Legal Aid QUEENSLAND

| | | | |
|---|---|---|---|
| **Your Ref** | 6671685; 608591/1 | **Telephone:** | [redacted] |
| **Our Ref:** | 2023/0689535 | **Facsimile:** | |
| **Date:** | 4 July 2023 | **E-mail:** | [redacted] |

Mr John Robertson
Chair
Queensland Sentencing Advisory Council
GPO Box 2360
BRISBANE QLD 4001

**By email:** submissions@sentencingcouncil.qld.gov.au

Dear Mr Robertson,

**Re: Review of sentencing for sexual violence offences and aggravating factor for domestic and family violence offences**

Legal Aid Queensland (LAQ) welcomes the opportunity to provide preliminary feedback to the Council to assist in identifying key issues the Council should explore in responding to the reference to review sentencing for sexual violence offences and aggravating factor for domestic and family violence offences. This feedback has been prepared by the Criminal Law Services Division of LAQ in consultation with the Public Defenders Chambers.

**Sentencing for sexual violence offences**

LAQ encourages a longitudinal qualitative analysis of sentencing proceedings relating to rape and sexual assault offences. Research has shown that the community, when provided with access to all of the facts of a case, typically supported a sentence that was either more lenient than or was at least consistent with the sentence that was actually imposed.[1] A qualitative analysis of proceedings should involve an examination of the offence conduct and offender antecedents over an extended period of time, including both matters which resolved by way of a plea of guilty or finding of guilt following a trial.

As discussed in *R v Colless* [2010] QCA 26,[2]

> *While the Criminal Code establishes the same maximum penalty, whether the rape be accomplished by penetration by the penis or digitally, it is reasonable to observe that, without additional aggravating features (weapons, extra brutality, threats of serious harm, premeditation, residual injury etc), a rape accomplished digitally may generally be seen as somewhat less grave than a rape accomplished by penile penetration. See R v Wark [2008] QCA 172. That is because it may be less invasive, would not carry a risk of pregnancy, and would ordinarily carry substantially reduced risk of infection.*

[1] State of Victoria, Sentencing Advisory Council, *Public Opinion about Sentencing: A Research Overview* (13 December 2018).
[2] *R v Colless* [2011] 2 Qd R 421 at [17].

This accords with the experience of LAQ practitioners that sentences imposed for rape and sexual assaults vary in accordance with those factors. Further, the sentencing factors for a youthful offender whose offending conduct could be described as an 'anomaly' rather than something more embedded may place (appropriately, in our submission) more significant emphasis on rehabilitation; and particularly for youths, their treatment needs are specifically recognised by youth-specific programs such as the Griffith Youth Forensic Service.

Section 160D of the *Penalties and Sentences Act 1992 (Qld)* (PSA) requires the court to impose a parole eligibility date where a term of imprisonment is imposed for a sexual offence. In our experience the inability to set a parole release date for an offender whose offending conduct falls towards the lower end of the threshold but still calls for some form of imprisonment to be imposed, creates a difficulty for the court in crafting an appropriate sentence which properly balances the sentencing principles. For example, where a defendant is being sentenced in relation to a single offence, a court is unable to impose a suspended term of imprisonment alongside a probation order,[3] where the court would otherwise consider that an appropriate course. A prison-probation order, which would provide for a certainty of release of the defendant and a set period of supervised intervention in the community, still requires actual imprisonment to be served prior to release onto the probation order.[4]

Section 9 PSA has been subject to a significant number of amendments over the last 10 years and contains a comprehensive and significant number of factors which a court must consider. Analysis of the sentencing factors contained in the PSA and their ability to address offending behaviour relating to sexual assault and rape should also be considered in the context of other provisions which provide for the punishment and management of sexual offenders; Part 9A PSA regarding serious violent offence (SVO) declarations, Part 9B PSA regarding repeat child sex offences, Part 10 PSA regarding indefinite sentences, the *Child Protection (Offender Reporting) Act 2004* (Qld), and the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). While a sentencing court cannot have regard to whether an offender may become or is the subject of a dangerous prisoners application or may become subject to an order because of a dangerous prisoners application pursuant to s 9(9) PSA, it cannot be ignored that a not insignificant number of prisoners who received an SVO involving a rape or of maintaining a sexual relationship with a child went on to be subject to a supervision or detention order under the DPSOA scheme.[5]

LAQ also notes recent legislative changes in relation to the consent provisions in the *Criminal Code 1899 (Qld)*, which may have capacity to capture offenders who lie closer to the margins of offending behaviour and may have an impact on sentencing trends.

**Domestic violence as an aggravating factor**

It is the experience of LAQ's practitioners that the aggravating factor is a foremost factor in a sentencing court's consideration of appropriate penalties, which is reflected in the ultimate penalties imposed; this is not inconsistent with the finding of the Council's previous study into the impact of domestic violence as an aggravating factor on sentencing outcomes.[6] While that

[3] *Penalties and Sentences Act 1992* (Qld) s 92(5).
[4] *Penalties and Sentences Act 1992* (Qld) s 92.
[5] Queensland Sentencing Advisory Council, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992* (Qld), (Final Report, 12 May 2022), 93.
[6] Queensland Sentencing Advisory Council, *The impact of domestic violence as an aggravating factor on sentencing outcomes* (Research Brief No. 1, May 2021).

study focused on matters where the most serious offence was a common assault or assault occasioning bodily harm, LAQ's practitioners anecdotally have experienced a similar experience in relation to offences such as wilful damage demarcated as a domestic violence offence. Further analysis of the impact of s 9(10A) should include a sufficiently wide variety of offences which also constitute domestic violence.

LAQ welcomes the opportunity to provide further feedback to the Council upon the release of the Issues Papers in relation to each of the above. [redacted]

Yours sincerely

[redacted]

Nicky Davies
Chief Executive Officer
Legal Aid Queensland