

Sexual assaults – adult victims

ss 325 & 326 Criminal Code

From 1 January 2021

Transitional Sentencing Provisions: This table is divided into thirds based on the three relevant periods of Sentencing Provisions:

- Post-transitional provisions period
- Transitional provisions period
- Pre-transitional provisions period

These periods are separated by a row which shows when the transitional provisions were enacted, and another showing when they were repealed.

Glossary:

AOBH	assault occasioning bodily harm
agg	aggravated
att	attempted
burg	burglary
circ	circumstances
con	concurrent
cum	cumulative
ct	count
dep lib	deprivation of liberty
imp	imprisonment
indec	indecent
ISO	intensive supervision order
PCJ	pervert the course of justice
PG	plead guilty
PNG	plead not guilty
sex pen	sexual penetration without consent
susp	suspended
TES	total effective sentence
TIC	time in custody

No.	Case	Antecedents	Summary/Facts	Sentence	Appeal
16.	<i>McFarlane v The State of Western Australia</i> [2024] WASCA 33 Delivered 02/04/2024	30 yrs at time offending. 42 yrs at time sentencing. Convicted after PG (25% discount) Minor criminal history; traffic offences and criminal damage. Born in WA; positive upbringing; devoid of any trauma or abuse. Expelled from school in yr 8; completed apprenticeship in carpentry. Employed as building supervisor; operated own carpentry business. Married one year before offending; four children; separated from wife; in another relationship at time sentencing. Began drinking at 13 yrs; later received treatment for alcohol and substance abuse. Diagnosed ADHD; received treatment for depression and anxiety.	1 x Sex pen without consent The appellant committed the offence whilst attending a 'buck's party at a residence. At the party, both the appellant and the victim were intoxicated. During the party, the appellant spoke to and flirted with the victim. The victim did not reciprocate. Later in the evening, the victim was taken by a female friend to a bedroom in the house. In her intoxicated state, the victim laid down on the bed. The appellant went searching for the victim and found her in the bedroom. The appellant and the victim spoke and engaged in mutual kissing. The appellant removed the victim's underwear and penetrated her vagina with his tongue. At the time the victim believed the appellant was another friend of hers, named Jake. The victim's friend turned on the lights, and the victim realised the appellant was not Jake. The appellant got dressed, left the room and later left the house. During the initial police investigation, the appellant told police he did not enter any bedroom nor did he touch 'any females'. A decade later, subsequent forensic testing linked the appellant to the swabs provided by the victim.	2 yrs 4 mths imp. EFP. The sentencing judge found that the appellant had offended against a victim who was highly vulnerable, as she was so intoxicated she could not provide consent. The offending resulted in the victim suffering from long-term distress, trauma and fear; loss of self-confidence and self-worth; diagnosed with severe anxiety and depression; struggled to re-engage in social activities and build trusting relationships. The sentencing judge accepted that the appellant had an honest, but unreasonable, belief that the victim was consenting Despite the substantial delay, the sentencing judge found a suspended sentence would be wholly inappropriate.	Appeal dismissed (leave refused). Appeal concerned the type of sentence imposed. At [44] '... his Honour was correct to conclude that the imposition of a term of suspended imprisonment was inappropriate in this case.' At [45] 'without question, the offence committed by the appellant was serious.' At [46] 'even in his intoxicated state, the appellant was well aware that the victim was heavily intoxicated ... she had left the party and retreated into a bedroom to sleep ... The appellant then went looking for her. There was no suggestion made that he did this out of concern for the victim's welfare.' At [47] '... [the victim's] confusion was no source of mitigation to the appellant, as he was aware of her incapacity to consent to any sexual activity.' At [49] 'in <i>Taylor v The State of Western Australia [2019] WASCA 217</i> this court observed that, generally speaking, an offender who is convicted of a sexual offence that includes, as an element, the absence of consent, and who honestly but unreasonably believed that the victim was consenting to the act in question, will be less morally culpable than an offender who did not honestly believe the victim was consenting. However, the court in <i>Taylor</i> emphasised that the question of whether an honest belief will be a mitigating factor and, if so, to what extent, will depend upon the relevant facts and circumstances of the particular case.' At [50] '... generally speaking, where the inability of an offender to appreciate the nature and consequence of his actions, mistake, or misjudgement arises from self-induced intoxication, the moral culpability of the offender is not reduced.' At [54] 'an examination of the comparable cases reveals that, over the last 20 years, this court has not imposed a sentence of suspended imprisonment, conditional or otherwise, for an offence contrary to s 325 of the Code.' At [55] 'the mitigating factors in the present case were of substantial weight, when viewed in combination... Together these factors justified the imposition of a term of imprisonment towards the lower end of the range. However ... none of the mitigating factors were ... of such a nature as to justify a departure from the ordinary position for an offence of sexual penetration without consent.'
15.	<i>The State of Western Australia</i>	43 yrs at time offending. 44 yrs at time sentencing.	1 x Sex pen without consent.	12 mths ISO with a program condition.	Appeal allowed.

<p>v Wynne</p> <p>[2024] WASCA 20</p> <p>Delivered 01/03/2024</p>	<p>Convicted after PG (20% discount).</p> <p>Criminal history; mostly traffic and drug related; no previous sexual offences; long period of no offending until methyl use.</p> <p>Born in Albany; Indigenous heritage; parents both died when he was a young child.</p> <p>Difficult childhood; lived with an aunt and uncle in a regional town; aunt died when the respondent was 10 yrs; uncle became physically abusive; sexually abused by a cousin; left the house at 14 yrs to live with a sister.</p> <p>Attended primary school; below average performance; left school at 14 yrs old.</p> <p>Attended TAFE; completed courses for bricklaying; completed a diploma in counselling.</p> <p>Variety of jobs; community development employment work; youth development officer; counsellor at Aboriginal healing service; pastor; employment ceased in connection to breakdown of marriage.</p> <p>Homeless at time of offending; assaulted whilst living on the streets.</p> <p>Cannabis and alcohol use since 13 yrs; methyl use from age of 38 yrs.</p> <p>One significant long-term relationship; 21 yr old son from another relationship; limited contact with son.</p>	<p>The victim was travelling on a Transperth bus on her way to school. The victim was aged 16 yrs at the time of offending. She was wearing her school uniform.</p> <p>The respondent later got onto the bus, and sat on the right-hand side of the aisle, immediately across from the victim. The respondent angled towards the victim and mumbled something at her to gain her attention. The victim ignored what he said. The respondent then screwed up a bus ticket and threw it at the victim. She again ignored the respondent.</p> <p>The respondent then moved to the aisle seat. Soon after, the victim stood up to disembark the bus at her usual stop. As she did this the respondent rose from his seat, he then reached under the victim's school shorts and pushed his finger towards her anus. The respondent's finger pushed the complainant's underwear into her anus. He then withdrew his hand and moved to an opposite seat. The victim disembarked the bus and later reported the incident to the police.</p>	<p>The sentencing judge found that the offending was fleeting and found it hard to imagine it could be more fleeting.</p> <p>The sentencing judge found that the offending as on the lower end of the scale for offences of the same type.</p> <p>The sentencing judge found that the offending as 'absolutely out of character' for the respondent.</p> <p>The sentencing judge found the respondent's five mths on remand was persuasive in favour of imposing an ISO.</p>	<p>Appeal concerned length of sentence.</p> <p>Resentenced:</p> <p>2 yrs imp.</p> <p>EFP.</p> <p>At [73] 'it is noteworthy ... that in the sentencing judge's comments during submissions and in her sentencing remarks, she repeatedly refers to the offending as "touching" and to that touching being in "the area" of the anus. The word "penetration" is not used. Whilst it is unnecessary for present purposes to make any finding as to whether her Honour erred in the appreciation of the nature of the offence, the repeated use of the word "touching" in this context may well indicate how her Honour arrived at the conclusion that an ISO was an available disposition.'</p> <p>At [75] 'as to the seriousness of the offence, whether its duration is described as brief or fleeting, the context in which it occurred was important. The offence was preceded by repeated attempts by the respondent to engage with the complainant... Whatever his motivation, it was obvious that the complainant was a school aged girl, dressed in school uniform and travelling on her own. She was self-evidently vulnerable.'</p> <p>At [76] 'to describe the offence as opportunistic is accurate to the extent that there is nothing to suggest it was premeditated or planned. There was, however, an element of calculation in the way in which the respondent carried it out. It is clear from the CCTV footage that the respondent anticipated that the complainant was preparing to get off the bus and he moved closer to the aisle.'</p> <p>At [80] '... the fact that the offence occurred on a vulnerable young victim using public transport reinforced the need for general deterrence.'</p> <p>At [81] 'there is no fixed range of sentences for sexual offences. However, as a matter of fact, it is unusual for an offence of sexual penetration without consent to result in anything other than an immediate sentence of imprisonment.'</p> <p>At [89] 'in our view... an ISO for the offence of sexual penetration without consent was unreasonable or plainly unjust. A different and significantly higher sentence should have been imposed.'</p>
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14	<p><i>The State of Western Australia v Pereira</i></p> <p>[2023] WASCA 162</p> <p>Delivered 15/11/2023</p>	<p>39 yrs at time sentencing.</p> <p>Convicted at trial.</p> <p>No criminal history.</p> <p>Born in East Timor; moved to Portugal and eventually Australia; move was initially difficult; generally had a positive upbringing.</p> <p>Completed yr 12; had been continuously employed as an adult.</p> <p>Lost his FIFO employment, likely as a result of the publicity of the charges.</p> <p>In a long-term relationship with his partner for seven yrs; relationship was reasonably strong; partner remained in Sydney.</p> <p>No diagnosed mental or physical health issues; had occasionally used illicit drugs.</p> <p>Several character references from the respondent's family, friends and former colleagues; references suggested the respondent was kind, supportive of others, and a trustworthy person.</p>	<p>Ct 1: Sex pen without consent. Ct 2: Indec assault. Ct 3: Sex pen without consent. Ct 4: Indec assault.</p> <p>Just after midnight, two women (the victims) were walking together on their way to meet a friend. The respondent had been following them in his car, tracking their movements.</p> <p>The respondent parked his car, and after waiting in the shadows of a side street, ran up and grabbed both women from behind.</p> <p>When the respondent grabbed the women, he penetrated both women's vaginas through their clothes using his fingers, and simultaneously touched their bottoms or anuses.</p>	<p>Ct 1: 14 mths (cum) Ct 2: 6 mths (conc) Ct 3: 14 mths (cum) Ct 4: 6 mths (conc)</p> <p>TES: 2 yrs 4 mths imp.</p> <p>EFP.</p> <p>Sentencing judge found the offending was premeditated: the offender had followed and observed both woman for a period of time leading up to the offending. The offending occurred almost simultaneously.</p> <p>The offender had made admissions in his record of interview, and formal admissions at trial — reducing the length of the trial.</p> <p>Sentencing judge found the respondent as genuinely remorseful.</p> <p>Offending had left the women anxious, traumatised, fearful and withdrawn.</p> <p>One victim said she felt violated; had been unable to eat or sleep properly; struggled to be intimate with her partner and to show affection; struggled to concentrate at work; and did not feel safe in public places.</p> <p>The other victim spoke about becoming extremely scared; anxious, stressed and feeling violated; her academic performance had deteriorated and was unable to qualify for her honours program; had experienced feelings of shame, guilt and self-blame.</p> <p>Sentencing judge erroneously stated the maximum penalty of sex pen without consent as 10 years' imp; respondent's counsel corrected the judge after the sentence was imposed; his Honour corrected himself but stated it would not increase the sentence because the offending was 'unique factually'.</p>	<p>Appeal allowed.</p> <p>Appeal concerned length of sentenced imposed for cts (1) and (3) and first limb of totality principle.</p> <p>Ct 1: 3 yrs imp Ct 2: 6 mths imp (conc) Ct 3: 3 yrs (reduced to 12 mths for totality served cum) Ct 4: 6 mths (conc)</p> <p>TES: 4 yrs imp.</p> <p>EFP.</p> <p>At [45] 'it is recognised that there is no tariff for sexual offences. This is because offences of that nature are committed in a very wide range of circumstances ... it is also important to observe that there is no hierarchy of sexual offending.'</p> <p>At [50] 'in considering [comparable cases] care must be taken to guard against an approach that assume the existence of a hierarchy of sexual penetration offences'.</p> <p>At [51] 'there are also obvious differences in both the circumstances of the commission of the offences that were the subject of the appeal in <i>Rayapen, Musgrave, and Vartolo</i>, and in the personal circumstances of the respective offenders. An important difference is the fact that in this case the respondent used violence to offend against two women who were in a public place at night, after stalking them in his car for a period of time and then lying in wait for them in a dark side street. Nevertheless ... both the individual sentences for counts 1 and 3, and the aggregate sentence, imposed on the respondent were substantially less than the respective sentences that were ultimately imposed in <i>Rayapen, Musgrave, and Vartolo</i>.'</p> <p>At [53] 'the fact that the penetrations occurred through clothing, in our view, does not reduce the seriousness of the respondent's conduct. The respondent's actions were forceful, demeaning, and amounted to a serious physical violation of two separate women.'</p> <p>At [56] 'on occasions, "unique" appeared to be used to suggest that the offending was towards the lower end of the scale of seriousness. While it may be accepted that the offences committed by the respondent were, as a matter of fact, unusual, we do not think that this reduces the seriousness of the offending.'</p> <p>At [56] 'the respondent's conduct was shocking, humiliating, and it</p>

					has had a profound impact on his two victims’. At [67] ‘the aggregate sentence must reflect the fact that the respondent offended against two women.’
13.	Moore v The State of Western Australia [2023] WASCA 156 Delivered 06/11/2023	Convicted after trial. No physical or mental health issues.	66 x Sex pen without consent. 10 x Indec assault. 7 x Sexual coercion. 2 x Agg indec assault. 1 x Agg sexual coercion. 1 x Agg sex pen without consent. The appellant committed 87 sex offences against 13 women, over a 12 year period. In all but 13 of the offences, the appellant drugged the victims with an unknown substance in order to offend against them. The offences included multiple acts of sexual penetration without consent, the use of bondage, domination, urination, acts intended to demean the complainants and bestiality. The appellant had photographed or videoed the victims whilst the sexual acts were occurring, and retained those images, which were subsequently seized by police.	TES: 30 yrs imp. EFP. The sentencing judge found the offending was in a ‘truly exceptional category’, falling within the worst category for totality purposes. The sentencing judge found the appellant derived ongoing sexual gratification from watching the extreme violence he had inflicted on his victims. The sentencing judge had explicit regard to the totality principle: only six of the 87 individual sentences were accumulated to arrive at the TES. The offender had made no steps towards rehabilitation at the time of sentencing. At [78] ‘no summary of [the victim impact] statements can possibly convey the profound, devastating and enduring effect that the offending has had upon the victims.’	Appeal dismissed (leave granted). Sentence appeal concerned second limb of totality principle. At [88] ‘... although the total sentence is long, it incorporated very significant allowances for totality. These included reducing individual sentences and making the majority of the sentences wholly concurrent. Cumulative sentences were imposed in respect of only five of the 13 victims. From this perspective it is difficult to see how the sentence could have been further reduced without failing to be an adequate reflection of the overall criminality.’ At [89] ‘the second limb of the totality principle does not operate at the expense of the first. A total effective sentence must still be proportionate to the overall criminality of the appellant’s offending. Moreover, the second limb of the totality principle is not an absolute rule. If a sentence is crushing in the relevant sense, that outcome may permit a reduction in the total sentence, but it does not require one.’ At [91] ‘there is no reason to believe that the appellant will die before his sentence is complete. For that reason, it could be argued that the sentence in this case is not crushing in the relevant sense.’ At [94] ‘... it cannot be ignored that the appellant continued his offending over a 12-year period and much of that offending was undetected for many years because of the effects of the stupefying drugs that he used on the victims. He enjoyed underserved liberty during those years, and any complaint that any otherwise appropriate sentence will consume much of his remaining life deserves little sympathy.’ At [96] ‘... the number of offences, the nature of the offences, the number of victims and the length of time over which the offending continued places this total offending into a category of extraordinary seriousness. Indeed, the offending in this case was of such seriousness that the appellant has forfeited any right to expect that he will be released at an age where he could enjoy any significant life after prison.’
12.	The State of Western Australia v LSM [2023] WASCA 132	27 yrs at time offending. 28 yrs at time sentencing. Convicted after late PG (25% discount).	Ct 1: Dep lib. Ct 2: Threat to kill. Cts 3-5: Agg sex pen without consent. Ct 6: Att PCJ. LSM subjected his wife, F, to a	Ct 1: 9 mths imp (cum) Ct 2: 18 mths imp (conc). Ct 3: 18 mths imp (conc). Ct 4: 3 yrs imp (conc). Ct 5: 4 yrs imp (conc). Ct 6: 4 yrs imp (cum).	Allowed. Appeal concerned length of sentence. Resentence (15% discount cts 1, 2, 3, 4 5 & 7 and 20% discount ct 6):

<p>Delivered 01/09/2023</p>	<p>No prior criminal history.</p> <p>Eldest of two children; parents separated when young; four half-siblings; close and supportive family.</p> <p>Dyslexic; struggled at school; completed yr 11 and trade apprenticeship.</p> <p>Hard working; consistent employment history; own business.</p> <p>Good physical health; history of alcohol and illicit drug use; struggled with alcohol and methyl use aged 19 – 25 yrs; relapsed into methyl use; coming down from methyl and significantly intoxicated with alcohol at time of offending.</p>	<p>prolonged episode of physical and sexual violence.</p> <p>Whilst out celebrating F’s birthday LSM became jealous and accused F of being unfaithful. On leaving to go home they argued, so F said she would order an Uber. At this point LSM grabbed the back of her neck and forced her to walk to their car. He then drove dangerously at speed and repeatedly told her he was going to crash the car with her in it. When F attempted to get out of the car several times, LSM prevented her from doing so by grabbing her arm or hair and pulling her back into the car. She repeatedly asked SLM to pull over or slow down, but he continued to drive dangerously.</p> <p>On two occasions SLM stopped the car. F was able to get out of the vehicle and call triple zero. However, on both occasions he forced her back into the car. F put her mobile phone under her seat, with the triple zero operator still on the line. The recording captured parts of the offending the subject of cts 3 - 6.</p> <p>Over the course of about 2 hrs SLM deprived F of her liberty, during which time he also committed cts 2-6.</p> <p>On arriving home SLM pushed F into the house, stripped her naked and forcefully penetrated her vagina with his fingers. This incident was captured by the triple zero recording and F could be heard pleading with SLM to stop and his reply, ‘I’ll rape you if I want’.</p> <p>SLM then forced F to perform fellatio, causing her to choke. He forced his penis into her mouth a second time, squeezing her throat with his hands while she did so, causing her to choke and experience difficulty breathing. The triple zero recording captured this incident.</p>	<p>Ct 7: 9 mths imp (cum).</p> <p>TES 5 yrs 6 mths imp.</p> <p>EFP.</p> <p>The sentencing judge found the respondent’s offending ‘incredibly serious’; the dep lib ‘involved significant levels of ... control’, including forcing F into the car and driving in a manner that caused ‘very real danger’; the offending took place over a period of about two hrs.</p> <p>The sentencing judge found the sex offending occurred in the context that the respondent had already put F in danger; in circumstances where she was entitled to look to him for protection, as her husband; he was physically much bigger than F, who was not able to resist him and the offending took place in the family home, where she was entitled to feel safe.</p> <p>The sentencing judge found the respondent continued his violent behaviour towards F, who was calling out in pain and distress; the telephone calls constituting the att to PCJ, demonstrated the exercise of coercion over her; the whole of the offending has to be seen in the context of the family relationship.</p> <p>Respondent remorseful; offending out of character.</p>	<p>Ct 1: 2 yrs imp (cum) Ct 2: 2 yrs imp (conc). Ct 3: 5 yrs imp (conc). Ct 4: 6 yrs imp (cum). Ct 5: 6 yrs imp (conc). Ct 6: 5 yrs 9 mths imp (conc). Ct 7: 18 mths imp (cum).</p> <p>TES 9 yrs 6 mths imp.</p> <p>EFP.</p> <p>At [4] ‘it is clear that the respondent’s sexual violence against his wife was a grotesque form of ‘punishment’ ... His sexual offences were calculated to demean his wife and assert his dominance over her. He was callously indifferent to her cries of pain and her pleas for him to stop ...’</p> <p>At [24]-[27] ‘... there were, in essence, three distinct categories of offending, each of which was inherently serious. All of the offences, ... had the underlying feature that they all involved the coercive control by the respondent of his wife ...’</p> <p>At [59] ‘another very serious feature of the respondent’s offending ... was the nature and quality of the violence he inflicted on F. Domestic and sexual violence can involve physical injury, sexual assault, psychological injury and emotional trauma. Domestic and sexual violence is a major concern in Australia. ... The respondent’s offending included behaviour that was calculated to intimidate, coerce and control F. Denunciation of the respondent’s criminal conduct and personal and general deterrence were important sentencing considerations.’</p> <p>At [71] ‘a very serious feature of the respondent’s offending on cts 1, 2 and 7 (which also permeated his offending on cts 3, 4, 5 and 6) was the pattern of abuse that characterise his interaction with F ... All of those cts manifested behaviour by the respondent that was calculated to intimidate, coerce and control F.’</p> <p>At [127] ‘because the respondent did not enter his PG on counts 1 – 5 and ct 7 at the first reasonable opportunity, her Honour did not have the statutory power to reduce the head sentences she would otherwise have imposed for these offences by 25%. ... her Honour erred in law in doing so. ... In respect of cts 1, 5 and ct 7, this error, regardless of grounds 2 and 3, would have enlivened this court’s power to resentence the respondent.’</p> <p>At [147] ‘... while the respondent’s personal circumstances were not to be ignored, they could not, when weighed against the ‘incredibly serious nature of the respondent’s offending, give rise to what, on any</p>
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			<p>SLM then had sexual intercourse with F. This was again heard on the triple zero recording in which F is heard crying, exclaiming in pain, and repeatedly begging him to stop.</p> <p>A short time later F was able to run partially clothed from the house. SLM was arrested and was remanded in custody.</p> <p>While in custody SLM's telephone calls were monitored and on a number of occasions, during conversations with F, he sought to suborn her into dropping the charges brought against him.</p>		<p>analysis, were unduly lenient individual sentences for cts 3 - 6 and an unduly lenient TES.'</p>
11.	<p><i>The State of Western Australia v Rayapen</i></p> <p>[2023] WASCA 55</p> <p>Delivered 12/04/2023</p>	<p>24 yrs at time offending. 26 yrs at time sentencing.</p> <p>Convicted on late PG (in full satisfaction of the ind) (15% discount).</p> <p>No criminal history.</p> <p>Born Italy; moved to UK aged six yrs; moved to Australia with family aged 17 yrs; raised loving and caring family; not subjected to any severe physical punishment, trauma, abuse or adversity during childhood.</p> <p>Positive and supportive references; offending inconsistent and out of character.</p> <p>Time of offending studying law at university; moved to Melbourne to complete his studies.</p> <p>In a relationship at time sentencing.</p> <p>No history of illicit drug use; commenced drinking alcohol aged 18 yrs; variable drinking pattern, during university would get drunk on a regular basis; taking</p>	<p>Ct 2: Agg indec assault. Ct 4: Sex pen without consent.</p> <p>The victim, aged 21 yrs, was celebrating the end of exams on Rottnest Island. During the afternoon the victim, along with a male friend, socialised at a nearby unit. Later, Rayapen also arrived at the unit.</p> <p>The victim and Rayapen did not know each other. They interacted with each other during the evening.</p> <p>In the early hrs of the morning the victim returned to her unit with her male friend. Rayapen tagged along with them and was told he could stay the night.</p> <p>The victim got into bed, which was made up of two beds pushed together. Rayapen lay in the bed next to her. On the other side of the bed was the victim's male friend.</p> <p>During the night Rayapen squeezed the victim's breasts, causing her pain and bruising, and penetrated her vagina with his fingers. She physically resisted him and curled herself up into a foetal position. Six times she told him 'no'. Rayapen only desisted when she pushed</p>	<p>Ct 2: 12 mths imp (conc). Ct 4: 2 yrs imp (conc).</p> <p>TES 2 yrs imp, susp 2 yrs.</p> <p>The sentencing judge found 'the inherent exercise of mercy' in combination with other factors, concluded that it was not appropriate to impose an immediate term of imp.</p> <p>The sentencing judge found that while there was a degree of persistence in the offending, it was opportunistic and overall it lacked any real premeditation; the widespread mainstream and social media reporting had no doubt been a source of humiliation to Rayapen and he had lost the ability to practice law in WA, or anywhere in the Commonwealth.</p> <p>Significant steps taken towards rehabilitation; attending alcohol counselling.</p> <p>Low risk of reoffending; deeply and genuinely remorseful; deep sense he had brought dishonour to his family; attempt at self-harm.</p>	<p>Allowed.</p> <p>Appeal concerned length of sentence and error in sentencing (degree of remorse and plea discount).</p> <p>Resentenced (10% discount):</p> <p>Ct 2: 12 mths imp (conc). Ct 4: 3 yrs 3 mths imp (conc).</p> <p>TES 3 yrs 3 mths imp.</p> <p>EFP.</p> <p>At [164] ... we have concluded that the learned sentencing judge erred in concluding that Mr Rayapen had 'deep and genuine remorse' at the 'highest end or remorse'. ...</p> <p>At [171]-[172] ... we are satisfied that the discount of 15% from the head sentence was such that we should infer error on the part of the sentencing judge. ... Mr Rayapen did not PG, or indicate he would PG, at the earliest reasonable opportunity. On the contrary, ... Mr Rayapen PG at the latest available opportunity.</p> <p>At [186] ... the State case is properly characterised as strong. That was a matter relevant to the discount to be given for Mr Rayapen's PG.</p> <p>At [228] The sentencing judge was wrong to conclude that there were exceptional circumstances capable of justifying the exercise of mercy ... his Honour was wrong to conclude that, having regard to all relevant sentencing factors, there was a proper basis for imposing a sentence other than immediate imp.</p>

		antidepressant medication since offending.	<p>on his throat with her hand.</p> <p>The next day the victim confronted Rayapen and he told her he was sorry for what had happened.</p> <p>Some days later the victim made a pretext call to Rayapen and he made some admissions of wrongdoing.</p>		<p>At [240] ... The sentence [for the offence of sex pen without consent] was not commensurate with the seriousness of the offence, ...</p> <p>At [241] ... the TES did not bear a proper relationship to the overall criminality involved in all of the offences. ...</p> <p>At [243] As to the objective seriousness of the offence, the offence in the present case, while not in the most serious category, was nevertheless a serious case of its kind. The victim was in a vulnerable position, affected by alcohol and, at least on the verge of sleep, when Mr Rayapen began the offending conduct. Prior to the offence of sex pen, Mr Rayapen had persistently touched the victim without her consent, with sufficient force to cause her bruising. Her repeated attempts to prevent that conduct, by physical resistant Mr Rayapen and saying 'no', left no ambiguity as to her wish to be left alone. Notwithstanding those attempts, Mr Rayapen persisted, escalating to the offence of unlawful sex pen.</p>
10.	<p>The State of Western Australia v Buscunan Cabrera</p> <p>[2023] WASCA 34</p> <p>Delivered 21/02/2023</p>	<p>35 yrs at time first offending. 44 yrs at time sentencing.</p> <p>Convicted after trial.</p> <p>No prior criminal history.</p> <p>Born Chile, moved to Australia with family in 1983.</p> <p>Completed yr 12; Bachelor of Iridology and Advanced Diploma in Natural Medicine.</p> <p>Employed father's naturopath business; eventually took over business with his brother.</p> <p>Married 10 yrs; two children.</p> <p>Good physical and mental health.</p> <p>No issues with drugs and alcohol.</p>	<p>5 x Sen pen without consent. 1 x Indec assault.</p> <p>The offending occurred when the victims visited Buscunan Cabrera in his capacity as a practitioner of natural medicine.</p> <p>The offending extended over a period of about five-yrs on five separate occasions.</p> <p><u>Ct 1</u> The victim, AL, was aged 18 or 19 yrs. In the company of her boyfriend AL consulted Buscunan Cabrera, who performed iridology on her. He told her she had thrush. She was then told to remove her clothes and to lay down on the examination table. She was uncomfortable but did as instructed. He then touched her clitoris. He repeatedly told her that she had thrush. AL told him that she knew what thrush felt like and she did not have it.</p> <p><u>Ct 2</u> The victim, NL, was aged 31 yrs. She consulted Buscunan Cabrera for shoulder and knee pain. During the examination he asked her to remove her pants. She did so, keeping her underwear on. He then manipulated her</p>	<p>Ct 1: 2 yrs imp (conc). Ct 2: 2 yrs imp (conc). Ct 3: 18 mths imp (cum). Ct 6: 2 yrs imp (cum). Ct 8: 9 mths imp (conc). Ct 9: 2 yrs imp (cum).</p> <p>TES 5 yrs 6 mths imp.</p> <p>EFP.</p> <p>The trial judge found the respondent's offending very serious; it was opportunistic and carried out for sexual gratification over a considerable, lengthy period of time; the victims were vulnerable and the offending aggravated by his position of trust, which he ultimately breached by conducting examinations that were not medically warranted.</p> <p>No findings of remorse; acceptance of responsibility or demonstrated insight into his offending; low risk of re-offending if employed different role and not as a naturopath.</p> <p>The trial judge found the only appropriate sentencing disposition was a term of imp.</p>	<p>Allowed.</p> <p>Appeal concerned sentenced on mistaken basis (ct 3 offence of indec assault); length of individual sentences cts 1, 2, 3, 6 & 9 and totality principle.</p> <p>Resentenced:</p> <p>Ct 1: 3 yrs 9 mths imp (cum). Cts 2 & 6: 3 yrs 9 mths imp (conc). Ct 3: 3 yrs 3 mths imp (conc). Ct 8: 9 mths imp (cum). Ct 9: 3 yrs 6 mths imp (conc).</p> <p>TES 7 yrs 3 mths imp.</p> <p>EFP.</p> <p>At [57] ... it is apparent from his Honour's findings of fact that the pen the subject of ct 3 (while very serious) was less invasive than the penetrations the subject of cts 2, 6 and 9 (all of which involved digital pen of the vaginal canal) and slightly less invasive than the pen the subject of ct 1.</p> <p>At [81] In the present case, the facts and circumstances of the respondent's offending in relation to cts 1, 2, 3, 6 and 9 were very serious. The respondent was in a position of trust in relation to the complainants and he breached that trust. The complainants regarded the respondent as a professional healer and they put their faith in him. The complainants suffered from a variety of ailments and were vulnerable. The impact of the respondent's offending upon the complainants was significant. His offending adversely affected their trust in medical professionals. The relevant examinations carried out</p>

		<p>knee. After performing iridology on NL he told her she might have thrush and that he had to check her vagina. NL agreed because she felt desperate about her pain and thought it somehow might help. During the examination he inserted a finger into her vagina, then informed her he had found inflammation.</p> <p><u>Ct 3</u> The victim, FJ, was aged 33 yrs. She visited Buscunan Cabrera for recurring thrush. After performing iridology on FJ he told her he needed to know what he was dealing with and asked her to remove her lower clothing. She complied. He used his fingers to press her clitoris and down around her labia for about one minute.</p> <p><u>Ct 6</u> The victim, TC, was aged 29 yrs. She consulted Buscunan Cabrera as she suffered from migraines and had coeliac disease. After he performed iridology on her the conversation turned to sexual intercourse. TC was taken aback. She said intercourse was fine but sometimes painful. He said there could be ulcers on her vaginal walls and asked to examine her. During the examination he circled the entrance to her vaginal canal with his finger, then inserted two fingers about 3 cm into her vagina.</p> <p><u>Cts 8 and 9</u> CM was aged 26 yrs. She had lupus, which caused her fatigue, joint pain and rashes so she consulted Buscunan Cabrera. During the consultation he performed iridology on her. Following a discussion of her symptoms he asked to look at her joints and chest. She removed her top and bra. She was not given anything to cover herself. He examined her breasts by touching them (ct 8).</p> <p>Buscunan Cabrera then spoke to CM</p>		<p>by the respondent were not medically warranted. His motivation was sexual gratification. The offending was brazen, especially in relation to the complainant the subject of ct 1 ... whose boyfriend at the time was in the consulting room when the offending occurred. ...</p> <p>At [85] ... each individual sentence imposed on the respondent for cts 1, 2, 3, 6 and 9 was not commensurate with the seriousness of the offence. ... the length of each individual sentence was unreasonable or plainly unjust.</p> <p>At [87] Each individual sentence for cts 1, 2, 3, 6 and 9 was substantially less than the sentence open to his Honour on a proper exercise of the sentencing discretion. ...</p> <p>At [93] ... the TES ... did not bear a proper relationship to the overall criminality involved in all of the offences, viewed together, and having regard to all relevant facts and circumstances and all relevant sentencing factors. ... The TES was unreasonable or plainly unjust.</p>
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			about vaginal discharged and asked to check her for it. CM agreed. During the examination he used a torch and inserted a finger into her vagina and moved it around (ct 9).		
9.	<p>Mehta v The State of Western Australia</p> <p>[2023] WASCA 24</p> <p>Delivered 08/02//2023</p>	<p><u>Mehta</u> 28 yrs at time offending.</p> <p>Convicted after trial.</p> <p>No prior criminal history.</p> <p>Born and educated in India; arrived Australia aged 19 yrs; father deceased; financially responsible for his mother in India.</p> <p>Positive and supportive character references.</p> <p>Studies in engineering and business management.</p> <p>Employed in restaurants; purchased own pizza shop; worked very hard in the business; in business with co-offender Sachdeva at time offending.</p> <p>Stable relationship; intends to get married.</p> <p>Suffers depression and anxiety.</p> <p><u>Sachdeva</u> 28 yrs at time offending.</p> <p>Convicted after trial..</p> <p>Born and educated in India; impoverished upbringing; physically abused; arrived Australia aged 18 yrs.</p> <p>Educated in India; diploma in welfare; support worker in mental health field six yrs; at same time in business with co-offender Mehta; unemployed since</p>	<p>1 x Sex pen without consent.</p> <p>The victim was aged 47 yrs.</p> <p>Mehta and Sachdeva owned a café style restaurant. The victim’s daughter worked as a waitress at the restaurant.</p> <p>One evening after she had finished her shift, she and the victim dined at the restaurant.</p> <p>During the meal the victim drank about three glasses of wine.</p> <p>After the meal the victim and her daughter were joined by both Mehta and Sachdeva. They both provided the victim with more alcohol. She became increasingly drunk, causing her daughter to become concerned and upset. She wanted to take the victim home, but Mehta and Sachdeva encouraged the victim to stay.</p> <p>Sachdeva escorted the victim’s daughter outside, following which the front door was locked.</p> <p>The victim remained inside the restaurant, she recalled she started getting hazy and the next thing she remembered was waking up in hospital. She had no memory of any sexual activity.</p> <p>Much of what occurred was seen on CCTV footage tendered at the trial.</p>	<p><u>Mehta</u> 7 yrs 6 mths imp.</p> <p>EFP.</p> <p><u>Sachdeva</u> 7 yrs imp.</p> <p>EFP.</p> <p>The trial judge found, while not the worst example of its kind, the offending was extremely serious.</p> <p>The trial judge found Mehta the instigator of the offending, while Sachdeva aided him; both appellants came to an agreement that sexual activity would take place; the offending ‘was not a spur of the moment decision’; the victim so obviously intoxicated she was not capable of freely and voluntarily consenting; both relied on her intoxicated state to commit the offence; Mehta’s offending was more serious than Sachdeva’s, including he was the instigator, persistent and ultimately did have sex with the victim without any thought or care for her health or welfare.</p> <p>Offending long-lasting and devastating effect on victim.</p> <p>No expressions of any real remorse by the appellants.</p>	<p>Dismissed.</p> <p><u>Mehta</u> Appeal concerned error of law (failing to consider time in custody more onerous) and length of sentence.</p> <p><u>Sachdeva</u> Appeal concerned length of sentence and parity principle.</p> <p>At [168] There was no basis for the learned trial judge to conclude that Mr Mehta’s time in prison would be more onerous ... On the contrary, he tendered multiple character references from his partner and friends (in Perth) who supported him.</p> <p>At [189] To briefly reiterate that seriousness: Mr Mehta’s offending was planned and premeditated. ... he and Mr Sachdeva came to an agreement that they would take advantage of the victim’s vulnerable position. He had contributed to that vulnerable position by providing the victim with alcohol, in his own business premises, where he was under a duty to care for his customers, not to prey on them. The victim was isolated and resisted his advances on a number of occasions, including my moving away from him and saying ‘no’. Mr Mehta committed his offence with the assistance of, and in the presence of, Mr Sachdeva, adding to the victim’s vulnerability. Mr Mehta did all of this with complete disregard of the victim’s autonomy and her humanity. ...</p> <p>At [192] In our view, it cannot be said that Mr Mehta’s sentence ... was unjust or plainly unreasonable.</p> <p>At [196] ... Mr Sachdeva’s conduct was not merely to assist Mr Mehta in satisfying Mr Mehta’s sexual gratification at the expense of the victim. Mr Sachdeva’s participation in Mr Mehta’s commission of the offence was to serve his own sexual gratification, as reflected in his active participation in sexual activity with the victim.</p> <p>At [201] While we are prepared to accept that the sentence imposed on Mr Sachdeva was high, it was not plainly unjust or unreasonable. ...</p> <p>At [208] ... In our view, it was open to the learned trial judge to impose sentences with the degree of disparity that her Honour did.</p>

		<p>offending.</p> <p>No long-term intimate relationships.</p> <p>History of depression and anxiety.</p>			
8.	<p><i>The State of Western Australia v HNU</i></p> <p>[2023] WASCA 6</p> <p>Delivered 05/01/2023</p>	<p>47 yrs at time offending. 48 yrs at time sentencing.</p> <p>Convicted after early PG (22.5% discount).</p> <p>Prior criminal history.</p> <p>Yindjibarndi man; spent entire life in regional town where born.</p> <p>Seven siblings; difficult early life; parents drank heavily; violence common; witnessed domestic violence.</p> <p>Educated to yr 9; TAFE studies.</p> <p>Employed various labouring roles; heavy machinery operator.</p> <p>One long-term relationship; raised partner's two young nieces since babies; partner remains supportive.</p> <p>Commenced drinking alcohol aged 14-15 yrs; soon drinking weekly basis; continues to drink heavily; acknowledges alcohol addiction.</p>	<p>1 x sex pen without consent.</p> <p>The victim is the sister of HNU's de facto partner.</p> <p>The victim and HNU were drinking with family and friends. During the evening the victim left and walked to another house and went to sleep. In the morning she was alone in the house when HNU walked in through an unlocked door. She told him to leave.</p> <p>After using the toilet, the victim walked into the laundry. HNU also entered the laundry and closed the door behind him. The victim told him not to be silly. HNU told the victim he wanted to have sex with her. She told him, 'No'.</p> <p>HNU grabbed the victim by the arm and told her he would tell her sister that they had had sex before. When she shouted for help, he put his hands on her mouth and told her nobody could hear her. She managed to open the door and run into another room.</p> <p>HNU grabbed the victim, pushed her onto a couch, took off his shorts and, while holding her throat with two hands, pushed his penis into her mouth.</p> <p>HNU held the victim's neck and forced his penis into her mouth again, demanding oral sex. He then pushed his penis inside her mouth about three times while she was being held down.</p> <p>The victim shouted that she needed water and couldn't breathe. HNU got up and went to the kitchen and the victim took the opportunity to run from the</p>	<p>2 yrs 6 mths imp.</p> <p>EFP.</p> <p>The sentencing judge found the offence a very serious one; the respondent breached the trust the victim had in him because she was his sister-in-law and knew her well; the victim was vulnerable as she was alone in the house and asleep when he arrived; he used physical force on the victim and there was persistence in what he did.</p> <p>Traumatic effect on victim; suffers anxiety and sleep problems for which she continues to see a counsellor.</p> <p>Very remorseful; accepting of responsibility and consequences of his offending.</p>	<p>Allowed.</p> <p>Appeal concerned length of sentence.</p> <p>Resentenced (22.5% discount):</p> <p>3 yrs 4 mths imp.</p> <p>EFP.</p> <p>At [84] ... The victim and the appellant were members of the same family and the offending involved a significant breach of trust. The fact that the respondent had had a prior consensual encounter with the victim three yrs earlier provided no justification for his offending. The victim made it plain from the outset that his demands for sex were unwelcome and there was no suggestion that he had any reasonable belief to the contrary. The offending involved significant persistence in the face of the victim's resistance. The respondent used violence to restrain the victim and to force her to comply with his demands. The victim was vulnerable as she had been drinking the night before, was alone in the house and had just been roused from sleep. The offence caused the victim to fear for her life and has had a significant impact upon her.</p> <p>At [87] In our view, ... the sentence of ... imp was unreasonable or plainly unjust. It did not adequately reflect the very serious circ of the offence. ...</p>

			house to a neighbouring home. The victim then got into her car and drove to her partner. She told him what had happened. They drove to the police station, but she left without speaking to police. Later that day police spoke to the victim.		
7.	<i>The State of Western Australia v Tumata</i> [2022] WASCA 161 Delivered 06/12/2022	<u>Tumata</u> 24 yrs at time offending. 28 yrs at time sentencing. Convicted after PG (cts 1, 6, 34 and 35) (10% discount). Convicted after trial (cts 2-5; 7-22; 25; 28; 29; 31; 32; 36-38 Lengthy criminal history. Parents separated when aged 4 yrs; raised by mother; sent to live with a relative in NZ aged 12 yrs due to his behaviour; returned to live with his father, now estranged. Limited literacy and numeracy skills. No history of paid employment; other than labouring work about aged 17 yrs. Commenced cannabis and alcohol use aged 12 yrs; regular user of methyl and alcohol excessively. <u>Sheppard</u> 23 yrs at time offending. 27 yrs at time sentencing. Convicted after PG (ts 1, 4, 6, 7, 16 and 35) (10% discount). Convicted after trial (cts 2; 3; 5; 8-15; 17-22; 25; 28; 29; 32; 34; 36; 38 and 39. Lengthy criminal history. Positive, stable and prosocial	<u>Tumata</u> 8 x Agg sex pen without consent. 3 x Agg indec assault. 1 x Demanding property with oral threats. 10 x AOBH. 8 x Act with intent to harm. 2 x Threats to harm. <u>Sheppard</u> 8 x Agg sex pen without consent. 3 x Agg indec assault. 1 x Demanding property with oral threats. 11 x AOBH. 7 x Acts with intent to harm. 1 x Threat to harm. <u>Woods</u> 8 x Agg sex pen without consent. 1 x Agg indec assault. 1 x Demanding property with oral threats. 4 x AOBH. 4 x Acts with intent to harm. 1 x Threat to harm. The victim, M, was aged 22 yrs. He was remanded in custody and had never been to prison before. Tumata, Sheppard and Woods, who were also prisoners, entered M's cell, alleging he was an informant. Sheppard told M he had to pay a fine, to increase each wk until it was paid. If the fine was not paid M was told he would be killed. After this incident, over a period of 18 days and on an almost daily basis, Tumata, Sheppard and Woods subjected	<u>Tumata</u> TES 14 yrs imp. <u>Sheppard</u> TES 13 yrs 6 mths imp. <u>Woods</u> TES 12 yrs imp. The sentencing judge found Tumata and Sheppard the ringleaders and that Woods' acted 'more as a follower' and he was overall less culpable than Tumata and Sheppard; after the initial extortion the three respondents, sometimes as a pair or individually, engaged in a concerted, persistent and ongoing course of conduct against M over an extended period; they subjected M to increasingly violent physical and sexual attacks to enforce their demand for money; Tumata and Sheppard were physically powerful men, M, helpless and defenceless and extremely frightened and scared of the three respondents who terrorised him; the attacks designed to intimidate and frighten; they attacked M's personal dignity and caused him to suffer significant embarrassment; the sexual offences designed to cower, humiliate and demean for the purpose of forcing him to pay money when there was no legitimate basis for the demand; the respondents' domination and control over M extended to his communications with his family and the attacks generally occurred inside a prison cell away from the sight of prison guards and other prisoners, with one of the respondents acting as a lookout. No demonstrated insight into the consequences of their offending; no exhibited remorse, apart from the PGs entered by Tumata and Sheppard.	Allowed. Appeal concerned totality principle (individual sentences not challenged). Resentenced: <u>Tumata</u> TES 17 yrs imp. EFP. <u>Sheppard</u> TES 16 yrs 6 mths imp. EFP. <u>Woods</u> TES 14 yrs 6 mths imp. EFP. At [113] The offending was aptly characterised by the State ... as sadistic, malicious, humiliating and intimidating. The respondents, in concert, deliberately preyed upon a highly vulnerable victim. ... Together, the respondents waged a campaign of terror upon M, which caused him significant physical injury and broke him psychologically. The respondents' acts were merciless. They involved a level of deliberate callousness, cruelty and depravity seldom seen by this court. At [114] An especially serious feature of the offending was that it was committed in a prison by inmates upon another inmate. ... Prisoners, particularly those who, like M, are young, alone and have never been incarcerated before, may be highly vulnerable to the threats and intimidation of more experienced prisoners such as, in this case, the respondents. ... [The victim's] vulnerability would have been apparent to the respondents, who immediately proceeded to take advantage of it. ... At [118] ... the eight offences of agg sex pen involved a high level of criminality. The respondents together committed each of these offences over three separate and distinct incidents on different days, either as a principal or an aider. ... Each offence was committed in company and was designed to, and did in fact, terrify, degrade and humiliate M as well as cause him physical and psychological harm. ...

		<p>upbringing until the deaths of his mother and grandmother aged 15-16 yrs; struggled to deal with the grief; became homeless and associated with negative family members.</p> <p>Completed yr 10; no real work history.</p> <p>Methyl use from aged 15-16 yrs.</p> <p><u>Woods</u> 26 yrs at time offending. 30 yrs at time sentencing.</p> <p>Convicted after trial (cts 1; 2; 4; 5; 7-14; 18-22; 28 and 29.</p> <p>Significant prior criminal history.</p> <p>Parents separated aged 2 yrs; lived with mother and siblings; positive home life; eventually lived with father, exposing him to domestic violence and substance abuse.</p> <p>At time sentencing father and four brothers serving terms of imp.</p> <p>Left school during yr 10; never had paid employment.</p> <p>Long-term relationship; two children.</p> <p>Introduced to methyl by his father.</p>	<p>M to violence and brutality of the most extreme kind. This included beating, kicking and indecently assaulting him, choking him to the point he lost consciousness, burning him with boiling water and repeatedly sexually penetrating him with their bodies, a broom handle and a pencil.</p> <p>Tumata, Sheppard and Woods also threatened to rape his partner.</p>	<p>Offending profound effect on the victim.</p>	<p>At [120] The seriousness of the offences of agg sex pen without consent was heightened because they occurred in the context of the ongoing extortion of M, ... All of these offences, when considered together, substantially increased each respondent's overall criminality, ...</p>
6.	<p><i>Long v The State of Western Australia</i></p> <p>[2022] WASCA 101</p> <p>Delivered 08/08/2022</p>	<p>19 yrs at time offending. 22 yrs at time sentencing.</p> <p>No prior criminal history.</p> <p>Convicted after trial.</p> <p>Very strong family support; positive contributions to local community.</p>	<p>1 x Sex pen without consent.</p> <p>The victim was aged 21 yrs.</p> <p>The victim, Long, Mr G and Ms M were at a house. They had all consumed a considerable quantity of alcohol. In the afternoon they all engaged in a water fight, after which they showered together.</p>	<p>4 yrs imp.</p> <p>EFP.</p> <p>The trial judge found, although not planned, the offending was serious; the appellant restrained the victim; she had already rejected his physical advances a number of times; he continued when told to stop and she showed signs of distress; he continued when Ms M entered the room and told him to get off the</p>	<p>Dismissed (leave refused).</p> <p>Appeal concerned length of sentence.</p> <p>At [39] In our opinion, the facts and circumstances of the appellant's offending ... were very serious. The offending did not merely involve an absence of consent by the complainant. She expressly refused consent to penile/vaginal penetration. She expressly reiterated her refusal of consent while the offending was happening. The appellant physically restrained the complainant to enable him to have sexual intercourse with her despite her protestations. The complainant's</p>

		<p>Completed yr 12 high school.</p> <p>Employed shearing industry; strong work ethic.</p> <p>Good physical health.</p>	<p>While in the shower Long att to touch the victim's buttocks and breasts and att to kiss her. She rejected his advances.</p> <p>During the evening they all danced with each other. Long again att to touch the victim's buttocks and breasts. She again rejected his advances.</p> <p>Later the victim, Mr G and Ms M were in bed. Long entered the room and also got into the bed. When Mr G and Ms M left the room Long began to touch the victim sexually.</p> <p>Long penetrated the victim's vagina with his fingers. Immediately afterwards she told him she was not consenting to any further physical activity. Long responded by grabbing her wrists and putting them above her head. He then removed her shorts. Pushing her underwear to the side he sex pen her vagina with his penis.</p> <p>The victim told Long to get off her and began to cry. She attempted to get out of the bed and leave the room but he prevented her from doing so.</p> <p>Ms M entered the room. On seeing Long and the victim engaging in sexual intercourse she asked the victim if this was what she wanted. She replied, 'No, get him off me'. Ms M could see the victim was crying.</p> <p>Ms M pushed Long off the victim when he refused to do so. Ms M and the victim then left the room.</p> <p>The following day the victim complained to her mother. Long sent her a message of apology.</p>	<p>victim and, despite his level of intoxication, he must have been aware she was not consenting.</p> <p>Psychological and emotional impact of offending on victim likely to be continuing.</p> <p>Remorseful; good prospects of rehabilitation and low risk of reoffending.</p>	<p>distress was obvious. The appellant refused to get off the complainant and he prevented her from getting out of the bed and leaving the room. The appellant ignored Ms M when she told the appellant to get off the complainant. The appellant only desisted when Ms pushed him off the complainant.</p> <p>At [40] The appellant's intoxication is, in part, an explanation for his offending, but it is not, to any extent, an excuse.</p> <p>At [43] In our opinion, the sentence of 4 yrs' immediate imp was commensurate with the seriousness of the offence. ...</p>
5.	<p><i>Harris v The State of Western Australia</i></p> <p>[2022] WASCA 84</p>	<p>22 yrs at time offending. 26 yrs at time sentencing.</p> <p>Convicted after trial; on pre-sentence order at time offending.</p>	<p>Ct 1: Agg burg. Ct 2: Agg sex pen without consent.</p> <p>In the early hrs of the morning Harris unlocked a security screen and gained entry to a house, occupied by L, and his</p>	<p>Ct 1: 4 yrs imp (conc). Ct 2: 16 yrs imp (conc).</p> <p>TES 16 yrs imp.</p> <p>EFP.</p>	<p>Dismissed (leave refused).</p> <p>Appeal concerned length of sentence ct 2.</p> <p>At [39] We do not accept the submission that, when the nature of the offence and the circumstances of the appellant are considered, ct 2 was</p>

	<p>Delivered 15/07/2022</p>	<p>Lengthy criminal history.</p> <p>Aboriginal; traumatic childhood; dysfunctional upbringing; profound childhood deprivation; born while mother incarcerated; father frequently in prison; raised by grandmother and sister; exposed to alcohol abuse and family violence.</p> <p>Death of grandmother aged 13 yrs had significant impact on him; time in care of DCP.</p> <p>Left home aged 18 yrs; resided with cousin who took own life; blamed for death.</p> <p>Attended school to yr 10; some further education and training.</p> <p>Never employed.</p> <p>Good physical health; experienced depression, suicidal thoughts; acts of self-harm.</p> <p>History of alcohol and illicit drug use; escalated following cousin's death.</p>	<p>partner, E.</p> <p>L was asleep, naked, on the couch. E was asleep in a bedroom.</p> <p>Harris knelt next to the couch on which L was sleeping. He took L's penis and performed fellatio on him. L presumed it was his partner.</p> <p>When L opened his eyes and saw Harris he punched him in the face. Harris said sorry, then ran for the door. L wrestled with Harris and tried to detain him. Harris picked up a torch and struck L in the head, causing a small laceration which bled. After a short scuffle Harris left the premises.</p> <p>Harris returned a few minutes later and requested the return of his thongs.</p> <p>At the time of the offending Harris was under the influence of alcohol, drugs and solvents.</p>	<p>The trial judge found the offending spontaneous or opportunistic behaviour that took place over a short period of time.</p> <p>The trial judge found the offending as 'towards the lower end of the scale for agg sex pen without consent', but not at the lowest level having regard to the agg factors.</p> <p>Genuinely remorseful; high risk of future sex reoffending.</p>	<p>a case in the least serious category.</p> <p>At [40] ... Adding to the seriousness of the offending was the vulnerability of L, who was naked and asleep in his own home. While the act of penetration was relatively brief in time, it could not be said to be fleeting and resulted in L ejaculating. The offence caused humiliation for L. The appellant, in an attempt to thwart his apprehension, struck L in the head with the ... torch causing a minor injury. Compared to other offences of its type, the objective facts and circumstances of the offending could not reasonably be said to be at the lowest end of the scale of seriousness.</p> <p>At [42] ... In our opinion it is not reasonably arguable that the sentence of 16 yrs' imp was manifestly excessive.</p>
<p>4.</p>	<p><i>Panomarenko v The State of Western Australia</i></p> <p>[2022] WASCA 71</p> <p>Delivered 23/06/2022</p>	<p>42 yrs at time offending.</p> <p>Convicted after PG (20% discount).</p> <p>Very minor criminal history.</p> <p>Little contact with biological father; close relationship with step-father.</p> <p>Educated to yr 11; completed trade apprenticeship.</p> <p>Gainfully employed; good work history; strong work ethic; running own business at time offending and sentencing.</p>	<p>1 x Sex pen without consent.</p> <p>The victim was aged 50 yrs. She met Panomarenko on an online dating application. She would regularly stay at his home.</p> <p>The victim, who had consumed drugs earlier in the evening, was asleep. Panomarenko lay on the bed beside her and began masturbating. He then positioned his penis near her head and inserted his penis into her mouth.</p> <p>The victim woke up, startled, disorientated and confused. Panomarenko comforted her and she fell asleep again. He continued masturbating and ejaculated over her</p>	<p>2 yrs 6 mths imp.</p> <p>EFP.</p> <p>The sentencing judge rejected submissions the appellant had honestly believed the victim had consented to the sexual activity.</p> <p>The sentencing judge found the seriousness of the appellant's offending was agg by his conduct in video recording his actions without the victim's knowledge and consent, actions which were inherently demeaning and degrading; the victim felt humiliated and embarrassed; he recorded the offending for his own sexual gratification.</p> <p>Offending serious emotional and psychological consequences for the victim.</p>	<p>Dismissed (leave refused).</p> <p>Appeal concerned type of sentence and error in finding (recording of offending for sexual gratification)</p> <p>At [50] It was open to her Honour to infer beyond reasonable doubt, ... that the appellant video recorded the offending for, at least, the dominant purpose of sexual gratification ...</p> <p>At [53] In any event, even if her Honour's finding was attended by error, we are satisfied that, in all the circumstances, it is not reasonably arguable that the error was capable of affecting the actual sentence imposed The alleged error was not 'material' in the relevant sense. ...</p> <p>At [60] In our opinion, the sentence of ... imp imposed on the appellant is broadly consistent with previous sentencing decisions for offending against s 326(1) of the Code (having regard to the similarities and differences between the offenders and the offending),</p>

		<p>Married; relationship ended 2013; current partner supportive.</p> <p>Problems with obesity, low confidence and poor self-esteem.</p> <p>History of illicit drug use; particularly cannabis and methyl; other illicit drugs occasionally.</p>	<p>back.</p> <p>Panomarenko video recorded, without the victim's knowledge and consent, this incident.</p> <p>The victim became increasingly suspicious of Panomarenko. When she examined the contents of his computer hard drives she found 41 recordings which captured sexual activity between them. She had not known these recordings had been made.</p>	<p>Remorseful; below average risk for future sexual offending.</p>	<p>including those decisions cited by counsel for the appellant.</p> <p>At [61] ... we are satisfied that it was reasonably open for the sentencing judge to conclude that it was inappropriate to suspend or conditionally suspend (wholly or partly) the sentence of imp. ... The type of individual sentence imposed on the appellant was not unreasonable or plainly unjust. ...</p>
3.	<p><i>Suleman v The State of Western Australia</i></p> <p>[2022] WASCA 19</p> <p>Delivered 18/02/2022</p>	<p>26 yrs at time offending. 28 yrs at time sentencing.</p> <p>Convicted after trial.</p> <p>No prior criminal history.</p> <p>Born Pakistan; good upbringing; 10 brothers and sisters; parents alive and living in Pakistan; supportive family.</p> <p>Liable for deportation on completion of sentence under current migration regime.</p> <p>Arrived Australia 2013; completed English language course; certificate and diploma in work health and safety.</p> <p>Married five yrs; 15-mth old daughter; care of 5-yr-old daughter from previous relationship with medical issues requiring ongoing treatment.</p> <p>Consistent employment history; various roles.</p> <p>No mental health or substance abuse issues.</p>	<p>3 x Sex pen without consent (digital).</p> <p>The victim, N, was aged 18 yrs. She was employed to promote and sell a mobile payment system. Suleman was employed by the same company to drive young women, including N, around.</p> <p>On the day of the offending Suleman drove N to various locations and, over the course of a few hrs, she sold some of the systems. At one point, Suleman collected a key to a vacant unit and, after buying N lunch, he drove her to the unit for a lunch break.</p> <p>At the unit Suleman sat next to N. Feeling uncomfortable she tried to move away. He persisted in leaning on her and she began to feel scared. He squeezed her thigh, undid the buttons and zip on her pants and placed his hand down her pants, underneath her underwear and rubbed her vaginal area. N told him 'Don't'. Suleman took his hand away, before digitally penetrated her vagina (ct 1).</p> <p>N told Suleman to stop and att to wriggle away, but he put his hand under her clothing and grabbed the sides of her stomach. He put his hand down her pants and rubbed her vagina (ct 2). N again told him 'Don't'.</p> <p>Partially straddling her, Suleman placed</p>	<p>Ct 1: 2 yrs 5 mths imp (conc). Ct 2: 2 yrs 3 mths imp (cum). Ct 3: 2 yrs 7 mths imp (cum).</p> <p>TES 4 yrs 10 mths imp.</p> <p>EFP.</p> <p>The trial judge found the offending serious; it was persistent and involved three separate acts of sex pen; N repeatedly asked the appellant to stop; he was physically much larger than N and he used a degree of physical force to overcome her resistance when he committed ct 3.</p> <p>The trial judge noted the age disparity between the appellant and N; he was employed to drive N and he was her only means of transport.</p> <p>Significant adverse impact on victim.</p> <p>No demonstrated remorse; no insight into his offending behaviour.</p>	<p>Dismissed – leave refused.</p> <p>Appeal concerned totality principle (individual sentences not challenged).</p> <p>At [31] ... The offending involved a high degree of criminality. ...</p> <p>At [32] ... We do not doubt that his incarceration will cause hardship to his wife and children. His wife will, herself, have to care for the appellant's daughters. The appellant's 5-yr-old child requires medical care. However, the degree of hardship to the appellant's family is not exceptional.</p> <p>At [33] ... the TES ... was broadly consistent with the range of sentences customarily imposed.</p>

			<p>a finger or fingers inside her vagina (ct 3). During this conduct, which lasted for less than a minute, N told him to stop. He eventually did so. After briefly leaving the room Suleman returned and att to grab N's legs, but she pulled herself into a protective ball.</p> <p>They returned to the vehicle and eventually to the depot at the end of N's shift.</p>		
2.	<p>Musgrave v The State of Western Australia</p> <p>[2021] WASCA 67</p> <p>Delivered 23/04/2021</p>	<p>23 yrs at time offending. 25 yrs at time sentencing.</p> <p>Convicted after trial.</p> <p>Prior juvenile and adult criminal history.</p> <p>Youngest of three siblings; home environment free from substance abuse and violence; experienced some difficulties growing up; overweight; father a strict disciplinarian with high expectations; sexually abused by two ministers of religion aged 14 yrs.</p> <p>Left school aged 14; bullied; often retaliated resulting in his expulsion.</p> <p>Commenced TAFE pre-apprenticeship; did not complete the course.</p> <p>Some short term relationships; no established long term relationships.</p> <p>Short periods of work various roles; employment terminated primarily because of alcohol and drug misuse; unemployed two yrs prior to sentencing.</p> <p>Good physical health; history of hospital admissions for drug induced psychosis; periods of</p>	<p>Ct 1: Indec assault. Ct 2: Sex pen without consent (digital).</p> <p>The victim, S, was a young female backpacker from Europe. On her arrival in Perth she obtained work at a country tavern owned by Musgrave's parents. She was provided with a room, containing two beds, attached to the tavern.</p> <p>On New Year's Eve S completed her shift and joined patrons and Musgrave's family in the celebrations. During the evening she sat at a table and spoke with Musgrave, his mother and other people. However, S did not know Musgrave's name and at no time did she talk solely with him.</p> <p>At about 4.00am S went to her room and went to sleep in her bed. Sometime later Musgrave went to her room without invitation. He knocked persistently on the door until she answered. He said something which she did not understand before asking S for a hug. She told him, 'no'. S then made it clear she was not interested in him and that she wanted to sleep on her own. He then asked if he could sleep in her bed, to which she responded 'no'.</p> <p>As he was the son of her employer S did not consider herself to be in any danger from Musgrave, and appreciating he was drunk and would be unable to drive a motor vehicle, she offered him the other bed in her room. He agreed.</p>	<p>Ct 1: 6 mths imp (conc). Ct 2: 3 yrs 6 mths imp (conc).</p> <p>TES 3 yrs 6 mths imp.</p> <p>EFP.</p> <p>The trial judge characterised the sexual penetration as no less serious by the fact that it was a digital penetration than it would have been had it been a penile penetration.</p> <p>The trial judge found the appellant's offending aggravated by his persistence; the victim's vulnerability and defencelessness and the power imbalance, in that she was a foreigner who had recently arrived in Australia, she had limited English skills and she was employed by his parents.</p> <p>Offending very significant and continuing impact on victim.</p> <p>No victim empathy or demonstrated remorse; continued to deny the offences; little understanding of appropriate conduct towards women; elevated risk of reoffending if treatment needs not addressed.</p>	<p>Dismissed.</p> <p>Appeal concerned error in characterisation of the seriousness of ct 2 and length of sentence of ct 2.</p> <p>At [3]-[6] Ground 1 challenges the ... remark that the offence of sex pen without consent committed by the appellant, which consisted of [him] inserting his fingers into the complainant's vagina, was 'no less serious' by the fact that it was digital pen than it would have been had it been a penile pen. Underlying that challenge is the proposition that penile-vaginal sex pen without consent is inherently more serious criminal conduct ... That proposition is not only wrong, as a matter of law. It is incoherent. ... this Court has repeatedly confirmed, there is no hierarchy of sex pen. The seriousness of every offence of unlawful sex pen must be determined by its own individual circumstances. ...</p> <p>At [186]-[187] ... the statement by the sentencing judge ... that the appellant's offending in relation to ct 2 was 'no less serious by the fact that it was a digital penetration than it would have been had it been a penile penetration' indicated that, in her Honour's view, the sentence that should be imposed on the appellant for ct 2 involving digital penetration should not be materially less than the sentence that would have been imposed if the ct had involved penile penetration. ... her Honour's view was not erroneous.</p> <p>At [205] ... The appellant did not simply digitally penetrate the complainant's vagina without her consent. [He] sexually penetrated [her] despite [her] having made plain ... that she was not interested in him. Later, when the appellant was getting into her bed [she] reiterated ..., forcefully and unequivocally, that she did not want any physical contact with him. The appellant ignored [her] wishes and, despite her having in substance expressly refused consent, sexually penetrated her while she was sleeping. [His] offending was persistent and involved some premeditation. He breached the trust which the complainant had shown by permitting him to sleep separately from her but in her room.</p> <p>At [283] Nothing in the definition in s 319(1) or in s 325 of the <i>Criminal Code</i> suggests that any particular form of sex pen is, of itself, more serious than another. ... That is not to suggest, ... that all</p>

		<p>depression and suicidal ideation.</p> <p>History of cannabis and alcohol use; later amphetamines and other drugs, including LSD; intravenous methyl use aged 14-15 yrs.</p>	<p>As S was falling asleep she realised Musgrave was getting into her bed. She screamed and told him to leave her alone. She then got out of her bed and into the other bed. Sometime later Musgrave offered to get out of her bed. S agreed and she returned to her own bed and went back to sleep.</p> <p>Later S woke up to find Musgrove in her bed. Her clothing was pulled down. He was touching her breasts and penetrating her vagina with his fingers. Shocked, S tried to push Musgrove away. She immediately got out of bed and left the room crying.</p> <p>A short time later S returned to her room, locked the door, showered and prepared to leave. S then left the tavern and hitchhiked to a regional urban area. She reported the matter to the police that same evening.</p>		<p>offences of sex pen without consent will be equally serious. Rather, the seriousness of a particular offence will fall to be assessed by reference to all of the circumstances of the case, ...</p> <p>At [322] ... The offending in ct 2 was clearly not at the most serious end of the spectrum of offending conduct of this kind. Nevertheless, ... this case involved a very serious instance of sex pen without consent.</p>
1.	<p><i>Alizada v The State of Western Australia</i></p> <p>[2021] WASCA 18</p> <p>Delivered 05/02/2021</p>	<p>45-46 yrs at time offending.</p> <p>Convicted after trial.</p> <p>Prior criminal history; conviction of AOBH on his (then) wife.</p> <p>Born Afghanistan; difficult life in that country; endured war; came to Australia as a refugee.</p> <p>Granted Australian citizenship.</p> <p>Divorced; six children aged 11 to 24 yrs; continues to support his family.</p> <p>Very good work history; worked very hard to improve his position in life.</p> <p>No alcohol or drug issues.</p>	<p>1 x Sex pen without consent.</p> <p>The victim, aged 18 yrs, was in hospital being treated for mental health issues. She had a mild intellectual disability. A friend, S, invited her to spend the day with her in the community and the hospital granted her permission to do so.</p> <p>The victim and S were collected by a friend of S's. Later, Alizada agreed they could come to his factory unit to socialise. Alizada had not previously met S or the victim.</p> <p>At the factory Alizada gave the victim four cans of premixed Jack Daniels. The victim quickly drank the cans. She vomited.</p> <p>Feeling unwell the victim went and laid down on the back seat of Alizada's vehicle. She quickly fell asleep, as a result of her intoxication and the medication she had taken.</p>	<p>5 yrs 8 mths imp.</p> <p>EFP.</p> <p>The trial judge found the appellant penetrated a vulnerable young woman, while she was asleep and unconscious and obviously intoxicated; the offending was agg by the victim's vulnerability; their substantial age difference and that he plied her with alcohol in the hope that she might become disinhibited.</p> <p>Victim suffered significant ongoing emotional trauma; agg the trauma she was already suffering; attempted suicide.</p> <p>Appellant not remorseful and no insight into his offending.</p>	<p>Dismissed.</p> <p>Appeal concerned length of sentence and errors of finding (offending premediated and his 'serious attitudinal problem' in relation to women).</p> <p>At [54] We are satisfied that, although the offending was not premediated in that the offending was not a planned event, the appellant made a deliberate decision to exploit an 18 yr old woman whom he knew to be vulnerable.</p> <p>At [63] We are satisfied that the facts and circumstances of the appellant's offending against the complainant do indicate that the appellant had a serious attitudinal problem with women in that he appears to think that he is entitled to have sexual intercourse with a woman who is asleep or unconscious.</p> <p>At [76] ... the facts and circumstances of the offence committed by the appellant were very serious. ...</p> <p>At [77] We consider that the sentence ... was commensurate with the seriousness of the offence. ... We are satisfied, having regard to all relevant facts and circumstances and all relevant sentencing factors ... that the length of the sentence was not unreasonable or plainly unjust.</p>

			<p>While the victim was unconscious in his vehicle Alizada removed her pants and had sexual intercourse with her. After having sex with her he left her undressed in the back of his car.</p> <p>The victim eventually woke up. She put on her clothes and went inside the factory unit where she told S she though she had been raped.</p> <p>The victim was taken back to the hospital and the police were called.</p> <p>Alizada was interviewed by the police some mths later. He denied any relationship with the victim and when shown her photograph claimed not to recognise her.</p> <p>DNA analysis established Alizada had sexual intercourse with the victim.</p>		

Office of the Director of Public Prosecutions