

SENTENCING OF
CHILD SEXUAL OFFENCES
IN QUEENSLAND

ISSUES PAPER

**Sentencing of child sexual offences in Queensland:
Issues Paper
November 2011**

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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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Contents

Tables	iii
Figures	iii
Acknowledgements	v
Call for submissions	vi
Questions	vii
Introduction	1
1.1 Our approach	2
1.2 Child sexual offences in Queensland	2
1.3 Legislative reform	3
2 The sentencing framework	5
2.1 Purposes of sentencing	5
2.2 Principles and factors	5
2.3 Factors relevant to offence seriousness	8
2.4 Other aggravating and mitigating factors relevant to sentencing	11
3 Sentencing outcomes in Queensland	15
3.2 How common are Terms of Reference offences?	16
3.3 What proportions of Terms of Reference defendants are sentenced?	16
3.4 Demographic characteristics of Terms of Reference offenders	17
3.5 What sentences are imposed on Terms of Reference offenders?	17
3.6 What is the average sentence length for Terms of Reference offenders?	18
3.7 Summary	19
4 Other approaches to sentencing guidance and alternative responses	21
4.1 Alternative approaches	21
Appendixes	24
References	34
Endnotes	35

Tables

Table 1: Average sentence lengths for Reference offenders by selected most serious penalty outcomes, Queensland courts 2006–10	19
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Figures

Figure 1: Proportion of Reference offenders receiving imprisonment or a partially suspended sentence as their most serious penalty, Queensland courts 2006–10	18
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This paper has been drafted by Nadine Seifert and Leigh Krenske of the Council's Secretariat.

Call for submissions

The Sentencing Advisory Council invites feedback on the questions and issues raised in this Issues Paper. Your submission will be considered by the Council in responding to the Terms of Reference on the sentencing of child sexual offences in Queensland.

Submission deadline: 9 December 2011

How do I make a submission?

Please title your correspondence ‘Submission on sentencing of child sexual offences’.

Online

Provide a submission using our online form, available at www.sentencingcouncil.qld.gov.au.

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If you would like to make a submission but need a translator or interpreter, please let us know.

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QUESTIONS

1. In addition to the child sexual offences listed in the Terms of Reference, should any other child sexual offences be considered by the Council when responding to the Reference? If so, what offences should be considered and why?
2. Is there a need for increased guidance to decide whether ‘exceptional circumstances’ exist and an offender should not be sentenced to an actual term of imprisonment for a sexual offence committed against a child under 16 years?
3. Should specific issues be included or excluded when the court is deciding if ‘exceptional circumstances’ exist pursuant to section 9(5)(b) of the *Penalties and Sentences Act 1992* (Qld) and the offender does not have to serve an actual term of imprisonment?
4. Is the current list of factors in section 9(6) of the *Penalties and Sentences Act 1992* (Qld) that the court must consider when sentencing an offender for a sexual offence committed against a child under 16 years appropriate? Should specific factors be either included or excluded?
5. How can the harm caused, or risked, to the victim in child sexual offences best be communicated to the court?
6. What factors related to the seriousness of the offence should be treated as aggravating when sentencing an offender for a child sexual offence? For example, within offence categories (such as rape), what makes one offence more serious than another?
7. What should the most important aggravating factors be in sentencing an offender for a child sexual offence? Should these differ between offences?
8. What factors relevant to the seriousness of the offence should be treated as mitigating when sentencing an offender for a child sexual offence? For example, within offence categories (such as rape), what makes one offence less serious than another?
9. What should the most important mitigating factors be in sentencing an offender for a child sexual offence? Should these differ between offences?
10. What factors or circumstances personal to the offender should be considered by a court as either mitigating or aggravating in sentencing an offender for a child sexual offence?
11. Are there any factors or circumstances personal to the offender or their circumstances (for example, good character or remorse) that a court should not be able to take into account as mitigating, or only be allowed to take into account if certain criteria are met?

12. Is there a need for additional guidance in sentencing an offender for a child sexual offence?
If so, what form should this take?
13. Are there any other approaches to the sentencing of child sexual offences you would like considered?

1 INTRODUCTION

On 14 July 2011, the Queensland Attorney-General, the Honourable Paul Lucas MP, issued Terms of Reference to the Sentencing Advisory Council (the 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 must 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*.

As requested, the Council will examine and report on a number of issues in providing its advice, including:

- current sentencing practices for adult offenders aged 17 years and over who are convicted of child sexual offences
- the impact any legislative reform has had on current sentencing practices and the sentences imposed for child sexual offences
- any differences in sentencing outcomes for sexual offences committed against children when compared with sentencing outcomes for sexual offences committed against adults, and
- factors most commonly taken into account by the courts when sentencing adult offenders for child sexual offences.

The Council has also been 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.

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

The Council acknowledges that child sexual offences by their nature are serious and often result in substantial harm to victims, their families and their communities. They also result in significant financial and social costs to the community, including in the detection, prosecution and management of offenders and the tangible and intangible costs of abuse to victims. The Council further recognises that

the number of child sexual offences reported and prosecuted through the criminal justice system significantly underrepresents the true extent of child sexual offending in the community.

1.1 Our approach

In responding to the Terms of Reference, the Council is carrying out:

- a detailed analysis of courts data to provide information on current sentencing practices for adult offenders convicted of sexual offences against children
- a comprehensive analysis of sentencing remarks to determine (a) which factors are taken into account when sentencing adult offenders for sexual offences committed against children, including the use of victim impact statements, and (b) whether sentencing outcomes for sexual offences committed against children are different from those for sexual offences committed against adults
- a trend analysis of courts data to identify whether recent changes in legislation have affected the sentencing of sexual offences against children
- 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 case law relevant to how the principles and factors are interpreted and applied, including the aggravating and mitigating factors taken into account when sentencing offenders for child sexual offences
- an analysis of the legislation in other Australian and overseas jurisdictions to identify any alternative responses to the sentencing of offenders for child sexual offences
- the release of this Issues Paper and a public call for submissions on the issues it raises
- targeted consultations around Queensland
- the release of a Research Paper on sentencing for sexual offences against children to coincide with the release of the Issues Paper
- the release of a Final Report in early 2012, providing advice to the Attorney-General on the Terms of Reference, and
- the release in 2012 of a Research Report on the sentencing of sexual offences committed against children.

This Issues Paper identifies a number of matters that will assist the Council respond to the Terms of Reference, and feedback is invited on these matters. The outcome of the Council's review and analysis of sentencing remarks, legislation, relevant case law and trend analysis of courts data will be reported on by the Council in its Final Report.

1.2 Child sexual offences in Queensland

Chapter 22 of the *Criminal Code* (Qld) lists a range of 'offences against morality'; this chapter provides 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 child sexual offences, in particular the following *Criminal Code* offences:

- Indecent treatment of a child (s 210), unlawful carnal knowledge (s 215) and maintaining a sexual relationship with a child (s 229B). These offences prohibit certain conduct involving a child under 16 years old. Consent is not an element of these offences.
- Unlawful sodomy (s 208). This offence prohibits certain conduct involving a child under 18 years old. Consent is not an element of this offence.
- Rape (s 349) and attempted rape (s 350). These offences can be committed against children or adults. Sexual conduct is unlawful in certain circumstances and consent is an element of the offence. The offence of rape specifically provides that a child under the age of 12 years is incapable of giving consent.¹

All these offences are gender-neutral and can be committed by a male or female offender against a male or female victim. Appendix 2 of this paper sets out the offences and sets out the current maximum penalty for those offences cited in the Terms of Reference.

For the offences of unlawful sodomy, indecent treatment of a child and unlawful carnal knowledge, the offence provisions provide a range of subsections that increase the maximum penalty for the offence if any of the following circumstances apply:

- if a child was under 12 at the time of the offence
- if the offender had knowledge that the child was of lineal descent, and
- if 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 to the offences specifically listed in the Terms of Reference, Chapter 22 of the *Criminal Code* includes a number of other sexual offences that could fall within the ambit of the Reference. These offences include:

- child exploitation material offences – involving a child in making child exploitation material (s 228A), making child exploitation material (s 228B), distributing child exploitation material (s 228C), possessing child exploitation material (s 228D)
- incest (s 222)
- procuring a young person for carnal knowledge (s 217), and
- using the internet to procure children under 16 (s 218A).

QUESTION:

1. **In addition to the child sexual offences listed in the Terms of Reference, should any other child sexual offences be considered by the Council when responding to the Reference? If so, what offences should be considered and why?**

1.3 Legislative reform

The Terms of Reference ask the Council to consider what impact, if any, legislative reform has had on sentencing practices and the sentences imposed for child sexual offences. Approaches to the sentencing of sexual offenders have largely focused on the need for community protection, with an emphasis on the use of actual imprisonment over non-imprisonment orders. It is important to consider the sentencing of child sexual offences in the context of broader law reforms and approaches to the management of these offenders. As well as specific sentencing reforms for child sexual offences discussed in this paper, other relevant reforms are:

- over time, increases in the maximum penalty for some child sexual offences²
- amendments to existing offences to broaden the scope of conduct that can be captured within an offence; for example, in October 2000 the offence of rape was amended to broaden the conduct captured by the offence³
- changes to the court process, with the removal of judicial warnings to juries about uncorroborated evidence⁴
- the introduction of special provisions about how some child victims and witnesses give evidence, to preserve the integrity of this evidence and reduce the distress and trauma the child may experience when giving evidence⁵
- the inclusion of specific sentencing principles in the *Penalties and Sentences Act* to guide the court when sentencing an adult for an offence of a sexual nature committed against a child under 16⁶

- the introduction of the *Victims of Crime Assistance Act 2009* (Qld), providing specific provisions about the use of victim impact statements during sentencing and fundamental principles of justice to be applied in the way victims are treated⁷
- the introduction of the ‘serious violent offence’ provisions in Part 9A of the *Penalties and Sentences Act*, which provide for an offender convicted of certain offences, including child sexual offences, to be declared by a court as convicted of a ‘serious violent offence’ which means the offender must serve 80 per cent of their prison sentence before being eligible to apply for parole⁸
- the introduction of parole eligibility provisions that exclude the availability of court-ordered parole for offenders convicted of a sexual offence⁹
- the introduction of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), which provides for the post-sentence continued detention and supervision of offenders
- the *Child Protection (Offender Reporting) Act 2004* (Qld), which provides for post-sentence reporting requirements
- the *Child Protection (Offender Prohibition Order) Act 2008* (Qld), which allows the court to make orders against particular sexual offenders that prohibit them from engaging in certain conduct, and
- proposed amendments to the *Criminal Code* including a new offence of ‘grooming children under 16’ and increases in the maximum penalties for offences relating to child exploitation material, introduced for debate in Parliament by the Criminal and Other Legislation Amendment Bill 2011 (Qld).

Some of these reforms will be considered in further detail in the Council’s Final Report.

2 THE SENTENCING FRAMEWORK

The Council has been asked to consider current sentencing practices for child sexual offences, including 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.

The sentencing of 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*. In addition, sentencing courts are guided by comparative cases and appeal decisions. The purposes of sentencing, the principles and factors set out in legislation and the guidance provided by existing case law do not operate in isolation of one another.

When an offender is sentenced for any sexual offence against a child under 16, a leading principle is that the offender must serve an actual term of imprisonment unless there are ‘exceptional circumstances’.¹⁰ When imposing a sentence of imprisonment, the court’s reasons must be stated and recorded.¹¹ The level of detail given for the reasons for the sentence is up to the individual sentencing judge or magistrate. In responding to the Terms of Reference, the Council is reviewing sentencing remarks. Findings will be presented in the Council’s Final Report.

2.1 Purposes of sentencing

The *Penalties and Sentences Act*¹² 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; the punishment must be proportionate to the offence committed¹³
- 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.

2.2 Principles and factors

The purposes of sentencing are supported by a range of principles and factors that the court must consider when sentencing an offender. These differ depending on the type of offence involved. There is overlap between the purposes of sentencing and some of the principles and factors.

Section 9(5)(b) *Penalties and Sentences Act* ‘exceptional circumstances’

One specific aspect of legislative reform that the Council will consider is the effect of the 2010 amendments to the *Penalties and Sentences Act*. These amendments changed the legislative principles that courts must take into account when sentencing an offender for a sexual offence committed against a

child under 16 years to provide that the offender must serve an actual term of imprisonment unless there are ‘exceptional circumstances’.¹⁴ Prior to the 2010 amendments, courts were guided by the requirement that the principles that imprisonment should only be imposed as a last resort, and that a sentence allowing the offender to stay in the community is preferable, did not apply when sentencing an offender for a sexual offence committed against a child under 16 years.¹⁵

The only 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.¹⁶ Whether exceptional circumstances exist will depend on the facts and circumstances of the individual case. There does not appear to be a consistent approach to how the existence of exceptional circumstances is determined,¹⁷ although guidance can be taken from the Chief Justice’s comments in *R v Quick; Ex parte A-G (Qld)* that ‘exceptional’ is synonymous with (that is, the same as) ‘unusual’ or ‘extraordinary’.¹⁸

The term ‘exceptional circumstances’ is also used in Part 10 of the *Penalties and Sentences Act*, which relates to indefinite sentences, and in the *Dangerous Prisoners (Sexual Offenders) Act*. In cases involving the *Dangerous Prisoners (Sexual Offenders) Act*, courts¹⁹ have repeatedly affirmed the interpretation of ‘exceptional’ as provided in *R v Kelly (Edward)*²⁰ to mean,

a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special or uncommon”. It need not be “unique, or unprecedented, or very rare”, but it cannot be a circumstance that is “regularly, or routinely, or normally encountered”.

A preliminary analysis of the approach taken by courts²¹ indicates that courts look at the case as a whole and take into account all the circumstances of the offence and the offender, including:

- a plea of guilty
- the age of the offender
- the offender’s cooperation with authorities
- any remorse expressed by the offender
- the offender voluntarily seeking counselling
- the offender’s loss of employment because of the offending conduct
- the offender being excommunicated by the church because of the offending conduct
- the offender having a good work history
- any reconciliation between the victim and the offender
- the offender having family support
- the offender suffering from a mental health problem at the time of the offending
- an expert report stating there is no real risk of re-offending, a lack of paedophilic tendencies or a lack of other sexual deviancy
- the offending conduct being deemed to be of a low level of offence seriousness
- minimal or no impact of the offending conduct on the victim, and
- the age of the victim.

The Council will consider this issue further in its Final Report.

QUESTIONS:

2. Is there a need for increased guidance to decide whether 'exceptional circumstances' exist and an offender should not be sentenced to an actual term of imprisonment for a sexual offence committed against a child under 16 years?
3. Should specific issues be included or excluded when the court is deciding if 'exceptional circumstances' exist pursuant to section 9(5)(b) of the *Penalties and Sentences Act 1992* (Qld) and the offender does not have to serve an actual term of imprisonment?

The principles and factors in sections 9(6) of the *Penalties and Sentences Act*

Sections 9(6)(a) to (j) of the Act set out the other principles and factors that the court must primarily consider when sentencing an offender for a sexual offence against a child under 16 years.²² The emphasis is on harm, deterrence, community protection (including the protection of the child and other children) and the management of risk. These amendments were introduced to 'ensure that child sex offences are recognised as offences equating in seriousness to offences of violence',²³ as specific sentencing principles had previously been introduced into the *Penalties and Sentences Act* for the sentencing of offences involving violence.

The principles and factors in section 9(6) are not categorised as aggravating or mitigating factors. In sentencing an offender for any offence of a sexual nature committed in relation to a child under 16, the court must have primary regard to:

- (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, age and character
- (h) any remorse or lack of remorse by 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.

In addition to factors listed in sections 9(6), the court has to consider a number of additional principles and factors in section 9 of the *Penalties and Sentences Act*.

QUESTION:

4. Is the current list of factors in sections 9(6) of the *Penalties and Sentences Act 1992* (Qld) that the court must consider when sentencing an offender for a sexual offence committed against a child under 16 years appropriate? Should specific factors be either included or excluded?

2.3 Factors relevant to offence seriousness

A range of factors are relevant to deciding the seriousness of an offence in a sentencing context. These include:

- how an offence is classified and conceived within the overall scheme of criminal offences²⁴
- the maximum and any minimum penalty for the offence,²⁵ and
- the jurisdiction in which the offence can be prosecuted.

The seriousness of an individual offence is generally assessed by reference to the conduct involved,²⁶ the moral culpability²⁷ of the offender and the harm to the victim.²⁸ The principle of proportionality ‘requires courts to impose sentences that bear a reasonable or proportionate relationship to the criminal conduct in question’.²⁹

Factors relating to offence seriousness are assessed on the entire case, against considerations of the legislative requirements, case precedent and any aggravating and mitigating circumstances.

The maximum penalty

Parliament’s view on offence seriousness is primarily represented through the maximum penalty, which provides:

- a limit to judicial discretion by placing a statutory maximum on the sentence that can be imposed on an offender³⁰
- a deterrent by warning potential offenders of the consequences of committing such a crime,³¹ and
- the penalty for the worst examples of the offence.³²

In sentencing, the court must consider the maximum and any minimum penalty for an offence.³³ All the offences nominated in the Terms of Reference attract a significant maximum penalty of 14 years, 20 years or life imprisonment.

As well as the statutory maximum penalty, an indefinite sentence (available under Part 10 of the *Penalties and Sentences Act*) may be applied to the offences listed in the Terms of Reference.

The post-sentence continued detention or supervised release orders available pursuant to the *Dangerous Prisoners (Sexual Offenders) Act* may also be applied to offenders convicted of the offences listed in the Terms of Reference.³⁴ These post-sentence orders come into operation after an offender has completed their sentence.

Jurisdiction

The child sexual offences listed in the Terms of Reference can be dealt with on indictment in the District Court or, in certain circumstances, summarily in the Magistrates Court (see Appendix 2).³⁵

When sentencing an offender in the Magistrates Court, the Court is limited to imposing a maximum penalty of three years imprisonment. A magistrate must abstain from exercising this jurisdiction and refer the case to a higher court ‘if satisfied, at any stage, and after hearing any submissions by the prosecution and defence, that because of the nature or seriousness of the offence or any other relevant consideration the defendant, if convicted, may not be adequately punished on summary conviction’.³⁶

Nature of the conduct

The nature of the sexual conduct involved in the offences listed in the Terms of Reference varies significantly within offence categories.

For example, the offence of indecent treatment of a child under 16 captures a wide range of sexual behaviour that may or may not include physical contact with the child, such as non-contact grooming, exposing the child to an indecent act, or hands-on contact such as fondling. The offence of rape refers to penetrative sexual contact, which may range from slight penetration by a finger to penetration by the penis involving ejaculation. Appendix 3 of this paper explores the issue of case variation in more detail and provides a series of case studies to illustrate this point for some of the offences nominated in the Terms of Reference.

The nature of the sexual conduct may often be a strong indicator of the level of harm caused to the victim. For example, in the case of indecent treatment of a child under 16 involving indecent touching, relevant considerations about the nature of the conduct may include:

- what part of the child’s body the offender touched
- whether the touching occurred on the inside or outside of the clothing
- how long the touching went on for
- where the offence occurred, and
- how often the touching occurred.

Harm caused or risked to the victim

It is recognised that sexual offences involve a significant degree of harm, as they represent a violation of the autonomy, dignity, privacy and sense of security of a person.³⁷

When sentencing under the *Penalties and Sentences Act*, the court must consider any harm caused or risked by the offence, including any actual physical, mental or emotional harm or the threat of these harms to the child.³⁸ The greater the level of harm caused to the child, the more serious the offence; conversely, a lack of harm or risk of harm may reduce the offence seriousness.³⁹

During sentencing, harm is typically communicated in submissions to the court by the prosecutor or in a victim impact statement. The *Victims of Crime Assistance Act* introduced specific provisions governing the use of victim impact statements in sentencing, which affirmed previous informal processes. The sentencing court can decide if, and how, details of the harm are given to the court in accordance with the rules of evidence and the court’s practices and procedures. When deciding the sentence, the sentencing court will also decide how much weight or influence the harm caused, or risked, to the victim will have. Even where there is no direct evidence of harm, the court may still reach a conclusion on the adverse impact the offending conduct has had on the child.⁴⁰

The type of harm caused to a child, or risked, because of a sexual offence may depend on the severity of the abuse.⁴¹ Assessing the level of harm caused to an individual in a particular case for the purposes of sentencing is complex. Although the physical harm associated with child sexual offences can be established – for example, by medical evidence of any injury caused by penetration, pregnancy or a sexually transmitted infection – long-term harm, including psychological harm, may be difficult to determine, particularly if it is less obvious or unascertainable at the time of sentencing. Such harm may include:⁴²

- fear, humiliation, degradation, shame or embarrassment
- lowered self-esteem of the victim
- cultural consequences that impair marriageability
- inability to develop trust in future relationships
- inability to form personal or intimate relationships in adulthood
- self-harm and suicide
- ongoing trauma-related mental health problems, and
- reduced capacity to engage in education or work.

When dealing with child sexual offences involving young victims, one difficulty is identifying the level of harm and how that can be best communicated to and understood by the court. Parents or legal guardians of the child can currently provide a victim impact statement discussing the harm caused to the victim by the offence by, for example, referring to behavioural or personality changes in the child.

The Council will explore these issues further, including the use of victim impact statements, in its Final Report.

QUESTION:

5. How can the harm caused, or risked, to the victim in child sexual offences best be communicated to the court?

Culpability

Culpability – as distinct from criminal or legal responsibility – for an offence refers to the extent to which the offender is to blame for the offence, including the offender’s intention or motivation.

Although it is not included in the specific principles and factors in section 9(6) of the *Penalties and Sentences Act*, culpability is recognised as a relevant sentencing factor in section 9(2)(d) of the Act. In general, an offender’s level of culpability assessed in a sentencing context is correlated to the harm; the greater the harm intended or caused, the greater the offender’s culpability.⁴³ In assessing offence seriousness and culpability, courts also take into account whether the offence ‘is carefully and deliberately planned and executed’ as opposed to crimes committed on impulse which ‘may be regarded as less grave [as] they are seen as uncharacteristic of the offender and therefore less likely to be repeated’.⁴⁴ The United Kingdom sentencing guideline for the *Sexual Offences Act 2003* (UK) takes the position that the offender’s culpability is high and the offence is inherently harmful ‘where the activity is in any way non-consensual, coercive or exploitative’.⁴⁵

In determining an offender’s moral culpability at sentencing, factors such as intellectual capacity or mental illness directly related to the commission of the offence can also be relevant. The degree to which any of these factors are taken into account, and influence the severity of the sentence, is at the sentencing judge’s discretion.

The Council will be exploring the issue of culpability further in its Final Report.

Assessing harm and culpability

In practice, the assessment of the seriousness of an offence by courts with reference to harm and culpability are often very closely linked. Factors that courts may take into account in assessing both harm and culpability for sexual offences include:

- the type of offence and whether it was committed against an adult or child
- whether the offender deliberately caused more harm than necessary when committing the offence – for example, significant use of violence in the commission of a sexual offence to overcome the victim’s resistance
- the age of the victim and their vulnerability – for example, an offender targeting a victim based on youth or old age, any physical or intellectual disability of the victim, or any personal problems the victim may have had
- the age difference between the offender and the victim, and

- whether the offender was in a position of power or trust with the victim – for example, through an extra- or intra-familial relationship or from the offender’s professional or other responsibility to the child; the greater the breach of trust, the greater the level of culpability.

2.4 Other aggravating and mitigating factors relevant to sentencing

There are a range of aggravating and mitigating factors taken into account during the sentencing process. Most of these are not specific to the offence, but relate to personal characteristics of the offender as well as conduct occurring before and after the offence was committed.

The *Penalties and Sentences Act* outlines a range of aggravating and mitigating factors to be taken into account in sections 9(2)(b) to (r) and sections 9(6)(a) to (j). These factors are not identified as aggravating or mitigating, and in some circumstances may be either depending on the circumstances and type of the offence. Section 9(2)(g) of the Act refers to ‘the presence of any aggravating and mitigating factor concerning the offender’. Case precedent also gives guidance to the court on what factors should be considered. For example the Court of Appeal decision of *R v SAG*⁴⁶ provides an example of the variety of matters that can operate to increase or mitigate a sentence imposed on an offender for the offence of maintaining a sexual relationship with a child. Justice Jerrard undertook an extensive review of comparative cases and compiled a list of relevant matters.

Matters that may increase the severity of the sentence were identified as:⁴⁷

- the young age of the child when the relationship first began
- maintaining the relationship for a lengthy period
- penile rape during the course of the relationship
- unlawful carnal knowledge of the victim
- the commission of those offences over a long period
- the victim bearing a child to the offender
- a parental or protective relationship between the offender and the victim
- the offender being dealt with for offences against more than one child victim, and/or
- actual physical violence used by the offender – and, if not, whether there was evidence of emotional blackmail or other manipulation of the victim.

Matters that may mitigate the severity of the sentence were identified as:⁴⁸

- conduct by the offender showing remorse, such as the offender voluntarily approaching the authorities, or seeking help for the family
- cooperation with investigating bodies, including admissions of offending behaviour, and/or
- cooperation with the administration of justice and sparing the victim the need to give evidence in court.

Aggravating and mitigating factors do not operate on a continuum. Equally so, the absence of a mitigating factor does not necessarily mean there is a consequential aggravating factor.⁴⁹ For example, a guilty plea is normally a mitigating factor, but an election to proceed to trial is not an aggravating factor. As when assessing offence seriousness, a court will apply its discretion on how much weight or influence any aggravating or mitigating factor will have.

The Council is examining what factors are commonly referred to by the courts when sentencing offenders for child sexual offences and will report on these in its Final Report.

Aggravating factors

In the context of child sexual offences, some of the factors that are generally deemed to be aggravating and indicate a culpability higher than usual, or an increased level of harm caused to the victim, are provided in the *Penalties and Sentences Act*:

- any actual or threat of physical harm or any emotional or mental harm to the child⁵⁰
- the age of the child⁵¹
- if other children were exposed to or witnessed the offence⁵²
- the risk of the offender re-offending and the need to protect the victim or other children⁵³
- a lack of remorse shown by the offender⁵⁴
- any damage, injury or loss caused by the offender⁵⁵
- any previous criminal history, in particular the number, seriousness, date, relevance and nature of prior offences,⁵⁶ and
- whether the offences were committed while the offender was serving a sentence or was on bail for other offences.⁵⁷

Additional aggravating factors can include:

- where the offending behaviour resulted in a pregnancy
- the transmission of any infections
- repeated assaults or a sustained assault on the victim
- if the offence occurred in a location where the victim should be able to feel safe – for example, in the victim’s home
- whether there was an intention to commit more serious harm than actually resulted from the offence
- where the offending took place over a long period
- whether there were multiple victims
- any additional degradation of the victim (for example, the offender took photographs or filmed the conduct)
- the use of a weapon in the commission of the offence, and
- any attempt to conceal or dispose of evidence.

QUESTIONS:

6. What factors related to the seriousness of the offence should be treated as aggravating when sentencing an offender for a child sexual offence? For example, within offence categories (such as rape), what makes one offence more serious than another?
7. What should the most important aggravating factors be in sentencing an offender for a child sexual offence? Should these differ between offences?

Mitigating factors

Mitigating factors may be those which indicate a level of culpability that is lower than usual, or that the harm caused may be less serious, or may be related to the offender’s personal history or circumstances, or conduct after the offence. Statutory factors in the *Penalties and Sentences Act* that may be considered as mitigating include:

- a plea of guilty⁵⁸ and the timeliness of the plea – in particular, electing to have the matter proceed by way of an ex-officio indictment; emphasis is placed on the expedition of the matter to sentencing where the victim does not have to give evidence in court
- remorse shown by the offender⁵⁹

- assistance to law enforcement agencies in the investigation of the offence or other offences⁶⁰
- a positive response to previous court orders such as bail conditions, probation or an intensive correction order⁶¹
- if the offender is Aboriginal or a Torres Strait Islander, any submissions made by representatives of the community justice group in the offender's community⁶²
- the offender's character, age and intellectual capacity;⁶³ in determining the offender's character, a court can consider the offender's criminal history, any significant contributions made to the community and any other matters the court considers relevant;⁶⁴ the court may also consider the offender's work or family history; the impact of the age of the offender – being either very young or very old – will depend on the circumstances of the case, or
- the prospect of rehabilitation and the availability of any medical or psychiatric treatment.⁶⁵

In the case of historical sexual offences the consequences of the delay in prosecution has been accepted in some cases as raising issues in mitigation. For example, in the matter of *R v D'Arcy*,⁶⁶ a number of circumstances were taken into account, including the age of the offender and the state of his health at the time of sentencing. This matter involved offending that had occurred about 30 years before complaints were made to police; the delay in prosecution plus the age and state of health of the offender were taken to be mitigating factors; these matters were taken into account against a background of the offender's contribution to the community between the time the offences occurred and the time of sentencing.

Some other factors that courts may take into account as mitigating are:

- any reconciliation between the offender and the victim
- any consensual relationship that was ongoing between the offender and the victim
- minimal or no impact of the offending conduct on the victim
- mental illness or disability of the offender
- any personal efforts at rehabilitation, such as voluntarily seeking counselling to deal with the offending behaviour, and
- the offender's loss of employment because of the offending conduct.

The acceptance of some these of factors is contentious. In NSW, the *Crimes (Sentencing Procedure) Act 1999* (NSW) has been amended to prevent the court taking into account the offender's good character or lack of previous convictions as a mitigating factor in the case of child sexual offences if the court is satisfied that the factor concerned assisted the offender in committing the offence.⁶⁷ Remorse may be a mitigating factor if the offender has provided evidence that they have accepted responsibility for their actions, or acknowledged any injury, loss or damage caused by their actions, or made reparation for injury, loss or damage.⁶⁸

Some commentary on the NSW restrictions on the use of good character has questioned the need for this legislative reform on the basis that courts are already adopting this approach and it unnecessarily singles out sexual offences against children for special treatment. Alternatively, it has been proposed that good character should no longer be available as a mitigating factor when sentencing for any offence and that an absence of prior convictions should be the only basis for mitigation.⁶⁹

QUESTIONS:

8. What factors relevant to the seriousness of the offence should be treated as mitigating when sentencing an offender for a child sexual offence? For example, within offence categories (such as rape), what makes one offence less serious than another?
9. What should the most important mitigating factors be in sentencing an offender for a child sexual offence? Should these differ between offences?
10. What factors or circumstances personal to the offender should be considered by a court as either mitigating or aggravating in sentencing an offender for a child sexual offence?
11. Are there any factors or circumstances personal to the offender or their circumstances (for example, good character or remorse) that a court should not be able to take into account as mitigating, or only be allowed to take into account if certain criteria are met?

3 SENTENCING OUTCOMES IN QUEENSLAND

This section summarises some of the key findings, to date, of the Council's research on sentencing for sexual offences against children. Information is provided on how frequently defendants with sexual offences against children appear before the Queensland courts, the personal characteristics of offenders sentenced for such offences and the sentencing outcomes for offenders found guilty of child sexual offences.

3.1 Data definitions and limitations

The information presented relates to matters finalised in the Queensland Magistrates, District and Supreme Courts in 2006–10. Information was developed using Queensland courts data maintained by the Queensland Office of Economic and Statistical Research (OESR). These data come from administrative information collected by the Department of Justice and Attorney-General (DJAG).

The types of sexual offences discussed are those specified in the Terms of Reference. They are unlawful sodomy, indecent treatment, unlawful carnal knowledge of a child under 16, maintaining a sexual relationship with a child, rape and attempted rape – hereafter referred to as *Reference offences*.

The offences of indecent treatment, unlawful carnal knowledge of a child and maintaining a sexual relationship with a child can only be committed against a child under 16 years. Unlawful sodomy is an unlawful act for any person aged less than 18 years. The offences of rape and attempted rape can be committed against a child or adult victim.⁷⁰

For the purpose of analyses and reporting, *Reference defendants* are defined as adult defendants with a Reference offence listed on their indictment as their most serious offence.⁷¹ *Reference offenders* are reference defendants who have been sentenced by the courts – that is, offenders sentenced with a Reference offence as their most serious offence. A distinction between Reference defendants and Reference offenders is made as not all persons before the courts for Reference offences will be convicted. *Other defendants* or *other offenders* refer to defendants or offenders being dealt with for an offence other than a Reference offence (including non-sexual offences) as their most serious offence.

Reference offences were categorised according to the 2008 Australian Bureau of Statistics (ABS) Australian Standard Offence Classification Scheme. The most serious offence committed and the most serious penalty for the case were used to structure data analyses. The most serious offence is the most serious offence for the case and was determined using the ABS 2009 National Offence Index. Penalty seriousness is ranked according to the classification scheme used by the ABS.

The data discussed here are a simplified representation of a complex criminal justice system and are subject to limitations. Caution must be used when interpreting these data.

Key data limitations are:

- The sexual offences discussed in this chapter are those specified in the Terms of Reference. This means that information on the full scope of sexual offences that may properly be classified as ‘child sexual offences’ is not provided.
- Information on the specific subcategories of ‘indecent treatment’ is not provided because not all subcategories of this offence category contain enough cases to ensure reliable analysis.
- Courts data do not include comprehensive information on victim age; therefore the findings do not distinguish between the rape or attempted rape of an adult or child.
- Information reflects data from government administrative systems. The accuracy of the information that follows reflects how information is structured, entered and maintained in these systems, and how it is extracted from them.
- 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. For example, a defendant with a most serious offence of rape may also have indecent treatment 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 defendants before the courts for less serious sexual offences may seem low.
- The OESR courts data is not updated to reflect changes in sentencing outcomes that may occur because of appeal decisions or re-trials.
- Information on defendant disability status is not reported as this information is not collected by DJAG.
- Cases with missing information were excluded from analyses where relevant. For example, cases without Aboriginal and Torres Strait Islander status information (11%) were not included in analyses relating to Aboriginal and Torres Strait Islander people.

Research findings summarised here are reported in the *Sentencing of Child Sexual Offences: Research Paper*. This document contains further information on data definitions and limitations.

3.2 How common are Terms of Reference offences?

Across the Queensland court system in 2006–10, less than 1 per cent (0.6%) of adult defendants had a Reference offence as their most serious offence. Although Reference offences are not common in the Queensland courts system, research has found that sexual offences are often not reported.⁷²

Of the 4,752 defendants before the courts with a Reference offence as a most serious offence, just under half (47%) had indecent treatment as their most serious offence. Rape was the next most common offence group (31%), while 12 per cent of Reference defendants had a most serious offence of carnal knowledge and 7 per cent had a most serious offence of maintaining a sexual relationship with a child. The least prevalent Reference offences as most serious offence were attempted rape (1%) and unlawful sodomy (2%).

3.3 What proportions of Terms of Reference defendants are sentenced?

Some defendants plead guilty and some are found guilty at trial. These offenders are sentenced by the courts.

In total, about three-quarters (73%) of Reference defendants with a most serious offence of carnal knowledge and 59 per cent of Reference defendants with a most serious offence of maintaining a sexual relationship with a child were sentenced by the Queensland courts in 2006–10. This compares

with approximately half of defendants with a most serious offence of unlawful sodomy (51%) and indecent treatment (49%), and approximately a third of rape (30%) and attempted rape (28%) defendants.

Defendants not sentenced had cases that were discontinued or were found not guilty at trial.

Reference defendants with a most serious offence of carnal knowledge were most likely to plead guilty (72%), while Reference defendants with a most serious offence of rape (22%) and attempted rape (22%) were least likely. Exactly half (50%) of Reference defendants with a most serious offence of unlawful sodomy pleaded guilty, compared with 43 per cent of indecent treatment defendants and 44 per cent of 'maintaining a sexual relationship with a child' defendants.

Overall, Reference defendants are half as likely to plead guilty (40%) than other defendants (82%). This difference is partly explained by the fact that most criminal matters relate to relatively minor offences (such as offensive behaviour or drive while disqualified) dealt with by the Magistrates Court.

The offence category with the largest share of Reference defendants found guilty was maintaining a sexual relationship with a child (15%), while 2 per cent of defendants with a most serious offence of carnal knowledge were found guilty. Less than 10 per cent of defendants with a most serious offence of attempted rape (6%), indecent treatment (6%) and rape (8%) were found guilty at trial and about 1 per cent of defendants with a most serious offence of unlawful sodomy were found guilty.

3.4 Demographic characteristics of Terms of Reference offenders

As a group, Reference offenders tend to be:

- male (98%), and
- older than other offenders (the average age of Reference offenders at the time of sentencing was 37 years, compared with 27 years for other offenders).⁷³

Eighteen per cent of Reference offenders were Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander people accounted for 15 per cent of other offenders.

3.5 What sentences are imposed on Reference offenders?

The variability in sexual offending is reflected in the sentences provided to Reference offenders. See Appendix 3 of this paper for further information on case variability for child sexual offending.

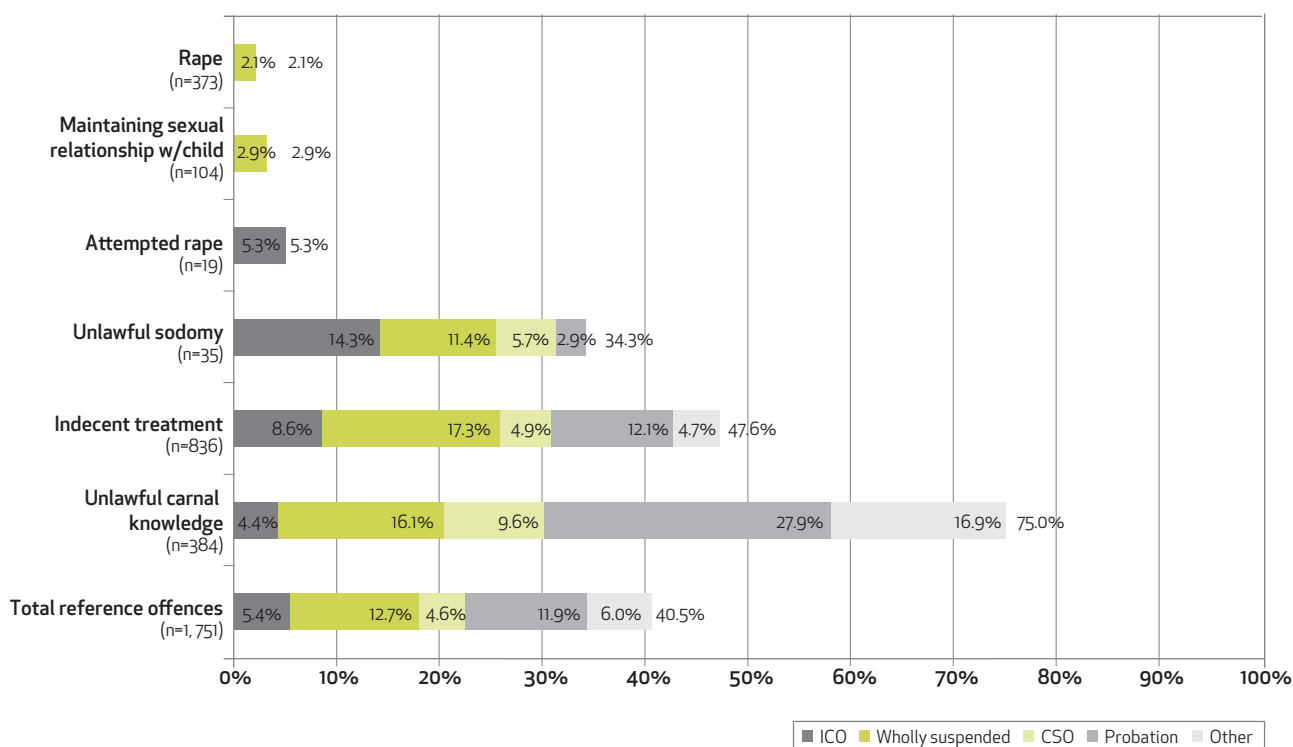
Figure 1 shows the proportion of Reference offenders sentenced to full-time imprisonment or a partially suspended sentence. At one end, nearly all Reference offenders with a most serious offence of attempted rape (95%), rape (98%) and maintaining a sexual relationship with a child (97%) were sentenced to time in custody. Reference offenders whose most serious offence was unlawful sodomy (66%) or indecent treatment (52%) were less likely to be sentenced to full-time imprisonment or a partially suspended sentence. Only a quarter of Reference offenders sentenced for unlawful carnal knowledge (25%) received full-time imprisonment or a partially suspended sentence.

The proportion of sexual offenders sentenced to full-time imprisonment is likely to increase with amendments to the *Penalties and Sentences Act* that became effective on 26 November 2010. Legislation now provides that offenders convicted of a sexual offence involving a child aged less than 16 years must serve an actual term of imprisonment unless there are exceptional circumstances.

Sentenced defendants who did not receive a full term of imprisonment or a partially suspended sentence were sentenced to intensive correction orders (ICOs), wholly suspended sentences, community service orders (CSOs) and probation orders in varying proportions across the different offence categories.

Reference offenders not given full-time imprisonment or a partially suspended sentence may still have served time in custody (on remand or for other offences committed during the same period) before being sentenced. This time may have been taken into account by the sentencing judge when deciding on a sentence.⁷⁴ Judges may also combine orders to ensure that people sentenced for lower-end sexual offences are supervised in the community if they do not receive a sentence involving actual time in custody. For example, a wholly suspended sentence (which is not supervised) may be combined with a probation order (which is supervised by the Department of Community Safety, Queensland Corrective Services) if the offender is sentenced for more than one offence.⁷⁵ This practice is not reflected in the data presented, as only the most serious penalty is shown.

Figure 1: Proportion of Reference offenders not receiving full-imprisonment or a partially suspended sentence as their most serious penalty, Queensland courts 2006–10^{1,2,3}



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.

3.6 What is the average sentence length for Reference offenders?

Table 1 shows the average sentence length imposed on Reference offenders by type of sentence and type of Reference offence. Averages were calculated on the most serious penalty imposed on the Reference offender.

Reference offenders most likely to receive imprisonment or partially suspended sentences tended to receive the longest sentences. The longest average lengths of imprisonment occurred for Reference offenders with a most serious offence of rape (6.5 years), maintaining a sexual relationship with a child (6.0 years) and unlawful sodomy (6.0 years). The shortest average terms of imprisonment were for Reference offenders with a most serious offence of indecent treatment (1.0 year) and unlawful carnal knowledge (1.0 year).

The average length of partially suspended sentences imposed on Reference offenders ranged from 1.3 years for indecent treatment to 3.5 years for maintaining a sexual relationship with a child. The average partially suspended sentence length for Reference offenders with a most serious offence of unlawful sodomy was 2.5 years, which compares with 3.0 years for rape.

The average sentence lengths for probation orders were generally longer than those for wholly suspended sentences and intensive correction orders. The average sentence for Reference offenders receiving a probation order ranged from 1.0 to 1.5 years, while the average sentence for Reference offenders sentenced to a wholly suspended sentence was 0.8 of a year, and 1.0 year was the average sentence length for Reference offenders receiving an intensive correction order.

Table 1: Average sentence lengths for Reference offenders by selected most serious penalty outcomes, Queensland courts 2006–10^{1,2,3}

Reference offence	Imprisonment		Partially suspended sentence ⁴		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 sexual relationship w/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 ⁵	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

1. Reference offenders are offenders sentenced with a Reference offence as their most serious offence.
2. 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 is not a round year.
3. The average sentence was not calculated for offence categories with an 'n' size of 10 or fewer.
4. Average partially suspended sentences refer to the whole period of imprisonment imposed – not the period of time served in custody.
5. Indecent treatment includes all subcategories of this offence category. This means the overall average for all subcategories of 'indecent treatment' is provided.

3.7 Summary

This section has provided information on the sentencing of sexual offences against children finalised in the Queensland courts in 2006–10. Information presented showed variability in sentencing outcomes for the different Reference offences. These differences may be explained by the different type of unlawful sexual conduct being sentenced across the different offence categories.

In summary, the data presented showed that:

- Reference offences (those referred to in the Terms of Reference) represented a very small proportion (0.6%) of total matters heard by the courts.
- Reference offences not involving penetration were more common than offences involving penetration.
- Reference defendants (defendants with a Reference offence as their most serious offence) were less likely to be sentenced (46%) than other defendants (94%). Reference defendants were also half as likely (40%) to plead guilty than other defendants (82%).
- Reference offenders (sentenced persons with a Reference offence as their most serious offence) were nearly all male (98%).
- Reference offenders were older on average (37 years) at the time of sentencing than other offenders (27 years).
- Eighteen per cent of Reference offenders were Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander people accounted for 15 per cent of other offenders.
- Almost all Reference offenders with a most serious offence of maintaining a sexual relationship with a child (97%), rape (98%) and attempted rape (95%) were sentenced to full-time imprisonment or a partially suspended sentence.
- One out of every four (25%) Reference offenders with a most serious offence of unlawful carnal knowledge were sentenced to full-time imprisonment or a partially suspended sentence.
- Reference offenders most likely to receive full-time imprisonment or partially suspended sentences tended to receive the longest sentences. The longest average lengths of imprisonment were for Reference offenders with a most serious offence of rape (6.5 years), maintaining a sexual relationship with a child (6.0 years) and unlawful sodomy (6.0 years).
- The shortest average terms of imprisonment were for Reference offenders with a most serious offence of indecent treatment (1.0 year) and unlawful carnal knowledge (1.0 year).

4 OTHER APPROACHES TO SENTENCING GUIDANCE AND ALTERNATIVE RESPONSES

The main sources of guidance to Queensland courts when sentencing adult offenders for a child sexual offence are:

- legislation, in particular the *Penalties and Sentences Act* and the *Criminal Code*
- case precedent, which identifies comparative sentences and provides guidance on aggravating and mitigating factors
- statistics, accessible from the Queensland Sentencing Information Service (QISIS)⁷⁶
- appeal decisions, and
- other resources, such as the *Queensland Sentencing Manual*.⁷⁷

The Court of Appeal now also has a formal legislative power to issue guideline judgments under Part 2A of the *Penalties and Sentences Act*, although no guideline judgments have yet been issued.

The Council has been asked in the Terms of Reference to provide advice on the need for additional guidance on the sentencing of child sexual offences and, if so, what form this guidance should take. The Council will be exploring this issue in its Final Report.

4.1 Alternative approaches

This section provides a snapshot of alternative approaches proposed and adopted in other jurisdictions, including national initiatives to respond to child sexual offending. The Council invites views on any alternative responses that might be considered for adoption in Queensland.

At a national level, the National Child Sexual Assault Reform Committee has recommended the introduction of specialist child sexual offence courts in each Australian jurisdiction.⁷⁸ Child sexual offence matters would be prosecuted and sentenced in the specialist courts. 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.

In Victoria, a number of reforms have been implemented in response to the 2004 Victorian Law Reform Commission Report on sexual offences. These include the development of a Sexual Assault Education Framework by the Judicial College of Victoria, which provides education for judges, magistrates and Victorian Civil and Administrative Tribunal members. The Framework has four components: education programs for the judiciary; a sexual offences education curriculum, which includes sentencing issues in its coverage; a DVD program directed at cultural change issues; and online manuals and publications. The curriculum modules address the law as well as the social context in which these offences occur and skills development.⁷⁹

Several mechanisms have been introduced in NSW:

- A Sentencing Bench Book that provides guidance to the judiciary and legal practitioners on the principles and practices of sentencing in NSW, and a specialist Sexual Assault Handbook.⁸⁰ The Sentencing Bench Book includes information on legislative principles and requirements and summarises relevant appeal court authority on particular issues.
- Legislative restrictions on matters that can be taken into account in mitigation; the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides:
 - special rules for the sentencing of child sexual offences; the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned assisted the offender in committing the offence,⁸¹ and
 - that remorse can be a mitigating factor if the offender has provided evidence that they have accepted responsibility for their actions, or acknowledged any injury, loss or damage caused by their actions, or made reparation for injury, loss or damage.⁸²
- The introduction of a sentencing diversionary program.⁸³ The NSW Pre-Trial Diversion of Offenders Program (Child Sexual Assault) allows certain categories of child sexual assault offender who plead guilty to sexually abusing a child in their care to be diverted from the criminal justice process into a two-year treatment program. Although not strictly a form of sentencing order, this initiative provides 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.⁸⁴ The program also focuses on therapeutic and support services for victims and their families. The program 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.⁸⁵ The program started in 1989 and was evaluated in 2009. Evaluation outcomes have included a reduction in re-offending rates.

The Sentencing Council for England and Wales has published a detailed guideline for the sentencing of sexual offences, including child sexual offences.⁸⁶ The UK guidelines on sexual offences are part of a range of guidelines developed by the Sentencing Council (a body which includes judicial officers) specific to individual offences, offence types or general sentencing factors (such as offence seriousness). The guidelines provide a detailed sentencing framework of the matters to be taken into consideration in the sentencing process. For example the guideline provides 10 years imprisonment as a starting point sentence for a case involving the rape of a child under 13 where no aggravating factors exist.⁸⁷ The guideline also identifies different types of conduct that may occur within offence categories and the associated starting point sentence and sentencing range for the type of conduct; aggravating and mitigating factors are also identified for offence categories. For example aggravating factors listed for the offence of rape include if the offender ejaculated, if there was a background of intimidation or if there was coercion or threats to prevent the victim reporting the incident.⁸⁸ There is a legal requirement that courts must follow guidelines issued by the Council.⁸⁹

The Office of the Council has advised that the sexual offences guideline is 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.⁹⁰

QUESTIONS:

12. Is there a need for additional guidance in sentencing an offender for a child sexual offence? If so, what form should this take?
13. Are there any other approaches to the sentencing of child sexual offences you would like considered?

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

Offence description and maximum penalty for sexual offences nominated in the Terms of Reference						
Offence description <i>Criminal Code</i> (Qld)	Age of consent	Maximum penalty				Summary disposal
		Child under 12	Child under 16	16 & 17 yr olds	Aggravating circumstances	
<p>Unlawful sodomy (s 208) It is an offence if a person does, or attempts to do, any of the following:</p> <ul style="list-style-type: none"> sodomise a person under 18 years permits a male person 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. 	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 (<i>Criminal Code</i> (Qld) s 552B)
<p>Indecent treatment of a child under 16 (s 210) It is an offence for any person to:</p> <ol style="list-style-type: none"> unlawfully or indecently deal with a child under the age of 16 years unlawfully procure a child under the age of 16 years 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, audiotape, picture, photograph or printed or written matter without legitimate reason, take any indecent photograph or records, 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)
<p>Unlawful carnal knowledge with or of children under 16 (s 215)</p>	16 years	Life	14 years	n/a	14 years – if the offence is an	Yes – in certain circumstances (as

Offence description and maximum penalty for sexual offences nominated in the Terms of Reference						
Offence description <i>Criminal Code</i> (Qld)	Age of consent	Maximum penalty				Summary disposal
		Child under 12	Child under 16	16 & 17 yr olds	Aggravating circumstances	
<p>It is an offence to have or attempt to have carnal knowledge with a child under the age of 16 years.</p> <p>Unlawful carnal knowledge involves sexual intercourse that is complete upon penetration to any extent but does not include sodomy.</p>		14 years for an attempt			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.	for s 208)
<p>Maintaining a sexual relationship with a child (s 229B)</p> <p>It is an offence for any adult to maintain an unlawful relationship of a sexual nature with a child under the prescribed age.</p> <p>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 sections 208, 210 (other than 210(1)(e) or (f)), 215, 222, 349, 350 or 352 of the Criminal Code.</p> <p>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.</p> <p>A person cannot be prosecuted for this offence without the consent of the Attorney-General or the Director of Public Prosecutions.</p>	16 years	Life	Life	n/a	n/a	Yes – in certain circumstances (as for s 208)
<p>Rape (s 349)</p> <p>Rape – it is an offence for a person to rape another person.</p> <p>The type of conduct that amounts to rape is:</p>	n/a	Life	Life	Life	n/a	Yes – in certain circumstances (as for s 208)

Offence description and maximum penalty for sexual offences nominated in the Terms of Reference						
Offence description <i>Criminal Code (Qld)</i>	Age of consent	Maximum penalty				Summary disposal
		Child under 12	Child under 16	16 & 17 yr olds	Aggravating circumstances	
<ul style="list-style-type: none"> 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. <p>A child under the age of 12 years is incapable of giving consent to any of these acts.</p> <p>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.</p> <p>The offence of rape is complete where there is penetration to any extent.</p>						
<p>Attempted rape (s 350)</p> <p>Provides an offence for a person who attempts to commit the crime of rape.</p>	n/a	14 years	14 years	14 years	n/a	Yes – in certain circumstances (as for s 208)

Appendix 3 – Variation in sexual offending

There is significant variability in unlawful sexual conduct. This behaviour can range from exposing a child to pornography, to touching someone's genitals, to rape with violence. A case can involve one sexual offence or multiple offences of a similar or different description. A case can also involve one or multiple victims. The types of offences sentenced and the types of sentences imposed for sexual offences reflect this variation.

The following case summaries outline some of the differences in the types of offending behaviour sentenced for different Terms of Reference offences to demonstrate offence and case variability. These case studies show how sexual offences committed against children can differ in terms of offence characteristics (for example, the degree of harm caused and the length of offending), offender culpability (for example, the age of the offender and pre-planning of the offence), offender characteristics (for example, previous criminal history) and victim characteristics (for example, the age of the victim). The level of cooperation shown in the administration of justice (including whether or not the offender pleaded guilty) may also affect a sentence outcome (including where a parole eligibility date is set).

The case information described below was derived from sentencing remarks relating to child sexual offences accessed from the Queensland Sentencing Information System (QGIS). The names of the defendants in these matters have been abbreviated to their initials as access to the QGIS database from which they have been drawn is restricted.

Most serious offence is unlawful carnal knowledge of a child under 16

Case study 1:

***R v LCB* (Unreported, District Court of Queensland, Shanahan DCJ, 4 September 2009)**

The offender had unprotected sexual intercourse with the complainant. The complainant told the offender she was aged 17 years. The offender was not charged for this incident.

A few days later, the complainant returned to the offender's home and the offender had unprotected sexual intercourse with the same complainant after being told she was aged 15 years. The complainant voluntarily participated in both sexual encounters.

The incident became known when the complainant became aware she was pregnant, the court presumed this was as a result of the first sexual encounter. The complainant willingly participated in both sexual encounters.

The offender was 18 at the time of the offence and pleaded guilty by way of ex-officio indictment. The case did not involve other offences.

The offender was sentenced to nine months probation. No conviction was recorded.

Case study 2:

***R v JTA* (Unreported, District Court of Queensland, Koppenol DCJ, 5 March 2009)**

The offender had sexual intercourse with the complainant on two occasions in the context of a boyfriend-girlfriend relationship.

The offender was 19 at the time of the offences. The offender submitted that he thought the complainant was aged 16 years. The complainant was 12.

The offender pleaded guilty to two counts of unlawful carnal knowledge and one count of stealing.

The offender was sentenced to two and a half years imprisonment for each count of unlawful carnal knowledge and six months for stealing, and was ordered to pay restitution for stolen goods. The imprisonment terms were ordered to be served concurrently.

One of the key differences between case 1 and case 2 is the age of the complainant. The age of the complainant in case 1 was 15 years, compared with 12 years in case 2. Although the law provides that persons of this age in Queensland cannot lawfully engage in sexual activity, in both cases, the complainant willingly participated in the sexual behaviour. This may explain why sentences for unlawful carnal knowledge tend to be lower than those imposed for other offences such as rape and unlawful sodomy.

Most serious offence is indecent treatment of a child under 12

Case study 3:

***R v TM* (Unreported, District Court of Queensland, Rafter SC DCJ, 16 January 2009)**

The case involved four counts of indecent treatment of a child under the age of 12.

The offender was 17 at the time of the offences.

The complainant was the offender's nephew, lived with the offender's family and was 11 at the time of the offences.

The first offence involved the offender showering with the complainant. The offender played with his own penis and told the complainant to play with his own penis.

The second offence involved the offender lying in the bath and touching the complainant's penis and moving his hand over it. The offender also self-masturbated in front of the complainant. The complainant left the bathroom after refusing the offender's request to lie in the bath with him.

Count three involved the offender moving his erect penis to the proximity of the complainant's buttocks. The offender desisted from further activity after the complainant resisted.

The final offence occurred when the complainant and offender were showering together. The offender began to masturbate the complainant, but desisted after the complainant told the offender to stop.

The offender pleaded guilty to the offences, cooperated with police, expressed remorse and had no previous criminal history.

The offender was diagnosed as suffering from a number of health issues including Asperger's syndrome and depression. The offender was taking medication to control sexual impulses at the time of sentencing.

The judge declared exceptional circumstances leading to a sentence that did not involve an actual period of imprisonment. The offender was sentenced to two years probation with a conviction recorded.

Case study 4:

***R v BJD* (Unreported, District Court of Queensland, Samios DCJ, 11 December 2009)**

The offender was sentenced for one count of burglary in the night, one count of indecent treatment of a child under 12 and one count of failing to comply with reporting obligations.

The offence involved the offender breaking into the complainant's bedroom at night. The complainant was 4 at the time of the offence. The offender admitted to pulling the complainant's shorts and underpants down and looking at her before being interrupted by a member of the household. The offender made his escape by jumping out of the window.

The offender was 44 at the time of the offences and was a stranger to the complainant.

The offender had a long relevant criminal history. He had previous convictions for sexual offences in Queensland and in two other states. The offences occurred within the operational period of a partially suspended sentence imposed for a previous indecent treatment offence.

The offender had also failed to complete a sexual offender treatment program recommended by the Court.

The judge acknowledged that the offender had had a difficult life, having been sexually abused by his father as well as by a worker engaged by Child Welfare Services.

The offender made full and frank admissions to the offences, pleaded guilty at committal and expressed remorse. The offence did not involve the use or threat of violence.

The offender was sentenced to four years imprisonment and ten months of the previous partially suspended sentence (breached by the offender) was activated to be served cumulatively to the four-year sentence. A cumulative sentence of one month was imposed for the failing to comply offence.

The different sentence outcomes for these two cases are possibly explained by difference in offender culpability and offender characteristics, rather than offence characteristics. The offender in case 3 was arguably less culpable than the offender in case 4 as he was young. This offender also suffered from Asperger's syndrome. Case 4 was characterised by considerable age disparity and the targeting of a very young victim (aged 4). The offender in case 4 had a long criminal history related to sexual offences, while the offender in case 3 was being sentenced for the first time. Neither case involved penetrative sexual behaviour. The absence of sexual penetration in 'indecent treatment' offence may explain why the sentences for such offences tend to be less severe than sentences given for other Reference offences such as rape and unlawful sodomy.

Most serious offence is maintaining a sexual relationship with a child

Case study 5:

***R v DIM* (Unreported, District Court of Queensland, Rafter SC DCJ, 20 April 2007)**

The case involved one count of maintaining a sexual relationship with a child and two counts of indecent treatment of a child under 12 under care.

The offences involved the offender touching the complainant over her clothes. The offences were regular and occurred over one and a half years. On numerous occasions the offender touched or brushed against the complainant's back, breasts, bottom and vaginal area.

The offender was the complainant's uncle and lived with his mother and step-father. The offences occurred when the complainant was visiting her grandparents.

The complainant was aged 11 to 12 years at the time of the offences and the offender was aged around 40 at the time of the offences.

The offender's previous offence history was not related to the offences being sentenced.

The offender, rather than the complainant, reported the offences to the police. When interviewed by the police, the complainant stated that she did not remember the offences.

The offender had sought treatment for his problems with alcohol.

The offender received a two-year partially suspended sentence for the maintaining a sexual relationship with a child offence, to be suspended after serving four months. Imprisonment probation orders were imposed for the indecent treatment offences. The imprisonment probation orders included four months imprisonment.

Case study 6:

***R v AJM* (Unreported, District Court of Queensland, McGill SC DCJ, 20 October 2009)**

The offender was sentenced for one count of maintaining a sexual relationship with a child with circumstances of aggravation, three counts of incest, three counts of indecent treatment of a child under 12 under care and four counts of indecent treatment of a child under 16 under care.

The offences initially involved indecent touching without penetration, but this escalated to simulated sexual intercourse, masturbation in the complainant's presence, oral sex and digital/penile penetration of the complainant's vagina. The offender also provided the complainant with a book of indecent photographs and took an indecent photograph of the complainant without her knowledge.

The offences listed on the indictment occurred while the complainant was aged 10 to 14 years. The offender was the complainant's step-father.

The offences were committed without violence, but the offender threatened to abuse the complainant's younger siblings if she did not cooperate with the offender.

The offender entered a late plea of guilty after the committal hearing and had no previous criminal convictions.

The offender was sentenced to nine years imprisonment.

The case information provided above shows that cases of maintaining a sexual relationship with a child can involve non-penetrative offences only or both non-penetrative and penetrative offences. Case 5, which received the less severe sentence of the two cases, involved indecent treatment type behaviour only. Case 6 was characterised by more severe sexual offences involving penetration that were maintained over a longer period of time than those occurring in case 5. The use of violence was not evident in either case and both cases involved a circumstance of aggravation of 'under care'. However, case 6 involved the use of emotional blackmail and the offender was the complainant's step-father and responsible for her care.

Most serious offence is rape

Case study 7:

***R v JEH* (Unreported, District Court of Queensland, Martin SC DCJ, 19 April 2010)**

The offender pleaded guilty to two counts of rape.

The offences involved the digital penetration of a 9-year-old child. The offender penetrated the complainant's vagina with his finger. The complainant resisted by moving away from the offender, but the offender followed and repeated the behaviour.

The offences did not involve undue force and no threat was made to the complainant.

The offender was a trusted family friend of the complainant and aged 26 years at the time of the offences.

The judge accepted that the offender was affected by the use of cannabis at the time of the offence and was remorseful.

The offender had a significant previous criminal history which included offences for violence, but not sexual offences.

The offender was sentenced to two years and ten months imprisonment.

Case study 8:

***R v ADA* (Unreported, District Court of Queensland, Britton SC DCJ, 18 November 2008)**

The offender was sentenced for one count of indecent treatment of a child under 16 who was of lineal descendent under care and three counts of rape.

The complainant was aged 14 years at the time of the offences and was the biological daughter of the offender. The offender was 40 years of age.

The offences all occurred on the same evening while the complainant pretended to be asleep. They involved touching of the complainant's breasts under her clothing, licking and penetration of the vagina with a tongue and penetration of the vagina with a penis.

No violence was used to commit the offences.

The judge recognised that the offences represented a significant breach of trust, but accepted that the offender had not established normal father–daughter bonds with the complainant. With the exception of the three months before the offences, the complainant had not lived with the offender since the age of 2.

The offender ultimately pleaded guilty to the offences after DNA evidence was submitted, but maintained that he did not remember the offences because of alcohol intoxication.

A report submitted by a psychologist indicated that the offender did not suffer any sexual pathology. The offences were believed to be explained by alcohol intoxication, head injury, sleep deprivation and possibly a depressive condition.

The offender’s criminal history involved two traffic offences.

The offender was sentenced to seven years imprisonment.

Information provided in Figure 1 (Section 3 of this paper) shows that rape cases overwhelmingly result in a term of imprisonment. The different terms of imprisonment imposed for the two rape cases described above may be explained by offence and offender characteristics. Although both cases involved two counts of rape, case 8 involved a lineal relationship and penetration of the vagina with a penis. Case 7 involved digital penetration of the vagina by a known rather than a related person.

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ENDNOTES

- ¹ *Criminal Code* (Qld) s 349(3).
- ² For example, amendments took effect on 1 July 1997 to increase penalties for unlawful sodomy (simpliciter) from 7 to 14 years, attempted sodomy (simpliciter) from 3 to 7 years, indecent treatment of a child under 16 from 5 to 10 years and from 10 to 14 years, unlawful carnal knowledge of a child from 5 to 14 years and from 10 to 14 years, and maintaining a sexual relationship with a child from 7 years to 14 years; see *Criminal Law Amendment Act 1997* (Qld). Further amendments commenced 1 May 2003 increasing the penalty for indecent treatment of a child from 10 to 14 years and from 14 years to 20 years, and to provide one penalty of life imprisonment for the offence of maintaining a sexual relationship with a child; see *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld).
- ³ See *Criminal Law Amendment Act 2000* (Qld).
- ⁴ The requirement for a judicial warning to be given to a jury of the danger of convicting on the uncorroborated testimony of one witness unless the jury finds the evidence corroborated by some other evidence was removed; see *Criminal Law Amendment Act 1997* (Qld).
- ⁵ See *Evidence (Protection of Children) Amendment Act 2003* (Qld).
- ⁶ These principles were first introduced in May 2003 by the *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld); further amendments were introduced by the *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld).
- ⁷ *Victims of Crime Assistance Act 2009* (Qld) Chapter 2.
- ⁸ Introduced by the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld).
- ⁹ *Penalties and Sentences Act 1992* (Qld) s 160D introduced by the *Corrective Services Act 2006* (Qld).
- ¹⁰ *Penalties and Sentences Act 1992* (Qld) s 9(5)(b).
- ¹¹ *Penalties and Sentences Act 1992* (Qld) s 10. This includes a suspended sentence of imprisonment. A sentence is not invalid if the court fails to state its reason; however, this may affect an appeal against the sentence.
- ¹² *Penalties and Sentences Act 1992* (Qld) s 9(1).
- ¹³ Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) 43–4.
- ¹⁴ *Penalties and Sentences Act 1992* (Qld) s 9(5)(b). The amending Act which introduced these principles was the *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld).
- ¹⁵ *Penalties and Sentences Act 1992* (Qld) s 9(5)(a). The amending Act which introduced these principles was the *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld).
- ¹⁶ *Penalties and Sentences Act 1992* (Qld) s 9(5A). During the introduction of this amendment, the example provided was of ‘where a 17-year-old and a 15-year-old were in a consensual relationship, it might seem unjust that one of them be imprisoned for conduct in the course of the relationship that raised no other inference of criminality but for the fact of their respective ages’ – Queensland, *Parliamentary Debates*, Legislative Assembly, 3 August 2010, 2309 (Hon Cameron Dick, Attorney-General and Minister for Industrial Relations).
- ¹⁷ For example, in *R v Quick, Ex parte A-G (Qld)*, Holmes J dissented from the views of de Jersey CJ and Chesterman J and took the view that the circumstances in that matter were exceptional. See also *R v L* [2000] QCA 123 (10 April 2000) for a discussion of what factors were taken to be exceptional by the sentencing judge; the Court of Appeal dismissed the Attorney-General appeal against the leniency of this sentence.
- ¹⁸ *R v Quick, Ex parte A-G (Qld)* [2006] QCA 477 (9, 17 November 2006) [7].
- ¹⁹ For example, see *Harvey v Attorney-General (Qld)* [2011] QCA 256 (27 September 2011); *Attorney-General (Qld) v Francis* [2008] QCA 243 (20 June, 22 August 2008).
- ²⁰ [2000] QB 198, 208.
- ²¹ For example, *R v Quick, Ex parte A-G (Qld)* [2006] QCA 477 (9, 17 November 2006); *R v L* [2000] QCA 123 (10 April 2000); *R v KT* (Unreported, District Court of Queensland, Robertson DCJ, 8 August 2011); *R v ST* (Unreported, District Court of Queensland, Rylie DCJ, 22 July 2011).
- ²² These principles and factors were introduced by the *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) in response to the joint Queensland Crime Commission and Queensland Police Service report *Project Axis, Child Sexual Abuse in Queensland: The Nature and Extent*.
- ²³ Explanatory Memorandum, *Sexual Offences (Protection of Children) Amendment Bill 2002* (Qld), 2.
- ²⁴ Mackenzie and Stobbs (2010), above n 13, 212. The example is provided of the therapeutic and rehabilitative approach taken in response to certain drug offences, in contrast to the focus on incarceration and community protection in relation to offenders convicted of sexual offences.
- ²⁵ *Penalties and Sentences Act 1992* (Qld) s 9(2)(b).
- ²⁶ *Penalties and Sentences Act 1992* (Qld) ss 9(2)(c), (6)(c).
- ²⁷ *Penalties and Sentences Act 1992* (Qld) s 9(2)(d).
- ²⁸ *Penalties and Sentences Act 1992* (Qld) ss 9(6)(a), (c).

29 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (ALRC, 2006) cited in Mackenzie and Stobbs (2010), above n 13, 53.

30 Richard Fox and Arie Frieberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2nd ed, 1999) 233.

31 Ibid 234.

32 *Veen v the Queen (No 2)* (1988) 164 CLR 465, 478.

33 *Penalties and Sentences Act 1992* (Qld) s 9(2)(b).

34 The Council's Terms of Reference concern the sentencing of offenders for child sexual offences. As orders made under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) are post-sentence orders, a review of these orders is outside the scope of this review.

35 *Criminal Code 1899* (Qld) s 552B.

36 *Criminal Code 1899* (Qld) s 552D(1).

37 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5th ed, 2010) 134.

38 *Penalties and Sentences Act 1992* (Qld) ss 9(2)(c)(i), (6)(c).

39 Ashworth (2010), above n 37, 110.

40 See for example, *R v Bloss* [1995] QCA 636, cited in John Robertson DCJ and Geraldine Mackenzie, *Queensland Sentencing Manual* (1998–) (Thomson Reuters Legal Online) [16.1330].

41 For example, studies have found that victims with histories of the most physically intrusive forms of abuse involving sexual intercourse are at the most risk of developing significant adult mental health problems, experiencing domestic violence, rape, sexual problems, low self-esteem, and problems with intimate relationships compared with other victims of child sexual abuse and those who have not experienced abuse from similar backgrounds: Mullen et al, 'Childhood Sexual Abuse and Mental Health in Adult Life' (1993) 163 *British Journal of Psychiatry* 721 and Fleming et al, 'The Long Term Impact of Child Sexual Abuse in Australian Women' (1999) 23(2) *Child Abuse and Neglect* 145.

42 See, for example, the United Kingdom Sentencing Guidelines Council, *Sexual Offences Act 2003: Definitive Guideline* (Sentencing Council for England and Wales) 6.

43 Ashworth (2010), above n 37, 148.

44 Fox and Frieberg (1999), above n 30, 248. For example child sexual offences may involve a prolonged period of grooming of the child. The Queensland Government recently introduced a new offence of 'grooming children under 16' for debate in Parliament. This offence was introduced in response to the 'wide-ranging behaviour designed to facilitate, or make easier, the later procurement of a child for sexual activity (for example, an offender might build a relationship of trust with the child, and then seek to sexualise that relationship).' See the Explanatory Memorandum, Criminal and Other Legislation Amendment Bill 2011 (Qld), 10.

45 United Kingdom Sentencing Guidelines Council, *Sexual Offences Act 2003: Definitive Guideline* (Sentencing Council for England and Wales).

46 *R v SAG* [2004] 147 A Crim R 301.

47 *R v SAG* [2004] 147 A Crim R 301, 306–307 [19] (Jerrard JA).

48 *R v SAG* [2004] 147 A Crim R 301, 307 [20] (Jerrard JA).

49 Ashworth (2010), above n 37, 158.

50 *Penalties and Sentences Act 1992* (Qld) ss 9(2)(c)(i), (6)(c).

51 *Penalties and Sentences Act 1992* (Qld) s 9(6)(b).

52 *Penalties and Sentences Act 1992* (Qld) s 9(2)(c)(ii).

53 *Penalties and Sentences Act 1992* (Qld) s 9(6)(d).

54 *Penalties and Sentences Act 1992* (Qld) s 9(6)(h).

55 *Penalties and Sentences Act 1992* (Qld) s 9(2)(e).

56 *Penalties and Sentences Act 1992* (Qld) ss 9(2)(f), (6)(g) and 11. Section 11 provides the matters to be considered in determining the offender's character which includes reference to previous criminal history.

57 *Penalties and Sentences Act 1992* (Qld) ss 9(2)(k), (l) and (m).

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

59 *Penalties and Sentences Act 1992* (Qld) s 9(6)(h). The Act refers to 'any remorse or lack of remorse'.

60 *Penalties and Sentences Act 1992* (Qld) s 9(2)(i).

61 *Penalties and Sentences Act 1992* (Qld) ss 9(2)(n), (o).

62 *Penalties and Sentences Act 1992* (Qld) s 9(2)(p).

63 *Penalties and Sentences Act 1992* (Qld) s 9(2)(f).

64 *Penalties and Sentences Act 1992* (Qld) s 11.

65 *Penalties and Sentences Act 1992* (Qld) s 9(6)(f).

66 (2001) 122 A Crim R 268.

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

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

⁶⁹ Kate Warner, 'Sentencing Review 2008–2009' (2010) 34 *Criminal Law Journal* 16, 23.

⁷⁰ Statistical information presented in the Final Report for this project will provide more details about the proportion of these matters that are committed against children.

⁷¹ A defendant is a person against whom one or more criminal charges have been laid, which are heard together as one unit of work by a court level (OESR 2011).

⁷² Karen Gelb, *Recidivism of Sex Offenders Research Paper* (Sentencing Advisory Council of Victoria, 2007).

⁷³ The median was used to calculate average age because of the distribution of ages.

⁷⁴ For example, an offender sentenced for one count of unlawful carnal knowledge who had spent 9.5 months in custody, of which only around 2 months could be declared as time served under that sentence pursuant to s 159A of the *Penalties and Sentences Act 1992* (Qld), was sentenced to 2 years imprisonment wholly suspended with an operational period of 3 years: *R v JGB* (Unreported, District Court of Queensland, Botting DCJ, 6 February 2009).

⁷⁵ An example of this is in *R v DLE* (Unreported, District Court of Queensland, Irwin DCJ, 2 June 2011), where the offender was sentenced for four counts of indecent treatment of a child under 16 years. For three of those counts, he was sentenced to 9 months imprisonment wholly suspended for an operational period of 2 years. For count 4, the offender was sentenced to probation for 2 years, which included a condition that he submit to any medical, psychiatric or psychological assessment and treatment as directed by an authorised Corrective Services Officer.

⁷⁶ QGIS is a computer-based recoding 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.

⁷⁷ John Robertson and Geraldine Mackenzie, *Queensland Sentencing Manual* (1998–) (Thomson Reuters Legal Online).

⁷⁸ See <<http://www.law.unsw.edu.au/sites/law.unsw.edu.au/files/docs/nationalcsareformcommitteereport2010.pdf>> (accessed 19 October 2011).

⁷⁹ Email communication from Manager, Programs, Judicial College of Victoria to Nadine Seifert, 28 October 2011.

⁸⁰ See <<http://www.judcom.nsw.gov.au/bench-books>> (accessed 28 October 2011).

⁸¹ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A).

⁸² *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(i).

⁸³ The *Pre-Trial Diversion of Offenders Act 1985* (NSW) provides for the establishment of the program.

⁸⁴ For further detail on the program, see <<http://www.wsahs.nsw.gov.au/services/cedarcottage/index.htm>> (accessed 19 October 2011).

⁸⁵ Jane Goodman-Delahunty, 'The NSW Pre-Trial Diversion of Offenders (Child Sexual Assault) Program: An Evaluation of Treatment Outcomes', prepared for Sydney West Area Health Services (2009) 8.

⁸⁶ See <http://sentencingcouncil.judiciary.gov.uk/docs/web_SexualOffencesAct_2003.pdf> (accessed 19 October 2011).

⁸⁷ United Kingdom Sentencing Guidelines Council, *Sexual Offences Act 2003: Definitive Guideline*, (Sentencing Council for England and Wales) 23.

⁸⁸ *Ibid*, 26.

⁸⁹ *Coroners and Justice Act 2009* (UK) s 125.

⁹⁰ Email communication from Senior Policy Officer, Office of the Sentencing Council to Nadine Seifert, 13 October 2011.