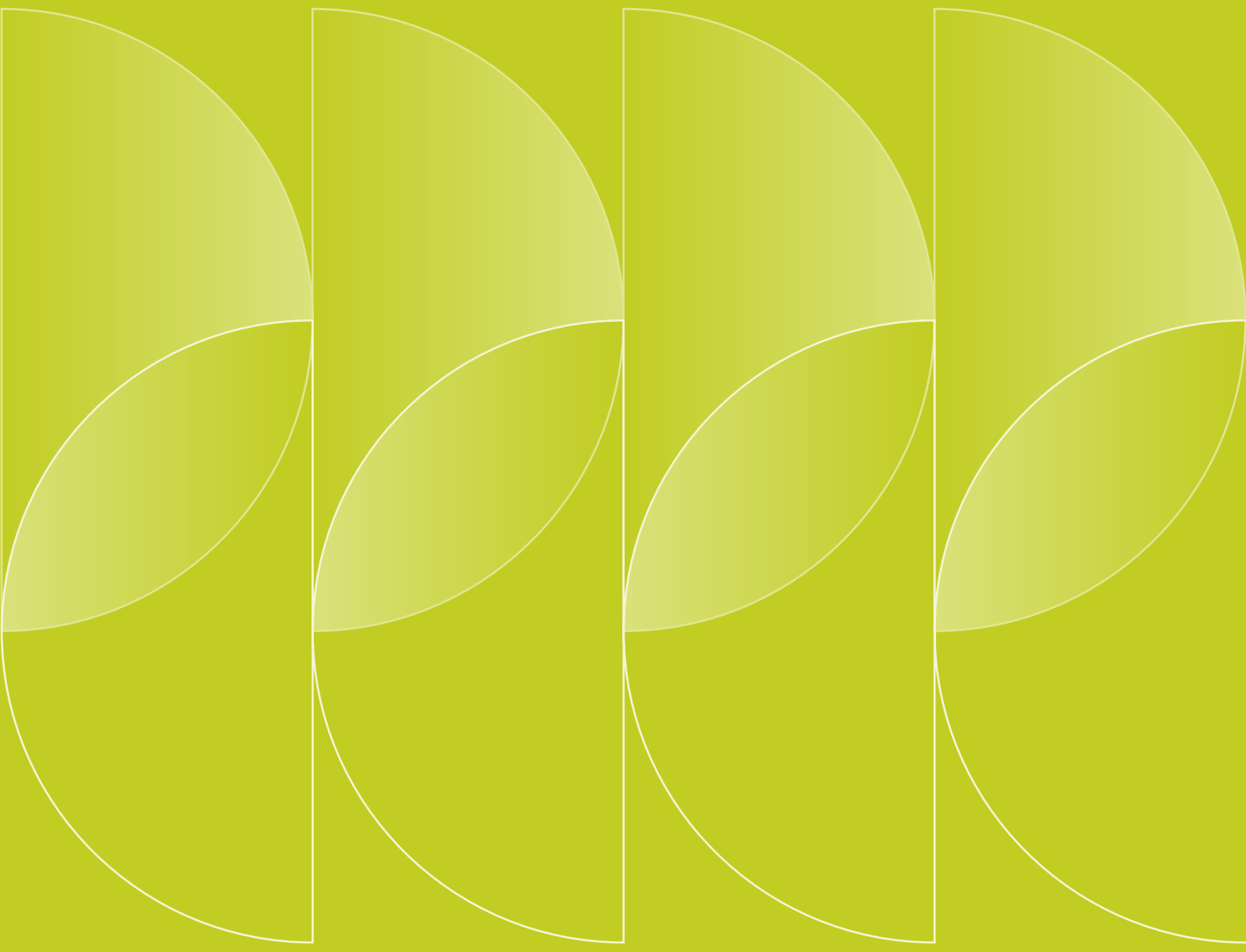
SENTENCING OF CHILD SEXUAL OFFENCES IN QUEENSLAND

FINAL REPORT

January 2012



SENTENCING ADVISORY COUNCIL

Sentencing of child sexual offences in Queensland

FINAL REPORT

January 2012

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Disclaimer
This report is not intended to provide legal advice, and has been prepared by the Council only to respond to the Terms of Reference issued to it by the Attorney-General. While all reasonable care has been taken in the preparation of this publication, no liability is assumed for any errors or omissions.

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31 January 2012

The Hon Paul Lucas MP
Attorney-General
Minister for Local Government and Special Minister of State
GPO Box 15009
CITY EAST QLD 4002

Dear Attorney-General

Re: Terms of Reference on sentencing of offenders convicted of child sexual offences

On 14 July 2011, the Council received Terms of Reference from you, pursuant to section 200(1) of the *Penalties and Sentences Act 1992* (Qld), to review the sentences imposed on offenders convicted of child sexual offending and sentenced pursuant to the *Penalties and Sentences Act*.

The Terms of Reference request a report to you by 31 January 2012.

On behalf of the Council, and in accordance with section 203L(1)(b) of the *Penalties and Sentences Act 1992* (Qld), I enclose the Council's final report and recommendations: *Sentencing of child sexual offences in Queensland: Final Report*.

Yours sincerely,

Professor Geraldine Mackenzie
Chair
Sentencing Advisory Council

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Preface

I am pleased to present this report on the important issue of sentencing for child sexual offences, responding to Terms of Reference issued by the Queensland Attorney-General on 14 July 2011.

This Reference explores the sentencing of one of the most important categories of criminal offences. Sexual offending against children attracts considerable media interest and public concern. A range of views about criminal justice and sentencing responses were expressed to the Council in consulting on this Reference. Themes emerging from consultations and submissions included the need to ensure that sentencing responses reflect the harm caused by the offending behaviour, the importance of rehabilitation to reduce the risks of re-offending, and the need to encourage those who offend to take responsibility for their offending and avail themselves of treatment.

The Council has debated at length the adequacy of existing approaches and guidance, and considered a range of options for improving current approaches to sentencing for offenders convicted of child sexual offences. The Council affirms the critical importance of maintaining the court's discretion to respond to the individual circumstances of each case, and acknowledges that it may be possible to enhance current forms of guidance and information available to courts in sentencing. With this in mind, the Council presents its recommendations.

Ensuring sentencing responses are effective in meeting the objectives of sentencing for these offences is not just about the guidance provided to courts, but also about the legal frameworks and administrative arrangements that support the prosecution of these offences, prescribe the types of sentencing orders that can be made, and guide how these orders are to be managed, as well as improving the availability and efficacy of treatment programs.

At the heart of this sentencing exercise is the protection of the community and individuals and, ultimately, sentencing for these offences must serve the protection and best interests of those who are amongst society's most vulnerable and powerless members – children.

Professor Geraldine Mackenzie
Chair
Sentencing Advisory Council

Acknowledgments

The Council would like to thank all those who participated in consultations on the Reference and who provided a submission to the review.

Queensland courts data included in this report are based on administrative data provided by the Department of Justice and Attorney-General (DJAG). The Council thanks DJAG for making these data available to it and for granting permission to access and use District Court sentencing remarks for the purposes of the Council's analysis of sentencing remarks.

The Council acknowledges Council members Nicholas Tucker and Christy McGuire who were on the Project Board for their guidance of this project. The Council also thanks the Secretariat for their contribution to this report.

Abbreviations

ABS	Australian Bureau of Statistics
A Crim R	Australian Criminal Reports
AIJA	Australian Institute of Judicial Administration
ANCOR	Australian National Child Offender Register
CCYPCG	Commission for Children and Young People and Child Guardian
CJ	Chief Justice
CMC	Crime and Misconduct Commission
COVA	*Criminal Offence Victims Act 1995* (Qld)
CSO	community service order
Cth	Commonwealth
DCJ	District Court Judge
div	division
DJAG	Department of Justice and Attorney-General (Qld)
DPSOA	*Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)
Hon	Honourable
ICO	intensive correction order
J	Judge, Justice (JJ plural)
JIRS	Judicial Information Research System
LAQ	Legal Aid Queensland
n	number
NSWCCA	New South Wales Court of Criminal Appeal
NZ	New Zealand
NZLR	New Zealand Law Reports
ODPP	Office of the Director of Public Prosecutions
OESR	Office of Economic and Statistical Research
PACT	Protect All Children Today Inc
para	paragraph
pt	part
QCA	Queensland Court of Appeal
Qd R	Queensland Reports
QLS	Queensland Law Society
QPS	Queensland Police Service
QPUE	Queensland Police Union of Employees
QSIS	Queensland Sentencing Information Service
R	Regina (the Crown)
s	section (ss plural)
SSOSA	Special Sex Offender Sentencing Alternative
ToR	Terms of Reference
v	against
VIS	victim impact statement

EXECUTIVE SUMMARY

Background to the report

On 14 July 2011, the Queensland Attorney-General issued Terms of Reference to the Sentencing Advisory Council asking it to:

- review the sentences imposed on offenders aged 17 years and over convicted of the offences of unlawful sodomy, indecent treatment of a child under 16, unlawful carnal knowledge, maintaining a sexual relationship with a child, rape and attempted rape
- consider the impact of sentencing reform on sentencing practices and sentences imposed
- compare sentencing outcomes for sexual offences committed against children with sentencing outcomes for sexual offences committed against adults
- identify the factors most commonly taken into account by the courts when sentencing offenders for child sexual offences
- state the Council's view on what factors should be taken into account in sentencing for child sexual offences, and
- state the Council's view on whether additional guidance is required in sentencing for child sexual offences.

The Council's approach to the Reference

In responding to the Terms of Reference, the Council has:

- sought preliminary comments from key stakeholders to guide the work of the Council
- released an Issues Paper and a companion Research Paper on sentencing for child sexual offences
- invited submissions from key stakeholders and members of the public (26 written submissions were received and 41 respondents completed an online response form)
- conducted targeted consultation sessions in Brisbane, Ipswich, Beenleigh, Cairns and Mt Isa, attended by 52 participants, and
- conducted a Legal Issues Roundtable in Brisbane with key criminal justice agencies, sexual assault service providers and legal representatives.

The Council also:

- analysed courts data to review current sentencing practices for child sexual offences
- undertook a longitudinal analysis of courts data to assess the impact of legislative reform on sentencing outcomes for child sexual offences
- undertook a review of a sample of higher court sentencing decisions to identify the factors most commonly taken into account when sentencing for child sexual offences, and to compare sentencing outcomes for the offence of rape committed against a child compared with the offence of rape committed against an adult
- reviewed a sample of 109 District Court first-instance sentencing decisions to determine the approach taken by courts in deciding if exceptional circumstances exist supporting a sentence other than a term of actual immediate imprisonment, and
- reviewed relevant case law on the approach to sentencing for the offences listed in the Terms of Reference.

The limitations of the data and the methodology used by the Council to respond to the Terms of Reference are detailed in Chapter 1 and should be taken into account when reviewing the Council's findings.

The current framework for sentencing child sexual offences

The current approach to the sentencing of offenders in Queensland for sexual offences committed against a child is guided by the general purposes of sentencing, and the specific principles and factors set out in the *Penalties and Sentences Act 1992* (Qld).

In 2003, two key amendments were made to the Act. Section 9(6) was inserted to require courts to have primary regard to the following factors when sentencing offenders for an offence of a sexual nature committed in relation to a child under 16:

(a) the effect of the offence on the child
(b) the age of the child
(c) the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another
(d) the need to protect the child, or other children, from the risk of the offender re-offending
(e) the need to deter similar behaviour by other offenders to protect children
(f) the prospects of rehabilitation, including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community
(g) the offender's antecedents,[1] age and character
(h) any remorse or lack of remorse of the offender
(i) any medical, psychiatric, prison or other relevant report relating to the offender, and
(j) anything else about the safety of children under 16 the sentencing court considers relevant.

The inclusion of s 9(6) does not remove the court's ability to consider the other sentencing factors set out in ss 9(2)(b) to (r) which apply in all cases.

Section 9(5)(a) was also inserted into the Act stating that the following principles do not apply to the sentencing of offenders for an offence of a sexual nature committed in relation to a child under 16:

- that a sentence of imprisonment should only be imposed as a last resort, and
- preference should be given to a sentence that allows the offender to stay in the community.

In 2010, further amendments were made inserting s 9(5)(b) into the Act to require that, in the sentencing of an offender for an offence of a sexual nature against a child under 16, an actual term of imprisonment must be served, unless there are exceptional circumstances. 'Exceptional circumstances' is not defined in the Act but are to be determined by courts with the guidance of case law.

In addition to sentencing legislation, sentencing courts are guided by maximum penalties for these offences, previous sentencing decisions

and appeal court decisions. These sources of sentencing guidance operate in conjunction with one another. The sentencing judge will also be informed by submissions made by the prosecution and defence.

The sentencing judge will apply their own discretion to the weight to be given to individual considerations (including sentencing factors) during the sentencing process and decide on the appropriate sentence to be imposed.

Other sentencing considerations for child sexual offences

With the exception of murder, Queensland does not have mandatory sentencing laws that require courts to impose a certain penalty for serious offences, such as child sexual offences. However, the following are relevant to the sentencing of child sexual offences:

- Pursuant to the serious violent offence provisions in part 9A of the *Penalties and Sentences Act*, in certain circumstances an offender may be required to serve a minimum of 80 per cent of their imprisonment term (or 15 years, whichever is the lesser) before being eligible for parole. In instances where an offender is sentenced to 10 years or more imprisonment for a qualifying offence (which includes a child sexual offence),[2] a court must declare the offender convicted of a serious violent offence, which triggers the minimum 80 per cent (or 15 years imprisonment) parole eligibility;[3] where the offender is sentenced to more than 5 years but less than 10 years imprisonment, the court may declare the offender convicted of a serious violent offence, thereby requiring the offender to serve a minimum of 80 per cent of their imprisonment term before being eligible to apply for release on parole.[4]

- Section 156A of the *Penalties and Sentences Act* requires a court in sentencing an offender for certain serious violent offences (which include child sexual offences listed in schedule 1) to order any sentence of imprisonment to be served cumulatively with any other term of imprisonment the offender is liable to serve if the offence was committed in certain circumstances (such as if the offender committed the offence while on parole).

- A Bill currently before the Queensland Parliament – the Law Reform Amendment Bill 2011 (Qld) – proposes to introduce a new power to declare an offender sentenced to 5 years imprisonment or more but less than 10 years, who is not declared convicted of a serious violent offence, as convicted of a 'serious offence' unless the court considers it unjust to do so. If such a declaration is made, the offender will be required to serve a minimum of 65 per cent of their sentence in prison before being eligible to apply for parole.

- Part 10 of the *Penalties and Sentences Act* provides the court with the power to impose an indefinite sentence for certain offences, including some child sexual offences.[5] This power may be exercised in circumstances where the court is satisfied that the offender is a serious danger to the community,[6] and the court must take into account a range of factors when making this assessment.[7]

- Court-ordered parole provisions introduced by the *Penalties and Sentences Act* in 2006[8] provide the court with a range of powers governing when a court can set a parole release date or a parole eligibility date for an offender sentenced to a term of imprisonment. When sentencing an offender for a sexual offence, a court has the power to set only a parole eligibility date, not a parole release date.[9] Courts generally exercise their discretion to set a parole eligibility date, and in some cases are required to do so.[10] However, if this discretion is not exercised, an offender convicted of a sexual offence is able to apply for parole after serving 50 per cent of their sentence.[11]

- A separate post-sentence detention and supervision scheme exists for offenders serving a period of imprisonment for a

serious sexual offence (including an offence of a sexual nature against children) under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (DPSOA).[12] This scheme is aimed at protecting the community by ensuring that offenders who pose a serious danger because of their risk of re-offending are either detained in custody or supervised in the community after the completion of their term of imprisonment.

- The personal details of offenders convicted of reportable child sexual offences are also required to be listed on the Australian National Child Offender Register (ANCOR). Offenders on this register are subject to ongoing reporting requirements under the *Child Protection (Offender Reporting) Act 2004* (Qld) and must keep police informed of their current whereabouts and other personal details, including address and employment details, internet use details, e-mail addresses and user names, car registration details and any affiliations with clubs that have children as members or involve children in their activities.

- Under the *Child Protection (Offender Prohibition Order) Act 2008* (Qld), a form of civil order known as a prohibition order may be made against certain offenders convicted of child sexual offences to prohibit them from engaging in certain conduct, such as associating with, or contacting other sex offenders, being certain locations (such as near a school), living where children live, or engaging in certain types of employment.[13] The court must be satisfied that, having regard to the nature and pattern of conduct recently engaged in by the offender, they pose an unacceptable risk to the lives or sexual safety of children in the community and the making of the order will reduce this risk.[14] The conduct need not amount to a criminal offence. When a prohibition order is made, the respondent to the order is placed on the ANCOR register if they are not on the register already.

Current sentencing practices

Term of Reference: Examine and report on current sentencing practices for offenders aged 17 years and over convicted of unlawful sodomy, indecent treatment of a child under 16, unlawful carnal knowledge, maintaining a sexual relationship with a child, rape and attempted rape.

The Council analysed Queensland courts data for the period 2006–10 to explore sentencing practices for offenders aged 17 years and over convicted of the offences listed in the Terms of Reference (referred to in this report as 'Reference offences'). Courts data do not include comprehensive information on victim age. Consequently, sentencing outcome information for the offences of rape and attempted rape based on courts data does not distinguish between offences committed against children and those committed against adults. Similarly, data for the offence of unlawful sodomy may include offences committed in relation to an adult over the age of 18 years with an impairment of the mind.

The Council's analysis of sentencing outcomes was based on the most serious offence for which the offender was convicted. The Australian Bureau of Statistics (ABS) 2009 National Offence Index was used to rank offence seriousness.

The Council's analysis of Queensland courts data for the period 2006–10 indicates that:

- almost all offenders with a most serious offence of maintaining a sexual relationship with a child (97%), rape (98%) and attempted rape (95%) were sentenced to imprisonment or a partially suspended sentence which requires the offender to serve a period of actual immediate imprisonment
- one quarter (25%) of offenders with a most serious offence of unlawful carnal knowledge were sentenced to a term of imprisonment or partially suspended sentence
- offenders most likely to receive a period of actual immediate imprisonment also tended to receive the longest sentences; the longest average lengths of imprisonment were for

offenders with a most serious offence of rape (6.5 years), maintaining a sexual relationship with a child (6 years) and unlawful sodomy (6 years), and
- the shortest average terms of imprisonment imposed were for offenders with a most serious offence of indecent treatment of a child under 16 (1 year) and unlawful carnal knowledge (1 year).

Due to differences in sexual offence provisions and the conduct they capture, it is not possible to determine how sentencing practices in Queensland compare with those in other Australian jurisdictions.

The impact of legislative reform on sentencing practices

Term of Reference: Consider what, if any, impact legislative reform has had on sentencing practices and the sentences imposed for child sexual offences, particularly the 2003 and 2010 amendments.

In responding to the Terms of Reference, an analysis of sentencing trends was undertaken by the Council in relation to the impact of the 2003 amendments on sentencing practices and sentences imposed. This analysis was conducted for matters sentenced over the period 2001–10.

The 2003 amendments

The 2003 amendments removed the principles that imprisonment should only be imposed as a penalty of last resort, and a sentence that allows the offender to stay in the community is preferable, as sentencing considerations for offenders convicted of an offence of a sexual nature against a child under 16. These amendments also inserted specific sentencing factors to which the court must have primary regard in sentencing for these offences, and increased the maximum penalties for the offences of indecent treatment of a child under 16 and maintaining a sexual relationship with a child.

The rate of offenders pleading guilty increased for all Reference offences over the period 2001–10, with the exception of the offence of maintaining a sexual relationship with a child; this increase began before 2003. In contrast, the rate of offenders pleading guilty was stable for non-Reference offences over this period.

The rate of convictions (that is, offenders pleading guilty or found guilty at trial) for all Reference offences, other than that for maintaining a sexual relationship with a child, increased after 2003. There was no change in the rate of convictions for maintaining a sexual relationship with a child, which remained stable at just under 90 per cent. Conviction rates for all finalised District Court non-Reference offences also remained stable after 2003.

The years immediately preceding and following the 2003 amendments saw a number of other legislative reforms that may also have impacted on sentencing practices for Reference offences. For example, in 2000, the definition of rape was expanded to include penetration by the offender of the vagina, vulva or anus of the victim by any body part or object, and penetration of the mouth of the victim by the offender's penis. In 2004, the offence of rape was again amended to provide that a child under the age of 12 is incapable of giving consent to the conduct identified in the offence. There were also changes in 2003 introducing special provisions for children giving evidence brought about by the *Evidence (Protection of Children) Amendment Act 2003* (Qld).[15]

The Council's analysis of Queensland courts data shows that the average sentence length for indecent treatment of a child under 16 decreased after 2003, while a small increase in average sentence length for maintaining a sexual relationship with a child that occurred after the 2003 amendments was not sustained beyond 2005. In contrast, there was an increase in average sentence lengths of imprisonment for non-Reference offences after 2005.

In relation to sentence outcomes for Reference offences, the analysis of courts data for 2001–10 shows:

- the 2003 amendments appear to have had little, if any, effect on the proportion of offenders receiving a term of actual immediate imprisonment for the offences of maintaining a sexual relationship with a child, unlawful sodomy, indecent treatment of a child under 16 and unlawful carnal knowledge sentenced in the District Court
- although the proportion of offenders receiving a term of actual immediate imprisonment for rape did not change after 2003, there was an increase in the proportion of these offenders receiving imprisonment rather than a partially suspended sentence, and
- there has been an increasing use of partially suspended prison terms in the period 2001–10 for the offence of indecent treatment of a child under 16 for offenders sentenced in the District Court; this does not appear to be related to the 2003 amendments.

The 2010 amendments

The 2010 amendments to the *Penalties and Sentences Act* provided that, in sentencing an offender for an offence of a sexual nature committed in relation to a child under 16 years, the offender must serve an actual term of imprisonment unless there are 'exceptional circumstances'. This amendment embodied the principle, well-established in common law, that, other than in exceptional circumstances, those who indecently assault or otherwise deal with children should be sent to prison.

The recency of the 2010 amendments means there are insufficient courts data to conduct meaningful statistical analysis to determine whether there has been any change in sentencing practices following these amendments. However, a review of a sample of 109 first-instance sentencing decisions of the District Court after the introduction of the amendments, revealed that over half (65 cases) referred to exceptional circumstances, and in 28 cases the sentencing judge considered there were exceptional circumstances justifying a sentence other than one involving actual immediate imprisonment being imposed. These cases involved indecent treatment of a child under 16 offences (22 cases, one of which also involved a conviction for attempted rape) and unlawful carnal knowledge offences (6 cases). This analysis suggests that a finding of exceptional circumstances is more likely to be made in cases where the level of offending is at the less serious end of the spectrum.

Sentencing outcomes for child victims of rape compared with adult victims

Term of Reference: Compare the sentencing outcomes for sexual offences committed against children with sentencing outcomes for sexual offences committed against adults.

Analyses of higher court decisions for a sample of 176 rape cases sentenced between 2007 and 2009 shows that:

- the average sentence lengths of imprisonment for rape tend to be longer for victims aged 18 years and over (adult victims) than for victims aged under 16 years (child victims)[16]
- the difference in average sentence lengths is statistically significant[17] for offences involving multiple rapes, where the average sentence length for offences involving victims aged under 16 years was 7.9 years, compared with an average sentence length for offences involving adult victims of 10.5 years, and
- the difference in average sentence lengths by the age of the victim was also statistically significantly different for all rape cases combined, with an average sentence length of 6.4 years for victims aged under 16 years, compared with an average of 8.6 years for adult victims.

The reasons for these differences are unclear and further research would be needed to determine the impact of offence differences on sentencing practices. For example, rape offences against

adults may be more likely to involve the use of actual violence or to be perpetrated by offenders with previous convictions for sexual offences and other offences of violence than those involving a child victim.

Factors in sentencing child sexual offences

Term of Reference: Identify the factors that are most commonly taken into account by the courts when sentencing offenders for child sexual offences.

The Council undertook a review of 458 Queensland District Court, Supreme Court and Court of Appeal decisions for the offences of rape (228 cases), maintaining a sexual relationship with a child (113 cases) and unlawful carnal knowledge (117 cases) sentenced between 2007 and 2009 to examine the factors expressly referred to by judges in their sentencing decisions. The majority of these matters related to District Court sentencing decisions, with a small number involving matters sentenced in the Supreme Court and appeals to the Court of Appeal. The Council accessed these sentencing decisions from the Queensland Sentencing Information Service (QSIS). These decisions represent 91 per cent of the relevant matters sentenced in the higher courts in the 2007–09 period. Sentencing decisions where the most serious offence was unlawful sodomy and attempted rape were also examined, but the numbers were considered too few to enable meaningful analysis and were subsequently excluded. Sentencing decisions for indecent treatment of a child under 16 were also excluded on the basis of the limited information available in these decisions.

Remarks on sentence are not made for research purposes, and there is no set formula they must follow. Although sentencing decisions provide an indication of the factors likely to have influenced the sentence imposed they do not necessarily provide information on the weight given to particular factors. The Council further acknowledges that just because judges do not specifically refer to a particular factor in their sentencing remarks (which could therefore be captured in the Council's analysis) does not mean the factor has not been taken into account.

It must be noted that there may be a range of reasons why judges specifically refer to particular factors and sentencing purposes and not others in delivering their remarks on sentence. For example, in some cases, courts are legislatively required to take a factor into account and (in the case of a guilty plea, for example)[18] to state that it was taken into account in open court. However, because a factor was not specifically mentioned does not mean that it was not taken into account, as the sentencing judge is not required to list the factors taken into account, other than the examples listed above.

In the sample of decisions analysed, relevant considerations most commonly mentioned by judges in relation to the offender were:

- whether the offender was convicted on a plea of guilty or following a trial (referred to in 97% of cases)
- the offender's criminal history (in 81% of cases the offender's criminal history, or lack of one, was mentioned)
- whether the offender had served a period of pre-sentence custody (50% of cases)
- whether the offender was otherwise of 'good character' (37% of cases)
- whether the offender cooperated with police (35% of cases), and
- whether the offender demonstrated remorse (30% of cases) or, conversely, there was no remorse shown (45% of cases).

There is no uniformity of definition for terms such as 'good character' or 'cooperation'; rather they take their meaning from the ordinary everyday use of the words and from case law and, consequently, these terms may cover a range of circumstances.

Factors most commonly referred to by judges in relation to characteristics of the victim were:

- the age of the victim (mentioned in 76% of cases)
- the relationship of the victim to the offender (86% of cases)
- the harm or potential harm to the victim (63% of cases), and
- whether the victim was under the care of the offender (37% of cases).

Factors most commonly mentioned by judges in relation to the nature of the offence were:

- the nature of the offending conduct (referred to in 94% of cases)
- the period of time over which the offending took place (64% of cases), and
- the fact that it occurred in a private location (60% of cases).

The pattern of factors specifically referred to by judges varied across the different offence categories in the sample of decisions analysed, with some factors mentioned more often for some offences than for others.

In relation to the sentencing purposes referred to by judges in sentencing decisions, punishment (23% of cases) and general deterrence (22%) were the most commonly mentioned, followed by individual deterrence (18%) and denunciation (17%).

Council recommendations

Terms of Reference: State the Council's views on the factors that should be of most relevance when assessing offence seriousness for child sexual offences, including the harm to the victim and the culpability of the offender, and the relevance of specific aggravating and mitigating factors, and state the Council's views on whether there is a need for additional guidance in sentencing offenders for child sexual offences and, if so, the form that this guidance should take.

A majority of submissions supported the current approach to sentencing and existing forms of sentencing guidance, including legislative factors, as being appropriate and made no recommendation for amendment, although some submissions supported tougher sentencing responses.

Based on its review of current approaches, the Council has formed the view that there is insufficient evidence to suggest that existing guidance in the form of legislation, appellate court decisions, comparative sentences or other resources is in need of substantial reform. However, the Council makes the following recommendations to clarify and expand on the existing guidance provided in s 9 of the *Penalties and Sentences Act*, and to increase transparency when findings of exceptional circumstances are made. A majority of the Council recommends limiting the use of good character in sentencing as a mitigating factor for sexual offences against children where the court is satisfied that this assisted the offender in committing the offence. The Council further recommends the development of additional resources to support judicial officers in their role, and identifies a need for ongoing professional development and access to information for all parties involved in the sentencing process regarding the nature and consequences of sexual offences against children.

RECOMMENDATION 1

1. That s 9 of the *Penalties and Sentences Act 1992* (Qld) be amended as follows:

1.1 In sentencing an offender to whom s 9(5) applies, the court be required to have regard primarily to the safety, protection and dignity of children, with all other factors identified in paragraphs (9)(6)(a) to (j) (as amended) listed as a means of meeting this objective.

1.2 The following amendments should be made to s 9(6):

- s 9(6)(a) be amended to acknowledge physical, mental or emotional harm and the effect of the offending conduct on both the child and their family, including information provided to the court under the *Victims of Crime Assistance Act 2009* (Qld)

- s 9(6)(b) be amended to focus on the vulnerability of the child, including vulnerability due to the victim's disability or any other relevant factor known to the offender
- s 9(6)(c) be amended to remove the example 'any physical harm or the threat of physical harm to the child or another' and to refer to the 'nature of the offending conduct' rather than the 'nature of the offence', and
- s 9(6)(h) be amended to remove reference to 'any remorse or lack of remorse by the offender' and to replace this with the degree of insight or acceptance of responsibility by the offender for the offending conduct as a relevant factor.

1.3 An additional factor be included in s 9(6) to require a court to take into account whether the offender was in a position of trust or authority in relation to the victim when the offending conduct occurred.

1.4 The sentencing factor 'any remorse or lack of remorse by the offender' be relocated from s 9(6)(h) and included in the list of general sentencing principles and factors in s 9(2), thereby establishing the factor legislatively as a general sentencing factor rather than only as a primary consideration in sentencing an offender for an offence of a sexual nature committed in relation to a child under 16.

RECOMMENDATION 2

2. That the *Penalties and Sentences Act 1992* (Qld) be amended to include a new provision which provides that, in sentencing an offender for an offence of a sexual nature committed in relation to a child under 16, the good character (including any significant contributions made by the offender to the community) of the offender must not be taken into account as a mitigating factor if the court is satisfied that this assisted the offender in committing the offence.

RECOMMENDATION 3

3.1 That the *Penalties and Sentences Act 1992* (Qld) be amended to require a court, in imposing a sentence other than actual imprisonment on an offender convicted of an offence of a sexual nature committed in relation to a child under 16 years, to state in open court its reasons for finding that exceptional circumstances exist and to cause these reasons to be recorded.

3.2 That a failure to provide reasons should not invalidate the sentence, but that the court's failure to do so may be considered by an appeal court if an appeal against sentence is made.

RECOMMENDATION 4

4. That all parties involved in the sentencing process for child sexual offences undertake ongoing professional development and have access to information about the nature and consequences of sexual offending against children.

RECOMMENDATION 5

5. That consideration be given to the development of additional resources to be made available to judicial officers to assist in exercising their sentencing discretion when sentencing an offender for an offence of a sexual nature committed in relation to a child under 16.

Additional responses

A number of relevant issues raised during consultations and in submissions fell outside the scope of the Council's response to the specific Terms of Reference, including:

- the possible benefits of a strengthened focus on rehabilitation – rather than a purely punitive response – to reduce the longer-term risks of re-offending
- concerns that some sentences for offenders

convicted of child sexual offences do not give them sufficient time to complete programs while in prison (in some cases as a result of time spent on remand)
- the current operation of the DPSOA provisions and whether post-sentence orders (particularly those involving continued detention) are justified on the basis of community protection, and
- the difficulty in assessing and acknowledging the harm done to child victims of sexual abuse at the time of sentencing.

The Council's view is aligned with those expressed during consultations and in submissions to this Reference that in order to improve current sentencing responses to child sexual offences, what may be required is not simply forms of additional guidance in sentencing, or increasingly more punitive responses, but rather integrated and 'end-to-end' approaches to sentencing and the management of these offenders.

Whatever the approach taken, the challenge is to ensure that the serious nature of these offences and the need for just punishment is recognised in the sentence imposed, while meeting the interests of community protection through rehabilitation and ongoing supervision and monitoring. In their form and intent, effective sentencing responses for child sexual offences should encourage offenders to take full responsibility at the earliest opportunity for their actions and the harm they have caused, while reducing the risks of re-offending.

RECOMMENDATIONS

RECOMMENDATION 1

1. That s 9 of the *Penalties and Sentences Act 1992* (Qld) be amended as follows:

1.1 In sentencing an offender to whom s 9(5) applies, the court be required to have regard primarily to the safety, protection and dignity of children, with all other factors identified in paragraphs (9)(6)(a) to (j) (as amended) listed as a means of meeting this objective.

1.2 The following amendments should be made to s 9(6):

- s 9(6)(a) be amended to acknowledge physical, mental or emotional harm and the effect of the offending conduct on both the child and their family, including information provided to the court under the *Victims of Crime Assistance Act 2009* (Qld)
- s 9(6)(b) be amended to focus on the vulnerability of the child, including vulnerability due to the victim's disability or any other relevant factor known to the offender
- s 9(6)(c) be amended to remove the example 'any physical harm or the threat of physical harm to the child or another' and to refer to the 'nature of the offending conduct' rather than the 'nature of the offence', and
- s 9(6)(h) be amended to remove reference to 'any remorse or lack of remorse by the offender' and to replace this with the degree of insight or acceptance of responsibility by the offender for the offending conduct as a relevant factor.

1.3 An additional factor be included in s 9(6) to require a court to take into account whether the offender was in a position of trust or authority in relation to the victim when the offending conduct occurred.

1.4 The sentencing factor 'any remorse or lack of remorse by the offender' be

relocated from s 9(6)(h) and included in the list of general sentencing principles and factors in s 9(2), thereby establishing the factor legislatively as a general sentencing factor rather than only as a primary consideration in sentencing an offender for an offence of a sexual nature committed in relation to a child under 16.

RECOMMENDATION 2

2. That the *Penalties and Sentences Act 1992* (Qld) be amended to include a new provision which provides that, in sentencing an offender for an offence of a sexual nature committed in relation to a child under 16, the good character (including any significant contributions made by the offender to the community) of the offender must not be taken into account as a mitigating factor if the court is satisfied that this assisted the offender in committing the offence.

RECOMMENDATION 3

3.1 That the *Penalties and Sentences Act 1992* (Qld) be amended to require a court, in imposing a sentence other than actual imprisonment on an offender convicted of an offence of a sexual nature committed in relation to a child under 16 years, to state in open court its reasons for finding that exceptional circumstances exist and to cause these reasons to be recorded.

3.2 That a failure to provide reasons should not invalidate the sentence, but that the court's failure to do so may be considered by an appeal court if an appeal against sentence is made.

RECOMMENDATION 4

4. That all parties involved in the sentencing process for child sexual offences undertake ongoing professional development and have access to information about the nature and consequences of sexual offending against children.

RECOMMENDATION 5

5. That consideration be given to the development of additional resources to be made available to judicial officers to assist in exercising their sentencing discretion when sentencing an offender for an offence of a sexual nature committed in relation to a child under 16.

1 INTRODUCTION

This chapter discusses the background to the Terms of Reference and how the Council has approached its response. It also presents information on the research methodologies employed.

1.1 Background to this report

On 14 July 2011, the Queensland Attorney-General, Minister for Local Government and Special Minister of State, the Honourable Paul Lucas MP, issued Terms of Reference to the Sentencing Advisory Council asking it to review the sentences imposed on offenders convicted of child sexual offences and sentenced under the *Penalties and Sentences Act 1992* (Qld).

The Council was required to report to the Attorney-General by 31 January 2012.

In referring this matter to the Council, the Attorney-General cited a number of issues:

- the Queensland Government's concern that the penalties being imposed for child sexual offending are not always commensurate with the harm experienced by child victims or with community expectations
- the general expectation of the Queensland Government that child sexual offenders serve an appropriate period of actual incarceration
- the need to promote public confidence in the criminal justice system
- the need to maintain judicial discretion to impose a just and appropriate sentence in individual cases, and
- the sentencing principles set out in the *Penalties and Sentences Act*.

The Terms of Reference are provided in Appendix 1 of this report.

In undertaking the Reference, the Council was asked to:

- examine and report on current sentencing practices for offenders aged 17 years and over convicted of a child sexual offence, in particular the *Criminal Code* (Qld) offences of unlawful sodomy (s 208), indecent treatment

of a child under 16 (s 210), unlawful carnal knowledge (s 215), maintaining a sexual relationship with a child (s 229B), rape (s 349) and attempted rape (s 350)
- consider what impact, if any, sentencing reform has had on sentencing practices and the sentences imposed for child sexual offences, in particular: the *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) and the *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld)
- compare sentencing outcomes for sexual offences committed against children with sentencing outcomes for sexual offences committed against adults, and
- identify the factors that are most commonly taken into account by the courts when sentencing offenders for child sexual offences.

The Council was asked to state its views on:
- what factors should be of most relevance when assessing offence seriousness for child sexual offences, including the harm to the victim and the culpability of the offender, and the relevance of specific aggravating and mitigating factors
- whether there is a need for additional guidance in sentencing offenders for child sexual offences and, if so, what form this guidance should take, and
- any other matter the Council considers relevant.

A number of significant legislative reforms have been introduced in Queensland over the previous 12 years aimed at better responding to child sexual abuse, strengthening sentencing responses and minimising any trauma to children giving evidence in court. In addition to the amendments introduced by the legislation referred to in the Terms of Reference, the Council considers an awareness of the broader legal context and approaches to the management of offenders important in considering the potential impact of these reforms. Relevant reviews and legislative reforms in relation to criminal justice responses to sexual offences against children include:

- The Queensland Government's Report of the Taskforce on Women and the Criminal Code, released in 2000.[19]
- *Project Axis*[20] – a wide-ranging inquiry into sexual offending against children in Queensland conducted by the then Queensland Crime Commission (now the Crime and Misconduct Commission) and the Queensland Police Service (QPS) in 2000. The recommendations made in the Project Axis report resulted in reforms introduced by the *Sexual Offences (Protection of Children) Amendment Act*.
- The Queensland Law Reform Commission report *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, released in 2000. The recommendations made in this report led to the introduction of the *Evidence (Protection of Children) Amendment Act 2003* (Qld).
- *Seeking Justice: An Inquiry into the Handling of Sexual Offences by the Criminal Justice System*, completed by the Crime and Misconduct Commission in 2003.
- A Queensland government-initiated review relating to victims of crime in November 2007, followed by the release of the *Victims of Crime Review Report* in November 2008. After the release of this report, the *Victims of Crime Assistance Act 2009* (Qld) was introduced, which repealed the *Criminal Offence Victims Act 1995* (Qld) (COVA) and introduced a new financial assistance scheme for victims of crime.

There has been no comprehensive review undertaken to determine the broader impact these reforms have had or their effectiveness in achieving their aims and objectives.[21]

This report provides an opportunity to consider what impact the specific legislative reforms referred to in the Terms of Reference have had on sentencing practices and sentences imposed. It is beyond the scope of the Reference to consider the broader impacts of other legislative reforms.

1.2 The Council's approach to the Reference

The Council acknowledges that child sexual offences are serious and result in substantial harm to victims, their families and their communities and that the sentencing of offenders for child sexual offences is one part of a larger community and criminal justice response to child sexual abuse and the protection of children.

The Council's approach in responding to the Terms of Reference has included:

- a detailed analysis of relevant courts data to provide information on current sentencing practices for offenders aged 17 years and over convicted of sexual offences against children
- a comprehensive analysis of sentencing decisions of the Queensland District Court, Supreme Court and Court of Appeal for 2007–09 for offences listed in the Terms of Reference and accessed from the Queensland Sentencing Information System (QSIS) to determine (a) which factors Queensland courts (primarily the District Court) commonly refer to in their sentencing decisions when sentencing adult offenders for sexual offences committed against children, including the use of victim impact statements, and (b) whether sentencing outcomes for the offence of rape committed against a child are different from those involving rape committed against adults (see Chapter 4)
- a trend analysis of courts data to identify whether recent changes in legislation have affected the sentencing of sexual offences against children (see Chapter 3)
- a review of legislation, including the principles and factors guiding the sentencing process for child sexual offences, and the recent legislative history of offence, penalty and sentencing provisions
- a review of a sample of 109 District Court first-instance sentencing decisions to determine the approach taken by courts in deciding if exceptional circumstances exist supporting a sentence other than a term of actual immediate imprisonment
- a review of case law, and specifically Court of Appeal and High Court judgments, to explore how relevant sentencing principles and factors are interpreted and applied, including the aggravating and mitigating factors a court may take into account when sentencing offenders for sexual offences against children, and
- consideration of legislation in other Australian and overseas jurisdictions to identify any alternative responses to the sentencing of offenders for sexual offences against children.

In August 2011, correspondence was sent to various Queensland stakeholders inviting their views on the issues the Council should explore as part of this Reference. In October 2011, letters were also sent to justice agencies in Canada, England, Ireland, Northern Ireland and New Zealand advising of the Reference and requesting information on the approaches taken in those jurisdictions to the sentencing of offenders for child sexual offences.[22] Responses were received from the Ministry of Justice Canada, Sentencing Council for England and Wales, the New Zealand Ministry of Justice and the Department of Justice and Equality Ireland.

On 8 November 2011, the Council released an Issues Paper, *Sentencing of Child Sexual Offences in Queensland: Issues Paper*, and called for submissions on the Terms of Reference. The Issues Paper identified and sought feedback on a number of matters to help the Council respond to the Reference; 13 questions for response were included. The Council also released a companion Research Paper, *Sentencing of Child Sexual Offences in Queensland: Research Paper*. The Research Paper provided information on the sentencing of child sexual offences committed by offenders aged 17 years and over for the period 2006–10.

After the release of the Issues Paper, the Council used print advertisements and other media channels to invite members of the community to make submissions. These could be made in a number of ways, including through an online response form that contained 22 questions.

In response to the Issues Paper, 26 submissions were received and 41 respondents completed the online response form.[23] Appendix 3 provides a list of some of the submissions received, including respondents to the online response form.

In November 2011, the Council conducted targeted face-to-face consultations with sexual assault service providers, victim advocacy and support organisations, court support workers, offenders' services, legal practitioners and others in Beenleigh, Brisbane, Cairns, Ipswich and Mt Isa. The consultations were attended by 52 participants.

The Council consulted with a respected member of the Aboriginal and Torres Strait Islander community in Mt Isa, who identified appropriate local stakeholders to invite to the consultation there. The Council also met with a group of Aboriginal and Torres Strait Islander Elders in Cairns, hosted by Gumba Gumba – the Cairns and District Aboriginal and Torres Strait Islander Corporation for Elders and Cairns Community Justice Group. This consultation focused on the impact of cultural factors and considerations in sentencing for child sexual offences and communicating the harm to the court caused to victims, their family members and the broader community.

In December 2011, the Council conducted a roundtable consultation session in Brisbane with key criminal justice agencies, sexual assault service providers and legal representatives to consider the legal aspects of the Reference.

1.3 The Council's approach to data

A number of different data sources and methods were used to inform the Council's response to the Terms of Reference. These data sources and methods, as well as their limitations, are described below.

Courts data

Administrative courts data were used to provide information on the current sentencing outcomes for child sexual offences and to determine the impact of legislative reform on the sentencing of these offences. These data are collected by the Department of Justice and Attorney-General (DJAG) and maintained by the Queensland Office of Economic and Statistical Research (OESR).

Offences were primarily categorised according to the offence legislative section, supported by DJAG data offence description as contained in the administrative data. The most serious offence committed and the most serious penalty for a matter were used to structure data analyses. The ABS 2009 National Offence Index was used to rank offence seriousness. Penalty seriousness was ranked according to the classification scheme used by the ABS.

Information on the current sentencing outcomes for Reference offences relates to matters finalised in the Queensland courts in 2006 to 2010 (see section 3.2). Longitudinal trend analyses[24] undertaken to assess the impact of legislative reform relate to cases finalised in the District Court[25] or Magistrates Court in 2001–10 (see section 3.3).

The courts data presented in this report are a simplified representation of sentencing outcomes for Reference offences. For example, the data are based on an analysis of matters by the most serious offence of which the offender was charged or convicted only, and sentencing outcomes reported on refer to averages only. Consequently, they provide only a partial representation of sentencing outcomes in Queensland for these offences. Caution must be exercised when interpreting these data.

Data definitions and the limitations of courts data are set out in Appendix 4 of this report.

The impact of the 2003 amendments on the Reference offences was explored by determining whether or not the guilty plea rate, the conviction

rate, the use of imprisonment and the average sentence length changed after 2003. Attempted rape and, in some instances, unlawful sodomy were not included in longitudinal analyses because the number of offences was insufficient to reliably determine sentencing patterns. Analyses of sentencing outcomes for indecent treatment of a child under 16 and unlawful carnal knowledge were separated into higher and lower courts, as these two offences had a substantial number of cases sentenced at both court levels.

Yearly variations in the number of cases involving Reference offences (which tends to be relatively small) made it difficult to determine overall trends. To address this difficulty, a three-year moving average was used to better illustrate underlying trends. The three-year moving average is the average (mean) of the current year and two preceding years.[26]

Sentencing decisions data

Sentencing decisions were used to provide information on the sentencing of offences committed with respect to children compared with those committed against adults 18 years and over, and on the factors judges referred to when sentencing. These remarks on sentence were retrieved from QSIS and most often relate to cases before the Queensland District Court and Court of Appeal. A small number of Supreme Court decisions (10 cases) were also included in the sample. This information assisted the Council to explore whether or not sentences handed down by Queensland higher courts (primarily the District Court) to offenders convicted of sexual offences against children were different over the period examined from those imposed on offenders who were convicted of sexual offences against adult victims. This analysis was based on sentencing outcomes for the offence of rape, which can be committed against a child or an adult.

Remarks on sentence are made by judges when they deliver a sentence to an offender. As required by s 10 of the *Penalties and Sentences Act*, a court must state its reasons in open court when imposing a sentence of imprisonment (including a suspended sentence) on an offender. These statements are generally recorded and stored in QSIS and are available to authorised users.

Analysis of sentencing decisions is being increasingly used as a research tool by legal and criminological researchers to provide insight into the factors contributing to judges' sentencing decisions.[27] This methodology is primarily useful in revealing how courts communicate the reasons for their sentencing decision, but equally it is important to note the limitations of using sentencing remarks as an indicator of factors being considered by judges.

Limitations of using sentencing remarks as a data source

Sentencing remarks are not delivered for research purposes, and there is no set formula they must follow. Sentencing remarks vary considerably from case to case and from judge to judge. Sentencing remarks can be very detailed and run to several thousand words or be very short. No conclusions can be drawn from the length of the decision. Further, just because judges do not specifically refer to a particular factor in delivering their sentence (which could therefore be captured in the Council's analysis) does not mean the factor has not been taken into account.

As Hall and Wright have acknowledged, while '[t]he major limitation of content analysis … is that one cannot treat as accurate and complete the facts and reasons given in opinions', the advantage of the approach is in its descriptive capacity; for this reason this approach, Hall and Wright argue, provides 'the most precise way for documenting what … judges decide and how they explain their decisions' but may not indicate their rationale.[28]

The findings can also only be taken as reflecting the sentencing practices of the Queensland higher courts (primarily the District Court) for the period within which the sample decisions arise (in this case, 2007–09) and may not reflect the current approach to the sentencing of these matters.

Sample

The information presented in this report is based on the Council's analysis of sentencing decisions relating to cases sentenced between 2007–09 where the most serious offence (measured using the most serious penalty imposed) was rape (228 cases), maintaining a sexual relationship with a child (113 cases) and unlawful carnal knowledge (117 cases). The numbers of sentencing decisions relating to matters where the most serious offence was unlawful sodomy or attempted rape were considered too few to enable meaningful analysis, so they have been omitted. Cases where the most serious offence was indecent treatment of a child under 16 could not be included in the analysis as the information contained in these sentencing decisions did not provide enough detail to indicate what factors the judge had considered in deciding on a penalty. It should be noted that, in cases where an offender is convicted and sentenced for two or more offences with the same penalty outcome (for example, maintaining a sexual relationship with a child and rape, with both offences receiving a term of imprisonment of 6 years), the most serious offence is determined using the ABS 2009 National Offence Index.

Sentencing decisions accessed by the Council represent 91 per cent of relevant matters sentenced in the higher courts in the 2007–09 period. To determine whether there may be any significant bias in the sample used for the analyses presented here, key variables[29] were compared between the sentencing decision sample (458 cases) and all matters heard in the higher courts between 2007–09 (501 cases). This comparison shows there was little difference between the two groups for most comparison variables. The only differences that should be noted were:

1. the percentage of those pleading guilty to maintaining a sexual relationship with a child was higher for the sample group (82%) than for the total number in that offence category (71%), and
2. there was a higher proportion of offenders aged 17–19 years in the sample group for unlawful carnal knowledge (31%) than for the total number in that offence category (21%).[30]

For all other comparison variables, the differences between the two groups were less than 5 per cent, suggesting that there is unlikely to be any significant bias in the sample of sentencing decisions examined.

Data collection

The Council developed a data collection sheet (coding frame) to provide for the systematic collection and coding of information referring to particular factors relevant to the Terms of Reference.

Information was collected in relation to the following factors:

- offence characteristics (such as type of sexual conduct, length of offending period)
- victim characteristics (such as victim age, relationship to the offender)
- offender characteristics (such as offender age, offence history)
- reference to the principles of sentencing (such as punishment, rehabilitation), and
- sentence outcomes (such as type of penalty, length of sentence).

Members of the Council's Secretariat who were responsible for examining the sentencing decisions were trained to ensure a consistent approach to the coding of material. Each completed data collection sheet was checked by another staff member to ensure that coding work accurately reflected information contained in sentencing remarks.

2 CURRENT FRAMEWORK FOR SENTENCING CHILD SEXUAL OFFENCES

This chapter discusses the current legal framework for sentencing child sexual offences and the sentencing guidance that currently exists. The sentencing orders available to the court are also briefly discussed.

The current approach to sentencing adult offenders for sexual offences committed against a child is guided by the general purposes of sentencing, and the specific principles and factors set out in the *Penalties and Sentences Act 1992* (Qld). In addition, sentencing courts are guided by the maximum penalties for these offences, comparative sentences and appeal court decisions. These sentencing considerations operate in conjunction with one another. Sentencing judges exercise their discretionary judgment in determining the weight to be given to individual considerations during the sentencing process, and the appropriate sentence to be imposed informed by submissions made by the prosecution and the defence.

2.1 The purposes of sentencing

Section 9(1) of the *Penalties and Sentences Act* states that the only purposes for which a sentence can be imposed are:

- to punish the offender to an extent or in a way that is just in all the circumstances[31]
- to provide conditions in the court's order that the court considers will help the offender's rehabilitation
- to deter the offender (specific deterrence) or others (general deterrence) from committing the same or a similar offence/s
- to make it clear that the community, acting through the court, denounces the offender's conduct
- to protect the Queensland community from the offender, or
- a combination of two or more of the reasons mentioned above.

The purposes of sentencing are supported by a range of principles and factors that the court must consider when sentencing an offender.

2.2 Introduction of legislative sentencing principles and factors for child sexual offences

In 2003 the *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) amended the *Penalties and Sentences Act* to introduce specific sentencing principles and factors to guide the court when sentencing an adult for an offence of a sexual nature committed against a child under 16 years. These added to the existing range of principles and factors in the *Penalties and Sentences Act* set out in ss 9(2),[32] (3) and (4).[33] The Council has been asked to consider what, if any, impact these amendments have had on sentencing practices and the sentences imposed for child sexual offences.

According to the Explanatory Notes to the Bill, the additional principles and factors were introduced to provide 'a tougher sentencing regime'.[34] The then Attorney-General commented that the effect of this amendment would be to put on a statutory basis that the primary considerations for judges when sentencing offenders for child sexual offences should be 'the effect of the offence on the child, the need to protect the child and other children from the offender and the need to deter similar behaviour by other offenders'.[35]

The 2003 amendments also sought to exclude the principle of parsimony[36] applying to the sentencing of offenders convicted of a sexual offence committed in relation to a child under 16. This means the existing principles that a sentence of imprisonment should only be imposed as a last resort, and a sentence that allows the offender to stay in the community is preferable, do not apply to the sentencing of an offender for an offence of a sexual nature committed in relation to a child under 16 years.[37]

Ten factors were introduced to which a court must have primary regard when sentencing an offender for any offence of a sexual nature committed in relation to a child under 16:

(a) the effect of the offence on the child
(b) the age of the child
(c) the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another
(d) the need to protect the child, or other children, from the risk of the offender re-offending
(e) the need to deter similar behaviour by other offenders to protect children
(f) the prospects of rehabilitation, including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community
(g) the offender's antecedents,[38] age and character
(h) any remorse or lack of remorse of the offender
(i) any medical, psychiatric, prison or other relevant report relating to the offender, and
(j) anything else about the safety of children under 16 the sentencing court considers relevant.

The factors are not categorised as aggravating or mitigating and their introduction does not prevent the court from taking into account the existing sentencing factors set out in s 9(2), including 'any other relevant circumstance'.[39]

In practice, the 2003 amendments may simply have reinforced much of the existing guidance in case law and the purposes, principles and factors already set out in the *Penalties and Sentences Act*. For example, the Court of Appeal in *R v Pham* noted: 'this Court has clearly indicated that, other than in exceptional circumstances, those who indecently assault or otherwise deal with children should be sent to jail'.[40]

The Council has also been asked to consider the further amendments made to the *Penalties and Sentences Act* in 2010 by the *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld). A new legislative principle was introduced in s 9(5)(b) of the *Penalties and Sentences Act*

that 'the offender must serve an actual term of imprisonment unless there are exceptional circumstances'. This principle reflected earlier Queensland Court of Appeal authority (as already identified previously from the case of *R v Pham*) and according to the former Attorney-General Cameron Dick, the principle was also introduced to send a clear message to offenders about community expectations.[41]

An actual term of imprisonment is defined to mean a term of imprisonment served wholly or partially in a corrective service facility (for example, a prison or a work camp).[42] It therefore includes a partially suspended sentence which is a term of imprisonment partly served in prison, with the remainder of the term suspended for a set period,[43] but excludes forms of custodial orders, such as intensive correction orders and wholly suspended sentences that do not require an offender to serve actual prison time.

To assist the court to determine what constitutes 'exceptional circumstances' and allow for cases involving offences committed by a young person in a relationship with the complainant, s 9(5A) was included which provides that 'in deciding whether there are exceptional circumstances, a court may have regard to the closeness in age between the offender and the child'. Apart from this statement, no further guidance is provided in the legislation on how a court is to approach the question of what constitutes 'exceptional circumstances'.

The absence of a legislative definition of 'exceptional circumstances' was deliberate; the Bill's Explanatory Notes state that the term was one with which 'the courts are familiar and the circumstances that may amount to "exceptional" are best assessed on a case-by-case basis'.[44] Reference was also made to the observations of Chief Justice de Jersey in *R v Quick; Ex parte Attorney-General*[45] that, in considering the circumstances of the case and what exceptional circumstances means 'the Macquarie Dictionary offers unusual and extraordinary' and to comments of Chesterman J in *R v Quick* that 'to qualify as "exceptional" the circumstances of the offender or the offence must be properly identifiable as truly out of the ordinary, or extraordinary'.[46]

The 2010 amendments also introduced a general sentencing principle that, when sentencing an offender with previous convictions, the court must treat the previous convictions as an aggravating factor when the court considers it reasonable to do so, having regard to:

- the nature of the previous convictions and its relevance to the current offence, and
- the time that has elapsed since the previous convictions.[47]

The aim of this amendment was said to be that 'the court will increase the penalty to be given to the offender within the established common law sentencing range for that conduct. The penalty must, however, still be proportionate to the gravity of the current offence.'[48]

The Council's findings on the impacts of the 2003 and 2010 legislative reforms are presented in Chapter 3 of this report.

2.3 Other sentencing guidance

In addition to the legislative purposes and principles the court must consider, sentencing guidance is provided by the maximum penalty for the offence, comparative sentences and appeal court decisions, statistical information and sentencing manuals. These provide sentencing courts with guidance on factors and principles to be applied in sentencing, including the relevance of particular aggravating and mitigating factors, as well as accepted sentencing ranges and practices. Guidance can also be provided through sentencing bench books and guideline judgments, but these are not yet in use in Queensland.

Comparative sentences

Typically, courts approach the task of sentencing by referring to cases of a similar nature when available (for example, involving the same offence and some common factual and case

circumstances) that have been previously decided. These comparators provide courts with guidance on the appropriate penalty for conduct based on previous sentencing decisions, contributing to consistency in the sentencing process.

The consideration of comparative sentences is part of the framework of the law applied by the courts; the process relies on the prosecution and defence identifying appropriate comparable cases and arguing for their application and their distinction.

Appellate court decisions

Appellate courts regularly provide commentary in the course of hearing appeals against sentence that operates to provide courts of first instance with sentencing guidance.

There is a substantial body of appellate court authority in Queensland which sets out the factors which are generally considered aggravating and mitigating for offenders convicted of child sexual offences, as well as the established ranges and sentencing practices for cases sharing particular characteristics. Relevant Court of Appeal decisions in relation to the offences and sentencing factors under review are explored in the following chapters of this report.

Guideline judgments

Guideline judgments have been described as:

> … a judgment of an appeal court which goes beyond the facts of a particular case before the court and suggests a starting point or range for dealing with variations of certain types of offences.[49]

Guideline judgments are not aimed at directing sentencers in the lower courts to make certain decisions, but aim to promote consistency in decision-making by providing guidelines to assist decision-makers in the future make 'like decisions on like cases'.[50]

Though the Queensland Court of Appeal provides guidelines for sentencing courts to follow through its appeals decisions, in 2010 the Queensland Court of Appeal was provided with a formal power to issue guideline judgments by the *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld), which inserted a new part 2A into the *Penalties and Sentences Act*.

Because the power to issue formal guideline judgments has only recently been conferred on the Queensland Court of Appeal, it is not yet clear how (if at all) guideline judgments will be used in Queensland.

To date, the NSW Court of Criminal Appeal has made the most use of guideline judgments in Australia; however, the last formal guideline was issued by the NSW Court of Criminal Appeal in September 2004.[51] The Victorian Court of Appeal has also had formal power to issue a guideline judgment prescribed in legislation since 2003, however none have been issued.[52]

Statistical information on sentencing

In Queensland, statistical information on sentencing outcomes is provided by an internet-based legal research tool, the Queensland Sentencing Information Service (QSIS) which assists courts achieve consistency in sentencing.

Sentencing bench books and manuals

Bench books are resources made available to assist the sentencing court on relevant topics. There is a publicly accessible bench book in Queensland for the Supreme and District Courts, but it does not include information on sentencing.[53]

At a national level, the Australasian Institute of Judicial Administration has published a *Solution-Focused Judging Bench Book*[54] and a *Bench Book for Children Giving Evidence in Australian Courts*.[55] Although neither deals directly with issues of sentencing for child sexual offences, they include substantial information on the harm caused by sexual offending against children.

Other jurisdictions, such as NSW and Victoria, provide detailed sentencing resources that are publicly accessible online.

The Judicial Commission of NSW has developed a Sentencing Bench Book that is a looseleaf and internet-based research tool which provides information on sentencing law, including relevant legislation, procedural and evidentiary matters and case law specific to NSW.[56] Specific parts of the bench book deal with different offence categories; the section on sexual offences against children includes commentary drawn from decisions of the NSW Court of Criminal Appeal on perceived changing community attitudes to child sexual assault and the harm judged as being caused by these offences.

The Judicial Commission has also released a *Sexual Assault Handbook* that includes key steps and factors a NSW court must consider in sentencing an offender for a sexual offence as a form of 'sentencing template'.[57]

In Victoria, the Judicial College has developed a comprehensive sentencing manual as a resource.[58] It provides information on recent cases, a monthly review of cases, sentence overviews, current issues in sentencing, a guide to maximum penalties, a guide to legislative changes and recent updates.

Queensland does have similar sentencing information resources, but these are subscription-based. For example, the *Queensland Sentencing Manual* is available as a looseleaf or online subscription service.[59] This manual provides information on the *Penalties and Sentences Act* and common law principles of sentencing, including relevant case law.

Sentencing information is also provided in other looseleaf and online subscription services, such as *Carters Criminal Law of Queensland*,[60] *Summary Offences Law and Practice Queensland*,[61] and *Cross on Evidence*.[62]

Other forms of sentencing guidelines

In some jurisdictions, such as the United Kingdom, formal sentencing guidelines have been developed for use by the courts outside the context of appeals against sentence. Unlike guideline judgments, they are often developed and issued by a body independent of the courts and, in the case of the guidelines developed for use in England and Wales, there is a legislative requirement that courts must follow them.[63]

The UK guidelines are detailed sentencing guidelines developed and published by the Sentencing Council for England and Wales and its predecessor, the Sentencing Guidelines Council. Those issued to date provide a structured approach to courts in sentencing for specific offences, including sexual offences.[64] They also outline factors that impact on sentencing generally, such as assessing different levels of offence seriousness and reductions for a guilty plea.

The Office of the Council has advised that the sexual offences guideline is currently under review to determine whether amendments are required in response to changes in the nature of offending behaviour, and concerns that greater attention should be paid to victim harm and the offender's culpability rather than the nature of the activity.[65]

2.4 Queensland sentencing orders

The *Penalties and Sentences Act* provides for a range of custodial and non-custodial sentencing orders that can be made when sentencing an offender.[66] Some of these orders also include community supervision.[67] The Council explores the use of these orders for child sexual offences and how sentencing patterns have changed over time in Chapter 3 of this report.

In sentencing an adult offender for a sexual offence committed in relation to a child under 16, the court must sentence the offender to serve a term of actual imprisonment unless there are exceptional circumstances. Provided the term of imprisonment imposed is 5 years or less, it may be partially suspended. Courts must also have regard to the maximum penalty for the offence. Within these parameters, courts have discretion when sentencing an offender to impose a sentence they consider appropriate in all the circumstances.

With the exception of murder, Queensland does not have mandatory sentencing laws that require a certain penalty to be imposed for serious offences.

Pursuant to the serious violent offence provisions in part 9A of the *Penalties and Sentences Act*, in certain circumstances an offender may be required to serve a minimum of 80 per cent of their imprisonment term (or 15 years, whichever is the lesser) before being eligible for parole. In instances where an offender is sentenced to 10 years or more imprisonment for a qualifying offence (which includes a child sexual offence),[68] a court must declare the offender convicted of a serious violent offence, which triggers the minimum 80 per cent (or 15 years imprisonment) parole eligibility;[69] where the offender is sentenced to more than 5 years but less than 10 years imprisonment, the court may declare the offender convicted of a serious violent offence, thereby requiring the offender to serve a minimum of 80 per cent of their imprisonment term before being eligible to apply for release on parole.[70]

Section 156A of the *Penalties and Sentences Act* requires a court in sentencing an offender for certain serious violent offences (which include child sexual offences) to order any sentence of imprisonment to be served cumulatively with any other term of imprisonment the offender is liable to serve if the offence was committed in certain circumstances (such as while the offender was serving a term of imprisonment or while on parole).

Part 10 of the *Penalties and Sentences Act* provides the court with the power to impose an indefinite sentence for certain offences, including some child sexual offences.[71] This power may be exercised in circumstances where the court is satisfied that the offender is a serious danger to the community,[72] and the court must take into account a range of factors when making this assessment.[73]

Court-ordered parole

Court-ordered parole provisions were introduced into the *Penalties and Sentences Act* in 2006[74] to provide the court with the ability, in certain circumstances, to set a parole release date or a parole eligibility date.

The introduction of court-ordered parole allows a sentencing court to set a parole release date for certain offences for which the sentence is a term of imprisonment of 3 years or less; however, this does not apply when sentencing an offender for a sexual offence or a serious violent offence.[75] When sentencing an offender for a sexual offence, a court has the power to set only a parole eligibility date, not a parole release date.[76] Courts generally exercise their discretion to set a parole eligibility date, and in some cases are required to do so.[77] However, if this discretion is not exercised, the offender is able to apply for parole after serving 50 per cent of their sentence.[78]

The rationale for excluding sexual offences from court-ordered parole was that '[t]hese types of prisoners pose a serious risk to the community and no matter how long or short their sentence is they will either have to serve their full term in jail, or be deemed suitable by a parole board before being released.'[79]

The Law Reform Amendment Bill 2011 (Qld), currently before the Queensland Parliament,[80] proposes the introduction of a new sentencing regime of minimum standard non-parole periods for serious offences of violence and sexual offences. Should the amendments be passed, they will require an offender convicted of a serious offence (which includes child sexual offences) and sentenced to imprisonment of 5 years or more, but less than 10 years, to serve 65 per cent of the term of imprisonment before being eligible to apply for parole, unless the court is of the opinion it would be unjust to do so.

2.5 Post-sentence management

A separate post-sentence detention and supervision scheme exists for offenders serving a period of imprisonment for a serious sexual offence (including an offence of a sexual nature against children) under the *Dangerous Prisoners*

(Sexual Offenders) Act 2003 (Qld) (DPSOA).[81] This scheme is aimed at protecting the community by ensuring that offenders who pose a serious danger because of their risk of re-offending are either detained in custody or supervised in the community after the completion of their term of imprisonment.

At the Legal Issues Roundtable held by the Council in Brisbane, some participants raised concerns that detention under this scheme is a form of arbitrary detention contrary to article 9, paragraph 1, of the International Covenant on Civil and Political Rights, as was the finding of the United Nations Human Rights Committee in the matter of Fardon.[82] It was suggested that the current practice of orders being made during the last 6 months of the prisoner's sentence creates unfair uncertainty for offenders about their eventual release date, and should be rectified.

In addition to the requirements under the DPSOA, the personal details of offenders convicted of reportable child sexual offences must also be listed on the Australian National Child Offender Register (ANCOR). Offenders on this register are subject to ongoing reporting requirements under the *Child Protection (Offender Reporting) Act 2004* (Qld) and must keep police informed of their current whereabouts and other personal details, including address and employment details, internet use details, e-mail addresses and user names, car registration details and any affiliations with clubs that have children as members or involve children in their activities. Reporting obligations may apply for a period of between 4 years and life.

The *Child Protection (Offender Reporting) Act* provides two lists of offences that are 'reportable offences' (class 1 and class 2). All the offences listed in the Terms of Reference are class 1 reportable offences, with the exception of indecent treatment of a child under 16, which is a class 2 offence. An offender convicted of either a class 1 or a class 2 offence may become a reportable offender. There are some exceptions, including if no conviction was recorded,[83] or if the offence was a class 2 offence and the sentence did not include a term of imprisonment or a requirement that the offender be under supervision,[84] but the court has discretion to make a reporting order against the offender.

Under the *Child Protection (Offender Prohibition Order) Act 2008* (Qld), a form of civil order known as a prohibition order may be made against certain offenders convicted of child sexual offences to prohibit them from engaging in certain conduct, such as associating with, or contacting other sex offenders, being certain locations (such as near a school), living where children live, or engaging in certain types of employment.[85] The court must be satisfied that, having regard to the nature and pattern of conduct recently engaged in by the offender, they pose an unacceptable risk to the lives or sexual safety of children in the community and the making of the order will reduce this risk.[86] The conduct need not amount to a criminal offence. When a prohibition order is made, the respondent to the order is placed on the ANCOR register if they are not on the register already.

3 CURRENT SENTENCING PRACTICES AND THE IMPACT OF LEGISLATIVE REFORM

The Terms of Reference ask the Council to consider and report on three aspects of current sentencing practices for child sexual offences:

- current sentencing practices for offenders aged 17 years and over convicted of certain child sexual offences
- what, if any, impact legislative reform has had on sentencing practices and the sentences imposed for child sexual offences, and
- comparison of sentencing outcomes for sexual offences committed against children with sentencing outcomes for sexual offences committed against adults.

This chapter begins with a discussion of Reference offences and how they have changed over time. It then reports the findings of the Council's research addressing each of the three areas outlined above.

3.1 Overview of Reference offences and legislative reforms

Chapter 22 of the *Criminal Code* (Qld) contains a range of 'offences against morality', including laws that prohibit specific sexual conduct against adults and children. The Terms of Reference ask the Council to examine and report on the current sentencing practices for offenders aged 17 years and over convicted of the *Criminal Code* offences of unlawful sodomy (s 208), indecent treatment of a child under 16 (s 210), unlawful carnal knowledge (s 215), maintaining a sexual relationship with a child (s 229B), rape (s 349) and attempted rape (s 350). These offences have been termed 'Reference offences' for the purposes of analyses presented in this report.

The offences listed in the Terms of Reference can be committed by male or female offenders. The offence provisions are described in detail below and further information is provided in Appendix 5 of this report.

The maximum penalties for the offences listed in the Terms of Reference range from 14 years to life imprisonment. For the offences of indecent treatment of a child under 16, unlawful carnal knowledge and unlawful sodomy, each offence has aggravated forms which carry higher maximum penalties if any of the following circumstances apply:

- the child was under 12 at the time of the offence
- the offender had knowledge that the child was of lineal descent, or

- the child was under the offender's care at the time of the offence, or the offender was the child's legal guardian.

In addition, for the offence of unlawful sodomy, it is a circumstance of aggravation if the child has an impairment of the mind. In October 2011, a Bill was introduced into Parliament by the Honourable Paul Lucas MP, Attorney-General, Minister for Local Government and Special Minister of State to provide further aggravated forms of the offences of indecent treatment of a child under 16 and unlawful carnal knowledge based on whether the child has an impairment of the mind.[87] This Bill, if passed, would also introduce a new offence of 'grooming children under 16' into the *Criminal Code*.[88] This offence would target offenders who engage in the grooming of a child under 16 with the intent to facilitate the procurement of the child for sexual activity or to expose the child to any indecent matter. Depending on the circumstances of the offence, the maximum penalty that would apply to this proposed offence would be 5 or 10 years imprisonment.

Appendix 7 details the amendments to the *Criminal Code* that have occurred since 1989 for Reference offences. Discussion of a number of more recent amendments is included below.

Maintaining a sexual relationship with a child

Section 229B provides that it is an offence for an adult to maintain an unlawful relationship of a sexual nature with a child under a certain age. This offence aims to respond to the continued sexual abuse of a child over a period of time and is one of the most serious child sexual offences in the *Criminal Code*. The maximum penalty for this offence is life imprisonment. A person cannot be prosecuted for this offence without the consent of the Attorney-General or the Director of Public Prosecutions.[89] When providing the Council with this Reference, the Attorney-General expressed particular concern about 'situations where an adult has abused a child over a period of time by maintaining an ongoing sexual relationship with them'.[90]

To constitute the offence, the relationship must involve more than one unlawful sexual act over a period of time. An unlawful sexual act means an act that constitutes or would constitute an offence of a sexual nature. An offence of a sexual nature is a *Criminal Code* offence defined in sections 208 (unlawful sodomy), 210 (indecent treatment of a child under 16, with the exception of subsections 210(1)(e) or (f)), 215 (unlawful carnal knowledge), 222 (incest), 349 (rape), 350 (attempted rape) and 352 (sexual assault).[91]

The Explanatory Notes to the Bill introducing the current form of the offence state that one of the reasons for structuring the offence in this way is that 'persistent sexual abuse commonly results in the child being unable to distinguish between particular episodes of abuse, especially if the conduct is the same or similar on all occasions'.[92] Where there is insufficient information on which to proceed with each offence, but the child is able to give evidence of the sexual acts occurring, the evidence will go towards proving the maintaining offence.

For an offender to be charged with the offence of maintaining a sexual relationship with a child, the victim must be under the 'prescribed age'. What age is prescribed depends on the type of sexual conduct involved:

- if the conduct constitutes or would constitute the offence of unlawful sodomy, the victim must be under 18 years, and
- for all other sexual conduct, the victim must be under 16 years.[93]

The original form of this offence was introduced in 1989[94] and substantially amended in 2003 by the *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld). The 2003 amendments reduced the number of unlawful sexual acts the prosecution is required to prove as part of the maintaining period from three to one, and removed the requirement that members of the jury have to be satisfied that the same unlawful sexual acts occurred in the maintaining period before the accused could be found guilty of the maintaining offence.[95] The 2003 amendments also provided for one maximum penalty of life imprisonment

regardless of the type of conduct involved. Table 1 shows the changes to the maximum penalty since the introduction of the offence. Before 2003, different penalty subcategories existed depending on the circumstances of the offence (see Appendix 7 for further detail).

Table 1: Maximum penalties for maintaining a sexual relationship with a child (*Criminal Code* (Qld) s 229B), 1989 to current

Year	1989[96]	1997[97]	2003[98]
Penalty (in years)	7 14 Life	14 Life	Life

Following the 2003 amendments, for an adult to be convicted of the offence, the jury must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship with the child involving unlawful sexual acts existed.[99] However, in relation to the unlawful sexual acts that occurred during the relationship, section 229B(4) provides that:

- the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act was charged as a separate offence (for example, where a sexual act occurred multiple times, the prosecution does not have to allege each individual act)[100]
- the jury is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence,[101] and
- all members of the jury are not required to be satisfied about the same unlawful sexual acts.[102]

Where the offender pleads guilty to the offence, in most instances, the prosecution will provide a schedule of facts outlining the offending conduct. The offender will be sentenced on this basis, with the schedule of facts providing the court with guidance to determine offence seriousness and offender culpability. However, in cases that proceed to trial and the offender is found guilty of the offence, difficulties may arise in determining the basis on which the offender should be sentenced when the maintaining offence consists of a large number of sexual acts involving conduct of different seriousness, as these sexual acts may not be identified as individual charges.

The 2004 Court of Appeal decision of *R v SAG*,[103] listed a range of factors that can aggravate or mitigate a sentence imposed for the offence of maintaining a sexual relationship with a child. The Court identified factors that may increase the severity of the sentence, including if penile rape occurred or if there was unlawful carnal knowledge of the victim during the course of the relationship.[104] Where such acts are not identified as individual charges, the sentencing court must make a finding of fact as to whether and how often such acts occurred during the course of the unlawful sexual relationship.[105]

The Court of Appeal has recognised this concern, stating that 'jurors could be unanimously satisfied that the accused maintained an unlawful sexual relationship with the child involving more than one unlawful sexual act whilst at the same time disagreeing about which two or more of numerous alleged unlawful sexual acts were proved beyond reasonable doubt',[106] and further:

> Because jurors might differ about which unlawful sexual acts are proved and which are not, a verdict that the defendant is guilty of an offence against s 229B may leave unresolved some matters that bear significantly upon the defendant's culpability, such as the frequency and seriousness of the unlawful sexual acts involved in the unlawful sexual relationship. In the result, trial judges may be required to make significant findings of fact in the sentencing process.[107]

Unlawful sodomy

The offence of unlawful sodomy (s 208), provides that a person who does, or attempts to do, any of the following commits a crime:

- sodomises a person under 18 years
- permits a male person under 18 years to sodomise him or her
- sodomises a person with an impairment of the mind, or
- permits a person with an impairment of the mind to sodomise him or her.

Consent is not an element of the offence.

Before 1 July 1997, the offence of unlawful sodomy was divided into two offences: s 208 (unlawful sodomy) and s 209 (attempted sodomy). These offences were merged into one offence in December 2008.[108]

The maximum penalties for unlawful sodomy and the previous offence of attempted sodomy were amended over time to provide for different maximum penalties depending on the age of the victim, whether the victim has an impairment of the mind and the relationship between the victim and the offender. Tables 2 and 3 show the changes in the maximum penalty over time and for different aggravated forms of the offence (see Appendix 7 for further detail). The maximum penalty for unlawful sodomy is currently 14 years or life imprisonment, depending on the circumstances of the offence, and a maximum of 14 years imprisonment for an attempt to commit unlawful sodomy.

Table 2: Maximum penalties for unlawful sodomy (*Criminal Code* (Qld) s 208), 1989 to current

Year	1989[109]	1997[110]
Penalty (in years)	7 14 Life	14 Life

Table 3: Maximum penalties for attempted unlawful sodomy (*Criminal Code* (Qld) s 209 – now repealed), 1989 to 2008

Year	1989[111]	1997[112]	2008[113]
Penalty (in years)	3 7 14	7 14	14

Indecent treatment of a child under 16

The offence of indecent treatment of a child under 16 (s 210), prohibits a range of contact and non-contact sexual conduct with a child under the age of 16 years. It is unlawful for a person to:

- unlawfully or indecently deal with a child under 16
- unlawfully procure a child to commit an indecent act
- unlawfully permit himself or herself to be indecently dealt with by a child under the age of 16 years
- wilfully and unlawfully expose a child under the age of 16 years to an indecent act by the offender or any other person
- without legitimate reason, wilfully expose a child under the age of 16 years to any indecent object, or any indecent film, videotape, picture, photograph, printed or written matter, or
- without legitimate reason, take any indecent photograph or record, by any device, or any indecent visual image of a child under 16 years.

Consent is not an element of the offence.

The prosecution must prove that the defendant's dealing with the complainant was 'indecent'. In determining whether the conduct is indecent, the ordinary and popular meaning of the word 'indecent' is considered as well as the time, place and circumstances of the conduct.[114] The Court of Appeal has stated that the conduct must involve a sexual connotation.[115]

Historically the offence was divided into two offences specific to the gender of the victim, and in 1989 these offences were merged into one. The conduct prohibited by the offence has remained substantially the same since the 1989 amendments. However, there have been increases in the maximum penalty, which are identified in Table 4 below, including for the aggravated forms of the offence (see Appendix 7 for further detail). The last amendment to the penalty provisions occurred in 2003, increasing the maximum penalties from 10 to 14 years and from 14 to 20 years for some forms of the offence.[116] The Terms of Reference make specific mention of this amendment and ask the Council to consider what impact, if any, this has had on sentencing practices and sentences imposed by the courts.

Table 4: Maximum penalties for indecent treatment of a child under 16 (*Criminal Code* (Qld) s 210), 1989 to current

Year	1989[117]	1997[118]	2003[119]
Penalty (in years)	5 10	10 14	14 20

The types of conduct that falls within the offence of indecent treatment of a child under 16 based on previous cases include acts such as:

- briefly placing a hand on the breast of a 12-year-old girl[120]
- encouraging a 14-year-old step-daughter to use a vibrator while the offender watched[121]
- exposing a 4-year-old to the offender's penis and getting her to touch it[122]
- masturbating in front of a 13-year-old girl[123]
- allowing a child aged 15 years and 11 months to take away a pornographic magazine depicting homosexual and heterosexual intercourse and male/female bondage,[124] and
- taking indecent photographs of two girls, aged 14 and 15 years, undressing.[125]

Unlawful carnal knowledge

The offence of unlawful carnal knowledge (s 215), prohibits a person having sexual intercourse with a child under the age of 16 years.[126] Consent is not an element of the offence.

Table 5 shows the amendments to the maximum penalty provisions. As for indecent treatment of a child under 16, different maximum penalties have applied to the offence depending on the circumstances in which it has been committed (see Appendix 7 for further detail). The last amendments to the maximum penalties for the offence occurred in 1997,[127] increasing the maximum penalties for some forms of the offence from 5 to 14 years and from 10 to 14 years. The maximum penalty of life imprisonment introduced in 1989,[128] , continues to apply for offences involving a child under the age of 12 years, or if the child is not the lineal descendant of the offender but the offender was the child's guardian or, for the time being, the child was under the offender's care.

Table 5: Maximum penalties for unlawful carnal knowledge (*Criminal Code* (Qld) s 215), 1989 to current

Year	1989[129]	1997[130]
Penalty (in years)	5 10 14 Life	14 Life

Rape and attempted rape

The offences of rape (s 349) and attempted rape (s 350) can be committed against a person of any age. The offences occur if a person does (in the case of rape) or attempts to (for attempted rape):

- have sexual intercourse with or of another person without the other person's consent
- penetrate the vulva, vagina or anus of another person to any extent with a thing or part of the person's body that is not a penis without the other person's consent, or
- penetrate the mouth of the other person to any extent with the person's penis without the other person's consent.

The offence of rape is complete where there is penetration to any extent.

Consent is an element of the offence. Section 349(3) of the *Criminal Code* specifically provides that a child under the age of 12 years is incapable of giving consent.

Since 1989, the maximum penalties for rape (life imprisonment) and attempted rape (14 years imprisonment) have not changed.

3.2 Current sentencing practices for child sexual offences

In November 2011 the Council released a Research Paper, *Sentencing of Child Sexual Offences in Queensland: Research Paper*, which presented information on the current sentencing practices for child sexual offences to respond to the Terms of Reference.[131]

The data presented in the Council's Research Paper and this report provide a simplified picture of a complex system and should be interpreted with caution given their limitations. For example, the data are based on an analysis of matters by the most serious offence of which the offender was charged or convicted (that is, the offence receiving the most serious penalty), and sentencing outcomes reported refer to averages only. Consequently, they provide only a partial representation of sentencing outcomes in Queensland for these offences. These limitations are outlined in more detail in Appendix 4. In particular, courts data do not enable an accurate analysis of sentencing outcomes for rape and attempted rape offences based on whether the victim was an adult or a child. It is possible that sentencing outcome information for these offences considered in aggregate may be skewed due to the different offence profile of offences committed against children when compared with those committed against adults. For example, rape offences against adults may be more likely to involve the use of actual violence or to be perpetrated by offenders with previous convictions for sexual offences and other offences of violence than those involving a child victim. However, further analysis would be required to determine if this is the case.

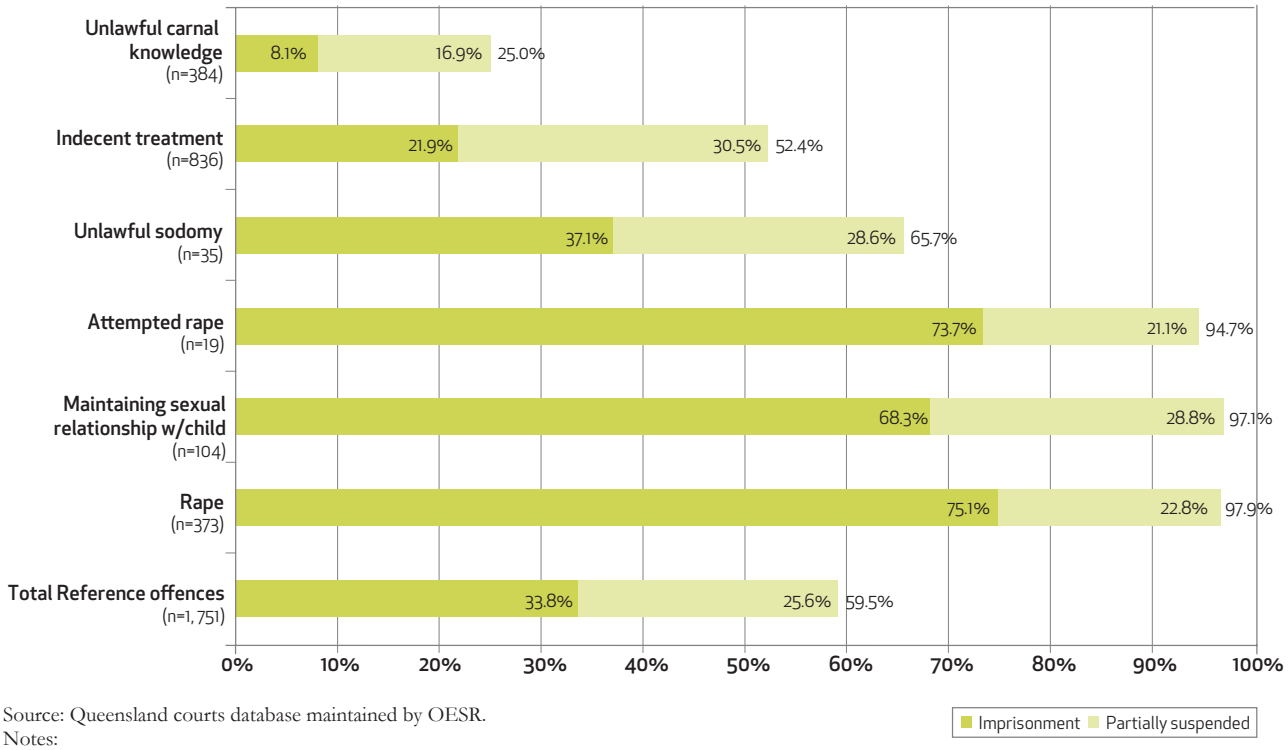
The Council's Research Paper reported that, across all people charged with a most serious offence listed in the Terms of Reference, almost half were charged with indecent treatment of a child under 16 (47%). Those charged with a most serious offence of rape comprised the next largest offence category (31%), while unlawful carnal knowledge represented 12 per cent of those charged with a Reference offence, maintaining a sexual relationship with a child represented 7 per cent of those charged and unlawful sodomy represented 2 per cent of those charged. The smallest offence category was attempted rape, with only 1 per cent of those being charged with this offence.

Rates of conviction for Reference offences are discussed in section 3.3 of this report.

Of those offenders sentenced for a child sexual offence listed in the Terms of Reference, the types of sentences varied from offence to offence. Figure 1 shows the proportion of offenders receiving an actual immediate term of imprisonment (either immediate imprisonment or a partially suspended sentence). About 95 per cent of offenders sentenced for rape, maintaining a sexual relationship with a child and attempted rape received an actual term of imprisonment; this compares with 66 per cent of those sentenced for unlawful sodomy, 52 per cent of those sentenced for indecent treatment of a child under 16 and 25 per cent sentenced for unlawful carnal knowledge.

These sentencing outcomes do not take into account the outcomes of any sentencing appeals and therefore should be treated with caution.

Figure 1: Proportion of Reference offenders sentenced to imprisonment or a partially suspended sentence as their most serious penalty, Queensland courts, 2006–10[1, 2, 3]

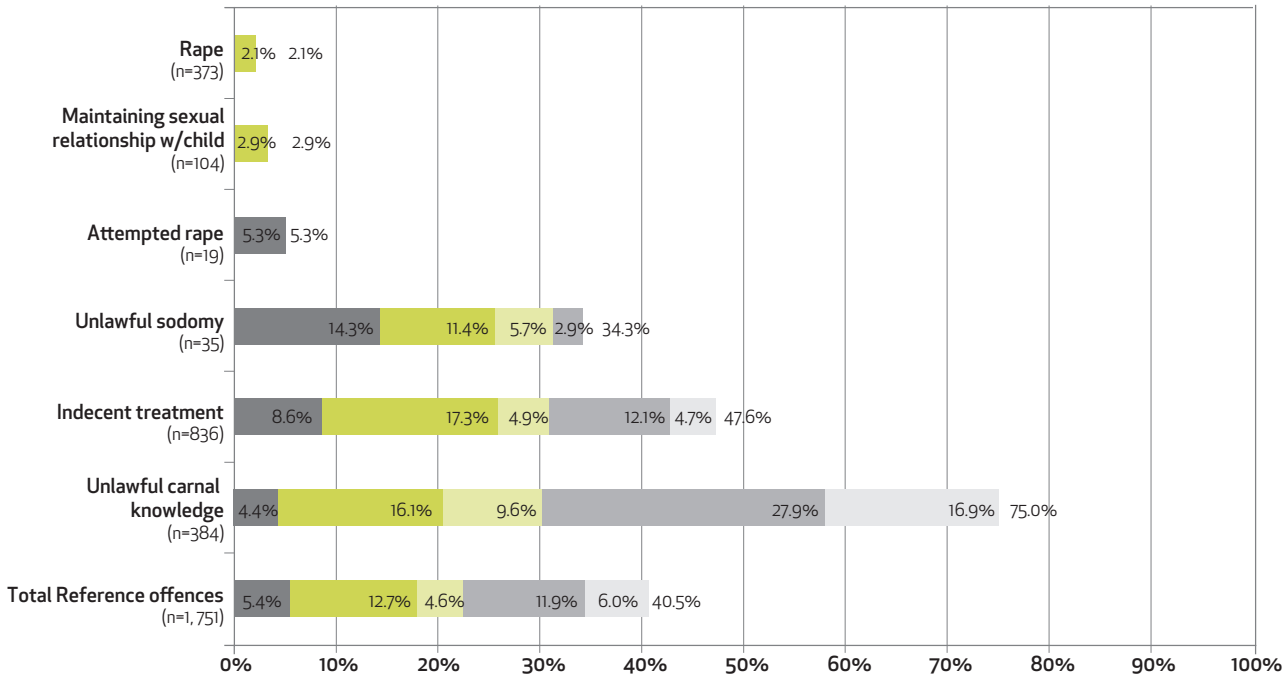


Source: Queensland courts database maintained by OESR.

Notes:

1. Reference offenders are offenders sentenced with a Reference offence as their most serious offence.
2. Indecent treatment includes all subcategories of this offence category. This means that the overall sentence outcomes for all subcategories of 'indecent treatment' are shown.
3. Rape and attempted rape includes offences committed against both adults and children.

Figure 2: Proportion of Reference offenders not sentenced to imprisonment or a partially suspended sentence as their most serious penalty, Queensland courts, 2006–10[1, 2, 3, 4]



Source: Queensland courts database maintained by OESR.

Notes:

1. Reference offenders are offenders sentenced with a Reference offence as their most serious offence.
2. 'Other' includes fines, good behaviour bonds, restitution orders and recognisance orders.
3. Indecent treatment includes all subcategories of this offence category. This means the overall sentence outcomes for all subcategories of indecent treatment are shown.
4. Rape and attempted rape include offences committed against both adults and children.

Figure 2 shows the range of other sentencing orders imposed for offenders sentenced for a Reference offence. It shows that of offenders who received a sentence other than actual immediate imprisonment who were sentenced for rape or maintaining a sexual relationship with a child, all received a wholly suspended sentence of imprisonment, while offenders sentenced for attempted rape who did not receive a term of actual immediate imprisonment received an intensive correction order. An intensive correction order is a prison sentence of up to 12 months served in the community which requires the offender to comply with strict requirements, including attending programs and performing community service for up to 12 hours a week.[132]

Other offences also attracted a range of other sentencing orders such as a community service order, probation or other (including fines, good behaviour bonds, restitution orders and recognisance orders).

Table 6 shows the average sentence length associated with each Reference offence for the period 2006–10. The highest average length of imprisonment was for offenders sentenced for rape (6.5 years), followed by maintaining a sexual relationship with a child and unlawful sodomy (6 years). The lowest average sentence lengths for imprisonment were for unlawful carnal knowledge and indecent treatment of a child under 16 (1 year).

Table 6: Average sentence lengths for Reference offences by selected most serious penalty outcomes, Queensland courts, 2006–10[1, 2]

Reference offence	Imprisonment		Partially suspended sentence[3]		Wholly suspended sentence		Intensive correction order		Community service order		Probation	
	(years)	(n)	(years)	(n)	(years)	(n)	(years)	(n)	(hours)	(n)	(years)	(n)
Unlawful sodomy	6.0	13	2.5	10	–	4	–	5	–	2	–	0
Unlawful carnal knowledge	1.0	31	1.5	65	0.8	62	1.0	17	150	37	1.0	107
Maintaining a sexual relationship with a child	6.0	71	3.5	30	–	3	–	0	–	0	–	0
Rape	6.5	279	3.0	85	–	8	–	0	–	0	–	0
Attempted rape	5.0	14	–	4	–	0	–	1	–	0	–	0
Indecent treatment[4]	1.0	183	1.3	255	0.8	145	1.0	72	120	41	1.5	101
Total Reference offences	4.0	591	1.5	449	0.8	222	1.0	95	150	80	1.5	208

Source: Queensland courts database maintained by OESR.

Notes:

1. The median was used to calculate average sentences because of the distribution of sentence lengths. This explains why the average wholly suspended sentence for unlawful carnal knowledge and indecent treatment of a child under 16 is not a whole year number.
2. The average sentence was not calculated for offence categories with an 'n' size of 10 or fewer.
3. Average partially suspended sentences refer to the whole period of imprisonment imposed – not the period of time served in custody.
4. Indecent treatment includes all subcategories of this offence category. This means that the overall average for all subcategories of indecent treatment of a child under 16 is provided.

Due to differences in sexual offence provisions and the conduct they capture, it has not been possible for the Council to determine how sentencing practices in Queensland compare with those in other Australian jurisdictions.

3.3 Impact of legislative reforms on sentencing outcomes

In addition to requesting a review of current sentencing patterns, the Terms of Reference ask the Council to determine the impact on sentencing practices of the amendments made by the *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) and the *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) to the *Penalties and Sentences Act*.

The *Sexual Offences (Protection of Children) Amendment Act* amendments included:

- for an offender convicted of an offence of a sexual nature committed in relation to a child under 16, the removal of the principles that:
  - imprisonment should only be imposed as a penalty of last resort, and
  - a sentence that allows the offender to stay in the community is preferable
- the inclusion of specific sentencing factors to which the court must have primary regard in sentencing an offender convicted of a sexual nature committed against a child under 16, and
- an increase in the maximum penalties for the offences of indecent treatment of a child under 16 and maintaining a sexual relationship with a child.

The *Penalties and Sentences (Sentencing Advisory Council) Amendment Act* introduced an additional legislative requirement that offenders sentenced for an offence of a sexual nature committed in relation to a child under 16 must serve an actual term of imprisonment unless there are 'exceptional circumstances'.[133] Following the 2010 amendments, courts are now also legislatively required by s 9(8) of the *Penalties and Sentences Act* to treat any previous conviction as an aggravating factor where the court considers it can reasonably be treated as such, having regard to the nature of the previous conviction and its relevance to the current offence, and the time that has elapsed since the conviction. However, the sentence imposed must not be disproportionate to the gravity of the offence for which the offender is being sentenced.[134]

The Council was not able to assess the impact of the 2010 amendments as insufficient time has elapsed to gauge the possible effects of these legislative changes on sentencing. However, this report discusses the application of the amendments directing courts to impose an 'actual term of imprisonment' from a sample of first-instance District Court sentencing remarks and relevant Court of Appeal decisions.

To examine the impacts, if any, of the 2003 amendments, the Council undertook a trend analyses of courts administrative data to explore whether there were changes in the proportion of offenders pleading guilty, conviction rates, the use of actual immediate imprisonment, and sentence lengths after 2003. The three-year moving average was used to describe longitudinal data trends, because the small number of cases for each Reference offence occurring for each year resulted in annual variations which obscured the longer trends. The three-year moving average is the average (mean) of the current year and two preceding years.[135]

Caution is required when interpreting the longitudinal data trends presented in this report. Small numbers reduce the reliability of data provided for some offence categories and it is not possible to isolate the impact of single legislative changes. Many factors may explain the sentencing trends described below, including legislative reform, changes in the characteristics of cases being finalised by the courts and changes in the way in which data are collected. Refer to Appendix 4 for data limitations.

The impact of the 2003 amendments on the rate of guilty pleas

The Council examined whether the 2003 amendments had any impact on guilty pleas where

a Reference offence was the most serious offence of which the offender was charged.

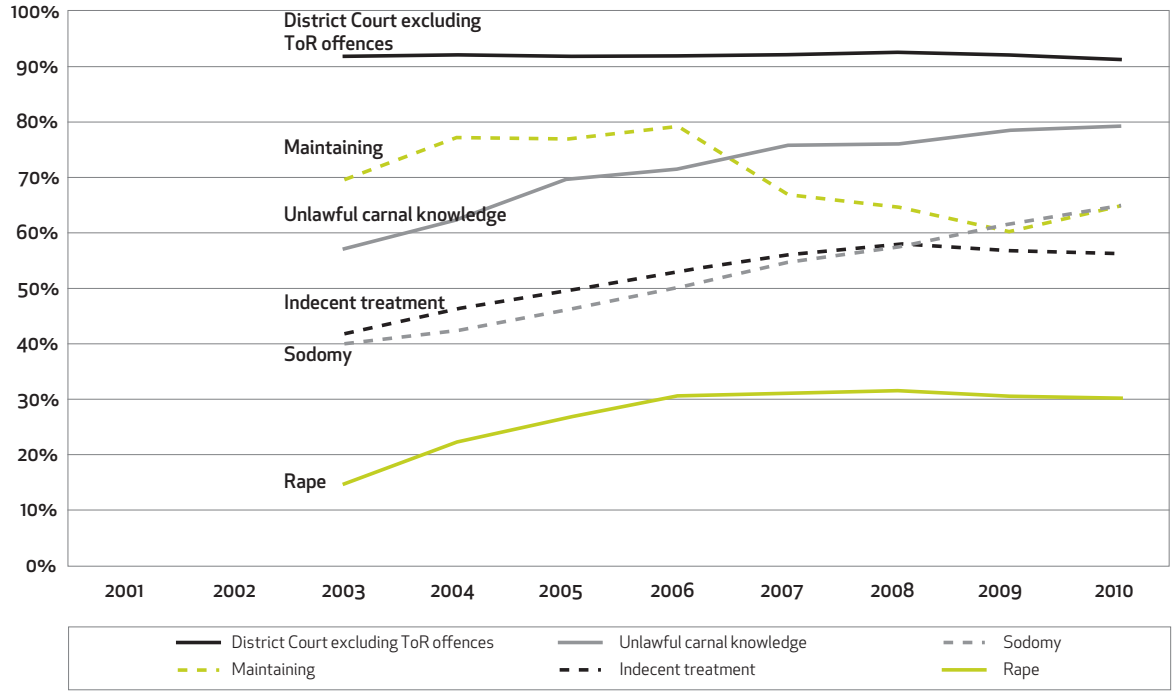
For the purpose of this analysis, a plea of guilty was defined as the formal entering of a guilty plea. All District Court plea outcomes, excluding those for Reference offences, were used as a comparison to determine trends for the District Court.

The trends in offenders pleading guilty in Figure 3 show that, other than for the offence of maintaining a sexual relationship with a child, there was an increase in the moving average for the proportion of those charged with a Reference offence who pleaded guilty. However, this increase began before the 2003 amendments, so is unlikely to be related. This general increase in the rate of offenders pleading guilty in the years adjacent to 2003 is in contrast to the rate of offenders pleading guilty for District Court non-Reference offences overall, which was stable during the period under analysis.

The decline in the number of offenders pleading guilty to maintaining a sexual relationship with a child may be partly explained by the 2003 amendment that increased the maximum penalty for some forms of the offence and the 2004 Court of Appeal decision in *R v SAG*,[136] which reviewed the range of sentences that could be expected for this type of offence.

Overall, rape had the lowest proportion of persons charged with this offence pleading guilty. This may be due partly to the inclusion of rape cases involving both adult and child victims in the rape category. People charged with committing rape offences against adults may be less likely to plead guilty (as the issue of consent may be contested) than people charged with rape offences involving children.

Figure 3: Three-year moving average showing the proportion of accused persons pleading guilty to Reference offences, Queensland courts, 2001–10[1, 2, 3]



Source: Queensland courts database maintained by OESR.
Notes:
1. The number of cases for this figure are presented in Table 1 of Appendix 8.
2. Rape includes offences committed against both adults and children.
3. Analysis excludes discontinued matters to avoid misrepresenting the proportion of accused persons pleading guilty. See Appendix 4 for further information on the issue of replacement indictments.

The impact of the 2003 amendments on conviction rates

The Council examined conviction rates for Reference offences over time.

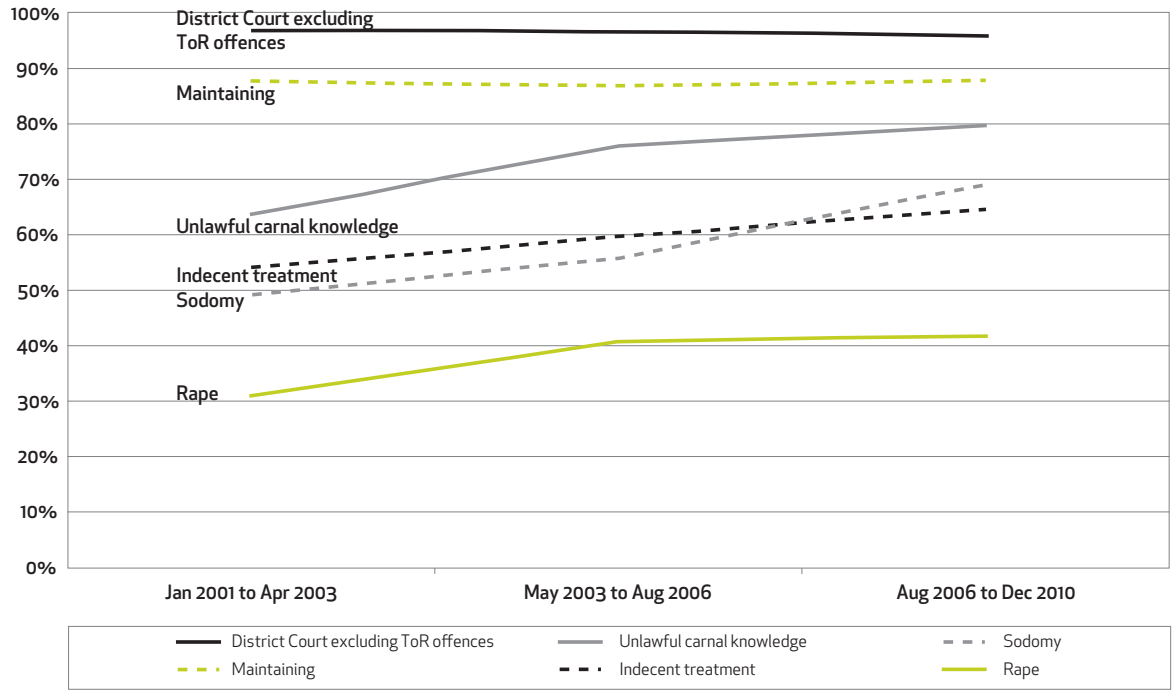
These analyses involved examining the proportion of those charged with Reference offences pleading guilty and the proportion of those who pleaded not guilty but were subsequently found guilty across three different time periods – January 2001 to April 2003, May 2003 to July 2006 and August 2006 to December 2010.

Figure 4 shows that conviction rates for most Reference offences increased after 2003. For example, the conviction rate for unlawful carnal knowledge increased from 64 per cent in the first reporting period to 76 per cent in the second reporting period and then again to 80 per cent in the third reporting period. The conviction rate for unlawful sodomy increased from 49 per cent in the first reporting period to 56 per cent in the second reporting period and 69 per cent in the third reporting period. The conviction rate for rape did not increase in the third reporting period, but increased from 31 per cent in the first reporting to 41 per cent in the second reporting period. This could be attributed to increases in the proportion of offenders pleading guilty to rape (see Figure 3).

The conviction rate for maintaining a sexual relationship with a child did not increase after 2003 despite significant legislative reforms to this offence. However, the conviction rate for this offence was higher than the conviction rate for other Reference offences before the introduction of legislative change. This stable conviction rate occurred in a context of decreasing pleas of guilty (see Figure 3).

These general upward trends for conviction rates for Reference offences are in contrast to the average rates for non-Reference offences finalised in the District Court, which were essentially flat across all three time periods.

Figure 4: Proportion of accused persons convicted of Reference offences across three comparison periods, Queensland courts, 2001–10[1, 2, 3, 4]



Source: Queensland courts database maintained by OESR.

Notes:

1. The number of cases for this figure are presented in Table 2 of Appendix 8.
2. Rape includes offences committed against both adults and children.
3. Persons convicted includes accused persons who pleaded guilty or were found guilty. Conviction rates are the proportion of accused persons who pleaded guilty or were found guilty out of accused persons pleading guilty or matters going to trial.
4. Analysis excludes discontinued matters to avoid misrepresenting the proportion of accused persons receiving a conviction. See Appendix 4 for further information on the issue of replacement indictments.

The impact of the 2003 amendments on the use of imprisonment

The 2003 amendments provided that the principles that a sentence of imprisonment should only be imposed as a last resort and a sentence that allows the offender to stay in the community is preferable do not apply when sentencing offenders for sexual offences committed against a child under 16. The Council examined courts data to determine if there was any change in the use of actual immediate imprisonment in the years after 2003. Chapter 2 of this report notes that there was already a well-established principle at common law that provided that, other than in exceptional circumstances, those who indecently assault or otherwise deal with children should be sent to prison.[137] In conducting this trend analysis, the Council therefore did not anticipate significant change in the use of actual immediate imprisonment for Reference offences by courts after the introduction of the 2003 amendments.

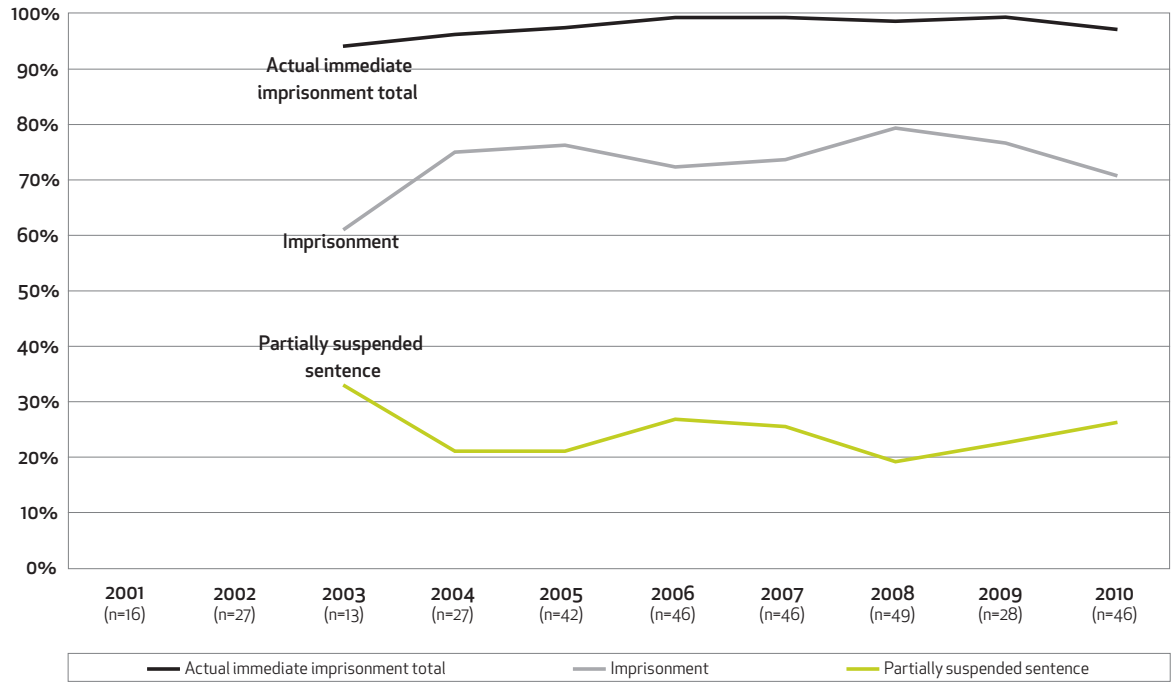
Definition of 'immediate imprisonment'

For the purposes of the analyses presented below, an actual 'immediate term of imprisonment' includes imprisonment and partially suspended sentences. A partially suspended sentence is a term of imprisonment partly served in prison, with the remainder of the term suspended for a set period.[138]

Maintaining a sexual relationship with a child

Based on the Council's analysis of sentencing trends, the 2003 amendments do not appear to have increased the use of an actual immediate term of imprisonment for offenders sentenced for maintaining a sexual relationship with a child as the most serious offence (see Figure 5). Nearly all offenders convicted of this offence as a most serious offence received an actual term of imprisonment (either imprisonment or a partially suspended sentence) and had done so before the introduction of the amendment.

Figure 5: Three-year moving average showing the proportion of offenders sentenced for maintaining a sexual relationship with a child (as most serious offence) receiving an actual immediate term of imprisonment, Queensland higher courts, 2001–10[1, 2]



Source: Queensland courts database maintained by OESR.
Notes:
1. This graph primarily represents District Court cases. However, 5 cases were sentenced in the Supreme Court.
2. Actual immediate imprisonment total is the sum of imprisonment and partially suspended sentences.

As shown in Figure 5, the Council's analysis shows that if the use of imprisonment increases, the use of partially suspended sentences decreases and vice versa.

Unlawful sodomy

Figure 6 shows there has been a decline in the use of actual immediate imprisonment for unlawful sodomy offences since 2005, indicating the 2003 amendments have not led to an increase in the use of actual immediate imprisonment. This decline, which flattens in 2008, was largely driven by a decline in the use of imprisonment, as the three-year moving average shows that the use of partially suspended sentences increased after 2004. In more recent years, this trend has reversed. Further analysis by the Council shows that the use of intensive correction orders increased between 2005 and 2007, while the use of imprisonment decreased.

Indecent treatment of a child under 16

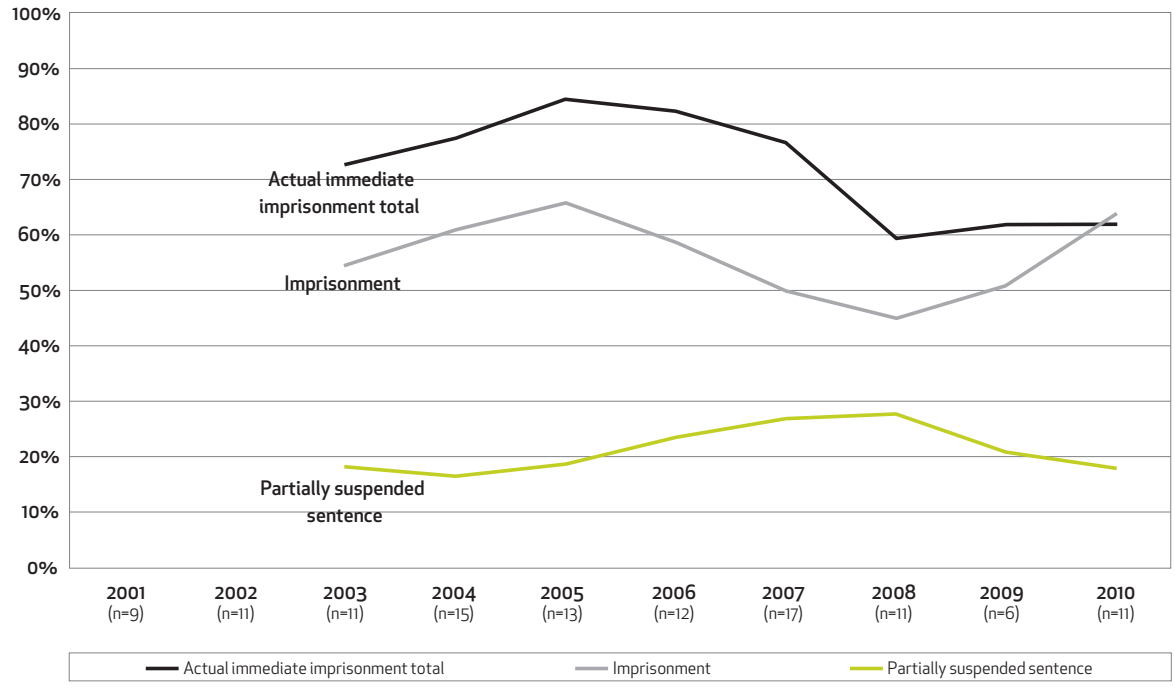
Higher courts

As shown in Figure 7, the proportion of offenders with a most serious offence of indecent treatment of a child under 16 sentenced in the higher courts who were given an actual immediate term of imprisonment does not appear to have increased after the 2003 amendments.

Although the use of an actual term of imprisonment has remained relatively stable, the use of imprisonment declined steadily after 2003, while the use of partially suspended sentences increased. This increase started before 2003, suggesting that changes in sentencing practices may be explained by factors other than the 2003 amendments.

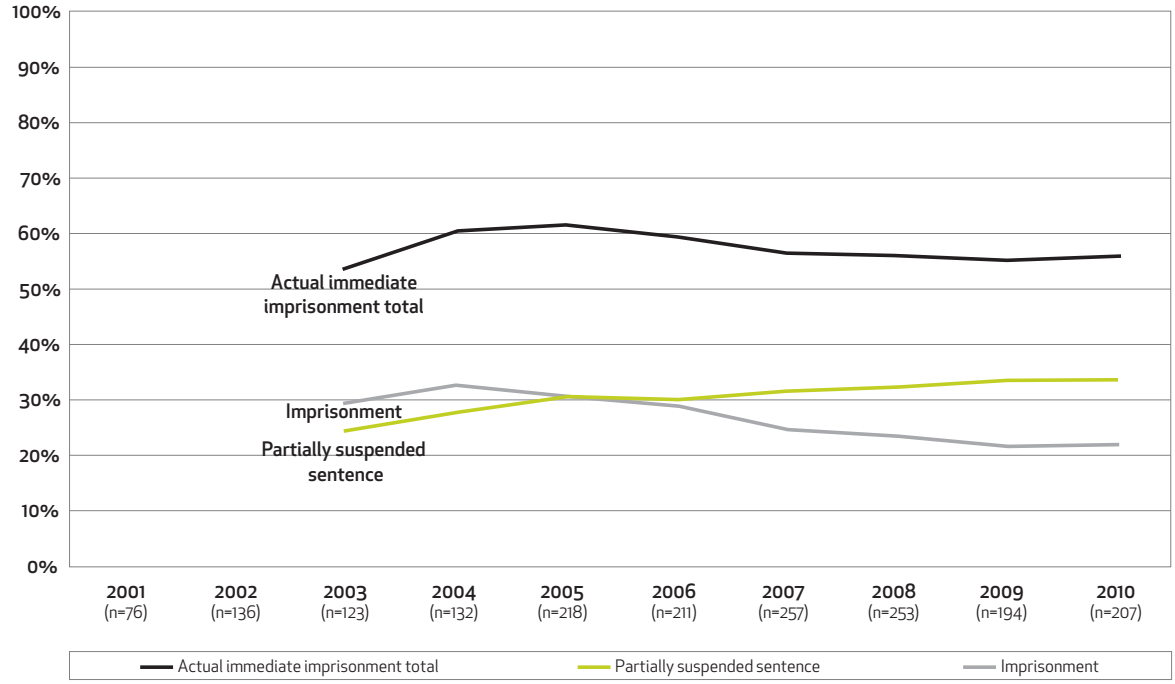
The three-year moving average for the rate of actual immediate imprisonment is consistent for the years immediately following 2003, after which there is a small decline.

Figure 6: Three year moving average showing the proportion of offenders sentenced for unlawful sodomy (as most serious offence) receiving an actual immediate term of imprisonment, Queensland higher courts, 2001–10[1, 2]



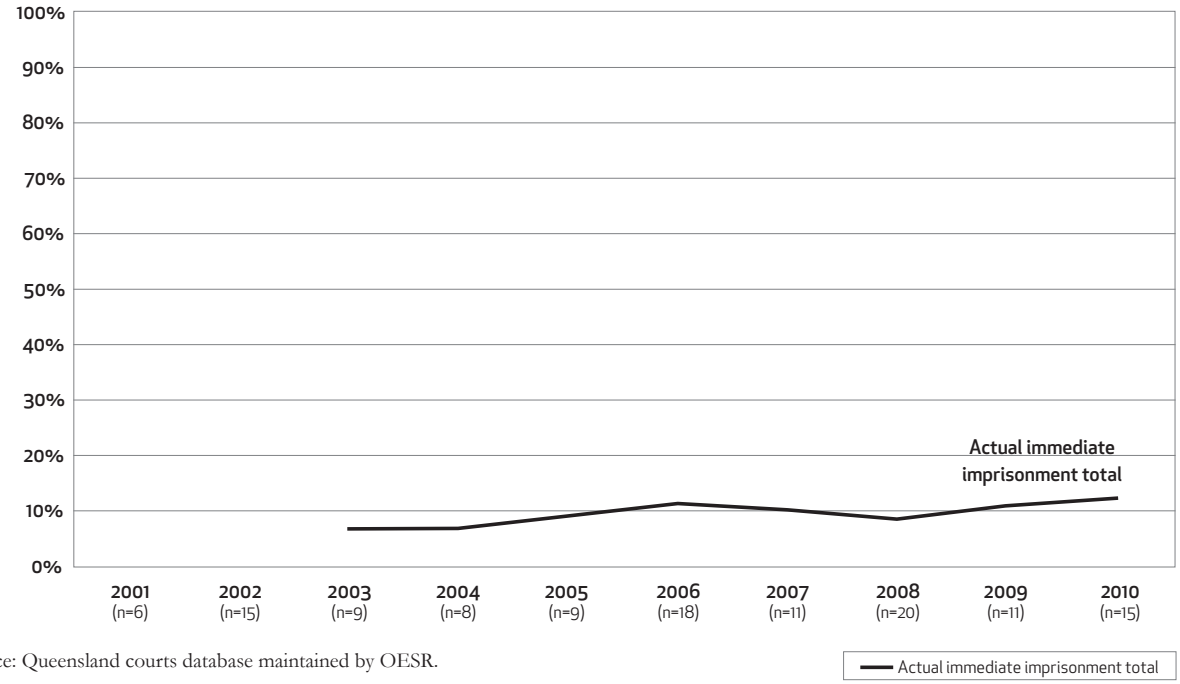
Source: Queensland courts database maintained by OESR.
Notes:
1. This graph primarily represents District Court cases. However, 5 cases were sentenced in the Supreme Court.
2. Actual immediate imprisonment total is the sum of imprisonment and partially suspended sentences.

Figure 7: Three-year moving average showing the proportion of offenders sentenced for indecent treatment of a child under 16 (as most serious offence) receiving an actual immediate term of imprisonment, Queensland higher courts, 2001–10[1, 2]



Source: Queensland courts database maintained by OESR.
Notes:
1. This graph primarily represents District Court cases. However, 8 cases were sentenced in the Supreme Court.
2. Actual immediate imprisonment total is the sum of imprisonment and partially suspended sentences.

Figure 8: Three-year moving average showing the proportion of offenders sentenced for indecent treatment of a child under 16 (as most serious offence) receiving an actual immediate term of imprisonment, Queensland Magistrates Court, 2001–10[1, 2]



Source: Queensland courts database maintained by OESR.
Notes:
1. Low numbers of cases did not allow the presentation of a trend line for imprisonment or partially suspended sentences.
2. Actual immediate imprisonment total is the sum of imprisonment and partially suspended sentences.

Magistrates Court

There is some evidence that an increase in the use of actual immediate imprisonment when sentencing for indecent treatment of a child under 16 in the Magistrates Court coincided with the 2003 amendments (see Figure 8). However, it is difficult to determine the situation immediately before and after 2003, as 2002 and 2006 are the only years adjacent to 2003 that have sufficient cases (10 or more) to justify analysis. This large proportion of missing data destabilises the three-year moving average. Despite this, the moving average does indicate an increase in the years immediately after 2003, followed by a somewhat consistent rate that varies by around 10 per cent. However, the large proportion of excluded years and the low numbers overall make this conclusion tentative.

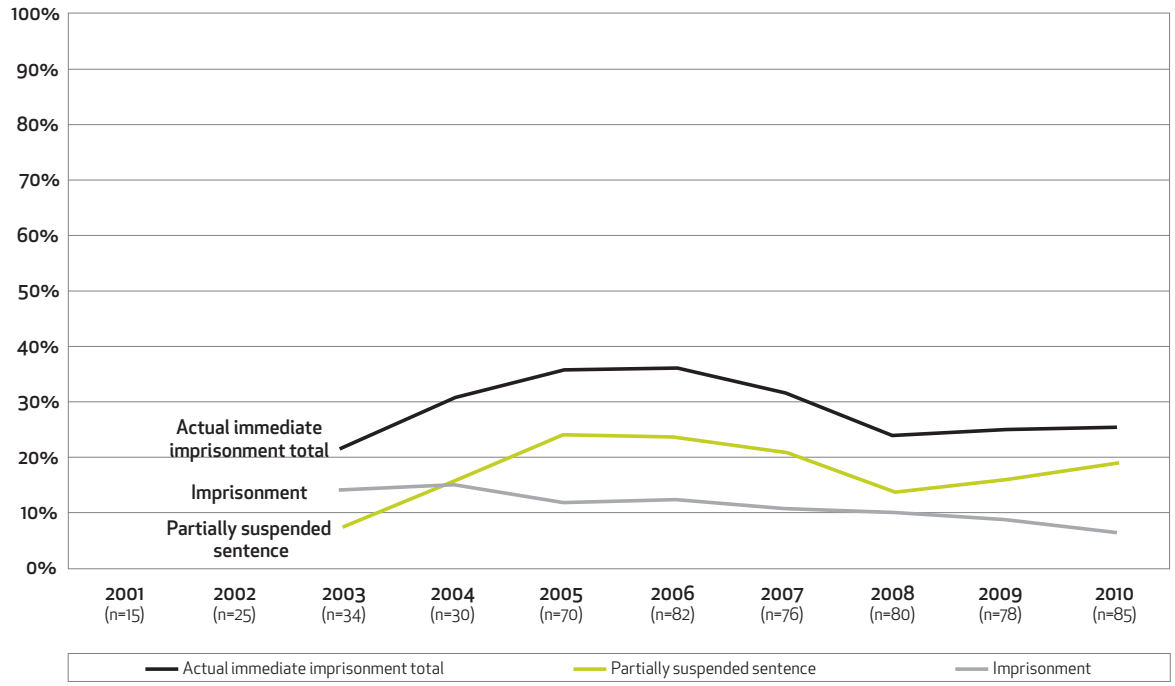
Unlawful carnal knowledge

Higher courts

The three-year moving average indicates that the 2003 amendments did not appear to increase the proportion of offenders with unlawful carnal knowledge as the most serious offence sentenced to an actual immediate term of imprisonment (see Figure 9). Although there was a small increase after 2003, further analysis showed that this increase began before that year. In addition, the increase did not continue, but sharply declined over the following years. It could therefore be concluded that the increase did not result from the 2003 amendments.

There was a general decline in the use of imprisonment after 2006 and partially suspended sentences after 2005. Further analysis shows that this decline coincided with an increased use of intensive correction orders and wholly suspended sentences.

Figure 9: Three-year moving average showing the proportion of offenders with unlawful carnal knowledge (as most serious offence) receiving an actual immediate term of imprisonment, Queensland higher courts, 2001–10[1, 2]



Source: Queensland courts database maintained by OESR.
Notes:
1. This graph primarily represents District Court cases. However, 7 cases were sentenced in the Supreme Court.
2. Actual immediate imprisonment total is the sum of imprisonment and partially suspended sentences.

Magistrates Court

There were an insufficient number of offenders sentenced in the Magistrates Court with an actual immediate term of imprisonment for unlawful carnal knowledge in the years before 2003 to allow a comparison of before and after the 2003 amendments. Therefore, the impact of the 2003 amendments on the use of actual immediate terms of imprisonment for unlawful carnal knowledge is unable to be reported.

Rape

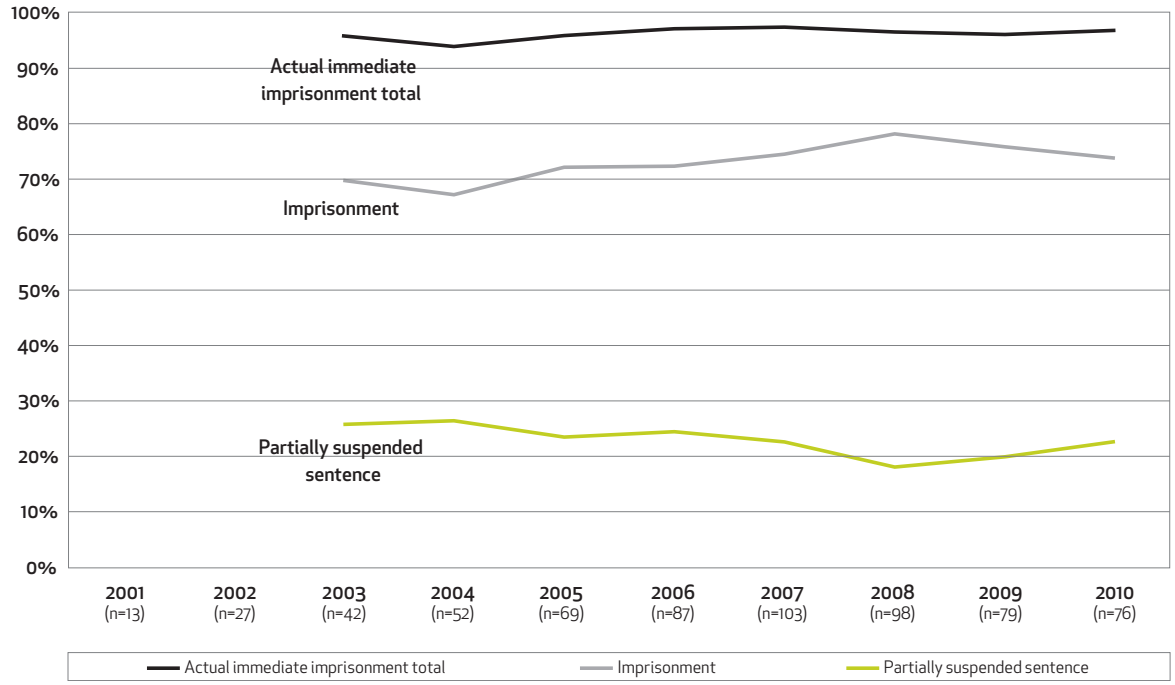
Nearly all offenders convicted of rape and sentenced over the period 2001–10 were sentenced to an actual immediate term of imprisonment.

Figure 10 shows that overall the rate of offenders receiving an actual term of imprisonment increased slightly after 2004 and the rate of imprisonment increased between 2004 and 2008. This indicates that the 2003 amendments do not appear to have increased the use of actual immediate imprisonment. As with the offence of maintaining a sexual relationship with a child, increases in the use of imprisonment corresponded to a decline in the use of partially suspended sentences and vice versa.

The impact of the 2003 amendments on the average (median) sentence length for offenders sentenced to imprisonment

The 2003 amendments provided increases in the maximum penalties for the offence of indecent treatment of a child under 16 and provided one penalty for the offence of maintaining a sexual relationship with a child. The average length of imprisonment imposed for these offences was examined over time to determine if the legislative reforms affected the average sentence length for these offences. The offence of rape was also considered. The remaining Reference offences were omitted due to the number of offenders receiving imprisonment being insufficient for analysis.

Figure 10: Three-year moving average showing the proportion of offenders sentenced for rape (as most serious offence) receiving an actual immediate term of imprisonment, Queensland courts, 2001–10[1, 2, 3]



Source: Queensland courts database maintained by OESR.

Notes:

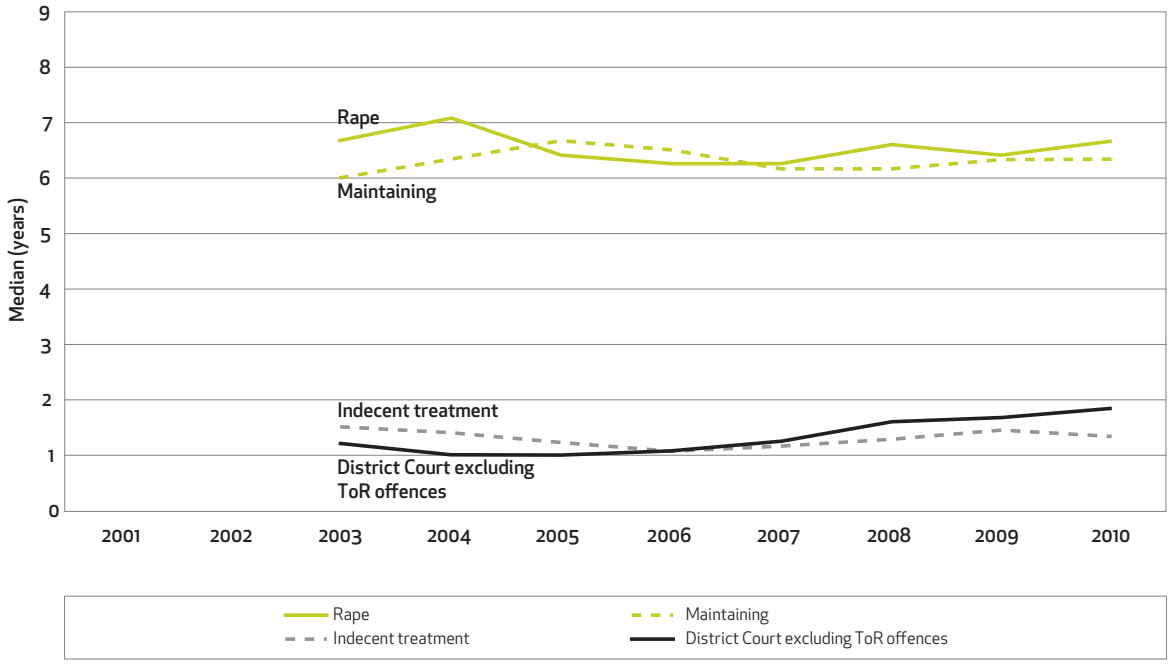
1. This graph primarily represents District Court cases. However, 7 cases were sentenced in the Supreme Court.
2. Rape cases include offences committed against both adults and children.
3. Actual immediate imprisonment total is the sum of imprisonment and partially suspended sentences.

Figure 11 shows that the average length of imprisonment sentences for indecent treatment of a child under 16 appears to have declined after 2003. The average sentence length of imprisonment for maintaining a sexual relationship with a child did increase in the years immediately after 2003, but this increase was not sustained. These findings do not suggest the 2003 amendments have had a sustained impact.

The average length of imprisonment for rape decreased after 2003, while the average length of imprisonment for all District Court non-Reference offences was characterised by a general increase after 2005.

Other legislative reforms were likely to have changed the profile of indecent treatment of a child under 16 and rape cases coming before the courts for sentencing, which may partly explain the slight decrease in average sentence lengths for these offences. The most significant of these was the reclassification of some conduct that previously would have fallen under indecent treatment of a child under 16 or sexual assault as forms of rape (from October 2000). As the 2000 amendments only applied to offences committed after this time and the Council's analysis includes historical offences, the extent to which this has affected sentence outcomes is unclear. However, it can be assumed that more serious forms of indecent treatment of a child under 16 after this time would have been charged as rape, while offences sentenced as rape would include some new types of conduct which could fall in some instances at the lower end of offence seriousness.

Figure 11: Three-year moving average showing the average length of imprisonment given to offenders convicted of Reference offences compared to total District Court matters (excluding Reference offences), Queensland higher courts, 2001–10[1, 2, 3, 4]



Source: Queensland courts database maintained by OESR.

Notes:

1. This graph primarily represents District Court cases. However, 4 rape cases, 3 cases of maintaining a sexual relationship with a child and 4 cases of indecent treatment of a child under 16 were sentenced in the Supreme Court.
2. Information on unlawful carnal knowledge and unlawful sodomy is not included because of the low number of cases for these offences.
3. The number of cases for this figure is presented in Table 3 of Appendix 8.
4. Rape includes offences committed against both adults and children.

The impact of the 2010 'exceptional circumstances' amendment

The 2010 amendments to the *Penalties and Sentences Act* provided that, in sentencing an offender for an offence of a sexual nature committed in relation to a child under 16 years, the offender must serve an 'actual term of imprisonment' unless there are 'exceptional circumstances'. An 'actual term of imprisonment' is defined in the Act to mean a term of imprisonment served wholly or partly in a corrective services facility. This amendment enshrined what had previously been a principle at common law that 'other than in exceptional circumstances, those who indecently assault or otherwise deal with children should be sent to jail'.[139]

In Queensland, the only legislative guidance provided in the *Penalties and Sentences Act* on how a court should approach the finding of 'exceptional circumstances' is that the court may consider the closeness in age between the offender and the child.

Because of the recency of the 2010 legislative amendments (which came into effect on 26 November 2010), sufficient courts data is not yet available to allow the Council to assess what impact, if any, this amendment has had.

The findings regarding the use of an actual immediate term of imprisonment as reported above, suggests that sentencing courts are complying with this principle. A sentence other than actual immediate imprisonment is more commonly made for child sexual offences where the offending conduct is seen to be at the lower end of offence seriousness (for example, some cases of indecent treatment of a child under 16 and unlawful carnal knowledge). This is particularly the case for matters dealt with in the Magistrates Court. For a matter to be dealt with in the Magistrates Court the following must be satisfied:

- the offence does not involve a circumstance of aggravation
- the complainant was 14 years of age or over at the time of the alleged offence
- the offender has pleaded guilty, and
- the Court is satisfied that, taking into account the nature or seriousness of the offence or any other relevant consideration, the offender can be adequately punished on summary conviction (which, for an indictable sexual offence dealt with summarily, is 100 penalty units or 3 years imprisonment).[140]

To respond to the question of the impact of putting this principle on a legislative basis, the Council reviewed a sample of first-instance decisions of the District Court and relevant Court of Appeal authority.

Court of Appeal authority

The approach to the finding of exceptional circumstances was discussed in the leading decision of *R v Quick; Ex parte Attorney-General (Qld)*.[141] In this case, the sentencing court held that the circumstances relating to the offender and the offending, when taken together, amounted to 'exceptional circumstances'. The circumstances included:

- there had been a plea of guilty to an ex-officio indictment
- there was no prior criminal history
- the offender had voluntarily sought psychological assistance and counselling
- remorse had been demonstrated that was 'significant and ongoing'
- the offender was not a paedophile, sociopath or psychopath
- it was considered that the offender was not likely to re-offend
- it was judged that difficulty would be endured by the offender in custody
- the offences were at the lower end of seriousness, and
- there was a two-year delay in bringing the matter to court.

The 29-year-old offender (a former teacher of the complainant, who was 14 years at the time of the offending), pleaded guilty to two counts of indecent treatment of a child aged under 16 years and was sentenced to 18 months imprisonment wholly suspended for a 2 year period for the first offence, and a 12 month intensive correction order on the second.

On an appeal by the Attorney-General, the Court set aside the original sentence and ordered the offender to serve a term of imprisonment of 18 months for both offences, suspended after 3 months for an operational period of 2 years.

The phrase 'exceptional circumstances' is also used in part 10 of the *Penalties and Sentences Act*, in relation to indefinite sentences, and in the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (DPSOA). In judgments involving the DPSOA, the guidance provided by the Court of Appeal is consistent with that in *R v Quick* that whether exceptional circumstances exist in a particular case must be determined by reference to the facts and circumstances of that case.[142]

The Explanatory Notes for the Penalties and Sentences (Sentencing Advisory Council) Bill 2010 (Qld), which introduced this provision, suggest that, in drafting the new s 9(5) of the *Penalties and Sentences Act*, the legislature took into consideration the fact that the term 'exceptional circumstances' was one with which the courts were familiar and as such it did not need its own specific definition in the Act.[143] The Explanatory Notes also make clear the expectation that the courts will approach this assessment on a case-by-case basis, drawing guidance from cases such as *R v Quick; Ex parte Attorney-General (Qld)*.[144]

A review of a sample of first-instance sentencing decisions in the District Court

In looking at the issue of exceptional circumstances, the Council reviewed a sample of 109 Queensland District Court sentencing decisions drawn from the Queensland Sentencing Information Service (QSIS) database, using the search terms 'actual', 'imprisonment' or 'prison', and/or 'exceptional' and 'circumstances', for the offences of unlawful carnal knowledge, indecent treatment of a child under 16, rape, unlawful sodomy and maintaining a sexual relationship with a child. The purpose of this exercise was to seek to establish the types of circumstances classified by judges at first-instance as 'exceptional'. The Council only reviewed those cases decided after 25 November 2010, when the new section came into operation.

From the Council's review, there does not appear to be a consistent set of factors considered by the court in deciding if exceptional circumstances exist. Based on the sample of District Court decisions examined, judges often take guidance from the Chief Justice's comments in *R v Quick; Ex parte Attorney-General (Qld)* that 'exceptional' is synonymous with (that is, the same as) 'unusual' or 'extraordinary'.[145]

Of the 109 District Court cases for the Reference offences included in this sample, over half (65 cases) made specific reference to 'actual imprisonment', 'actual prison' and/or 'exceptional circumstances'. The sentencing judge found that there were 'exceptional circumstances' in 28 cases and went on to outline what factors present were considered relevant, supporting the decision to impose a sentence other than 'actual imprisonment'.

Eighteen of the 65 cases specifically referred to s 9(5) of the Act as informing the sentencing decision, while a further six mentioned the legislative requirement in a generic way (for example, 'under State legislation'). A much larger number (32 cases) referred to previous Queensland Court of Appeal authority establishing this principle, with the cases most commonly cited being *Pham*[146] and *Quick*.[147]

Of those 28 cases where exceptional circumstances were found, they most commonly involved the offence of indecent treatment of a child under 16 (22 cases); one of these 22 also involved the more serious offence of attempted rape. The other six involved offenders convicted of unlawful carnal knowledge. By their nature, these offences are generally viewed as less serious than the offences of rape, unlawful sodomy and maintaining a sexual relationship with a child.

The sample of District Court cases examined indicates that, in deciding whether exceptional circumstances exist, judges take into account those factors which may not be individually exceptional but, when considered in the context of the whole case, can tip the balance in favour of a finding of exceptional circumstances. In

R v Quick this approach was explained in the judgment of Holmes JA, referring to the earlier decision of *R v L; Ex parte Attorney-General (Qld)*[148] as authority for the principle that 'it is unnecessary to embark on a search for individual "exceptional circumstances" when in a given case a sufficient aggregation of mitigating circumstances, none of which is remarkable per se, may warrant a non-custodial sentence'.[149]

This approach appears to largely reflect that taken by District Court judges in the sample of cases examined in making such findings, which can be triggered by a combination of any number of different factors. The following case summaries provide examples of the wide range of factors that sentencing judges considered met the definition in combination as being 'exceptional'.

***R v JDM* (Unreported, District Court of Queensland, Brisbane, 29 September 2011)**

The offender pleaded guilty to one count of unlawful carnal knowledge involving a 13-year-old complainant. The court sentenced the offender to 18 months probation on the basis that the overall circumstances of the case were exceptional and justified the court imposing a sentence other than actual imprisonment. Matters the sentencing judge identified as exceptional included:

- the age of the offender (18 at the time of offending, 19 at sentence)
- the circumstances of the actual offence (initiated by the complainant and the offender discontinued the offence before ejaculation)
- the fact that the offence only came to light after the complainant's mother discovered reference to the offending in the complainant's diary
- the lack of evidence presented to the police (the complainant did not make a statement)
- the offender's cooperation with the police by making full admissions
- family support for the offender
- the offender's current stable relationship
- the lack of prior criminal history
- a plea of guilty at the committal stage that was said to show a 'real attitude of remorse', and
- good future prospects, including the offender undertaking a traineeship.

***R v BKB* (Unreported, District Court of Queensland, Brisbane, 20 July 2011)**

The 71-year-old offender pleaded guilty to one count of indecent treatment of a child under 16 who was a 10-year-old girl. The conduct involved the offender touching the child on the breast under her singlet and simultaneously kissing her on the cheek. The offender was sentenced to 12 months imprisonment wholly suspended for 12 months, as the sentencing judge held that exceptional circumstances existed in the matter, none of them amounting to exceptional circumstances individually but being present 'by way of amalgamation', including that:

- the offending was, as stated by the court, 'very much at the lower end of the scale of seriousness'
- there was no premeditation
- it was an isolated incident
- the 71-year-old offender had no criminal history
- there was a timely plea of guilty
- the offending was not exploitative
- the offender was not in a position of influence over the victim
- there were no threats made to the victim
- the offending did not occur in an isolated location
- the age of the offender and associated health problems (heart condition, joint problems and movement problems generally) would make a period of actual immediate imprisonment more difficult for the offender than for a younger more able-bodied person, and
- the offender had the benefit of a very supportive family.

Of note in this matter was that the sentencing judge did not place a great deal of weight on the fact that the offender had suffered a degree of shame and that the offending had an adverse impact on his family. It was commented that for shame to have any impact insofar as leniency in sentencing is concerned there must be 'very positive evidence in that regard before the court can take such a matter into account'.

***R v KNJ* (Unreported, District Court of Queensland, Toowoomba, 8 September 2011)**
The offender pleaded guilty to three counts of indecent treatment of a child under 12 and one count of attempted rape. The offences occurred over a three-year period and began when the offender was aged 13 and the victim was aged 4. The offender was charged as a 17-year-old after the offending came to light. As this delay in bringing the matter to court was not considered undue, it meant the offender was to be sentenced as an adult. After deliberation, the sentencing judge was satisfied that exceptional circumstances supported a non-custodial sentence, in part because of the competing sentencing principles of the *Youth Justice Act 1992* (Qld) and the *Penalties and Sentences Act* arising from the age of the offender at the time of offending and the time of sentence.

Section 144(2) of the *Youth Justice Act* states that a sentencing court must have regard to the fact that the offender was a child when the offending occurred, and also to the sentence that might have been imposed had the offender been sentenced as a child rather than as an adult.

The exceptional circumstances in this case were found to be:

- the age of the offender at the time of offending
- the age of the offender at sentencing
- the nature of the actual offending
- admissions were made to police and responsibility for the offending had been taken by the offender
- remorse was displayed both to the police and to the interviewing clinical psychologist
- it was considered unlikely that the offender would re-offend
- the offender was within the borderline range of intelligence
- the offender had good family support to provide assistance with any community-based order
- there was little evidence of the offender being a danger to the community if not imprisoned, and
- the Court was not satisfied that the offender would have been sentenced to a period of detention if sentenced as a juvenile under the *Youth Justice Act*.

The Council's review of first-instance sentencing decisions of the District Court suggests that judges are continuing to apply the interpretation of 'exceptional circumstances' endorsed by the Court of Appeal in *R v Quick*, and appear to be more inclined to find 'exceptional circumstances' where the offences are at the less serious end of offending or where other factors are at play (such as the offence being committed when the offender was a juvenile).

In Chapter 5, the Council recommends some minor modifications to the operation of this provision to ensure that it operates transparently and its application can continue to be monitored.

3.4 Comparing sentencing outcomes for offences against children with those for adults

Comparing sentence outcomes for offences involving children with those for offences involving adults is complex and difficult. Administrative data collected and maintained by DJAG do not systematically record the age of the victim. This means an analysis of courts data to answer this question was not possible. The Council considered comparing sentencing outcomes for a sexual offence that can only be committed against a child (such as indecent treatment of a child under 16) with outcomes for sexual offences that typically involve an adult victim (such as sexual assault). However, there is wide variation in the type of conduct captured by different sexual offences and the profile of offending behaviour falling within them. A direct comparison of sentencing outcomes for offences committed against children with those committed against adults on the basis of age differences alone would therefore be problematic.

The Council's approach was to take the offence category of rape and compare sentencing outcomes for those offences committed against a child with those committed against an adult. The only available source of information available to enable this comparison was sentencing remarks. Using sentencing decisions as a data source also enabled the Council to control, in an approximate way, for the seriousness of the offence by comparing outcomes by age of victim as well as by the nature of the rape involved, although other factors may also have had a significant impact on the court's assessment of offence seriousness.

Table 7 presents the average sentence length for offenders convicted of rape by victim age group and nature of the offence (whether it was an offence involving a single instance or multiple instances of rape, and whether the offence involved a digital or penile rape).

In determining the extent to which the victim's age influences the sentence imposed, there are a number of other factors that need to be considered in the analysis, such as whether the offender pleaded guilty and the offender's criminal history (which are factors taken into account by judges when making sentencing decisions), and whether or not violence or threats of violence were present. It must also be recognised that some of these factors may not be directly referred to in the sentencing remarks. To more fully assess the relationship between average sentence length and other variables, a more complex analytic tool would be required.

A preliminary analysis of sentencing decisions for 176 rape cases presented in Table 7 suggests that average sentence lengths for imprisonment for rape tend to be longer for victims aged 18 years and over than for victims aged under 16.[150] Table 7 also shows that rape offences only involving digital penetration resulted in shorter sentences of imprisonment than rape offences involving penile penetration.

These findings need to be approached with extreme caution for the reasons outlined above and the small number of cases on which this analysis is based. The reasons for the differences in average sentence lengths are unclear and further research would be needed to determine the impact of case variability on sentencing practices.

The median sentence imposed for rape offences committed against children aged under 12 years was 3 years (single digital penetration), 7 years (single penile penetration) and 9.0 years (multiple penile penetration). The median sentence for similar conduct was equal or slightly higher for victims aged 16 years and over: 3.2 years (single digital penetration), 7 years (single penile penetration) and 9.4 years (multiple penile penetration). The median sentence imposed for rape offences involving adults aged 18 years and over was 7.5 years (single penile penetration) and 9.9 years (multiple penile penetration).

Mean average sentences were used to test for statistically significant differences in sentence outcomes for rape offences involving children compared to adults. Differences in mean age was statistically significant[151] for offences involving multiple rapes, where the mean sentence length for victims aged under 16 years was 7.9 years, compared with a mean sentence length for adult victims of 10.5 years. The difference by age was also statistically significantly different for all rape cases combined, with a mean sentence length of 6.4 years for victims aged under 16 years versus 8.6 years for adult victims.

Again, there are a number of potential reasons for these findings, and they need to be approached with extreme caution. It is quite possible that these differences in sentencing outcomes can be explained by differences between the profiles of cases involving adult victims and those involving child victims which it has not been possible for the Council to examine.

Table 7: Average (mean and median) sentence length for offenders sentenced to imprisonment for rape by age of the victim, sample of sentencing decisions by Queensland higher court judges, 2007–09[1, 2, 3]

Age of youngest victim		Type of rape			Total cases[5] (years)
		Single digital[4] (years)	Single penile (years)	Multiple (years)	
Under 12 years	Median	3.0	7.0	9.0	7.0
	Mean	3.9	7.6	8.7	6.6*
		(n=12)	(n=11)	(n=16)	(n=50)
12–15 years	Median	–	–	7.0	6.3
	Mean	–	–	6.8**	6.1**
		–	–	(n=11)	(n=22)
Under 16 years	Median	3.0	7.0	7.5	6.8
	Mean	3.7	7.3	7.9*	6.4**
		(n=15)	(n=15)	(n=27)	(n=72)
16–17 years	Median	–	–	–	6.0
	Mean	–	–	–	5.4**
		–	–	–	(n=13)
16 years and over	Median	3.2	7.0	9.4	7.5
	Mean	4.3	8.2	9.7	7.8
		(n=11)	(n=16)	(n=20)	(n=52)
18 years and over	Median	–	7.5	9.9	8.5
	Mean	–	8.5	10.5	8.6
		–	(n=14)	(n=16)	(n=39)

Source: Data coded from higher courts sentencing remarks maintained by QSIS.

Notes:

1. The mean is shown as this measure enables greater flexibility for significance testing. The median is shown to ensure consistency in data reporting across the report and as a more reliable measure of central tendency given the distribution of data.
2. Cell sizes of 10 or fewer have been excluded from the analyses.
3. Tests of significance were performed using two-sample t-tests with unequal variance on mean sentence lengths (*$p < 0.05$; **$p < 0.01$). The 16 years and over age category was used as a reference category for significance testing performed for cases involving single digit penetration; the 18 years and over category was used as a reference for significance testing performed for single penile and multiple penetration categories.
4. The category of single digital penetration refers to cases involving a single act of digital penetration, single penile refers to cases involving a single act of penile penetration and multiple refers to cases involving more than one act of penetration with at least one penis penetration.
5. The numbers in type of penetration categories do not add up to the total number of cases across the different age categories, since two types of penetration categories have not been presented in the table. These categories were excluded due to small numbers. They are 'multiple penetrations (digital)' and 'other penetration'.

4 FACTORS IN SENTENCING CHILD SEXUAL OFFENCES

The Council has been asked to consider current sentencing practices for child sexual offences, in particular what factors are most commonly taken into account when assessing offence seriousness, such as the harm to the victim, the culpability of the offender and the relevance of specific aggravating and mitigating factors.

To identify the factors most commonly taken into account by the courts when sentencing child sexual offences, the Council reviewed a sample of Queensland higher court sentencing decisions handed down between 2007–09 for the Reference offences of rape, maintaining a sexual relationship with a child and unlawful carnal knowledge.This chapter presents the Council's findings.

4.1 Legislative sentencing considerations

Chapters 2 and 3 discussed the current legislative framework for the sentencing of sexual offences against children, the maximum penalties that apply to those offences and legislative reforms.

Courts are also guided by factors that have been identified in previous court decisions as relevant in sentencing.

Each of the legislative factors and purposes listed in s 9(6) and elsewhere in the Act are relevant to different aspects of sentencing for these offences such as the offender's level of culpability, the harm caused to the victim, and the type of sentence that should be imposed taking into account the need to protect children from the risk of the offender re-offending. It is important to recognise that not all factors listed will apply in all cases and their relevance must therefore be considered by courts when sentencing on a case-by-case basis. Further, several of the factors and purposes overlap and are interconnected, and must be considered in the context of the case as a whole.

For example, remorse, or lack of remorse by the offender is identified in s 9(6)(g) as a factor to which a court must have primary regard. The basis for remorse as a mitigating factor is its perceived relevance to an offender's prospects

of rehabilitation[152] (listed a separate factor in s 9(6)(f)). In the case of a remorseful offender, it may also be argued that less punishment may be required to deter the offender from re-offending.[153] Conversely, a lack of remorse may suggest the offender is less amenable to reform and at a greater risk of re-offending.

In addition to remorse or lack of remorse, Queensland courts are required to take a guilty plea into account in sentencing by virtue of s 13 of the Act and may reduce the sentence on this basis. While a plea of guilty, particularly at an early stage, may be referred to as providing evidence of remorse, the High Court in the case of *Cameron v The Queen* made clear that remorse and a plea of guilty can be separate and independent sentencing considerations.[154] A plea of guilty can be taken into account independently of the subjective elements of remorse or acceptance of responsibility. In this sense, as suggested by Kirby J, 'Remorse, when present, is icing on the cake'.[155] Equally, a plea of guilty of itself may be insufficient evidence of remorse.

To support a sentencing discount on the basis of remorse, it is not enough for the offender to state they are remorseful. There must be clear and tangible evidence, such as an apology to the victim, payment of compensation, or the voluntary disclosure of other offences that might not otherwise have come to light.[156] The Council presents its recommendation in relation to this and other factors listed in s 9(6) in Chapter 5 of this report.

4.2 Queensland Court of Appeal guidance

Maintaining a sexual relationship with a child

In the course of considering appeals against sentence and in referring to sentences imposed in comparable cases, the Court of Appeal has on a number of occasions, such as in *R v BBY*,[157] commented on the appropriate or accepted sentencing levels and ranges for the offence of maintaining a sexual relationship with a child. For example, in *WAM v R*, the Court, citing the earlier decisions of *R v P; Ex parte Attorney-General (Qld)*[158] and *R v PAN*,[159] observed that '[t]he most serious cases of offending against multiple young children, even when there are timely pleas of guilty, can result in sentences of 17 years imprisonment'.[160] In *R v P*, the Court found that, had the offender not cooperated with the authorities, 'a sentence of at least 20 years would have been within the appropriate range'.[161] The offender in that case pleaded guilty to a 52-count indictment; a further 184 offences of a sexual nature were taken into account under s 189(1) *Penalties and Sentences Act*.

Rape

The offence of rape encompasses a range of unlawful conduct, ranging from digital and oral penetration and penetration with an object, to sexual intercourse.

The Court of Appeal has recognised that, while cases of penile vaginal or penile anal penetration will often be viewed as more serious and attract heavier penalties than those involving digital penetration without additional aggravating features (such as the use of a weapon, extreme brutality or threats of serious harm), each case will depend on its own circumstances.[162] The reasons for this include that digital rape 'may be less invasive, would not carry a risk of pregnancy and would ordinarily carry substantially reduced risk of infection'.[163] This does not mean that offenders convicted of rape by digital penetration do not receive substantial sentences in some cases. For example, in the case of *R v Colless*,[164] an offender convicted of a series of sexual offences, including five instances of digital rape, committed on 11 women over a 27-month period was re-sentenced on appeal to 16 years imprisonment, with a minimum non-parole period of 12.8 years.

In *R v Wark*, McMurdo P identified factors that might increase the level of seriousness as including whether the complainant was a child and, if so, their age, whether violence had been used, the physical and psychological effect of the offence on the victim and whether the offender had a previous history of relevant offences.[165] The Court of Appeal has also made statements,

with reference to previous decisions, about the appropriate sentencing range for rape meeting certain criteria, including those committed against children. For example, see *R v KU & Ors; Ex parte Attorney-General (Qld)*.[166]

The Court of Appeal has cautioned that, because the circumstances of rape exhibit 'infinite variation, one should not be rigidly tied to [sentencing] ranges as such, but flexible enough to give due allowance to significant variations from case to case'.[167]

Unlawful carnal knowledge

The offence of unlawful carnal knowledge may be charged in circumstances where the offender and the complainant are in a consensual, but unlawful, sexual relationship.

The closeness, or disparity, in ages between the victim and the offender is a key consideration for courts in sentencing for this offence as offences involving older offenders are likely to include a predatory aspect. In contrast, where the offender and complainant are close in age and the offending occurs in the context of a dating relationship, the offence may be viewed as falling at the lower end of offence seriousness. The Court of Appeal has affirmed that the exploitative nature of the relationship and the age disparity between the victim and the offender are primary considerations in sentencing for unlawful carnal knowledge, see for example *R v Ritchie; Ex parte Attorney-General (Qld)*[168] and *R v Beesley*.[169]

The relevance of the age gap between the victim and offender is recognised legislatively in s 9(5A) of the *Penalties and Sentences Act* which states that, 'in deciding whether there are exceptional circumstances [justifying a sentence other than actual imprisonment], a court may have regard to the closeness in age between the offender and the child'. In contrast to Queensland, some jurisdictions, including the Australian Capital Territory, Tasmania, Victoria and Canada, have introduced special defences that apply to consensual sexual conduct engaged in by young people with adolescent children.[170]

4.3 Analysis of sentencing decisions

Chapter 1 outlines the Council's work to analyse a sample of sentencing decisions delivered by Queensland higher court judges (primarily District Court judges) in relation to offenders convicted of Reference offences. This research was undertaken to assist the Council to identify the factors most commonly referred to by the courts in sentencing for sexual offences against children, as requested in the Terms of Reference.

This section provides information derived from 458 sentencing remarks made by Queensland higher court judges in 2007–09 in relation to a most serious offence of rape, maintaining a sexual relationship with a child and unlawful carnal knowledge. Sentencing remarks for cases with a most serious offence of unlawful sodomy and attempted rape were not included as there were insufficient numbers to allow valid comparisons. Sentencing remarks for cases with a most serious offence of indecent treatment of a child under 16 were also excluded from the analysis on the basis that they were universally short and offered insufficient detail to enable determination of the factors judges were taking into account for these offences.

Sentencing remarks are the comments made by judges when they deliver a sentence to an offender. The factors that apply and are mentioned by the judge will vary on a case-by-case basis. Further, while a specific factor may not have been mentioned by the judge in their sentencing remarks does not mean that the judge did not take this factor into account. For example, in some cases (such as where the offender has been convicted following a trial), the harm caused to a victim may be so clearly evident to the judge and other parties involved that it might not be specifically referred to by the sentencing judge in delivering their remarks even though it may have a strong influence on the sentence imposed.

Relevant considerations relating to the offender

Table 8 presents the factors relating to the offender that judges in this sample of higher court cases have specifically referred to in their sentencing remarks. The table breaks these offences down by the three offence categories of rape, maintaining a sexual relationship with a child and unlawful carnal knowledge. It shows that, across all offence types, the offender's plea (whether the offender pleaded guilty or not guilty) is the most commonly mentioned factor. In fact, there were very few cases (3%) in which the offender's plea is missing from the sentencing remarks. Section 13 of the *Penalties and Sentences Act* requires a court when sentencing to take an offender's guilty plea into account and to state this in open court.

The second most commonly referred to factor was the offender's criminal history (in 81% of cases the offender's criminal history, or lack of one, was mentioned). Sections 9(2)(f) and 9(6)(g) of the *Penalties and Sentences Act* list the offender's 'character' as one of the factors to which a court must have regard and, in the case of offences of a sexual nature against children, have primary regard to, in sentencing. The relevance of character to sentencing is discussed further in Chapter 5.

Other factors that judges in this sample most commonly referred to were whether the offender:

Table 8: Proportion of sample of sentencing remarks referring to relevant considerations relating to the offender, Queensland higher courts, 2007–09

Factor		Most serious offence[1]		
		Rape (%)	Maintaining a sexual relationship with a child (%)	Unlawful carnal knowledge (%)
Plea	Guilty	73.2	81.4	89.7
	Not guilty	25.9	17.7	1.7
Remorse[2]	Demonstrated	33.3	32.7	19.7
	Explicitly not demonstrated	22.8	14.2	2.6
Offending history	Prior sexual offences	13.2	8.0	3.4
	Prior offences of violence	22.8	8.0	9.4
	Any prior offences	60.1	40.7	48.7
	No prior offences	24.1	32.7	31.6
Age at the time of the offence	17 years or under	6.2	0.0	15.4
	18–49	46.5	50.4	54.7
	50+	5.7	6.2	1.7
Good character/good employment history[3]		33.8	44.2	35.0
Cooperated with police		30.7	47.8	29.1
Drug use history		22.4	15.0	12.8
Offender was a victim of sexual offending		5.3	9.7	0.0
Served a term of pre-sentence custody		64.9	49.6	19.7
Total number		**228**	**113**	**117**

Source: Data coded from Qld higher courts sentencing decisions maintained by QSIS.
Notes:
1. It should be noted that, in cases where the case involves two or more offences with the same penalty outcome (for example, maintaining a sexual relationship with a child and rape both sentenced to 6 years imprisonment), QSIS randomly selects which offence is treated as the most serious offence.
2. Demonstrated remorse was coded as apparent when the judge explicitly stated that remorse was demonstrated. Remorse explicitly not demonstrated was coded as apparent when the judge specifically stated that the offender showed no remorse.
3. Good character and/or good employment history was coded as apparent when the judge acknowledged either or both of these characteristics. These characteristics were at times implied by comments made by the judge (for example, 'you have been employed for many years and are well respected in the community').

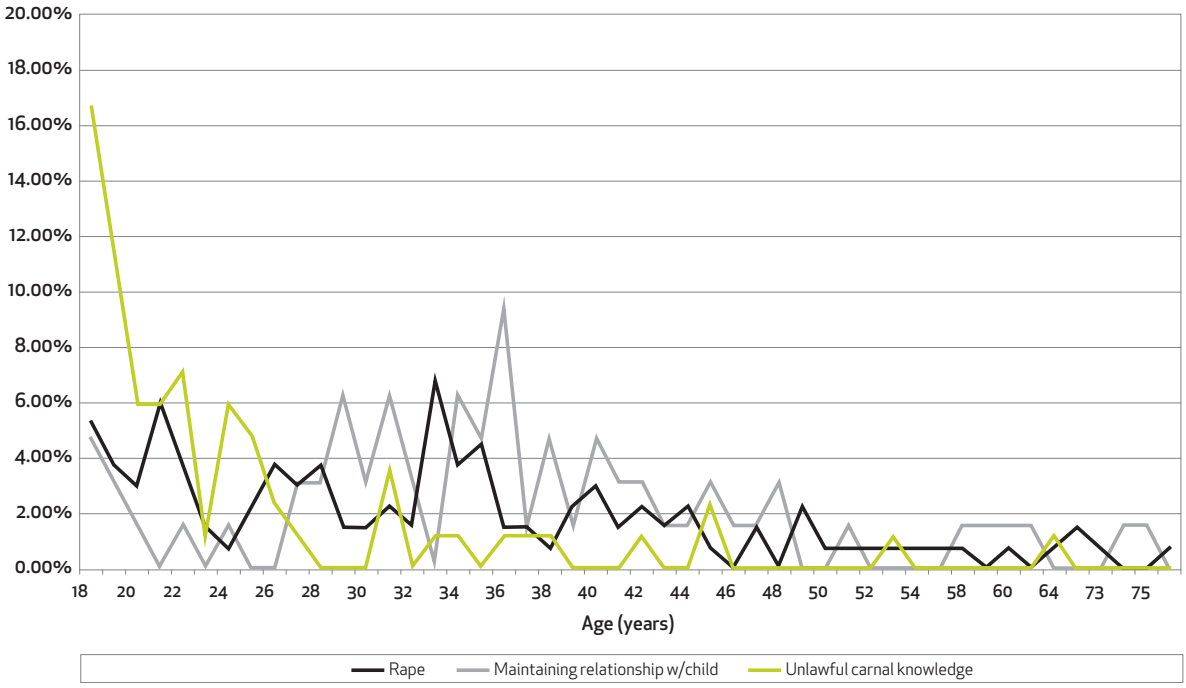
- had been in custody prior to sentencing (mentioned in 50% of cases); this is relevant particularly in instances where the court makes a pre-sentence custody declaration
- had shown evidence of 'good character' (37% of cases)
- had cooperated with police (35% of cases), and
- had demonstrated remorse (30% of cases) or, conversely, where there was a lack of demonstrated remorse (45% of cases).

Less commonly referred to was an offender's drug use history (18% of cases) or whether the offender had been a victim of sexual offending themselves (5% of cases).

The pattern of factors referred to also varies by offence category. Data presented throughout this chapter demonstrate the different nature of each of the offence categories. For example, Table 8 shows that pre-sentence custody appears to be a less common factor mentioned when sentencing offenders convicted of unlawful carnal knowledge.

Figure 12 shows the different age profile for offenders sentenced for the offence categories examined and highlights the very different profile of unlawful carnal knowledge offenders, whose age at the time of offence peaks dramatically at 18 years.

Figure 12: Age of the offender at the time of the offence as referred to in a sample of sentencing remarks (n=281), Queensland higher courts, 2007–09[1]



Source: Data coded from Qld higher courts sentencing decisions maintained by QSIS.
Note:
1. Information about the age of the offender was missing in 177 of the 458 cases.

Factors relating to characteristics of the victim

There is limited information about the characteristics of victims recorded in Queensland criminal justice databases. The Council's analysis of sentencing decisions therefore contributes to understanding of victim characteristics for the offences of rape, maintaining a sexual relationship with a child and unlawful carnal knowledge. Table 9 presents a number of factors relevant to the victim that are mentioned by judges in this sample of Queensland higher court cases when delivering sentencing remarks. As discussed earlier in this report, the age of the victim is not consistently recorded in the courts data and, consequently, the only way the Council could access this information was to analyse a sample of sentencing decisions. The age of the victim at the time of the offence was mentioned in 76 per cent of cases overall. In just under two-thirds of these cases where the age of the victim was referred to, the victim was aged under 16. The age of the child is one of the factors listed in s 9(6) of the

Table 9: Proportion of sample of sentencing remarks referring to particular factors relating to the victim, Queensland higher courts, 2007–09

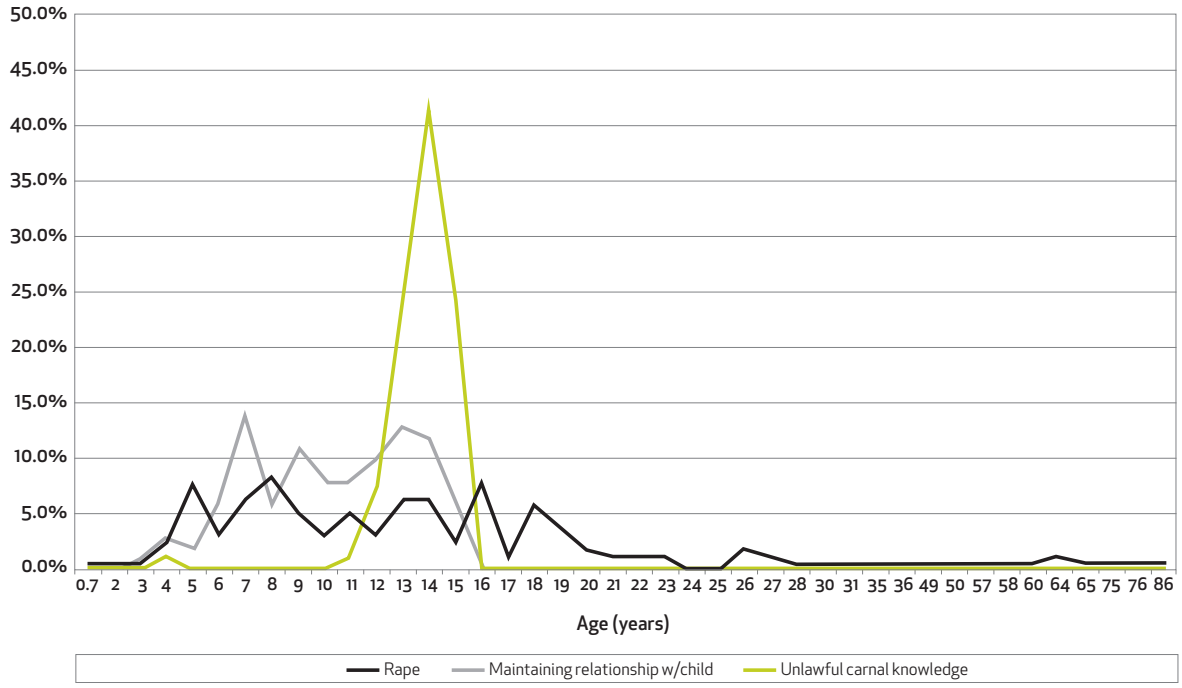
Factor		Most serious offence[1]		
		Rape (%)	Maintain a sexual relationship with a child (%)	Unlawful carnal knowledge (%)
Age of victim at time of offence	Under 6 years	15.4	12.0	1.1
	7–11 years	28.2	47.0	1.1
	12–15 years	18.6	41.0	97.8
	16–17 years	9.0	–	–
	18+ years	28.8	–	–
Relationship of the offender to the victim	Intimate partner[2]	8.8	5.3	23.1
	Family member (lineal or non-lineal)[3]	39.4	71.7	6.8
	Known, non-family member[4]	28.1	15.0	37.6
	Unknown (stranger)	15.4	0.0	0.9
Particular vulnerability of the victim	Mental health problem[5]	1.8	1.8	0.9
	Physical health problem	6.1	4.4	0
	Intellectual impairment[6]	3.5	3.5	1.7
Acknowledgement of harm caused by the offence	Victim submitted a victim impact statement (VIS)	60.1	56.6	20.5
	Judge refers to harm in VIS	57.0	50.4	16.2
	Acknowledges harm[7]	73.7	73.5	32.5
Victim is under the care of the offender		32.5	76.1	6.0
Total number		**228**	**113**	**117**

Source: Data coded from Qld higher courts sentencing decisions maintained by QSIS.

Notes:

1. It should be noted that, in cases where the case involves two or more offences with the same penalty outcome (for example, maintaining a sexual relationship with a child and rape both sentenced to 6 years imprisonment), QSIS randomly selects which offence is treated as the most serious offence.
2. Intimate partner (for example, husband, de facto partner, boyfriend).
3. Family member – lineal (for example, father, grandfather, brother, cousin). Family member – non-lineal (for example, step family member, sister's boyfriend).
4. Known, non-family member (for example, friend, acquaintance, teacher).
5. Mental health problem was coded as apparent when the judge explicitly stated that the offender suffered from a mental health problem at the time of the offence (for example, depression, post-traumatic stress disorder, schizophrenia).
6. Intellectual impairment was coded as apparent when the judge explicitly stated that the offender suffered from an intellectual impairment at the time of the offence (for example, suffered from a condition that involves significant limitations in both intellectual functioning and adaptive behaviours affecting conceptual, social and practical adaptive skills).
7. Acknowledgment of harm was coded when the judge referred to victim harm in any way (for example, 'these offences can impact the victim's development' or 'the VIS outlines harm to the victim').

Figure 13: Age of victims at time of the offence as referred to in a sample of sentencing remarks (n=349), Queensland higher courts, 2007–09[1]



Source: Data coded from Qld higher courts sentencing decisions maintained by QSIS.
Note:
1. Information about the age of the victim was missing in 109 of the 458 cases.

Penalties and Sentences Act to which a court must have primary regard in sentencing for an offence of a sexual nature against a child under 16.

Table 9 and Figure 13 show the different patterns of victim age across the three offence types, with nearly all victims of unlawful carnal knowledge falling in the 12–15 year age group. Children aged under 12 years are incapable of consenting to acts of sexual penetration that constitute the offence of rape at law[171] and therefore carnal knowledge of a child under this age is more likely to be charged as rape (which carries a higher maximum penalty).

The other most common factors referred to by judges in this sample are:

- the relationship of the victim to the offender (mentioned in 86% of cases)
- the harm or potential harm to the victim (63% of cases), and
- whether the victim was under the care of the offender (37% of cases).

It is important to note the different pattern of factors at play in different offence categories. In the majority of cases of maintaining a sexual relationship with a child, for example, the judge refers to the fact the offender had a close familial relationship to the victim, which was much lower for rape cases and for unlawful carnal knowledge cases. A mental, physical or intellectual impairment in the victim is also much less likely to be specifically referred to in unlawful carnal knowledge sentencing remarks. Most notably, victim impact statements were referred to by judges in fewer unlawful carnal knowledge cases than for the other offences (mentioned in 21% of unlawful carnal knowledge cases, compared with 57% of maintaining a sexual relationship with a child cases and 60% of rape cases).

Factors relating to characteristics of the offending behaviour

Table 10 presents a number of aspects of the offence itself that are mentioned by judges in this sample of Queensland higher court cases when delivering sentencing remarks, providing

information about the nature of the offences for which offenders are sentenced. The factor most commonly referred to by judges in relation to the nature of the offending behaviour was the nature of the offending conduct[172] (mentioned in 94% of cases). The nature of the offence is referred to in s 9(2)(c) of the *Penalties and Sentences Act* as a factor to which courts must have regard in sentencing and in s 9(6)(c) as a factor to which courts must have primary regard in sentencing for sexual offences against children under 16.

Other commonly referred to factors were the period of time over which the offending took place (64% of cases) and that it occurred in a private location (60% of cases).

Factors less commonly referred to were that the offender was intoxicated at the time of the offence (in 23% of cases), or that the offending involved actual violence (21% of cases). Reference was made by judges to the behaviour being premeditated in only 13 per cent of cases, while in 12 per cent it was classified as opportunistic.

Again the pattern of these factors is different across the different offences. From the sample of sentencing remarks examined by the Council,

Table 10: Proportion of sample of sentencing remarks referring to particular factors relating to offence, Queensland higher courts, 2007–09

Total offending conduct[1]		Most serious offence[2]		
Factor		Rape (%)	Maintaining a sexual relationship with a child (%)	Unlawful carnal knowledge (%)
Nature of offending conduct	Non-penetrative only	n/a	11.53	n/a
	Penetrative only[4]	44.7	21.2	75.2
	Digital penetration only[5]	11.4	1.8	0.0
	Penile penetration only[6]	25.4	16.8	74.4
Length of offending conduct	Over a single day	52.6	0.0	39.3
	Greater than one day but less than one year	10.5	16.8	11.1
	One year or longer	7.9	46.9	1.7
Violence and threats	Involved violence[7]	33.8	14.2	3.4
	Involved threats of violence or repercussions[8]	20.6	19.5	0.0
Premeditation	Premeditated	14.9	15.9	6.8
	Opportunistic	16.2	2.7	12.0
Offender intoxicated at the time of the offence		30.3	8.8	22.2
Occurred in a private location[9]		68.4	65.5	39.3
Total number		**228**	**113**	**117**

Source: Data coded from Qld higher courts sentencing decisions maintained by QSIS.

Notes:

1. This analysis is based on information for all offences for which the offender was sentenced.
2. It should be noted that, in cases where the case involves two or more offences with the same penalty outcome (for example, maintaining a sexual relationship with a child and rape both sentenced to 6 years imprisonment), QSIS randomly selects which offence is treated as the most serious offence.
3. Missing information regarding the nature of offending conduct was counted as non-penetrative offending. This means that the proportion of 'Non-penetrative only' conduct for maintaining a sexual relationship with a child may be over-counted.
4. 'Penetrative only' refers to conduct involving any type of penetration constituting the offence of 'rape'. It does not include indecent treatment–type offences that do not involve penetration.
5. 'Digital penetration only' refers to a penetrative act where only the offender's finger was involved.
6. 'Penile penetration only' refers to a penetrative act where only the offender's penis was involved.
7. The involvement of violence was coded as present when physical violence or force, in excess of the offence itself, was used during the commission of the offence (for example, punching or slapping the victim).
8. Threats of violence were coded as present when the judge referred to the offender using threats to coerce a victim to engage in certain behaviour (for example, 'If you tell someone I will hurt you').
9. Private locations included the victim's or offender's home, a hotel, a classroom or a vehicle.

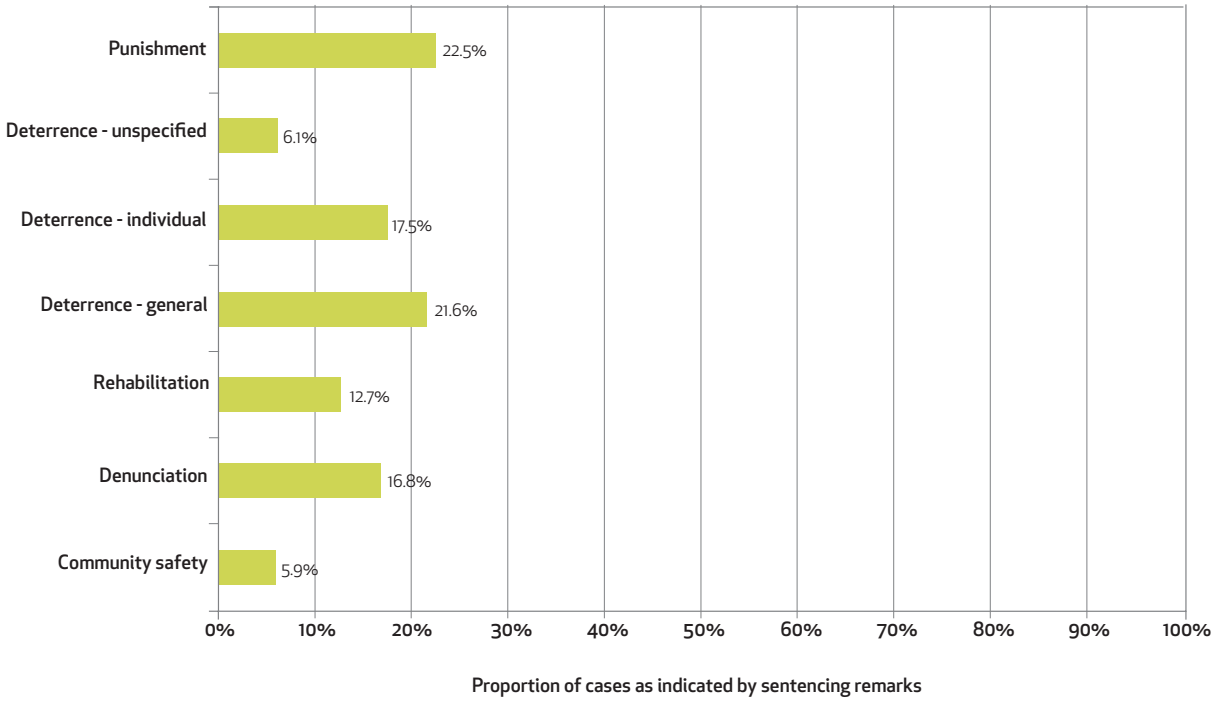
nearly half of the offences of maintaining a sexual relationship with a child were referred to by the judge as having occurred over a period of a year or longer.

Judges in this sample of cases infrequently referred to the occurrence of violence or threatened violence in cases of unlawful carnal knowledge, which could reflect the low occurrence of violence in these cases (actual violence was mentioned in 3% of unlawful carnal knowledge cases, 14% of maintaining a sexual relationship with a child cases and 34% of rape cases; threats of violence or repercussions were referred to in none of the unlawful carnal knowledge cases analysed, but was mentioned in 20% of maintaining a sexual relationship with a child cases and 21% of rape cases).

Purposes of sentencing

Figure 14 reports on the purposes of sentencing listed in s 9(1) of the *Penalties and Sentences Act* referred to by judges in this sample of Queensland higher court cases. Punishment (23% of cases) and general deterrence (22% of cases) were the most commonly mentioned sentencing purposes by judges in this sample, followed by individual deterrence and denunciation.

Figure 14: Purposes of sentencing referred to in sample of sentencing remarks (n=458), Queensland higher courts, 2007–09



Source: Data coded from Qld higher courts sentencing decisions maintained by QSIS.

5 THE NEED FOR ADDITIONAL GUIDANCE AND COUNCIL RECOMMENDATIONS

The Terms of Reference ask the Council to state its views on the factors that should be of most relevance when assessing offence seriousness for child sexual offences, including the harm to the victim and the culpability of the offender, and the relevance of specific aggravating and mitigating factors. This chapter presents the Council's views on these matters and identifies the factors the Council considers should be taken into consideration when sentencing for child sexual offences.

This chapter also considers the related issue in the Terms of Reference of whether there is a need for additional guidance in sentencing and, if so, the form this guidance should take.

In presenting this advice, the Council proposes amendments to the *Penalties and Sentences Act 1992* (Qld) to provide legislative sentencing guidance to better reflect the nature of sexual offending against children.

5.1 Consultation and submission feedback

The Council's Issues Paper invited views about whether the current list of principles and factors specific to the sentencing of offenders for offences of a sexual nature committed in relation to children set out in s 9(6) of the *Penalties and Sentences Act* is appropriate or in need of reform. A majority of submissions supported the current list of factors listed and made no recommendation for amendment.[173] This position was reflected in consultations with key stakeholders, with most attendees opposed to listing additional factors or adopting a prescriptive legislative list.[174] A number of those consulted supported current judicial discretion being maintained and noted that courts already appropriately take into account a wide range of factors beyond those specifically listed in the *Penalties and Sentences Act*.

However, there was some support in consultations[175] and submissions[176] for reconsidering the relevance of 'good character'

as a mitigating factor and how this is taken into account in sentencing for child sexual offences, and for additional factors being included in s 9(6) of the Act. The Crime and Misconduct Commission supported making reference to the length of the offending conduct, the relationship of the offender to the child and the deliberateness of the offending.[177] The Queensland Police Union of Employees (QPUE) suggested that reference also be made to the effect the offending has on those other than the child.[178]

The difficulties associated with some factors currently listed in s 9(6), and specifically the issue of remorse, were also highlighted at a number of consultation sessions and in submissions.[179] Protect All Children Today Inc commented that '[it is] difficult to determine whether remorse expressed by the offender is actually genuine'.[180] The issues of remorse and good character and the Council's view of their proper relevance as sentencing factors for child sexual offences are discussed in section 5.2.

In addition to broad support for retaining the current list of factors, some comments were made in submissions and consultations about particular sentencing principles and factors, including that:

- the principle of proportionality is undermined by the removal under the *Penalties and Sentences Act* of the principle of 'imprisonment as a last resort' in sentencing for child sexual offences[181]
- there is a need to ensure that judges place proper emphasis when sentencing for these offences on the harm to the victim and mechanisms for courts to take into account the likely longer-term impacts of these offences[182]
- the broader impacts of the offending conduct on victims' families and communities should be acknowledged,[183] including as this applies to offending in Aboriginal and Torres Strait Islander communities,[184] and
- cultural considerations that affect the victim and offender, particularly in Aboriginal and Torres Strait Islander communities, should be recognised.[185]

Rehabilitation was identified by many as an important sentencing objective for offenders convicted of sexual offences against children, to promote community safety by minimising the risks of offenders re-offending.[186] The Commission for Children and Young People and Child Guardian supported the age of the offender and their genuine willingness to participate in rehabilitation programs as being key considerations in determining an offender's capacity to address their offending behaviour.[187] Sisters Inside Inc was among those who submitted that further punitive responses will do little to improve public confidence, prevent child sexual abuse or effectively respond to offenders convicted of child sexual offences.[188]

Concerns were raised in submissions about the lack of access to treatment programs for offenders in custody, either on remand or serving a sentence,[189] and that not enough emphasis is placed on the rehabilitative aspects of the sentence.[190]

In its Issues Paper, the Council also invited feedback on the need for additional sentencing guidance (both legislative and non-legislative) and, if so, what form this should take. Existing forms of guidance are reviewed in Chapter 2.

A number of those consulted and/or who made submissions pointed to a range of forms of sentencing guidance that might improve current sentencing responses. Suggestions included:

- ongoing judicial education, training and the development of resources[191]
- the introduction of a sentencing grid for judges that provides concrete parameters for sentencing for specific offences and objective seriousness ranges[192]
- an application by either the Attorney-General or the Director of Public Prosecutions for a guideline judgment,[193] and
- sentencing guidance in the form of legislative amendments.[194]

Some submissions from members of the public and non-government organisations called for tougher sentencing responses for child sexual

offences,[195] including forms of mandatory sentencing and indefinite sentences to be served in specialist correctional facilities. The QPUE also supported forms of minimum mandatory sentencing for different types of sexual conduct. For example, for offences involving penetration of a child without consent, the QPUE recommended that a mandatory period of imprisonment of at least 5 years should apply, and a term of at least 10 years for the rape of a child under 12 years.[196]

Online response form

The online response form included a number of questions on the relevance of particular sentencing purposes and factors in sentencing offenders for offences of a sexual nature committed in relation to children. Of the 41 people who made a submission using the form and commented on the importance of existing sentencing purposes for child sexual offences, all ranked denunciation and community protection as being of most importance, followed by deterrence, punishment and lastly rehabilitation.

When asked to nominate the most important purpose of sentencing out of the six current sentencing purposes, the two most common responses were 'protecting the community from the offender' and 'punishing the offender for the offence to an extent or in a way that is just in all the circumstances'.

The online response form also asked respondents to rank 62 factors that might be considered when sentencing child sexual offenders by their perceived importance in sentencing. The factors nominated as being most important ('very important' or 'quite important') were:[197]

- the need to protect the child or other children from the risk of the offender re-offending
- the offender having a previous criminal history for other sexual offences
- the offender having committed offences against multiple victims
- the level of emotional and mental harm to the victim
- the level of physical harm to the victim
- the offender having a previous criminal history for any offences involving violence
- the offending behaviour involving multiple offences on different dates
- violence being used during the offence
- the offender threatening physical harm to the victim
- the offender threatening physical harm to another person, and
- the offender actively targeting the victim for sexual activity.

The factors respondents nominated as being of least importance were:[198]

- the offender pleading guilty to the offence
- the offender's background (for example, education, work history, relationship status)
- the offender stating that they have been a victim of sexual offences
- the offender being well respected by community members
- the offender being supported by their family, and
- the offender having made significant contributions to the community.

Additional comments made by some respondents about factors that should be considered in sentencing offenders for these offences included:

- that no factors should be allowed as mitigating circumstances
- whether the offender had independently sought counselling or treatment to address their sexual offending behaviour should be taken into account, and
- any expert reports or testimony on the impact of sexual victimisation on a child's future development should be allowed.

5.2 Additional guidance in sentencing and factors of most relevance

The Council's views on the need for additional guidance: an overview

Although submissions to this Reference from members of the public and non-government organisations called for tougher sentencing responses for child sexual offences, the Council notes that a majority of submissions supported the continuation of current forms of legislative sentencing guidance, including sentencing factors, as appropriate and made no recommendations for amendment.

Based on its review of current approaches, the Council has found insufficient evidence to suggest that existing guidance in the form of legislation, appellate court decisions, comparative sentences or other resources is in need of substantial reform. The Council acknowledges the concerns expressed in some consultations and in submissions, particularly with regard to the relevance of good character and remorse listed in s 9(6) of the *Penalties and Sentences Act*, and makes the recommendations listed below to qualify the relevance of good character and remorse. In addition, the Council proposes amendments to increase transparency when findings of exceptional circumstances are made in accordance with s 9(5) supporting a court imposing a sentence other than one requiring the offender to serve an actual term of imprisonment. The Council further recommends the development of additional resources to support judicial officers in their role and identifies a need for ongoing professional development and access to information by all parties involved in the sentencing process regarding the nature and consequences of sexual offending against children. These recommendations are intended to increase the transparency of, and consistency, in sentencing and ensure sentences reflect and are informed by the expanding body of research and information in relation to sexual offending against children.

Section 9(6) of the *Penalties and Sentences Act*

To determine what factors should be of most relevance when assessing offence seriousness for child sexual offences, including the harm to the victim, the culpability of the offender and the relevance of specific aggravating and mitigating factors, the Council reviewed the factors currently listed in s 9(6) of the *Penalties and Sentences Act*.

The Council supports the current factors in s 9(6) as the factors of most relevance in assessing the seriousness of these offences. However, the Council suggests this current form of guidance could be enhanced and strengthened to better reflect the nature of sexual offending against children, including the nature of the offending conduct and its consequences. The Council's suggested amendments are outlined in Table 11.

In recommending these amendments, the Council has taken guidance from existing case law, statutory sentencing factors adopted in other Australian and overseas jurisdictions and the literature on sexual offending against children. The changes recommended include:

- a requirement that courts have primary regard to the safety, protection and dignity of children in the sentencing of an offender for a child sexual offence as the overarching principle in sentencing for offences of a sexual nature committed against children under 16
- a focus on the vulnerability of the child, including vulnerability arising from the victim having a disability or any other relevant factor known to the offender
- a recognition of other factors relevant to the nature of the offence, rather than simply whether there was any physical harm or the threat of physical harm to the child
- the insertion of a new factor that directs the court to also consider whether the offender was in a position of trust or authority in relation to the victim when the offence was committed, acknowledging that this may increase the level of harm to a victim and that it also indicates a higher level of moral culpability by the offender, and

- qualifying the existing reference to remorse or lack of remorse by removing it as a primary factor from s 9(6) and replacing it with a factor focusing on the degree of insight or acceptance of responsibility by the offender for the offending conduct. The Council recommends that reference to remorse or lack of remorse should be relocated as a general sentencing factor to s 9(2) of the Act.

A majority of the Council further recommends that a new provision be included in the *Penalties and Sentences Act* that provides that when sentencing offenders for an offence of a sexual nature committed in relation to a child under 16, the offender's otherwise good character (including any significant contributions made by the offender to the community) must not be taken into account as a mitigating factor if the court is satisfied that this assisted the offender in committing the offence.

More detailed reasons for recommending these changes are set out below in Table 11 and the following section of this report.

Table 11: Suggested amendments to the factors set out in s 9(6) of the *Penalties and Sentences Act 1992* (Qld)

Current factor	Recommendation for amendment	Rationale
s 9(6) In sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years, the court must have regard primarily to the factors listed in paragraphs (6)(a) to (j)	Amend to require the court to have primary regard to the safety, protection and dignity of children as the overarching principle in sentencing an offender for offences of a sexual nature committed in relation to children under 16, with all other factors identified in paragraphs (9)(6)(a) to (j) (as amended) listed as a means of meeting this objective.	The factors set out in paragraphs 9(6)(a) to (j) should be listed as a means of responding to the fundamental principle that the safety, dignity and protection of children should be the primary considerations in sentencing for these offences.
s 9(6)(a) The effect of the offence on the child	Amend to specifically refer to the physical, mental or emotional harm and the effect of the offending conduct on both the child and their family, including information provided to the court under the *Victims of Crime Assistance Act 2009* (Qld).	All child sexual offences by their nature have significant physical, psychological and social impacts on a child and their longer-term health, wellbeing and life chances. Such impacts may be difficult to determine, particularly those relating to long-term harm. The consequences of child sexual offences often have a secondary impact on the child's family – for example, financial or emotional impacts or impacts on relationships between family members. The harm caused to other family members as a result of the offence is relevant to considering the extent of harm caused by the offence.
s 9(6)(b) The age of the child	Amend to focus on the vulnerability of the child, rather than just the child's age, including vulnerability due to the victim having a disability or any other relevant factor known to the offender.	As a general principle, all children are vulnerable. Emphasis should be placed on the overall issue of vulnerability and factors that contribute to it, which include the victim's age but may also include other reasons such as an intellectual or physical disability, dysfunctional family background, social isolation or homelessness.[199]

Current factor	Recommendation for amendment	Rationale
s 9(6)(c) The nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another	Amend to remove the example 'any physical harm or the threat of physical harm to the child or another' and to refer to the 'nature of the offending conduct' rather than the 'nature of the offence'.	Emphasis should be placed on the overall offending conduct rather than the nature of the offence. Sexual offending against children does not typically involve the use of actual violence or threats, but rather forms of emotional manipulation and grooming behaviour to facilitate the commission of the offence, maintain its secrecy and prevent the child disclosing the offending conduct. Such conduct can be equally as harmful as the use of actual violence.
s 9(6)(d) The need to protect the child, or other children, from the risk of the offender re-offending	No amendment is proposed to this factor. The Council recommends that a new overarching purpose of sentencing be included in s 9(6) which directs the court to have primary regard to the safety, protection and dignity of children in the sentencing of an offender for an offence of a sexual nature in relation to a child under 16, with the additional factors listed as a means of meeting this objective.	The need to protect the child and other children from the risk of further abuse by the offender should remain a primary consideration in sentencing. The Council considers that ensuring the safety, protection and dignity of children should be of primary importance in sentencing for child sexual offences.
s 9(6)(e) The need to deter similar behaviour by other offenders to protect children	No amendment.	The need for deterrence recognises the prevalence of these offences in the community and their devastating and costly impact on children and the broader community.
s 9(6)(f) The prospects of rehabilitation, including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community	No amendment.	The rehabilitation of offenders is a significant factor that contributes to the safety and protection of the victim and other children.
s 9(6)(g) The offender's antecedents, age and character	No amendment.	Further guidance should be provided on the use of good character when sentencing an offender for an offence of a sexual nature committed in relation to a child. The Council recommends limiting the applicability of good character as a mitigating factor in certain circumstances. This is discussed further below.
s 9(6)(h) Any remorse or lack of remorse by the offender	Amend to relocate remorse as a factor from s 9(6)(h) to s 9(2) and replace it with a new factor with a focus on the degree of insight or acceptance of responsibility by the offender for the offending conduct.	The Council recommends a new factor reflecting the offender's degree of insight or acceptance of responsibility for their offending conduct. This may be exhibited, for example, through self-initiated efforts at rehabilitation to address their offending behaviour or full disclosure of the extent of their offending behaviour.
s 9(6)(i) Any medical, psychiatric, prison or other relevant report relating to the offender	No amendment.	No amendment.
s 9(6)(j) Anything else about the safety of children under 16 the sentencing court considers relevant	No amendment.	No amendment.

Current factor	Recommendation for amendment	Rationale
New factor to be included in s 9(6) – the offender was in a position of trust or authority in relation to the victim when the offending conduct occurred[200]	To require a court to take into account whether the offender was in a position of trust or authority in relation to the victim when the offending conduct occurred.	The Council recommends the inclusion of this new legislative provision to recognise that sexual offending against children is commonly committed by those in positions of trust or authority over the child. This acknowledges that the virtual powerlessness of children against sexual abuse, particularly when the abuse is inflicted by an adult in a position of trust or authority over the victim, should be recognised as a key consideration. Such offending represents a gross breach of trust or parental or guardianship responsibility, and exploitation by an offender of their power or control over a child.

RECOMMENDATION 1

1. That s 9 of the *Penalties and Sentences Act 1992* (Qld) be amended as follows:

1.1 In sentencing an offender to whom s 9(5) applies, the court be required to have regard primarily to the safety, protection and dignity of children, with all other factors identified in paragraphs (9)(6)(a) to (j) (as amended) listed as a means of meeting this objective.

1.2 The following amendments should be made to s 9(6):

- s 9(6)(a) be amended to acknowledge physical, mental or emotional harm and the effect of the offending conduct on both the child and their family, including information provided to the court under the *Victims of Crime Assistance Act 2009* (Qld)
- s 9(6)(b) be amended to focus on the vulnerability of the child, including vulnerability due to the victim's disability or any other relevant factor known to the offender
- s 9(6)(c) be amended to remove the example 'any physical harm or the threat of physical harm to the child or another' and to refer to the 'nature of the offending conduct' rather than the 'nature of the offence', and
- s 9(6)(h) be amended to remove reference to 'any remorse or lack of remorse by the offender' and to replace this with the degree of insight or acceptance of responsibility by the offender for the offending conduct as a relevant factor.

1.3 An additional factor be included in s 9(6) to require a court to take into account whether the offender was in a position of trust or authority in relation to the victim when the offending conduct occurred.

1.4 The sentencing factor 'any remorse or lack of remorse by the offender' be relocated from s 9(6)(h) and included in the list of general sentencing principles and factors in s 9(2), thereby establishing the factor legislatively as a general sentencing factor rather than only as a primary consideration in sentencing an offender for an offence of a sexual nature committed in relation to a child under 16.

Good character

The current approach in Queensland

Factors to which a court must have primary regard in sentencing for offences of a sexual nature committed in relation to a child under 16 include the offender's antecedents, age and character (*Penalties and Sentences Act* s 9(6)(g)). These factors must be considered in conjunction with other factors to which a court must have primary regard listed in s 9(6) such as the need to protect the child or other children from the risk of the offender re-offending, as well as the general principles of sentencing set out elsewhere in part 2 of the Act.

Good character in a sentencing context is somewhat ambiguous in nature as it sometimes refers to an absence of prior convictions, and sometimes to positive actions, such as a history of previous good works and contribution to the community.[201] These different aspects are reflected in the guidance provided in s 11 of the Act that, in the consideration of the offender's character, the court may take into account:

- the number, seriousness, date, relevance and nature of any previous convictions of the offender
- any significant contributions made to the community by the offender, and
- such other matters as the court considers relevant.

'Antecedents', also listed in s 9(6)(g), includes an offender's previous record of criminal convictions and, while directly relevant to the issue of character pursuant to s 11, is a separate and distinct concept to 'character'.[202] In 2010, amendments were introduced to the *Penalties and Sentences Act*[203] to provide that the court must treat each previous conviction as an aggravating factor if it considers that they can reasonably be treated as such, having regard to:

- the nature of the previous conviction and its relevance to the current offence, and
- the time that has elapsed since the conviction.

In the sample of sentencing remarks reviewed by the Council, 'good character' was referred to in over a third of cases by judges in sentencing (37% overall). It was not possible to determine the treatment of 'good character' (for example, as a mitigating factor) and what weight it was accorded.

The High Court's decision in *Ryan v The Queen*

The leading authority on the nature of 'character' and its relevance to sentencing is the High Court decision of *Ryan v The Queen*.[204] The appellant, Ryan, was a Catholic priest who was sentenced in NSW for a large number of sexual offences committed against children over a 20-year period. The sentencing judge at first instance determined that the appellant's 'unblemished character and reputation are something to be expected of a priest' and concluded that these 'did not entitle the offender to any leniency whatsoever'.[205] An appeal by the appellant to the NSW Court of Criminal Appeal, including on the basis that his good character and reputation should have been taken into account in according him some leniency, was dismissed.

On appeal to the High Court, a majority of the Court held that the failure to accord the appellant some leniency because of his otherwise good character, and the Court of Criminal Appeal's subsequent dismissal of the appeal, constituted a sentencing error. The matter was remitted back to the Court of Criminal Appeal for re-sentencing. In making this determination a majority of the High Court found that good character must be taken into account, although the nature of the offending may limit its weight as a mitigating factor.

In considering the proper approach to be taken in sentencing, Gummow J commented:

> The "cardinal rule" is said to be that, whilst "good character" may operate in mitigation, "bad character" cannot operate in aggravation because a person is not to be punished or punished again for crimes other than that for which sentence is passed.[206]

His Honour went on to observe that good character is treated as relevant to sentencing for a range of reasons; '[f]or example, where the offence is an isolated lapse representing human frailty', and 'may also indicate the capacity of the person to appreciate the censure inherent in the outcome of the criminal process' and that the offender is unikely to re-offend.[207]

McHugh J, also in the majority, submitted that the proper approach to the issue of character, approved by other members of the Court, is to approach it in two 'logically distinct stages': first, the sentencing judge must determine whether the offender is of otherwise good character; and second, if the offender is of otherwise good character, what weight this should be given as a mitigating factor which 'will vary according to all of the circumstances'.[208]

In this instance, his Honour found that the nature of Ryan's offences, including that there were multiple offences involving repeated acts committed over a number of years involving breaches of trust, meant that his otherwise good character 'could only be a small factor to be weighed in the sentencing process'.[209]

Kirby J similarly remarked that 'evidence of good conduct, or of matters which reveal redeeming features of the offender's character, tendered as relevant to sentencing will rarely, if ever, be discarded as immaterial to the sentencing function'.[210] While the abuse of trust with so many young boys 'effectively made it impossible to give weight to his proper performance of priestly duties' before the offence came to light, his Honour found there were still other activities which operated to the appellant's credit and to which some consideration should have been given in sentencing.[211]

Following the decision of the High Court in *Ryan*, NSW legislated to require courts not to take into account the offender's good character or lack of previous convictions as a mitigating factor if the court is satisfied that the factor concerned assisted the offender in committing the offence.[212] This provision was enacted consistent with recommendations made by the NSW Sentencing Council in 2008.[213]

Issues and problems with the use of 'good character' as a mitigating factor

'Good character' as a general mitigating factor in sentencing is not without its critics. Some legal commentators[214] have questioned the justification for going beyond an offender's previous criminal history to consider the issue of character and the dimension of an offender's 'moral worth' to support a reduced sentence. Roberts has suggested the dangers of this form of 'social accounting' is that it allows factors unrelated to the offence or previous convictions to affect the severity of the sentence imposed, and 'creates a clear danger of inequitable treatment by privileging offenders with the means and opportunities to make a contribution to the community's welfare'.[215]

Warner, in commenting on the NSW reforms, has questioned the justification for placing sexual offences involving children in a special category and submitted that 'a more principled and admittedly more radical, approach' is one that would restrict the relevance of good character as a general sentencing factor in all cases (not just those involving sexual offences against children) to an absence of prior convictions.[216] She suggests that, if such an approach were to be taken, issues of reputation or significant contributions to the community, as well as the collateral consequences of the offence, such as a loss of reputation, professional standing and public opprobrium and stigma, would become irrelevant as mitigating factors, although character references might still have a role in assisting a court to assess an offender's prospects of rehabilitation.[217]

The potential pitfalls of separating out individual sentencing factors and considering their relevance or otherwise in individual cases is highlighted by Kirby J in *Ryan v The Queen*. His Honour refers to the error arising from the sentencing judge in that case viewing the offender 'in a one-dimensional way'.[218] It was suggested such an approach that ignores evidence relevant to an offender and their

subjective circumstances in sentencing, such as in this case on the basis of an assessment the offender was 'not a good man' or had committed serious crimes, involves a departure from basic sentencing principles.[219]

Consultations and submissions

There were a range of views expressed during consultations and in submissions about whether an offender's character should continue to be listed in s 9(6) of the Act as a factor to which a court must have primary regard in sentencing for sexual offences against children or should be permitted to be taken into account as a mitigating factor at all in sentencing. A number of submissions supported good character being explicitly excluded from consideration in the sentencing of an offender for a child sexual offence.[220] It was suggested the ability of an offender to raise their otherwise good character in mitigation can be distressing for victims.[221] Further, this does not suggest the offender has not offended previously, and this fact might have contributed to that person gaining a position of trust which facilitated the offending.

In contrast, submissions by the Queensland Law Society and Potts Lawyers supported the retention of full judicial discretion, with the suggestion that sentencing judges understand the complexities of aggravating and mitigating circumstances, and already take the abuse of positions of trust gained through otherwise good character into account as an aggravating factor.[222] On this basis, they were specifically opposed to legislating to exclude or limit good character from consideration as a mitigating factor in sentencing. Similar views were expressed in consultations, including that an offender's otherwise good character is often accorded little weight and is often counterbalanced by the aggravating factor of breach of trust.[223]

The Council's view

The Council recognises that in certain child sexual offence cases it is the offender's 'good character' that assists an offender in the facilitation of the offence, particularly where they are in a position of trust or authority over the child. The use of good character to gain access to children is one feature of cases involving a prolonged period of offending and offending against multiple victims. Consequently a majority of the Council is of the view that this warrants a different approach to the application of good character as a sentencing factor for these offences.

Although the Council acknowledges that the personal characteristics of the offender are important in the courts consideration of each matter as it relates to the victim and the offender, in instances where the offender has used his or her good character to facilitate the commission of the offence, the majority of the Council recommends that the offender's good character not be taken into account as a mitigating factor or accorded any weight. These Council members consider it important that this principle be reflected in legislation. Consequently, a majority of the Council recommends that the *Penalties and Sentences Act* be amended to limit the use of good character as a mitigating factor for offences of a sexual nature committed in relation to a child under 16.

RECOMMENDATION 2

That the *Penalties and Sentences Act 1992* (Qld) be amended to include a new provision which provides that, in sentencing an offender for an offence of a sexual nature committed against a child under 16, the good character (including any significant contributions made by the offender to the community) of the offender must not be taken into account as a mitigating factor if the court is satisfied that this assisted the offender in committing the offence.

Sections 9(5) and (5A) of the *Penalties and Sentences Act* – 'exceptional circumstances'

The current approach to 'exceptional circumstances'

Under s 9(5)(b) of the *Penalties and Sentences Act*, when sentencing an offender for an offence of

a sexual nature committed in relation to a child under 16, a court must order the offender to serve an actual term of imprisonment. This legislative requirement was inserted into the Act in 2010.[224]

As discussed in Chapter 3, a preliminary review of first-instance District Court cases determined after the 2010 amendments came into operation, showed a range of considerations were taken into account by courts in determining if 'exceptional circumstances' existed. To some extent, the variation in factors identified may simply reflect the varied individual circumstances of offenders and their offending rather than suggesting a need for greater legislative guidance.

Consultations and submissions

A number of the comments made, primarily by legal practitioners, opposed an increase in the number of legislative factors listed in s 9(6). Some of those consulted and who made a submission[225] also opposed a prescriptive list of factors in s 9(5A) providing the basis on which a finding of exceptional circumstances either could or could not be made. However, there was some support among these stakeholders for introducing a legislative requirement for courts to provide their reasons when making this determination.[226]

During consultations and in some submissions, some supported s 9(5A) including reference to whether the offender has an intellectual disability or developmental impairment as a basis upon which exceptional circumstances may be found.[227] Some also supported the circumstances of the victim being considered by courts when making this determination.[228]

The online response form explored views on the factors that should be of most relevance to courts in determining if exceptional circumstances exist in a particular case. Respondents were asked to rank (on a scale of importance) 40 factors that might be considered when determining whether 'exceptional circumstances' exist. The most important factors ('very important' or 'quite important') nominated by those who responded were:[229]

- the age of the victim
- the closeness in age between the victim and the offender
- the offender being under 17 years at the time of the offending, and
- the age of the offender.

The factors considered least important when determining whether 'exceptional circumstances' exist were generally personal factors unrelated to the commission of the offence, such as:[230]

- the offender has family support
- the offender lost employment because of the offending conduct
- the offender has a good work history
- the offender is elderly
- the offender has been excommunicated by the church, and
- the offender has poor physical health.

Some respondents felt there should be no departure from the principle in s 9(5)(b) that a sentence of actual imprisonment should be imposed on the basis of exceptional circumstances (that is, a term of actual immediate imprisonment should be ordered in all cases), while others nominated the maturity of the offender and whether there was consent by the parties involved in situations where both the victim and the offender were young and of similar age (such as is already explicitly referred to in s 9(5A) as the closeness in age between the offender and the child).

The Council's view

The Council recognises concerns raised during consultations and in some submissions about the dangers of legislating lists of factors which courts must consider in making a determination about exceptional circumstances. The Council considers the approach should be for courts to continue the practice of considering whether the combination of factors brings the case into the 'exceptional' category. For these reasons, the Council does not recommend any legislative change to s 9(5A) to add additional factors that either should, or should not, be permitted to be considered by a court when determining if exceptional circumstances exist.

The Council also cautions against adopting an approach requiring all offenders convicted of child sexual offences to serve a term of actual immediate imprisonment regardless of their circumstances. Sexual offences against children capture a broad spectrum of offending behaviour and such an approach would fail to allow the court to recognise this in cases where it is appropriate to do so.

There is an aspect of the current operation of the 'exceptional circumstances' provisions that the Council considers would benefit from reform. In the interests of transparency and to promote community understanding of the reasons for the court imposing a sentence other than actual imprisonment, the Council considers it appropriate for the court to be required by legislation to provide clear reasons for reaching this conclusion. Accordingly, the Council recommends that the *Penalties and Sentences Act* be amended to include a requirement that, if a court does not impose an actual term of imprisonment (as permitted under s 9(5)), it must state in open court its reasons for finding exceptional circumstances and cause these reasons to be recorded. Consistent with s 10 of the *Penalties and Sentences Act*, a failure to provide reasons should not invalidate the sentence.

RECOMMENDATION 3

3.1 That the *Penalties and Sentences Act 1992* (Qld) be amended to require a court, in imposing a sentence other than actual imprisonment on an offender convicted of an offence of a sexual nature committed in relation to a child under 16 years, to state in open court its reasons for finding that exceptional circumstances exist and to cause these reasons to be recorded.

3.2 That a failure to provide reasons should not invalidate the sentence but that the court's failure to do so may be considered by an appeal court if an appeal against sentence is made.

5.3 Taking harm into account

The inherent harm caused by sexual offences against children, and the particular harm to the victim or victims concerned, is clearly a central consideration for courts in sentencing for an offence of a sexual nature committed in relation to a child.

The Council's analysis of a sample of sentencing remarks from the higher courts for 2007–09 showed that harm to the victim is often specifically mentioned by judges in sentencing. For example, in 74 per cent of the sample of sentencing remarks examined for both rape and maintaining a sexual relationship with a child, the judge expressly referred to victim harm. Even in cases where harm to the victim is not specifically referred to, this does not mean the judge did not take this factor into account. In some cases, harm may be so clearly evident that specific mention of it may not be considered necessary.

Although the dynamics of harm caused by child sexual offences are complex, there is a body of research that confirms the considerable mental, physical, behavioural and social harm which may be caused to a victim by childhood sexual abuse.[231] This harm has a financial and social impact on individual victims and their families, as well as on the broader community.[232]

Currently, information on harm is communicated to the court through the facts of the case, comments made by the prosecution in their sentencing submissions and the tendering of a victim impact statement (VIS). A VIS allows the court to be informed of the details of the harm caused by the offence from the perspective of the victim; this is often a factor relevant to the sentence imposed and does not have a purely 'therapeutic' function for the victim.[233]

Consultations and submissions

One of the themes to emerge during consultations was the potential benefits of the sentencing process and the visible aspects of it, such as judges' sentencing remarks, placing greater

emphasis on the harm to the victim and expressly acknowledge the longer-term impacts of the offence.[234] Some suggested that there should be more balance between time devoted to addressing the personal circumstances of the offender and the offending, and time spent acknowledging the position of the victim and the consequences of the abuse.

A number of those consulted also commented on the need for better mechanisms to communicate to the court the harm caused by child sexual offences to the child, their family and the broader community and to have this taken into account. Particularly where the complainant is quite young, the value of a victim impact statement was felt to be limited as the complainant may not be able to adequately identify and articulate the harm experienced, and many of the longer-term consequences of the abuse will not yet be evident.[235] It was suggested that an adult victim of historical abuse is in a better position to communicate the harm caused than a child victim in whose case the longer-term impacts will not yet be apparent.

The difficulty of attributing a causal connection between the offence and the physical or psychological manifestations of it was also seen by some to be a barrier to courts considering the full impacts of the abuse. Others commented that in some cases a victim may not want some or all aspects of the harm caused by the offending conduct to be known to the offender, so the victim may not disclose everything or may limit the amount of information provided.[236] Comments were also made on the potential barriers in Aboriginal and Torres Strait Islander communities in making the full extent of harm caused by the offence known due to the complex nature of relationships in these communities.[237]

A number of suggestions were made during consultations and in submissions regarding improvements to the current processes to ensure that harm is better understood and communicated to the court and longer-term harm is taken into account. These included:

- adopting a model, similar to that used in the Family Court of Australia for the purposes of preparing Family Reports, of court-appointed experts who would interview the child and present an independent assessment of the harm to the child and evidence on the likely longer-term impacts of the type of abuse experienced
- introducing more targeted judicial and legal professional education and training to explore the nature and consequences of child sexual abuse
- developing resources for courts and prosecutors exploring issues relating to sentencing for child sexual offences
- prosecutors tendering articles and research papers on the impact of child sexual abuse during sentencing, paving the way for the Court of Appeal to take judicial notice of current evidence of short-term and longer-term impacts of child sexual abuse; these judgments might then act as future points of reference for courts of first instance when sentencing for these offences
- providing financial assistance to enable child victims to have a psychological report prepared on their behalf, and
- in the case of Aboriginal and Torres Strait Islander victims, enabling the child and family members to meet with a male and/or female Elder of their tribe or clan, who would then make direct representations to the court on the impact of the offence on the victim, family and community.[238]

The Council's view

In the Council's view, the inherent harm caused by sexual offences against children, and the particular harm to the victim or victims concerned, should be a central consideration in sentencing for these offences. The Council considers it appropriate to recognise this harm in the court's sentencing remarks.

The Council recognises that comments made during consultations suggest a level of dissatisfaction with the current approach to sentencing with respect to an acknowledgement of the harm caused by this type of offending.

Although the Council has recommended an amendment to s 9(6) to allow an acknowledgment of physical, mental or emotional harm and the effect of the offending conduct on both the child and their family, it acknowledges there was a strong emphasis in submissions and consultations on the need to explore alternative responses, including the view that society should respond to sexual offences in a more therapeutic way in all instances. A therapeutic approach, drawing on principles of therapeutic jurisprudence, would be one in which the legal system's response to sexual offences against children would take into account its potential impact on the emotional life and psychological wellbeing of victims and offenders.[239]

Though it has not been possible within the timeframe for this Reference to consult victims directly about their individual experiences or to fully explore other justice models that might better meet the needs of victims and the interests of community safety, the Council will consider these issues as part of its ongoing work, as well as how the harm to the broader community, or some parts of it, could be better taken into account.

The need for the impact of offending on the community to be considered was a key topic of concern in consultations with Aboriginal and Torres Strait Islander Elders. Some jurisdictions, such as South Australia and the Northern Territory, include specific provisions in their sentencing legislation for the court to take into account the impact of the offence on the community generally or on a particular community. However, for these provisions to operate effectively, supporting processes need to be put in place to make this information available to a court.

Reference has also been made during the consultation process to the need for judicial officers and legal practitioners to inform themselves on an ongoing basis about the nature and dynamics of child sexual abuse and its short and long-term consequences.

The Council supports the need for all those who work in the criminal justice system and come into contact with children to develop a proper understanding of child sexual abuse, its impacts and the complex family and social contexts in which it commonly occurs. It is the Council's view that it is important that such training and information be made available on an ongoing and regular basis.

RECOMMENDATION 4

That all parties involved in the sentencing process for child sexual offences undertake ongoing professional development and have access to information about the nature and consequences of sexual offending against children.

5.4 Sentencing decisions

During the Council's consultations, a concern raised by some participants about current approaches to sentencing for child sexual offences was the need for courts to articulate the reasons for the sentence imposed and, in particular, how the harm to the victim and family members more generally has been taken into account.[240]

The potential to make de-identified sentencing remarks more readily available and dispel some of the myths and misconceptions concerning sexual offending against children was also discussed as a way of improving public understanding of and confidence in sentencing.

Sentencing remarks are recognised as an important way in which courts can communicate to the community the reasons for the sentence imposed in a particular case.

The Council's view

The Council recognises the importance of transparency in the giving of judicial reasons for the sentence imposed.

Section 10 of the *Penalties and Sentences Act* includes a requirement where a court imposes a sentence of imprisonment (including a suspended sentence) for the court to state in open court its reasons for the sentence and have the reasons

recorded; however, the format these reasons should take is not prescribed.

In the Council's view it is critical for judicial discretion in sentencing to be unfettered. However, there is value in increasing the level of consistency in how sentencing remarks are structured and for resources to be made available to judicial officers to assist in exercising their sentencing discretion, including in sentencing for sexual offences against children.

The Council further acknowledges its role in publishing and providing information relating to sentencing, including in reports such as these released in response to specific Terms of Reference and on its website.

RECOMMENDATION 5

That consideration be given to the development of additional resources to be made available to judicial officers to assist in exercising their sentencing discretion when sentencing an offender for an offence of a sexual nature committed in relation to a child under 16.

6 ADDITIONAL RESPONSES

This chapter responds to the remaining Term of Reference, which asks the Council to report on any other matter that the Council considers relevant. It discusses some existing challenges in the sentencing of child sexual offences, considers alternative sentencing responses, and identifies the potential for future work to be undertaken to explore these further and progress other issues raised over the course of the Reference.

6.1 Current challenges in the sentencing of child sexual offences

Over the course of this Reference, comments made in submissions and during consultations raised a number of matters:

- the possible benefits of a strengthened focus on rehabilitation – rather than a purely punitive response – to reduce the longer-term risks of re-offending[241]
- concerns that some sentences for offenders convicted of child sexual offences do not give them sufficient time to complete programs while in prison (in some cases as a result of time spent on remand),[242] and
- the current operation of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) and whether post-sentence orders (particularly those involving continued detention) are justified on the basis of community protection.[243]

These concerns raise questions about the adequacy of existing sentencing responses, and the community and justice system responses to offending from the time an incident first comes to light, to the end of an offender's sentence after conviction.

They also highlight that sentencing is only one component of what should be a coordinated, holistic, whole-of-government and community effort to ensure that responses to sexual offending against children are effective.

Research in Australia and elsewhere has confirmed that most sexual offending goes unreported or

there is a significant delay in reporting, particularly where the offending involves a friend or family member.[244] Offenders charged and convicted of a child sexual offence are therefore highly likely to represent only a small proportion of all offenders.

It has also been recognised that child sexual offences are among the most difficult to prosecute.[245] A number of reforms over the previous decade, including the restructuring of offence provisions and introduction of special provisions for children giving evidence, aim to overcome some of the existing barriers. Based on the Council's consultations, concerns appear to remain by some working in the criminal justice system about the need to create an environment in which children feel safe to disclose abuse and to minimise the risks of re-traumatisation of victims. The need for an increased focus on rehabilitation and the prevention of child sexual abuse was also discussed in some consultations.

As discussed in Chapter 3, consistent with trends in other Australian jurisdictions, the proportion of offenders charged with sexual offences committed against children who are convicted and sentenced remains consistently below that for other non-Reference offences. Taking into account offenders convicted after a trial, those charged with a Reference offence were also less likely to reach the sentencing stage of the criminal justice process and be sentenced than those charged with a non-Reference offence as their most serious offence.

Of offenders who are sentenced for a Reference offence, consistent with the guidelines set out in the *Penalties and Sentences Act*, a substantial proportion of offenders (60%) are being sentenced to serve actual terms of imprisonment, although this varies depending on the seriousness of the offence. In the case of more serious offences, such as maintaining a sexual relationship with a child and rape, almost all offenders are sentenced to an immediate term of imprisonment (97% and 98% respectively).[246]

For offenders sentenced to actual immediate imprisonment, the average length of sentence varies by offence, as does the level of supervision on release. A recent independent outcome evaluation of the Queensland Corrective Services prison-based sexual offender program by Smallbone and McHugh found that, of the sample of prisoners included in the study, almost half (47%) were released with no community supervision.[247]

At the time when court-ordered parole was introduced in Queensland in 2006, offenders convicted of sexual offences were deliberately excluded on the basis of the 'serious risk to the community' these types of prisoners pose.[248] Courts can achieve a similar outcome as court-ordered parole (a fixed release date), but a partially suspended sentence has a limitation that such a sentence does not carry the supervisory component on a prisoner's release that court-ordered parole provides.

There is some evidence to suggest that community supervision and supported re-integration from prison may be particularly beneficial for child sexual offenders in reducing risks of re-offending. For example, the recent evaluation by Smallbone and McHugh of Queensland prison-based sexual offender treatment programs found that standard community supervision appeared to have had a stronger independent effect than treatment on reducing sexual and violent recidivism.[249] It further found that 'a higher assessed risk, not participating in a treatment program, identifying as Indigenous, and being discharged without supervision, are all associated in some way with sexual, nonsexual violent and any recidivism'.[250] The evaluation recommended that standard post-release supervision should be made more accessible for both treated and untreated sexual offenders, as the combination of treatment and post-release supervision was the most favourable to reducing re-offending.

Research also supports the benefits of programs delivered in non-custodial settings in reducing risks of re-offending. A 2005 meta-analysis of 69 studies involving more than 22,000 sexual offenders found that community-based treatment programs are generally more effective than programs delivered in prison settings.[251] This is

consistent with findings about the effectiveness of offender treatment programs more generally.[252]

The range of challenges that remain in achieving a more effective response to sexual offending against children suggest that a broader and more diverse re-think of current approaches to the sentencing and management of child sexual offenders may need to be considered.

6.2 Consultations and submissions

The comments and submissions received by the Council in response to the Terms of Reference were diverse. In addition, many issues were raised that were beyond the scope of the Reference.

Some who provided feedback to the review raised broader questions about the effective operation of the criminal justice system relating to the prosecution of child sexual offences, including time spent by prosecutors with victims before trial, the time taken for sexual offence prosecutions to be finalised and the potential for child victims to be re-traumatised as a result of the process, despite significant reforms that have occurred over the past 10 years to better protect children giving evidence.[253]

Some respondents also advocated a more holistic review of sentencing policies and approaches to promote what is perceived as a more coherent and rational response, rather than reviewing aspects of sentencing in a more piecemeal way.[254]

It was suggested that increasing the punitive aspects of sentencing for a child sexual offence may actually have the unintended consequence of protecting offenders.[255] For example, as children often know their abuser, they may be inhibited from disclosing sexual abuse where they believe the response to the offender will be a harsh punitive one. This could be for a number of reasons, including that the abuser may be the financial provider for the family, and that as a result the child may wish the abuse to stop without wanting to separate the abuser from the family.[256]

Those who made submissions generally agreed that consistency of approach and transparency in sentencing are important objectives, while a number also were supportive of preserving judicial discretion.[257] Another theme in the consultations and submissions was the need to better understand what the community's views on sentencing for child sexual offences are, to determine whether sentences are in fact inconsistent with community expectations, as the Terms of Reference suggest might be the case.[258]

Though outside the scope of the Terms of Reference, questions were also raised about a range of related matters, such as:

- the structure of some of the current offence provisions and their limitations, including what types of relationships are captured[259]
- why different penalties apply for child sexual offences based on the age of the child. For example, it was proposed that all children under the age of 16 should be protected from sexual assault and questions were raised with respect to the justification for different maximum penalties to apply based on the age of the child[260]
- the need to review sentencing outcomes for all sexual offences rather than just offences against children and explore responses to juvenile offenders[261]
- strategies to address the causes of sexual offending against children and the need to place a stronger focus on providing support to victims of abuse to break the potential victim–perpetrator cycle,[262] and
- the need for community education on sentencing practices.[263]

In response to the question of what other sentencing responses might be explored for child sexual offences, there was strong support by legal practitioners and service providers for alternative and more innovative approaches to be considered, rather than a sole focus on the use of imprisonment or increasing incarceration periods.

In submissions to this Reference, the need for alternative sentencing and criminal justice system responses to better meet the needs of victims,

offenders and the community was also raised.[264] A continued focus on punitive responses was said to ignore the complexities of the issue and do little to prevent child sexual abuse in the community.

In preliminary comments on the Reference, one submission advocated for the benefits of targeted rehabilitation programs that not only operate in the custodial setting but also support offenders transitioning from a custodial environment into the community. Such programs, it was proposed, should include appropriate mechanisms for accountability. Detailed reference was made to the Circles of Support and Accountability programs that originated in Canada,[265] which were also referred to during consultations as a model that might be explored in Queensland.[266]

Comments were made with respect to the need for strategies that respond to offending to be directed at prevention, treatment, rehabilitation and re-integration; the view was expressed that current processes that focus on external control, policing and punishing do not work effectively as they may not foster honesty in offenders and offenders learn to say what they expect people want to hear, learning to use denial or conformity.[267]

A number of concerns were raised during consultations about the appropriateness of group-based models of treatment and support currently offered in prison, and suggestions were made for more individualised and tailored treatment models. For a range of reasons, it was suggested that offenders may be reluctant to discuss their offending in front of other prisoners and that housing sexual offenders together risks reinforcing their behaviour. The potential for post-sentence orders to be made at the end of an offender's sentence, resulting in their continued supervision or detention, was also viewed by some as being counterproductive to achieving positive treatment outcomes.

Funding additional strategies aimed at rehabilitating offenders was suggested in several submissions, with accompanying arguments that such funding would prevent the 'too little, too late' approach to treatment programs offered within correctional facilities. An investigation into programs in other jurisdictions was suggested – for example, the NSW Pre-Trial Diversion of Offenders Program (Child Sexual Assault), described below.[268]

At a Legal Issues Roundtable, it was suggested there could be merit in introducing a form of intensive targeted order for child sexual offenders, modelled on the intensive correction order or the intensive drug rehabilitation order that operates in the Drug Court.[269]

6.3 Additional responses to sentencing child sexual offences

In the Issues Paper, the Council presented a snapshot of alternative approaches to the sentencing of child sexual offences adopted, or recommended for adoption, in other jurisdictions. These included recommendations by the National Child Sexual Assault Reform Committee in 2010 for the introduction of specialist child sexual offence courts in each Australian jurisdiction.[270] Under that committee's proposals, child sexual offence matters would be prosecuted and sentenced in specialist courts with specialist judges and prosecutors. Although the focus of the specialist courts would be on the prosecution process, these courts would also be responsible for the sentencing of offenders and their post-sentence management, with emphasis on:

- mandatory treatment programs for all child sexual offenders
- offenders' compulsory attendance at compliance hearings after conviction and release, and
- the establishment of an IT system to track charges, dispositions, sentence, bail and probation conditions, the status of each case and actions taken at each hearing.

The development of alternative criminal justice responses in Australia has included the introduction in NSW of a sentencing diversion program for offenders who offend within the family.[271] The NSW Pre-Trial Diversion

of Offenders Program (Child Sexual Assault) allows certain categories of offenders who plead guilty to sexually abusing a child in their care to be diverted from the criminal justice system into a 2-year treatment program. Although not strictly a sentencing order, this initiative gives an alternative means of responding to offenders convicted of child sexual offences. Entry to the program depends on an assessment of the offender's suitability, requires physical separation from the family and is subject to strict compliance with the program requirements. A conviction is recorded against the offender and they enter into an undertaking with the District Court to take part in the program. If the offender breaches the program, they are returned to court for sentencing. If they successfully complete the program, no further action is taken.[272] The program also focuses on therapeutic and support services for victims and their families. It is based on several key principles: giving primacy to the rights of victims, strengthening relationships between victims and non-offending parents and siblings, and requiring offenders to take responsibility for their behaviour.[273] The program began operating in 1989 and was evaluated in 2009. Evaluation outcomes have included reduced re-offending rates and greater disclosure by participants about their offending behaviour.

In some overseas jurisdictions, specialist sentencing orders have been introduced targeted at sexual offenders. For example, in Washington State in the United States, a Special Sex Offender Sentencing Alternative (SSOSA) was introduced in the early 1980s. The aim of the SSOSA was to provide certain sexual offenders with an alternative to imprisonment that permits community supervision and treatment in place of incarceration. Under the SSOSA, a court sets a determinate period of imprisonment of up to 11 years, which is then suspended and a period of community supervision imposed. Offenders on a SSOSA are required to undergo treatment for up to 5 years. The court may also order the offender to serve a period of confinement. There are yearly court reviews of the offender's progress and a failure to comply with the conditions of supervision or to make satisfactory progress in treatment can result in a judge revoking the SSOSA and imposing the determinate sentence. Courts are directed to 'give great weight to the victim's opinion' about whether the offender should receive this form of disposition, and if the court acts contrary to the victim's wishes it must state its reasons for doing so.[274] Evaluations of the order have found lower rates of re-arrest and re-conviction for non-sexual offences for offenders who received a SSOSA and for sexual offences during the first 2 years of a SSOSA.[275] The evaluation also found that the SSOSA was a lower-cost alternative to imprisonment that did not increase the risk that these offenders posed to the community.[276]

In England and Wales, courts can impose what is referred to as an 'extended sentence of imprisonment' on offenders convicted of certain specified violent and sexual offences if the court considers there is a 'significant risk to members of the public of serious harm' occasioned by the commission by the offender of further specified offences. This sentencing order is a sentence of imprisonment that is equal to the aggregate of 'the appropriate custodial term' for the offence that would have otherwise been imposed and a further period referred to as 'the extension period', during which time the offender is subject to conditions similar to parole. The extension period is set by the court by reference to the period the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the offender committing further specified offences, and can be up to 8 years for offenders convicted of a sexual offence.

6.4 The Council's view

The Council's position is aligned with views expressed in consultations and submissions that, to improve current sentencing responses to sexual offending against children, what will be required is not simply additional guidance or increasingly more punitive responses to patterns of offending, but rather an integrated and 'end-to-end' approach to the sentencing and management of these offenders.

It is the Council's view that the community has a legitimate expectation that responses to patterns of child sexual offending, including sentencing responses, should appropriately reflect the harm that child sexual abuse causes to victims, families and communities and that the safety of children should be the primary concern.

Though the need for general deterrence is sometimes cited as a justification for more punitive responses, the 2010 report released by the National Child Sexual Assault Reform Committee highlighted the limitations of the criminal justice system in responding to these offences:

> The combination of low rates of reporting, high attrition rates and low conviction rates indicate that the criminal justice system, from policing to prosecuting through to the trial process, has an extremely limited capacity to act as any real deterrent to the vast majority of those who commit sex offences against children.[277]

The unintended consequences of sentencing and criminal justice reforms must also be taken into account. For example, it is possible that current criminal justice system responses to child sexual offences may inhibit the disclosure and reporting of these offences or deter criminal proceedings being commenced, particularly where the offences occur within the family, because of factors such as concerns about the implications for the offender of prosecution. More punitive responses to protect the community may also risk offenders taking more extreme steps to avoid their offending being detected. Similarly, any increase in maximum penalties, the introduction of mandatory penalties and mandatory registration requirements may result in a reduced willingness by offenders to plead guilty, and consequently there may be a drop in conviction rates.

Service providers consulted by the Council repeatedly raised the point that, in addition to wanting to feel safe and have the offender address their offending behaviour, victims of abuse want the offending against them acknowledged and the offender to take full responsibility for their actions. It is important that the criminal justice system and sentencing responses are appropriately structured to respond to these concerns.

The Council also notes that the sentencing orders imposed on child sexual offenders do not operate in isolation, but in an increasingly regulated and complex administrative and legal context. Concerns about the risks that offenders convicted of child sexual offences are seen to pose to the community and specifically children, has led to reform targeted at their management in the community. People convicted of sexual offences against children are generally subject to ongoing reporting requirements under the *Child Protection (Offender Reporting) Act 2004* (Qld). They may also be subject to post-sentence detention and supervision orders at the end of their sentence, pursuant to the *Dangerous Prisoners (Sexual Offenders) Act*, and orders that prohibit them from engaging in specified conduct which poses an unacceptable risk to the lives or safety of children in the community, as provided for under the *Child Protection (Offender Prohibition Order) Act 2008* (Qld); the conduct need not constitute a criminal offence.

The Council considers it critical that sentencing responses to child sexual offences are considered further within this broader context.

In the case of sentences for child sexual offenders, a number of suggestions for improving current responses have been made over the course of this Reference. The Council is of the view these merit further consideration. These include the potential for pre-trial programs (as diversionary measures or as part of a deferral of sentencing), new forms of targeted and specialised sentencing orders, and innovative approaches to the structuring and management of sentencing orders that give high priority to community safety and minimise the need for post-sentence detention.

The development of alternative sentencing responses requires close and careful consideration of the adequacy of current responses, the possible benefits of alternative approaches and evidence of 'what works' in reducing the risks posed by these offenders. Whatever the approach taken, the challenge is to ensure that the serious nature of these offences and the need for just punishment and offender treatment programs is recognised in the sentence imposed, while

meeting the interests of community protection through ongoing rehabilitation and ongoing supervision and monitoring where necessary. It is the Council's position that in their form and intent, effective sentencing responses for child sexual offences should encourage offenders to take full responsibility at the earliest opportunity for their actions and the harm they have caused, while reducing the risks of re-offending.

APPENDIXES

Appendix 1 – Terms of Reference

Terms of Reference - Sentencing Advisory Council

Sentencing of offenders convicted of child sexual offences

I, Paul Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, having regard to:

- the concern of the Queensland Government that the penalties being imposed for child sexual offending are not always commensurate with the harm experienced by child victims;
- the concern of the Queensland Government that the penalties being imposed for child sexual offending are not always commensurate with community expectations;
- the general expectation of the Queensland Government that child sexual offenders serve an appropriate period of actual incarceration;
- the need to promote public confidence in the criminal justice system;
- the need to maintain judicial discretion to impose a just and appropriate sentence in individual cases;
- the sentencing principles set out in the *Penalties and Sentences Act 1992*

refer to the Sentencing Advisory Council, pursuant to section 200(1) of the *Penalties and Sentences Act 1992*, a review of the sentences imposed on offenders convicted of child sexual offending and sentenced pursuant to the Penalties and Sentences Act.

In undertaking this reference, the Sentencing Advisory Council will:

- examine and report on current sentencing practices for offenders aged 17 years and over convicted of child sexual offences, in particular for the offences of: sodomy (section 208); indecent treatment of a child under 16 (section 210); unlawful carnal knowledge (section 215); maintaining an unlawful sexual relationship with a child (section 229B); rape (section 349); and attempted rape (section 350);
- consider what, if any impact, legislative reform has had on sentencing practices and the sentences imposed for child sexual offences, in particular: the *Sexual Offences (Protection of Children) Amendment Act 2003* which amended the Criminal Code to increase the maximum penalties for section 210 and amended the Penalties and Sentences Act to remove from consideration, the principle that a term of imprisonment is a sentence of last resort, when sentencing child-sex related offenders; and the *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* which amended the Penalties and Sentences Act to provide that in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16

years the offender must serve an actual term of imprisonment unless there are exceptional circumstances;

- compare sentencing outcomes for sexual offences committed against children with sentencing outcomes for sexual offences committed against adults;
- identify the factors that are most commonly taken into account by the courts when sentencing offenders for child sexual offences;
- state the Council's views on the factors that should be of most relevance when assessing offence seriousness for child sexual offences, including the harm to the victim and the culpability of the offender, and the relevance of specific aggravating and mitigating factors;
- state the Council's views on whether there is a need for additional guidance in sentencing offenders for child sexual offences and if so, the form that this guidance should take; and
- any other matter that the Council considers relevant.

The Sentencing Advisory Council is to provide a report on its examination to the Deputy Premier and Attorney-General and Minister for Local Government and Special Minister of State and will provide the report to the Deputy Premier by 31 January 2012.

Dated the 14th day of July 2011.

PAUL LUCAS MP
Deputy Premier and Attorney-General,
Minister for Local Government
and Special Minister of State

Appendix 2 – Glossary

Actual term of imprisonment	A term of imprisonment served wholly or partly in a corrective services facility (a prison, a community corrections centre or a work camp). See *Penalties and Sentences Act 1992* (Qld) s 9(10).
Aggravating factor	A factor that may increase a sentence for an offence – for example, the use of violence.
Bench book	Bench books are guidelines made available to the courts on relevant topics, to assist the courts in a number of areas.
Common law	Also known as case law. It is developed through decisions of the courts rather than through legislation.
Concurrent sentence	If an offender is found guilty of more than one offence and sentenced to multiple terms of imprisonment, the individual imprisonment terms can be ordered to served simultaneously with one another. The period of imprisonment that the offender must serve is the highest sentence of imprisonment imposed by the court for an offence that forms part of the sentence.
Court-ordered parole	The ability of the court to set a parole release date or a parole eligibility date for an offender sentenced to a term of imprisonment.
Culpability	The degree of individual fault for an offence.
Cumulative sentence	If an offender is ordered to serve imprisonment for more than one offence, the court may order the terms of imprisonment to be served one after the other, as opposed to concurrently.
Head sentence	The total period of the sentence, including the non-parole period and the parole period. For example, if a court sentences an offender to 5 years imprisonment with a non-parole period of 2 years, 5 years is the head sentence.
Higher courts	The District Court and Supreme Court of Queensland.
Imprisonment	An order of imprisonment that must be served in custody until parole is granted. It excludes partially and wholly suspended sentences.
Indefinite sentence	A penalty that the court may impose on its own initiative or after an application by the prosecution, requiring an offender to be held indefinitely in prison. An indefinite sentence continues until a court orders it discharged.
Indictable offence	A type of offence that is usually dealt with in the higher courts (the District and Supreme Courts). Such offences are heard by a judge and jury or a judge alone. In some instances an indictable matter can be heard in the Magistrates Court.
Indictment	A formal charge or accusation of a crime (for persons sentenced in Queensland, in the District Court or Supreme Court).
Intensive correction order	If a court sentences a person to 12 months imprisonment or less, the court may make an intensive correction order. The effect of the order is that the offender serves the sentence in the community, not in a prison, and must comply with strict requirements. See *Penalties and Sentences Act 1992* (Qld) pt 6.

Longitudinal trend analyses	Longitudinal trend analyses are performed to examine if changes in data occur over time. For example, whether or not the values of data points remain constant, increase or decrease.
Mandatory sentence	The only sentence that can be imposed for an offence that cannot be deviated from or mitigated by the sentencing court. For example, murder carries a mandatory life sentence, which means that all offenders sentenced for murder must be sentenced to life imprisonment.
Maximum penalty	The maximum penalty that can be imposed on an offender for a given offence. Each criminal offence has a maximum penalty, and Parliament decides what this should be.
Mitigating factor	A factor that may reduce a sentence imposed on an offender for an offence – for example, pleading guilty or cooperating with police.
Most serious offence	The offence receiving the most serious penalty. If none of the offences receive a penalty, the most serious offence is determined by the Australian Bureau of Statistics National Offence Index Ranking.
Non-parole period	The period during which an offender is serving their sentence in prison, prior to any eligibility date for release on parole.
Offence	An illegal act as defined by legislation.
Offence simpliciter	The basic offence without any circumstance of aggravation. A circumstance of aggravation is a further element of the offence that increases the seriousness of the offence and penalty. For example, for the offence of unlawful sodomy (*Criminal Code* (Qld) s 208), unlawful sodomy of a person under 18 is the offence simpliciter and attracts a penalty of 14 years imprisonment. If the offence involves a child under the age of 12 years, this is a circumstance of aggravation and a higher maximum penalty of life imprisonment applies.
Parole	The period of time when a person serving a term of imprisonment is released from prison to serve out the remainder of their sentence in the community under strict supervision.
Parole boards	Independent statutory bodies responsible for determining if prisoners are released to parole. There are three parole boards in Queensland – the Queensland Parole Board, the Southern Queensland Regional Parole Board and the Central and Northern Queensland Regional Parole Board.
Parole eligibility date	The date at which an offender is eligible to apply for parole. The parole eligibility date is set by the courts or by legislation.
Parole release date	A date set by the court upon which the offender is to be released from prison.
Partially suspended sentence	The partial suspension of a term of imprisonment. The court can impose a partially suspended sentence if an offender is sentenced to imprisonment for 5 years or less. See *Penalties and Sentences Act 1992* (Qld) pt 8.
Penalty	The sentence or sanction imposed by a court for an offender found guilty of an offence.
Period of imprisonment	The unbroken duration of imprisonment that an offender is to serve for two or more terms of imprisonment, whether ordered to be served concurrently or cumulatively.

Probation	A sentencing order that allows the offender to remain in the community under strict requirements set by the court and Queensland Corrective Services. See *Penalties and Sentences Act 1992* (Qld) pt 5.
Queensland Sentencing Information Service (QSIS)	A computer-based recording system that contains a large collection of linked sentencing-related information, including full-text criminal Queensland Court of Appeal judgments, case summaries, and revised sentencing remarks from the Supreme and District Courts, dating back to 1999.
Reference offences	The six child sexual offences specified in the Terms of Reference.
Serious violent offence	As defined in the *Penalties and Sentences Act 1992* (Qld) pt 9A, an offence listed in schedule 1 of the Act or of counselling or procuring the commission of, or attempting or conspiring to commit, an offence listed in schedule 1, as well as other offences involving the use, counselling or procuring the use, or conspiring or attempting to use, serious violence against the person, or that result in serious harm to another person in circumstances where a court makes a declaration that the offender is convicted of a 'serious violent offence'. If a court makes such a declaration it means that the offender must serve a minimum of 80 per cent of the sentence or 15 years in prison (whichever is the lesser) before being eligible to apply for release on parole. This declaration is mandatory if the offender has been sentenced for a qualifying offence to 10 years imprisonment or more.
Standard non-parole period	A legislated period intended to provide guidance to courts on the minimum length of a non-parole period to be set for a given offence.
Summary offence	Summary offences are dealt with in the Magistrates Court and are heard by a magistrate alone.
Term of imprisonment	The duration of imprisonment imposed for a single offence. See *Penalties and Sentences Act 1992* (Qld) s 4.
Three-year moving average	The three-year moving is often used in time series data to smooth out highly fluctuating data (sometimes caused by small numbers of matters) to show overall trends. The three year moving average starts with an initial value calculated by averaging the first three values in a series of numbers. This value is then moved forward by including the next value in the number series and excluding the first value in the calculation of averages. This process is repeated until the end of the until the final year.
Wholly suspended sentence	The complete suspension of a term of imprisonment. The court can impose a wholly suspended sentence if an offender is sentenced to imprisonment for 5 years or less. See *Penalties and Sentences Act 1992* (Qld) pt 8.

Appendix 3 – Submissions and consultations

1. Initial comments on the Terms of Reference

No.	Date received	Name
1	15/08/2011	Protect All Children Today Inc
2	31/08/2011	Stonewall Medical Centre
3	2/09/2011	Queensland Police Service
4	5/09/2011	Queensland Corrective Services
5	14/09/2011	Queensland Law Society
6	28/09/2011	Kuranda Social Justice Group
7	30/09/2011	Gold Coast Centre Against Sexual Violence Inc

2. Written submissions[1]

Submission no.	Date received	Name of submitter
1	11/11/2011	S McElnea (thesis submission)
2	13/11/2011	M Bentley
3	14/11/2011	C James
4	23/11/2011	M White
5	5/12/2011	Confidential
6	5/12/2011	J Davis
7	7/12/2011	Sisters Inside Inc
8	9/12/2011	Gold Coast Centre Against Sexual Violence Inc
9	9/12/2011	Commission for Children and Young People and Child Guardian
10	9/12/2011	Potts Lawyers
11	12/12/2011	Anonymous
12	12/12/2011	Queensland Law Society
13	12/12/2011	Youth Advocacy Centre
14	12/12/2011	Prison Fellowship Australia (Queensland)
15	13/12/2011	A Brent
16	13/12/2011	Protect All Children Today Inc
17	14/12/2011	Crime and Misconduct Commission
18	14/12/2011	Zig Zag Young Women's Resource Centre Inc
19	14/12/2011	Prisoners' Legal Service Qld (endorsing Sisters Inside Inc submission)
20	15/12/2011	Queensland Advocacy Incorporated
21	16/12/2011	Queensland Police Union of Employees
22	16/12/2011	Catholic Prison Ministry (endorsing Sisters Inside Inc submission)
23	20/12/2011	Bravehearts Inc
24	20/12/2011	Legal Aid Queensland

Note:

1. Submissions received from victims of crime and their family members have been treated for the purposes of this Reference as made in a confidential capacity.

3. Interviews

Date of interview	Name of submitter
30/11/2011	Lynda
8/12/2011	B Spencer

4. Online response form

This list only includes those respondents who indicated they were happy to be identified in this report and for their comments to be attributed to them.

Name of submitter	Name of submitter
L Bird	M Lowcock
J Burke	E Mallon
R Chapman	M Mallon
E Cooper	Melissa
L Crighton	B Pearson
V Dickson	S Penola
L Hart	B Reilly
D Hutchinson	R Sawyer
Paula J	H Sinclair
F Jewell	R Stokman
N Lindenberg	M Turner

5. Statewide consultations (November–December 2011)

Date	Location	Venue
Tuesday 22 Nov 4.00pm–4.30pm	Cairns	Palmer Room, Hotel Cairns, cnr Abbott and Florence Sts
Wednesday 22 Nov 12.00pm–4.00pm	Cairns	Cairns & District Aboriginal and Torres Strait Islander Corporation for Elders (Gumba Gumba) 289 Little Spence St, Bungalow
Wednesday 23 Nov 4.00pm–4.30pm	Mt Isa	Terrace Gardens Function Centre, 4 Duchess Rd
Monday 28 Nov 4.00pm–4.30pm	Ipswich	Ipswich Civic Centre, cnr Limestone and Nicholas Sts
Tuesday 29 Nov 4.00pm–4.30pm	Brisbane	Avenir Room, Ibis Hotel, 27–35 Turbot St
Wednesday 30 Nov 4.00pm–4.30pm	Beenleigh	Beenleigh Events Centre, cnr Crete and Kent Sts
Thursday 15 Dec 4.00pm–4.30pm	Brisbane (Legal Issues Roundtable)	Palladium Room, State Law Building, 50 Ann St

Appendix 4 – Data definitions and limitations

- The child sexual offences discussed in this report are those specified in the Terms of Reference. This means information on the full scope of sexual offences that may properly be classified as 'child sexual offences' is not provided.
- Information reflects data from government administrative systems. The accuracy of the information provided in this report reflects how information is structured, entered and maintained in these systems, and how it is extracted. This is especially relevant for courts data used for longitudinal analyses. Offence categories and the conduct they capture have changed over time with legislative amendment.
- Information on the specific subcategories for the offence of indecent treatment of a child under 16 is not provided because not all subcategories contained enough cases to ensure reliable analysis.
- Courts data do not include comprehensive information on victim age. This means that sentencing outcome information for rape and attempted rape offences based on courts data does not distinguish between offences committed against children and those committed against adults.
- DJAG does not collect information on disability status.
- Replacement indictments may be submitted after original indictments are presented to the court. Where there is a replacement indictment, and an offender is sentenced on that replacement indictment, DJAG records the sentence outcome information against the replacement indictment. The sentence outcome for the original indictment (that has been replaced) will be discontinued (a nolle prosequi is entered). This means that the number of matters shown as discontinued may be inflated and the proportion of cases resulting in a sentence may be understated. The issue of replacement indictments explains why a number of analyses reported in Chapter 3 have excluded cases where 'discontinued' was the sentence outcome.
- The use of the most serious offence and the most serious penalty means that offences or penalties not defined as most serious are not included in data analyses. This method of reporting is consistent with national counting rules for data of this nature. For example, an accused person with a most serious offence of rape may also have indecent treatment of a child under 16 offences listed on their indictment. The indecent treatment offences will not be counted, as the most serious offence is used to generate prevalence information. This explains why the number of accused people before the courts for less serious sexual offences may seem low.
- OESR courts data are not updated to reflect changes in sentencing outcomes that may occur because of appeal decisions or re-trials.
- Cases with missing information are excluded from analyses where relevant.
- The impact of legislative reform on sentencing practices is difficult to determine using courts data alone. Changes in sentencing practices after the introduction of legislative amendment may be due to the amendments, changes in the way data is captured or other external factors.
- Some graphs in Chapter 3 include averages for non-Reference offences for District Court cases or Magistrates Court cases for comparison, to represent the broader court trends. These averages exclude offences that are violations of orders. The District Court was chosen as the comparison because most (91%) of the analysed Reference offences are sentenced in the District Court.

Appendix 5 – Offence description, maximum penalty and summary disposition for the sexual offences listed in the Terms of Reference

Offence description and maximum penalty for sexual offences listed in the Terms of Reference						
Offence description, *Criminal Code* (Qld)	Age of consent	Maximum penalty				Summary disposal
		Child under 12	Child under 16	16 & 17 yr olds	Aggravating circumstances	
Unlawful sodomy (s 208) • It is an offence if a person does, or attempts to do, any of the following: • sodomise a person under 18 years • permit a male person under 18 years to sodomise him or her • sodomise a person with an impairment of the mind • permit a person with an impairment of the mind to sodomise him or her.	18 years	Life	14 years	14 years	Life – if the offence involves a child, or a person with an impairment of the mind, who is to the knowledge of the offender: (a) his or her lineal descendant; or (b) under his or her guardianship.	Yes – unless defendant elects otherwise, provided: – no circumstance of aggravation – the complainant was 14 years or over – the defendant pleads guilty (*Criminal Code* (Qld) s 552B).
Indecent treatment of a child under 16 (s 210) (a) It is an offence for any person to: unlawfully or indecently deal with a child under the age of 16 years (b) unlawfully procure a child under the age of 16 years to commit an indecent act (c) unlawfully permit himself or herself to be indecently dealt with by a child under the age of 16 years (d) wilfully and unlawfully expose a child under the age of 16 years to an indecent act by the offender or any other person (e) without legitimate reason, wilfully expose a child under the age of 16 years to any indecent object or any indecent film, videotape, audiotape, picture, photograph or printed or written matter (f) without legitimate reason, take any indecent photograph or record, by any device, any indecent visual image of a child under 16 years.	16 years	20 years	14 years	n/a	20 years – if the child is, to the knowledge of the offender, his or her lineal descendant. 20 years – if the offender is the guardian of the child, or for the time being has the child under his or her care.	Yes – in certain circumstances (as for s 208).

Offence description and maximum penalty for sexual offences listed in the Terms of Reference						
Offence description, *Criminal Code* (Qld)	**Age of consent**	**Maximum penalty**				**Summary disposal**
		Child under 12	**Child under 16**	**16 & 17 yr olds**	**Aggravating circumstances**	
Unlawful carnal knowledge with or of children under 16 (s 215) It is an offence to have or attempt to have carnal knowledge with a child under the age of 16 years. Unlawful carnal knowledge involves sexual intercourse that is complete upon penetration to any extent but does not include sodomy.	16 years	Life 14 years for an attempt	14 years	n/a	14 years – if the offence is an attempt and the child is not the lineal descendant of the offender but the offender was the child's guardian or, for the time being, has the child under the offender's care. Life – if the child is not the lineal descendant of the offender but the offender was the child's guardian or, for the time being, has the child under the offender's care.	Yes – in certain circumstances (as for s 208).
Maintaining a sexual relationship with a child (s 229B) It is an offence for any adult to maintain an unlawful relationship of a sexual nature with a child under the prescribed age. An unlawful sexual relationship is a relationship that involves more than one unlawful sexual act over a period of time. An unlawful sexual act means an act that constitutes or would constitute an offence of a sexual nature. An offence of a sexual nature means an offence defined in ss 208, 210 (other than 210(1)(e) or (f)), 215, 222, 349, 350 or 352 of the *Criminal Code*. The prescribed age is dependent on the type of offence involved. For an offence against s 208 the age is 18 years; for any other offences the age is 16 years. A person cannot be prosecuted for this offence without the consent of the Attorney-General or the Director of Public Prosecutions.	16 years	Life	Life	n/a	n/a	Yes – in certain circumstances (as for s 208).

Appendix 6 – Amendments to the *Penalties and Sentences Act 1992* (Qld) s 9

Section 9(1) of the *Penalties and Sentences Act 1992* (Qld) provides the purposes of sentencing.

Section 9(2) of the *Penalties and Sentences Act 1992* (Qld) included a wide range of principles and factors that the court must have regard to when sentencing an offender.

Section 9(3) and (4) of the *Penalties and Sentences Act 1992* (Qld) included a wide range of principles and factors that the court must have regard to when sentencing an offender for any offence:

- that involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person; or
- that resulted in physical harm to another person.

Existing principles and factors in the *Penalties and Sentences Act 1992* (Qld), Reprint 7G in force 10 March 2003	2003 amendments to the principles and factors in s 9
• s 9(2)(c) the nature of the offence and how serious the offence was, including any physical or emotional harm done to a victim • s 9(4)(c) the personal circumstances of the victim	• s 9(6)(a) the effect of the offence on the child
• Not included	• s 9(6)(b) the age of the child
• s 9(2)(c) the nature of the offence and how serious the offence was, including any physical or emotional harm done to a victim • s 9(4)(d) the circumstances of the offence, including the death of or any injury to a member of the public or any loss or damage resulting from the offence	• s 9(6)(c) the nature of the offences, including, for example, any physical harm or threat of physical harm to the child or another
• s 9(1)(e) to protect the Queensland community from the offender • s 9(4)(a) the risk of physical harm to any members of the community if a custodial sentence was not imposed • s 9(4)(b) the need to protect any members of the community from the risk	• s 9(6)(d) the need to protect the child, or other children, from the risk of the offender re-offending
• s 9(1)(c) to deter the offender or other persons from committing the same or similar offence	• s 9(6)(e) the need to deter similar behaviour by other offenders to protect children
• s 9(1)(b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated	• s 9(6)(f) the prospects of rehabilitation, including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community
• s 9(2)(f) the offender's character, age and intellectual capacity	• s 9(6)(g) the offender's antecedents, age and character
• s 9(4)(i) any remorse or lack of remorse of the offender	• s 9(6)(h) any remorse or lack of remorse of the offender
• s 9(4)(j) any medical, psychiatric, prison or other relevant report in relation to the offender	• s 9(6)(i) any medical, psychiatric, prison or other relevant report relating to the offender
• s 9(4)(k) anything else about the safety of the community that the sentencing court considers relevant	• s 9(6)(j) anything else about the safety of children under 16 the sentencing court considers relevant

Offence description and maximum penalty for sexual offences listed in the Terms of Reference						
Offence description, *Criminal Code* (Qld)	Age of consent	Maximum penalty				Summary disposal
		Child under 12	Child under 16	16 & 17 yr olds	Aggravating circumstances	
Rape (s 349) Rape – it is an offence for a person to rape another person. The type of conduct that amounts to rape is: • a person has carnal knowledge with or of another person without the other person's consent • a person penetrates the vulva, vagina or anus of another person to any extent with a thing or part of the person's body that is not a penis without the other person's consent • a person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent. A child under the age of 12 years is incapable of giving consent to any of these acts. Consent must be given freely and voluntarily by a person with the cognitive capacity to give it. Consent is not given freely and voluntarily if it is obtained by force, by threat or intimidation, by fear of bodily harm, by exercise of authority, by false and fraudulent representations about the nature or purpose of the act or by a mistaken belief induced by the accused person that the accused person was the person's sexual partner. The offence of rape is complete where there is penetration to any extent.	n/a	Life	Life	Life	n/a	Yes – in certain circumstances (as for s 208).
Attempted rape (s 350) Provides an offence for a person who attempts to commit the crime of rape.	n/a	14 years	14 years	14 years	n/a	Yes – in certain circumstances (as for s 208).

Appendix 7 – Legislative history of Reference offences: 3 July 1989 to 1 December 2008

UNLAWFUL SODOMY – s 208 *Criminal Code* (Qld)		
Current offence If a person does, or attempts to do, any of the following: • sodomise a person under 18 years • permits a male person under 18 years to sodomise him or her • sodomises a person with an impairment of the mind • permits a person with an impairment of the mind to sodomise him or her.	**Penalty** • s 208 (1)(a), (b), (c) or (d) – 14 years • s 208(2)(a) – life – if the child is under 12 • s 208(2)(b) – life – if the offence involves a child, or a person with an impairment of the mind, who is to the knowledge of the offender: (i) his or her lineal descendant or (ii) under his or her guardianship.	**Defences** If the accused believed on reasonable grounds that: • if the offence involves a child who is 12 years or more, that the person was 18 years or older; or • the person did not have an impairment of the mind • the act that was the offence did not, in the circumstances, constitute the sexual exploitation of the person with an impairment of the mind.

Amending legislation and commencement date	Amendment details	Offence title	Section	Penalty
Prior to 3 July 1989	s 208 provided an offence for a person to: • have carnal knowledge of a person against the order of nature; or • have carnal knowledge with an animal; or • permit a male to have carnal knowledge against him or her against the order of nature.	Unnatural offences	s 208	• ss 208 (1), (2) or (3) – 14 years with hard labour
	s 209 provided a separate offence for any person who attempts to commit an offence in s 208.	Attempt to commit unnatural offences	s 209	• s 209 – 7 years with hard labour
Corrective Services (Consequential Amendments) Act 1988 (Qld) s 5 1 December 1988	Removed reference to hard labour in the penalty for both ss 208 and 209.	Unnatural offences Attempt to commit unnatural offences	s 208 s 209	• ss 208(1), (2), or (3) – 14 years • s 209 – 7 years
Criminal Code, Evidence Act and Other Acts Amendment Act 1989 (Qld) ss 10 and 11 3 July 1989	s 208 was amended: • the penalty was reduced for this offence from 14 to 7 years • circumstances of aggravation were added which provided for increased penalties depending on the age of the child and the relationship between the offender and the child.	Unnatural offences	s 208	• 7 years • 14 years – child is under 16 • life – child is under 12 • life – child is to the knowledge of the offender his lineal descendant, the offender is the guardian of the child, or has the child under his care
	s 209 was amended: • penalty reduced for an attempt offence from 7 to 3 years • circumstances of aggravation added which provided for increased penalties depending on the age of the child involved and the relationship between the offender and the child.	Attempt to commit unnatural offences	s 209	• 3 years • 7 years – child is under the age of 16 • 14 years – child is under the age of 12 • 14 years – child is to the knowledge of the offender his lineal descendant, if the offender is the guardian of the child, or has the child under his care

Amending legislation and commencement date	Amendment details	Offence title	Section	Penalty
Criminal Code and Another Act Amendment Act 1990 (Qld) ss 5 and 6 19 January 1991	s 208 was amended to decriminalise anal intercourse between consenting adults. Further amendments were: • the offence name changed to 'unlawful anal intercourse' • reference to 'carnal knowledge against the order of nature' removed and replaced with: 'A person who – (1) has carnal knowledge by anal intercourse with any person not an adult; or (2) permits a male person not an adult to have carnal knowledge of him or her by anal intercourse' • reference to carnal knowledge with an animal removed and a separate offence created for carnal knowledge of an animal • a defence provision included if the accused person believed on reasonable grounds that the person in respect of whom the offence was committed was an adult • a warning provision for the jury was included of the danger of convicting a person for this offence on the uncorroborated testimony of one witness unless the jury find the evidence is corroborated in some other evidence implicating the person.	Unlawful anal intercourse	s 208	Remained the same: • s 208(1)(a), (b) – 7 years • s 208(2)(a) – 14 years – child is under 16 • s 208(2)(b)(i) – life – child is under 12 • s 208(2)(b)(ii) – life – child is to the knowledge of the offender his lineal descendant • s 208(2)(b)(iii) – life – if the offender is the guardian of the child • s 208(2)(b)(iv) – life – if the offender has the child under his care
	s 209 was amended in accordance with the amendments to s 208.	Attempt to have unlawful anal intercourse	s 209	• Remained the same: • s 209 – 3 years • s 209(a) – 7 years – child is under 16 • s 209(b)(i) – 14 years – child is under 12 • s 209(b)(ii) – 14 years – child is to the knowledge of the offender his lineal descendant • s 209(b)(iii) – 14 years – if the offender is the guardian of the child, or has the child under his care • s 209(b)(iv) –14 years – child is under the care of the offender

Amending legislation and commencement date	Amendment details	Offence title	Section	Penalty
Criminal Law Amendment Act 1997 (Qld) ss 21 and 22(2)–(3) 1 July 1997	s 209 was replaced with a new offence which: • changed the offence name to 'unlawful sodomy' • changed the wording from reference to carnal knowledge to sodomy • broadened the scope of the offence to make it unlawful to sodomise or be sodomised by an intellectually impaired person • increased the penalty provision for a simpliciter offence from 7 to 14 years • amended the wording of the defence provision.	Unlawful sodomy	s 208	• ss 208(1)(a), (b), (c) or (d) – 14 years • s 208(2)(a) – life – child is under 12 • s 208(2)(b)(i) – life – if the offence involves a child or an intellectually impaired person who is to the knowledge of the offender his or her lineal descendant • s 208(2)(b)(ii) – life – if the offence involves a child or an intellectually impaired person who is to the knowledge of the offender under his or her guardianship or care
	s 209 was amended in accordance with amendments to s 208 and: • the offence name was changed to 'attempt to have unlawful sodomy' • the penalty provisions changed with the removal of the penalty provision if the child is under the age of 16 • there was an increase in the maximum penalties from 3 to 7 years, and from 7 to 14 years.	Attempt to have unlawful anal intercourse	s 209	• s 209(1) – 7 years • s 209(2)(a) – 14 years – child under 12 • s 209(2)(b)(i) – 14 years – if the offence involves a child or an intellectually impaired person who is to the knowledge of the offender his or her lineal descendant • s 209(2)(b)(ii) – 14 years – if the offence involves a child or an intellectually impaired person who is under the offender's guardianship or care

Amending legislation and commencement date	Amendment details	Offence title	Section	Penalty
Criminal Code and Other Acts Amendment Act 2008 (Qld) ss 38 and 39 1 December 2008	s 208 was replaced with a new offence which: • merged the previous ss 208 and 209 into one provision • amended the wording from 'intellectually impaired person' to 'person with an impairment of the mind' • provided one penalty for an attempt offence of 14 years (an increase from the previous penalty of 7 years for an attempt offence in s 209(1)).	Unlawful sodomy	s 208	• ss 208(1)(a), (b), (c) or (d) – 14 years – for an actual or an attempt to commit the offence • s 208(2)(a) – life – for an offence other than an attempt if child is under 12 • s 208(2)(b)(i) – life – for an offence other than an attempt if the offence involves a child or an intellectually impaired person who is to the knowledge of the offender his or her lineal descendant • s 208(2)(b)(ii) – life – for an offence other than an attempt if the offence involves a child or an intellectually impaired person who is to the knowledge of the offender under his or her guardianship or care
	s 209 was omitted as a separate offence and the attempt provision was merged with the substantive offence found in s 208.	Attempted sodomy	s 209	• increase in the penalty provision from the previous s 209(1) attempt offence from 7 to 14 years • all unlawful sodomy attempt offences 14 years

INDECENT TREATMENT OF A CHILD UNDER 16 – s 210 *Criminal Code* (Qld)		
Current offence Any person who: (a) unlawfully or indecently deals with a child under 16 (b) unlawfully procures a child under 16 to commit an indecent act (c) unlawfully permits himself or herself to be indecently dealt with by a child under 16 (d) wilfully and unlawfully exposes a child under 16 to an indecent act by the offender or any other person (e) without legitimate reason, wilfully exposes a child under 16 to any indecent object or any indecent film, videotape, audiotape, picture, photograph or printed or written matter (f) without legitimate reason, takes any indecent photograph or records, by any device, any indecent visual image of a child under 16.	**Penalty** • s 210(2) – 14 years – if child is or is above 12 • s 210(3) – 20 years – if child is under the age of 12 • s 210(4) – 20 years – if the child is, to the knowledge of the offender, his or her lineal descendant • s 210(4) – 20 years – if the offender is the guardian of the child, or for the time being has the child under his or her care.	**Defences** If the offence is alleged to have been committed in respect of a child of or above the age of 12, it is a defence to prove that the accused believed on reasonable grounds that the child was of or above the age of 16.

Amending legislation and commencement date	Amendment details	Offence title	Section	Penalty
Prior to 3 July 1989 – separate offences of indecent treatment of boys and girls. The term 'deal with' includes doing any act which, if done without consent, would constitute an assault as hereinafter defined.	s 210 Any person who unlawfully and indecently deals with a boy under the age of 17 is guilty of a crime, and is liable to imprisonment with hard labour for 5 years. s 216 Any person who unlawfully and indecently deals with a girl under the age of 16 years is guilty of a misdemeanour, and is liable to imprisonment with hard labour for 5 years.	Indecent treatment of boys under seventeen Indecent treatment of girls under sixteen	s 210 s 216	• 5 years • 7 years if the boy or girl is under 14 It is a defence to a charge of the offence defined in this section to prove that the accused person believed, on reasonable grounds, that the girl was of or above the age of 16 years.
Criminal Code, Evidence Act and Other Acts Amendment Act 1989 (Qld) s 12 3 July 1989	Repealed the previous two offences and created one offence of indecent treatment of children under 16 with 6 types of offending conduct and aggravating circumstances: (a) unlawfully and indecently deals with a child under 16 (b) unlawfully procures a child under 16 years to commit an indecent act (c) unlawfully permits himself to be indecently dealt with by a child under 16 (d) wilfully and unlawfully exposes a child under 16 years to an indecent act by the offender or any other person (e) without legitimate reason, wilfully exposes a child under 16 to any indecent object or any indecent film, videotape, audiotape, picture, photograph or printed or written matter (f) without legitimate reason takes any indecent photograph or records, by means of any device, any indecent visual image of a child under 16. • provided a misdemeanour offence if the child is of or above the age of 12 • provided a defence if the offence is alleged to have been committed against a child of or over 12, that the accused believed on reasonable grounds the child was of or above 16 • provided for a judicial warning that a court must warn the jury of the danger of convicting a person based on the uncorroborated evidence of one witness unless that evidence is corroborated by some other evidence implicating the accused.	Indecent treatment of children under 16	s 210	• 5 years – child is of or above 12 (misdemeanour offence) • 10 years – child under 12 • 10 years – child is, to the knowledge of the offender, the offender's lineal descendant or if the offender is the guardian of the child or, for the time being, has the child under his care
Criminal Law Amendment Act 1997 (Qld) s 23 1 July 1997	The offence provision was amended: • the misdemeanour provision was removed • the maximum penalties were increased from 5 to 10 years, and from 10 to 14 years • the judicial warning to the jury of the danger of convicting on the uncorroborated testimony of one witness unless the jury finds that evidence is corroborated by some other evidence implicating the person was removed.	Indecent treatment of children under 16	s 210	• s 210(2) – 10 years – child is of or above 12 years • s 210(3) – 14 years – child is under 12 years • s 210(4) – 14 years – child is, to the knowledge of the offender, the offender's lineal descendant • s 210(4) – 14 years – if the offender is the guardian of the child or has the child under his care

Amending legislation and commencement date	Amendment details	Offence title	Section	Penalty
Sexual Offences (Protection of Children) Amendment Act 2003 (Qld) s 15 1 May 2003	The maximum penalty provisions were increased: • from 10 to 14 years • from 14 to 20 years.	Indecent treatment of children under 16	s 210	• s 210(2) – 14 years – child is of or above 12 years • s 210(3) – 20 years – child is under 12 years • s 210(4) – 20 years – child is, to the knowledge of the offender, the offender's lineal descendant • s 210(4) – 20 years – if the offender is the guardian of the child or has the child under his care

UNLAWFUL CARNAL KNOWLEDGE WITH OR OF CHILDREN UNDER 16 – s 215 *Criminal Code* (Qld)		
Current offence If a person has or attempts to have carnal knowledge with a child under the age of 16. Carnal knowledge involves sexual intercourse that is complete upon penetration to any extent but does not include sodomy.	**Penalty** • s 215(2) – 14 years – if the child is of or above the age of 12 • s 215(3) – 14 years – if the offence is an attempt and the child is under the age of 12 • s 215(3) – life – if the child is under the age of 12 • s 215(4) – 14 years – if the offence is an attempt and the child is not the lineal descendant of the offender but the offender was the child's guardian or, for the time being, has the child under the offender's care • s 215(4) – life – if the child is not the lineal descendant of the offender but the offender was the child's guardian or, for the time being, has the child under the offender's care.	**Defences** If the offence involves a child of or above 12, it is a defence to prove the accused person believed, on reasonable grounds, that the child was of or above 16 years.

Amending legislation and commencement date	Amendment details	Offence title	Section	Penalty
Prior to 3 July 1989	The *Criminal Code* contained several offences for having carnal knowledge with girls under the age of 16 years: s 214 attempt to abuse girls under 10 s 215 defilement of girls under 16 or idiots s 216 indecent treatment of girls under 16.	Attempt to abuse girls under ten Defilement of girls under sixteen or idiots Indecent treatment of girls under sixteen	s 214 s 215 s 216	• s 214 – 14 years • s 215 – 5 years (misdemeanour offence) • s 216 – 5 years, or 7 years if the girl is under 14

Amending legislation and commencement date	Amendment details	Offence title	Section	Penalty
Criminal Code, Evidence Act and Other Acts Amendment Act 1989 (Qld) s 14 3 July 1989	Provided for a new offence that combined elements of the previous offences found in ss 214, 215 and 216. The one offence of having or attempting to have carnal knowledge of girls under 16 was drafted into a new s 215. Carnal knowledge involves sexual intercourse that is complete upon penetration to any extent. If the offence is alleged to have been committed in respect of a girl of or above 12 years, it is a defence to prove that the accused person believed, on reasonable grounds, that the girl was of or above the age of 16. A person can be convicted of this offence, but a judicial warning must be given by the court warning the jury of the danger of convicting a person based on the uncorroborated evidence of one witness unless that evidence is corroborated by some other evidence implicating the accused.	Carnal knowledge of girls under sixteen	s 215	• 5 years – girl is of or above 12 years (misdemeanour offence) • life – girl is under 12 years • 10 years – in the case of an attempt – girl is under 12 years • life – girl is not a lineal descendant of the offender but the offender was the girl's guardian or, for the time being, had the girl under the offender's care • 14 years – in the case of an attempt – girl is not a lineal descendant of the offender but the offender was the girl's guardian or, for the time being, had the girl under the offender's care If a prosecution for this offence is not commenced within 2 years from the date it is alleged to have occurred, a Crown Law Officer must provide consent.
Criminal Law Amendment Act 1997 (Qld) s 26 1 July 1997	s 215 was amended to remove several provisions and to provide for increased maximum penalties: • from 5 to 14 years, and from 10 to 14 years • removal of the requirement that, if a prosecution for this offence is not commenced within 2 years from the date it is alleged to have occurred, a Crown Law Officer must provide consent • removal of the judicial warning to the jury of the danger of convicting on the uncorroborated testimony of one witness unless the jury finds that evidence is corroborated by some other evidence implicating the person	Carnal knowledge of girls under sixteen	s 215	• s 215(2) – 14 years – girl is of or above 12 • s 215(3) – life – girl is under 12 years • s 215(3) – 14 years – in the case of an attempt girl is under 12 years • s 215(4) – life – girl is not a lineal descendant of the offender but the offender was the girl's guardian or, for the time being, had the girl under the offender's care • s 215(4) – 14 years – in the case of an attempt if the girl is not a lineal descendant of the offender but the offender was the girls guardian or, for the time being, had the girl under the offender's care

Amending legislation and commencement date	Amendment details	Offence title	Section	Penalty
Criminal Law Amendment Act 2000 (Qld) ss 17(2)–(5) 27 October 2000	s 215 was amended to remove reference to 'girl' or 'girls' and replaced with 'child'	Carnal knowledge of girls under sixteen	s 215	Penalties remained the same

MAINTAINING A SEXUAL RELATIONSHIP WITH A CHILD – s 229B *Criminal Code* (Qld)		
Current offence Any adult who maintains an unlawful relationship of a sexual nature with a child under the prescribed age. An unlawful sexual relationship is a relationship that involves more than one unlawful sexual act over a period of time. An unlawful sexual act means an act that constitutes or would constitute an offence of a sexual nature. An offence of a sexual nature means an offence defined in ss 208, 210 (other than 210(1)(e) or (f)), 215, 222, 349, 350 or 352 of the *Criminal Code*. The prescribed age is dependent on the type of offence involved. For an offence against s 208 the age is 18 years; for any other offences the age is 16 years. A person cannot be prosecuted for this offence without the consent of the Attorney-General or the Director of Public Prosecutions.	**Penalty** life	**Defences** If the child was at least 12 years when the crime was alleged to have been committed, it is a defence to prove that the adult believed on reasonable grounds that the child was at least the prescribed age.

Amending legislation and commencement date	Amendment details	Offence title	Section	Penalty
Criminal Code, Evidence Act and Other Acts Amendment Act 1989 (Qld) s 23 3 July 1989	The offence was introduced into the *Criminal Code* making it unlawful for an adult to have a relationship of a sexual nature with a child under the age of 16. A Crown Law Officer must consent to the prosecution for this offence. In order to convict a person for the offence, it must be shown that the offender (a person over the age of 18) did an act defined to constitute an offence of a sexual nature on three or more occasions. Evidence of these acts is admissible and probative to proving the maintenance of a sexual relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions. If the offence involved a child of or above 12, it is a defence to prove that the accused person believed, on reasonable grounds, that the child was of or above 16 at the commencement of the relationship.	Maintaining a sexual relationship with a child under sixteen	s 229B	• 7 years • 14 years – if, in the course of the sexual relationship, the offender has committed an offence of a sexual nature for which he is liable for 5 years or more but less than 14 years imprisonment • life – if, in the course of the sexual relationship, the offender has committed an offence of a sexual nature for which he is liable for 14 years or more imprisonment
Criminal Law Amendment Act 1997 (Qld) ss 33(2)–(13) 1 July 1997	s 229B was amended to: • increase the penalty from 7 to 14 years for some forms of offending • broaden the scope of offences of a sexual nature to include unlawful sodomy and attempted unlawful sodomy • introduce reference to 'prescribed age' • amend the existing defence to if the accused 'believed throughout the relationship, on reasonable grounds' that the child was of or above the prescribed age.	Maintaining a sexual relationship with a child under 16	s 229B	• 14 years • life – if, in the course of the relationship, the offender has committed an offence of a sexual nature for which the offender is liable to imprisonment for 14 years or more

Amending legislation and commencement date	Amendment details	Offence title	Section	Penalty
Sexual Offences (Protection of Children) Amendment Act 2003 (Qld) s 18 1 May 2003	Replaced the old offence with a new offence which: • provided one maximum penalty of life imprisonment • simplified the evidentiary process by reducing the need for the prosecution to prove that three acts of a sexual nature occurred during the relationship to only having to prove one act • included a requirement that for an adult to be convicted of the offence 'all members of the jury must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship with the child involving unlawful sexual acts existed'; however, in relation to the unlawful sexual acts: - the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act was charged as a separate offence (for example, where a sexual act occurred multiple times, the prosecution does not have to allege each individual act) - the jury is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence - all members of the jury are not required to be satisfied about the same unlawful sexual acts.	Maintaining a sexual relationship with a child under 16	s 229B	life
Criminal Code and Other Acts Amendment Act 2008 (Qld) s 43 1 December 2008	Amended the offence provision to remove reference to s 209 (attempted unlawful sodomy) as this offence was subsumed by other amendments into s 208.			

RAPE – s 349 *Criminal Code* (Qld) and ATTEMPTED RAPE – s 350 *Criminal Code* (Qld)	
Current offence **Rape** – it is an offence for a person to rape another person. The type of conduct that amounts to 'rape' is: a person has carnal knowledge with or of another person without the other person's consent a person penetrates the vulva, vagina or anus of another person to any extent with a thing or part of the person's body that is not a penis without the other person's consent a person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent. Consent must be given freely and voluntarily by a person with the cognitive capacity to give it. Consent is not given freely and voluntarily if it is obtained by force, by threat or intimidation, by fear of bodily harm, by exercise of authority, by false and fraudulent representations about the nature or purpose of the act or by a mistaken belief induced by the accused person that the accused person was the person's sexual partner. A child under the age of 12 is incapable of giving consent. The offence of rape is complete where there is penetration to any extent.	**Penalty** life
Attempted rape – it is an offence for a person to attempt to commit the crime of rape.	14 years

Amending legislation and commencement date	Amendment details	Offence title	Section	Penalty
Prior to 3 July 1989	Offence detail: 'Any person who has carnal knowledge of a woman, or girl, not his wife, without her consent, or with her consent, if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape.'	Definition of rape Punishment of rape Attempt to commit rape	s 347 s 348 s 349	• s 348 – life • s 349 – 14 years – for an attempt
Criminal Code, Evidence Act and Other Acts Amendment Act 1989 (Qld) ss 31, 32 3 July 1989	A new s 347 was substituted, allowing a husband to be charged with the rape of his wife. The new offence provided: 'Any person who has carnal knowledge of a female, without her consent, or with her consent, if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape.'	Definition of rape Punishment of rape Attempt to commit rape	s 347 s 348 s 349	Remained the same
Criminal Law Amendment Act 1997 (Qld) ss 62(2)–(5) 1 July 1997	The definition of rape was amended and broadened to include the act of sodomy of a person without his or her consent.	Definition of rape Punishment of rape Attempt to commit rape	s 347 s 348 s 349	Remained the same
Criminal Law Amendment Act 2000 (Qld) s 24 27 October 2000	Substantial amendments were made to the definition of rape to broaden the conduct captured by the offence: • if a 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 • if a person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent • s 348 was replaced with a new section which provided a specific meaning of consent • rape renumbered from s 348 to s 349 and attempt to commit rape renumbered from s 349 to s 350.	Meaning of consent Rape Attempted rape	s 348 s 349 s 350	Remained the same
Evidence (Protection of Children) Amendment Act 2003 (Qld) s 11 5 January 2004	The offence of rape was amended to include a subsection that a child under the age of 12 is incapable of giving consent.	Meaning of consent Rape Attempted rape	s 348 s 349 s 350	Remained the same

Appendix 8 – Number values for selected figures

Table 1: n values for Figure 3, Chapter 3 – Three-year moving average showing the proportion of accused persons pleading guilty to Reference offences, Queensland courts, 2001–10

Year	Rape	Maintaining a sexual relationship with a child	Indecent treatment of a child under 16	Unlawful carnal knowledge	Unlawful sodomy	Total District Court (excluding Reference offences)
2001	95	20	189	29	17	4,962
2002	123	31	248	39	30	5,004
2003	134	17	252	48	22	4,749
2004	139	27	249	47	24	4,819
2005	191	49	359	86	25	3,565
2006	193	56	329	110	25	3,591
2007	236	54	397	98	22	3,615
2008	226	54	378	99	16	3,372
2009	208	36	320	95	10	3,192
2010	182	49	315	104	14	3,261

Table 2: n values for Figure 4, Chapter 3 – Proportion of accused persons convicted of Reference offences across three comparison periods, Queensland courts, 2001–10

Type of offence	January 2001 to April 2003	May 2003 to July 2006	August 2006 to December 2010
Rape	255	550	922
Maintaining a sexual relationship with a child	56	127	210
Indecent treatment of a child under 16	514	990	1,532
Unlawful carnal knowledge	85	236	434
Unlawful sodomy	55	79	71
Total District Court (excluding Reference offences)	11,552	13,791	14,787

Table 3: n values for Figure 11, Chapter 3 – Three-year moving average showing the average length of imprisonment given to offenders convicted of Reference offences compared to total District Court matters (excluding Reference offences), Queensland higher courts, 2001–10

Year	Rape	Maintaining a sexual relationship with a child	Indecent treatment of a child under 16	Total District Court (excluding Reference offences)
2001	10	n/a	19	4,962
2002	14	17	40	5,004
2003	34	10	40	4,749
2004	36	23	43	4,819
2005	46	28	53	3,565
2006	70	30	57	3,591
2007	78	41	55	3,615
2008	76	41	53	3,372
2009	59	16	43	3,192
2010	53	33	46	3,261

REFERENCES

Ashworth, Andrew, *Sentencing and Criminal Justice* (Cambridge University Press, 5th ed, 2010)

Australian Bureau of Statistics, *Personal Safety Survey Australia* (2006 reissue), cat no 4606.0

Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians, Australia* (2006), cat no 4713.0

Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (Australasian Institute of Judicial Administration, updated 2010)

Berliner, Lucy, Lisa Miller, Donna Schram and Cheryl Milloy, *The Special Sex Offender Sentencing Alternative: A Study of Decision-Making and Recidivism: Report to the Legislature* (Harborview Sexual Assault Center and Urban Policy Research, 1991)

Bond, Christine and Samantha Jeffries, 'An Examination of the Sentencing Remarks of Indigenous and Non-Indigenous Criminal Defendants in South Australia's Higher Courts' (2010) 17(1) *Psychiatry, Psychology and the Law* 70

Bond, Christine, Samantha Jeffries and Heron Loban, *Exploring Indigenous and Non-Indigenous Sentencing in Queensland* (Queensland University of Technology and James Cook University, 2011)

Bouhours, Brigitte and Kathleen Daly, 'Youth Sex Offenders in Court: An Analysis of Judicial Sentencing Remarks' (2007) 9(4) *Punishment and Society* 371

Bronitt, Simon and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 2010)

Chief Justice of Queensland, the Honourable Paul de Jersey AC, and Her Honour Chief Judge Patricia M Wolfe, *Supreme and District Court Benchbook*, online at <http://www.courts.qld.gov.au/information-for-lawyers/benchbooks-and-ucpr-bulletin/supreme-and-district-courts-benchbook>

Cossins, Annie, *Alternative Models for Prosecuting Child Sex Offences in Australia: Report of the National Child Sexual Assault Reform Committee* (University of New South Wales, 2010)

Cossins, Anne, Jane Goodman-Delahunty and Kate O'Brien, 'Uncertainty and Misconceptions About Child Sexual Abuse: Implications for the Criminal Justice System' (2009) 16(3) *Psychiatry, Psychology and Law* 435

Crime and Misconduct Commission, *Seeking Justice: An Inquiry into the Handling of Sexual Offences by the Criminal Justice System* (Crime and Misconduct Commission, Brisbane, 2003)

Crime and Misconduct Commission, *How the Criminal Justice System Handles Allegations of Sexual Abuse: A Review of the Implementation of the Recommendations of the Seeking Justice Report* (Crime and Misconduct Commission, Brisbane, 2008)

Dinovitzer, Ronit, 'The Myth of Rapists and Other Normal Men: The Impact of Psychiatric Considerations on the Sentencing of Sexual Assault Offenders' (1997) 12 (Spring) *Canadian Journal of Law and Society* 147

Eastwood, Christine, Sally Kift and Rachel Grace, 'Attrition in Child Sexual Assault Cases: Why Lord Chief Justice Hale Got it Wrong' 16(2) *Journal of Judicial Administration* 81

Fleming, Jillian, Paul E Mullen, Beverly Sibthorpec and Gabriele Bammer, 'The Long Term Impact of Child Sexual Abuse in Australian Women' (1999) 23(2) *Child Abuse and Neglect* 145

Fox, Richard and Arie Frieberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2nd ed, 1999)

Gelb, Karen, *Recidivism of Sex Offenders Research Paper* (Sentencing Advisory Council of Victoria, 2007)

Goodman-Delahunty, Jane, *The NSW Pre-Trial Diversion of Offenders (Child Sexual Assault) Program: An Evaluation of Treatment Outcomes* (Sydney West Area Health Service, 2009)

Hall, Mark A and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 *California Law Review* 63

Heydon, John, *Cross on Evidence* (LexisNexis, Butterworths, Sydney, 2011)

Judicial College of Victoria, *Victorian Sentencing Manual*, online at <http://www.justice.vic.gov.au/emanuals/VSM/default.htm>

Judicial Commission of New South Wales, *Sentencing Bench Book*, online at <http://www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/sentencing_template.html>

Judicial Commission of New South Wales, *Sexual Assault Handbook*, online at <http://www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/sentencing_template.html>

King, Michael, *Solution Focused Judging Bench Book* (Australasian Institute of Judicial Administration, 2009)

The Hon Paul Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, 'Government Asks Sentencing Advisory Council to Review Sentences Imposed on Child Sex Offenders' (Media Release, 17 July 2011)

Mackenzie, Geraldine and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010)

Mackenzie, Geraldine, 'Achieving Consistency in Sentencing: Moving to Best Practice?' (2002) 22(1) *University of Queensland Law Journal* 74

Mullen, Paul E, Judy L Martin, Jessie C Anderson, Sarah E Romans and Peter Herbison, 'Childhood Sexual Abuse and Mental Health in Adult Life' (1993) 163 *British Journal of Psychiatry* 721

New South Wales Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales – Volume 1* (NSW Sentencing Council, Sydney, 2008)

Queensland, *Parliamentary Debates*, Legislative Assembly, 6 November 2002 (Rod Welford, Attorney-General and Minister for Justice)

Queensland, *Parliamentary Debates*, Legislative Assembly, 29 March 2006 (Judy Spence, Minister for Police and Corrective Services)

Queensland, *Parliamentary Debates*, Legislative Assembly, 3 August 2010 (Cameron Dick, Attorney-General and Minister for Industrial Relations)

Queensland, *Parliamentary Debates*, Legislative Assembly, 28 October 2010 (Cameron Dick, Attorney-General and Minister for Industrial Relations)

Queensland, *Parliamentary Debates*, Legislative Assembly, 28 October 2010 (Laurence Springborg, Deputy Leader of the Opposition and Shadow Attorney-General)

Queensland Crime Commission and Queensland Police Service, *Project Axis: Child Sexual Abuse in Queensland*, volumes 1 & 2 (2000)

Queensland Government, *Report of the Taskforce on Women and the Criminal Code* (Department of Communities, Brisbane, 2000)

Queensland Government, *Victims of Crime Review Report* (Department of Justice and Attorney-General, Brisbane, 2008)

Queensland Parliament, *Explanatory Notes*, Criminal and Other Legislation Amendment Bill 2011 (Qld)

Queensland Parliament, *Explanatory Notes*, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010 (Qld)

Queensland Parliament, *Explanatory Notes*, Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld)

Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (Queensland Law Reform Commission, Brisbane, 2000)

Robertson, John and Geraldine Mackenzie, *Queensland Sentencing Manual* (Thomson Reuters Legal Online, 1998–)

Richards, Kelly, 'Is It Time for Australia to Adopt Circles of Support and Accountability (COSA)?' (2011) 22 *Current Issues in Criminal Justice* 3

Richards, Kelly, *Misperceptions About Child Sex Offenders* (Trends and Issues in Crime and Criminal Justice No 429, Australian Institute of Criminology, 2011)

Roberts, Julian, *Punishing Persistent Offenders: Exploring Community and Offender Perspectives* (Oxford University Press, 2008)

Sentencing Advisory Council (Queensland), *Sentencing of Child Sexual Offences in Queensland: Issues Paper* (Sentencing Advisory Council, Brisbane, 2011)

Sentencing Advisory Council (Queensland), *Sentencing of Child Sexual Offences in Queensland: Research Paper* (Sentencing Advisory Council, Brisbane, 2011)

Sentencing Advisory Council (Victoria), *Aggravated Burglary: Current Sentencing Practices* (Sentencing Advisory Council, Melbourne, 2011)

Sentencing Council for England and Wales, *Sentencing Guidelines*, online at <http://sentencingcouncil.judiciary.gov.uk/sentencing-guidelines.htm>

Shanahan, Martin and Ron Donato, 'Counting the Cost: Estimating the Economic Benefit of Paedophile Treatment Programs' (2001) 25 *Child Abuse and Neglect* 541

Shanahan, Michael J, Paul E Smith and Soraya Ryan, *Carter's Criminal Law of Queensland* (LexisNexis Butterworths, Sydney, 2011)

Smallbone, Stephen and Meredith McHugh, *Outcomes of Queensland Corrective Services Sexual Offender Treatment Program: Final Report* (School of Criminology and Criminal Justice, Griffith University, 2010)

Trujillo, Bernard, 'Patterns in a Complex System: An Empirical Study of Valuation in Business Bankruptcy Cases' (2005) 53 *UCLA Law Review* 357

Tucker, Nicholas and Geraldine Mackenzie, *Summary Offences Law and Practice Queensland* (Thomson Reuters Online, 2011)

The Hon Justice Frank Vincent, 'The Role of the Courts' in Marianne James (ed), *Paedophilia: Policy and Prevention*, Research and Public Policy Series No 12 (Australian Institute of Criminology, 1997)

Warner, Kate, 'The Role of Guideline Judgements in the Law and Order Debate in Australia' (2003) 27 *Criminal Law Journal* 8

Warner, Kate, 'Sentencing Review 2008–09' (2010) 34 *Criminal Law Journal* 16

ENDNOTES

1 'Antecedents' refers generally to an offender's background, including previous record of criminal convictions, education and family history. See further Chapter 5.

2 The specific offences to which pt 9A applies are listed in schedule 1 of the Act, as well as an offence of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in schedule 1.

3 *Penalties and Sentences Act 1992* (Qld) s 161A(a); *Correctives Services Act 2006* (Qld) s 182(2).

4 *Penalties and Sentences Act 1992* (Qld) ss 161A(b) and 161B(3); *Corrective Services Act 2006* (Qld) s 182(2). A court also has the power to declare an offender convicted of a serious violent offence if sentenced to a term of imprisonment of any length if convicted on indictment of an offence: (i) that involved the use, counselling or procuring the use, or conspiring or attempting to use, serious violence against another person; or (ii) that resulted in serious harm to another person: *Penalties and Sentences Act 1992* (Qld) s 161B(4).

5 A 'qualifying offence' for the purposes of pt 10 is defined as: 'an indictable offence (a) against a provision of the Criminal Code mentioned in schedule 2, as in force at any time (a relevant Code provision); or (b) that involved counselling or procuring the commission of, or attempting or conspiring to commit, a relevant Code provision': *Penalties and Sentences Act 1992* (Qld) s 162. Schedule 2 lists a number of sexual offences in the *Criminal Code* (Qld) that be committed in relation to a child, including the Reference offences of unlawful sodomy (s 208), indecent treatment of a child under 16 (s 210), unlawful carnal knowledge (s 215), maintaining a sexual relationship with a child (s 229B), rape (s 349) and attempted rape (s 350).

6 *Penalties and Sentences Act 1992* (Qld) s 163(3)(b). The court must also be satisfied that the *Mental Health Act 2000* (Qld) ch 7 pt 6 does not apply: s 163(3)(a).

7 *Penalties and Sentences Act 1992* (Qld) s 163(4).

8 *Corrective Services Act 2006* (Qld) s 497 inserting pt 9 div 3 into the *Penalties and Sentences Act 1992* (Qld). These provisions came into force on 28 August 2006 (2006 SL No. 213).

9 *Penalties and Sentences Act 1992* (Qld) s 160D.

10 *Penalties and Sentences Act 1992* (Qld) s 160D. A court must set an offender's parole eligibility date if the offender had a current parole eligibility date or current parole release date, which must not be earlier than the current parole eligibility or release date: s 160D(2) and (4).

11 *Corrective Services Act 2006* (Qld) s 184(2).

12 A 'serious sexual offence' is defined in the schedule to the DPSOA to mean 'an offence of a sexual nature, whether committed in Queensland or outside Queensland: (a) involving violence; or (b) against children'.

13 *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 11.

14 *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 8(1).

15 For example, this legislation amended s 93A of the *Evidence Act 1977* (Qld) to extend the application of the section from children under 12 to children under 16 as well as children aged 16 and 17 who meet the definition of 'special witness' under s 21A and to remove the requirement that a statement made other than to a person investigating be made soon after the occurrence of fact to which the statement relates. Measures were also introduced by the insertion of a new div 4A introducing special measures for the giving of evidence of an affected child. Subdivisions 3 and 4 of the new div 4A create a presumption in favour of pre-recording the evidence of an affected child witness, and, where pre-recording has not occurred, the mandatory use of audiovisual links, if available.

16 For the purposes of this Reference, a 'child' was defined by reference to the relevant offence provisions. In the case of 'rape', a separate analysis was conducted of sentencing outcomes where the victim was aged 16 or 17 years. See further Table 7.

17 Tests for statistical significance examine the stability of the results, and the confidence in projecting findings based on a sample to the actual population. For results with a p-value of less than 0.05, this indicates that there is a less than 5 per cent chance that a difference of this size is due to an atypical sample of sentencing remarks. This indicates that there is a 95 per cent probability that differences of these amounts or greater actually exist in the Queensland higher courts.

18 *Penalties and Sentences Act 1992* (Qld) s 13.

19 The report is available at <http://www.communities.qld.gov.au/women/resources/resource-types/women-and-the-criminal-code>.

20 The report is available at <http://www.cmc.qld.gov.au/asp/index.asp?pgid=10833>.

21 In 2008, the Crime and Misconduct Commission conducted a review of the implementation of the recommendations made in their 2003 *Seeking Justice* report; however, this report was limited to two key agencies – the Queensland Police Service and the Office of the Director of Public Prosecutions – and did not attempt to examine other issues relating to the handling of child sexual offences by the criminal justice system. See Crime and Misconduct Commission, *How the Criminal Justice System Handles Allegations of Sexual Abuse: A Review of the Implementation of the Recommendations of the Seeking Justice Report* (2008) v.

22 Letters were sent to the New Zealand Ministry of Justice, the Sentencing Council for England and Wales, the Department of Justice and Equality Ireland, the Northern Ireland Department of Justice and the Ministry of Justice Canada.

23 A total of 56 respondents commenced the online response form with 41 respondents completing all the questions.

24 Longitudinal trend analyses are performed to examine if changes in data occur over time. For example, whether or not the values of data points remain constant, increase or decrease.

25 For some offence categories a very small number of offences were sentenced in the Supreme Court.

26 See further Appendix 2 (Glossary). If the value for a year is missing because there are fewer than 10 relevant cases for that year, that year is excluded from the calculation of the average. A moving average allows a clearer picture of the trend by smoothing out the peaks and troughs that can be evident when charting raw data. The decision to average over a three-year period, as opposed to a two-year or four-year period, was based on which period provided the clearest trend.

27 See, for example, Bernard Trujillo, 'Patterns in a Complex System: An Empirical Study of Valuation in Business Bankruptcy Cases' (2005) 53 *UCLA Law Review* 357; Brigitte Bouhours and Kathleen Daly, 'Youth Sex Offenders in Court: An Analysis of Judicial

Sentencing Remarks' (2007) 9(4) *Punishment and Society* 371; Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 *California Law Review* 63; Christine Bond and Samantha Jeffries, 'An Examination of the Sentencing Remarks of Indigenous and Non-Indigenous Criminal Defendants in South Australia's Higher Courts' (2010) 17(1) *Psychiatry, Psychology and the Law* 70; Sentencing Advisory Council (Victoria), *Aggravated Burglary: Current Sentencing Practices* (2011); and Christine Bond, Samantha Jeffries and Heron Loban, *Exploring Indigenous and Non-Indigenous Sentencing in Queensland* (Queensland University of Technology and James Cook University, 2011).

28 Hall and Wright, above n 27, 100. Hall and Wright suggest that content analysis may hold important promise for the world of legal scholarship by bringing 'the rigor of social science' to an understanding of case law, and in so doing create 'what is distinctively a legal form of empiricism'. While acknowledging the limitations of this approach, they observe that:

> … when one reads cases this way, one is engaged in a uniquely legal empirical method – a way of generating objective, falsifiable, and reproducible knowledge about what courts do and how and why they do it. (Ibid 64)

29 Comparison variables were gender, average offender age at sentencing, percentage of offenders who pleaded guilty, percentage of offenders receiving imprisonment as a sentencing outcome, and the average length of imprisonment imposed.

30 The offender's age is only available in the sentencing remarks data when the judge deems it relevant to mention the age. The distribution of the offender's age is partly dependent on its relevance to the case. Thus the proportion of 17–19 year olds might in fact be consistent across the two data sets, and judges are simply more likely to specify the offender's age in instances of unlawful carnal knowledge when the offender is of a similar age to the victim than when the offender is substantially older.

31 That is, the punishment must be proportionate to the offence committed: Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) 43–4.

32 The principles and factors in s 9(2) were introduced in 1992.

33 The principles and factors in ss 9(3) and (4) were introduced in 1997 and apply to the sentencing of offenders for any offence that involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person, or an offence that resulted in physical harm to another person.

34 Explanatory Notes, Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld) 7.

35 Queensland, *Parliamentary Debates*, Legislative Assembly, 6 November 2002, 4443 (Rod Welford, Attorney-General and Minister for Justice).

36 The principle of parsimony provides that a sentence should not be in excess of what is required to achieve the social purpose: Mackenzie and Stobbs, above n 31.

37 *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) s 28. The amendments to section 9 had a retrospective effect and were applicable in the sentencing process regardless of when the offence was committed. Explanatory Notes, Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld) 7.

38 'Antecedents' refers generally to an offender's background, including previous record of criminal convictions, education and family history. See further Chapter 5..

39 *Penalties and Sentences Act 1992* (Qld) s 9(2)(r).

40 *R v Pham* [1996] QCA 3 (6 February 1996) (Fitzgerald P, Davies JA and Mackenzie J).

41 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 August 2010, 2308 (Cameron Dick, Attorney-General and Minister for Industrial Relations).

42 *Penalties and Sentences Act 1992* (Qld) s 9(10). A corrective service facility is defined in schedule 4 of the *Corrective Services Act 2006* (Qld) to mean a prison, a community corrections centre or a work camp.

43 *Penalties and Sentences Act 1992* (Qld) pt 8.

44 Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010 (Qld) 7.

45 (2006) 166 A Crim R 588.

46 Above n 44, 7.

47 *Penalties and Sentences Act 1992* (Qld) s 9(8).

48 Queensland, *Parliamentary Debates,* Legislative Assembly, 3 August 2010, 2309 (Cameron Dick, Attorney-General and Minister for Industrial Relations).

49 Kate Warner, 'The Role of Guideline Judgements in the Law and Order Debate in Australia' (2003) 27 *Criminal Law Journal* 8, 9.

50 See Geraldine Mackenzie, 'Achieving Consistency in Sentencing: Moving to Best Practice?' (2002) 22(1) *University of Queensland Law Journal* 74, 90. For a discussion of the nature and role of guideline judgments and their role in avoiding the incidence of inappropriate sentencing inconsistency, see *Wong v The Queen* (2001) 207 CLR 584 [5]–[6] (Gleeson CJ).

51 *Attorney-General's Application No 3 of 2002* [2004] NSWCCA 303 (8 September 2004).

52 *Sentencing Act 1991* (Vic) pt 2AA.

53 Chief Justice of Queensland, the Honourable Paul de Jersey AC, and Her Honour Chief Judge Patricia M Wolfe, Introduction, *Supreme and District Court Benchbook*, accessible at <http://www.courts.qld.gov.au/information-for-lawyers/benchbooks-and-ucpr-bulletin/supreme-and-district-courts-benchbook>, accessed 2 December 2011.

54 Michael King, *Solution Focused Judging Bench Book* (Australasian Institute of Judicial Administration, 2009), accessible at <http://www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>, accessed 2 December 2011.

55 Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (updated 2010), accessible at <http://www.aija.org.au>, accessed 2 December 2011.

56 Judicial Commission of New South Wales, *Sentencing Bench Book*, <http://www.judcom.nsw.gov.au/publications/benchbks>, accessed 2 December 2011.

57 Judicial Commission of New South Wales, *Sexual Assault Handbook*, <http://www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/sentencing_template.html>, accessed 2 December 2011.

58 This is accessible on the Judicial College's website, <http://www.justice.vic.gov.au/emanuals/VSM/default.htm>, accessed 2 December 2011.

[59] John Robertson and Geraldine Mackenzie, *Queensland Sentencing Manual* (1998–). This service is accessible through Thomson Reuters Legal Online.
[60] Michael J Shanahan, Paul E Smith and Soraya Ryan, *Carter's Criminal Law of Queensland* (LexisNexis Butterworths, Sydney, 2011). This service is accessible through LexisNexis Online.
[61] Nicholas Tucker and Geraldine Mackenzie, *Summary Offences Law and Practice Queensland* (Thomson Reuters Online, 2011). This service is accessible through Thomson Reuters Legal Online.
[62] John Heydon, *Cross on Evidence* (LexisNexis, Butterworths, Sydney, 2011). This service is accessible through Lexis Nexis Online.
[63] *Coroners and Justice Act 2009* (UK) s 125.
[64] For a list of current guidelines, see Sentencing Council for England and Wales, 'Sentencing Guidelines' <http://sentencingcouncil.judiciary.gov.uk/sentencing-guidelines.htm> accessed 11 October 2011.
[65] Email communication from Senior Policy Officer, Office of the Sentencing Council, to Nadine Seifert, 13 October 2011.
[66] Custodial sentencing orders under the *Penalties and Sentences Act 1992* (Qld) include an intensive correction order pursuant to pt 6 of the Act or imprisonment pursuant to pt 9 of the Act; where the imprisonment term is for 5 years or less, the court may order the term of imprisonment to be wholly or partially suspended pursuant to pt 8 of the Act. Non-custodial orders under the *Penalties and Sentences Act 1992* (Qld) include a fine pursuant to pt 4 of the Act or a probation or a community service order pursuant to pt 5 of the Act.
[67] For example, under a probation or community service order or where an offender has been released on parole.
[68] The specific offences to which pt 9A applies are listed in schedule 1 of the Act, as well as an offence of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in schedule 1.
[69] *Penalties and Sentences Act 1992* (Qld) s 161A(a); *Correctives Services Act 2006* (Qld) s 182(2).
[70] *Penalties and Sentences Act 1992* (Qld) ss 161A(b) and 161B(3); *Corrective Services Act 2006* (Qld) s 182(2). A court also has the power to declare an offender convicted of a serious violent offence if sentenced to a term of imprisonment of any length if convicted on indictment of an offence: (i) that involved the use, counselling or procuring the use, or conspiring or attempting to use, serious violence against another person; or (ii) that resulted in serious harm to another person: *Penalties and Sentences Act 1992* (Qld) s 161B(4).
[71] A 'qualifying offence' for the purposes of pt 10 is defined as: 'an indictable offence (a) against a provision of the Criminal Code mentioned in schedule 2, as in force at any time (a relevant Code provision); or (b) that involved counselling or procuring the commission of, or attempting or conspiring to commit, a relevant Code provision': *Penalties and Sentences Act 1992* (Qld) s 162. Schedule 2 lists a number of sexual offences in the *Criminal Code* (Qld) that be committed in relation to a child, including the Reference offences of unlawful sodomy (s 208), indecent treatment of a child under 16 (s 210), unlawful carnal knowledge (s 215), maintaining a sexual relationship with a child (s 229B), rape (s 349) and attempted rape (s 350).
[72] *Penalties and Sentences Act 1992* (Qld) s 163(3)(b). The court must also be satisfied that the *Mental Health Act 2000* (Qld) ch 7 pt 6 does not apply: s 163(3)(a).
[73] *Penalties and Sentences Act 1992* (Qld) s 163(4).
[74] *Corrective Services Act 2006* (Qld) s 497 inserting pt 9 div 3 into the *Penalties and Sentences Act 1992* (Qld). These provisions came into force on 28 August 2006 (2006 SL No. 213).
[75] *Penalties and Sentences Act 1992* (Qld) s 160B.
[76] *Penalties and Sentences Act 1992* (Qld) s 160D.
[77] *Penalties and Sentences Act 1992* (Qld) s 160D. A court must set an offender's parole eligibility date if the offender had a current parole eligibility date or current parole release date, which must not be earlier than the curren parole eligibility or release date: s 160D(2) and (4).
[78] *Corrective Services Act 2006* (Qld) s 184(2).
[79] Queensland, *Parliamentary Debates*, Legislative Assembly, 29 March 2006, 941 (Judy Spence, Minister for Police and Corrective Services).
[80] The Law Reform Amendment Bill 2011 (Qld) was introduced into Parliament on 1 December 2011.
[81] A 'serious sexual offence' is defined in the schedule to the DPSOA to mean 'an offence of a sexual nature, whether committed in Queensland or outside Queensland: (a) involving violence; or (b) against children'.
[82] Application submitted by Robert John Fardon, Australia [2010] UNHRC 29; CCPR/C/98/D/1629/2007 (10 May 2010).
[83] *Child Protection (Offender Reporting) Act 2004* (Qld) s 5(2)(a).
[84] *Child Protection (Offender Reporting) Act 2004* (Qld) s 5(2)(b).
[85] *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 11.
[86] *Child Protection (Offender Prohibition Order) Act 2008* (Qld) s 8(1).
[87] Criminal and Other Legislation Amendment Bill 2011 (Qld) introduced for debate on 13 October 2011.
[88] Criminal and Other Legislation Amendment Bill 2011 (Qld) cl 33 proposing the insertion of a new s 218B in the *Criminal Code* (Qld).
[89] *Criminal Code* (Qld) s 229B(6).
[90] The Hon Paul Lucas, Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State, 'Government Asks Sentencing Advisory Council to Review Sentences Imposed on Child Sex Offenders' (Media Release, 17 July 2011).
[91] *Criminal Code* (Qld) s 229B(10).
[92] Explanatory Notes, Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld) 4.
[93] *Criminal Code* (Qld) s 229B(10).
[94] *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 23. When the offence was introduced the penalty range varied for the different offence subcategories from 7 years and 14 years to life imprisonment, depending on the type of conduct involved in the offence.
[95] *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) s 18.
[96] *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 23.

97 *Criminal Law Amendment Act 1997* (Qld) s 33.
98 *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) s 18.
99 *Criminal Code* (Qld) s 229B(3).
100 *Criminal Code* (Qld) s 229B(4)(a).
101 *Criminal Code* (Qld) s 229B(4)(b).
102 *Criminal Code* (Qld) s 229B(4)(c).
103 *R v SAG* [2004] 147 A Crim R 301.
104 *R v SAG* [2004] 147 A Crim R 301, 306–7 [19] (Jerrard JA).
105 Section 132C of the *Evidence Act 1977* (Qld) provides that a sentencing judge or magistrate may act on an allegation of fact if the judge or magistrate is satisfied on the balance of probabilities that the allegation is true.
106 *R v CAZ* [2011] QCA 231 (13 September 2011) [53] (Fraser JA, with whom Chesterman and White JJ agreed).
107 Ibid [54].
108 *Criminal Code and Other Acts Amendment Act 2008* (Qld) ss 38 and 39.
109 *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 10.
110 *Criminal Law Amendment Act 1997* (Qld) s 21.
111 *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 11.
112 *Criminal Law Amendment Act 1997* (Qld) s 22.
113 *Criminal Code and Other Acts Amendment Act 2008* (Qld) s 38. This Act recast s 208 to encompass attempted unlawful sodomy and provide for a single maximum penalty for this form of the offence of 14 years.
114 *R v Dunn* [1973] 2 NZLR 481.
115 *R v BAS* [2005] QCA 97 (8 April 2005) [16] (Fryberg J) citing *R v Harkin* (1989) 38 A Crim R 296. In *Harkin* it was stated that: 'if the assault alleged is one which objectively does not unequivocally offer a sexual connotation, then in order to be an indecent assault it must be accompanied by some intention on the part of the assailant to obtain sexual gratification': at 301. Fryberg J noted that this concept of indecency discussed in *Harkin* in the context of indecent assault applied equally to the offence of indecent dealing.
116 *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) s 15.
117 *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 12.
118 *Criminal Law Amendment Act 1997* (Qld) s 23.
119 *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) s 15.
120 *R v CJA* (Unreported, District Court of Queensland, McGill SC, 10 February 2011).
121 *R v SVH* (Unreported, District Court of Queensland, Reid DCJ, 14 November 2011).
122 *R v JLH* (Unreported, District Court of Queensland, Dearden DCJ, 16 May 2011).
123 *R v MC* (Unreported, District Court of Queensland, Bradley DCJ, 13 February 2007).
124 *R v WJH* (Unreported, District Court of Queensland, Koppenol DCJ, 9 April 2008).
125 *R v MAC* (Unreported, District Court of Queensland, Harrison DCJ, 15 July 2010).
126 Sexual intercourse is complete upon penetration to any extent; the offence provision does not include sodomy – *Criminal Code* (Qld) s 215(6).
127 *Criminal Law Amendment Act 1997* (Qld) s 26.
128 *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 14.
129 *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 14.
130 *Criminal Law Amendment Act 1997* (Qld) s 26.
131 Sentencing Advisory Council (Qld), *Sentencing of Child Sexual Offences in Queensland: Research Paper* (2011).
132 See *Penalties and Sentences Act 1992* (Qld) pt 6.
133 *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) s 5 which commenced on 26 November 2010 (SL 2010 No 330).
134 *Penalties and Sentences Act 1992* (Qld) s 9(9).
135 See further Glossary (Appendix 2). If the value for a year is missing because there are fewer than 10 relevant cases for that year, that year is excluded from the calculation of the average. A moving average allows a clearer picture of the trend by smoothing out the peaks and troughs that can be evident when charting raw data. The decision to average over a three-year period, as opposed to a two-year or four-year period, was based on which period provided the clearest trend.
136 [2004] 147 A Crim R 301.
137 See *R v Pham* [1996] QCA 3 (6 February 1996).
138 See *Penalties and Sentences Act 1992* (Qld) pt 8. A sentence of 5 years or less can be suspended wholly or partly. The operational period must be not less than the prison term imposed, and not more than 5 years.
139 *R v Pham* [1996] QCA 3 (6 February 1996) (Fitzgerald P, Davies JA and MacKenzie J).
140 *Criminal Code* (Qld) ss 552B(1)(a) (Charges of indictable offences that must be heard and decided summarily unless defendant elects for jury trial), 552D(1) (When magistrate must abstain from jurisdiction) and 552H (Maximum penalty for indictable offence dealt with summarily).
141 *R v Quick; Ex parte A-G* (Qld) (2006) 166 A Crim R 588.
142 See for example, *A-G (Qld) and Anor v Francis* [2008] QCA 243 [41] applying *R v Kelly (Edward)* [2000] QB 198, 208.
143 Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Bill 2010 (Qld) 7.
144 Ibid.
145 *R v Quick; Ex parte A-G (Qld)* (2006) 166 A Crim R 588 [7] (de Jersey CJ) referring to the Macquarie Dictionary definition of 'exceptional'.
146 *R v Pham* [1996] QCA 3 (6 February 1996).
147 *R v Quick; Ex parte A-G (Qld)* (2006) 166 A Crim R 588.

148 [2000] QCA 123 (10 April 2000).
149 *R v Quick; Ex parte A-G (Qld)* (2006) 166 A Crim R 588 [21] (Holmes JA). While dissenting on the issue of whether exceptional circumstances had been shown in this case, her Honour's position is consistent with the approach of the other members of the Court of Appeal on this issue.
150 Children aged 16 and 17 were excluded from this analysis because there were insufficient numbers for analysis.
151 Tests for statistical significance examine the stability of the results, and the confidence in projecting findings based on a sample to the actual population. For Table 7, results with a p-value of less than 0.05 indicate that there is a less than 5 per cent chance that a difference of this size is due to an atypical sample of sentencing remarks. This indicates that there is a 95 per cent probability that differences of these amounts or greater actually exist in the Queensland higher courts.
152 Mackenzie and Stobbs, above n 31, 93. Mackenzie notes that research suggests that this effect may be minor.
153 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5th ed, 2010), 173. Ashworth suggests that if the argument is that the offender's acceptance of responsibility means that less punishment is needed to deter or reform, it is questionable on two grounds: first, 'whether deterrent or subjective considerations should be given such weight'; and second, 'whether the assumption is in fact true': Ibid.
154 (2002) 209 CLR 339.
155 Ibid [82].
156 Mackenzie and Stobbs, above n 31, 93.
157 [2011] QCA 69 (15 April 2011).
158 [2001] QCA 188 (18 May 2001).
159 [2011] QCA 192 (12 August 2011).
160 [2011] QCA 316 (8 November 2011) [42].
161 [2001] QCA 188 (18 May 2001) [24] (McMurdo P).
162 *R v Colless* [2010] QCA 26 (23 February 2010) [17], [31]. See also *R v Wark* [2008] QCA 172 (27 June 2008) [2] (McMurdo P) and *Ibbs v R* (1987) 163 CLR 447, 451–2.
163 *R v Colless* [2010] QCA 26 (23 February 2010) [17].
164 Ibid.
165 *R v Wark* [2008] QCA 172 (27 June 2008) [2].
166 [2008] QCA 154 (13 June 2008).
167 *R v C; ex parte A-G (Qld)* [2003] QCA 134 (24 March 2003) 5.
168 [2009] QCA 270 (11 September 2009).
169 [2008] QCA 240 (19 August 2008).
170 In the ACT, it is a defence if the child was 10 years or older and the offender was not more than 2 years older than the victim and the victim consented to the sexual intercourse: *Crimes Act 1900* (ACT) s 55(3). Similarly, in Victoria consent is a defence if the difference in age was no more than 2 years: *Crimes Act 1958* (Vic) s 45(4)(b). This would apply, for example, to the situation of a 15-year-old who had sexual intercourse with a 17-year-old partner. In Tasmania, consent is a defence where, at the time of the offence, the complainant was of or above the age of 15 years and the accused was not more than 5 years older, or the complainant was of or above the age of 12 years and the accused was not more than 3 years older: *Criminal Code* (Tas) s 124(3). In Canada, to qualify for this defence, the accused person must be less than 2 years older (in the case of a 12 or 13-year-old complainant) or less than 5 years older (in the case of a 14 or 15-year-old complainant) and not be in a position of trust or authority, or a dependent or exploitative relationship with the complainant: *Criminal Code*, RSC 1985, c C-46, ss 150.1(2)–(2.1).
171 *Criminal Code* (Qld) s 349(3).
172 The nature of the conduct refers, for example, to whether the conduct involved a penetrative offence (such as penile or digital penetration) or a non-penetrative offence.
173 For example, Submissions 10 (Potts Lawyers) and 12 (QLS) and 24 (LAQ). Legal Aid Queensland specifically rejected the need for any form of additional legislative guidance on the basis that the current provisions in s 9 of the *Penalties and Sentences Act* are 'comprehensive and appropriate' (Submission 24, LAQ).
174 For example, Brisbane consultation (29 November 2011) and Legal Issues Roundtable (Brisbane, 15 December 2011).
175 For example, Beenleigh consultation (30 November 2011).
176 For example, Submissions 8 (Gold Coast Centre Against Sexual Violence Inc), 16 (PACT), 18 (Zig Zag Young Women's Resource Centre Inc) and 25 (Bravehearts Inc).
177 Submission 17 (CMC).
178 Submission 21 (QPUE).
179 For example, Submissions 16 (PACT) and 21 (QPUE).
180 Submission 16 (PACT).
181 Submission 7 (Sisters Inside Inc).
182 For example, consultations in Cairns (22 November 2011) and Ipswich (28 November 2011).
183 For example, consultations in Cairns (22 November 2011) and Beenleigh (30 November 2011).
184 This issue was discussed at length at the meeting with Aboriginal and Torres Strait Islander Elders in Cairns (23 November 2011).
185 Submission 7 (Sisters Inside Inc), Mt Isa consultation (23 November 2011) and consultation with Aboriginal and Torres Strait Islander Elders in Cairns (23 November 2011).
186 Initial comments on the Terms of Reference (received 31 August 2011) from Stonewall Medical Centre and Submissions 7 (Sisters Inside Inc), 12 (QLS) and 14 (Prison Fellowship Australia (Queensland).
187 Submission 9 (CCYPCG).
188 Submission 7 (Sisters Inside Inc).

189 For example, Submissions 12 (QLS) and 14 (Prison Fellowship Australia (Queensland). This issue was also raised in consultations.

190 For example, Sisters Inside Inc suggested that the problem would be better dealt with by a re-investment of funds into preventative programs:

> Rather than investing resources into accommodating people within prisons for longer periods of time, the community and potential future child victims would be better served investing in the prevention of child sexual offending through empirically supported and appropriately resourced programs (Submission 7, Sisters Inside Inc).

191 Submissions 9 (CCYPCG), 10 (Potts Lawyers) and 12 (QLS).

192 Submission 23 (Bravehearts Inc).

193 Submission 21 (QPUE).

194 Submissions 16 (PACT) and 18 (Zig Zag Young Women's Resource Centre Inc).

195 For example, Submissions 2 (M Bentley), 3 (C James), 15 (A Brent) and 21 (QPUE).

196 Submission 21 (QPUE).

197 A total of 39 people responded to this question, of whom 94 per cent or more rated these factors as 'very important' or 'quite important. These responses were nominated by at least 37 respondents.

198 Of the 39 people who responded to this question, 18 per cent or fewer (7 people or fewer) rated these factors as 'very important' or 'quite important.

199 This is consistent with the approach in some jurisdictions that also list aspects of vulnerability, rather than just the victim's age, as a separate sentencing factor. For example: *Sentencing Act 2002* (NZ) s 9(1)(g) ('that the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender'). In New Zealand, in sentencing an offender for an offence involving violence against, or neglect of, child under 14 years, the court is also directed to take into account as an aggravating factor to the extent that this and other factors are applicable in the case, the defencelessness of the victim: *Sentencing Act 2002* (NZ) s 9A(2)(a).

200 A number of jurisdictions list abuse of trust or authority as a separate sentencing factor that applies generally, or to particular types of offending. For example: *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(u) ('whether the offender was in a position of trust or authority when the offence was committed'); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(k) (under 'aggravating factors', 'the offender abused a position of trust or authority in relation to the victim'; *Sentencing Act 2002* (NZ) ss 9(1)(f) ('that the offender was abusing a position of trust or authority in relation to the victim') and 9A(2)(c) (in sentencing an offender for an offence involving violence against, or neglect of, child under 14 years, as an aggravating factor, 'the magnitude of the breach of any relationship of trust between the victim and the offender'); *Criminal Code*, RSC 1985, c C-46 s 718.2(a)(iii) ('evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim').

201 *R v Levi* (Unreported, Court of Criminal Appeal, Gleeson CJ, 15 May 1997) 5 (Gleeson CJ), quoted by Mc Hugh J in *Ryan v The Queen* (2001) 206 CLR 267 [27].

202 *Weininger v The Queen* (2003) 212 CLR 629 [59].

203 *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) s 5 inserting s 9(8).

204 *Ryan v The Queen* (2001) 206 CLR 267.

205 Remarks on sentencing as cited in *Ryan v The Queen* (2001) 206 CLR 267 [62].

206 *Ryan v The Queen* (2001) 206 CLR 267 [67].

207 Ibid [68].

208 Ibid [23]–[25] (McHugh J); [66] (Gummow J); and [101]–[102] (Kirby J).

209 Ibid [34] (McHugh J).

210 Ibid [102].

211 Ibid [104].

212 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A) (effective 1 January 2009) inserted by *Crimes Amendment (Sexual Offences) Act 2008* (NSW). The good character provision applies to the determination of a sentence for an offence whenever committed unless, before the commencement of the amendments, a court has convicted the person being sentenced of the offence or accepted a plea of guilty (which has not been withdrawn): sch 2 pt 19 cl 59.

213 NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales – Volume 1* (2008) Recommendation 38. The Council's rationale for recommending this amendment is set out in Chapter 5 ([5.57]–[5.66]) of the NSW Council's report.

214 For example, Ashworth, above n 153, 182–3; Julian Roberts, *Punishing Persistent Offenders: Exploring Community and Offender Perspectives* (Oxford University Press, 2008) 110; and Kate Warner, 'Sentencing Review 2008–2009' (2010) 34 *Criminal Law Journal* 16.

215 Roberts, above n 214, 110.

216 Warner, above n 214, 23–4.

217 Ibid 24. Warner further suggests: 'There may also be some benefit to offenders in terms of their future reintegration into society in the knowledge that people were willing to come forward and vouch for them when they were facing the judgment of the court': Ibid.

218 *Ryan v The Queen* (2001) 206 CLR 267 [100].

219 Ibid [110].

220 Submissions 8 (Gold Coast Centre Against Sexual Violence Inc), 9 (CCYPCG), 15 (A Brent), 16 (PACT), 18 (Zig Zag Young Women's Resource Centre Inc), 21 (QPUE), 23 (Bravehearts Inc).

221 For example, Submission 8 (Gold Coast Centre Against Sexual Violence Inc).

222 Submissions 12 (Queensland Law Society) and 10 (Potts Lawyers). This point was also made at the Brisbane consultation (29 November 2011).

223 For example, Brisbane consultation (29 November 2011).

224 *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) s 5 which commenced on 26 November 2010 (SL 2010 No 330).

225 Submissions 7 (Sisters Inside Inc), 10 (Potts Lawyers) and 12 (QLS).
226 This was suggested at the Brisbane consultation (29 November 2011) and endorsed by some participants at the Legal Issues Roundtable (Brisbane, 15 December 2011).
227 For example, Submissions 9 (CCYPCG) and 23 (Bravehearts Inc). Queensland Advocacy Incorporated provided a detailed submission specific to the overrepresentation of people with intellectual disabilities in prisons and commented on the need for an offender's intellectual disability to be taken into account when sentencing (Submission 20).
228 For example, Ipswich consultation (28 November 2011).
229 A total of 39 people responded to this question. These responses were nominated by at least 24 respondents.
230 These responses were nominated by fewer than 5 respondents.
231 For example see, Annie Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia: Report of the National Child Sexual Assault Reform Committee* (University of New South Wales, 2010).
232 For example, one Australian study has estimated the tangible and intangible costs of child sexual abuse (translated into 2008 dollars) as being in the range of $234,401 to $471,862 per victim per offence: Martin Shanahan and Ron Donato, 'Counting the Cost: Estimating the Economic Benefit of Paedophile Treatment Programs' (2001) 25 *Child Abuse and Neglect* 541 as cited by NSW Department of Community Services <http://www.community.nsw.gov.au/ benefits_assessment_group_page/counting_the_cost_estimating_the_economic_benefit_of_pedophile_treatment_programs.html> accessed 20 December 2011. The original study presented these costs in 1998 dollars (ranging from $176,940 to $356,190, depending on the methodology used to calculate these costs).
233 *R v Evans; R v Pearce* [2011] QCA 135 (21 June 2011) [17] (Chesterman JA).
234 For example, the QPUE stated that:

> Within the judgement, judges rarely give more than a paragraph of their time to the victim. It is accepted that it would be unfair to suggest the judges only give the victim very small consideration but they need to be more transparent in the way they write their decisions so it is clear to all that he/she has rightfully considered the victim to the same degree (or not more) as the offender (Submission 21, QPUE).

235 Consultations in Cairns (22 November 2011) and Ipswich (28 November 2011) and Submissions 5 (confidential), 12 (QLS), 16 (PACT), 18 (Zig Zag Women's Resource Centre Inc), 21 (QPUE), 23 (Bravehearts Inc) and 24 (LAQ).
236 Submission 18 (Zig Zag Women's Resource Centre Inc).
237 Mt Isa consultation (23 November 2011). The challenges of communicating harm caused by sexual offences committed against Aboriginal and Torres Strait Islander children was also raised at a meeting with Aboriginal and Torres Strait Islander Elders in Cairns (23 November 2011).
238 This suggestion was made at a meeting with Aboriginal and Torres Strait Islander Elders in Cairns (23 November 2011).
239 For a discussion of the principles of therapeutic jurisprudence, see David Wexler's article on the website of the International Network on Therapeutic Jurisprudence < http://www.law.arizona.edu/depts/upr-intj/> accessed 23 January 2012.
240 For example, in Cairns (22 November 2011) and Brisbane (29 November 2011).
241 For example, Submission 7 (Sisters Inside Inc), which was endorsed by the Prisoners' Legal Service Inc and the Catholic Prison Ministry.
242 The lack of availability of treatment programs for prisoners being held on remand for sexual offences was raised at a number of the Council's consultation sessions, including the Brisbane consultation (29 November 2011) and the Legal Issues Roundtable (Brisbane, 15 December 2011).
243 This issue was raised, for example, by some participants at the Legal Issues Roundtable (Brisbane, 15 December 2011).
244 Cossins, above n 231, 97; Anne Cosssins, Jane Goodman-Delahunty and Kate O'Brien, 'Uncertainty and Misconceptions About Child Sexual Abuse: Implications for the Criminal Justice System' (2009) 16(3) *Psychiatry, Psychology and Law* 435, 437.
245 Cossins, above n 231, [1.1].
246 See Chapter 3, Figure 1.
247 Stephen Smallbone and Meredith McHugh, *Outcomes of Queensland Corrective Services Sexual Offender Treatment Program: Final Report* (School of Criminology and Criminal Justice, Griffith University, 2010) x [10]. See <http://www.correctiveservices.qld.gov.au/Publications/Corporate_Publications/Reviews_and_Reports/Final%20Report_%20Outcomes%20of%20QCS%20Sexual%20Off%20Treatment%20Program.pdf>.
248 Queensland Parliament, above n 79, 941 (Judy Spence, Minister for Police and Corrective Services).
249 Smallbone and McHugh, above n 247, x [10]. The evaluation involved data obtained on 409 adult males who had served a term of imprisonment in Queensland for a sexual offence, and who had been discharged between 4 April 2005 and 30 June 2008. Seventy-three (17.8%) identified as Indigenous. Almost one in four (23.2%) had a prior history of sexual offences, and 35.5% had a prior history of nonsexual violent offences. The mean age at discharge was 45 years; 189 offenders (46.2%) were discharged with no community supervision, 190 (46.5%) were discharged under a standard community supervision order (eg parole), and 30 (7.3%) were discharged under a post-sentence *Dangerous Prisoners (Sexual Offences) Act 2003* (Qld) order; 158 (39%) had completed a sexual offender program.
250 Ibid xi [14].
251 Losel and Schmucker (2002) as cited in Smallbone and McHugh, above n 247, 8.
252 Smallbone and McHugh, above n 247, 8.
253 Cairns consultation (22 November 2011).
254 Brisbane consultation (29 November 2011). Similar comments were also made in: Submissions 7 (Sisters Inside Inc), 20 (Queensland Advocacy Incorporated) and 21 (QPUE).
255 Submission 13 (Youth Advocacy Centre)
256 Submission 13 (Youth Advocacy Centre).
257 See, for example, Submissions 9 (CCYPCG), 10 (Potts Lawyers), 12 (QLS) and 24 (LAQ).

[258] See, for example, Submissions 9 (CCYPCG), 10 (Potts Lawyers), 12 (QLS) and 24 (LAQ).

[259] For example, comment was made about the age prescribed for the offence of unlawful sodomy (s 208), with both the Youth Advocacy Centre (Submission 13) and Sisters Inside Inc (Submission 7) noting the anomaly under existing legislation that two 17-year-olds engaged in a homosexual relationship can be charged as adults for engaging in an act which is only illegal by virtue of the fact they are not yet adults. Another example provided was the offence of incest (s 222). The offence is intended to capture step-relationships and adoptive relationships but has been rendered ineffective by the current wording of the provision and the Court of Appeal's decision in *R v Rose* [2009] QCA 83 (9 April 2009). Subsection 8 of the offence of incest provides that the section does not apply to carnal knowledge between persons who are lawfully married or entitled to be lawfully married. The Court of Appeal found that, because a 16- or 17-year-old could apply to a judge or magistrate for permission to marry his or her step-parent, this means that he or she is 'entitled to be lawfully married' and no offence is committed. The example provided in the submission was of an adult man who groomed his de facto's teenage daughter and began a sexual relationship with her after she turned 16 years old: oral submission (B Spencer). Similar issues were raised during consultations, including the need for appropriate offences that capture sexual conduct by persons in a position of trust or authority (for example, step-parents and teachers) in relation to children who are above the legal age of consent but who are nevertheless vulnerable.

[260] Submission 16 (PACT).

[261] Submission 9 (CCYPCG, who recommended the inclusion of all child sexual offences), Submission 13 (Youth Advocacy Centre), Submission 17 (Crime and Misconduct Commission, who recommended the inclusion of child exploitation material related offences), Submission 21 (QPUE, who recommended the inclusion of torture and deprivation of liberty offences), Submission 23 (Bravehearts Inc, who recommended the inclusion of any sexual offence relating to a child).

[262] Submissions 6 (J Davis), 7 (Sisters Inside Inc), 9 (CCYPCG), 12 (LAQ), 13 (Youth Advocacy Centre), 14 (Prison Fellowship Australia (Queensland)).

[263] Submissions 7 (Sisters Inside Inc), 9 (CCYCPG) and 10 (Potts Lawyers).

[264] Submission 7 (Sisters Inside Inc) endorsed by the Prisoner's Legal Service and Catholic Prison Ministry.

[265] Submission 14 (Prison Fellowship, Australia (Queensland)). See also Kelly Richards, 'Is It Time for Australia to Adopt Circles of Support and Accountability (COSA)?' (2011) 22 *Current Issues in Criminal Justice* 3, 483.

[266] Legal Issues Roundtable (Brisbane, 15 December 2011).

[267] Initial comments on the Terms of Reference (received 31 August 2011) from Stonewall Medical Centre.

[268] Submission 12 (QLS).

[269] Legal Issues Roundtable (15 December 2011).

[270] Cossins, above n 231, 37, Recommendation 5.1.

[271] The *Pre-Trial Diversion of Offenders Act 1985* (NSW) provides for the establishment of the program.

[272] For further detail on the program, see <http://www.wsahs.nsw.gov.au/services/cedarcottage/index.htm> (accessed 19 October 2011).

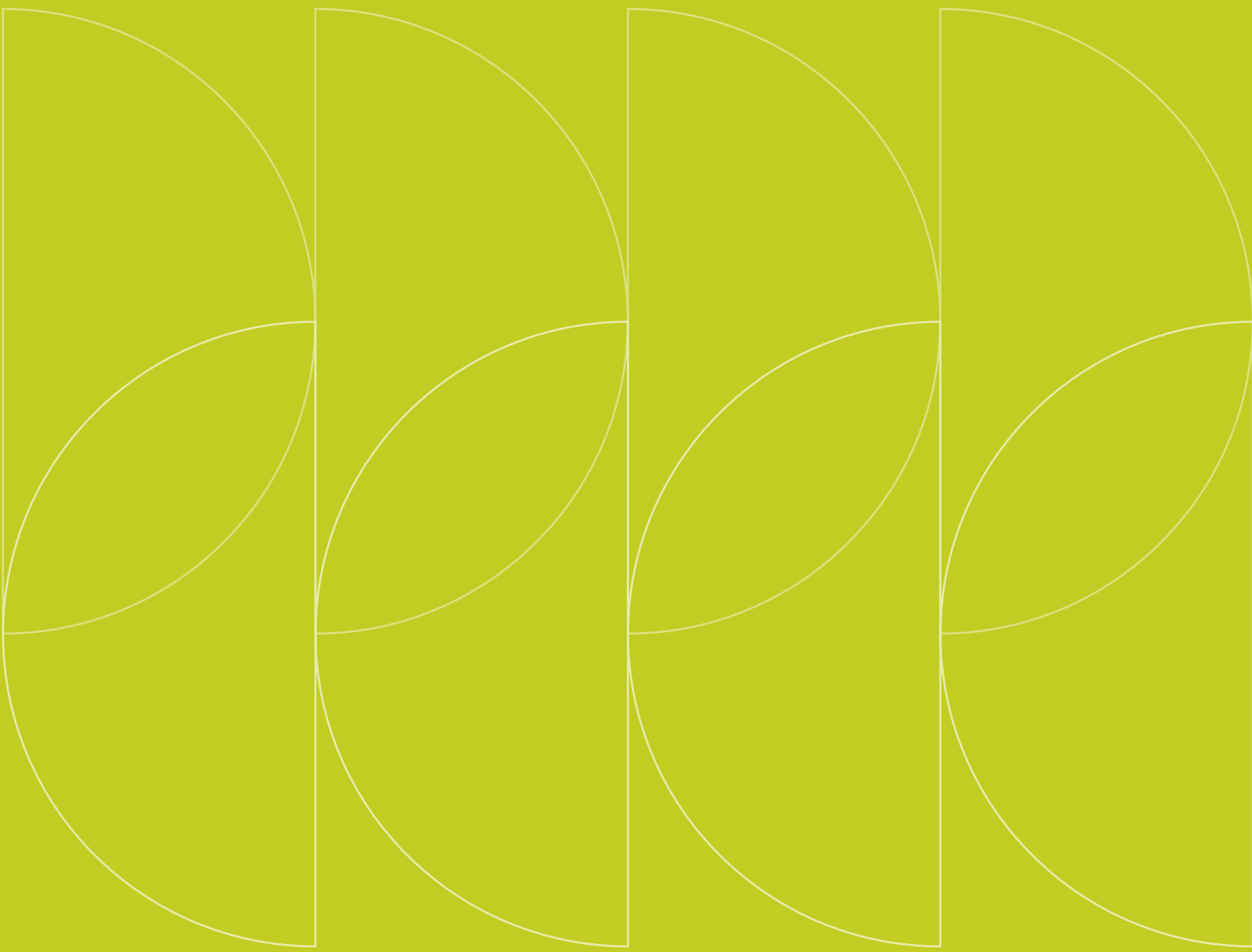
[273] Jane Goodman-Delahunty, *The NSW Pre-Trial Diversion of Offenders (Child Sexual Assault) Program: An Evaluation of Treatment Outcomes* (Sydney West Area Health Service, 2009) 8.

[274] RCW 9.94A.670 ('Special Sex Offender Sentencing Alternative').

[275] Lucy Berliner et al, *The Special Sex Offender Sentencing Alternative: A Study of Decision-Making and Recidivism: Report to the Legislature* (Harborview Sexual Assault Center and Urban Policy Research, 1991).

[276] Ibid.

[277] Cossins, above n 231, [1.38].



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