentencing) Act 1988* (SA), s 11; *Sentencing Act 1995* (WA), ss 6(4), 39(3); *Crimes Act 1914* (Cth), s 17A; *Sentencing Act 2002* (NZ), s 8(g); *Criminal Justice Act 2003* (UK), s 152(2); *Criminal Code* (Can), s 718(2)(d),(e). Queensland abolished the principle in 2014, see previously s 9(2)(a) of the *Penalties and Sentences Act 1992* (Qld), repealed and replaced by s 9(12): *Youth Justice and Other Legislation Amendment Act 2014* (Qld).

driving causing death, robbery, and break and enter/burglary. These offence categories were selected because they are some of the most common crimes dealt with on indictment in NSW.

The following indicators of sentencing severity or leniency have been used in the analysis of these offences:

- statutory maximum penalties
- rates of full-time imprisonment
- median head sentences where full-time imprisonment has been imposed.

2.2.1 Jurisdictions compared

Maximum penalties for offences falling in the five offence categories are compared across the following common law jurisdictions: NSW, Victoria, Queensland, South Australia, Western Australia, New Zealand and England.

Due to variation in the methodology and collection of sentencing information across these jurisdictions, the jurisdictional comparisons of rates of full-time imprisonment and median head sentences of full-time imprisonment are limited to NSW, Victoria and Queensland. South Australia and Western Australia use ANZSOC codes as the basis for classification (with some modifications). Although data are available for overall imprisonment rates in New Zealand, England (including Wales) and the US, it was not possible to align specific offences in those jurisdictions with those in NSW and other parts of Australia. There were too many differences in the way corresponding offences were defined.²⁷ The sentencing data for these jurisdictions lacked the specificity required to enable valid comparisons. There were also differences in the counting methods used and a lack of access to data for comparable data periods.

2.2.2 Data sources and data periods

The data periods used for the purposes of comparison of the offences varied depending on the jurisdiction.

In NSW, the sentencing data include sentencing cases finalised in the District and Supreme Courts for the period 1 July 2006 to 30 June 2013. First instance sentencing data are provided by the NSW Bureau of Crime Statistics and Research (BOCSAR) and then processed to generate the statistics appearing on JIRS.²⁸ The statistics are appearance (or person) based and record the sentence for the principal offence in each case. The principal offence for any given court appearance is the offence that attracts the most severe penalty.²⁹

In Victoria, the sentencing data include sentencing outcomes for people sentenced for the relevant principal offence in the County and Supreme Courts. If a person is sentenced for more than one charge in a single case, the principal offence is the offence for the charge that attracted the most serious sentence according to the

27 For example, none of these excluded jurisdictions had a specific offence of sexual assault of a child under 10 years of age. The US Department of Justice does not separate sexual assault against a child and sexual assault against an adult in their data. In New Zealand, imprisonment rates from Statistics New Zealand were based on ANZSOC codes which were too broad to compare with the specific offences examined in NSW, Queensland and Victoria. For example, the "Sexual assault" (ANZSOC Subdivision 031) and the two groups within that Subdivision (0311 "Aggravated sexual assault" and 0312 "Non-aggravated sexual assault") do not distinguish between sexual assaults committed against adults and those committed against children. Further, ANZSOC group 0311 "Aggravated sexual assault" includes the offences of assault with intent to commit a sexual act and attempted rape.

28 The statistics are adjusted or altered to take into account the outcomes of successful conviction or sentencing appeals to the Court of Criminal Appeal and the High Court of Australia as at December 2013. Where an appeal to the Court of Criminal Appeal or High Court resulted in an acquittal, a new trial or remittal to a lower court, the record was removed from the data. If the appeal resulted in a new sentence, that sentence replaced the first instance sentence on the Judicial Information Research System (JIRS).

29 Where an offender is convicted of two or more offences and received identical penalties, the offence with the highest statutory maximum penalty is selected as the principal offence. If two or more offences have the same statutory maximum penalty, the offence with a Form 1 attached is selected as the principal offence. In the absence of a Form 1, a standard non-parole period offence, substantive offence, or a completed offence rather than a "with intent" offence, is selected as the principal offence. Where none of these are present, the offence with the highest Median Sentencing Ranking (MSR) is selected as the principal offence. The MSR is a measure of offence seriousness in NSW, jointly developed in 2010 by BOCSAR and the Judicial Commission of NSW. See I MacKinnell, P Poletti and M Holmes, "Measuring offence seriousness", *Crime and Justice Bulletin*, No 142, BOCSAR, August 2010.

sentencing hierarchy. The data period varies according to the offence, but ranges generally from 1 July 2005 to 30 June 2012.³⁰

In Queensland, sentencing data include offenders sentenced between 1 July 2007 and 30 June 2013 in the District and Supreme Courts and are sourced from QGIS. Like NSW and Victoria, QGIS statistics are also based on the principal offence. Where there are multiple offences, QGIS only records the principal offence, that is, the most serious outcome, or the most serious offence on any given day in the same court as pre-determined by the Office of Economic and Statistical Research using the National Offence Index (NOI) as the benchmark.³¹

While the data periods used are not identical, they overlap to a significant degree and, given the length of each, allow valid comparisons to be made between jurisdictions.

2.2.3 Rationale for using the median head sentence

The term “median” refers to the sentence that lies in the middle of the distribution of sentences (the 50th percentile). Half of the cases lie above and half lie below. Medians rather than “means” have been used in the analysis on the basis that the mean has the potential to be skewed by outliers and is not as useful a measure of central tendency.

This study uses the median head sentences of full-time imprisonment in preference to the median non-parole period. A head sentence is the non-parole period and the parole period of a term of imprisonment. There are several reasons why the head sentence has been selected rather than the non-parole period.

It is often the case that an offender is required to serve longer than the non-parole period imposed for a principal offence. The High Court observed that “it is always necessary to recognise that an offender may be required to serve the whole of the head sentence that is imposed”.³² The length of an offender’s incarceration can be significantly affected by the operation of the parole system in the State or Territory concerned.³³

In NSW, JIRS sentencing data exclude non-parole periods where a court has imposed a consecutive or partly consecutive sentence. The reasons for this are explained further below. Suffice to state that if this study selected only the non-parole period for the principal offence, it would effectively exclude serious cases where two or more offences were committed and a consecutive sentence or partly consecutive sentence was imposed.

The head sentence is a better measure than the non-parole period when an offender has committed more than one offence. The principle of totality requires the court to impose an effective sentence which reflects the overall criminality involved in all of the offences. Extracting only a median non-parole period for the principal offence from the sentencing exercise may be misleading when a court imposes consecutive or partly consecutive sentences. This is because the court adjusts downwards individual non-parole periods in order to comply with the principle of totality. In NSW, it is accepted that courts apply the totality principle in cases where consecutive sentences are imposed by reducing the non-parole period where some form of accumulation of sentences is considered necessary.³⁴ Therefore, isolating or extracting one non-parole period for the principal offence is apt to give a misleading picture of the time an offender actually serves in these cases. On the other hand, the head

30 Data was extracted from the Victorian Sentencing Advisory Council (Vic) series: *Sentencing snapshots*, at www.sentencingcouncil.vic.gov.au/publications/sentencing-snapshots, accessed 16 January 2015. See this website for more information on the data source and methodology behind the Victorian statistics. Where a *Sentencing snapshot* had not been published for the particular offence being examined in this study, original data was provided by G Fisher, Senior Data Analyst, and Z Bathy, Data Analyst, of the Sentencing Advisory Council (Vic).

31 It should be noted that the sentencing practices in Queensland differ to those in NSW where the offender has been convicted of multiple offences. It is common practice in Queensland to impose a sentence for the most serious (or the last in point of time) offence that is higher than that which would have been imposed if that offence stood alone; the higher sentence taking into account the overall criminality of all offences: *R v Nagy* [2004] 1 Qd R 63 at [39], [66].

32 *PNJ v The Queen* (2009) 83 ALJR 384 at [11].

33 See a tabulated comparison of parole systems by the Sentencing Advisory Council (Vic) in *Review of the Victorian adult parole system*, Report, March 2012, at www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Review%20of%20the%20Victorian%20Adult%20Parole%20System%20Report.pdf, accessed 13 January 2015, App 3, pp 108–119. The report reflects the law as at 25 November 2011. There have been statutory changes in Victoria since that date: I Callinan, *Review of the parole system in Victoria*, Report, Department of Justice, Corrections Victoria, 2013, pp 42–50.

34 *Hejazi v R* (2009) 217 A Crim R 151 at [36]; *Spark v R* [2012] NSWCCA 140 at [35].

sentence imposed for the principal offence is a more accurate indicator of the time the offender will serve. As the High Court has observed, the task of setting a non-parole period for a specific offence “is but one part of the larger task of passing an appropriate sentence upon the particular offender”.³⁵

It should be emphasised that although the head sentence for the principal offence is a reliable comparative measure, it is not necessarily a reflection of how long an offender spends in prison. It is a reliable measure where an offender commits one offence, but not where the offender commits multiple offences. For crimes such as sexual assault, robbery, child sexual assault, and break and enter/burglary, it is common for offenders to commit more than one offence. In those cases, the court takes into account all the offences and applies the principle of totality. The court must impose an overall sentence to fit the criminality of the offender.

The focus of this study is on offences rather than offenders. There is an inherent problem in relying upon an overall sentence for an *offender* (in which the sentence for the principal offence is subsumed) rather than the head sentence for the *principal offence*. An overall sentence only reflects the sentences imposed in an individual case. There may be two or any number of offences which greatly vary in seriousness. Accordingly, an overall sentence — either an overall non-parole period or an overall head sentence — is not the best measure of sentences for a specific offence.

2.2.4 Imprisonment measure and partially suspended sentences

Although partially suspended sentences involve a period of incarceration, these have been excluded from the calculation of median head sentences. However, for completeness, they have been included in the graphs in Chapter 3, “A comparison of specific offences”, showing imprisonment rates for the offences.

New South Wales had partially suspended sentences as an available penalty option for a brief period before the legislation was amended.³⁶

During the data period (see 2.2.2 above), the Victorian government was phasing out suspended and partially suspended sentences as a penalty option and they were limited to certain offences.³⁷ There was a 2-year maximum term for suspended sentences in the Magistrates’ Court and a 3-year maximum term in the County and Supreme Courts.³⁸ Both penalty options were finally abolished in Victoria — for the Magistrates’ Court on 1 September 2014 and for the Supreme Court and County Court on 1 September 2013.³⁹ The Sentencing Advisory Council (Vic) excludes partially suspended sentences for the purposes of calculating the rates and lengths of full-time imprisonment. Partially suspended sentences were used relatively rarely in Victoria for serious offences.⁴⁰

35 *Muldock v The Queen* (2011) 244 CLR 120 at [17].

36 See *R v Gamgee* (2001) 51 NSWLR 707. Section 12(1)(a) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) provides that the order suspending a sentence of imprisonment may be made in respect of the *whole* (as opposed to part) of a sentence of imprisonment of up to 2 years. It is no longer possible to partially suspend a sentence of imprisonment for a State offence: *Crimes Legislation Amendment Act* 2003 (NSW), s 3, Sch 6[1], which commenced on 8 July 2003.

37 In Victoria, the power to impose a suspended sentence was contained in s 27(2B) (now repealed) of the *Sentencing Act* 1991. Part way during the data period used in this study (see 2.2.2), s 27(2B) was amended to provide that a court could not make an order suspending the whole or part of a sentence of imprisonment imposed on an offender for a serious or significant offence. The amendments applied to offences committed after 1 May 2011: *Sentencing Amendment Act* 2010, ss 12, 27; *Sentencing Further Amendment Act* 2011, ss 4, 5. “Serious offence” and “significant offence” were defined in s 3 of the *Sentencing Act* 1991 to include, inter alia, offences causing death and serious injury, sexual penetration offences, armed robbery, aggravated burglary, arson offences and serious drug trafficking offences.

38 *Sentencing Act* 1991 (Vic), s 27 (rep). The provision was repealed by the *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act* 2013 (Vic), s 11, which fully commenced on 1 September 2014.

39 Section 6(6) of the *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act* 2013 (Vic) inserted a new s 27(2C) into the *Sentencing Act* 1991 abolishing suspended sentences as a penalty option in the Supreme and County Courts for offences committed on or after 1 September 2013.

40 In Victoria, during the data period examined (see 2.2.2) partially suspended sentences were imposed in 2% of cases for armed robbery; 7% for non-aggravated robbery; 8% for aggravated burglary; 6% for simple burglary; 1% for sexual penetration of child under 10 years; 3% for culpable driving causing death; and 3% for adult sexual assault: Sentencing Advisory Council (Vic), *Sentencing snapshots: Sentencing trends in the higher courts of Victoria: 2008–09 to 2012–13*: No 152 Robbery, June 2014, at www.sentencingcouncil.vic.gov.au/publications/sentencing-snapshots/152-robbery, accessed 16 February 2015; No 153

Continued on p 9.

In Queensland, QGIS excludes partially suspended sentences from its full-time imprisonment graphs. However, partially suspended sentences are used frequently in Queensland⁴¹ and excluding them for the purpose of determining the median head sentence has a significant impact on the data in that State. For this reason, caution should be exercised when drawing conclusions from the median head sentences presented in this study.

From p 8.

Armed robbery, June 2014, at www.sentencingcouncil.vic.gov.au/publications/sentencing-snapshots/153-armed-robbery, accessed 16 February 2015; No 154 Burglary, June 2014, at www.sentencingcouncil.vic.gov.au/publications/sentencing-snapshots/154-burglary, accessed 16 February 2015; No 155 Aggravated burglary, June 2014, at www.sentencingcouncil.vic.gov.au/publications/sentencing-snapshots/155-aggravated-burglary, accessed 16 February 2015; and *Sentencing trends in the higher courts, 2007–08 to 2011–12*: No 142 Culpable driving causing death, May 2013, at www.sentencingcouncil.vic.gov.au/publications/sentencing-snapshots/142-culpable-driving-causing-death-higher-courts, accessed 16 February 2015; No 145 Rape, June 2013, at www.sentencingcouncil.vic.gov.au/publications/sentencing-snapshots/145-rape-higher-courts, accessed 16 February 2015; No 149 Sexual penetration of a child aged under 12, June 2013, www.sentencingcouncil.vic.gov.au/publications/sentencing-snapshots/149-sexual-penetration-child-aged-under-12-higher-courts, accessed 16 February 2016. See further above n 37.

41 *Penalties and Sentences Act 1992* (Qld), s 144.

A comparison of specific offences

3.1 Indicators of punitiveness

For the purposes of comparing the severity or leniency of sentencing in NSW relative to other jurisdictions, five specific offence categories have been selected: sexual assault, child sexual assault, dangerous/culpable driving causing death, robbery, and break and enter/burglary.

In order to gauge the severity or leniency of sentencing practices across jurisdictions, three indicators are used:

- statutory maximum penalties for offences
- rates of full-time imprisonment
- median head sentences where full-time imprisonment has been imposed.

The maximum penalty, the first indicator, represents the legislature's assessment of the seriousness of the offence and for this reason provides an important sentencing yardstick.⁴² The court must have regard to it in the sentencing process. Where Parliament increases the maximum penalty for an offence, the courts have interpreted this as an intention that the offence should attract a heavier sentence.⁴³

In this study, maximum penalties for the offences falling within the five selected offence categories are compared across seven common law jurisdictions: NSW, Victoria, Queensland, South Australia, Western Australia, New Zealand and England.⁴⁴ A previous Judicial Commission 2007 study noted that, in NSW, the maximum penalties for sexual assault, dangerous driving causing death, and break and enter had increased in the preceding 15 years.⁴⁵ Although the maximum penalties have not increased for any of the NSW offences falling within the five offence categories since the Judicial Commission 2007 study, a number of other jurisdictions have increased the maximum penalties applicable for certain dangerous driving causing death offences, reflecting the increasing seriousness with which many Parliaments view these offences.⁴⁶

The second indicator, the rate of full-time imprisonment for a specific offence, is a direct measure of punitiveness because it is the most severe of all penalties that can be imposed. Subject to an express provision to the contrary, a court is required to consider other options before it imposes full-time imprisonment. In Queensland on 28 March 2014, the *Youth Justice and Other Legislation Amendment Act 2014* (Qld) abolished the statutory provision requiring courts to treat imprisonment as the sanction of last resort. Given the recency of the amendment, it had no impact on the present study. The analysis focuses on offences in the eastern seaboard States of NSW, Victoria and Queensland.

The third indicator, the median head sentence of full-time imprisonment imposed for an offence, can also give specific and useful information about how lenient or severe sentences are in each jurisdiction. Again, the analysis is based on available data and therefore focuses on the eastern seaboard States of NSW, Victoria and Queensland.

42 *Elias v The Queen* (2013) 248 CLR 483 at [27].

43 *Muldrock v The Queen* (2011) 244 CLR 120 at [31]; *Baumer v The Queen* (1988) 166 CLR 51 at 56.

44 These are set out below at 3.2.2, 3.3.2, 3.4.2, 3.5.2 and 3.6.2.

45 Judicial Commission 2007 study, above n 12, p 14.

46 The maximum penalty for dangerous driving causing death was increased from 5 to 10 years in Victoria on 19 March 2008 (*Crimes Amendment (Child Homicide) Act 2008* (Vic), s 5); from 7 to 10 years in Queensland on 20 March 2007 (*Criminal Code and Civil Liability Amendment Act 2007*, s 4); from 4 to 10 years in Western Australia on 15 March 2008 (*Road Traffic Amendment Act (No 2) 2007*, s 22(3)); and, from 5 to 10 years in New Zealand on 10 May 2011 (*Land Transport (Road Safety and Other Matters) Amendment Act 2011*, s 20).

The relevant statutory provisions for each of the offences (NSW, Victoria and Queensland) are set out in Appendix A. Appendix B sets out, for each offence (NSW, Victoria and Queensland), the imprisonment rates and median terms of head sentences where full-time imprisonment was imposed. It presents the relevant date ranges for the sentencing data, the number of offenders sentenced and the number of offenders sentenced to full-time imprisonment. It also presents the numbers of offenders in Victoria and Queensland whose sentence was partially suspended.

3.2 Sexual assault

In this study, the term sexual assault includes an act of sexual penetration without consent. Parliaments across Australia treat this form of sexual assault as the most serious. The legislation in each jurisdiction uses differing terms for what constitutes an act of sexual assault. Notwithstanding these differences, the hierarchy of the seriousness of offences is very similar — from those that involve penetration to acts of indecency.

3.2.1 Aligning offences across jurisdictions

In NSW, “sexual intercourse” is defined in s 61H(1) of the *Crimes Act 1900* (NSW) for the purposes of Pt 3, Div 10, “Offences in the nature of rape, offences relating to other acts of sexual assault etc”, as follows:

- (a) sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person by:
 - (i) any part of the body of another person, or
 - (ii) any object manipulated by another person,except where the penetration is carried out for proper medical purposes, or
- (b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or
- (c) cunnilingus, or
- (d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

In Victoria, s 38 of the *Crimes Act 1958* (Vic) provides for the offence of rape which is described as intentional sexual penetration without consent. Sexual penetration is defined to include oral, anal and vaginal penetration.⁴⁷

In Queensland, “rape” under s 349 of the *Criminal Code* (Qld) is defined to include: having carnal knowledge with a person without their consent; penetrating the vulva, vagina or anus of another person with a thing or part of another person’s body that is not a penis without the person’s consent; or penetrating the mouth of another person to any extent with a person’s penis without consent.⁴⁸

In South Australia, a person is guilty of rape under s 48 of the *Criminal Law Consolidation Act 1935* (SA) if he or she engages in sexual intercourse with another person without consent or where consent is withdrawn. The term “sexual intercourse” is defined in s 5(1) to include: any activity (whether of a heterosexual or homosexual nature) consisting of, or involving, the penetration of a person’s vagina, labia majora or anus by any part of the body of another person or by any object; or, fellatio; or cunnilingus.

In Western Australia, the offence of sexual penetration without consent and the aggravated form of that offence under ss 325 and 326 respectively of the *Criminal Code* (WA) are committed where the offender sexually penetrates another person without their consent.

In New Zealand, the offence of “sexual violation” is provided for under s 128B of the *Crimes Act 1961* (NZ). “Sexual violation” is defined in s 128 to include rape of another person or unlawful sexual connection with another person. “Sexual connection” is defined in s 2(1) to include the introduction into the genitalia or anus of one person, into a part of the body of another person.

47 “Sexual penetration” is defined in s 35(1) of the *Crimes Act 1958* (Vic) as the introduction by a person of his penis into the vagina, anus or mouth of another person, whether or not there is emission of semen; or the introduction by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes.

48 Carnal knowledge is defined in s 6 of the *Criminal Code* (Qld) as complete upon penetration to any extent: s 6(1).

In England, the offence of rape, pursuant to the *Sexual Offences Act 2003* (UK), is committed if a person intentionally penetrates the vagina, anus or mouth of another person with his penis.⁴⁹

New South Wales and Western Australia provide separate offences for aggravated forms of sexual assault,⁵⁰ whereas other jurisdictions, including Victoria, Queensland, South Australia, New Zealand and England provide for only one form of the offence.⁵¹ Aggravating factors, such as being in company or causing injury to the victim are taken into account at the time of sentence. Higher penalties also apply in most jurisdictions where the sexual assault involves a child victim. Child sexual assault is dealt with separately below at 3.3. Standard non-parole periods exist for certain sexual offences in NSW.⁵²

3.2.2 Statutory maximum penalties

Table 3.1 sets out the statutory maximum penalties for sexual assault offences across a number of jurisdictions. New South Wales has the highest maximum penalty of all the jurisdictions for an offence of sexual assault (natural life for offences against s 61JA of the *Crimes Act 1900*). Queensland, South Australia and England have a maximum penalty of life imprisonment followed by Victoria (25 years), Western Australia and New Zealand (20 years each).

Table 3.1: Range of statutory maximum penalties for sexual assault offences

Jurisdiction	Statutory maximum penalties
New South Wales	14 yrs – Natural life
Victoria	25 yrs
Queensland	Life
South Australia	Life
Western Australia	14–20 yrs
New Zealand	20 yrs
England	Life

49 *Sexual Offences Act 2003* (UK), s 1. Section 2 provides for an offence of assault by penetration.

50 See *Crimes Act 1900* (NSW), ss 61J (aggravated sexual assault), 61JA (aggravated sexual assault in company). The aggravating factors are set out in s 61J(2) and include: intentionally or recklessly inflicting actual bodily harm; threatening to inflict actual bodily harm; being in company; the victim being under 16 years; the victim being under the authority of the offender; the victim having a serious physical disability or cognitive impairment; breaking into a dwelling with the intent to commit the offence or another indictable offence; and depriving the victim of his or her liberty. Section 326 of the *Criminal Code* (WA) provides for the offence of sexual assault in circumstances of aggravation (aggravated sexual penetration without consent). Section 319(1)(a) of the *Criminal Code* (WA) defines “circumstances of aggravation” to include circumstances where at, or immediately before or immediately after the commission of the offence the offender: is armed with any dangerous or offensive weapon or instrument or pretends to be so armed; is in company with another person or persons; does bodily harm to any person; does an act which is likely seriously and substantially to degrade or humiliate the victim; or threatens to kill the victim. Section 319(1)(b) also includes another aggravating circumstance, being that the victim is of, or over, the age of 13 years and under the age of 16 years.

51 See eg, *Crimes Act 1958* (Vic), s 38; *Criminal Code* (Qld), s 349; *Criminal Law Consolidation Act 1935* (SA), s 48; *Crimes Act 1961* (NZ), ss 128–128B; and *Sexual Offences Act 2003* (UK), ss 1–2.

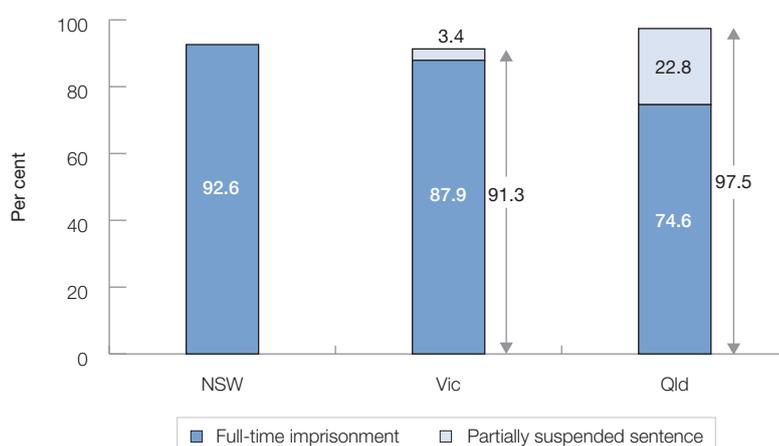
52 See eg, ss 61I, 61J and 61JA have standard non-parole periods of 7, 10 and 15 years respectively: *Crimes (Sentencing Procedure) Act 1999* (NSW), Table to Pt 4, Div 1A.

3.2.3 Rates of full-time imprisonment

Figure 3.1 shows the rates of full-time imprisonment for sexual assault offences in NSW, Queensland and Victoria. In Queensland, almost all sexual assault offences against children are dealt with under the general rape provision of s 349 of the *Criminal Code* (Qld).⁵³ In order to compare sexual assault across the eastern seaboard States, the 581 Queensland District Court sentencing judgments for offenders convicted of rape under s 349 of the *Criminal Code* (Qld) for the period 1 July 2007 to 30 June 2013 were analysed for the purposes of identifying those cases where the offence was committed against an adult.

New South Wales has the highest rate of imprisonment for all forms of this offence (non-aggravated and aggravated) (92.6%) compared with Victoria (87.9%) and Queensland (74.6%).⁵⁴ Even when the rate of imprisonment for the non-aggravated form of the offence in NSW (s 611) was compared with Victoria and Queensland (where there are no separate aggravated forms of the offence), the rate in NSW was still higher (89.7%) than Victoria and Queensland. However, when partially suspended sentences were included, Victoria's imprisonment rate rose by 3.4% to 91.3% and Queensland's rate of imprisonment rose by 22.9% to 97.5%.

Figure 3.1: Proportion of offenders sentenced to full-time imprisonment for sexual assault



3.2.4 Median head sentences

Figure 3.2 shows the median head sentences for sexual assault offences in NSW, Victoria and Queensland. Queensland had the highest median head sentence (84 months),⁵⁵ followed by NSW (72 months) and Victoria (60 months). In Queensland, there were 45 partially suspended sentences imposed in the data period (see 2.2.2). These were not included when calculating the median head sentence. The high median head sentence in Queensland may be partially explained by the large proportion of cases where the court imposed a partially suspended sentence for this offence. This form of penalty tends to attract shorter terms of imprisonment compared to sentences of full-time imprisonment, in part because there is a 5-year limit on the length of a suspended or partially suspended

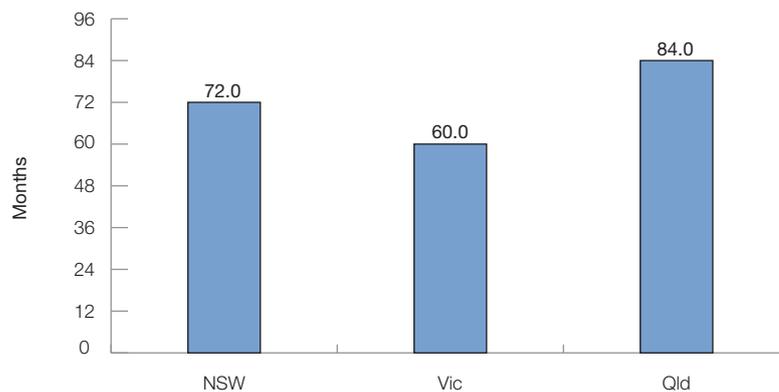
53 In Queensland, some child sexual assault offences are dealt with under s 215 of the *Criminal Code* (Qld): "carnal knowledge with or of children under 16". Where the child victim is under 16 years of age, but above the age of 12 years, the offence attracts a maximum penalty of 14 years: s 215(2). Where the child is under 12 years, a maximum penalty of life imprisonment applies: s 215(3). There were only two cases during the data period (see 2.2.2) where the offender was convicted of an offence under s 215(3) and only one was sentenced to full-time imprisonment. There were 320 cases dealt with under s 215(2) with only 21 (6.6%) sentenced to a term of imprisonment. "Carnal knowledge" under s 215 does not include sodomy: s 215(6), however, see more generally s 6(2). The *Criminal Code* contains a separate provision of unlawful sodomy of a child under 12 years which carries a maximum penalty of life imprisonment: s 208(2). There were three cases for this offence during the data period with two offenders being sentenced to full-time imprisonment.

54 The imprisonment rate for *all* rape cases under s 349 of the *Criminal Code* (Qld), including those cases where the victim was a child, was 70.7%.

55 The median head sentence for *all* rape cases under s 349 of the *Criminal Code* (Qld), including those where the victim was a child, was 78 months.

sentence that can be imposed.⁵⁶ By contrast, in Victoria, partially suspended sentences were imposed in only two cases for this offence. This could, in part, be due to the fact that the maximum term that could be imposed for a partially suspended sentence in Victoria was 2 years.

Figure 3.2: Median head sentences for sexual assault



3.3 Child sexual assault

For the purposes of this study, child sexual assault is an act of sexual penetration of a child. Sexual penetration has the same meaning as set out under “Sexual assault” at 3.2.⁵⁷

There is no uniform age of consent in Australia. The age of consent is 16 years in NSW,⁵⁸ Victoria⁵⁹ and Western Australia.⁶⁰ In South Australia⁶¹ it is 17 years. In Queensland, the age of consent for anal sex (referred to as sodomy in the *Criminal Code* (Qld)) is 18 years, and is 16 years for all other sexual acts.⁶²

The capacity to compare imprisonment rates for child sexual assault across jurisdictions is made difficult because of the large number and different types of child sexual assault offences within each jurisdiction. Most jurisdictions have specific child sexual assault offences which are delineated according to the age of the victim. In some jurisdictions, these are also grouped according to the circumstances of offending, for example, whether the child was under the care, supervision or authority of the offender.⁶³ Additionally, many Australian

⁵⁶ *Penalties and Sentences Act* 1992 (Qld), s 144(1).

⁵⁷ See 3.2.1.

⁵⁸ *Crimes Act* 1900 (NSW), s 66C.

⁵⁹ *Crimes Act* 1958 (Vic), s 45.

⁶⁰ *Criminal Code* (WA), s 321.

⁶¹ *Criminal Law Consolidation Act* 1935 (SA), s 49.

⁶² *Criminal Code* (Qld), ss 208, 215.

⁶³ For example, s 73 of the *Crimes Act* 1900 (NSW) provides for an offence of sexual intercourse with a child between 16 and 18 years under special care; s 45(2)(b) of the *Crimes Act* 1958 (Vic) provides for an offence of sexual penetration of a child between 12 and 16 years and under the care, supervision or authority of the accused; s 215(4) of the *Criminal Code* (Qld) provides an offence of carnal knowledge with or of a child under 16 years where the offender is the child’s guardian or has the child under his or her care; s 49(5) of the *Criminal Law Consolidation Act* 1935 (SA) provides for an offence of having sexual intercourse with a person under 18 years of age where the offender is in a position of authority; and s 322 of the *Criminal Code* (WA) provides for sexual offences against a child over 16 years by a person who has the child under his or her care, supervision or authority.

jurisdictions also have specific offences where there has been persistent or repeated sexual misconduct against a child.⁶⁴

Below is a brief outline of the various statutory schemes for child sexual assault across a number of jurisdictions. Sentencing outcomes in NSW, Victoria and Queensland are then compared for offences committed against children aged under 10 years.

3.3.1 Aligning offences across jurisdictions

3.3.1.1 New South Wales

New South Wales has carefully classified sexual offending against children so that various maximum penalties and standard non-parole periods apply dependent on the age of the child. Each (statutory) age grouping also has an aggravated form of the offence.

Section 66A of the *Crimes Act 1900* (NSW) provides for the offence of sexual intercourse with a child under 10 years. Section 66C(1) provides for the offence of sexual intercourse with a child between 10 and 14 years, and s 66C(3) provides for the offence of sexual intercourse with a child between 14 and 16 years.⁶⁵ Sections 66A(3)(a)–(i) and 66C(5)(a)–(i) set out the circumstances of aggravation for offences under ss 66A and 66C respectively. These include inflicting actual bodily harm on a child; committing the offence in company; committing the offence on a child with a serious physical disability or cognitive impairment; or where the child is under the offender’s authority.

In addition, offenders who commit a sexual offence against a child may be charged, convicted and sentenced under s 61J of the *Crimes Act* which provides for the offence of aggravated sexual intercourse without consent. Although it is possible for the Crown to utilise s 61J for an offence that involves a child aged under 10 years, it is not common practice.⁶⁶

64 The vast range of conduct making up each these offences means it is difficult to compare offences of persistent sexual abuse across jurisdictions. In NSW, s 66EA of the *Crimes Act 1900* (NSW) provides for the offence of persistent sexual abuse of a child (defined as a person under the age of 18 years: s 66EA(12)). A person who, on three or more separate occasions occurring on separate days during any period, engages in conduct in relation to a particular child that constitutes a “sexual offence” is liable to imprisonment for 25 years: s 66EA(1). “Sexual offence” is defined to include, the offences encompassed by ss 611–610 of the Act: s 66EA(12). Between 1 June 2007 and 31 December 2013, only 16 offenders were sentenced in the higher courts in NSW for s 66EA(1) offences. All of these offenders received a sentence of full-time imprisonment and the median head sentence was 10 years. In Victoria, s 47A(1) of the *Crimes Act 1958* (Vic) provides for an offence of persistent sexual abuse of a child under the age of 16 years. The maximum penalty for this offence is 25 years imprisonment. Between 1 July 2007 to 30 June 2012, 43 offenders were sentenced in the higher courts for the offence of sexual abuse of a child under the age of 16 years contrary to s 47A(1). Of these, 39 (91%) received a sentence of full-time imprisonment. The median head sentence for this offence was 6 years: Sentencing Advisory Council (Vic), *Sentencing snapshot: Sentencing trends in the higher courts of Victoria: 2007–08 to 2011–12*, No 148 Persistent sexual abuse of a child under 16, June 2013, at www.sentencingcouncil.vic.gov.au/publications/sentencing-snapshots/148-persistent-sexual-abuse-child-under-16-higher-courts, accessed 16 February 2015. In Queensland, s 229B of the *Criminal Code* (Qld) provides for an offence of maintaining an unlawful sexual relationship with a child under the prescribed age, which is defined in s 229B(10). This offence has a maximum penalty of life imprisonment. In contrast to NSW, between 1 July 2007 and 30 June 2014, 310 offenders were sentenced in the higher courts for the offence of maintaining a sexual relationship with a child contrary to s 229B(1) of the *Criminal Code* (Qld). Of these, 72.6% (225) were sentenced to full-time imprisonment. The median head sentence of imprisonment for offenders committing this offence was 6 years. In South Australia, s 50(1) of the *Criminal Law Consolidation Act 1935* (SA) provides for the offence of persistent sexual exploitation of a child. An adult person who, over a period of not less than three days, commits more than one act of sexual exploitation of a particular child under the prescribed age (as defined in s 50(7)) is guilty of an offence and is liable to life imprisonment. In Western Australia, s 321A of the *Criminal Code* (WA) provides for the offence of persistent sexual conduct with a child under 16 which requires sexual conduct with a child on three or more occasions each of which is on a different day. Sexual conduct includes sexual penetration of a child under the age of 13 years (s 320(2)) and of or over 13 years and under 16 years (s 321(2)).

65 In addition, s 66EA(1) of the *Crimes Act 1900* (NSW) provides for an offence of persistent sexual abuse of a child, see also *ibid*.

66 For example, an analysis of s 61J data revealed only four cases in the relevant data period (see 2.2.2).

Section 66A of the *Crimes Act 1900* (NSW) was amended by the *Crimes Amendment (Sexual Offences) Act 2008* (effective 1 January 2009), to create a non-aggravated (s 66A(1)) and a new aggravated (s 66A(2)) offence of sexual intercourse with a child under the age of 10 years. Section 66A(1) has a maximum penalty of 25 years imprisonment and a standard non-parole period of 15 years.⁶⁷ The aggravated form of the offence carries a maximum penalty of imprisonment for natural life with a standard non-parole period of 15 years.⁶⁸

3.3.1.2 Victoria

In Victoria, under s 45(2)(c) of the *Crimes Act 1958* (Vic), a person who takes part in an act of sexual penetration with a child between 12 and 16 years is liable to a maximum penalty of 10 years. If the child is under 12 years of age, the maximum penalty rises significantly under s 45(2)(a) to 25 years imprisonment. Section 45(2)(a) was amended in 2010 to increase the maximum age of the victim for this form of offence from 10 to 12 years⁶⁹ and this amendment applies to offences committed on or after 17 March 2010.⁷⁰ There was no change to the relevant maximum penalty. Data provided by the Sentencing Advisory Council (Vic) for this offence includes offenders sentenced under the old and new forms of s 45(2)(a). However, in the data period (see 2.2.2) there was only one case where the offender was sentenced under the new form of s 45(2)(a).⁷¹

The *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic) amended, inter alia, the *Sentencing Act 1991* (Vic) and the *Crimes Act 1958* (Vic) to introduce baseline sentencing for six offences including sexual penetration of a child under 12 years (s 45(2A) of the *Crimes Act*). A baseline sentence is the sentence Parliament intends to be the median sentence for sentences imposed for that particular offence.⁷² This legislation was not in force at the time of the data period (see 2.2.2) and so would not have an effect on the sentencing patterns reported in this study.

3.3.1.3 Queensland

Although Queensland has a specific offence of carnal knowledge with or of children under 16 years pursuant to s 215 of the *Criminal Code* (Qld),⁷³ the sentencing statistics on QGIS show that the vast majority of child sexual assault offenders are charged with the general rape offence under s 349.⁷⁴ As the Queensland legislation (and QGIS) does not delineate child sexual assault offences according to age, as is the case in NSW and Victoria, the 581 Queensland District Court sentencing judgments for offenders convicted of rape under s 349 of the *Criminal Code* (Qld) for the period 1 July 2007 to 30 June 2013 were analysed for the purposes of identifying those cases where the victim was a child under 10 years of age.⁷⁵

3.3.1.4 South Australia

In addition to the offence of rape under s 48 of the *Criminal Law Consolidation Act 1935* (SA), South Australia has an offence of unlawful sexual intercourse which provides that a person who has sexual intercourse with

67 *Crimes (Sentencing Procedure) Act 1999* (NSW), Table to Pt 4, Div 1A.

68 *ibid.*

69 *Crimes Legislation Amendment Act 2010* (Vic), s 3(1).

70 *ibid.*, s 2.

71 Whether the victim in this case was aged under 10 years or aged between 10 and 12 years is unknown: Sentencing Advisory Council (Vic), "Sentencing snapshot" publications: *Sentencing trends in the higher courts of Victoria: 2008–09 to 2012–13*, June 2014, No 149 Sexual penetration of a child aged under 12.

72 *Sentencing Act 1991* (Vic), s 3. A "median sentence" is defined in s 5B. In the case of an offence against s 45(2)(a), the baseline sentence is 10 years imprisonment.

73 Section 6(1) of the *Criminal Code* (Qld) provides: "If carnal knowledge is used in defining an offence, the offence, so far as regards that element of it, is complete on penetration to any extent". Carnal knowledge includes sodomy: s 6(2).

74 See eg, in *R v KAC* [2010] QCA 39, the five victims included the offender's three-year old niece and an eight-year old girl, in *R v NK* [2008] QCA 403 [(2008) 191 A Crim R 483], the victim was five years old, and in *R v MBG and MBH* [2009] QCA 252, the victims included the offenders' seven-year old daughter and her nine-year old friend. In each case, the offender or offenders were charged under s 349 of the *Criminal Code* (Qld).

75 The final figures include cases where the age of the child victim was known to be under 10 years of age. In 99 of these cases, the court did not explicitly specify the age of the victim. These cases were excluded from the data set. Of the 482 cases where the age of the victim was specified, 120 were children under 10 years of age, 165 were children between 10 and 18 years of age, and 197 were adults.

any person under the age of 14 years is guilty of an offence and liable to be imprisoned for life.⁷⁶ A maximum penalty of 10 years applies where the child is under the age of 17 years.⁷⁷

3.3.1.5 Western Australia

Western Australia has separate offences for sexually penetrating a child under 13 years of age⁷⁸ and between 13 and 16 years of age.⁷⁹ The term “to sexually penetrate” is defined in s 319(1) of the *Criminal Code (WA)*. Further, one of the circumstances of aggravation for any of the sexual offences in Chapter XXXI (Sexual offences) of the *Criminal Code* is that the victim is of, or over, the age of 13 years and under the age of 16 years.⁸⁰

3.3.1.6 New Zealand

New Zealand provides for separate offences where a person has a sexual connection with a person under the age of 12 years or under the age of 16 years.⁸¹ The maximum penalties for these offences are 14 years and 10 years respectively. The term “sexual connection” is defined in s 2(1) of the *Crimes Act 1961 (NZ)*.⁸² Section 128B of the Act provides for the offence of sexual violation. Sexual violation is defined in s 128 of the *Crimes Act* as rape or unlawful sexual connection with another person. It carries a maximum penalty of 20 years.⁸³

3.3.1.7 England

In England, the *Sexual Offences Act 2003 (UK)* provides for the offence of raping a child under the age of 13 years where the offender penetrates with his penis the child’s vagina, anus or mouth; and the offence of assaulting a child under 13 years where the offender penetrates the child’s vagina or anus with a part of his body or anything else.⁸⁴ The maximum penalty for these offences is imprisonment for life. The Act also provides a maximum penalty of 14 years imprisonment where the victim is under the age of 13 or 16 years and there has been intentional sexual touching, including penetration of the victim’s or offender’s anus or vagina with a part of the offender’s or victim’s body respectively, or penetration of the victim’s or offender’s mouth with the offender’s or victim’s penis respectively.⁸⁵

3.3.2 Statutory maximum penalties

Table 3.2 sets out the statutory maximum penalties for child sexual assault offences across a number of jurisdictions. In each jurisdiction, the statutory maximum penalty for child sexual assault offences depends primarily on the age of the victim. The circumstance that the victim was under the care or authority of the offender is generally treated as an aggravating factor which increases the maximum penalty prescribed for an offence. New South Wales has a maximum penalty of natural life for certain sexual offences against children, while Queensland, South Australia and England have a maximum penalty of life imprisonment. In each case, the maximum penalty is reserved for victims who are in the lowest age category.⁸⁶ In NSW, the statutory maximum of natural life applies to the aggravated form of the offence of sexual intercourse with a child under 10.⁸⁷ In Queensland, life imprisonment

76 *Criminal Law Consolidation Act 1935 (SA)*, s 49(1).

77 *ibid* s 49(3).

78 *Criminal Code (WA)*, s 320(2).

79 *ibid*, s 321(2).

80 *ibid*, s 319(1), definition of “circumstances of aggravation”, subs (b).

81 *Crimes Act 1961 (NZ)*, ss 132 and 134 respectively.

82 “Sexual connection” includes the introduction into the genitalia or anus, of a part of the body of another person or an object held or manipulated by another person or connection between the mouth or tongue of one person and a part of another person’s genitalia or anus.

83 *Crimes Act 1961 (NZ)*, s 128B.

84 *Sexual Offences Act 2003 (UK)*, ss 5 and 6 respectively.

85 *ibid*, s 9.

86 Aggravated sexual assault of a child under 10 years (*Crimes Act 1900 (NSW)*, s 66A(2)); carnal knowledge of a child under 12 years (*Criminal Code (Qld)*, s 215(3)); sexual intercourse with a child under 14 years (*Criminal Law Consolidation Act 1935 (SA)*, s 49(1)); and rape of a child under 13 years or assault by penetration of a child under 13 years (*Sexual Offences Act 2003 (UK)*, ss 5, 6).

87 *Crimes Act 1900 (NSW)*, s 66A(2).

is also prescribed as the maximum penalty where the child was under the guardianship or care of the offender or if the child is a person with an impairment of the mind.⁸⁸ In many jurisdictions the general rape or sexual assault provisions appear to be routinely used to accommodate child sexual assault offences. These are outlined above under “Sexual assault” at 3.2.

Table 3.2: Statutory maximum penalties for child sexual assault offences

Offence	Statutory maximum penalty
New South Wales – Crimes Act 1900	
s 66A(1) (child under 10)	25 yrs
s 66A(2) (child under 10 aggravated)	Natural life
s 66C(1) (child between 10 and 14)	16 yrs
s 66C(2) (child between 10 and 14 aggravated)	20 yrs
s 66C(3) (child between 14 and 16)	10 yrs
s 66C(4) (child between 14 and 16 aggravated)	12 yrs
s 61J(2)(d) (aggravated sexual assault where aggravating feature is victim under 16)	20 yrs
Victoria – Crimes Act 1958	
s 45(2)(a) (child under 10, repealed 17 March 2010)	25 yrs
s 45(2)(a) (child under 12)	25 yrs
s 45(2)(b) (child between 12 and 16 and under care, supervision or authority of accused)	15 yrs
s 45(2)(c) (child between 12 and 16)	10 yrs
s 48 (child 16 or 17)	10 yrs
Queensland – Criminal Code	
s 215(3) (child under 12)	Life
s 215(2) (child between 12 and under 16)	14 yrs
s 215(4) (child under 16 and under guardianship or care)	Life
s 215(4A) (child with an impairment of the mind)	Life
Western Australia – Criminal Code	
s 320(2) (child under 13)	20 yrs
s 321(2), (7)(a) (child between 13 and 16)	14 yrs
s 321(2), (7)(b) (child between 13 and 16 under care, supervision or authority)	20 yrs
s 321(2), (7)(c) (offender under 18 and child not under care, supervision or authority)	7 yrs
s 322 (child over 16 under care, supervision or authority)	10 yrs
South Australia – Criminal Law Consolidation Act 1935	
s 49(1) (unlawful sexual intercourse – person under 14)	Life
s 49(2) (unlawful sexual intercourse – person under 17)	10 yrs
s 49(5) (person under 18 under authority)	10 yrs
New Zealand – Crimes Act 1961	
s 132 (sexual conduct with child under 12)	14 yrs
s 134 (sexual conduct with person under 16)	10 yrs
England – Sexual Offences Act 2003	
s 5 (rape of child under 13)	Life
s 6 (assault of child under 13 by penetration)	Life
s 9(2) (sexual activity with a child)	14 yrs

88 *Criminal Code* (Qld), s 215(4), (4A).

Table 3.3 shows the statutory maximum penalties for a person who sexually assaults a child under the age of 10 years. For the offence of sexual assault of a child under 10 years, NSW has a maximum penalty of 25 years,⁸⁹ with a maximum penalty of imprisonment for natural life reserved for an aggravated form of the offence.⁹⁰ Despite the maximum age of the victim rising from 10 to 12 years in Victoria, the maximum penalty for this offence remains 25 years. In Queensland, despite the specific offence of carnal knowledge of a child under 12 years under s 215(3) of the *Criminal Code* (Qld), the general offence of rape is commonly used for child sexual assault. The general offence of rape has a statutory maximum penalty of life imprisonment. The maximum was set at this level in 2000.⁹¹

Table 3.3: Statutory maximum penalties for sexual assault of a child under 10 years

Offence	Statutory maximum penalty
New South Wales – <i>Crimes Act 1900</i>	
s 66A(1) (child under 10)	25 yrs
s 66A(2) (child under 10 aggravated)	Life
Victoria – <i>Crimes Act 1958</i>	
s 45(2)(a) (child under 10, repealed 17 March 2010)	25 yrs
s 45(2)(a) (child under 12)	25 yrs
Queensland – <i>Criminal Code</i>	
s 349 (rape)	Life

3.3.3 Rates of full-time imprisonment

Figure 3.3 shows the rates of full-time imprisonment for the offence of sexual assault against a child under the age of 10 years in NSW, Victoria and Queensland. New South Wales is the only Australian jurisdiction of those analysed that, at the time of publication, has a specific offence of sexual assault of a child under 10 years.⁹² In Queensland, almost all child sexual assault offenders are charged and convicted under the general rape provision and in Victoria the lowest age division for child sexual assault is currently 12 years. As discussed above (at 3.2.3), so that a meaningful comparison could be made with NSW, cases in Queensland where the victim of sexual assault was known to be under 10 years were extracted from the data and analysed.

Unlike NSW, Victoria and Queensland do not have aggravated forms of the offence. In those States, aggravating factors, such as those found in the NSW provisions, are taken into account as further facts during the sentencing process. Therefore, in order to make a valid comparison between the three States, the sentencing data for the non-aggravated and aggravated forms of the offence in s 66A(1) and (2) in NSW have been combined.

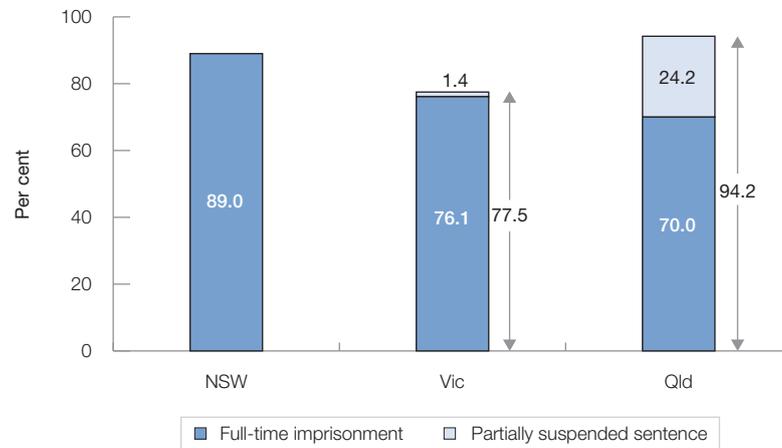
Of the eastern seaboard States, NSW had by far the highest rate of imprisonment where a sexual assault offence was committed against a child under 10 years of age. New South Wales had an overall imprisonment rate of 89.0%, followed by Victoria (76.1%) and Queensland (70.0%). When partially suspended sentences were included, the rate of imprisonment rose to 94.2% in Queensland. One offender was given a partially suspended sentence for this offence in Victoria.

89 *Crimes Act 1900* (NSW), s 66A(1).

90 *ibid*, s 66A(2).

91 The maximum penalty was set when a new s 349 was inserted by the *Criminal Law Amendment Act 2000* (Qld), s 24. The maximum penalty has not been amended since.

92 *Crimes Act 1900* (NSW), s 66A.

Figure 3.3: Proportion of offenders sentenced to full-time imprisonment for sexual assault of child under 10 years

3.3.4 Median head sentences

Figure 3.4 shows the median head sentences for the offence of sexual assault of a child under 10 years in NSW, Victoria and Queensland. New South Wales had the highest median head sentence for full-time imprisonment of the eastern seaboard States (84 months) for this offence. Queensland had a median head sentence of 72 months followed by Victoria (48 months).

Figure 3.4: Median head sentences for sexual assault of child under 10 years

3.4 Dangerous/culpable driving causing death

Most jurisdictions provide for separate dangerous driving offences depending on whether a person is seriously injured or killed as a result of the offence. This section focuses on driving offences that are dealt with on indictment. New South Wales, Queensland, South Australia and Western Australia have separate offences for aggravated forms of dangerous driving causing death or serious injury.⁹³ The circumstances of aggravation in NSW include the offender having the prescribed concentration of alcohol present in his or her breath or blood; driving more than 45 kilometres per hour above the speed limit; driving to escape pursuit by a police officer; or driving while very substantially impaired by drugs (other than intoxicating liquor) or a combination of drugs (whether or not intoxicating liquor was part of that combination).⁹⁴ In Queensland, where the offender was intoxicated, excessively speeding, taking part in an unlawful race or speed trial, or leaving the scene of an incident where he or she knew or ought to reasonably know the victim had been killed or injured, the offender is liable to a higher maximum penalty than that reserved for the non-aggravated offence of dangerous driving.⁹⁵

3.4.1 Aligning offences across jurisdictions

For the purposes of this study, it is necessary to carefully consider the complicated legislative history of the dangerous driving causing death offence provisions in Victoria. The offences are structured differently to those in NSW and Queensland. In Victoria, a more serious form of the offence, “culpable driving causing death” under s 318(1) of the *Crimes Act 1958* (Vic) is available and carries a higher maximum penalty of 20 years compared to the aggravated form of dangerous driving causing death in NSW and Queensland (which is 14 years in each jurisdiction).⁹⁶ Prior to 2004, there were only two serious driving offences in Victoria: “culpable driving causing death” and “dangerous driving”, which carried maximum penalties of 20 years and 2 years imprisonment respectively.⁹⁷ In 2004, the offence of dangerous driving causing death or serious injury was inserted into the *Crimes Act 1958* (Vic) with a maximum penalty of 5 years.⁹⁸ In 2008, the offence was divided into two separate offences of dangerous driving causing death⁹⁹ and dangerous driving causing serious injury,¹⁰⁰ carrying a maximum penalty of 10 years and 5 years respectively.¹⁰¹

Section 318(2)(b) provides that a person drives “culpably” if he or she drives a motor vehicle recklessly, negligently, or while under the influence of alcohol or a drug. It was accepted in *R v De’Zilwa*¹⁰² and later in *King v The Queen*¹⁰³ that by creating the offence of culpable driving causing death by negligence (see s 318(2)(b) and the non-exhaustive definition of negligence in s 318(2A)), the Victorian Parliament legislated the common law offence of manslaughter by gross criminal negligence when driving a motor vehicle. The High Court in *King v The Queen* discussed the difference between culpable driving causing death and dangerous driving causing death¹⁰⁴ and held that although the prosecution must prove negligence for a culpable driving charge under s 318(2)(b), the concept of negligence is not an ingredient of the offence of dangerous driving under s 319. Rather, dangerous driving is based upon the risk of danger posed to other persons and not upon the degree to which the driving falls short of the standard of care owed to other road users. The same approach applies to the NSW offence of dangerous driving causing death.¹⁰⁵

93 *Crimes Act 1900* (NSW), s 52A(1), (2); *Criminal Code* (Qld), s 328A(4)(b), (c); *Criminal Law Consolidation Act 1935* (SA), s 5AA; *Road Traffic Act 1974* (WA), s 59(3)(a). The equivalent offence in Queensland is the dangerous operation of a vehicle causing death or grievous bodily harm.

94 *Crimes Act 1900* (NSW), s 52A(7).

95 *Criminal Code* (Qld), s 328A(4)(b), (c).

96 *Crimes Act 1958* (Vic), s 318(1); *Crimes Act 1900* (NSW), s 52A(2); *Criminal Code* (Qld), s 328A(4)(b), (c).

97 *Crimes Act 1958* (Vic), s 318(1), and *Road Safety Act 1986* (Vic), s 64, respectively.

98 A new s 319 was inserted by *Crimes (Dangerous Driving) Act 2004* (Vic), s 6, which commenced on 13 October 2004.

99 *Crimes Act 1958* (Vic), s 319(1).

100 *ibid*, s 319(1A).

101 These amendments, made by *Crimes Amendment (Child Homicide) Act 2008* (Vic), only apply to offences committed on or after 19 March 2008.

102 (2002) 133 A Crim R 501 at [42]–[46].

103 (2012) 245 CLR 588.

104 *ibid* at [18].

105 *ibid* at [34], [45]–[46].

The addition, in Victoria, of the offence of culpable driving premised on gross negligence under s 318(2)(b), has to be taken into account when comparing imprisonment rates in Victoria with those in NSW and Queensland. At least some of the offenders convicted of culpable driving in Victoria would fall within the common law offence of manslaughter by gross criminal negligence arising from the use of a motor vehicle if the offender had been charged in NSW.¹⁰⁶ Offenders convicted of this form of manslaughter in NSW have not been included in the figures for NSW. Manslaughter by gross criminal negligence when driving a motor vehicle is not a discrete offence, but is rather a factual circumstance (of manslaughter). However, excluding motor vehicle manslaughter cases inevitably has the effect that the most serious driving offences in NSW are not included. The precise number of motor vehicle manslaughter cases in NSW is not known. Practical experience suggests that manslaughter is rarely charged in driving cases — it is reserved for only the very serious cases. Therefore, imprisonment rates and lengths of sentences for serious driving offences in NSW will be marginally underestimated relative to Victoria.¹⁰⁷ The same can be said of the imprisonment rates for the dangerous operation of a vehicle causing death in Queensland where cases of manslaughter by gross criminal negligence when driving a motor vehicle (which could be charged under s 300, as defined by s 303 of the *Criminal Code* (Qld)) are not included.

Other procedural issues are also worth noting. The offences of dangerous driving causing death in NSW and of dangerous operation of a vehicle causing death in Queensland are both strictly indictable offences. However, the offence of dangerous driving in Victoria under s 319(1) is an indictable offence that may be heard and determined summarily.¹⁰⁸ The figures supplied by the Sentencing Advisory Council (Vic) do not include the sentences imposed where the offence is dealt with summarily. Nonetheless, the more serious forms of the offence would be dealt with in the County Court of Victoria.

The *Crimes Act* 1958 (Vic) provides specific alternative verdicts for certain driving offences.¹⁰⁹ “Dangerous driving causing death” is available as an alternative verdict to the offence of “culpable driving causing death”, and “dangerous driving causing serious injury” is available as an alternative verdict to the offence of “negligently causing serious injury”.¹¹⁰ Under s 22, the offence of conduct endangering life is an indictable offence carrying a maximum penalty of 10 years imprisonment. Manslaughter is not included in the alternative verdict provisions in the Victorian Act. New South Wales, on the other hand, has specific provisions in the *Crimes Act* 1900 (NSW) providing for an alternative verdict of dangerous driving where the jury is not satisfied that the accused is guilty of manslaughter or murder.¹¹¹

Given the differences in the way dangerous driving offences are structured across the three eastern seaboard States, the maximum penalty was used as a basis for including certain driving offences in the cross-jurisdictional comparison. The difficulties in aligning dangerous driving offences in NSW and Queensland with those in Victoria meant that, for the purposes of comparison, three separate groupings have been presented for Victoria:

- dangerous driving causing death
- culpable driving causing death
- dangerous driving causing death combined with culpable driving causing death.

106 This interpretation is supported by the text of the alternative verdict provisions in the NSW and Victorian *Crimes Acts*: see *Crimes Act* 1900 (NSW), s 52AA(4), (5); *Crimes Act* 1958 (Vic), s 422A. See also Judicial Commission of NSW, “*King v The Queen* [2012] HCA 24: Directions on dangerous driving”, Special Bulletin 28, July 2012, in *Criminal Trial Courts Bench Book*, 2nd edn, 2002–. In *R v Cramp* (1999) 110 A Crim R 198 at [108], it was held that manslaughter is “a much more serious offence than aggravated dangerous driving causing death”, which carries a maximum penalty of 14 years imprisonment as opposed to 25 years for manslaughter. See also *R v Borkowski* (2009) 195 A Crim R 1.

107 See also Judicial Commission of NSW, above n 18.

108 The offence in s 319(1) of the *Crimes Act* 1958 (Vic) carries a maximum penalty of 10 years, which is a level 5 offence: see s 28 of the *Criminal Procedure Act* 2009 (Vic), concerning indictable offences that may be heard and determined summarily.

109 *Crimes Act* 1958 (Vic), s 422A, entitled “Alternative verdict for certain charges relating to driving”; see discussion in Judicial College of Victoria, *Victorian Criminal Charge Book*, “7.2.8 Culpable driving causing death”, at www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#4517.htm, accessed 16 February 2015.

110 *Crimes Act* 1958 (Vic), s 422A.

111 *Crimes Act* 1900 (NSW), s 52AA(4), (5). Section 52AA(4) provides that if on the trial of a person who is indicted for murder or manslaughter, or for an offence under ss 53 or 54, the jury is satisfied that the person is guilty of an offence under s 52A, the accused is liable to punishment accordingly.

3.4.1.1 Queensland and Victorian data

The Queensland Sentencing Information System does not separate sentencing data for the offences of dangerous operation of a vehicle causing death and dangerous operation of a vehicle causing grievous bodily harm. This is to be contrasted to the counting practices of NSW and Victoria. Consequently, to conduct a comparison with NSW, 448 sentencing judgments of the Queensland District Court for the period 1 July 2007 to 30 June 2013 were analysed and coded to isolate those cases where the offence under s 328A of the *Criminal Code* (Qld) resulted in the death of the victim.¹¹²

Victoria does not publish a *Sentencing snapshot* for the offence of dangerous driving causing death. Original data for this offence had to be directly sourced from the Sentencing Advisory Council (Vic).¹¹³ Only NSW reports separate sentencing data for non-aggravated and aggravated forms of the offence of dangerous driving causing death. In this study, the non-aggravated and aggravated forms of the offence in NSW have been combined into one category.

3.4.2 Statutory maximum penalties

Table 3.4 sets out the statutory maximum penalties for dangerous/culpable driving causing death across a number of jurisdictions. South Australia has the highest maximum penalty (life) for the most aggravated form of the offence,¹¹⁴ followed by Victoria (20 years). New South Wales, Queensland and England all have a maximum penalty of 14 years for the most aggravated forms of dangerous driving causing death, while in New Zealand the maximum penalty is 10 years.¹¹⁵

As noted above at 3.1, since the Judicial Commission 2007 study, the statutory maximum penalties for dangerous driving causing death have increased in Victoria, Queensland, Western Australia and New Zealand.¹¹⁶

In NSW, a guideline judgment¹¹⁷ was promulgated by the Court of Criminal Appeal for this offence in 1998 as a result of what the court described as a “pattern of inadequacy”¹¹⁸ of sentences. In 2002, the guideline was reformulated in *R v Whyte*,¹¹⁹ where the court held that a “custodial sentence will usually be appropriate unless the offender has a low level of moral culpability”.¹²⁰

112 In 28 cases, the remarks on sentence were not available and so it could not be determined whether the offence resulted in grievous bodily harm or death. In 182 of the remaining 420 cases, the offence resulted in death, while 227 resulted in grievous bodily harm. In one case, the judgment did not specify whether the victim was killed or suffered grievous bodily harm. This case was excluded from the data set.

113 Original data was generated and provided by G Fisher, Senior Data Analyst, and Z Bathy, Data Analyst, from the Sentencing Advisory Council (Vic). For the offence of culpable driving causing death, data was extracted from: Sentencing Advisory Council (Vic), *Sentencing snapshot: Sentencing trends in the higher courts of Victoria: 2007–08 to 2011–12*, No 142 Culpable driving causing death, above n 40.

114 *Criminal Law Consolidation Act* 1935 (SA), s 19A(1)(a)(ii). The maximum penalty of life imprisonment applies for the aggravated form of the offence or where there has been a subsequent offence under s 19A.

115 New Zealand has two dangerous driving causing death offences. One offence is under s 7 of the *Land Transport Act* 1998 (NZ), which provides that drivers may not drive a motor vehicle recklessly or dangerously. Where an offender contravenes s 7 by causing the death of another person, they are liable to a maximum penalty of 10 years: s 36AA(2)(a). Section 36AA was inserted on 10 May 2011 by s 20 of the *Land Transport (Road Safety and Other Matters) Amendment Act* 2011 (NZ). At the time of the last study in 2007, New Zealand did not make the distinction between causing injury or death in their legislation in that the maximum penalty was 5 years for both offences: see *Land Transport Act* 1998, s 36 (now in different terms). The other offence is “Person in charge of motor vehicle causing injury or death” under s 61 of the *Land Transport Act* 1998 (NZ), which applies where the offender is under the influence of drink or a drug (or both) while driving. The maximum penalty when the offence results in the death of another person is 10 years: s 61(3AA)(a). In England, s 1 of the *Road Traffic Act* 1991 (UK) provides for the offence of causing death by dangerous driving.

116 The maximum penalty for dangerous driving causing death (or an equivalent offence) was increased from 5 to 10 years in Victoria on 19 March 2008; from 7 to 10 years in Queensland on 20 March 2007; from 4 to 10 years in Western Australia on 15 March 2008; and from 5 to 10 years in New Zealand on 10 May 2011. See above n 46 for legislative details.

117 *R v Jurisic* (1998) 45 NSWLR 209.

118 *ibid* at 230.

119 (2002) 55 NSWLR 252.

120 *ibid* at [214].

The *Sentencing Amendment (Baseline Sentences) Act 2014 (Vic)* introduces baseline sentencing in Victoria for six offences, including culpable driving causing death. This legislation was not in force at the time of the relevant data period and so would not have an effect on sentencing patterns for the culpable driving offences reported in this study.

Similarly, Definitive Guideline, *Causing death by driving*, was issued in England and Wales in 2008. It provides guidance on factors the court should consider in the sentencing exercise for the four dangerous driving offences. The guideline sets out determinants of seriousness and the mitigating and aggravating factors.¹²¹

Table 3.4: Range of statutory maximum penalties for dangerous/culpable driving causing death

Jurisdiction	Statutory maximum penalties
New South Wales	10–14 yrs
Victoria	10–20 yrs
Queensland	10–14 yrs
South Australia	15 – Life
Western Australia	10–20 yrs
New Zealand	10 yrs
England	14 yrs

3.4.3 Rates of full-time imprisonment

Figure 3.5 shows the rates of full-time imprisonment for dangerous driving/culpable driving causing death offences in NSW, Victoria and Queensland. In Victoria, 83.1% of offenders were sentenced (under s 318) to full-time imprisonment for culpable driving; 33% for dangerous driving causing death (under s 319); and 54.8% were sentenced to full-time imprisonment when the two offences under ss 318 and 319 were combined. Including the non-aggravated and aggravated forms of the offence, NSW had an imprisonment rate of 66.8%. The rate for Queensland (35.7%) was similar to that for Victoria's dangerous driving offence, but significantly lower than rates for dangerous driving causing death in NSW and for culpable driving causing death in Victoria. As discussed above (at 3.4.1), imprisonment rates in NSW and Queensland for serious driving offences are marginally underestimated because the calculation does not include motor vehicle manslaughter cases.

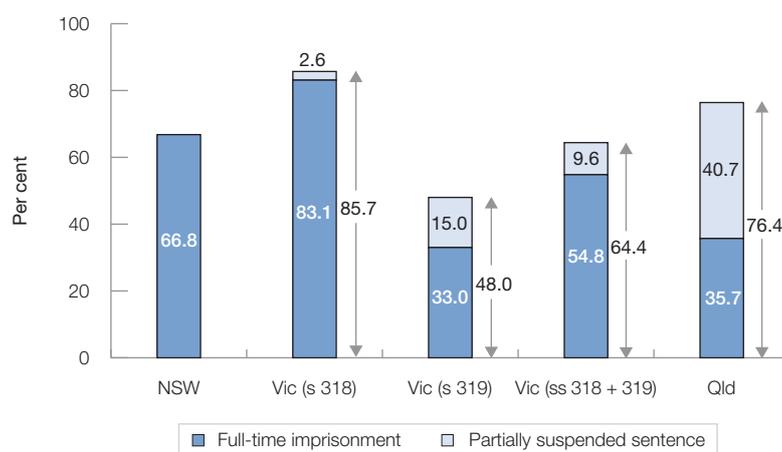
The use of partially suspended sentences for this offence in Queensland was high compared to other offences examined in this study, with 40.7% of offenders sentenced during the time period receiving a partially suspended sentence. When partially suspended sentences were included, the imprisonment rate in Queensland rose to 76.4%. Partially suspended sentences were not used as frequently for this offence in Victoria. When partially suspended sentences were included in the imprisonment rate in Victoria, the figure rose to 85.7% for culpable driving causing death (s 318), 48% for dangerous driving causing death (s 319), and 64.4% where both offences were combined.

¹²¹ Sentencing Guidelines Council (UK), *Causing death by driving*, Definitive Guideline, July 2008, at www.sentencingcouncil.org.uk/wp-content/uploads/web_causing_death_by_driving_definitive_guideline.pdf, accessed 16 February 2015. Before 6 April 2010, s 170(9) (now rep) of the *Criminal Justice Act 2003* (UK) gave the then Sentencing Guidelines Council power to issue guidelines. The Sentencing Guidelines Council was abolished by the *Coroners and Justice Act 2009* (UK), s 135. On 6 April 2010, the *Coroners and Justice Act 2009* provided for the Sentencing Council for England and Wales to have the function of preparing sentencing guidelines. The guideline originally applied to the sentencing of offenders (aged 18 years or over) convicted of an offence who were sentenced on or after 4 August 2008 and continues to apply to offences committed on or after 6 April 2010: see www/sentencingcouncil.judiciary.gov.uk/sentencing-guidelines.htm, accessed 20 January 2015.

Of the eastern seaboard States, only NSW separates those cases where the offender was under the influence of intoxicating liquor or of a drug.¹²² For dangerous driving causing death in NSW, 86.2% of offenders who committed the offence under the influence of intoxicating liquor or drugs received a sentence of full-time imprisonment. This compares to 88% of offenders in the Judicial Commission 2007 study.¹²³

In NSW, 97.8% of offenders with a blood alcohol level of 0.15 or more were charged, convicted and sentenced to full-time imprisonment under the aggravated form of the offence (s 52A(2)). This compares to 99% in 2007.¹²⁴

Figure 3.5: Proportion of offenders sentenced to full-time imprisonment for dangerous/culpable driving causing death



3.4.4 Median head sentences

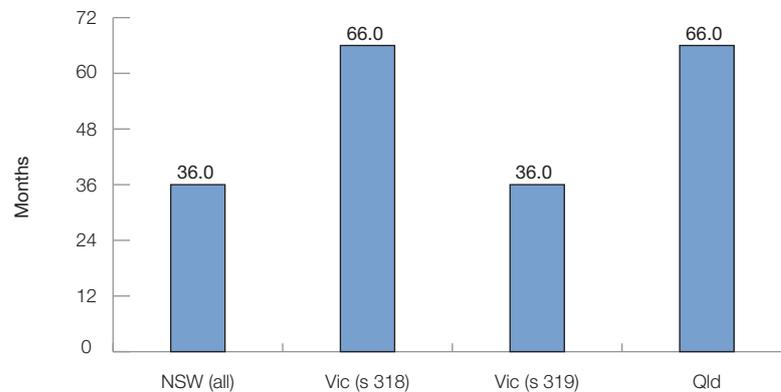
Figure 3.6 shows the median head sentences for dangerous/culpable driving causing death offences in NSW, Victoria and Queensland. Dangerous operation of a vehicle causing death offences in Queensland and culpable driving offences causing death in Victoria had equal highest median head sentence, with both States having a median sentence of 66 months. In NSW, even the median head sentence for the offence of aggravated dangerous driving causing death under s 52A(2) (60 months) was lower than those reported for the above offences in Victoria and Queensland. The median head sentence for dangerous driving causing death in Victoria and for all dangerous driving causing death offences in NSW was 36 months in both cases.

The higher ranking median head sentence in Queensland may in part be due to the large number of offenders given partially suspended sentences for this offence. In excluding partially suspended sentences from the Queensland data for the purposes of calculating the median sentence, those cases tending to attract shorter sentences of imprisonment were removed. Victoria's higher imprisonment rate for culpable driving was in part due to the existence of the alternative, less serious offence of dangerous driving causing death, and the fact that motor vehicle manslaughter was excluded from the data used to calculate the rates in NSW and Queensland. Motor vehicle manslaughter would have accommodated some of the cases falling within the offence of culpable driving causing death in Victoria.

122 *Crimes Act* 1900 (NSW), s 52A(1)(a). In Victoria, part of the definition of culpable driving under s 318 of the *Crimes Act* 1958 (Vic) includes driving whilst under the influence of alcohol to such an extent as to be incapable of having proper control of the motor vehicle; or whilst under the influence of a drug to such an extent as to be incapable of having proper control of the motor vehicle: s 318(2)(c), (d) respectively, but no separate data for these offenders was publicly available.

123 Judicial Commission 2007 study, above n 12, p 18.

124 *ibid.* Section 52A(7)(a) of the *Crimes Act* 1900 (NSW) provides that having the prescribed concentration of alcohol present in the accused's breath or blood is a "circumstance of aggravation" for the purposes of s 52A(2). Section 52A(9) provides that the "prescribed concentration of alcohol" means a concentration of 0.15 grammes or more of alcohol in 210 litres of breath or 100 millilitres of blood. Prior to the commencement of the *Road Traffic Legislation (Breath Testing and Analysis) Act* 2007 (NSW) on 25 January 2008, the prescribed concentration of alcohol was defined as "a concentration of 0.15 grammes or more of alcohol in 100 millilitres of blood".

Figure 3.6: Median head sentences for dangerous/culpable driving causing death

3.5 Robbery

For the purposes of this study, robbery includes offences dealt with on indictment where there is actual or threatened violence to force a victim to part with property.¹²⁵ Most jurisdictions separate offences and maximum penalties for different types of robbery according to a hierarchy of offence seriousness. High on the scale, are offences where the offender is armed, in company, or where the victim is wounded as a result of the robbery.

3.5.1 Aligning offences across jurisdictions

New South Wales has the most highly calibrated robbery offence provisions of the eastern seaboard States. The *Crimes Act 1900* (NSW) separates robbery into six main offence groups: robbery or stealing from the person (s 94); aggravated robbery or stealing from the person (s 95); robbery or stealing from the person with wounding (s 96); robbery being armed or in company (s 97(1)); aggravated robbery being armed or in company (s 97(2)); and robbery with arms and wounding (s 98).¹²⁶ In NSW, the Court of Criminal Appeal promulgated a guideline judgment¹²⁷ for the prevalent offence of armed robbery. The court identified “a category of case which is sufficiently common”¹²⁸ and held that the head sentence should “generally fall between four and five years”.¹²⁹ Although promulgated 15 years ago, the guideline continues to be used as an indicator or as a sounding board by the courts.¹³⁰

New South Wales has a standard non-parole period of 7 years for the offence of robbery with arms and wounding pursuant to s 98 of the *Crimes Act 1900*.¹³¹

Queensland and Victoria have only two offence groups for robbery. Queensland divides the offence of robbery into non-aggravated robbery¹³² and a more serious offence of robbery whilst armed with any dangerous or offensive weapon, in company, or wounding or inflicting personal violence immediately before or after the robbery.¹³³ Queensland also has a separate offence of assault with intent to steal.¹³⁴ Victoria divides the offence into robbery and armed robbery.¹³⁵

¹²⁵ *Smith v Desmond* [1965] AC 960 at 979, 992–993.

¹²⁶ *Crimes Act 1900* (NSW), ss 94–98.

¹²⁷ *R v Henry* (1999) 46 NSWLR 346.

¹²⁸ *ibid* at [162].

¹²⁹ *ibid* at [165].

¹³⁰ See eg, *R v Hopoi* [2014] NSWCCA 263; *R v Booth* [2014] NSWCCA 156; *CM v R* [2013] NSWCCA 341; *R v Lesi* [2010] NSWCCA 240.

¹³¹ *Crimes (Sentencing Procedure) Act 1999* (NSW), Table to Pt 4, Div 1A.

¹³² *Criminal Code* (Qld), s 411(1).

¹³³ *ibid*, s 411(2).

¹³⁴ *ibid*, s 413. This offence carries a maximum penalty of 3 years and has been excluded from the Queensland robbery data for the purpose of comparison in this study.

¹³⁵ *Crimes Act 1958* (Vic), ss 75 and 75A respectively.

Since robbery is structured differently in Queensland and Victoria compared with NSW, in order to make a valid comparison of imprisonment rates and head sentences imposed for the two aggravated forms of robbery (serious robbery and armed robbery), it was necessary to analyse the sentence outcomes for Queensland and Victoria against NSW separately. For that reason, for the purposes of the analysis of imprisonment rates and median head sentences in this study, robbery is divided into four subcategories: all robbery offences, non-aggravated robbery, serious robbery and armed robbery. The particular offences encompassed by each are discussed below under the discussion of each subcategory.

South Australia, Western Australia and New Zealand have separate offences of robbery and aggravated robbery.¹³⁶ In England, there is a single offence of robbery,¹³⁷ however, guidance as to where a particular robbery may fall in the sentencing range is provided by the Definitive Guideline, *Robbery*.¹³⁸

3.5.2 Statutory maximum penalties

Table 3.5 sets out the statutory maximum penalties for robbery across a number of jurisdictions. The statutory scheme in the *Crimes Act 1900* (NSW) provides a range of different maximum penalties and reflects a continuum or scale of seriousness. For the non-aggravated form of robbery (s 94), the statutory maximum is 14 years. For an aggravated robbery (s 95), the maximum is 20 years or 25 years where the victim is wounded (s 96). Robbery whilst armed or in company (s 97(1)) attracts a maximum penalty of 20 years for the non-aggravated offence and 25 years for an aggravated form of the offence (armed with a dangerous weapon (s 97(2)) or armed or in company and causing wounding or inflicting grievous bodily harm (s 98)). The other jurisdictions have fewer subcategories within robbery and smaller degrees of delineation between offence ingredients and the applicable statutory maximum penalties.

Queensland, South Australia, Western Australia and England have the highest statutory maximum penalties for robbery (life).¹³⁹ New South Wales and Victoria have a maximum penalty of 25 years for the more serious forms of robbery, while New Zealand provides a maximum penalty of only 14 years.¹⁴⁰

Queensland, South Australia, Western Australia and New Zealand have separate offences of assault with intent to rob or steal, with lower maximum penalties (3, 7, 10 and 7 years respectively).¹⁴¹ Western Australia also provides for the offence of aggravated assault with intent to rob, which carries a maximum penalty ranging from 14 years to life imprisonment.¹⁴² In NSW, Victoria and England, “assault with intent to rob” is included as a form of the substantive offence of robbery with the same maximum penalty.¹⁴³

136 *Crimes Act 1961* (NZ), ss 234, 235; *Criminal Code* (WA), ss 391, 392; *Criminal Law Consolidation Act 1935* (SA), s 137; “aggravated offences” are defined in ss 5 and 5AA.

137 *Theft Act 1968* (UK), s 8.

138 Sentencing Guidelines Council (UK), *Robbery*, Definitive Guideline, July 2006, at www.sentencingcouncil.org.uk/wp-content/uploads/web_robbery-guidelines.pdf, accessed 16 February 2015. The guideline was originally issued pursuant to s 170(9) (now rep) of the *Criminal Justice Act 2003* (UK). On 6 April 2010, the *Coroners and Justice Act 2009* (UK) provided for the Sentencing Council for England and Wales to have the function of preparing sentencing guidelines. The guideline initially applied to robbery offenders sentenced after 1 August 2006 and continues to apply to offences committed on or after 6 April 2010: see www/sentencingcouncil.judiciary.gov.uk/sentencing-guidelines.htm, accessed 20 January 2015. Part 1 of the guideline covers three types of robbery for adult and young offenders: street robbery or “mugging”; robberies of small businesses; and, less sophisticated commercial robberies. For other types of robbery, such as violent personal robberies in the home, no guideline is provided as these robberies are often accompanied by other serious offences which affect sentencing decisions. For professionally planned commercial robberies, existing UK case authority (Court of Appeal) is summarised in Pt 2 of the guideline.

139 *Criminal Code* (Qld), s 411(2); *Criminal Law Consolidation Act 1935* (SA), s 137(1)(b); *Criminal Code* (WA), s 392(c); *Theft Act 1968* (UK), s 8(2).

140 *Crimes Act 1900* (NSW), ss 96, 97(2), 98; *Crimes Act 1958* (Vic), s 75A(2); *Crimes Act 1961* (NZ), s 235.

141 *Criminal Code* (Qld), s 413; *Criminal Law Consolidation Act 1935* (SA), s 270B(3)(a); *Criminal Code* (WA), s 393(e); *Crimes Act 1961* (NZ), s 236(2). New Zealand has a non-aggravated and aggravated form of assault with intent to rob. Section 236(1) of the *Crimes Act 1961* (NZ) provides for the serious form of the offence where the offender causes grievous bodily harm, is armed with an offensive weapon or is in company. It carries a higher maximum penalty of 14 years.

142 *Criminal Code* (WA), s 393(c), (d).

143 See *Crimes Act 1900* (NSW), s 94; *Crimes Act 1958* (Vic), s 75(2); *Theft Act 1968* (UK), s 8(2).

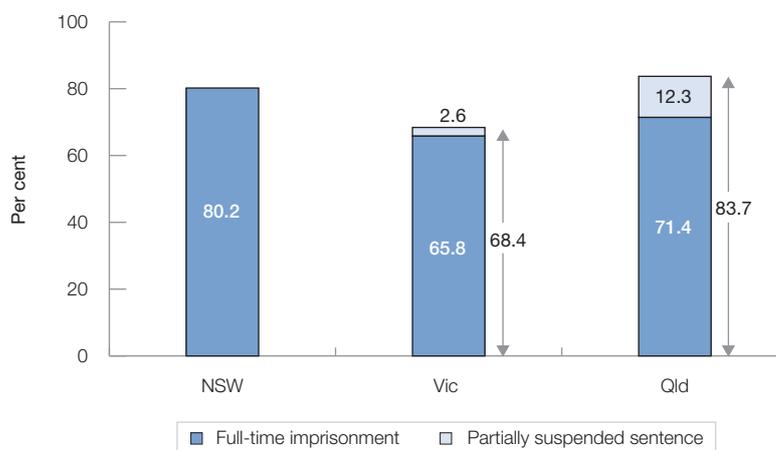
Table 3.5: Range of statutory maximum penalties for robbery

Jurisdiction	Statutory maximum penalties
New South Wales	14–25 yrs
Victoria	15–25 yrs
Queensland	14 yrs – Life (assault with intent to rob 3 yrs)
South Australia	15 yrs – Life (assault with intent to rob 7 yrs)
Western Australia	14 yrs – Life (assault with intent to rob 10 yrs)
New Zealand	10–14 yrs (assault with intent to rob 7–14 yrs)
England	Life

3.5.3 All robbery offences

3.5.3.1 Rates of full-time imprisonment

Figure 3.7 shows the rates of full-time imprisonment for all robbery offences in NSW, Victoria and Queensland. New South Wales has the highest imprisonment rate when all robbery offences are combined, with 80.2% of offenders sentenced to full-time imprisonment. Queensland had the second highest rate of imprisonment (71.4%) and Victoria had the lowest rate (65.8%). When partially suspended sentences were included, the rates in Queensland and Victoria rose to 83.7% and 68.4% respectively.

Figure 3.7: Proportion of offenders sentenced to full-time imprisonment for all robbery offences

3.5.3.2 Median head sentences

Figure 3.8 shows the median head sentences for all robbery offences in NSW, Victoria and Queensland. New South Wales had by far the longest median sentence of the three States (44 months), followed by Victoria and Queensland (both 36 months). Sentences imposed for robbery in NSW were so much longer than Victoria that even the median for armed robbery *alone* in Victoria (36 months) was lower than that for *all* robbery offences in NSW (44 months).

Figure 3.8: Median head sentences for all robbery offences

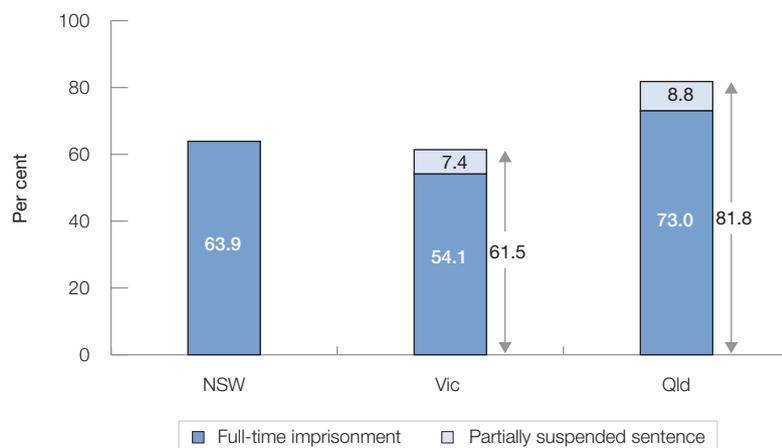


3.5.4 Non-aggravated robbery

3.5.4.1 Rates of full-time imprisonment

Figure 3.9 shows the rates of full-time imprisonment for non-aggravated robbery in NSW, Victoria and Queensland, that is, where there was no weapon or wounding involved and the offender committed the offence alone.¹⁴⁴ Queensland had the highest rate of imprisonment for non-aggravated robbery (73.0%) followed by NSW (63.9%) and Victoria (54.1%). When partially suspended sentences were included, Queensland and Victoria had imprisonment rates of 81.8% and 61.5% respectively.

Figure 3.9: Proportion of offenders sentenced to full-time imprisonment for non-aggravated robbery



144 *Crimes Act 1900* (NSW), s 94; *Crimes Act 1958* (Vic), s 75; *Criminal Code* (Qld), s 411(1).

3.5.4.2 Median head sentences

Figure 3.10 shows the median head sentences for non-aggravated robbery in NSW, Victoria and Queensland. Of the three States, NSW and Queensland had the highest median for non-aggravated robbery (30 months), followed by Victoria (20.5 months).

Figure 3.10: Median head sentences for non-aggravated robbery



3.5.5 Robbery – serious

3.5.5.1 Rates of full-time imprisonment

Most jurisdictions provide separate offences for serious forms of robbery, such as where there is the use of a weapon, committing the offence in company, or wounding the victim. For the purposes of this study, “serious robbery” includes offences under ss 96, 97 and 98 of the *Crimes Act 1900* (NSW) and s 411(2) of the *Criminal Code* (Qld).

Figure 3.11 shows the rates of full-time imprisonment for the more serious forms of robbery in NSW and Queensland.

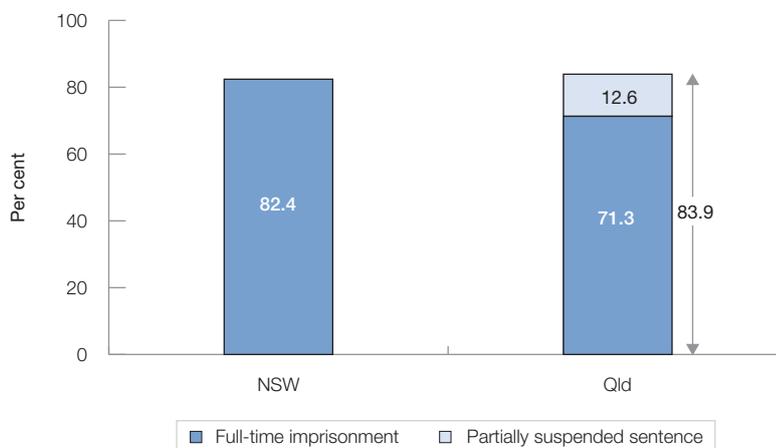
New South Wales had a far higher rate of imprisonment for more serious robbery offences than Queensland, with 82.4% of serious robbery cases attracting a sentence of full-time imprisonment in NSW compared with only 71.3% in Queensland. When partially suspended sentences were included for Queensland, the imprisonment rate rose to 83.9%.

In NSW, 80.4% of offenders sentenced for armed robbery or robbery in company under s 97(1) of the *Crimes Act 1900* received full-time imprisonment. Where a dangerous weapon¹⁴⁵ was used (s 97(2)), 94.5% of offenders received full-time imprisonment. For robberies, armed or in company, involving wounding of a victim (s 98), 90.4% of offenders were sentenced to full-time imprisonment.

In Queensland, the rate of imprisonment for the non-aggravated form of robbery (73.0%) was higher than that for serious robbery (71.3%), and when all robbery offences were grouped together (71.4%). This anomaly could, in part, be explained by the fact that there is a higher proportion of youths charged with the aggravated form of the offence because offenders in this age group often commit the offence in company. Of those offenders charged with aggravated robbery, 38.2% were under 20 years of age, whereas only 26.3% of those charged with non-aggravated robbery were under 20 years. The counter-intuitive figures may also be due to different charging practices.

¹⁴⁵ The term “dangerous weapon” is defined in s 4(1) of the *Crimes Act 1900* (NSW).

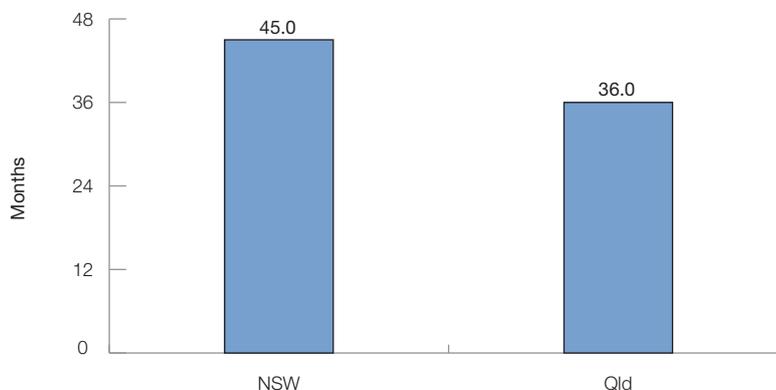
Figure 3.11: Proportion of offenders sentenced to full-time imprisonment for serious robbery offences



3.5.5.2 Median head sentences

Figure 3.12 shows the median head sentences for serious robbery offences in NSW and Queensland. New South Wales had the highest median head sentence (45 months), while Queensland had a median head sentence of 36 months (the same as the median head sentence in Queensland when all robbery offences were combined: see 3.5.3.2).

Figure 3.12: Median head sentences for serious robbery offences



3.5.6 Robbery — armed

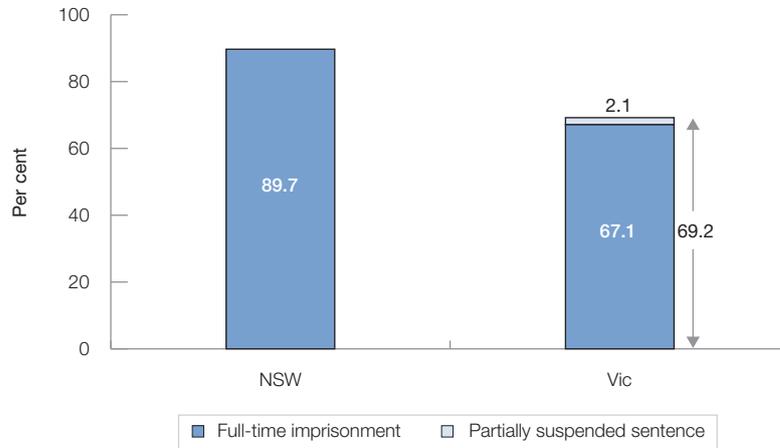
3.5.6.1 Rates of full-time imprisonment

Figure 3.13 shows the rates of imprisonment for armed robbery offences in NSW and Victoria. Victoria divides its offence of robbery into two clearly defined provisions: robbery (*Crimes Act* 1958, s 75) and armed robbery (s 75A). To compare rates of imprisonment in NSW and Victoria for armed robbery, NSW data was sorted to extract only those cases where the offender was armed.¹⁴⁶ New South Wales had a higher rate of imprisonment for armed robbery (89.7%) than Victoria (67.1%).¹⁴⁷ When partially suspended sentences were included, the rate for Victoria rose to 69.2%, which is still much lower than NSW.

¹⁴⁶ Only those cases within ss 97 and 98 of the *Crimes Act* 1900 (NSW) where the offender was armed were included in the data for NSW.

¹⁴⁷ These findings reflect those found by the Sentencing Advisory Council (Tas), above n 14, p 25.

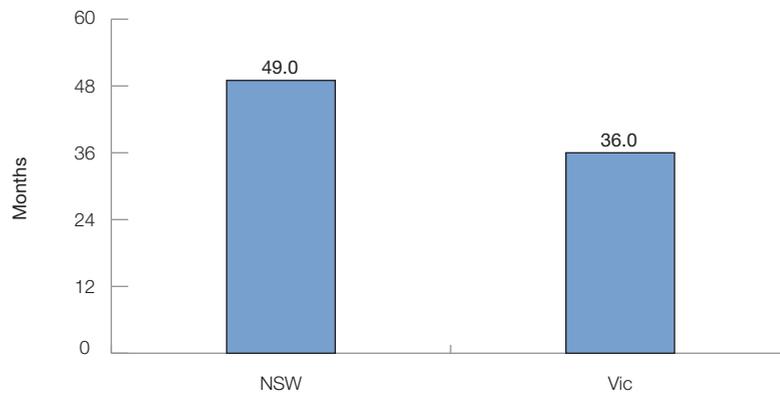
Figure 3.13: Proportion of offenders sentenced to full-time imprisonment for armed robbery offences



3.5.6.2 Median head sentences

Figure 3.14 shows the median head sentences for armed robbery offences in NSW and Victoria. New South Wales had a median head sentence of 49 months for armed robbery offences compared with 36 months in Victoria.

Figure 3.14: Median head sentences for armed robbery offences



3.6 Break and enter/burglary

The offence of break and enter, described as burglary in many jurisdictions, encompasses conduct where an offender trespasses on private property with intent to commit a more serious crime, usually theft. Most jurisdictions reviewed for this study provide for an aggravated form of the offence, for example, where the offender uses a firearm or knew there was a person inside the place where the offence was committed.¹⁴⁸ Some jurisdictions provide for different forms of the offence and differing levels of maximum penalties depending on whether the property being broken into was residential or non-residential.¹⁴⁹

3.6.1 Aligning offences across jurisdictions

In NSW, the *Crimes Act* 1900 divides the offence of break and enter into two main provisions. Section 112 of the Act provides for conduct where an offender breaks into the premises and commits a serious indictable offence, usually stealing. Section 113 covers conduct where an offender breaks into the premises with *intent* to commit a serious indictable offence. In NSW, there is also an offence under s 111(1) of entering a dwelling house with intent to commit a serious indictable offence and an offence under s 109 of “breaking out” of a dwelling house after committing, or entering with intent to commit, an indictable offence. Each of ss 111, 112 and 113 provides for aggravated and specially aggravated forms of these offences. The “circumstances of aggravation” and the “circumstances of special aggravation” are defined in s 105A of the *Crimes Act*.¹⁵⁰

Although NSW has standard non-parole periods for the offences of aggravated and specially aggravated break and enter to commit a serious indictable offence under ss 112(2) and (3) of the *Crimes Act* 1900,¹⁵¹ there is no standard non-parole period for the non-aggravated offence under s 112(1).

Victoria provides for offences of burglary and aggravated burglary.¹⁵² The circumstances of aggravation include: possession of a firearm, offensive weapon or explosive; or knowing there was a person inside the dwelling or being reckless as to that fact.¹⁵³

Queensland’s burglary provisions are structured differently to other common law jurisdictions. Section 419(1) of the *Criminal Code* (Qld) provides for the offence of entering a dwelling house with intent to commit an indictable offence. It carries a maximum penalty of 14 years imprisonment. Section 419(2) provides for the offence of entering a dwelling of another by means of any break. When an offence against either s 419(1) or (2) is committed at night or the offender uses or threatens actual violence, pretends to be, or is, armed with a dangerous weapon, is in company, or damages or threatens to damage property, an offence is committed against s 419(3).

148 See eg, *Crimes Act* 1990 (NSW), ss 111(3), 112(3), 113(3), which provide for offences of breaking and entering in circumstances of special aggravation; *Crimes Act* 1900 (NSW), ss 111(2), 112(2), 113(2), which provide for offences of breaking and entering in circumstances of aggravation; *Crimes Act* 1958 (Vic), s 77; *Criminal Code* (Qld), s 419(3); *Criminal Law Consolidation Act* 1935 (SA), ss 169(1)(b), 170(1)(b), (2); *Crimes Act* 1961 (NZ), s 232; *Theft Act* 1968 (UK), s 10.

149 See eg, *Criminal Law Consolidation Act* 1935 (SA), ss 168, 169 (“Serious criminal trespass — non-residential buildings”) and 170 (“Serious criminal trespass — places of residence”). Section 168 provides for the offence of serious criminal trespass where a person enters a place with the intention of committing an offence. Section 169 provides for serious criminal trespass in non-residential buildings with a maximum penalty of 10 years imprisonment for the non-aggravated offence and 20 years for the aggravated offence. Section 170 provides for serious criminal trespass in residential buildings and carries higher maximum penalties than s 169 (15 years imprisonment for the non-aggravated offence and life imprisonment for the aggravated offence). In England, a person who commits burglary is liable to 14 years imprisonment where the offence was committed in a dwelling and 10 years imprisonment in any other case: *Theft Act* 1968 (UK), s 9(3). In England, there is also a separate aggravated form of the offence where the offender is armed with a firearm, weapon or explosive: *Theft Act* 1968 (UK), s 10(1). The maximum penalty for aggravated burglary is life imprisonment: s 10(2).

150 The circumstances of aggravation include: being armed with an offensive weapon; being in company; using corporal violence; intentionally or recklessly inflicting actual bodily harm; depriving a person of his or her liberty; or knowing a person was inside the place where the offence was to be committed. The circumstances of special aggravation include: intentionally wounding or inflicting grievous bodily harm; inflicting grievous bodily harm and being reckless as to causing actual bodily harm; or being armed with a dangerous weapon.

151 The standard non-parole period for an offence under s 112(2) and (3) is 5 years and 7 years respectively: *Crimes (Sentencing Procedure) Act* 1999 (NSW), Table to Pt 4, Div 1A.

152 *Crimes Act* 1958 (Vic), ss 76, 77.

153 *ibid*, s 77.

Section 419(4) provides for the offence of entering a dwelling of another and committing an indictable offence. The offences in s 419(2), (3) and (4) carry a maximum penalty of life imprisonment. In Queensland, there is also an offence of entering or being in premises and committing an indictable offence under s 421 with a maximum penalty of 10 years where the offender intended to commit an indictable offence;¹⁵⁴ 14 years where an indictable offence was committed;¹⁵⁵ and life imprisonment where the offender gained entry to the premises by breaking and then committing the indictable offence.¹⁵⁶

It is unclear how prosecutors in Queensland utilise the burglary provisions available to them given most have a maximum penalty of life imprisonment and could accommodate several aggravating factors such as those found in the NSW provisions referred to above. *The Queen v De Simon*¹⁵⁷ is authority for the proposition that a sentencer 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. However, where the maximum penalty for an offence is life, it is difficult to envisage a more serious offence.

Our ability to compare break and enter/burglary cases between NSW and Queensland was impaired because many of the elements of the offences could not be matched between the two jurisdictions. It was, however, possible to compare a few very specific break and enter/burglary offences.

3.6.2 Statutory maximum penalties

Table 3.6 sets out the statutory maximum penalties for break and enter/burglary offences across a number of jurisdictions. The maximum penalties for these offences have remained stable since the Judicial Commission 2007 study. Despite the different legislative schemes in the various jurisdictions for these offences, the statutory maximum penalties cover similar ranges.

Most jurisdictions have a lowest statutory maximum of 10 years, although 14 years is the lowest in Western Australia. In Queensland, South Australia and England, life imprisonment is the highest statutory maximum for these offences, while in NSW and Victoria it is 25 years. Western Australia and New Zealand have a narrower penalty range with their highest statutory maximums being 20 years and 14 years respectively.

Table 3.6: Range of statutory maximum penalties for break and enter/burglary

Jurisdiction	Statutory maximum penalties
New South Wales	10–25 yrs
Victoria	10–25 yrs
Queensland	10 yrs – Life
South Australia	10 yrs – Life
Western Australia	14–20 yrs
New Zealand	10–14 yrs
England	10 yrs – Life

154 *Criminal Code* (Qld), s 421(1).

155 *ibid*, s 421(2).

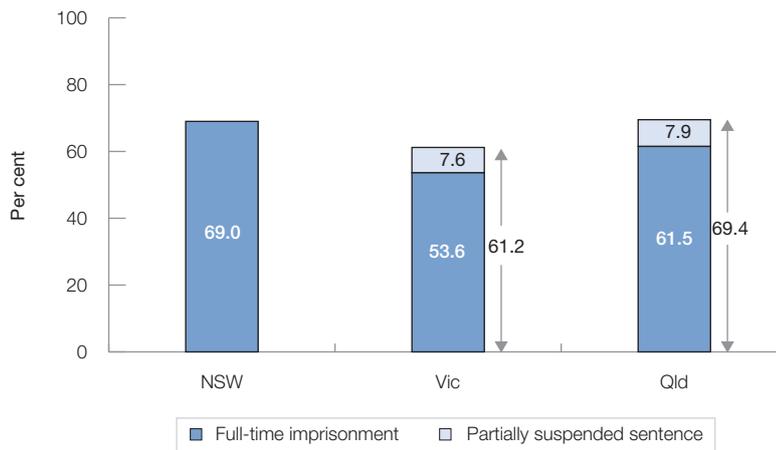
156 *ibid*, s 421(3).

157 (1981) 147 CLR 383.

3.6.3 Rates of full-time imprisonment

Figure 3.15 shows the rates of full-time imprisonment for break and enter/burglary offences in NSW, Victoria and Queensland. New South Wales had the highest rate of imprisonment among these three jurisdictions, with 69.0% of offenders being sentenced to full-time imprisonment. Queensland had the second highest rate (61.5%) and Victoria the lowest (53.6%). When partially suspended sentences were included for Victoria and Queensland, the rates increased to 61.2% and 69.4% respectively.

Figure 3.15: Proportion of offenders sentenced to full-time imprisonment for break and enter/burglary



3.6.4 Median head sentences

Figure 3.16 shows the median head sentences for all break and enter/burglary offences in NSW, Victoria and Queensland. New South Wales had the highest median head sentence for the offence of break and enter/burglary (36 months), followed by Victoria and Queensland (both 24 months).

Figure 3.16: Median head sentences for all break and enter/burglary

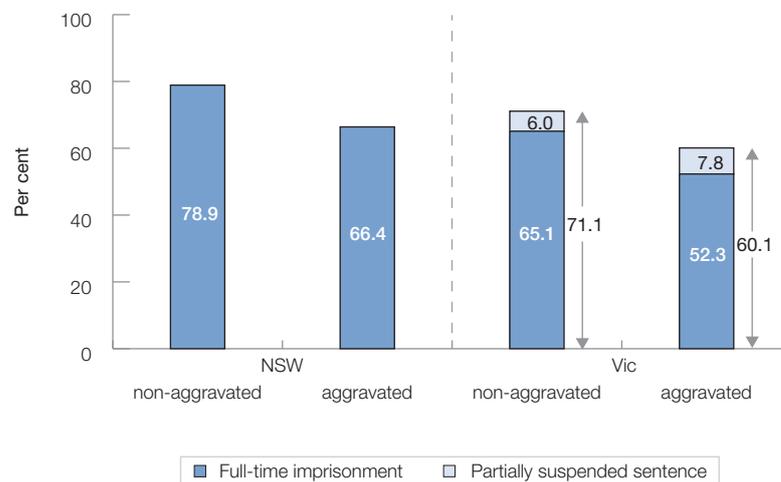


Given the significant differences between the offence provisions in NSW and those in Victoria and Queensland, it is not possible to compare imprisonment rates or median head sentences between the three eastern seaboard States with any greater specificity. However, by selecting specific offences, NSW can be compared with Victoria (at 3.6.4.1) and Queensland (at 3.6.4.2) and separately below.

3.6.4.1 New South Wales and Victoria

Figure 3.17 shows the rates of imprisonment for aggravated and non-aggravated forms of break and enter/burglary in NSW and Victoria. New South Wales had a full-time imprisonment rate of 66.4% for aggravated break and enter offences and 78.9% for non-aggravated break and enter offences. The rates in NSW were higher than Victoria for both forms of the offence. Victoria had a full-time imprisonment rate of 52.3% for aggravated burglary and 65.1% for non-aggravated burglary. When partially suspended sentences in Victoria were included, those rates rose to 60.1% and 71.1% respectively.

Figure 3.17: Proportion of offenders sentenced to full-time imprisonment for aggravated and non-aggravated break and enter/burglary



New South Wales had a higher median sentence than Victoria for both non-aggravated and aggravated break and enter offences (both 36 months). Victoria had a median head sentence of 18 months for non-aggravated burglary and 30 months for aggravated burglary.¹⁵⁸

In NSW, the fact that the aggravated form of break and enter has a lower imprisonment rate than the non-aggravated form and the fact that the aggravated and non-aggravated forms of the offence have the same median head sentence appear to be counter-intuitive. This issue has been raised in previous Judicial Commission publications¹⁵⁹ which found that several factors may provide an explanation for the result, including: the wider jurisdiction of the Children's Court to deal with offences under ss 112(1) and 112(2); the fact that the Local Court can deal with less serious offences under s 112(1) in the case of adults; the relative youth of offenders convicted and sentenced in the District Court for offences under s 112(3); and finally, the fact that adults dealt with in the District Court for offences under s 112(1) often have been convicted of the offence previously and were sentenced to imprisonment.

¹⁵⁸ The non-aggravated form of break and enter/burglary is provided by ss 111(1), 112(1), 113(1) of the *Crimes Act* 1900 (NSW) and s 76 of the *Crimes Act* 1958 (Vic). Sections 111(2), (3), 112(2), (3) and 113(2), (3) of the *Crimes Act* 1900 (NSW) govern aggravated and specially aggravated break and enter offences in NSW, while s 77 of the *Crimes Act* 1958 (Vic) provides for the offence of aggravated burglary.

¹⁵⁹ P Poletti and H Donnelly, "Special circumstances under s 44 of the Crimes (Sentencing Procedure) Act 1999", *Sentencing Trends & Issues*, No 42, Judicial Commission of NSW, 2013, pp 22–24; P Poletti and Z Baghizadeh, "Common offences in the NSW higher courts: 2010", *Sentencing Trends & Issues*, No 41, Judicial Commission of NSW, 2012, p 18.

In Victoria, both the non-aggravated and aggravated forms of burglary are indictable offences that may be dealt with summarily,¹⁶⁰ and like NSW, the non-aggravated form of burglary in Victoria has a higher imprisonment rate than the aggravated form of the offence. It was not possible to determine whether this similar sentencing trend in Victoria is occurring for the same reasons as those suggested for NSW. Unlike NSW, the median head sentence for aggravated burglary in Victoria was higher than that reported for the non-aggravated form of the offence.

3.6.4.2 New South Wales and Queensland

As mentioned above, a comparison of break and enter/burglary cases between NSW and Queensland was impaired because many of the elements of the offences could not be sufficiently aligned between the two jurisdictions. It was, however, possible to compare NSW and Queensland for the offence of entering a dwelling with intent to commit a serious indictable offence.¹⁶¹ The imprisonment rate in Queensland for this offence was 65.4% (69.2% when including partially suspended sentences), with a median head sentence of 18 months. The imprisonment rate in NSW was 50.0% and the median head sentence was 30 months.

When the offence of break, enter and commit a serious indictable offence in NSW¹⁶² is compared with the equivalent offence(s) in Queensland¹⁶³ the imprisonment rate was 69.8% and 60.5% respectively. The rate for Queensland rose to 67.6% when partially suspended sentences were included. The median head sentence was 36 months in NSW and 24 months in Queensland. It should be noted that some of the more serious break and enter/burglary cases in Queensland may be being charged under one of the other provisions such as s 419(3).

160 *Crimes Act 1958 (Vic)*, s 2B; what indictable offences may be heard and determined summarily is governed by *Criminal Procedure Act 2009 (Vic)*, ss 28, 29. Section 28(1)(a) provides that an offence referred to in Sch 2 to the *Criminal Procedure Act 2009* may be heard and determined summarily by the Magistrates' Court. Both burglary and aggravated burglary, offences under ss 76 and 77 of the *Crimes Act 1958*, are listed in Sch 2 [4.6] and [4.7].

161 *Crimes Act 1900 (NSW)*, s 111(1); *Criminal Code (Qld)*, s 419(1). The maximum penalty for the NSW offence is 10 years imprisonment and for Queensland it is 14 years.

162 *Crimes Act 1900 (NSW)*, ss 112(1), (2), (3).

163 *Criminal Code (Qld)*, ss 419(4), 421(3).

Imprisonment rates per 100,000 population

The imprisonment rate per 100,000 head of population is the last indicator used in this study to measure the use of full-time imprisonment in the Australian and international jurisdictions reviewed in this study. This is a commonly utilised indicator to make general comparisons about the use of imprisonment across jurisdictions.¹⁶⁴ The imprisonment rate per 100,000 head of population includes both sentenced prisoners and those on remand. Prisoners on remand are those awaiting trial or sentence. At a very broad level, the imprisonment rate per 100,000 provides a measure of the severity of bail and sentencing laws for a jurisdiction. In this chapter, imprisonment rates per 100,000 in NSW are compared with other Australian jurisdictions as well as New Zealand, England (including Wales), Canada and the US.

Rates of imprisonment per 100,000 head of population are affected by a number of factors, including changes to legislation and policy, crime rates, policing, the length of sentences imposed, changes to maximum penalties, the introduction of sentencing guidelines or standard non-parole periods, and population fluctuations. Caution should be taken when interpreting data of this kind.

The Australian Bureau of Statistics (ABS) bases its published imprisonment rates for Australian States and Territories on the number of prisoners per 100,000 people in the corresponding *adult* population. However, most international bodies base their rates of imprisonment on the *total national* population, which includes children.¹⁶⁵ For this reason, where comparisons are made *within* Australia, the ABS figures are used. However, when comparing Australia with international jurisdictions, figures reported by the International Centre of Prison Studies (ICPS)¹⁶⁶ (which use the full Australian population as the basis for their rates) are used.

4.1 Australian jurisdictions

The rate of imprisonment reported below is based on all of the criminal courts in Australia. The adult population includes people at, or over, the minimum age at which offenders are sentenced as adults in each jurisdiction. In all States and Territories in Australia, except Queensland, persons remanded or sentenced to adult custody are aged 18 years and over. Persons under 18 years are treated as juveniles in most Australian courts and are only remanded or sentenced to custody in adult prisons in exceptional circumstances. In Queensland, the term “adult” refers to persons aged 17 years and over.¹⁶⁷ Children sentenced at law in adult courts and managed by Corrective/Correctional Services are included in the data.

164 See eg, A Blumstein, M Tonry and A Van Ness, “Cross-national measures of punitiveness” in M Tonry and DP Farrington (eds), *Crime and punishment in Western countries, 1980–1999: Crime and Justice: a review of research*, Vol 33, Chicago University Press, p 347; AN Doob and CM Webster, “Countering punitiveness: understanding stability in Canada’s imprisonment rate” (2006) 40(2) *Law & Society Review* 325; Ministry of Justice (UK), *Story of the prison population: 1993–2012 England and Wales*, Report, 31 January 2013; R Sarre, “The importance of political will in the imprisonment debate” (2009) 21(1) *CICJ* 154; FE Zimring, “The scale of imprisonment in the United States: twentieth century patterns and twenty-first century prospects” (2010) 100(3) *Journal of Criminal Law and Criminology* 1225; R Ruddell, “Social disruption, State priorities, and minority threat: a cross-national study of imprisonment” (2005) 7(1) *Punishment & Society* 7; S Jou and B Heberton, “Researching and explaining the punitive: lessons and reflections from a comparative empirical study of Taiwan and England and Wales” (2011) 39(1) *International Journal of Law, Crime and Justice* 12; M Hall, “Key themes in New South Wales criminal justice” (2010) 22(1) *CICJ* 19; K Pease, above n 13; K Beattie, “Adult correctional services in Canada 2004–2005” (2006) 26(5) *Juristat* 1 at 8; D Weatherburn, K Grech and J Holmes, “Why does NSW have a higher imprisonment rate than Victoria?”, *Crime and Justice Bulletin*, No 145, BOCSAR, December 2010; L Babb, “Imprisonment rates in NSW and Victoria: explaining the difference”, *Crime and Justice Bulletin*, No 14, BOCSAR, March 1992.

165 Statistics Canada, however, provides incarceration rates per 100,000 *adults*: S Perreault, *Correctional service key indicators, 2012/2013*, Statistics Canada, 12 May 2014; Statistics Canada, Canadian Socio-Economic Information Management System (CANSIM), Tables 251-0005 and 251-0006, at www.statcan.gc.ca/daily-quotidien/140512/dq140512a-eng.htm, accessed 21 January 2015.

166 R Walmsley, *World prison population list*, 10th edn, International Centre for Prison Studies (ICPS), University of Essex, at www.prisonstudies.org/research-publications?shs_term_node_tid_depth=27, accessed 20 January 2015.

167 ABS, *Prisoners in Australia, 2014*, above n 14, “Explanatory notes”. These figures are based on the crude rate which measures the actual rate of imprisonment and are not adjusted for differences in population structures. Prior to 30 June 2009, approximately half of Australian Capital Territory prisoners were held in NSW prisons (and counted in NSW totals). After this date, those prisoners were no longer held in NSW prisons.

Unless otherwise specified, the figures below generally include both sentenced prisoners and those on remand.¹⁶⁸ Since prisoners on remand are included in imprisonment rates, any changes to bail laws will have an impact.¹⁶⁹ The number of offenders sentenced to six months imprisonment or less also has a significant impact on the prison population in any given jurisdiction.¹⁷⁰

Figure 4.1: Imprisonment rate per 100,000 adult population in Australia (as at 30 June 2014)

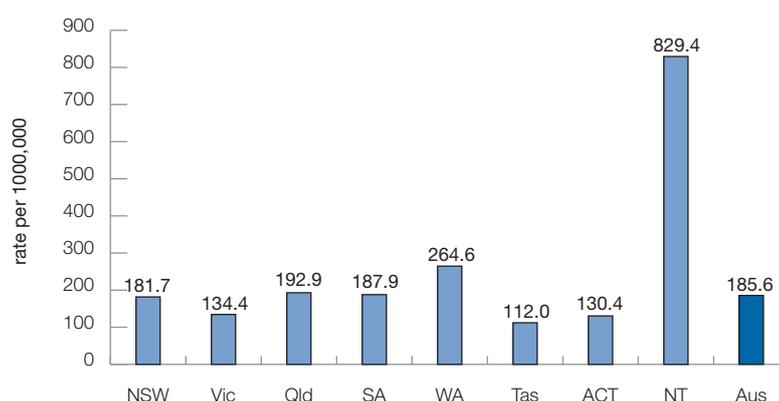


Figure 4.1 sets out the imprisonment rate per 100,000 adult population for Australia and each Australian State and Territory. The ABS reports the national imprisonment rate as at 30 June 2014 as 185.6 per 100,000 Australian adults, a 10-year high.¹⁷¹ This compares to 172.2 per 100,000 in 2013.¹⁷² There has been a gradual increase in the imprisonment rate from 158.8 in 2004, with the rate peaking at 185.6 in 2014.¹⁷³

Based on the total number of persons in the legal custody of adult corrective services at midnight 30 June 2014, the Northern Territory had by far the highest imprisonment rate at 829.4 prisoners per 100,000 adult population, followed by Western Australia (264.6). Queensland had the third highest rate of imprisonment in 2014 which was similar to the national rate, at 192.9 per 100,000 adult population. South Australia, NSW, Victoria and the Australian Capital Territory had imprisonment rates of 187.9, 181.7, 134.4 and 130.4 respectively. Tasmania had the lowest imprisonment rate at 112.0 prisoners per 100,000 adult population.¹⁷⁴

¹⁶⁸ The rate of imprisonment is determined by the number of prisoners counted on the night of 30 June each year. Sentenced prisoners include periodic detainees if those detainees were in prison on the night of the census (30 June). The count of periodic detainees covers the number of persons with an active periodic detainee warrant. However, periodic detainees who have breached orders may be excluded: ABS, *Prisoners in Australia, 2014*, above n 14, “Explanatory Notes”.

¹⁶⁹ For example, in NSW, the *Bail Act 2013* repealed the *Bail Act 1978*, and commenced on 20 May 2014. The new Act removed the scheme of offence-based presumptions in the *Bail Act 1978* and replaced it with a risk-management approach to bail decision-making. The *Bail Act 2013* was amended by the *Bail Amendment Act 2014*, which commenced on 28 January 2015. The amendments require, inter alia, that bail for certain serious offences be refused unless the accused shows cause why his or her detention is not justified. These new amendments may have an impact on future remand populations and consequently imprisonment rates. See BOCSAR, “NSW custody statistics: quarterly update Sep 2014”, media release, 20 October 2014, at www.bocsar.nsw.gov.au/bocsar/mr_nswcustodystatistics_sep2014.html, accessed 20 January 2015 (BOCSAR media release), which attributed a drop of 400 prisoners to “a decrease in the number of defendants being on remand (down 16%, from 3,238 in April 2014, to 2,720 in September)”.

¹⁷⁰ B Lind and S Eyland, “The impact of abolishing short prison sentences”, *Crime and Justice Bulletin*, No 73, BOCSAR, September 2002.

¹⁷¹ ABS, *Prisoners in Australia, 2014*, above n 14, “Prisoner characteristics, Australia” and Table 16.

¹⁷² *ibid*, Table 18.

¹⁷³ It should be noted that given NSW has such a large proportion of prisoners in Australia, imprisonment figures in NSW will have a strong impact on the national imprisonment rate. NSW had the largest prison population of all the Australian States (31.3% or 10,566) as at 30 June 2014. See discussion on p 43.

¹⁷⁴ ABS, *Prisoners in Australia, 2014*, above n 14, Table 18.

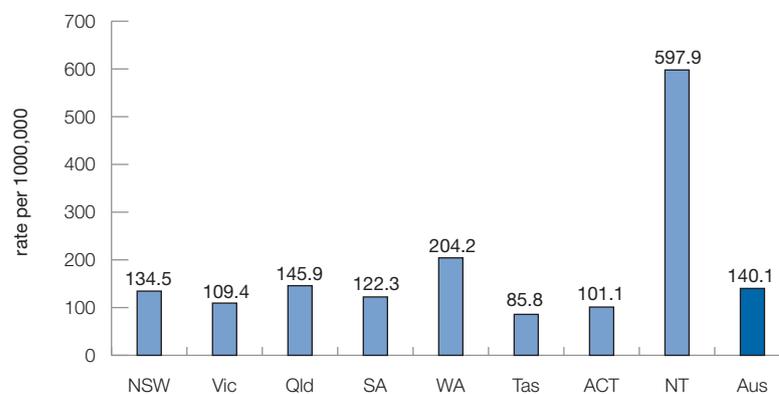
In NSW, the imprisonment rate in each of the years between 2004 and 2010 was higher than that reported in 2014, with the rate peaking at 205.6 per 100,000 adult population in 2009. In Victoria and Queensland, the imprisonment rate per 100,000 adult population has shown gradual increases (with some small fluctuations) since 2004 (when it was 94.6 and 179.8 respectively), with the rate rising markedly from 2012. In Victoria, the rate rose from 111.6 (2012), 119.8 (2013) to 134.4 (2014). In Queensland, the rate rose from 158.9 (2012), 169.0 (2013) to 192.9 (2014). Commentators have suggested these changes are a result of recent government policies aimed at being tough on crime.¹⁷⁵ The imprisonment rate in the Northern Territory has increased the most in comparison to the other Australian jurisdictions from 505.3 prisoners per 100,000 adult population in 2004 to 829.4 in 2014. There has been a gradual decrease in imprisonment rates in Tasmania over the 10-year period.¹⁷⁶

In 2010, BOCSAR examined why NSW had a higher imprisonment rate than Victoria.¹⁷⁷ Referring to 2009 ABS statistics, BOCSAR reported that the imprisonment rate in NSW was about twice that of Victoria (204 per 100,000 population compared with 104 per 100,000 population). As noted above, as at 2014, the difference between the two rates has narrowed (181.7 per 100,000 population in NSW compared with 134.4 per 100,000 population in Victoria). BOCSAR concluded that the higher imprisonment rate in NSW was attributable to a combination of factors, including a higher rate of court appearance, slightly higher conviction rate, higher likelihood of imprisonment, and a higher likelihood of being remanded in custody.

4.1.1 Imprisonment rate for sentenced offenders

Figure 4.2 sets out the imprisonment rates for sentenced offenders throughout Australia in 2014. The imprisonment rate for sentenced offenders¹⁷⁸ in Australia was 140.1 per 100,000 in the adult population.¹⁷⁹ The Northern Territory had the highest rate of sentenced prisoners (597.9), followed by Western Australia (204.2), Queensland (145.9), NSW (134.5), South Australia (122.3), Victoria (109.4), the Australian Capital Territory (101.1), and Tasmania (85.8). Again, the Australian rate was closest to that reported for NSW and Queensland.

Figure 4.2: Imprisonment rate per 100,000 adult population for sentenced offenders throughout Australia (as at 30 June 2014)



175 For example, G Egan, "Queensland has biggest prison population", *Sunshine Coast Daily*, 12 December 2014, at www.sunshinecoastdaily.com.au/news/queensland-biggest-prison-population-rise-country/2482817/, accessed 16 February 2015; R Willingham, "Crime crackdown leads to booming Victorian prison population", *The Age*, 13 March 2014, www.theage.com.au/victoria/crime-crackdown-leads-to-booming-victorian-prison-population-20140313-34on2.html, accessed 16 February 2015; P Mickelborough, "Napthine government's tough stance on crime swells prisoner ranks", *Herald Sun*, 21 November 2013, at www.heraldsun.com.au/news/law-order/napthine-governments-tough-stance-on-crime-swells-prisoner-ranks/story-fni0fee2-1226765562751, accessed 16 February 2015; J Steffanoni, "'Tough on crime' needs tough rethink", *Lawyers Weekly*, 14 January 2014, at www.lawyersweekly.com.au/opinion/15027-tough-on-crime-needs-tough-rethink, accessed 16 February 2015; J Gordo, "Napthine government spruiks prison expansion as jobs boon", *The Age*, 29 June 2014, at www.theage.com.au/victoria/napthine-government-spruiks-prison-expansion-as-jobs-boon-20140629-zsq5r.html, accessed 16 February 2015.

176 *ibid.*

177 Weatherburn, Grech and Holmes, above n 164.

178 Sentenced offenders are those who have been convicted and sentenced.

179 This figure has been calculated by multiplying the overall published imprisonment rate in ABS, *Prisoners in Australia, 2014*, above n 14, by the percentage of prisoners that have been sentenced as calculated from ABS, *Prisoners in Australia, 2014*, Table 13.

4.2 International jurisdictions

As discussed above, most international bodies base their reported imprisonment rates on the total national population, whereas the ABS bases its rate on the number of adults in the country.¹⁸⁰ To draw meaningful comparisons between imprisonment rates in Australia and international jurisdictions, this section uses figures published by the ICPS.¹⁸¹ ICPS uses the full Australian population as the basis for the rate. However, note that the figures for each jurisdiction do not always relate to common year spans.

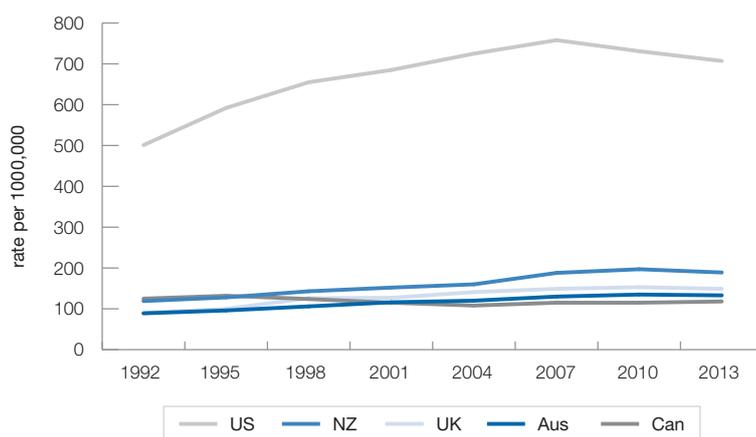
Table 4.1 and Figure 4.3 show imprisonment rates for five international jurisdictions over a 12- and an 11-year span respectively. Table 4.1 illustrates that the imprisonment rate in Australia has grown to 143 per 100,000 population in 2014, up from figures reported in 2013 (133) with the rate gradually increasing since 1992 (89).¹⁸² In 2014, the rate in Australia was less than that reported in New Zealand (190) and England (including Wales) (149). Australia had a much lower imprisonment rate than the latest rates reported in the US (707), but had a higher rate than that reported for Canada (118).¹⁸³

Table 4.1: Imprisonment rates per 100,000 adult over time^a

	1992	1995	1998	2001	2004	2007	2010	2013	2014
Australia ^b	89	96	106	116	120	130	135	133	143
New Zealand ^c	119	128	143	152	160	188	197	189	190
Canada ^d	125	132	124	115	108	115	116	118 ^e	Not available
United States ^f	501	592	655	685	725	758	731	707 ^g	Not available
England (including Wales) ^h	90	100	126	127	141	149	153	148	149

- Information in the table has been extracted from R Walmsley, *World prison population list*, 10th edn, ICPS, University of Essex, and ICPS, *World prison brief*, www.prisonstudies.org/world-prison-brief, accessed 9 November 2014.
- ICPS, *World prison brief*, at www.prisonstudies.org/country/australia, accessed 9 November 2014.
- ICPS, *World prison brief*, at www.prisonstudies.org/country/new-zealand, accessed 9 November 2014.
- ICPS, *World prison brief*, at www.prisonstudies.org/country/canada, accessed 9 November 2014; imprisonment rates for the years listed in the table were not available for Canada. The rates listed for Canada refer to the imprisonment rate reported for the preceding year. For example, under the "1995" column, the rate reported for Canada refers to the imprisonment rate reported for 1994.
- ibid; this figure refers to the imprisonment rate on 30 September 2011.
- ICPS, *World prison brief*, at www.prisonstudies.org/country/united-states-america, accessed 9 November 2014.
- ibid; this figure is based on an estimated national population of 315.1 million at "end of 2012".
- ICPS, *World prison brief*, at www.prisonstudies.org/country/united-kingdom-england-wales, accessed 9 November 2014.

Figure 4.3: Rate of imprisonment per 100,000 adult



¹⁸⁰ Perreault, above n 165; Statistics Canada, above n 165.

¹⁸¹ Walmsley, above n 166.

¹⁸² ICPS, *World prison brief*, at www.prisonstudies.org/country/australia, accessed 9 November 2014.

¹⁸³ ibid. The imprisonment rates reported above for Australia, New Zealand and England (including Wales) relate to data collected on "March 2014", "end of March 2014" and "end of September 2014", respectively. See also www.prisonstudies.org/country/new-zealand and www.prisonstudies.org/country/united-kingdom-england-wales, accessed 9 November 2014. The latest imprisonment rates available for the US and Canada were "end of 2012" and 30 September 2011, respectively. Figures for all jurisdictions include juveniles, however, these juveniles make up between 0.2% to 3.6% of the prison populations for the jurisdictions examined in this study: ICPS, *World prison brief*, at www.prisonstudies.org/world-prison-brief, accessed 9 November 2014.

Prison populations

5.1 Australia

The number of adults in custody has reached historic highs in many jurisdictions within Australia and internationally. In 2014, Australia's prisoner numbers reached a 10-year high. As at 30 June 2014, there were 33,791 prisoners (sentenced and unsentenced) in Australian prisons.¹⁸⁴ This represents an increase of 10% from 2013 and equates to 0.19% of Australia's adult population in Australian corrective services custody.¹⁸⁵ Of the 33,791 adults in custody, 25,513 were sentenced prisoners, and 8,210 (24.3% of the total prison population) were unsentenced,¹⁸⁶ representing an increase of 11% from 30 June 2013 (7,374).¹⁸⁷ The most common offences for male prisoners (who made up 92% of the prison population) were acts intended to cause injury, unlawful entry with intent, and robbery, extortion and related offences.¹⁸⁸

New South Wales had the largest prison population of all the Australian States (31.3% or 10,566) as at 30 June 2014, followed by Queensland (20.9% or 7,049), Victoria (18.1% or 6,112) and Western Australia (15.5% or 5,242). These four States made up 85.7% (28,969) of the total Australian prison population.¹⁸⁹

Between 30 June 2013 and 30 June 2014, the number of prisoners increased in all States and Territories, except Tasmania, where it decreased by 7%. The largest increases in prisoner numbers were in Queensland (973 prisoners) and Victoria (772 prisoners), with Queensland's and Victoria's prison population growing by 16% and 14% respectively between 30 June 2013 and 30 June 2014.¹⁹⁰

Similarly, the number of sentenced prisoners increased in all States and Territories between 30 June 2013 and 30 June 2014, with the exception of Tasmania (which decreased by 5% or 18 prisoners). Queensland recorded the largest increase in the number of sentenced prisoners (14% or 642 prisoners), followed by Victoria (13% or 587 prisoners).¹⁹¹ The Australian Capital Territory recorded the largest proportional increase in sentenced prisoners between 30 June 2013 and 30 June 2014 (16% or 41 prisoners).¹⁹²

5.1.1 Indigenous offenders

Indigenous offenders are over-represented in the Australian prison system. The ABS reported that, as at 30 June 2014, there were 9,264 prisoners who identified as Aboriginal or Torres Strait Islander.¹⁹³ This accounted for just over a quarter (27.4%) of the total prison population and represented a 10% increase (834 prisoners) from 30 June 2013 to 30 June 2014 (8,430). This was the highest number of Aboriginal and Torres Strait Islanders recorded in Australian prisons since 2004.¹⁹⁴ The proportion of Aboriginal and Torres Strait Islander offenders in NSW prisons was 23.6%. The Northern Territory had the highest proportion of Aboriginal and Torres Strait Islander prisoners (85.6%), while Victoria had the lowest (7.8%).¹⁹⁵

¹⁸⁴ ABS, *Prisoners in Australia, 2014*, above n 14, "Key findings" and Table 13.

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid.*

¹⁸⁷ ABS, *Prisoners in Australia, 2013*, cat no 4517.0, at www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/8453AB50C87D1D77CA257DAA000C77EE?opendocument, accessed 16 February 2015, Table 14.

¹⁸⁸ ABS, *Prisoners in Australia, 2014*, above n 14, Table 4.

¹⁸⁹ *ibid.*, Table 13.

¹⁹⁰ *ibid.*, "Prisoner characteristics, States and Territories" and Table 14; BOCSAR media release, above n 169.

¹⁹¹ ABS, *Prisoners in Australia, 2014*, above n 14, "Prisoner characteristics, States and Territories: sentenced prisoners" and Table 25.

¹⁹² *ibid.*

¹⁹³ Movements in Aboriginal and Torres Strait Islander prisoner numbers are influenced by the propensity to self-identify: ABS, *Prisoners in Australia, 2014*, above n 14, "Aboriginal and Torres Strait Islander prisoner characteristics" and Table 15.

¹⁹⁴ *ibid.*, Table 2.

¹⁹⁵ *ibid.*, Table 13.

As at 30 June 2014, the age standardised¹⁹⁶ imprisonment rate for Aboriginal and Torres Strait Islander prisoners in Australia was 1,857.2 per 100,000 adult Aboriginal and Torres Strait Islander population.¹⁹⁷ This is just under 13 times higher than non-Indigenous prisoners who had an age standardised imprisonment rate of 144 per 100,000 adult non-Indigenous population.¹⁹⁸ On 30 June 2014, the median age of Aboriginal and Torres Strait Islander prisoners was 31.0 years, which is 4.3 years lower than the median age of non-Indigenous offenders (35.3 years).¹⁹⁹

5.2 New South Wales

In NSW, at 30 June 2014, there were 10,566 prisoners in custody. Of these, 7,819 were sentenced prisoners.²⁰⁰

Prison numbers in NSW peaked in 2009 and 2010 (11,127 and 10,947, respectively). There has been a rapid increase between 2012 and 2014 with the NSW prison population rising by 8.7%.²⁰¹

In a 2014 BOCSAR publication,²⁰² the authors suggest that the key factors responsible for this recent rise appears to be a higher rate of arrest for serious crime and an increase in the proportion of convicted offenders given a prison sentence. There was no evidence that prisoners during 2013 were spending longer in custody.²⁰³

Since prisoners on remand are included in prison population figures, any changes to bail laws are likely to have an impact. BOCSAR reports that, between February and June 2014, the number of remand receptions arising from police bail refusal fell by 58%.²⁰⁴ Over the same period, the number of remand receptions as a result of court bail refusals fell by 40%.²⁰⁵ BOCSAR found that the fall in remand numbers coincided with the introduction of the *Bail Act* 2013.²⁰⁶ The authors suggested three possible reasons for the decline in the remand population: courts are granting bail to a higher proportion of defendants; the arrest rate for serious offences is falling; and police are more often dispensing with any requirement for bail.²⁰⁷

The number of sentenced prisoners in NSW peaked in 2009 with 8,535 prisoners, representing an increase of 21.2% since 2003. However, the number of sentenced prisoners has been falling since then with 7,411 in 2011, 7,169 in 2012 and 7,136 in 2013.²⁰⁸

196 Age standardisation is a statistical method that adjusts crude rates to account for age differences between study populations. Australia's Aboriginal and Torres Strait Islander population distribution is much younger than the non-Indigenous population: ABS, *Prisoners in Australia, 2014*, above n 14, "Explanatory Notes".

197 ABS, *Prisoners in Australia, 2014*, above n 14, "Aboriginal and Torres Strait Islander prisoner characteristics" and Table 16.

198 *ibid.*

199 *ibid.*, "Aboriginal and Torres Strait Islander prisoner characteristics" and Table 20.

200 *ibid.*, Table 13.

201 *ibid.*, Table 14.

202 D Weatherburn, W Wan and C Corben, "Why is the NSW prison population growing?", *Crime and Justice Statistics, Bureau Brief*, Issue Paper No 95, BOCSAR, April 2014.

203 *ibid.* at 1. It has been found that increasing arrest rates and increasing likelihood of receiving a sentence of imprisonment is likely to have the largest impact on crime rates. Increasing the length of prison terms beyond current levels does not appear to impact on the crime rate: W Wan et al, "The effect of arrest and imprisonment on crime", *Crime and Justice Bulletin*, No 158, BOCSAR, February 2012.

204 BOCSAR media release, above n 169.

205 *ibid.*

206 The *Bail Act* 2013 (NSW), which commenced on 20 May 2014, repealed the *Bail Act* 1978. The new Act replaced the scheme of offence-based presumptions which was found in the *Bail Act* 1978 with a risk-management approach to bail decision-making. Amendments made to the *Bail Act* 2013 by the *Bail Amendment Act* 2014, which commenced on 28 January 2015, may also impact on remand numbers: see above n 169.

207 *ibid.*

208 NSWLRC, above n 14, pp 18–19.

5.3 England (including Wales)

At 30 June 2014, the prison population in England (including Wales) stood at 85,698, which represented a 1.0% increase from the previous year.²⁰⁹ The increase was driven primarily by a rising remand population and a greater number of adult sentenced sex offender prisoners.²¹⁰ Following a small reduction in the prison population in the early 1990s, the increase has generally become more pronounced in recent years, with the average prison population increasing on average by 3.6% each year since 1993. Riots in England in August 2011 caused a sharp spike in the prison population (due to a large increase in public disorder related offences), reaching a record high of 88,179 on 2 December 2011. The remand population has fallen from 24% of the total number of prisoners in custody in June 1993 (21,162) to 14% in June 2014 (12,322).²¹¹

A report by the Ministry of Justice (UK) identified two factors underlying the increase in prison population: tougher sentencing and enforcement outcomes and a more serious mix of offence groups coming before the courts. Amendments to legislation have resulted in longer sentence lengths for certain offences, and an increasing likelihood of imprisonment for breach of a non-custodial sentence or failure to comply with licence conditions.²¹² These amendments include mandatory minimum sentences for a number of offences and the introduction of new sentences for public protection (imprisonment for public protection (IPP) and extended sentence for public protection (EPPs)).²¹³

Cases coming before the courts are becoming more serious. Three groups of offences have had the greatest impact on the increase in prison population: sexual offences, drug offences and offences of violence against a person. Not only has there been an increase in the number of these offences, but the custody rates and sentence lengths imposed have also increased, resulting in a growing prison population.²¹⁴ Between September 2012 and September 2013, the prison population began to fall due to a reduction in the remand population and a decline in the number of offenders aged under 18 years. The falling remand population was due, in part, to the introduction of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) in December 2012 which restricted the use of remand for offenders who would be unlikely to receive a custodial sentence.²¹⁵

5.4 New Zealand

As at 30 June 2014, in New Zealand, there were 8,037 prisoners in custody, of which 1,695 were on remand and 6,342 were sentenced offenders.²¹⁶ The number of charges and people in court has declined considerably since 2009, as has the number of people sentenced to imprisonment.²¹⁷

209 Ministry of Justice (UK), *Offender Management Statistics Bulletin, England and Wales*, April to June 2014, 30 October 2014, p 3.

210 *ibid* p 2.

211 Ministry of Justice (UK), above n 164, p 21.

212 *ibid* p 2.

213 These two forms of sentences are no longer available: see *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK).

214 Ministry of Justice (UK), above n 164, p 2; A Ashworth, "Analysing the rise in prison populations" (2013) 5 *Crim R* 367.

215 Ministry of Justice (UK), above n 210. Section 108(2) of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) inserted a new s 240ZA (time remanded in custody to count as time served: terms of imprisonment and detention) into the *Criminal Justice Act 2003* (UK). Most of the amendments affecting release on licence etc (Pt 3, Ch 4) commenced on 3 December 2012: *The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement and Saving Provisions) Order 2012*.

216 Department of Corrections (NZ), *Prison facts and statistics — June 2014*, 23 September 2014, at http://www.corrections.govt.nz/resources/quarterly_prison_statistics/CP_June_2014.html, accessed 16 February 2015.

217 Ministry of Justice (NZ), *Trends in conviction and sentencing in New Zealand 2011*, Report, May 2012, at www.justice.govt.nz/publications/global-publications/t/trends-in-conviction-and-sentencing-in-new-zealand-2011-1, accessed 16 February 2015. The New Zealand Police began the Policing Excellence Program in 2009, which was aimed at preventing crime before it happens, putting police resources where they are most needed, and responding better to the needs of victims. The report suggests police are making greater use of discretion, including pre-charge warnings and written traffic warnings, rather than prosecuting people in court. The number of charges laid in court dropped 18% between 2009 and 2011: p 3. Consequently, the number of people sentenced to imprisonment dropped by 11% between 2009 and 2011: p 8. The fall in the imprisonment rate may also be influenced by the commencement of the *Sentencing Amendment Act 2007* (NZ), which introduced a wider range of sentencing options, including home detention and other forms of supervision in the community: p 8.

5.5 United States

At the end of 2013, around 1.57 million people were incarcerated in State and federal correctional facilities in the US. The three-year decline in the prison population halted in 2013 due to an increase of 6,300 inmates in the State prison population. The federal prison population decreased for the first time since 1980, with 1,900 fewer prisoners in 2013 than in 2012.²¹⁸ It has been suggested that some of the decrease in the correctional population was due to a drop in California's correctional population, a decline thought to be driven by that State's *Public Safety Realignment Act* of 2011.²¹⁹

Between 1978 and 2009, the number of prisoners held in federal and State prisons increased by almost 430% from 294,400 on 31 December 1978 to 1,555,600 on 31 December 2009.²²⁰

5.6 Canada

In Canada for the 2012/2013 fiscal year, there were a total of 39,679 adult offenders in custody.²²¹ Of these 25,208 were in provincial or Territory prisons while 14,471 were held in the federal jurisdiction.²²² In 2013, Canada's prison population hit an all-time high, even though the crime rate has been decreasing over the past two decades.

Since March 2005, the federal inmate population increased by 17.5%. During this period, the Aboriginal incarceration population increased by 47.4% and the incarceration of black offenders rose by over 75%. These groups now comprise 22.8% and 9.8% of the total incarcerated population respectively. Over the same time period, the population of females sentenced in federal courts increased by 66%, the Aboriginal women count grew by 112%, while the number of Caucasian offenders has actually declined by 3%.²²³

A number of significant legislative amendments have underscored the severity of sentences being imposed in Canada. The *Safe Streets and Communities Act* (Can)²²⁴ in 2012 substantially limited conditional sentences and introduced a number of mandatory minimum sentences. Further, amendments were made to the *Criminal Code* (Can) in 2009 which limited credit for time spent in pre-sentencing custody.²²⁵ Commentators have also suggested that sentencing has become more punitive following reorientation of Pt XXIII of the *Criminal Code* so that the importance of rehabilitation and restorative aims have been diminished in favour of greater retribution.²²⁶

218 EA Carson, *Prisoners in 2013*, Bulletin, Bureau of Justice Statistics (US), September 2014, at www.bjs.gov/content/pub/pdf/p13.pdf, accessed 16 February 2015.

219 *ibid* p 12; EA Carson and D Golinelli, *Prisoners in 2012: trends in admissions and releases, 1991–2012*, Bulletin, Bureau of Justice Statistics (US), December 2013 (revised September 2014), at www.bjs.gov/content/pub/pdf/p12tar9112.pdf, accessed 16 February 2015; see also California Department of Corrections & Rehabilitation, at www.cdcr.ca.gov/realignment/, accessed 21 January 2015.

220 Carson and Golinelli, *ibid* p 1.

221 These figures are based on average counts. Average counts provide a snapshot of the correctional population and are used to represent the number of individuals in custody on any given day. The figures relate to the Canadian fiscal year (1 April 2012 to 31 March 2013) and represent the total number of persons held in custody under sentence, remand or who are otherwise legally required to be there and who are present at the time the count is taken: Perreault, above n 165; Statistics Canada, above n 165.

222 Perreault, above n 165, Table 2; Statistics Canada, above n 165.

223 H Sapers, *Annual report of the Office of the Correctional Investigator 2013–2014*, Office of the Correctional Investigator, Government of Canada, 27 June 2014, "Correctional Investigator's message".

224 As passed by the House of Commons of Canada on 5 December 2011 and assented to 13 March 2012. Part 3 of the Act amended the *Corrections and Conditional Release Act* (Can) to provide for the automatic suspension of conditional release if an offender received a new custodial sentence.

225 *Truth in Sentencing Act* (Can), assented to 22 October 2009.

226 P Healy, "Sentencing from there to here and from then to now" (2013) 17 *Canadian Criminal Law Review* 291; JV Roberts and HH Bebbington, "Sentencing reform in Canada: promoting a return to the principles and evidenced-based policy" (2013) 17 *Canadian Criminal Law Review* 327; R Pomerance, "The new approach to sentencing in Canada: reflections of a trial judge" (2013) 17 *Canadian Criminal Law Review* 305.

Conclusion

Sentencing is essentially a State or Territory issue. Parliaments across Australia generally legislate to reflect local concerns about crime with little reference to interstate developments. This creates differences in how criminal offences are defined, and in the maximum penalties for offences. These differences make the task of comparing sentencing patterns across jurisdictions difficult. Ultimately, the strength of any cross-jurisdictional sentencing comparison depends on the degree to which the offence (or offences) and sentencing procedures can be aligned. Rather than use ANZSOC classifications to test the severity or leniency of sentencing in NSW relative to other jurisdictions, this study matched selected offence provisions between jurisdictions by reference to specific offence ingredients. This enabled more targeted and precise sentencing comparisons.

The findings in this study for the offences selected show that sentences in NSW are among the most severe across the eastern seaboard states of Australia. Despite some small differences in statutory maximum penalties, (and putting to one side partially suspended sentences)²²⁷ NSW had higher full-time imprisonment rates than Queensland and Victoria for all five offence categories examined and higher median head sentences than both States for the offences of child sexual assault, robbery, and break and enter/burglary.

The sentencing patterns presented in this study are generally consistent with those reported by the Judicial Commission in 2007. That study concluded that calls in the media for more severe sentences in NSW, at least comparatively speaking, were “pushing an open door”. This study confirms that observation.

²²⁷ NSW has equal or lower statutory maximum penalties than Queensland and Victoria for all offences examined except for sexual assault and child sexual assault (where NSW has a maximum penalty of natural life and Victoria and Queensland have a maximum of life). See further at 3.2–3.6 above.

Appendix A: Offence provisions

The legislation set out below is current as at the last day of the relevant data period analysed in the study. Significant amendments to offence provisions during the data periods are discussed in the text above.

Sexual assault

New South Wales

Crimes Act 1900

61I Sexual assault

Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years.

61J Aggravated sexual assault

- (1) Any person who has sexual intercourse with another person without the consent of the other person and in circumstances of aggravation and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 20 years.
- (2) In this section, *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 under the age of 16 years, or
 - (e) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender, or
 - (f) the alleged victim has a serious physical disability, or
 - (g) the alleged victim has a cognitive impairment, or
 - (h) 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, or
 - (i) the alleged offender deprives the alleged victim of his or her liberty for a period before or after the commission of the offence.
- (3) In this section, *building* has the same meaning as it does in Division 4 of Part 4.

61JA Aggravated sexual assault in company

- (1) A person:
 - (a) who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse, and
 - (b) who is in the company of another person or persons, and
 - (c) who:
 - (i) at the time of, or immediately before or after, the commission of the offence, intentionally or recklessly inflicts actual bodily harm on the alleged victim or any other person who is present or nearby, or
 - (ii) at the time of, or immediately before or after, the commission of the offence, 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
 - (iii) deprives the alleged victim of his or her liberty for a period before or after the commission of the offence,is liable to imprisonment for life.
- (2) A person sentenced to imprisonment for life for an offence under this section is to serve that sentence for the term of the person's natural life.
- (3) Nothing in this section affects the operation of section 21 of the *Crimes (Sentencing Procedure) Act 1999* (which authorises the passing of a lesser sentence than imprisonment for life).
- (4) Nothing in this section affects the prerogative of mercy.

Victoria

Crimes Act 1958

38 Rape

- (1) A person must not commit rape.
Penalty: Level 2 imprisonment (25 years maximum).
- (2) A person commits rape if—
 - (a) he or she intentionally sexually penetrates another person without that person's consent—
 - (i) while being aware that the person is not consenting or might not be consenting; or
 - (ii) while not giving any thought to whether the person is not consenting or might not be consenting; or
 - (b) after sexual penetration he or she does not withdraw from a person who is not consenting on becoming aware that the person is not consenting or might not be consenting.

...

Queensland

Criminal Code, Sch 1 to the Criminal Code Act 1899

349 Rape

- (1) Any person who rapes another person is guilty of a crime.
Maximum penalty—life imprisonment.
- (2) A person rapes another person if—
 - (a) the person has carnal knowledge with or of the other person without the other person's consent; or
 - (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or
 - (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
- (3) For this section, a child under the age of 12 years is incapable of giving consent.

Child sexual assault

New South Wales

Crimes Act 1900

66A Sexual intercourse — child under 10

- (1) **Child under 10**
Any person who has sexual intercourse with another person who is under the age of 10 years is guilty of an offence.
Maximum penalty: imprisonment for 25 years.
- (2) **Child under 10 — aggravated offence**
Any person who has sexual intercourse with another person who is under the age of 10 years in circumstances of aggravation is guilty of an offence.
Maximum penalty: imprisonment for life.
- (3) In this section, *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.
- (4) A person sentenced to imprisonment for life for an offence under subsection (2) is to serve that sentence for the term of the person's natural life.
- ...

66C Sexual intercourse — child between 10 and 16

(1) Child between 10 and 14

Any person who has sexual intercourse with another person who is of or above the age of 10 years and under the age of 14 years is liable to imprisonment for 16 years.

...

(3) Child between 14 and 16

Any person who has sexual intercourse with another person who is of or above the age of 14 years and under the age of 16 years is liable to imprisonment for 10 years.

...

Victoria

Crimes Act 1958

45 Sexual penetration of child under the age of 16

- (1) A person who takes part in an act of sexual penetration with a child under the age of 16 is guilty of an indictable offence.
 - (2) A person who is guilty of an offence against subsection (1) is liable —
 - (a) if the court is satisfied beyond reasonable doubt that the child was, at the time of the offence, under the age of 12, to level 2 imprisonment (25 years maximum); or
 - ...
 - (c) in any other case of sexual penetration of a child between the ages of 12 and 16, to level 5 imprisonment (10 years maximum).
- ...

48 Sexual penetration of 16 or 17 year old child

- (1) A person must not take part in an act of sexual penetration with a 16 or 17 year old child to whom he or she is not married and who is under his or her care, supervision or authority.
- Penalty: Level 5 imprisonment (10 years maximum).
- ...

Queensland

Criminal Code, Sch 1 to the Criminal Code Act 1899

215 Carnal knowledge with or of children under 16

- (1) Any person who has or attempts to have unlawful carnal knowledge with or of a child under the age of 16 years is guilty of an indictable offence.
- (2) If the child is of or above the age of 12 years, the offender is guilty of a crime, and is liable to imprisonment for 14 years.
- (3) If the child is under the age of 12 years, the offender is guilty of a crime, and is liable to imprisonment for life or, in the case of an attempt to have unlawful carnal knowledge, to imprisonment for 14 years.
- (4) If the child is not the lineal descendant of the offender but the offender is the child's guardian or, for the time being, has the child under the offender's care, the offender is guilty of a crime, and is liable to imprisonment for life or, in the case of an attempt to have unlawful carnal knowledge, to imprisonment for 14 years.
- (4A) If the child is a person with an impairment of the mind, the offender is guilty of a crime, and is liable to imprisonment for life.

...

- (6) In this section —
carnal knowledge does not include sodomy.

...

349 Rape

- (1) Any person who rapes another person is guilty of a crime.

Maximum penalty—life imprisonment.

- (2) A person rapes another person if —
 - (a) the person has carnal knowledge with or of the other person without the other person's consent; or
 - (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or
 - (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
- (3) For this section, a child under the age of 12 years is incapable of giving consent.

Dangerous/culpable driving causing death

New South Wales

Crimes Act 1900

52A Dangerous driving: substantive matters

(1) Dangerous driving occasioning death

A person is guilty of the offence of dangerous driving occasioning death if the vehicle driven by the person is involved in an impact occasioning the death of another person and the driver was, at the time of the impact, driving the vehicle:

- (a) under the influence of intoxicating liquor or of a drug, or
- (b) at a speed dangerous to another person or persons, or
- (c) in a manner dangerous to another person or persons.

A person convicted of an offence under this subsection is liable to imprisonment for 10 years.

(2) Aggravated dangerous driving occasioning death

A person is guilty of the offence of aggravated dangerous driving occasioning death if the person commits the offence of dangerous driving occasioning death in circumstances of aggravation. A person convicted of an offence under this subsection is liable to imprisonment for 14 years.

...

(7) Circumstances of aggravation

In this section, *circumstances of aggravation* means any circumstances at the time of the impact occasioning death or grievous bodily harm in which:

- (a) the prescribed concentration of alcohol was present in the accused's breath or blood, or
- (b) the accused was driving the vehicle concerned on a road at a speed that exceeded, by more than 45 kilometres per hour, the speed limit (if any) applicable to that length of road, or
- (c) the accused was driving the vehicle to escape pursuit by a police officer, or
- (d) the accused's ability to drive was very substantially impaired by the fact that the accused was under the influence of a drug (other than intoxicating liquor) or a combination of drugs (whether or not intoxicating liquor was part of that combination).

...

Victoria**Crimes Act 1958****318 Culpable driving causing death**

- (1) Any person who by the culpable driving of a motor vehicle causes the death of another person shall be guilty of an indictable offence and shall be liable to level 3 imprisonment (20 years maximum) or a level 3 fine or both.
- (2) For the purposes of subsection (1) a person drives a motor vehicle culpably if he drives the motor vehicle —
 - (a) recklessly, that is to say, if he consciously and unjustifiably disregards a substantial risk that the death of another person or the infliction of grievous bodily harm upon another person may result from his driving; or
 - (b) negligently, that is to say, if he fails unjustifiably and to a gross degree to observe the standard of care which a reasonable man would have observed in all the circumstances of the case; or
 - (c) whilst under the influence of alcohol to such an extent as to be incapable of having proper control of the motor vehicle; or
 - (d) whilst under the influence of a drug to such an extent as to be incapable of having proper control of the motor vehicle.
- (2A) Without limiting subsection (2)(b), negligence within the meaning of that subsection may be established by proving that —
 - (a) a person drove a motor vehicle when fatigued to such an extent that he or she knew, or ought to have known, that there was an appreciable risk of him or her falling asleep while driving or of losing control of the vehicle; and
 - (b) by so driving the motor vehicle the person failed unjustifiably and to a gross degree to observe the standard of care which a reasonable person would have observed in all the circumstances of the case.

...

319 Dangerous driving causing death or serious injury

- (1) A person who, by driving a motor vehicle at a speed or in a manner that is dangerous to the public having regard to all the circumstances of the case, causes the death of another person is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

...

Queensland**Criminal Code, Sch 1 to the Criminal Code Act 1899****328A Dangerous operation of a vehicle**

...

- (4) A person who operates, or in any way interferes with the operation of, a vehicle dangerously in any place and causes the death of or grievous bodily harm to another person commits a crime and is liable on conviction on indictment —
 - (a) to imprisonment for 10 years, if neither paragraph (b) nor (c) applies; or
 - (b) to imprisonment for 14 years if, at the time of committing the offence, the offender is —
 - (i) adversely affected by an intoxicating substance; or
 - (ii) excessively speeding; or
 - (iii) taking part in an unlawful race or unlawful speed trial; or

- (c) to imprisonment for 14 years, if the offender knows, or ought reasonably know, the other person has been killed or injured, and the offender leaves the scene of the incident, other than to obtain medical or other help for the other person, before a police officer arrives.

...

- (6) In this section —

...

operates, or in any way interferes with the operation of, a vehicle dangerously means operate, or in any way interfere with the operation of, a vehicle at a speed or in a way that is dangerous to the public, having regard to all the circumstances, including —

- (a) the nature, condition and use of the place; and
- (b) the nature and condition of the vehicle; and
- (c) the number of persons, vehicles or other objects that are, or might reasonably be expected to be, in the place; and
- (d) the concentration of alcohol in the operator's blood or breath; and
- (e) the presence of any other substance in the operator's body.

...

prescribed offence means —

- (a) an offence against this section; or
- (b) an offence charged on indictment involving the driving or operation of a vehicle at a speed causing or likely to cause injury to anyone; or
- (c) an offence against the *Transport Operations (Road Use Management) Act 1995*, section 79(1), (1F), (2), (2AA), (2A), (2B), (2D) or (2J).

...

Robbery

New South Wales

Crimes Act 1900

94 Robbery or stealing from the person

Whosoever:

- robs or assaults with intent to rob any person, or
- steals any chattel, money, or valuable security from the person of another,

shall, except where a greater punishment is provided by this Act, be liable to imprisonment for fourteen years.

95 Same in circumstances of aggravation

- (1) Whosoever robs, or assaults with intent to rob, any person, or steals any chattel, money, or valuable security, from the person of another, in circumstances of aggravation, shall be liable to imprisonment for twenty years.
- (2) In this section, *circumstances of aggravation* means circumstances that (immediately before, or at the time of, or immediately after the robbery, assault or larceny) involve any one or more of the following:
 - (a) the alleged offender uses corporal violence on any person,
 - (b) the alleged offender intentionally or recklessly inflicts actual bodily harm on any person,
 - (c) the alleged offender deprives any person of his or her liberty.

96 Same (robbery) with wounding

Whosoever commits any offence under section 95, and thereby wounds or inflicts grievous bodily harm on any person, shall be liable to imprisonment for 25 years.

97 Robbery etc or stopping a mail, being armed or in company

- (1) Whosoever, being armed with an offensive weapon, or instrument, or being in company with another person, robs, or assaults with intent to rob, any person, or stops any mail, or vehicle, railway train, or person conveying a mail, with intent to rob, or search the same, shall be liable to imprisonment for twenty years.
- (2) **Aggravated offence**
A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) when armed with a dangerous weapon. A person convicted of an offence under this subsection is liable to imprisonment for 25 years.
- (3) **Alternative verdict**
If on the trial of a person for an offence under subsection (2) the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of an offence under subsection (1), it may find the accused not guilty of the offence charged but guilty of the latter offence, and the accused is liable to punishment accordingly.

98 Robbery with arms etc and wounding

Whosoever, being armed with an offensive weapon, or instrument, or being in company with another person, robs, or assaults with intent to rob, any person, and immediately before, or at the time of, or immediately after, such robbery, or assault, wounds, or inflicts grievous bodily harm upon, such person, shall be liable to imprisonment for 25 years.

Victoria**Crimes Act 1958****75 Robbery**

- (1) A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear that he or another person will be then and there subjected to force.
- (2) A person guilty of robbery, or of an assault with intent to rob, is guilty of an indictable offence and liable to level 4 imprisonment (15 years maximum).

75A Armed robbery

- (1) A person is guilty of armed robbery if he commits any robbery and at the time has with him a firearm, imitation firearm, offensive weapon, explosive or imitation explosive within the meaning assigned to those terms for the purposes of section 77(1).
- (2) A person guilty of armed robbery is guilty of an indictable offence and liable to level 2 imprisonment (25 years maximum).

Queensland**Criminal Code, Sch 1 to the Criminal Code Act 1899****409 Definition of robbery**

Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain the thing stolen or to prevent or overcome resistance to its being stolen, is said to be guilty of *robbery*.

411 Punishment of robbery

- (1) Any person who commits the crime of robbery is liable to imprisonment for 14 years.
- (2) If the offender is or pretends to be armed with any dangerous or offensive weapon or instrument, or is in company with 1 or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, the offender wounds or uses any other personal violence to any person, the offender is liable to imprisonment for life.

413 Assault with intent to steal

Any person who assaults any person with intent to steal anything is guilty of a crime, and is liable to imprisonment for 3 years.

Break and enter/burglary

New South Wales

Crimes Act 1900

111 Entering dwelling-house

- (1) Whosoever enters any dwelling-house, with intent to commit a serious indictable offence therein, shall be liable to imprisonment for ten years.
- (2) **Aggravated offence**
A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) in circumstances of aggravation. A person convicted of an offence under this subsection is liable to imprisonment for 14 years.
- (3) **Specially aggravated offence**
A person is guilty of an offence under this subsection if the person commits an offence under subsection (2) in circumstances of special aggravation. A person convicted of an offence under this subsection is liable to imprisonment for 20 years.

112 Breaking etc into any house etc and committing serious indictable offence

- (1) A person who:
 - (a) breaks and enters any dwelling-house or other building and commits any serious indictable offence therein, or
 - (b) being in any dwelling-house or other building commits any serious indictable offence therein and breaks out of the dwelling-house or other building,is guilty of an offence and liable to imprisonment for 14 years.
- (2) **Aggravated offence**
A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) in circumstances of aggravation. A person convicted of an offence under this subsection is liable to imprisonment for 20 years.
- (3) **Specially aggravated offence**
A person is guilty of an offence under this subsection if the person commits an offence under subsection (2) in circumstances of special aggravation. A person convicted of an offence under this subsection is liable to imprisonment for 25 years.

113 Breaking etc into any house etc with intent to commit serious indictable offence

- (1) A person who breaks and enters any dwelling-house or other building with intent to commit any serious indictable offence therein is guilty of an offence and liable to imprisonment for 10 years.
- (2) **Aggravated offence**
A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) in circumstances of aggravation. A person convicted of an offence under this subsection is liable to imprisonment for 14 years.
- (3) **Specially aggravated offence**
A person is guilty of an offence under this subsection if the person commits an offence under subsection (2) in circumstances of special aggravation. A person convicted of an offence under this subsection is liable to imprisonment for 20 years.

105A Definitions

- (1) In sections 106–115A:
building includes any place of Divine worship.
circumstances of aggravation means circumstances involving any one or more of the following:
 - (a) the alleged offender is armed with an offensive weapon, or instrument,
 - (b) the alleged offender is in the company of another person or persons,
 - (c) the alleged offender uses corporal violence on any person,
 - (d) the alleged offender intentionally or recklessly inflicts actual bodily harm on any person,
 - (e) the alleged offender deprives any person of his or her liberty,
 - (f) the alleged offender knows that there is a person, or that there are persons, in the place where the offence is alleged to be committed.

circumstances of special aggravation means circumstances involving any or all of the following:

- (a) the alleged offender intentionally wounds or intentionally inflicts grievous bodily harm on any person,
- (b) the alleged offender inflicts grievous bodily harm on any person and is reckless as to causing actual bodily harm to that or any other person,
- (c) the alleged offender is armed with a dangerous weapon

...

Victoria

Crimes Act 1958

76 Burglary

- (1) A person is guilty of burglary if he enters any building or part of a building as a trespasser with intent —
 - (a) to steal anything in the building or part in question; or
 - (b) to commit an offence —
 - (i) involving an assault to a person in the building or part in question; or
 - (ii) involving any damage to the building or to property in the building or part in question —
 which is punishable with imprisonment for a term of five years or more.
- (2) References in subsection (1) to a building shall apply also to an inhabited vehicle or vessel, and shall apply to any such vehicle or vessel at times when the person having a habitation in it is not there as well as at times when he is.
- (3) A person guilty of burglary is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

77 Aggravated burglary

- (1) A person is guilty of aggravated burglary if he or she commits a burglary and —
 - (a) at the time has with him or her any firearm or imitation firearm, any offensive weapon or any explosive or imitation explosive; or
 - (b) at the time of entering the building or the part of the building a person was then present in the building or part of the building and he or she knew that a person was then so present or was reckless as to whether or not a person was then so present.
- ...
- (2) A person guilty of aggravated burglary is guilty of an indictable offence and liable to level 2 imprisonment (25 years maximum).

Queensland

Criminal Code, Sch 1 to the Criminal Code Act 1899

419 Burglary

- (1) Any person who enters or is in the dwelling of another with intent to commit an indictable offence in the dwelling commits a crime.
Maximum penalty — 14 years imprisonment.
- (2) If the offender enters the dwelling by means of any break, he or she is liable to imprisonment for life.
- (3) If —
 - (a) the offence is committed in the night; or
 - (b) the offender —
 - (i) uses or threatens to use actual violence; or
 - (ii) is or pretends to be armed with a dangerous or offensive weapon, instrument or noxious substance; or
 - (iii) is in company with 1 or more persons; or
 - (iv) damages, or threatens or attempts to damage, any property;
 the offender is liable to imprisonment for life.
- (4) Any person who enters or is in the dwelling of another and commits an indictable offence in the dwelling commits a crime.
Maximum penalty — imprisonment for life.

421 Entering or being in premises and committing indictable offences

- (1) Any person who enters or is in any premises with intent to commit an indictable offence in the premises commits a crime.
Maximum penalty — 10 years imprisonment.
- (2) Any person who enters or is in any premises and commits an indictable offence in the premises commits a crime.
Maximum penalty — 14 years imprisonment.
- (3) If the offender gains entry to the premises by any break and commits an indictable offence in the premises, he or she is liable to imprisonment for life.

Appendix B: Imprisonment rates and median terms of head sentence for specific offences

Note: Figures shown in parenthesis refer to the imprisonment rate when partially suspended sentences were included.

Table B.1: Offenders sentenced to full-time imprisonment for sexual assault offences

Jurisdiction	Section	Date range	Sentenced	Imprisoned		Median head sentence (mths)
			n	n	%	
NSW	s 61I	1/7/06–30/6/13	243	218	89.7	59.5
	s 61J	1/7/06–30/6/13	142	137	96.5	96
	s 61JA	1/7/06–30/6/13	19	19	100	144
	Total: ss 61I, 61J, 61JA	1/7/06–30/6/13	404	374	92.6	72
Vic	s 38	2007/08–2011/12	264	232 (241)	87.5 (91.3)	60
Qld	s 349	1/7/07–30/6/13	197	147 (192)	74.6 (97.5%)	84

Table B.2: Offenders sentenced to full-time imprisonment for sexual assault of child under 10 years

Jurisdiction	Section	Date range	Sentenced	Imprisoned		Median head sentence (mths)
			n	n	%	
NSW	s 66A ^a	1/7/06–30/6/13	173	154	89.0	84
Vic	s 45(2)(a) ^b	2007/08–2011/12	71	54 (55)	76.1 (77.5)	48
Qld	s 349 rape of child under 10 yrs	1/7/07–30/6/13	120	84 (113)	70.0 (94.2)	72

- a. Includes offenders convicted under s 66A(1), (2) of the *Crimes Act* 1900 (NSW), and also under the previous form of s 66A (see discussion on p 17).
- b. Section 45(2)(a) of the *Crimes Act* 1958 (Vic) was amended to increase the minimum age of the victim for this offence from 10 to 12 years. The new age range of under 12 years applies for offences committed on or after 17 March 2010. The data include both cases before and after the legislation was amended. There was only one case that was sentenced under the new version of the legislation (sexual penetration of a child under 12 years) during the data period (see 2.2.2). It is not known whether the victim in that case was under 10 or between 10 and 12 years.

Table B.3 Offenders sentenced to full-time imprisonment for dangerous/culpable driving causing death

Jurisdiction	Section	Date range	Sentenced	Imprisoned		Median head sentence (mths)
			n	n	%	
NSW	s 52A(1)(a)	1/7/06–30/6/13	29	25	86.2	36
	s 52A(1)(b)	1/7/06–30/6/13	1	1	100	n/a ^a
	s 52A(1)(c)	1/7/06–30/6/13	163	89	54.6	32
	s 52A(2)	1/7/06–30/6/13	45	44	97.8	60
	Total: ss 52A(1), (2)	1/7/06–30/6/13	238	159	66.8	36
Vic	s 318	2007/08–2010/11	77	64 (66)	83.1 (85.7)	66
	s 319(1)	2007/08–2011/12	100	33 (48)	33.0 (48)	36
	Total: ss 318, 319	2007/08–2011/12	177	97 (114)	54.8 (64.4)	n/a ^b
Qld	s 328A(4) ^c	1/07/07–30/6/13	182	65 (139)	35.7 (76.4)	66

- a. There was only one case for this offence so a median cannot be derived. The offender was sentenced to 24 months imprisonment.
- b. A combined median for ss 318 and 319 of the *Crimes Act* 1958 (Vic) was not publically available.
- c. Section 328A(4) of the *Criminal Code* (Qld) includes dangerous driving causing both grievous bodily harm or death. There were a total of 448 cases for this offence. The remarks on sentence were analysed for each of these cases and instances where the offence resulted in grievous bodily harm rather than death were excluded from the data set. In one case, it was not possible to determine whether the offence resulted in death or grievous bodily harm. In 182 cases, the offence resulted in death.

Table B.4: Offenders sentenced to full-time imprisonment for robbery offences (all)

Jurisdiction	Section	Date range	Sentenced	Imprisoned		Median head sentence (mths)
			n	n	%	
NSW	ss 94–98	1/7/06–30/6/13	3,273	2,625	80.2	44
Vic	ss 75, 75A	2008/09–2012/13	1,114	733 (762)	65.8 (68.4)	36
Qld	ss 409, 411	1/7/07–30/6/13	2,127	1,519 (1,781)	71.4 (83.7)	36

Table B.5: Offenders sentenced to full-time imprisonment for robbery offences (non-aggravated)

Jurisdiction	Section	Date range	Sentenced	Imprisoned		Median head sentence (mths)
			n	n	%	
NSW	s 94	1/7/06–30/6/13	385	246	63.9	30
Vic	s 75	2008/09–2012/13	109	59 (67)	54.1 (61.5)	20.5
Qld	ss 409, 411(1)	1/7/07–30/6/13	137	100 (112)	73.0 (81.8)	30

Table B.6: Offenders sentenced to full-time imprisonment for robbery offences (serious)

Jurisdiction	Section	Date range	Sentenced	Imprisoned		Median head sentence (mths)
			n	n	%	
NSW	ss 96–98	1/7/06–30/6/13	2,888	2,379	82.4	45
Qld	s 411(2)	1/7/07–30/6/13	1,990	1,419 (1,669)	71.3 (83.9)	36

Table B.7: Offenders sentenced to full-time imprisonment for robbery offences (armed)

Jurisdiction	Section	Date range	Sentenced	Imprisoned		Median head sentence (mths)
			n	n	%	
NSW	ss 97, 98 ^a	1/7/06–30/6/13	1,355	1,215	89.7	49
Vic	s 75A	2008/09–2012/13	1,005	674 (695)	67.1 (69.2)	36

a. Includes only offenders convicted under ss 97 and 98 of the *Crimes Act* 1900 (NSW) where the offender was armed.

Table B.8: Offenders sentenced to full-time imprisonment for break and enter/burglary offences

Jurisdiction	Section	Date range	Sentenced	Imprisoned		Median head sentence (mths)
			n	n	%	
NSW	s 111	1/7/06–30/6/13	299	187	62.5	30
	s 112	1/7/06–30/6/13	2,395	1,674	69.9	36
	s 113	1/7/06–30/6/13	260	176	67.7	32
	Non-aggravated break and enter ^a	1/7/06–30/6/13	612	483	78.9	36
	Aggravated break and enter ^b	1/7/06–30/6/13	2,342	1,554	66.4	36
	Total: ss 111–113	1/7/06–30/6/13	2,954	2,037	69.0	36
Vic	s 76	2008/09–2012/13	83	54 (59)	65.1 (71.1)	18
	s 77	2008/09–2012/13	772	404 (464)	52.3 (60.1)	30
	Total: ss 76–77	2008/09–2012/13	855	458 (523)	53.6 (61.2)	24
Qld	ss 419, 421	1/07/07–30/6/13	2,379	1,462 (1,652)	61.5 (69.4)	24

a. Includes offenders convicted under ss 111(1), 112(1) and 113(1) of the *Crimes Act* 1900 (NSW).

b. Includes offenders convicted under ss 111(2), (3), 112(2), (3) and 113(2), (3) of the *Crimes Act* 1900 (NSW).

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