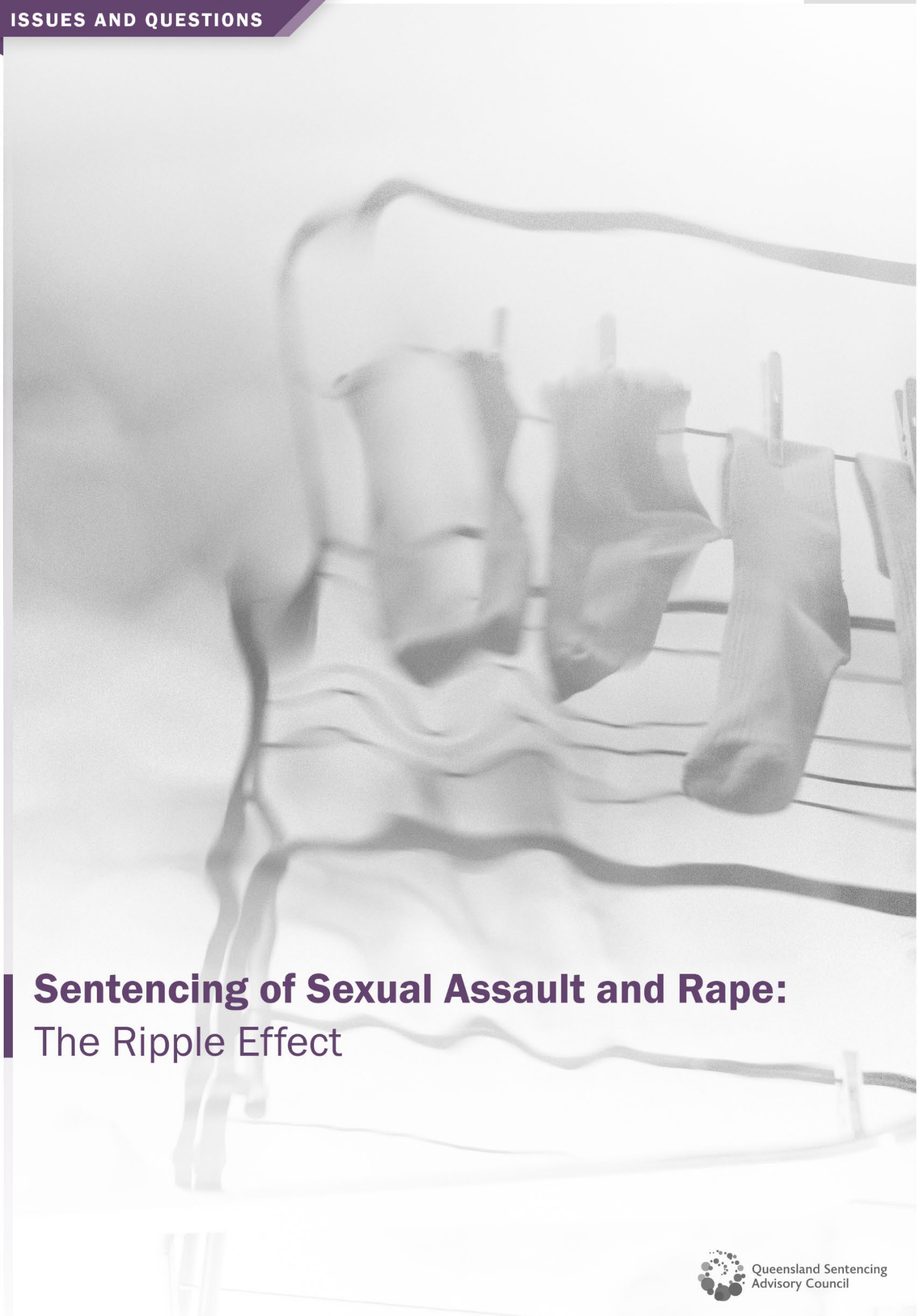
CONSULTATION PAPER:
ISSUES AND QUESTIONS

March 2024



Sentencing of Sexual Assault and Rape:
The Ripple Effect

Queensland Sentencing Advisory Council

Warning to readers

This paper contains subject matter that readers may find distressing. Material describing sexual violence offences, including case examples of rape and sexual assault, is included in this paper. It also includes descriptions of the impact sexual violence offences can have on adult and child victims. If you need to talk to someone, support is available:

Visit our website for options for advice and support.

For publication information, see page 121 of this paper.

Call for submissions

You are invited to make a submission based on the questions in this Consultation Paper, or any issues arising from the Terms of Reference.

Submission deadline: 10.00 am, Monday, 22 April 2024

Preparing submissions

You are invited to respond to any or all the questions and to provide your views on options presented. To assist in analysing responses, please identify the relevant question or option number/s in your submission.

How your submissions will be used

All submissions to this Consultation Paper, as well as additional consultation conducted with key stakeholders and victim survivors, will inform the Council's response to the Terms of Reference.

A final report with recommendations will be provided to the Attorney-General by 16 September 2024 and released publicly via the Council's website: www.sentencingcouncil.qld.gov.au.

If you make a submission, let us know if your submission is:

- **confidential** – for the information of the Council only, or
- **public** – meaning it may be published and we may refer to it in our final report.

If you do not tell us your submission is confidential, we will treat it as public.

If you are happy for us to publish and refer to your submission, but you want us to remove your personal information, including your name, and any other identifying information before we do this, please let us know. We call this an **anonymised public submission.**

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Email

We prefer to receive submissions by email. Email your submission to submissions@sentencingcouncil.qld.gov.au including 'Review of sentencing for sexual assault and rape offences' in the subject line.

Post

Post your submission to:

Queensland Sentencing Advisory Council
GPO Box 2360
Brisbane Qld 4001

Submission assistance

If you require any assistance to participate in this public consultation process, please contact the Council on (07) 3738 9499, or use the following services:

Translating and Interpreting Service

If you need an interpreter, contact the Translating and Interpreting Service (TIS) on 131 450 and tell them:

- the language you speak;

- the Council's name — Queensland Sentencing Advisory Council; and
- the Council's phone number — (07) 3738 9499.

TIS will arrange an interpreter so you can talk with us. This is a free service.

National Relay Service

The National Relay Service (NRS) is a free phone service for people who are deaf or have a hearing or speech impairment. If you need help contacting us, the NRS can assist. To contact the NRS you can:

- TTY/voice call — 133 677
- Speak and Listen — 1300 555 727
- SMS relay — 0423 677 767

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Chapter 1 Introduction

1.1 Background

On 17 May 2023, the former Attorney-General and Minister for Justice, the Honourable Shannon Fentiman MP, issued Terms of Reference to the Queensland Sentencing Advisory Council ('Council') asking us to review and report on two separate aspects of sentencing:

Part 1 sentencing practices for sexual assault and rape offences; and

Part 2 the operation of the aggravating factor in section 9(10A) of the *Penalties and Sentences Act 1992* (Qld) ('PSA') and the impact of increase in maximum penalties for contravention of a domestic violence order.

The Terms of Reference at **Appendix 3** set out in detail what we have been asked to do.

The referral of this review to the Council follows on from the work of the Women's Safety and Justice Taskforce ('WSJ Taskforce') in 2021.[1] The Taskforce, chaired by the former President of the Queensland Court of Appeal, the Honourable Margaret McMurdo AC, in its second report, *Hear Her Voice – Report Two,* made 188 recommendations intended to improve Queensland's criminal justice system for women and girls who are victim survivors of sexual violence or charged with or convicted of a criminal offence.[2] It reported on this aspect of its work in July 2022.

1.2 About this paper

This Consultation Paper is focused on Part 1 of the Terms of Reference on the sentencing of sexual assault and rape offences. We have been asked to consider whether current sentencing laws are appropriate and meeting their objectives or if any changes are needed.

In this paper, we present information about the sentencing of sexual assault and rape in Queensland and pose **25 questions** about the current approach to sentencing and potential areas for reform.

A general question is asked to ensure that we have identified all the issues that are important in responding to the Terms of Reference.

For each of the questions asked, we have set out some general considerations you might want to think about in responding, as well as legal and other considerations that raise more technical issues.

You can find information about how to make a submission at pages iii–iv.

1.3 Consultation Paper: Background

We have also prepared a *Consultation Paper: Background* which contains information about our approach to this review, data sources, the nature and context of sexual violence offending, the legal framework that guides sentencing in Queensland and other jurisdictions, relevant case law and how people who are convicted of sexual violence offences are managed in custody and in the community. Information contained in that paper is summarised throughout this paper.

The *Consultation Paper: Background* provides important contextual information to help inform the questions contained in this *Consultation Paper: Issues and Questions* paper. This includes the principles we have adopted to help guide this review.

We recommend that in responding to the questions in this paper, you refer to relevant content referenced in the Background paper.

1.4 Terminology

The Council acknowledges that the language we use when describing sexual offences and offending is important.

In this paper:

- **Sexual violence** is a broad term we use to mean any unwanted acts of a sexual nature perpetrated by one person against another person. The focus of our consultation paper is on two offences involving the use of sexual violence: rape and sexual assault.
- **Victim survivors and people who have experienced sexual violence** are used to mean those people who have had (or are alleged to have had) the act of sexual violence committed against them.[3] In the context of criminal proceedings, the term 'victim' refers to the person alleged by the prosecution to be a victim (often referred to as the 'complainant').[4] Many individuals who have experienced sexual violence prefer the term 'victim survivor' or 'survivor' rather than 'victim'[5] while some people do not identify with any of these terms. We also acknowledge that the experience of crime victimisation does not define who a person is.[6]
- **Sentenced people/people who have committed sexual violence** are used in place of 'offenders' or 'prisoners' unless these terms are used in legislation. This recognises that terms such as 'prisoner' and 'offender' can perpetuate stigma[7] and can perpetuate a false dichotomy between people who have been a victim of crime and those who commit crime. We sometimes also use 'perpetrator' or 'alleged perpetrator'.

Chapter 2 Current legal framework

2.1 About rape and sexual assault

2.1.1 Introduction

The Council has been asked to examine sentencing practices for two sexual offences: sexual assault and rape.

There are many different sexual violence offences that can be charged in addition to, or instead of, sexual assault and rape depending on the type of conduct and circumstances involved, including victim age.

In this section, we briefly discuss the legal definitions of these offences and the maximum penalties that apply.

Changes have been made to these two offences over time, including the type of conduct constituting these offences. See *Consultation Paper: Background* section 3.4 for more information.

2.1.2 Rape

Rape is defined in section 349 of the *Criminal Code* and involves a person penetrating another person without that person's consent. A person commits rape if, without consent:

- The person engages in penile intercourse with the other person;[1] or
- The person penetrates the vulva, vagina, or anus of another person with a thing or part of the body that is not a penis;[2] or
- The person penetrates the mouth of the other person with the person's penis.[3]

The maximum penalty for rape is **life imprisonment**.[4]

2.1.3 Sexual assault

The offence of sexual assault is established in section 352 of the *Criminal Code* (Qld). It involves different forms of unwanted sexual behaviour, done without the person's consent (agreement).[5]

One type of sexual assault involves a person unlawfully and indecently assaulting another person.[6] For conduct to be 'indecent' it must have a sexual connotation or motivation.[7] It can include unwanted kissing and inappropriate sexual touching.

Sexual assault can also include forcing another person to commit an act of gross indecency, or making a person see an act of gross indecency.[8] For example, if a person masturbates in front of another person.

There are 'circumstances of aggravation'[9] which are treated as being more serious forms of sexual assault and carry higher maximum penalties. In this paper we refer to offences with these circumstances of aggravation as 'aggravated sexual assault'.

The maximum penalty is:

Life imprisonment:

- if the person committing the offence is (or pretends to be) armed with a dangerous or offensive weapon, or is in company;[10]
- if the indecent assault involves the person who is assaulted penetrating the offender's vagina, vulva or anus to any extent with a thing or part of the person's body that is not a penis;[11]
- if an act of gross indecency is done by the person procured (recruited, enticed or forced) by the offender and includes the person who is procured penetrating the vagina, vulva or anus of the person who is procured or another person, with a thing or body part (other than a penis).[12]

14 years imprisonment:

- if the indecent assault or act or gross indecency includes bringing into contact any part of the genitalia or the anus of a person with any part of the mouth of a person.[13]

10 years imprisonment:

- If the sexual assault offence does not include any circumstances explained above ('circumstances of aggravation').

2.1.4 Consent

An important element of both sexual assault and rape is that the act was done by the defendant without the complainant's consent. Consent means to agree to the behaviour.

The age of consent in Queensland is 16 years.[14] This is inferred from many child sexual offences which apply where the child is under 16 years.[15] Only a person aged 16 year or over can provide effective, legal consent to a range of sexual acts that are prescribed by the offences in Chapter 32 of the *Criminal Code* (Qld).

Although a person is aged 16 years or older, there will be circumstances where they are not able to consent.

Children under 12 cannot consent

A child under the age of 12 cannot consent to any sexual act.[16] Where a complainant is aged 12 years or over but under 16 years, the prosecution must prove the act occurred without consent, otherwise an alternative charge could be considered which does not include consent as an element of the offence such as engaging in penile intercourse with a child under 16.[17]

'Freely and voluntarily given'

Currently, consent needs to be 'freely and voluntarily given' by a person 'with the cognitive capacity' to do so.[18] 'Cognitive capacity' means the person knows or understands what they are doing and are agreeing to it.[19]

There can be different ways that consent is not given, and a person can change their mind and withdraw consent.[20] For example, consent may not be given in circumstances where the complainant was asleep.[21]

Proposed amendments to consent

On 11 October 2023, the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 was introduced, following the recommendations of the Women's Safety and Justice Taskforce.[22] This Bill proposes to amend the definition of consent.[23]

The Bill was referred to the Legal Affairs and Safety Committee for detailed consideration. The Committee delivered its report on the Bill in January 2024, recommending that the Bill be passed.[24]

The excuse of mistake of fact

A person may be excused from criminal responsibility for the offence of sexual assault or rape if he or she can prove that they committed the offence under an honest and reasonable, but mistaken, belief that the complainant gave consent.[25] While principally a matter for trial, where a person is found to have an honest and mistaken belief that the complainant consented, but it is found not to be reasonable, this can be a matter taken into account at sentence.[26]

Proposed amendments to mistake of fact

The Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (discussed above) proposes to make changes to the excuse of mistake of fact,[27] including to provide that:

- A court must not have regard to the voluntary intoxication of a person when deciding if the person's belief that there was consent was honest and reasonably held;[28] and
- A person's belief that there was consent is not reasonable if the person did not say or do anything to ascertain if the other person consented, unless the accused person can show they have an impairment which substantially contributed to being unable to ascertain consent.[29]

This change was recommended by the Women's Safety and Justice Taskforce.[30]

Chapter 3 Sentencing purposes, principles and factors

3.1 Sentencing purposes

3.1.1 The current approach

Section 9(1) of the *Penalties and Sentences Act 1992* (Qld) ('PSA') (reproduced in **Appendix 5**) sets out the purposes of sentencing:

(a) to punish the offender to an extent or in a way that is just in all the circumstances; or

(b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or

(c) to deter the offender or other persons from committing the same or a similar offence; or

(d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or

(e) to protect the Queensland community from the offender; or

(f) a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e).

These assist the sentencing judge when determining the purpose of the sentence being imposed. The PSA does not suggest that one purpose should be more, or less, important than any other purpose; in practice, their relative weight must be assessed taking into account the individual circumstances involved.[1]

The PSA identifies particular purposes and factors of being of primary importance in sentencing a person convicted of sexual offences committed in relation to a child under 16 years, or involving the use of, or attempted use of violence or resulting in physical harm to another person, including of an adult victim. These are listed in **Appendix 5** and include:

- **community protection**;[2]
- **general deterrence;**[3] and
- **rehabilitation**.[4]

The purposes of sentencing help guide a court in determining the appropriate sentence in an individual case, including how a sentencing court considers other sentencing factors (discussed below), such as deciding what factors are relevant and, if so, how much weight they should be given.

3.1.2 How courts apply these purposes

Courts have found certain purposes are of particular importance when sentencing for rape and sexual assault.

In addition to **community protection**, **general deterrence** and **rehabilitation**,[5] courts place significant importance on the sentencing purpose of **denunciation**.[6] That is, to communicate through the imposition of the sentence, the community's strong disapproval of the person's conduct.

There is also a strong emphasis on the sentencing purpose of **personal deterrence** – that is, to deter that person from committing an offence of a similar nature again.

What purposes are most important helps to guide sentencing courts in determining the appropriate sentence in an individual case. This includes helping to guide how a sentencing court approaches the consideration of other sentencing factors (discussed in sections 3.2 and 3.3), including in deciding what factors are relevant and, if so, how much weight they should be given.

Sentencing purposes: Sentencing remarks preliminary findings

Preliminary findings from the Council's sentencing remarks analysis found magistrates and judges often refer to some or all of the sentencing purposes set out in s 9(1) of the PSA. While it was not uncommon to see a magistrate or judge mention all 5 purposes, it was more common to see 1 to 3 purposes mentioned. For example, in a sexual assault case, the magistrate stated:

> In sentencing you today, I take into account … that sentences must be imposed to deter you from committing the same or a similar offence. And to make it clear, the community acting through this court denounces this sort of conduct you're involved in. (LCMC_SA3)

In a rape case, the judge stated:

> General and personal deterrence are important considerations in the exercise of my discretion. The sentence I impose must deter others who consider sexually abusing children. It must deter you from doing so again, and it must denounce your conduct on behalf of the community.
>
> Our community finds it abhorrent that men like you, with no previous criminal convictions take the decision to sexually abuse a child. And the sentence I impose must condemn your conduct on behalf of the community, and it must punish you. It must also, of course, balance those features against your prospects of rehabilitation…(MCM5_R5)

There were some instances where no specific purpose for the sentence was stated, it was simply said: 'In sentencing you I have regard to the principles of sentencing mentioned in section 9 subsection (1) of the Penalties and Sentences Act…' (RL5_R1).

* These results should be interpreted with caution. The findings presented are from the partial coding of sentencing remarks that was completed at the time of the writing. They may be subject to change on completion of the coding and analysis of the full study sample: see section *Consultation Paper: Background*, Chapter 1.

See *Consultation Paper: Background*, section 7.2 for more information about how courts approach these purposes.

3.1.3 Why sentencing purposes are important

Understanding what sentencing purposes are most important can not only help guide courts in sentencing, but can also be a central consideration in deciding if any legislative reforms are needed. For example, during its most recent review of the serious violent offences scheme, the Council determined there are categories of offences which cause serious harm to individuals and the wider community and therefore require the courts to place greater weight on the principles of punishment, denunciation and community protection to ensure a just sentence.[7] The offences of aggravated sexual assault and rape were regarded by the Council as being among such offences. This finding was an important factor in the Council deciding to recommend changes to the serious violent offences scheme. See further 10.2.

3.1.4 What happens in other jurisdictions?

Most jurisdictions reviewed in Australia and internationally apply the general purposes of sentencing to their equivalent offences of rape and sexual assault. However, some jurisdictions direct the court to pay specific attention to some sentencing purposes when sentencing for specific types of offences.

For example, in Canada, courts are required to give primary consideration to the purposes of denunciation and deterrence in sentencing a person for an offence that involved the abuse of a person under 18 years.[8] The same requirement applies for an offence that involved the abuse of a person who is vulnerable because of their personal circumstances (including because the person is Aboriginal and female).[9]

In Australia, the Commonwealth Government has introduced a direction to courts when sentencing a person for a Commonwealth child sex offence, to have regard to the objective of rehabilitating the person,[10] which includes consideration of 'sufficient time for the person to undertake a rehabilitation program' when determining the sentence length.[11] In Victoria, a 'court must treat the protection of the community as the principal sentencing purpose' where imprisonment is justified for certain offences (including a 'serious sexual offender').[12]

There also are some differences between jurisdictions as to how the general purposes of sentencing are expressed. For example, in the Australian Capital Territory, New South Wales and South Australia, recognition of the harm done to any victim and to the community is listed as a separate purpose of sentencing distinct from the sentencing purposes of just punishment and denunciation,[13] and the requirement to take victim harm into account.[14]

See *Consultation Paper: Background*, section 10.3 for more information.

3.1.5 Stakeholder views

In its preliminary submission, the North Queensland Women's Legal Service ('NQWLS') told us that considering the purposes of sentencing was important 'given they exclude a purpose that specifically recognises the unique experiences of victim-survivors of sexual assault and rape offences.'[15] The NQWLS also noted that 'the concept of a sentence that is "just" in all the circumstances must clearly be shown to be "just" to the victim-survivor, not only the defendant.'[16]

The Women's Legal Service Queensland recognised that sentencing purposes (and factors) may have broader impacts on other stages of the criminal justice process and how sexual offences are responded to.[17]

Other legal stakeholders who participated in subject matter expert interviews told us that they thought the sentencing purposes in Queensland were adequate and provide a broad basis for sentencing.[18]

When sentencing sexual violence offences, interviewed participants acknowledged the importance of the principles of community protection and denunciation in particular, along with punishment.[19] There was also support for the sentencing purpose of deterrence for sexual offending[20] — but some participants considered that while sentencing responses may provide punishment and individual deterrence, they might be unlikely to be effective in achieving general deterrence.[21]

Rehabilitation in some cases was also viewed as an important sentencing consideration.[22] However some participants were cautious about the ability to accurately assess a person's risk of reoffending[23] and suggested that providing the court with specific evidence of rehabilitation could be helpful to a judge when sentencing.[24]

Some participants supported a strong emphasis 'not just the appropriate punishment for the crime to fit the crime, but the needs of … and the impact on victims', [25] including protecting victims from further harm.[26]

3.1.6 Questions

Understanding what purposes are considered to be most important in sentencing offences of rape and sexual assault will help inform the Council's assessment of the adequacy and appropriateness of the current approach to sentencing for these offences, as well as if any changes are needed.

We are also interested in views about whether any important purposes are missing or should be emphasised more strongly in legislation or otherwise as primary sentencing considerations.

The Council invites feedback on these issues.

Question: Sentencing purpose

1. **What are the most important purposes in sentencing a person for sexual assault and rape, and why?**
2. **Should any changes be made to the general or specific purposes a court must consider when sentencing a person for rape or sexual assault?**

General considerations

You might think about:

- the existing purposes of sentencing:
  - punishment;
  - denunciation;
  - community protection;
  - deterrence; and
  - rehabilitation.
- which of these purposes, or combination of purposes, are most important;
- if different purposes apply in different situations (e.g., based on the type of conduct involved and its circumstances, whether the person has committed this type of offence before and their assessed level of risk of reoffending, the personal circumstances of the victim survivor and the harm caused etc);
- additional sentencing purposes recognised in other jurisdictions.

Legal and other considerations

You might think about:

- current case law and whether the purposes under s 9(1) of the PSA are applied consistently and appropriately in the individual circumstances of the case;
- if the emphasis in ss 9(3) and (6) of the PSA on community protection and the protection of children, deterrence and rehabilitation is appropriate;
- evidence about how effective sentencing is in meeting the purposes of sentencing and if any are not useful or relevant when sentencing for sexual violence offences.

3.2 General sentencing guidance

3.2.1 The current approach

General and specific sentencing factors to which a court must have regard in sentencing) are set out in sections 9(2)–9(11) of the PSA (reproduced in **Appendix 5**). Section 9 applies to any sentence for potentially any offence committed by an adult.

Table 1 sets out the factors in section 9 that must be applied when sentencing offences generally. Table 2 sets out factors which a court must have primary regard to when sentencing a person for offences involving violence or that resulted in physical harm to another person, and Table 3 includes relevant factors when sentencing people for offences of a sexual nature committed against children under 16.

Table 1: General sentencing principles and factors, PSA section 9

Section	General factors applying to all offences
9(2)	In sentencing an offender, a court must have regard to:
(a)	Principles that a sentence of imprisonment should only be imposed as a last resort and a sentence that allows the person to stay in the community is preferable
(c)	The nature of the offence and how serious the offence was, including: any physical, mental or emotional harm done to a victim, including harm mentioned in a victim impact statement; and the effect of the offence on any child under 16 years who may have been directly exposed to, or a witness to the offence
(d)	The extent to which the offender is to blame for the offence (culpability)
(e)	Any damage, injury or loss caused by the offender
(f)	The offender's character, age and intellectual capacity
(g)	The presence of any aggravating or mitigating factor concerning the offender
(gb)	Whether the offender was a victim of domestic violence and the offence can be partly or wholly attributed to this
(h)	The prevalence of the offence
(i)	How much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences
(j)	Time spent in custody by the offender for the offence before being sentenced
(k)–(m)	Other sentences imposed on the offender or that the offender is liable to serve
(p)	Submissions made by a representative of the community justice group in the offender's community, if the offender is an Aboriginal or Torres Strait Islander person
(r)	Any other relevant circumstance
9(9)(b)	The court must not have regard to whether or not the person may become, or is, subject to an application or an order of the dangerous prisoners scheme
9(9A)	Voluntary intoxication of the offender by alcohol or drugs is not a mitigating factor
9(10)	The court must treat the offender having 1 or more previous convictions as aggravating. The court must consider the nature and relevance of the criminal history and the time since the conviction
9(10A)	Domestic violence is an aggravating factor unless it is not reasonable because of exceptional circumstances[27]
9(10B)	If the person sentenced is a victim of domestic violence, court must treat as mitigating: (a) the effect of the domestic violence on the offender, unless it is not reasonable due to exceptional circumstances; and (b) if the commission of the offence is wholly or partly attributable to the effect of the domestic violence on the offender—the extent to which this is the case.
9(11)	Despite the offender's criminal history, the sentence must not be disproportionate to the gravity of the offence
	Proposed additional factors:[28] *The hardship that any sentence imposed would have on the offender and the probable effect on a person for whom the offender is primary caregiver, caring for in an informal care relationship or is the person's unborn child (if the person is pregnant)* *The offender's history of being abused or victimised* *If the offender is an Aboriginal or Torres Strait Islander person—any cultural considerations, including the effect of systemic disadvantage and intergenerational trauma on the offender.*

Table 2: Sentencing factors for offences of violence/resulting in physical harm, PSA section 9

Section		Principles and factors
9(2A)		The principles that imprisonment should only be imposed as a last resort and allowing the person to stay in the community is preferable do not apply
9(3)		The court must have regard primarily to:
	(a)	the risk of physical harm to any members of the community if a custodial sentence were not imposed
	(b)	the need to protect any members of the community from that risk
	(c)	the personal circumstances of any victim of the offence
	(d)	the circumstances of the offence, including the death of or any injury to a member of the public or any loss or damage resulting from the offence
	(e)	the nature or extent of the violence used, or intended to be used, in the commission of the offence
	(f)	any disregard by the offender for the interests of public safety
	(g)	the past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed
	(h)	the antecedents, age and character of the offender
	(i)	any remorse or lack of remorse of the offender
	(j)	any medical, psychiatric, prison or other relevant report in relation to the offender
	(k)	anything else about the safety of members of the community that the sentencing court considers relevant

Table 3: Sentencing factors for sexual offences committed in relation to a child under 16 years, PSA section 9

Section		Principles and factors
9(4)(b)		The principles that imprisonment should only be imposed as a last resort and allowing the person to stay in the community is preferable do not apply
9(4)(c) & 9(5)		The offender must serve an actual term of imprisonment, unless there are exceptional circumstances (and in doing so, may have regard to the closeness in age between the offender and child)
9(6)		The court must have regard primarily 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 reoffending
	(e)	any relationship between the offender and the child
	(f)	the need to deter similar behaviour by other offenders to protect children
	(g)	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
	(h)	the offender's antecedents, age and character
	(i)	any remorse or lack of remorse of the offender
	(j)	any medical, psychiatric, prison or other relevant report relating to the offender
	(k)	anything else about the safety of children under 16 the sentencing court considers relevant
9(7AA)		The court must not have regard to the offender's good character if it assisted the offender in committing the offence

Aggravating and mitigating factors

Under section 9(2)(g) of the PSA, a sentencing judge is required to take any aggravating or mitigating factors into account when determining a sentence.

Aggravating factors include details about the offence, the victim, and/or the offender that tend to increase the person's culpability and the sentence received. Comparatively, mitigating factors include details about the offender and the offence that tend to reduce the severity of the sentence.

Both aggravating and mitigating factors can impact the sentence imposed, depending on their relevance and the weight placed on them by the court. At times 'many of these factors conflict with each other'.[29]

Circumstances of aggravation (also called 'aggravating circumstances') operate differently to aggravating factors. Circumstances of aggravation are any circumstances by reason of which the person who has been convicted of an offence is subject to a greater punishment than that to which they would be subject if the offence were committed without the existence of this.[30] For example, there are 2 specific subsections of section 352 of the *Criminal Code* which establishes the offence of sexual assault that define circumstances of aggravation for the purposes of this offence and provide for higher maximum penalties to apply where those aggravating circumstances are established.

The following factors are regarded in statute and case law as important aggravating considerations in sexual offence sentencing:

- victim particularly vulnerable due to age and/or disability;[31]
- offender's relevant criminal history;[32]
- offence involved use of a weapon;[33]
- offence involved additional use of violence;[34]

- abuse of position of trust;[35]
- offender's knowledge of harm caused because of their profession;[36]
- domestic violence offence;[37]
- victim became pregnant to, and/or had a baby fathered by the offender;[38] and
- risk of and actual transmission of disease.[39]

The following factors are regarded in statute and case law as important mitigating considerations in sentencing for sexual offences:

- guilty plea;[40]
- lack of criminal history or no relevant/recent convictions;[41]
- good character;[42]
- age of offender such as young or elderly;[43]
- assistance to law enforcement, such as full admissions;[44]
- offender is a victim of domestic violence;[45]
- offender is a victim of child sexual abuse;[46]
- remorse;[47]
- rehabilitation efforts after offence or willingness to engage in rehabilitation;[48]
- impact of childhood trauma and disadvantage;[49]
- if a person's time in prison will be more onerous;[50]
- cognitive impairment and/or mental illness;[51] and
- significant health conditions.[52]

More information about relevant factors, including aggravating and mitigating factors can be found in Chapter 6 of the *Consultation Paper: Background*.

An analysis of case law considering the relevance of specific sentencing factors and the approach to taken by courts in assessing offence seriousness and determining sentence is presented in Chapter 7 of the *Consultation Paper: Background*.

Mandatory and presumptive sentencing provisions in Queensland that also guide sentencing are discussed in section 5.2.3.

3.2.2 The Council's approach

In considering whether current sentencing guidance is adequate, the Council will consider:

- whether the factors agreed by stakeholders and community members to be important in sentencing these offences are being taken into account by the courts (and conversely, whether any factors viewed as being unimportant or irrelevant are not being considered or given any weight in determining the sentence to be imposed);
- if it appears that important purposes, principles and factors are not being appropriately recognised by courts in sentencing, or there are problems identified with courts' treatment of specific factors at sentence, what the reasons are for this. Reasons might include, for example, because:
  - the type of guidance provided by legislation, case law or otherwise is inadequate;
  - legal practitioners and/or sentencing courts are interpreting these factors in a way that was not intended by Parliament;
  - sentencing courts are treating factors in an appropriate way and giving relevant factors appropriate weight, but are not making their reasoning clear and accessible; and/or
  - the prosecution or defence are encouraging certain sentencing practices through the submissions made.

3.2.3 Why sentencing guidance is important

Several arguments have been put forward for comprehensive guidance regarding sentencing factors. They include that:

- aggravating and mitigating factors 'can exert a powerful influence over sentence outcomes';
- research suggests there is considerable variation in judicial assessments as to the weight and significance of particular sentencing factors, suggesting some factors may be being interpreted differently;

- sentencing guidance promotes a consistent approach to sentencing and public confidence.[53]

Guidelines are also a more direct way of influencing sentencing practices rather than relying on appellate court guidance.

The High Court has said that the criminal justice system should strive for consistency,[54] however, 'the consistency that is sought is consistency *in the application of relevant principles*' rather than 'numerical equivalence'.[55] The guidance provided to sentencing courts in legislation and case law supports this objective. The current approach can make it difficult to determine how effectively the desired consistency has been achieved.

An alternative approach is that which exists in England and Wales, and more recently introduced in Scotland (also recommended for introduction in Victoria) in establishing a role for sentencing councils or commissions when setting sentencing guidelines. The benefits of this form of guidance have been argued to include that:

- sentencing councils or commissions can help detect sentencing disparities, and modify sentencing guidelines to correct for excessive variability in punishment;
- by consulting with a broad range of stakeholders, sentencing councils or commissions can 'better incorporate the community's views within penal policy'; and
- sentencing councils or commissions can 'improve transparency and expand the public's knowledge about sentencing and increase their confidence in it'.[56]

The Council has been established to deliver similar benefits. For example, our functions include to provide the community with information to enhance its knowledge and understanding of matters relating to sentencing.[57] The Council consults widely in providing its advice to the Attorney-General on issues of sentencing policy, thereby meeting the objective of incorporating the community's views within penalty policy (assuming the community views gathered and the Council's advice leads to policy changes).[58] However, these functions do not extend to an ability to modify existing guidelines directly. Instead, this is achieved by recommendations made to the Attorney-General for law reform.

3.2.4 What happens in other jurisdictions?

The sentencing legislation in other states and territories and international jurisdictions also sets out general purposes, principles and factors courts must consider when imposing sentence. For example:

- In **New South Wales**, the *Crimes (Sentencing Procedure) Act 1999* sets out the purposes of sentencing, aggravating, mitigating and other sentencing factors and the types of sentencing orders a court can make. This Act also establishes a standard non-parole period scheme;
- In **Victoria**, the *Sentencing Act 1991* sets out a list of similar purposes and factors to Queensland and New South Wales, but also establishes several sentencing schemes that must be applied when sentencing for serious offences (including standard sentences, category 1 and 2 offences, minimum terms of imprisonment and non-parole periods, and a serious offenders scheme);
- **New Zealand's** *Sentencing Act 2002* includes a list of purposes and principles of sentencing, as well as a non-exhaustive list of aggravating and mitigating factors which apply generally to courts in sentencing;[59]
- **England and Wales'** *Sentencing Code*[60] identifies statutory sentencing purposes and matters relevant to sentence, including aggravating and mitigating factors, and also provides that every court, in sentencing an offender, must follow any guidelines (developed by the Sentencing Council for England and Wales), unless satisfied that it would be contrary to the interests of justice.[61] The function and operation of sentencing guidelines are discussed in Chapter 10 of the *Consultation Paper: Background*.

The level of discretion (choice) a court may exercise in an individual case generally varies depending on the type of offence committed and any special or additional requirements or principles that must or may be applied under statute or by operation of the common law (case law).

Examples of forms of special guidance are discussed in our *Consultation Paper: Background*, section 10.4.

3.2.5 Stakeholder views

Legal Aid Queensland referred to the 'significant number of amendments' the PSA has been subject to over the last 10 years and that it 'contains a comprehensive and significant number of factors which a court must consider'.[62]

This view was shared by legal stakeholders who participated in subject matter expert interviews who generally reinforced the importance of maintaining the courts' discretion in sentencing, given that ever case is different and that it is not possible to anticipate all of the relevant considerations in a given case.[63] There was a general view that the current level of guidance is adequate and that additional factors not be prescribed.[64] Several interview participants commented on the complexity of section 9 and that it was already very extensive.[65] These stakeholders

told us that the more factors that are listed, then the more complicated the legislation becomes and the more difficult it is to apply.[66]

One legal practitioner commented that section 9(2) can be very useful for self-represented people, as a Magistrate can step them through it and ask them to 'make any comment on [their] age and character and [their] history'.[67] It is useful to ensure people being sentenced are prompted 'to say what they ought to focus on'.[68]

There was some support for the provisions in section 9(6) – which apply to the sentencing of sexual offences against children under 16 – applying to all sexual offences and all victims.[69] It was seen to be 'an inherent unfairness'[70] that those principles could not be applied to a sexual offence against an adult victim.

To supplement current forms of guidance, one stakeholder referred to the usefulness of sentencing schedules, such as those prepared by the DPP, listing comparable cases, which they suggested could be made more widely available, and the Queensland Sentencing Information Services, noting recent changes had been made to this service that have affected its functionality.[71]

In relation to judicial discretion and guidance in the form of mandatory sentencing schemes, stakeholders expressed mixed views about their appropriateness for sexual assault and rape offences. Fighters Against Child Abuse Australia ('FACAA') recommended 'mandatory minimum sentences for penetrative rapes of 10 years for first offences and up to 14 years for aggravating circumstances such as the victim being under the age of 12'.[72] FACAA acknowledged this was extremely punitive but thought it reflected the 'traumatic effects of rape' which last a lifetime, and that it would 'act as a serious deterrent'.[73]

Sisters Inside was among those who opposed the use of mandatory sentencing of any kind, advocating for judicial discretion to 'account for nuance, complexity and circumstance' in each case. Sisters Inside also noted that evidence does not show that mandatory penalties 'deter interpersonal violence' and instead are a 'blunt tool that causes more harm'.[74]

3.2.6 Questions

The Council invites views about whether the current general factors listed in section 9 of the PSA, in particular, provide an appropriate framework for courts in sentencing for these offences and if the current form of guidance could be improved or enhanced in any way.

Feedback is also invited about whether the existing forms of guidance (such as in legislation and case law) are adequate, or if there are any problems or limitations.

Questions: General sentencing principles and factors and forms of sentencing guidance

3. How well does section 9 of the *Penalties and Sentences Act 1992* (Qld) capture the principles and factors that are important in sentencing for sexual assault and/or rape offences? Can this section be improved in any way? [See Appendix 5 for relevant factors listed in s 9]

4. Are current forms of sentencing guidance adequate to guide sentencing for rape and sexual assault? Are there any problems or limitations?

General considerations

You might think about:

- current guidance in legislation;
- existing case law guidance in Queensland (as discussed in the *Consultation Paper: Background*);
- the benefits of courts having a broad discretion (choice) to consider the circumstances of the offence, including any harm caused to the victim and any factors personal to the individual being sentenced; and
- the types of legislative guidance that exist in other jurisdictions.

Legal and other considerations

You might think about:

- if section 9 is too complex and if so, how it could be simplified as it applies to sexual offences;
- any issues that arise in practice in applying section 9 when sentencing for rape and sexual assault;
- if factors listed in section 9(6) should extend to victims of any age;
- if 'involved the use... of personal violence' in s 9(2A)(a) of the PSA should be clarified to recognise both rape and acts of sexual assault 'involve violence' even if there is no additional physical violence involved;
- whether courts are taking a consistent approach in determining what is an appropriate or adequate sentence in sentencing for sexual assault and rape and the role of sentencing submissions in informing this;
- the forms of guidance adopted in other jurisdictions (e.g., standard sentences, sentencing guidelines, sentencing manuals/bench books etc).

3.3 Special sentencing guidance

3.3.1 Introduction

There are also specific forms of sentencing guidance that apply when sentencing people for the offences of sexual assault and rape. In this section we discuss:

- the relevance of victim age and vulnerability;
- factors relevant to the person being sentenced (good character, systemic background and disadvantage, history of victimisation and exceptional circumstances); and
- the principles and guidelines that apply to historical sexual offences.

This section does not consider the sentencing guidance which came into operation in May 2016 that requires a court in sentencing a person for a domestic violence offence (including for rape and sexual assault committed in a domestic violence context) to treat that fact as aggravating unless the court considers it is not reasonable due to exceptional circumstances.[75] That section will form the focus of the next part of our review.[76] For more information, please visit our website.

3.3.2 Relevance of victim age and vulnerability

The current position

The circumstances of the victim survivor are very important in determining the seriousness of any offence. The Court of Appeal has recognised that sexual violence offending against vulnerable victim survivors is particularly serious. A victim survivor may be vulnerable for a range of reasons, including due to their age, personal circumstances and/or the situation they are in during the course of the offending.[77]

The Queensland Parliament has enacted sentencing factors so sexual violence against children is considered as 'equating in seriousness to offences of violence'.[78] Legislative reforms demonstrate the intention of the Queensland Parliament to ensure that sexual violence against children is 'regarded with greater seriousness than previously'.[79] The Council's analysis of sentencing outcomes for rape over a 12-month period (2022–23) found that the same type of conduct (penile rape or digital/object rape) when committed against children attracted, on average, longer custodial sentences than where the victim of the offence was an adult. These differences were found to be statistically significant. This preliminary analysis also suggests that courts are treating offences against children as being more serious in line with relevant legislative reforms.

While the Court of Appeal has acknowledged the vulnerability of victims,[80] there is no express legislative provision in Queensland that directs that a court must take into account a victim's vulnerabilities as aggravating, unless the victim is a child.[81]

Stakeholder views

Some preliminary submissions from sexual violence support and advocacy services expressed a view that sentences for child sexual offences are too low.[82] Various submissions commented on the particular impacts of sexual offences on children, including the Queensland Family & Child Commission, who told us that: '[e]xperiencing violence can have a wide range of detrimental impacts on children's development, mental and physical health and general wellbeing'.[83] These significant and traumatic impacts are discussed further in our *Consultation Paper: Background*, section 4.4.3.

Several legal stakeholders who participated in subject matter expert interviews identified the vulnerability of the victim as a key consideration when assessing the seriousness of the offence, noting that:

- Vulnerability can be due to the victim survivor being intoxicated, sleeping or unconscious.[84]
- Child victims were generally viewed as a different category due to their higher level of vulnerability.[85]
- Victims who had an intellectual and/or physical impairment are also recognised as vulnerable.[86]
- Where the perpetrator has power over the victim survivor this will be aggravating, such as 'a teacher to a student or an employer to an employee'.[87]

Some participants told us the issue of victim vulnerability was complex and needs to be assessed taking into account the individual circumstances involved and the context.[88] The introduction of evidence of other behaviours exhibited by the offender may assist with exploring the issue of victim vulnerability, but presents difficulties, as this may be too prejudicial to the offender and may be objected to by defence. [89]

What happens in other jurisdictions?

In Chapter 10 of the *Consultation Paper: Background*, Table 26 provides examples of special purposes, principles, and factors in sentencing sexual offences in select jurisdictions. The table shows in some jurisdictions a victim's age or other vulnerability is an express statutory aggravating factor:

- **Tasmania:** aggravating factors for sexual offences include if the victim was a person with a disability, under care, supervision or authority, the victim was under 13 (or 18 years if the person is in a position of authority);[90]
- **New Zealand:** if an offence of violence against child under 14, the 'defencelessness of the victim' is listed as an aggravating factor.[91] For any offence, it is an aggravating factor that the victim was vulnerable because of their age, or any factor known to the sentenced person.[92]
- **Canada:** if the offence involved the abuse of an intimate partner, the court must consider the increased vulnerability of female victims, particularly if the person is an Aboriginal female victim.[93] For any offence, it is an aggravating factor if the person abused their intimate partner or member of their family or was in a position of trust, and if the abused person was 18 years, and/or when 'the offence had a significant impact on the victim, considering their age and other personal circumstances'.[94]

Question

The Council's analysis of Court of Appeal decisions identified victim age and vulnerability as a key consideration taken into account at sentence and impacting the courts' assessment of an offence's seriousness.

Sentencing courts' consideration of these factors is supported by the general requirement under sections 9(2)(c)-(d) of the PSA to consider:

- the nature of the offence and how serious it was, including any harm done to a victim and the effect of the offence on any child under 16 years who may have been directly exposed to the offence; and
- the extent to which the person is to blame for the offence.

In the case of sexual offences committed against children under 16, section 9(6) of the PSA reinforces and strengthens this focus by directing courts to have primary regard to factors, including the effect of the offence on the child and their age when sentencing a person for a sexual offence. Section 9(3) – which applies to offences involving violence or resulting in physical harm – also recognises the personal circumstances of any victim of the offence as a primary sentencing consideration.

Considered together, these provisions enable the courts to find an offence to be more serious by reason of the victim's vulnerability — both because the harm to the victim might be greater and the person's culpability higher in targeting a victim who the person knew to be vulnerable.

As discussed above, some jurisdictions have introduced additional aggravating factors that refer to victim vulnerability in a more explicit way (e.g., New Zealand), or identify specific factors relevant to this assessment (e.g. in Canada, the increased vulnerability of women who are victims of an offence committed by an intimate partner, with particular attention given to the circumstances of Aboriginal female victims).

Question: Relevance of victim vulnerability	
5.	**Is the current approach to sentencing for sexual assault and rape offences committed against children under 16 years appropriate? What about for other people who are vulnerable for other reasons (e.g., due to advanced age, disability, cultural background)? Should any changes be made?**

General considerations

You might think about:

- how important victim vulnerability is when deciding how serious an offence of rape or sexual assault is;
- the current approach of listing certain factors in legislation as being of most importance when a court is sentencing a person for a sexual offence committed in relation to a child under 16 years (including the victim's age) and in sentencing an offences involving violence or resulting in physical harm;
- the ability of courts to take other factors that may make a person more vulnerable into account without these factors being separately listed in legislation.

Legal and other considerations

You might think about:

- if the case law guidance for sentencing courts in the treatment of victim vulnerability is appropriate and consistently applied;
- if there is any benefit in the PSA more clearly identifying victim vulnerability as a relevant sentencing factor (noting the significant number of factors already listed in section 9 of the PSA);
- the existing requirement if the victim is a child under 12, and the offence involved the use or attempted use of violence, for a court to treat this factor as aggravating in deciding whether to declare a person convicted of a serious violence offence (see PSA s 161B(5));
- if victim vulnerability were separately identified as an aggravating factor, how it might interact with s 9(10A) of the PSA (which requires courts to treat the fact an offence is a domestic violence offence as aggravating) and with other provisions within s 9.

3.3.3 Good character

The current position

In Queensland, a court is required to consider the character of the person being sentenced.[95] This evidence is usually provided by way of reference letters from someone who can speak to the character of the person being sentenced. When considering a person's character, a court may take into account any previous convictions (and their nature), any contributions to the community, any history of domestic violence and any other relevant matter.[96] The relevance of having no previous convictions is assessed as part of 'character' but receives special treatment and will usually attract a more lenient sentence.[97] However, when sentencing a person for a sexual offence against a child under 16 years a court '*must not* have regard to the offender's good character if it assisted in committing the offence'.[98]

Whether a person is of 'otherwise good character' will vary according to the person and the High Court has acknowledged 'it is impossible to state a universal rule.'[99] The criminal law has tended to treat people in a one-dimensional way and with a single label as having either 'good' or 'bad' character.[100]

The Queensland *Director of Public Prosecution's Guidelines* states that a prosecutor has a 'duty to do all that can reasonably be done to ensure that the court acts only on truthful information.'[101] On receipt of a reference letter, the prosecutor can make enquires with the writer of the letter to ensure the truthfulness of its contents, including whether they are aware of the offences the person being sentenced for and if they are content with their letter being provided to the sentencing judge for consideration in light of those offences. The Guidelines also recognise that the victim survivor often has a good knowledge of the offender and encourages prosecutors to ask victim survivors to be present during the sentence.[102] They should also 'be told that, if when present in court, there is anything said by the defence which they know to be false, they should immediately inform the prosecutor so that, where appropriate, the defence assertions can be challenged.'[103] If it is determined after the sentence that the offender has made false assertions during the sentence – such as regarding their health, employment status or prior trauma – the sentence may be reopened to correct a substantial error of fact pursuant to section 188 of the PSA.

In 2020, the PSA was amended[104] in response to a recommendation made by the Royal Commission into Institutional Responses to Child Sexual Abuse which recommended 'good character be excluded as a mitigating factor in sentencing for child sexual abuse'.[105] The Queensland provision goes further than the Royal Commission's recommendation by providing that good character cannot be taken into account *at all* if it assisted the person.

Prior to the amendment being passed, in submissions to the Legal Affairs and Community Safety Committee on the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019, Bravehearts and knowmore supported the amendment.[106] However, knowmore was concerned that the word 'assisted' would result

in a narrow application.[107] The Queensland Law Society submitted that the amendment could undermine the sentencing principle of rehabilitation and undermine judicial discretion.[108] The Committee recommended the Bill be passed without amendment.

See *Consultation Paper: Background*, section 7.3.4 for more information.

Stakeholder views

Several victim survivor support and advocacy stakeholders were concerned about character references being allowed in sentencing for sexual offences, particularly when the victim was a child. They also referred to interstate examples of old references being provided to the court without the author's knowledge.

Fighters Against Child Abuse Australia ('FACAA') was concerned that 'a favourable character reference [could] change the outcome of a conviction' stating that 'rapists are not people of good character'.[109] It called for these types of references to be 'abolished for rape cases (especially child rape cases)', [110] suggesting that treating people who have committed such serious offences as being 'of good character' is 'a literal contradiction of terms' and should not be permitted.[111]

Full Stop Australia ('FSA') told the Council that many victim survivors report that it can be 'incredibly painful and retraumatising to hear reviews of their offender's "good character" during sentencing'.[112] It referred to two recent rape cases in the ACT and Victoria where the offenders had received community-based sentences and good character had been an important mitigating factor.[113]

FSA suggested 'limiting, or altogether precluding the use of character references in sentencing for sexual offences would give survivors more faith that the justice system recognises the harm caused by sexual violence'.[114]

The Queensland Sexual Assault Network ('QSAN') also commented on the use of character references and that they may reinforce 'attitudes about who perpetuates sexual violence and is particularly concerning as many sexual violence offenders engage in deliberate grooming and coercive control tactics… to discredit victim survivors'.[115]

Legal stakeholders who participated in subject matter expert interviews were concerned that to remove the lack of prior criminal history as 'a mitigating factor would be unfair'.[116]

Participants told the Council that where the issue of 'good character' was raised in the case of an adult victim based on no previous history, the sentencing court did not place much weight on this as people convicted of sex offences often do not have previous convictions.[117] However, participants noted a lack of previous convictions is a relevant consideration as compared to someone who might have a prior history of similar offending.[118] An absence of prior convictions might suggest the person has good prospects of rehabilitation,[119] although this will depend on the individual circumstances of the case.[120] With respect to offences against adults, it was noted that courts already treat an abuse of a position of trust as an aggravating factor.[121]

Where there is a character reference, the view of several participants was that this would depend on who had provided the reference, with less weight placed on references from friends and family members.[122] A reference stating the offending was 'out of character' or that the person is remorseful is of limited value to the court.[123] There was a view that 'character references can't offer any support to [the sentenced] person unless [they] own up to their character and identity'[124] and weight will not be given to a reference if it is not apparent the author was aware of the charges.[125] One participant considered a character reference should be evidence of 'how they've conducted themselves' and 'about rehabilitative steps and expressions of remorse, which is different from [suggesting] "He is a good guy"'.[126]

If a reference as to the person's 'good character' was provided in circumstances where the PSA provided the person's good character cannot be taken into account, it was noted that these references might still be considered as to any other information that might be relevant referred to.[127]

Some interviewees considered that issues that have arisen in other jurisdictions are not as relevant in Queensland due to the different approach to sentencing. In Queensland, this would generally be managed by way of a submission by the defence and the prosecution would either accept this or say that they do not accept the plea on this basis.[128]

What happens in other jurisdictions?

In all Australian jurisdictions 'character' is a relevant matter that may be taken into account when sentencing any offence.[129] Most Australian jurisdictions have statutory limitations when sentencing for child sexual offences on reliance on good character where this assisted in the commission of the offence.[130] In Western Australia, case law provides for the diminished relevance of good character for sexual offending against children.[131]

In our *Consultation Paper: Background* we discuss two cases in Victoria and New South Wales about the operation of the equivalent sections to Queensland and the evidence required to establish the person's good character where it assisted them in committing the offence.

For Commonwealth offences, if a person's 'standing in the community' aided the commission of the offence, this is an aggravating factor.[132]

In New Zealand, courts are required to take into account evidence of a person's previous good character as a mitigating factor,[133] although the New Zealand Court of Appeal has said a person may be disqualified from 'any credit for previous good character' where sexual offending occurs over an extended period of time, if there are other uncharged offences,[134] or if the offender has admitted to lying and falsely discrediting victims during the trial.[135]

Current reviews and/or petitions to change the treatment of good character in sentencing for sexual offences

The community led campaign, *Your Reference Ain't Relevant*, is calling for the abolition of character references for people convicted of child sexual abuse.[136] Founders and sexual abuse survivors, Harrison James and Jarad Grice, argue 'by definition of the crime, child sexual abusers do not have good characters'.[137] In its ePeititon to the New South Wales Parliament, the campaign requested section 21A(5A) be amended to remove the words, 'if the court is satisfied that the factor was of assistance to the offender in the commission of the offence'.[138]

In July 2023, the New South Wales Attorney-General, Michael Daley, asked the Department of Communities and Justice ('DCJ') to review section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the use of evidence of good character in child sexual offence matters. This review is currently underway.[139]

The campaign has expanded to the Australian Capital Territory, calling for the prohibition on using good character references to be expanded to all perpetrators of child sexual offences not only those who used their professional role to target children.[140]

The Australian Capital Territory Attorney-General, Shane Rattenbury, has said the issue is being examined by the Justice and Community Safety Directorate.

There has been a similar community-led call for good character reform in Tasmania.[141]

Question

The Council acknowledges the concerns and issues raised in preliminary consultation by several victim survivor support and advocacy stakeholders about the treatment of 'good character' evidence – in particular, the use of personal character references being allowed in sentencing for sexual offences, particularly when the victim was a child. The Council notes this issue may impact victim survivor satisfaction and how the community views the adequacy and appropriateness of sentencing practices for rape and sexual assault.

At the same time, we recognise the circumstances of each person being sentenced, and offence are varied. It is therefore important that information about a person including their character, antecedents and reputation, is considered alongside other information to assist the court in arriving at an appropriate sentence that is just in all the circumstances.

When considering whether to further limit information available to a sentencing court, the Council is mindful that sentencing approaches that promote individualised justice applied within a framework of broad judicial discretion are generally more likely to support positive outcomes than a 'one size fits all' or 'one size fits most' approach.[142]

As with previous reports, the Council will seek to balance many competing interests and views when developing its recommendations. The Council invites feedback on whether there should be any changes to how 'good character' evidence is considered by courts and how this could be improved.

Question: Good character as a sentencing factor	
6. Should any changes be made to how good character can be considered by courts as this applies to sexual assault and rape?	

General considerations
You might think about:
• what things by law a court may consider in deciding a person's character (including any previous convictions the person has, if they have a history of domestic violence orders being made or issued against them as an adult, any significant contributions they have made to the community and anything else that is relevant);
• how courts currently treat the issue of good character in sentencing for sexual offences;
• the difference between a factor not being mitigating (used as a basis to reduce the sentence) and saying it cannot be considered at all.
	Legal and other considerations
	You might think about:
	• if the current wording of s 9(6A) of the PSA and its intended operation is clear (see **Appendix 5**);
	• if s 9(6A) of the PSA should be extended to apply, for example, to:
	  ○ all sexual offences committed against children under 18 (rather than limited to a sexual offence against a child under 16); or
	  ○ all sexual offences, regardless of victim age.
	• the existing relevance of a person breaching a position of trust in sentencing;
	• any practical problems that might arise for courts in sentencing if the use of good character is further restricted, for example, how a court assesses the need for deterrence, community protection, and any prospects of the person's rehabilitation.

3.3.4 Systemic disadvantage and cultural considerations

The current position

Violence and in particular, violence against women and children, is not part of traditional Aboriginal and Torres Strait Islander culture.[143] However, due to a range of complex current and historical intergenerational factors, including the ongoing impact of colonisation, and structural and institutional discrimination,[144] Aboriginal and Torres Strait Islander peoples are disproportionately represented in all areas of the criminal justice system.[145] An Aboriginal and Torres Strait Islander person may have experienced trauma which is unique to their Indigeneity (for example as a result of being a member of the Stolen Generation and displacement).[146] Aboriginal and Torres Strait Islander peoples may also experience intersecting forms of disadvantage such as having a disability, living in poverty, having a low socio-economic status, experiencing a lack of employment and having a limited education.[147]

The High Court of Australia has recognised that Aboriginal and Torres Strait Islander peoples 'as a group are subject to social and economic disadvantage'.[148] In *R v Fernando*,[149] the High Court of Australia expressed 8 principles from a review of earlier cases (known as the *Fernando* principles).[150] The High Court has also recognised that exposure to, and the experience of, disadvantage is relevant to sentencing.[151]

If a person has experienced a deprived background, this does not diminish over time.[152] For this to mitigate the sentence being imposed, the person must provide some evidence of that background.[153]

The High Court has held that these principles apply for all offenders, not just Aboriginal and Torres Strait Islander peoples.[154]

If a person identifies as an Aboriginal or Torres Strait Islander person and there is a submission from a community justice group (CJG) representative on 'cultural considerations', a court must take this into account.[155] The Court of Appeal has acknowledged that submissions from a CJG representative should be given great weight.[156] The information available to a court to inform sentencing, including submissions made by CJG representatives, is discussed in section 6.2.

While submissions on 'cultural considerations' may help a court understand the background of the person in the context of the offending, it does not excuse the offending. A sentencing court must balance the mitigating factors with all the circumstances of the offence:

> Aboriginal women and children who live in deprived communities or circumstances should not also be deprived of the law's protection. … they are entitled to equality of treatment in the law's responses to offences against them, not to some lesser response because of their race and living conditions.[157]

Violence against Aboriginal and Torres Strait Islander peoples, including sexual violence, is perpetrated by people of all cultural backgrounds, in many different contexts and settings.[158]

Under the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023, it is proposed to require a court in sentencing an Aboriginal or Torres Strait Islander person to take into account 'any cultural considerations, including the effect of systemic disadvantage and intergenerational trauma on the

offender'.[159] The Women's Safety and Justice Taskforce found that 'The formal recognition of these issues within the criminal justice system would be a useful step towards healing their consequences'[160] and would improve the sentencing process and outcomes for Aboriginal and Torres Strait Islander peoples.[161]

While there is no express legislative provision to require a court to take into account a person's background and upbringing in the case of non-Indigenous persons, this can be taken into account if it is relevant.[162] For example, in *R v SEB*,[163] the applicant was a refugee from Afghanistan who experienced a difficult upbringing because of armed conflict in that country.[164] He experienced violence and on arrival in Australia spent time in an immigration detention camp and refugee camp.[165] In this case, the Court accepted that understanding how his early life contributed to his behaviour was relevant and mitigating.[166]

There is also no express legislative provision that requires a sentencing judge to treat a person's cultural considerations or background as a mitigating factor. Case law supports the position that where a person being sentenced has experienced disadvantage or comes from a deprived background, this *may* have mitigating effect on a sentence. However, other considerations such as the seriousness of the offence and community protection, may reduce or eliminate the mitigating effect.[167] The High Court explained that while a disadvantaged background might suggest the person has a lower level of culpability, it equally may elevate the importance of community protection.[168]

A person's cultural conditioning and views will also not always be mitigating. In the New South Wales case of *R v MAK*,[169] it was argued on appeal that as MAK was from Pakistan and culturally conditioned to have 'very traditional views about women' this was, in combination with other factors including mental disorder, relevant to the commission of the offence.[170] The New South Wales Court of Appeal rejected this argument finding: 'there was, and is, not the slightest basis for concluding other than that in both places, all women are entitled to respect and safety from sexual assault'.[171]

What happens in other jurisdictions?

As in Queensland, some other jurisdictions expressly provide for cultural considerations to be taken into account in sentencing. For example:

- **Australian Capital Territory**: a court can consider 'the cultural background, character, antecedents, age and physical or mental condition of the offender'.[172]
- **South Australia**: provides access to a culturally-appropriate sentencing option for an Aboriginal or Torres Strait Islander person who has pleaded guilty to a criminal offence in the Magistrates Court, has no other outstanding criminal charges and who applies to be sentenced in the Nunga Court (Aboriginal Court Day or Aboriginal Sentencing Court) through a (less-formal) sentencing conference.[173]
- **New Zealand**: a person may request for the court to hear from any person who can speak to issues such as the cultural background of the person, how it related to the offence, any processes to resolve the issue with the victim and family or community support.[174]
- **Canada**: a sentencing judge is required to consider 'sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims' and with particular attention to the circumstances of Aboriginal offenders'.[175]

For a Commonwealth offence, from 2006 it is no longer an express legislative requirement for a person's cultural background to be considered as a sentencing factor.[176] However, a court may still take cultural considerations into account.[177]

Stakeholder views

Preliminary submissions discussed this issue to a limited extent. Relationships Australia Queensland thought unless efforts were made to address the 'structural issues' that contribute to (domestic violence) offending there is a 'risk of exacerbating over criminalisation and over-incarceration of marginalised groups, including First Nations people'.[178] The submission went on to suggest it was vital to 'address the complex intersection of intergenerational trauma and dispossession'.

Stakeholders in interviews agreed that cultural considerations, including systemic disadvantage and intergenerational trauma, were relevant to sentencing.

Much of the feedback related to practical challenges experienced in ensuring relevant information was put before a court. For example, two legal stakeholders observed that where a person was from a First Nations community (either a victim or a person being sentenced), the person may be reluctant to discuss the offence and may experience shame.[179] As explained in one interview, 'there was this deeply entrenched culture of you just do not talk about it. It's very – it's considered a very shameful thing to talk about'.[180]

Difficulty in taking instructions was also raised in respect of defendants with limited English and that in some locations it can be difficult to access interpreters.[181] Similarly, for complainants from a culturally and linguistically diverse background the 'prosecution aren't necessarily getting the whole story, the full picture, either'.[182]

On stakeholder noted 'the court can only provide an interpreter for the court proceedings,' and therefore, if a defendant is relying on a duty lawyer, it may be difficult for the duty lawyer to organise on the day. If this person self-represents, they may say something 'adverse in his interests in court'.[183]

While the PSA provides for CJG representatives to make submissions, some interviewees also identified that for other cultural groups, it would be equally beneficial to have more information about the person being sentenced to better understand their upbringing and background.[184]

The issue of cultural submissions and reports is explored further in section 6.2 below.

Submissions to the Legal Affairs and Safety Committee inquiry

Submissions to the recent Legal Affairs and Safety Committee's inquiry on the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 commented on the proposed changes to section 9 of the PSA.[185] Most supported the proposed expansion of sentencing considerations in the Act, however support was not universal.[186]

The NQWLS and one submitter considered the PSA to already have sufficient scope to consider these factors.[187] The NQWLS opposed the reforms on the basis it: 'signals the wrong message to victims-survivors' given it 'could be seen as an elevation of the rights of First Nations men who commit domestic violence, at the expense of the rights of First Nations women and children to live free of violence'.[188] It was concerned the inclusion of these factors in section 9 would result in a form of 'systemic disadvantage' for victim-survivors.[189]

The Brisbane Rape and Incest Survivors Support Centre ('BRISSC Collective') concluded that the issue was 'complicated and case by case' as there 'are ways [the changes] will be used to support community and ways that it will be used to minimise the sentences of violence offenders and not meet the justice needs of victim-survivors and community'.[190]

Questions

The changes to section 9 of the PSA proposed by the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023, will require a court in sentencing an Aboriginal or Torres Strait Islander person to take into account 'any cultural considerations, including the effect of systemic disadvantage and intergenerational trauma on the offender'.[191] These changes are limited to Aboriginal and Torres Strait Islander persons.

The Council welcomes feedback on cultural issues impacting on Aboriginal and Torres Strait Islander persons and from other cultural backgrounds that are particularly important in sentencing for sexual violence offences and any issues associated with the current consideration by courts of these factors.

Question: Cultural issues and factors

7. What cultural issues impact on Aboriginal and Torres Strait Islander persons that are particularly important in sentencing for rape and/or sexual assault?

8. What cultural considerations apply to people from other culturally and linguistically diverse backgrounds relevant to sentencing for these types of offences?

General considerations

You might think about:

- what cultural issues are most important and relevant in understanding a person's sexual offending and the context in which it happened;
- changes to legislation which will mean a court must consider cultural considerations when sentencing an Aboriginal or Torres Strait Islander person;
- the current requirement for a court in sentencing an Aboriginal or Torres Strait Islander person to consider any submissions made by a representative of the community justice group;
- what cultural issues are likely to be most relevant when deciding the most appropriate type of sentence;
- what cultural considerations or issues of cultural safety impact the victim survivor [*see section 7.4 and Question 19*].

Legal and other considerations

You might think about:

- the focus of the new proposed s 9(2)(oa) on cultural considerations as these apply only to an Aboriginal or Torres Strait Islander person being sentenced;
- the role of community justice groups in making submissions on sentence for Aboriginal and Torres Strait Islander persons;
- any issues with the operation of s 9(2)(p) in practice [*see also section 6.2 and Question 16*];
- any ways in which the understanding of cultural issues could be improved – particularly as these impact on the sentencing of sexual offences.

3.3.5 History of victimisation

The current position

Where a sentenced person is also a victim survivor of domestic and family violence, this is an express legislative mitigating factor.[192]

Recent amendments to the PSA require a court to treat this as a mitigating factor and to consider the effect that this had on the commission of the offence unless it is not reasonable to do so.[193] Generally, there will need to be some evidence as to the causal connection between the offending being sentenced and the person's own victimisation.[194] The circumstances of experiencing domestic violence, childhood deprivation, abuse and dysfunction must be balanced with the gravity of the offence and other factors, including the need for general or specific deterrence and community protection. A history of child sexual abuse is generally treated as explanatory, not excusatory.[195]

Amendments proposed in the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023, will require a court to take into account factors including the person's 'history of being abused or victimised'.[196]

The new factors included in section 9 largely recognise specific sentencing considerations that fall within the general ability of courts to consider 'the presence of any aggravating or mitigating factor concerning the offender' (PSA, s 9(2)(g)) and the existing approach required for this these factors to be treated as mitigating.

Stakeholder views

In submissions, stakeholders did not directly refer to how a sentenced person's history of victimisation should be treated by the courts in sentencing, however many referred to the long-term harm of childhood experiences of sexual and domestic violence.[197]

Several participants of the Subject Matter Expert interviews discussed the person being sentenced having a history of victimisation, noting that the profound effects of child sexual abuse were prominent when sentencing people with who had experienced that in their childhood.[198] One participant spoke of how a person's upbringing may impact culpability (blameworthiness), as well as 'their mental vulnerability' and 'life circumstances'.[199] Participants also spoke about the challenges with getting information from defendants about their childhood trauma, particularly if the person is unrepresented.[200]

Submissions to the Legal Affairs and Safety Committee inquiry

Several submissions made to the recent Legal Affairs and Safety Committee's inquiry on the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 commented on the proposed changes to the sentencing guidelines in section 9 to take into account a history of abuse or victimisation. There was general support for this change, including by QCOSS, Multicultural Australia, the Queensland Human Rights Commission, knowmore and NQWLS.[201] The BRISSC Collective viewed the issue of adding these types of factors to section 9 as complicated, with their primary concern being the impacts in mitigating sentence leading to reduced sentences.[202]

Question

The Council acknowledges recent changes made to section 9 and proposed to be introduced will direct specific attention to a person's own history of victimisation. The impacts of these forms of victimisation have long been recognised as factors which can be raised by defendants as matters in personal mitigation or to help the court understand factors related to their offending.

The Council invites views about the extent to which these matters should be taken into account and are relevant at sentence for those convicted of rape and sexual assault.

Question: Relevance of being a victim survivor of sexual violence to sentence	
9. To what extent should being a victim survivor of sexual violence and other forms of abuse be taken into account when sentencing a person for sexual assault and rape?	
General considerations *You might think about:* • what evidence (information) may be needed to show the connection between the person being a victim of domestic violence (whether as an adult or a child) and their sexual offending; • how much weight, in practice, judges and magistrates will give to this – particularly if the offence is very serious (see discussion in section 3.3.4 above).	**Legal and other considerations** *You might think about:* • the requirements of s 9(10B) of the PSA for DV-related victimisation to be treated as mitigating; • if any changes might be needed to support the consistent treatment of this information as to relevance and weight – while noting that information about prior abuse and victimisation is considered by courts on a routine basis in the context of considering the antecedents of the person being sentenced.

3.3.6 'Exceptional circumstances' under s 9(4)(c) of the PSA

The current position

Parliament amended section 9(5) of the PSA (now s 9(4)(c)) so that a person sentenced for a sexual offence against a child under 16 'must serve an actual term of imprisonment, unless there are exceptional circumstances'.[203] There is no statutory definition of what might amount to 'exceptional circumstances' although when deciding whether exceptional circumstances exist, the court may consider the closeness in age between the person being sentenced and the child.[204]

A review of Queensland case law has found there is 'no one clear prescription for what circumstances are capable of being regarded as exceptional.'[205] The Court of Appeal has also observed that it will often be a consideration of the sentenced person's personal circumstances, the offending and the need for deterrence.[206] A finding of exceptional circumstances is not a two-stage process, it is 'one part of the overall process of "instinctive synthesis"'.[207] There can be different opinions in the Court of Appeal on whether exceptional circumstances exist in a particular case.[208]

From the sentencing remarks reviewed so far, the Council observed that while some magistrates and judges will clearly outline the factors considered and the reasoning for their decision that exceptional circumstances did not apply, often magistrates and judges do not do so expressly. Accordingly, it can be difficult to determine if exceptional circumstances are being applied with any consistency.[209]

Data findings

Rape and sexual assault data does not distinguish between those cases involving an adult victim and those involving a child victim.

However, the Council reviewed 45 rape sentencing remarks to better understand the reasons why wholly suspended sentences were made for a rape as the most serious offence sentenced ('MSO') and found the reasons included:

- the person was being sentenced for a rape (MSO) committed when they were a child; or
- the person had actually spent substantial time in custody prior to sentence, with this time taken into account in deciding the sentence, but not formally declared as time served pursuant to section 159A(3B)(c) of the PSA.

Over the 18-year data period, there were 24 cases of rape (MSO) which received a non-custodial penalty. Of those 24 cases, 21 involved an offence committed by a person who was a child at the time of the offence but who were sentenced as an adult.[210]

Although a non-imprisonment sentence was far more common for sexual assault, this offence is much less likely than rape to involve a child victim. This is because if a person commits an act which would constitute a sexual assault against a child under 16, it may be charged as an indecent treatment of a child under 16 years,[211] instead of sexual assault.

What happens in other jurisdictions?

Several other jurisdictions have a mandatory or presumptive sentence requirement for sexual offences. These include:

- In the **Northern Territory**: a requirement for courts to record a conviction and impose either a term of actual imprisonment or a partly suspended sentence when sentencing an offender for a sexual offence.[212]
- In **Victoria**: mandatory imprisonment (which must not be imposed in addition to making a community correction order)[213] which applies to 23 'Category 1 offences' (including rape, aggravated forms of rape, and child sexual abuse),[214] providing the offence was committed by a person aged 18 years or more at the time the offence was committed.[215]
- In **New South Wales**: a requirement when sentencing a person found guilty of a domestic violence offence (including a sexual offence committed in the context of domestic violence),[216] for a court to impose either a sentence of full-time detention or a supervised order[217] unless satisfied that a different sentencing option is more appropriate in the circumstances.[218]
- In **New Zealand**: a presumption of imprisonment in circumstances where a person is convicted of sexual violation by unlawful sexual connection or rape.[219] The court can impose a sentence other than imprisonment if, having regard to the particular circumstances of the person convicted and the offence (including the nature of the conduct involved) it thinks that the person should not be sentenced to imprisonment.[220] This is not limited to offences committed in relation to children.
- In **Canada**: mandatory minimum prison sentences apply to offences of sexual assault in certain cases. Where the offence was committed against a child under the age of 16 years, these are fixed at one year for an indictable offence and 6 months for an offence dealt with summarily.[221] Higher minimum sentences apply to more serious forms of sexual assault.[222]

Stakeholder views

In preliminary consultation the Council heard that the law on 'exceptional circumstances' can be complicated and unclear.

Preliminary submissions raised mandatory minimum sentencing schemes and judicial discretion, with divergent views expressed on their suitability for sexual assault and rape offences. Fighters Against Child Abuse Australia recommended ' mandatory minimum sentences for penetrative rapes of 10 years for first offences and up to 14 years for aggravating circumstances such as the victim being under the age of 12'.[223] Sisters Inside opposed the use of mandatory sentencing of any kind, advocating for judicial discretion to 'account for nuance, complexity and circumstance' in each case.[224]

Legal stakeholders who participated in Subject Matter Expert interviews told us that the retention of some degree of discretion was important.[225]

Some referred to the case law about factors relevant to considering if there are exceptional circumstances as being clear[226] and resulting in a consistent approach.[227] It was thought that a judge finding exceptional circumstances was 'close to an impossibility'[228] for rape offences.[229] The Council's data findings suggest this is the case with only 24 cases over the 18-year data period receiving a non-custodial penalty for rape (MSO) — and most of these involving offences people committed when they were a child.[230]

One practitioner interviewed described mandatory sentencing as being 'very difficult', with reference to the exceptional circumstances requirement and acknowledged that the impact of going to prison is significant.[231] Another practitioner thought the exceptional circumstances provision should be extended 'to all sexual offences, not just sexual offences committed against a child'.[232]

Question

The Council notes that there is no statutory definition of what may amount to 'exceptional circumstances'. The Court of Appeal has acknowledged that such circumstances could be established by a 'combination' of individual factors, and consideration of each set of factors will be case-specific.[233]

It has been difficult for the Council to determine if exceptional circumstances are being applied with any consistency.[234] It is also unclear from the data currently available to the Council whether the victim for a rape (MSO) or sexual assault (MSO) was a child under 16 years or an adult. The Council intends to do further analysis for the Final Report if this data becomes available.

In previous reviews, the Council has identified that there are benefits to be gained in minimising the complexity of sentencing, including promoting greater certainty and clarity about how the law is to be applied and reducing the risk of error (and any appeals required to correct such errors). Such an approach also supports the fair and consistent application of the law, and ensures courts are not unnecessarily constrained by legislation in making orders that respond to the individual circumstances of the case. Given the current limitations in data available to the Council, feedback is invited on whether the 'exceptional circumstances' provision under s 9(4)(c) of the PSA is working and how this could be improved.

Question: Exceptional circumstances	
10. How well are 'exceptional circumstances' (s 9(4)(c) of the PSA) working as this applies to sexual assault and rape offences? Should any changes be made?	
General considerations *You might think about:* • if allowing a court to impose a sentence that does not involve actual imprisonment only if there are 'exceptional circumstances' is appropriate or if any changes should be made. • if sentences that do not involve actual imprisonment for people convicted of child sex offences are being imposed only where this is appropriate.	**Legal and other considerations** *You might think about:* • if the current threshold of 'exceptional circumstances' is appropriate. • if courts are applying s 9(4)(c) consistently in deciding if there are 'exceptional circumstances'; and • if any additional guidance is needed for courts in deciding this (noting s 9(5) of the PSA only identifies the closeness in age between the person being sentenced and child is as something the courts can consider).

3.3.7 Sentencing standards for historical sexual offences

Royal Commission into Institutional Responses to Child Sexual Abuse

One of the difficult questions faced by sentencers when sentencing a person for a historical sexual abuse offence traditionally has been what standards to apply when sentencing the person for that offence.

The position at common law in many Australian jurisdictions, including Queensland, prior to legislative reform was that sentencing courts should have regard to sentencing standards applying at the time the offence was committed.[235] This was on the basis that the laws should not be applied retrospectively, consistent with the presumption against retrospective penalties.[236]

The Royal Commission into Institutional Responses to Child Sexual Abuse in 2017 recommended this position be changed.[237] The Commission viewed this change as particularly important as it applied to historical child sexual abuse offences.[238]

The current position

Many jurisdictions, including Queensland, acted on the Commission's recommendations by amending sentencing legislation to require a court to have regard to the sentencing practices, principles and guidelines that apply at the time the sentence is imposed rather than when the offence was committed (see *Consultation Paper: Background*, Chapter 10).

In Queensland, the provision applies to offences of a sexual nature committed in relation to a child under 16 years and to child exploitation material offences.[239] A high level review of recent first instance decisions shows that this is being actively applied and referred to by courts. This includes noting that the principle that a sentence of imprisonment should only be imposed as a last resort does not apply and that an actual term of imprisonment must be served unless there are exceptional circumstances.[240] It is unclear, however, whether this change is having a material impact on sentence lengths.

What happens in other jurisdictions?

In Tasmania, the Australian Capital Territory and South Australia, an equivalent provision to Queensland applies to offences of a sexual nature committed in relation to children. but with different ages specified (under 17 in Tasmania, and under 18 years in the Australian Capital Territory and South Australia).[241]

New South Wales has legislated to extend this required approach to all offences with limited exceptions (only if the offence is not a child sex offence and there are exceptional circumstances).[242]

In introducing the New South Wales reforms, the Attorney-General cited a case example in which the former provision applied to some historical sexual offences on the basis they were committed against victim survivors aged under 16, while for offences committed against victims aged over 16 years, the person benefited from this being outside scope of the new section solely based on the age of the victim (meaning the position at common law applied and they were to be sentenced according to the sentencing standards that applied at the time of the offence rather than at the time of sentence).[243] In response to the anomalous treatment of these two set of offences based on victim age, the reforms were intended to: 'ensure that sentences for historical offences are consistent with current

community standards, that they reflect community expectations and that courts are not obliged to perpetuate past sentencing errors or maintain historically inadequate sentencing patterns'.[244]

Stakeholder views

Limited feedback was provided on this issue during preliminary consultation although one participant in the subject matter expert interviews acknowledged the changes regarding sentencing standards for historical sexual offence matters as a 'big' change in the approach that traditionally had been taken.[245]

There was general recognition that child sexual offences in particular were viewed as more serious and that sentencing practices in relation to sexual assault had changed more recently.

The Council's analysis of cases sentenced 10 years or more after the date these offences were committed identified (and for our purposes, classed as being 'historical'):

- for rape, there were 118 historical offences sentenced between 2005–06 and 2022–23 (MSO, 5.8%);
- for sexual assault, there were only 14 historical offences (MSO) sentenced between 2005–06 and 2022–23 [although this excluded 59 cases sentenced involving an offence of sexual assault charged under the former s 337 of the *Criminal Code* (Qld)].

The age of the victim survivors involved in these cases is unknown.

The Council's analysis excluded conduct charged under other offences, such as indecent treatment of a child under 16, for which the number of historical offences is likely to be higher.

Question

The Council notes the changes made as a result of the Royal Commission's recommendations are relevantly recent and their true impacts on sentencing levels may not be known for some time.

Because of the context in which these changes were made, in Queensland the requirement to sentence a person having regard to current sentencing practices, principles and guidelines rather than at the time an offence was committed is limited to cases in which the sexual offence was committed against a child aged under 16.

The Council invites views about how the current provision is working and if any changes should be made – such as its extension to sexual offences against children aged 16 or 17 years or to involving adult victims.

Question: Sentencing standards for historical offences

11. Should any changes be made to the requirement in section 9(4)(a) of the *Penalties and Sentences Act 1992* (Qld) for courts to have regard to current sentencing practices, principles and guidelines when sentencing a person for a sexual offence against a child under 16 years regardless of when the offence was committed?

General considerations

You might think about:

- the Royal Commission into Institutional Responses to Child Sexual Abuse's reasons for recommending this change to the law;
- if the same reasons the Royal Commission had for recommending this might also apply to historical sexual offences committed against older children (aged 16 and 17 years) and adult victim survivors.

Legal and other considerations

You might think about:

- if this requirement should be extended to:
  - all sexual offences committed against children under 18 (rather than limited to a sexual offence against a child under 16);
  - all sexual offences, regardless of victim age (both children and adults);
- the approach in New South Wales, which extends this to any offence committed against a victim of any age, but with some legislative exceptions.

Chapter 4 Current approach to sentencing and sentencing practices

4.1 Assessing adequacy and appropriateness

4.1.1 Introduction

At the heart of this review is the question of whether sentences for sexual assault and rape adequately and appropriately reflect the community's views about the seriousness of these offences and the purposes of sentencing.

In this chapter, we provide an overview of our approach, why this task is challenging and current sentencing practices. See Chapter 7 of our *Consultation Paper: Background* for more information.

4.1.2 Why assessing adequacy and appropriateness is challenging

In **Appendix 6**, we present some summarised case studies based on actual cases sentenced in Queensland over the past 3 years. These case studies show that the context and factual circumstances involved in offences of sexual assault and rape vary significantly as do the personal circumstances of those sentenced for these types of offences. They reveal that there is no 'typical' case involving rape or sexual assault, and that every case is unique. This is one reason why assessing the adequacy of sentencing practices for these offences is so difficult. What sentence might be appropriate in one type of case might not be appropriate in another and it is important for the legislative framework to be broad enough to capture a range of offending circumstances.

Briefly, of the case studies explored, the sentencing court imposed a broad range of sentences varying from life imprisonment to 3 years' probation, and 7 years' imprisonment to non-custodial sentences respectively. However, these cases are not necessarily representative of all cases and are presented for illustrative purposes only to show the diversity of offending and range of sentences imposed during the analysed period.

4.1.3 The Council's approach

The Council intends to adopt a mixed methods approach in responding to the question of adequacy and appropriateness, considering both qualitative and quantitative evidence. Broadly these measures will examine three thematic areas:

1. whether current sentencing practices align with community and stakeholder views about the relative seriousness of these offences and the primary purposes of sentencing;
2. evidence of inconsistency in approach to sentencing; and
3. evidence of inconsistency of approach with other jurisdictions.

While the Council is continuing to refine the measures against which the adequacy and appropriateness of sentencing practices will be assessed, we will consider the following evidence:

- feedback received in response to this consultation paper;
- views of subject matter experts, including by members of the Council's consultative forums;
- the Council's research on current sentencing practices for rape and sexual assault;
- the Council's qualitative analysis of a sample of sentencing remarks and submissions from sexual assault and rape cases between July 2020 to June 2023;
- commissioned research which will explore community views of sentencing factors and matters going to offence seriousness, including victim harm;
- other studies on perceptions of crime harm;[1]
- commentary by judicial officers, legal academics, victim survivors' advocates and others regarding the adequacy of sentencing levels for these offences;

- sentencing practices of other jurisdictions in Australia and overseas; and
- effective or promising alternative sentencing practices (see Chapter 8 discussion of restorative justice approaches).

The approach adopted by the Council has been informed by feedback received during the preliminary stages of the review.[2]

4.1.4 Comparing sentencing outcomes across jurisdictions

Another potential source of evidence as to the adequacy of sentencing responses is to compare sentencing levels in other Australian and international jurisdictions.

There are several methodological challenges in undertaking this type of comparative sentencing research, including differences between jurisdictions in:

- the way offences are defined and the type of conduct captured within specific offences;
- the maximum penalties that apply and, in the case of indictable offences, whether they can be dealt with summarily (by a local court or Magistrates Court) and in what circumstances, as well as the jurisdictional limits that apply if dealt with in this way;
- the statutory frameworks that guide sentencing, including the types of sentencing orders available; and
- for sentences of imprisonment, laws or local practices that guide the setting of non-parole periods.

A small number of Australian studies have attempted this type of comparison. For example, the Judicial Commission of New South Wales in a 2015 study compared sentencing outcomes for rape committed against an adult victim sentenced from 1 July 2007 to 30 June 2013 across 3 jurisdictions: Queensland, New South Wales and Victoria.[3]

The Judicial Commission urged caution in interpreting findings relating to sentence length given that partially suspended sentences were excluded from this calculation.[4]

Another key difference between these 3 jurisdictions is that the minimum time to be served in custody varies:

- in Queensland the minimum non-parole period (by operation of legislation) is ordinarily 50 per cent of the head sentence if the court does not set a parole eligibility date,[5] (typically where the person has been convicted following a trial) but it is often set below this (commonly at one-third where the person has pleaded guilty);[6]
- in New South Wales, a court must not order a non-parole period of less than 75 per cent when sentencing a person for any offence, unless there are 'special circumstances';[7]
- in Victoria, there is no set ratio between the head sentence and non-parole period, but sentencing courts generally impose non-parole periods that are between 60 and 75 per cent of the head sentence.[8]

A literature review prepared for the Scottish Sentencing Council considered the outcomes for rape in England and Wales and Scotland as part of its exploration of issues in seeking to undertake cross-jurisdictional sentencing comparisons and identified similar problems.[9]

For this reason, the Council has not attempted a quantitative comparison of sentencing outcomes for rape or sexual assault across jurisdictions.

4.2 Sentencing practices and trends

4.2.1 Background

In Chapter 8 of our *Consultation Paper: Background* we present our findings about sentencing practices and trends in Queensland for adults sentenced for rape and sexual assault offences. These findings are summarised below.

The findings are based on rape or sexual assault sentenced as the most serious offence ('MSO') in the case. This means if there were multiple counts of rape or sexual assault sentenced, only the offence which attracted the highest penalty was reported. It also means that where there were other more serious offences sentenced at the same time, these have been excluded from the analysis.

The majority of the analysis focuses on the 18-year period from July 2005 to June 2023, however due to the limitations of the administrative data available, some analysis focused on shorter time periods due to the availability of data from specific time periods, or required a review of sentencing remarks to obtain further details. These are detailed accordingly.

The information presented is descriptive only. Several factors that may impact sentencing are not accounted for in presenting this data. These factors include:

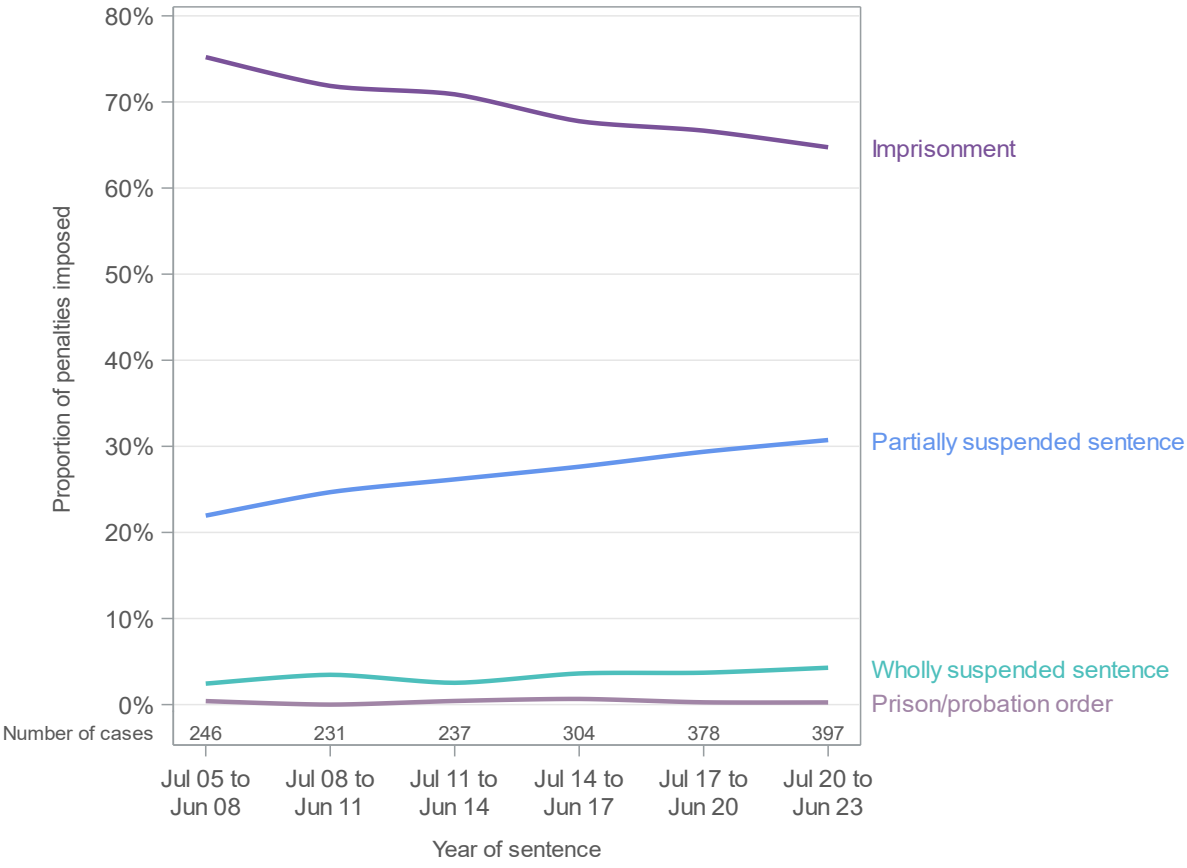
- the type of conduct involved and its relative seriousness as well as the context in which it occurred;
- whether the person was sentenced for a single offence, multiple counts of the same offence and/or multiple offences against the same or multiple victims;
- the prior criminal history (if any) of the person being sentenced;
- whether the person pleaded guilty or was found guilty following a trial;
- any time the person spent in pre-sentence custody and whether this time was declared by the court as time served under the sentence;[10]
- whether the offence was committed when the person was a child, in which case the court must take into account the sentence that might have been imposed had the person been sentenced as a child; and[11]
- any impact as a result of responding to the COVID-19 pandemic.

For the purposes of the discussion below in relation to sentence length, we report on median sentence length (or the mid-point of all sentences imposed), rather than the mean (or average), due to the highly skewed nature of the data and the presence of life sentences.

4.2.2 Rape

Sentencing outcomes

Figure 1: Custodial penalty type as a proportion of all penalties imposed for rape (MSO), by year of sentence (grouped)

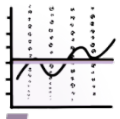


Data notes: MSO, adults, higher courts, 2005–06 to 2022–23. Intensive correction orders (n=1) were included in the calculations but have not been presented in the figure. See **Error! Reference source not found.** in Appendix 4 for more detail.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Key data findings in relation to rape cases sentenced as the MSO from July 2005 to June 2023 include:

- almost all penalties were custodial (98.7%) and the vast majority (96.4%) required the person to serve time in prison;[12]
- as shown in Figure 1, the proportion of custodial sentences that were sentences of imprisonment with a parole eligibility date has been decreasing (from 78.5% in 2005–06 to 57.5% in 2022–23) while the proportion of partially suspended sentences has been increasing (from 20.3% in 2005–06 to 36.2% in 2022–23);
- the median custodial sentence length (including suspended sentences) for rape has remained relatively stable each year, over time (median between 5.0 and 6.0 years);
- for imprisonment, the median sentence length was 6.5 years, while for partially suspended sentences it was 3 years (with a median of 12 months to serve in prison prior to suspension);
- only 24 cases over the entire 18-year data period received a non-custodial sentence for rape, with most (n=21) imposed on a person who committed the offence as a child; and
- there were 7 life sentences imposed for rape (MSO) over the 18-year period. [13]

98.7%
sentenced received a custodial penalty



6.5 years
was the median imprisonment length

Outcomes for specific cohorts

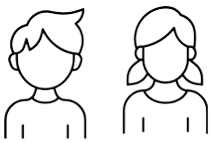
- Less than 1 per cent of all cases involved a female perpetrator (n=18), and all received a custodial penalty, with the most common penalty being an imprisonment order (66.7%).

- Just under 5 per cent (n=84) of all adults sentenced for rape committed the offence when they were a child — all of whom were male, and most (n=63) were non-Indigenous.
- Aboriginal and Torres Strait Islander peoples were no more or less likely than non-Indigenous people to receive a custodial penalty, although they were less likely to receive a partially suspended sentence (16.2% v 31.1%) and more likely to receive a sentence of imprisonment (80.0% v 65.0%).[14]

Analysis of relationship, victim-survivor age and conduct

For rape (MSO) cases sentenced from July 2022 to June 2023:[15]

- in over half of the cases sentenced the victim survivor was a child under 18 (56.8%);
- the vast majority of victim survivors were offended against by someone known to them (87.3%);
- more than half of all cases involved penile rape (52.5%), while over one third involved digital/object rape (37.3%) and the remainder involved oral rape (10.2%);
- penile rape was more commonly sentenced where the victim survivor was an adult (70.6%) compared to where the victim was a child (38.8%), and far more cases with a child involved digital/object rape (46.3%) or oral rape (14.9%) as compared to where the victim survivor was an adult (25.5% and 3.9% respectively);
- the median custodial penalty length for penile rape was 6.0 years, compared to 4.0 years for oral rape and 3.0 years for digital/object rape;
- penile rape offences were more likely to receive an imprisonment sentence than digital/object rape (71.7% vs 45.5%);[16]



56.8%
of rape victim survivors were children

Conduct impacts imprisonment length
Penile rape: 7.0 years median
Digital/object rape: 3.3 years median

- penile rape offences received longer sentences, with the median imprisonment sentence being 7.0 years, compared to 3.3 years for digital/object rape;
- a higher proportion of cases where the victim survivor was a child received an imprisonment sentence (61.5%) and a smaller proportion received a suspended sentence (33.9%), compared to cases involving an adult victim survivor (52.9% and 39.2% respectively);[17] and
- custodial penalties for rape of a child were longer than when the victim was an adult (for penile rape, a median 7.5 years where the victim was a child, compared to a median of 5.5 years where the victim was an adult, and for digital/object rape 3.0 years vs 2.5 years respectively).

Domestic violence offences

For rape offences sentenced since July 2016, just over one-third (35.5%) were sentenced as a domestic violence offence ('DV offence').[18]

Rape (DV) offences:

- were more likely to receive a sentence of imprisonment than a rape (non-DV) offence (70.9% compared to 63.2%)[19] and less likely to be sentenced to a partially suspended sentence (26.3% compared to 32.2%) or wholly suspended sentence (1.6% compared to 5.6%);
- received slightly longer sentences of imprisonment than for rape (non-DV) offences (the median prison sentence was 6.5 years for rape (DV) offences compared to 6.0 for rape (non-DV) offences);[20] and
- received longer partially suspended sentences with a median partially suspended sentence length of 4.0 years for rape (DV) compared to 3.0 years for rape (non-DV).

35.5%
were DV offences:
- **imprisonment more likely**
- **suspended sentence less likely**
- **longer custodial sentences**

Parole eligibility and minimum time to serve in custody

Time served before PED longer after trial

median: 50% vs 33.4% (guilty plea)

Courts in Queensland have a broad discretion in setting a person's parole eligibility date (or declining to do so, in which case the statutory 50% non-parole period ordinarily applies[21]). Generally, a guilty plea (along with other factors in mitigation) in Queensland is recognised by a court through the non-parole period being set at around the one-third mark (that is one-third of the head sentence) although there are some exceptions [such as for people declared convicted of a serious violent offence ('SVO')].[22] This is discussed further in section 5.2 below.

The Council's preliminary analysis of sentencing remarks found that a defendant's guilty plea was the most commonly referenced factor in mitigation. The value of a guilty plea was explained by sentencing courts in different ways including evidence of cooperation with the administration of justice, acceptance of responsibility for the offending, and sparing the victim from having to give evidence. See section 7.3.4 of the *Consultation Paper: Background* for more information.

The Council's data analysis of cases sentenced from July 2011 to June 2023 confirmed that while for the majority of people sentenced, regardless of plea, parole eligibility was set at or below the statutory 50 per cent mark, there was a difference in the minimum time required to be served in custody before becoming eligible for parole depending on whether a person pleaded guilty or went to trial.

For those who pleaded guilty to rape and received an imprisonment order:

- the median time to be served before parole eligibility was 2.3 years, compared to 3.0 years for a person who pleaded not guilty;
- over half (55.8%) had parole eligibility set at or below the one-third mark, compared to only 3.7% of those who did not plead guilty; and
- the median proportion of the head sentence to serve before parole eligibility was 33.4% compared to 50.0% for those who did not plead guilty.

Regardless of plea type, a small but noticeable proportion (11.1%) of people were eligible for release on parole after serving 80 per cent of their sentence, indicating the court had made an SVO declaration.

There were also differences found in time to serve for partially suspended sentences based on plea. See Chapter 8, of the *Consultation Paper: Background* for more information.

Pre-sentence custody

From July 2011 to June 2023, for those receiving an imprisonment order, pre-sentence custody was declared in 69.2 per cent of cases. The median declared time in pre-sentence custody for an imprisonment sentence was about 10 months (313 days).

Just over half of partially suspended sentences had no pre-sentence custody declared (54.9%). One-third had some time declared but still had additional time to serve in custody (32.7%). For the remaining 12.4 per cent (n=47), their declared pre-sentence time in custody was equal to the time required to serve before the sentence was suspended, meaning they were able to be released immediately after being sentenced.

4.2.3 Sexual assault

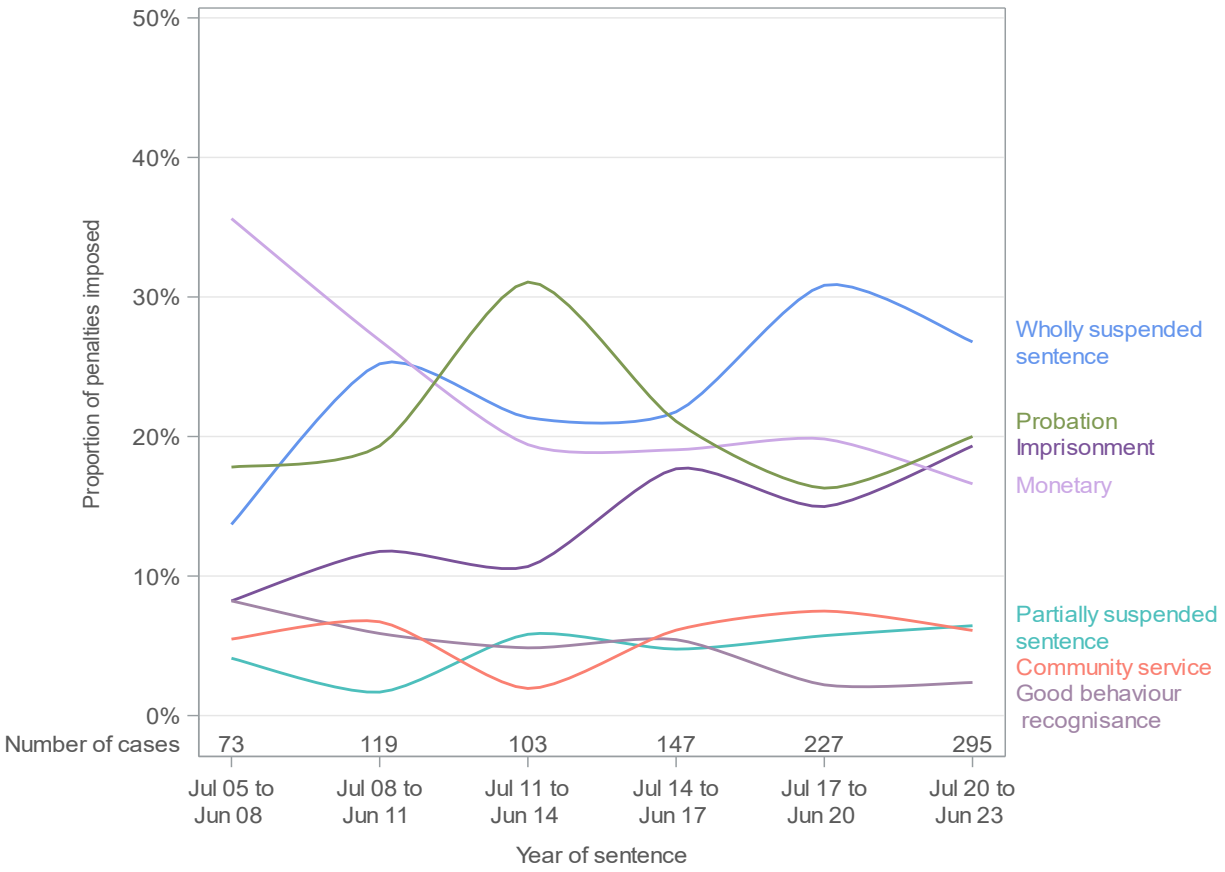
The Council found non-aggravated sexual assault[23] accounted for almost all of the adult sexual assault (MSO) cases sentenced in the courts over the 18-year data period (95.4%, n=1,816).

For cases involving charges of non-aggravated sexual assault, just over half were sentenced in the Magistrates Courts (53.1%, n=964), with the remaining 46.9% (n=852) sentenced in the higher courts. All aggravated sexual assault[24] cases (n=88) were sentenced in the higher courts.

The most common penalties imposed by court level and median sentences are presented below.

Sentencing trends: Magistrates Courts

Figure 2: Penalties imposed for non-aggravated sexual assault (MSO) in the Magistrates Courts, by year of sentence (grouped)



Data notes: Non-aggravated sexual assault (MSO), adults, Magistrates Courts, 2005–06 to 2022–23. Rising of the court (n=1), Convicted - not further punished (n=7), intensive corrections order (n=8), and combined prison/probation orders (n=15) were included in the calculations but have not been presented in the figure. See the *Consultation Paper: Background* Appendix for further detail.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023

Over the 18-year period, the most common penalty imposed in the Magistrates Court was a wholly suspended sentence (25.2%), followed by monetary orders (20.7%), probation (20.2%) and imprisonment (15.4%).

As shown in Figure 2, the use of monetary orders decreased in the Magistrates Courts over the data period, while sentences of imprisonment and wholly suspended sentences both increased. Partially suspended sentences and community service orders remained stable.

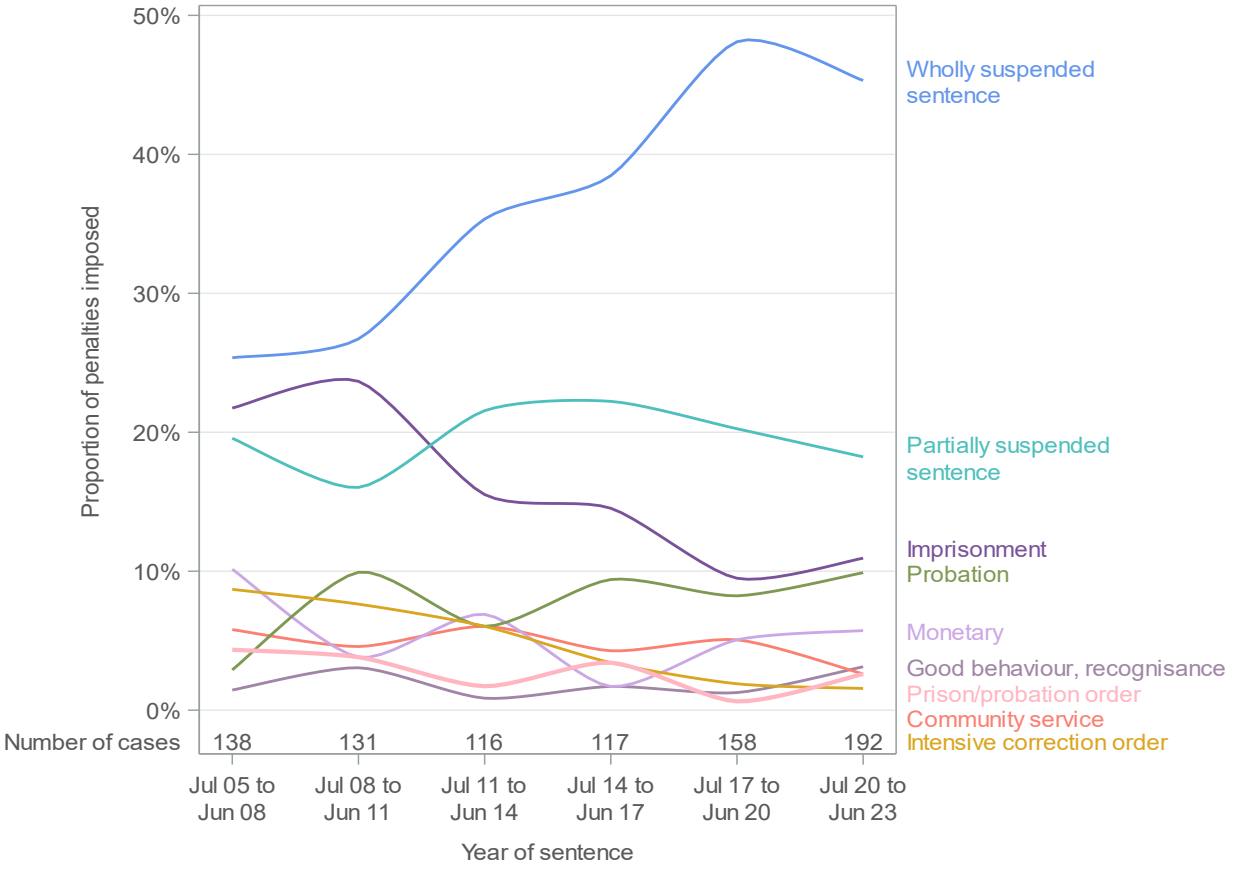
Given the changes over time, based on cases sentenced over the most recent 3-year period (July 2020 to June 2023), while the most common penalty imposed for sexual assault cases sentenced in the Magistrates Courts remained a wholly suspended sentence (26.8%), this was followed by probation (20.0%), imprisonment (19.3%) and monetary penalties (16.6%).

Most common penalties

- **Wholly suspended sentences: 25.2%**
- **Monetary: 20.7%**
- **Probation: 20.2%**
- **Imprisonment: 15.4%**

Sentencing trends: higher courts

Figure 3: Penalties imposed for non-aggravated sexual assault (MSO) in the higher courts, by year of sentence (grouped)



Data notes: Non-aggravated sexual assault (MSO), adults, higher courts, 2005–06 to 2022–23. Rising of the court (n=1) and convicted not further punished (n=1) were included in the calculations but have not been presented in the figure. See the *Consultation Paper: Background* Appendix for further detail.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Most common penalties (non-aggravated)

- **Wholly suspended sentences: 37.4%**
- **Partially suspended sentences: 19.5%**
- **Imprisonment: 15.5%**

Over the 18-year period, the most common penalty imposed in the higher courts for non-aggravated sexual assault was a wholly suspended sentence (37.4%), followed by a partially suspended sentence (19.5%) and an imprisonment order (15.5%), though as shown in Figure 3, the trends differed over time.

While wholly suspended sentences were the most common penalty type across all years (37.4% of cases), with a median sentence of 9 months (0.8 years), the proportion of these sentences increased considerably over the period, and in the 3-year period from July 2020 to June 2023 they represented 45.3% of all sentences. The use of partially suspended sentences remained relatively stable over the period, with a median sentence of 1.3 years. However while imprisonment orders represented 15.5% of sentence outcomes overall, in the most recent 3 year period they accounted for only 10.9% of all sentences. The median length of imprisonment for cases sentenced over the full 18-year data period was 1.0 years.

For aggravated sexual assault, the most common penalty types were partially suspended sentences and imprisonment. Imprisonment lengths were highest for aggravated (life) offences with the median sentence being 3.0 years, and the median length of partially suspended sentences being 2.5 years (with about 11 months (0.9 years) to serve prior to suspension).

Only 4 cases of aggravated sexual assault received a non-custodial penalty. No aggravated (life) offences (as the MSO) resulted in a life sentence.

Combination sentences

Where a wholly suspended sentence was imposed, and the person was sentenced for another offence (about 44.9% of cases sentenced in the Magistrates Courts and 38.0% of cases sentenced in the higher courts):

- another wholly suspended sentence was the most commonly ordered additional penalty in both courts (56.9% in the Magistrates Courts and 78.1% in the higher courts);
- probation was ordered alongside the suspended sentence in just over 1 in 5 cases sentenced where there was a co-sentenced offence (22.9% in the Magistrates Courts and 21.9% in the higher courts); and
- a monetary penalty (e.g., a fine) was also commonly ordered alongside this sentence – particularly for cases sentenced in the lower courts (ordered in 33.0% of cases).

The use of combination sentences is discussed further in section 5.5.3.

Outcomes for specific cohorts

Based on the data available in the courts administrative data over the 18-year period:

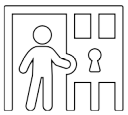
- only 29 women were sentenced for sexual assault over the period, and all but one was for non-aggravated sexual assault;
- nearly 60 per cent of all women sentenced received a non-custodial order (n=17, 58.6%), with the most common penalty being a probation order (n=11, 37.9%), and the most likely custodial penalty received was a wholly suspended sentence (n=7, 24.1%);
- there were only 13 cases where an adult was sentenced for sexual assault for offences they committed while they were a child;
- one in five cases sentenced for sexual assault involved an Aboriginal and Torres Strait Islander person, and the overwhelming majority of these were for non-aggravated sexual assault (95.1%); and
- Aboriginal and Torres Strait Islanders were more likely to receive a custodial penalty (81.8%) than non-Indigenous people (60.2%), though there was little difference the length of custodial penalties received.

Analysis of relationship between victim survivor and perpetrator

57.3%
of perpetrators were known to the victim survivor

The Council undertook analysis of case characteristics obtained from the sentencing remarks of a stratified representative random sample of 75 cases from all cases sentenced over the 3-year period from July 2020 to June 2023.

In 57.3 per cent of sampled sexual assault cases the perpetrator was known to the victim survivor prior to the incident occurring. In the remaining 42.6 per cent of cases the perpetrator was unknown to the victim survivor prior to the sexual assault occurring.



69.8%
of known perpetrators receive a custodial sentence (vs 59.3% if unknown)

Differences in outcomes were observed depending on whether the victim survivor and perpetrator were known to each other. More of the known perpetrators (69.8%) received a custodial penalty as compared to the perpetrators who were strangers (59.3%), and the type of custodial order varied. For perpetrators who were known to the victim, the most common outcomes were a wholly suspended sentence (39.5%), followed by probation (18.6%) and imprisonment (16.3%). In contrast, where the perpetrator was a stranger, the most common sentencing outcomes were a sentence of imprisonment or a wholly suspended sentence (28.1% each) followed by community service orders and monetary penalties (each representing 12.5% of penalties).

Domestic Violence offences

Since July 2016, only 7 per cent (n=73) of all cases sentenced for sexual assault (MSO) were charged as DV offences. The proportion of sexual assault offences sentenced as a DV offence remained consistent over the past 7 years.

Offences with aggravating circumstances were significantly more likely to be DV offences.[25]

7.2%
were DV offences

Parole eligibility and minimum time to serve in custody

Time served before PED

2.5 months - Magistrates Courts
10 months - Higher courts (guilty plea)

Since July 2011, for prison sentences imposed in the Magistrates Courts, the median time to serve before being eligible for release on parole was 2.5 months. Two-thirds (71.1%) of cases had parole eligibility set at or below one-third of the head sentence (median 31.7%).

In the higher courts, the median time to serve before being eligible for release on parole for those who pleaded guilty was 0.8 years (approximately 10 months).

In the higher courts, the majority of people who did not plead guilty had to serve 50 per cent or more of their sentence before being eligible for parole (64.2%), compared to around one in 6 (16.0%) of people who pleaded guilty. Over half of people who pleaded guilty (62.0%) were eligible for parole at or below one-third of their sentence compared to only 7.1 per cent of people who did not plead guilty.

The time to serve prior to release for partially suspended sentences ranged from a median of 2.9 months for cases sentenced in the Magistrates Courts to 4.0 months for those sentenced in the higher courts.

Pre-sentence custody

Of the 237 cases where an imprisonment sentence was imposed for sexual assault (MSO) during July 2011 to June 2023:

- 2 in 5 had no declared time in pre-sentence custody (41.8%);
- a similar proportion (42.6%) had pre-sentence time declared which was less than the sentence length;
- 15.6 per cent (n=37) had pre-sentence time declared which equalled the sentence length, meaning they were able to apply for parole immediately; and
- the median declared time in pre-sentence custody for an imprisonment sentence was just under 4 months (116 days).

For offences that resulted in a partially suspended sentence being ordered:

- more than half had no pre-sentence custody declared (51.3%);
- more than 1 in 4 had time declared which equalled the time to serve before release (28.6%);
- the remaining 20.1 per cent (n=38), had declared pre-sentence custody time that was less than the time required to serve before the sentence was suspended, meaning they had further time to serve in custody before release; and
- the median time declared was about 3 months (92.5 days).

Comparative offences

To help inform the assessment of whether rape and sexual assault sentences adequately reflect the seriousness of these offences, the Council undertook a comparative analysis of outcomes for 14 other offences (taking into account both non-aggravated and aggravated forms) over the 3-year period from July 2020 to June 2023 . While the conduct captured within these other offences and the elements of these offences are not directly comparable to rape or sexual assault, they are somewhat comparable to the extent that they carry maximum penalties that are the same as, higher or lower than for rape (life imprisonment) and sexual assault (10 years, 14 years, or life imprisonment depending on the type of conduct involved and other factors).

Outcomes for rape compared to other offences

- Rape attracted the second highest proportion of sentences involving actual imprisonment (imprisonment and partially suspended sentences combined) (94.1%), after acts intended to cause GBH and other malicious acts ('malicious acts') which also has a maximum penalty of life (98.0%).
- Sentences of imprisonment were more common for the offences of malicious acts (91.1%), strangulation (77.2%) (which has a 7-year maximum penalty), aggravated burglary (68.0%) (which has a maximum penalty of life) and trafficking in dangerous drugs (70.3%) (which has a maximum penalty of life, which increased in May 2023 from 25 years) than for rape (63.9%). This reflects the high proportion of partially suspended sentences imposed for rape (30.2%) compared to other offence types, with the exception of aggravated fraud (49.3%), dangerous driving causing death/GBH (aggravated) (38.3%) and aggravated sexual assault (56.3%).[26]
- Where imprisonment was ordered, rape had the second longest average sentence length (at about 6 years and 1 month) being higher only for the offence of malicious acts (at about 6 years and 10 months).

Outcomes for sexual assault compared to other offences

- Non-aggravated sexual assault was more likely to result in a sentence of actual imprisonment (imprisonment or a partially suspended sentence) (28.8% of cases) than common assault (18.4%) or fraud (simpliciter) (13.9%), both of which have lower maximum penalties (3 years and 5 years respectively). Non-aggravated sexual assault was far less likely than these two other offences to result in a non-custodial sentence[27] (37.2% compared to 72.1% and 75.3%).
- A sentence involving actual imprisonment was more likely for AOBH (simpliciter) which has a lower 7 year maximum penalty (42.3%) than for non-aggravated sexual assault (28.8%).
- For the 17.7% of non-aggravated sexual assault cases where a prison sentence was imposed (not suspended in whole or in part), the average sentence was just under 1 year and 5 months (16.9 months). This was:
  - longer than for assault occasioning bodily harm ('AOBH') (which has a lower maximum penalty of 7 years), common assault (which has a 3-year maximum penalty) and fraud simpliciter (the maximum penalty for which is 5 years);
  - the same as for burglary (simpliciter), which has a higher 14-year maximum penalty; and
  - just below AOBH (aggravated) (which has the same 10-year maximum penalty), the average sentence for which was just under 1 year and 6 months (17.8 months) and burglary (aggravated - commit an indictable offence) (which has a maximum penalty of life imprisonment) for which the average sentence was about 1 year and 7.5 months (19.6 months).

See section 8.4 of the *Consultation Paper: Background* for more information.

4.2.4 Next steps

The Council is undertaking further analysis during the next stage of the review to explore differences in sentencing outcomes based on factors discussed in this summary, including expanding its analysis of the characteristics of rape cases to cases sentenced over a 3-year period.

Evidence gathered by the University of the Sunshine Coast on community views on offence seriousness will also help inform assessments about how seriously different types of rape and sexual assault are viewed, as well as how they are assessed relative to other offence types. This will build on research undertaken in Queensland and in other jurisdictions which has found that rape and other sexual offences, in particular, are viewed as being extremely serious — and particularly so when committed against children.[28]

4.3 Stakeholder views

4.3.1 Preliminary submissions

Several preliminary submissions commented on the adequacy of sentencing outcomes and the current sentencing framework and the impacts this could have on victim survivors and the broader community. As well as at other stages of the criminal justice process.

The impacts of sentencing were described as extending beyond the sentence itself to what it might signal to those working within the criminal justice system in terms of the decisions made at various stages of the criminal justice process. In this context, the Women's Legal Service Queensland commented that a 'significantly large number of sexual violence offences do not make it' to conviction and sentence and understanding the reasons for this is important.[29]

For cases that did proceed to sentence, Queensland Sexual Assault Network ('QSAN'), the Brisbane Rape and Incest Survivors Support Centre ('BRISSC Collective') and Full Stop Australia ('FSA') were concerned that sentencing outcomes can be low and inconsistent.[30] Full Stop Australia identified this as having several negative impacts, including that it can:

- 'be retraumatising of the victim-survivors crimes' and 'have significant and lasting impacts on their recovery, by signalling to them that the harm they experienced was not considered serious';
- impact reporting rates for sexual offences and child sexual offences;[31]
- negatively impact the ability to achieve general and specific deterrence; and
- 'sen[d] a message to the community that these are not important issues' which 'impacts primary prevention efforts aimed at ending sexual violence and abuse'.[32]

The BRISSC Collective told us that: '[m]inimal punitive penalties, suspended sentences, evidence requirements and lengthy court processes feed into the community perception that sexual offences have minimal consequence.'[33]

Both QSAN and FSA supported the Council considering an 'uplift of sentences' for sexual violence,[34] especially in relation to child sexual abuse due to the 'traditionally low sentencing in these types of cases and a greater understanding of the lifelong harm and impact of this type of offending'[35] – a position also supported by another submitter who recommended the Council's review 'should focus … on increasing the severity of sentencing for *repeat, serious, child sexual abuse* offenders'.[36]

Fighters Against Child Abuse Australia which also supported increasing penalties and the introduction of mandatory minimum sentences, commented that sentences for rape 'are nowhere near the public expectations nor are they just, considering the lifelong impact felt by the victim-survivors'.[37]

In contrast, Sisters Inside indicated its strong opposition to the implementation of mandatory sentencing of any kind or to increasing penalties and questioned the utility of this approach in addressing the causes of offending.[38] It highlighted a need for more information to be provided to the community in different forms to encourage greater understanding and identified a role for the Council in facilitating this.[39]

The North Queensland Women's Legal Service ('NQWLS') emphasised the importance of understanding sentencing practices from a victim survivor perspective, submitting: 'the concept of a sentence that is "just" in all the circumstances must clearly be shown to be "just" to the victim-survivor, not only the defendant'.[40] It noted where a 'substantial penalty' was imposed, it may have potential to result in behavioural change.[41]

While experiences and views varied, the NQWLS advised that most victim survivors told them 'the lasting impacts on their lives was not reflected in the sentencing process or outcome'.[42]

FSA also raised concerns about how myths and misconceptions about sexual offences and negative attitudes towards victims, including victim blaming, might be impacting sentencing.[43]

4.3.2 Subject matter expert interviews

The purpose of conducting subject matter expert interviews was to explore current sentencing practices, rather than to seek stakeholders' views of the appropriateness of current sentencing outcomes. Interviewees responded to various issues including any observed changes in sentencing practices, factors impacting the assessment of the seriousness of an offence and the sentence imposed and potential impacts of reforms to increase sentencing levels.

It should be cautioned that any views expressed during the interviews and summarised here represent the interviewee's own views and do not necessarily reflect a collective view of current sentencing practices in Queensland. They nevertheless provide an invaluable source of information about current sentencing approaches.

Changes in penalties and the assessment of offence seriousness over time

Interviewees expressed mixed views surrounding whether sentences have increased over time. [44] Although most interviewees thought that the sentencing outcomes appear to have increased for domestic violence related cases,[45] offences involving child victims[46] and for sexual assault offences,[47] some interviewees expressed the view that there has not been a 'noticeable [increase] in terms of sentence outcomes'.[48] Some interviewees recognised that there have been changes to societal views, with corresponding impacts upon the sentences being imposed. For example, one interviewee noted that rape offences committed within a domestic setting are now viewed as being just as significant as a rape offence committed by a stranger – which represents a marked difference to previous sentencing practices.[49] Some interviewees also referred to sentences for penile/vaginal rape being higher than for non-penile rape,[50] and that penile - vaginal rape sentencing levels have stayed relatively stable over time.[51]

Participants also referred to legislative changes having had significant impacts on the sentences imposed for some offences. One interviewee referred to statements made by Justice Sofronoff that legislative changes needed to be taken into account when determining the appropriate sentence.[52] As a relevant example, the legislative change which resulted in digital penetration being moved to conduct falling within the offence of rape rather than indecent treatment of a child under 16years was viewed by interviewees as having resulted in a slight uplift in penalties for this form of conduct.[53] Interviewees also noted the importance of being aware of different maximum penalties across different timespans and encouraged practitioners to avoid using dated case precedents for sexual assault (from the 2000s to 2010) as these represent decisions and views 'from a different era'.[54]

Factors impacting the assessment of offence seriousness

Determining the seriousness of offence is often a balancing exercise for the sentencing judge. One interviewee told us that the seriousness of the offending is case-specific and may be aggravated by one factor or a combination of factors when viewed together.[55]

For sexual assault offences, the nature of the assault was viewed to be important when assessing the seriousness of the offence [e.g. touching a person on top of clothing or under clothing (skin on skin)],[56] as well as the number of offences committed,[57] whether the person was in a position of trust (including taxi and Uber drivers),[58] the age difference between the person who committed the offence and the victim,[59] whether the offender had knowledge of the vulnerability of the victim (for example, because of their age, background, history of previous sexual assault, abuse or neglect, or level of intoxication)[60] and the impacts of the offending on the victim survivor (recognising that the impacts can vary considerably).[61]

Interviewees also indicated that there are a broad range of factors impacting the assessment of the objective seriousness of an offence of rape, including the type of rape committed, the context within which the offence occurred and various other relevant factors:

- Digital and oral rape offences were viewed as being less serious than penile rape or rape with an object.[62] Circumstances where the victim consented to sexual intercourse but did not consent to the non-use of a condom were considered less serious than circumstances where the victim did not have the opportunity to communicate their non-consent at all (such as where the victim was asleep or unconscious).[63] Circumstances involving a risk of pregnancy and/or contracting a sexually transmitted disease (STD) were also viewed as a 'much worse violation' than circumstances where there was no risk of this occurring.[64] However, one interviewee expressed concerns that too much emphasis is placed upon the type of offence committed, rather than on the impact the offending had upon the victim survivor[65] – a view shared by another interviewee 'because you never really know what the impact on the individual is'.[66] This was particularly relevant for offences committed against young children[67] Another interviewee similarly recognised that it is always important to consider 'what's happened to that person, recognising everyone is different'.[68]
- The context within which the offending occurred was also viewed as important when assessing its seriousness, with examples given including the age of the victim survivor, whether there was additional physical violence and/or a weapon used, the duration of the offending, whether it was premeditated, the nature of the relationship between the victim survivor and person who committed the offence, the number of offenders involved and any consequences of the offending (such as the victim survivor becoming pregnant or contracting an STI). [69]

Seriousness of child sex offending

While offending is often categorised as being more or less serious depending upon the type of conduct (e.g. digital, oral or penile/vaginal), interviewees viewed child sex offending as a 'different category'[70] — recognising that any form of penetration is serious and harmful from a child's perspective.[71]

Challenging aspects of sentencing for sexual violence offence

One participant commented on challenges surrounding the sentencing of people who are young and who engaged in sexual behaviour within the context of a relationship or in the course of a consensual sexual experience.[72]

Consequences should sentences increase further

If sentences were to increase in severity, risks identified included delays in matters being finalised and more cases going to trial.[73]

Factors influencing the use of actual imprisonment and suspended sentences

In the case of sexual assault, interviewees identified various aggravating factors they considered likely to result in an actual term of imprisonment being imposed, including the disparity in age, whether the offending involved a breach of trust and the nature of the offending.[74] One interviewee commented that conduct constituting sexual assault varies in seriousness and that there are types of behaviours which, once present, make it more likely that a term of actual imprisonment will be imposed.[75] For example, the principle of imprisonment as a sentence of last resort will not apply where additional violence is used,[76] or where the conduct involves a 'sinister element' (such as threats if the victim reports it or predatory conduct).[77]

For rape offences attracting a sentence of 5 years imprisonment or less, interviewees indicated that various factors contribute to the consideration of a suspended sentence (most usually a partially suspended sentence), including the number of charges,[78] the period of the offending, [79] and whether an assessment has been made that the person might not require supervision or treatment.[80] If there are aggravating features, such as multiple complainants involved or factors tending to suggest the person is at risk of reoffending, then imprisonment with a parole eligibility date was viewed as being more appropriate.[81] Some participants also considered that the lack of certainty regarding the person's likely release date when imposing a sentence of imprisonment was a relevant consideration in imposing a partially suspended sentence in Queensland. This is discussed further in section 5.5.

4.4 Question

As discussed in section 4.1.3, the Council recognises that responding to the Terms of Reference as to the adequacy and appropriateness of sentencing practices for rape and sexual assault will involve a very complex assessment and will be drawing on a range of evidence to inform our conclusions and advice.

Feedback received in response to this Consultation Paper is an important part of informing this assessment.

The Council invites feedback on whether sentencing for rape and sexual assault adequately reflects the purposes of sentencing (discussed in Chapter 3) and the seriousness of these offences.

Question: Current approach to sentencing	
12. Does sentencing for sexual assault and rape adequately reflect the purposes of sentencing and the seriousness of these offences? Should any changes be made?	

General considerations
You might think about:
• the existing purposes of sentencing (punishment, denunciation, community protection, deterrence and rehabilitation);
• current sentencing practices and the current approach to sentencing;
• approaches to sentencing in other jurisdictions;
• the benefits of retaining courts' discretion (choice) to decide what type of sentence is most appropriate in the individual circumstances of the case.
	Legal and other considerations
	You might think about:
	• if current sentencing levels are appropriate and reflect the nature and seriousness of these offences;
	• for the offence of sexual assault:
	  ○ factors that constitute circumstances of aggravation, meaning that a higher maximum penalty of either 14 years or life imprisonment applies and whether these are appropriate (including if any important considerations are missing); and
	  ○ the level at which maximum penalties are set depending on type of conduct and circumstances involved (10 years (non-aggravated), 14 years or life).

Chapter 5 Penalty and parole options

5.1 Custodial and non-custodial sentencing orders

The *Penalties and Sentences Act 1992* (Qld) ('PSA') provides for two broad categories of penalty options:

1. non-custodial options such as fines and good behaviour bonds and community-based orders such as community service and probation; and
2. custodial penalties, which involve the court imposing a sentence of imprisonment.

Non-custodial options in Queensland include:

- **a good behaviour bond/recognisance:** a requirement to appear before the court if called on to do so and to 'be of good behaviour' (not to break the law) for a set period;[1]
- **a fine:** an order to pay an amount of money. The maximum fine depends on the type of offence and the court hearing the matter. A fine can be ordered in addition to, or instead of, any other sentence with or without a conviction being recorded;[2]
- **a community service order:** an order to do unpaid community service between 40 and 240 hours, usually within 12 months, and to comply with reporting and other conditions, with or without a conviction being recorded;[3]
- **a probation order:** an order between 6 months and 3 years, with or without a conviction being recorded, that is served in the community with monitoring and supervision by an authorised corrective services officer.[4]

Custodial penalties that can be imposed by a court include:

- **a combined prison and probation order:** a sentence of imprisonment of 12 months or less, immediately followed by a period of probation in the community for a minimum of 9 months and up to 3 years;[5]
- **an intensive correction order:** a period of up to 12 months imprisonment served in the community under intensive supervision; [6]
- **a wholly suspended sentence of imprisonment:** a sentence of up to 5 years suspended in full for a set period of time (called the 'operational period') of up to 5 years.[7] The only condition of this order is that the person not commit another offence punishable by imprisonment during the operational period of the order;[8]
- **a partially suspended sentence of imprisonment:** a sentence of up to 5 years suspended for a set period of time (called the 'operational period') of up to 5 years after the person has served part of the prison sentence in custody.[9] As for wholly suspended sentences, the only condition of this order is that the person not commit another offence punishable by imprisonment during the operational period of the order;[10]
- **imprisonment:** which can be for a period up to (and including) the maximum penalty for the offence.[11] Most individuals are released on parole at some point after reaching their parole release or parole eligibility date.

As is clear from the sentencing practices of courts discussed in section 4.2, while all sentencing options are available to a court in sentencing a person for rape, in practice the seriousness of this offence means that courts only make use of a limited number of sentencing options (overwhelmingly, imprisonment and partially suspended sentences). In the case of sexual offences against a child under 16 years, a sentence of actual imprisonment must ordinarily be imposed unless the court finds there are exceptional circumstances.[12]

For offences of sexual assault, which vary widely as to the conduct involved and circumstances of the offence, courts make use of a far broader range of penalty options, although they increasingly are preferring custodial sentences over non-custodial orders.

5.2 Imprisonment and parole

5.2.1 Types of parole

Queensland has a 'mixed system where orders for release on parole are either made by the court at the time of sentence or by the Parole Board sometime during the sentence period'.[13] This means that when a court decides to sentence an offender to imprisonment with parole, there are two different approaches to setting a parole eligibility date that may apply:[14]

1. Court ordered parole – where a court sentences an offender to a term of imprisonment of 3 years or less the court must set a parole release date at the time of sentence, unless specific circumstances apply.[15] The offender must be released on that date, subject to the power of the Parole Board to order that the parole order be suspended.[16] The court may fix any day of the offender's sentence as their parole release date, including the day of sentence or the last day of the sentence.[17] **A court ordered parole order cannot be made in the case of a person convicted of a sexual offence**.[18]

2. Board ordered parole – where a court either chooses to set the date a person becomes eligible for release on parole or makes no order (meaning, in most instances, that the person must serve 50 per cent of their sentence before being eligible for release on parole),[19] the Parole Board will decide whether the person should be released when an application is made. The actual date of their release is at the discretion of the Parole Board and can vary greatly depending on the circumstances of the case and of the offender. In some cases, offenders serve their full sentence in custody. **This is the only type of parole order a court can make when a person is sentenced for a sexual offence**.[20]

5.2.2 Setting of a parole eligibility date

Courts have discretion under the PSA to set a parole eligibility date for sentences of imprisonment that are longer than 3 years, or of any length if the person is being sentenced for a sexual offence, with some exceptions.[21] Courts declining to set a parole eligibility date, meaning that parole eligibility is usually set legislatively at 50 per cent of the head sentence, is a common approach adopted by courts when sentencing people convicted following a trial.

It is accepted common practice in Queensland that mitigating factors (including a timely plea of guilty) will usually be reflected in setting parole eligibility at approximately one-third of the head sentence (representing a one-third reduction from the statutory 50% ordinarily required to be served if no parole eligibility date is set).[22] However, the Court of Appeal has increasingly noted the 'one-third reduction for a plea of guilty is not a rule' but rather a 'starting point, to be adjusted up or down, depending on the particular circumstances of each case'.[23]

The Court has also said that when a judge postpones an offender's parole eligibility date beyond the 'one-third mark' where there is a plea of guilty, they may be expected to provide reasons for doing so.[24] And when exercising the discretion to postpone a person's parole eligibility date past the statutory 50 per cent mark, this must be supported by a 'good reason'.[25]

5.2.3 Mandatory and presumptive sentencing provisions

Discussed in section Chapter 3 of this paper and Chapter 6 of our *Consultation Paper: Background*, there are several statutory provisions and schemes that guide or limit the types of orders that can be made in Queensland when sentencing a person convicted of a sexual violence offence, including:

- a requirement for a court when sentencing a person for an **offence of a sexual nature against a child aged under 16 years** to order the person to serve an **actual term of imprisonment** (meaning a term of imprisonment served wholly or partly in a corrective services facility)[26] unless there are exceptional circumstances;[27]
- **the serious violent offences ('SVO') scheme** which requires a person declared convicted of certain listed offences[28] to serve 80 per cent of their sentence (or 15 years, whichever is less) in prison before being eligible for release on parole (discussed further in section 10.4);[29]
- **mandatory sentences for repeat serious child sex offences** which requires a court to impose a life sentence or an indefinite sentence[30] with a 20 year minimum non-parole period[31] for certain repeat serious child sex offences. This applies to an adult offender convicted of a 'serious child sex offence'[32] that was committed after 19 July 2012,[33] and who has a prior conviction (as an adult) for a relevant serious child sex offence.[34] Rape and sexual assault are both prescribed offences under the scheme;

- **a mandatory minimum non-parole of 15 years for life sentences** (other than for a repeat serious child sex offence), or unless sentenced alongside murder to which higher non-parole periods apply).[35] A court can set a later parole eligibility date (but not an earlier one);[36]
- **serious organised crime circumstance of aggravation**, which applies when an offence is committed as part of the person's involvement in a criminal organisation.[37] The sentence must include an extra, mandatory 7 years' imprisonment (served wholly in custody) in addition to, and cumulatively upon the sentence for the prescribed offence itself. Rape and sexual assault are both subject to this circumstance of aggravation;[38]
- **a requirement for a court to order a cumulative sentence** where a person has been convicted of certain listed offences (or of counselling, procuring, attempting or conspiring to commit it) and the person committed the offence while in prison serving a term of imprisonment, on parole or other post-prison community-based release, on a leave of absence from prison, or unlawfully at large after escaping from lawful custody under a sentence of imprisonment. [39] Any sentence of imprisonment imposed for the listed offence must be ordered to be served cumulatively (one after the other) with any other term of imprisonment the person is liable to serve. Both sexual assault and rape are listed offences.[40] The use of concurrent and cumulative sentences is discussed in section 10.4.

5.2.4 Orders in addition to sentence

The PSA also provides for other orders a court can make at sentence. These include:

- **compensation and restitution orders***:* requiring that the person make restitution or pay compensation for property loss or personal injury[41] (either of which can be made in addition to any other sentence to which the person is liable[42]). The court can order the person be imprisoned (for a default period of no more than 1 year) if they fail to comply with the order;[43]
- **non-contact orders**: which require that the person not contact the victim or someone with them when the offence was committed for a stated period of time (2 years after the order is made or the term of imprisonment ends), and/or not go to a stated place or within a stated distance of a stated place, for a stated period of time.[44] This order can be made if a court convicts a person of a personal (indictable) offence in addition to any other order (unless an order instead can be made under the *Domestic and Family Violence Protection Act 2012*);[45]
- **domestic violence orders**: If the person being sentenced is convicted of a 'domestic violence offence', the court may, on its own initiative, make a protection order against the person if satisfied the necessary criteria are met. The Court may also decide to vary an existing domestic violence order if one is already in force.

5.3 The Council's previous recommendations

In its 2019 *Community-based Sentencing Orders, Imprisonment and Parole Options: Final Report* ('*Community-based Sentencing Orders* report') the Council recommended reforms to the existing mix of sentencing orders in Queensland designed to achieve greater flexibility of courts in sentencing. Our recommendations included:

- the introduction of a new intermediate sanction — a 'community correction order' ('CCO') — which can be tailored through the conditions imposed to meet the various purposes of sentencing, while also responding to the individual factors contributing to offending;[46]
- allowing courts to combine a suspended sentence with a CCO when sentencing a person for a single offence,[47] and until such time as the CCO is fully operational, allowing a court to combine a suspended sentence with a probation order or community order when sentencing a person for a single offence.[48]
- establishing a dual discretion to set either a parole eligibility date or a parole release date when sentencing a person to 3 years or less for a sexual offence,[49] and providing legislative guidance as to whether a parole release date or parole eligibility date should be set in such circumstances.[50]

The Women's Safety and Justice Taskforce recommended in *Hear Her Voice – Report Two* that '[t]he Queensland Government respond to and implement the recommendations of the Queensland Sentencing Advisory Council's *Community-based sentencing orders, imprisonment and parole options report*' with particular reference to 'the need to expand suitable, gender-specific services that support women being sentenced to community-based orders rather than short periods of imprisonment'.[51]

In its response, the Queensland Government indicated its in principle support for this recommendation, noting it 'is considering the recommendations of the Queensland Sentencing Advisory Council's Community-based sentencing *orders* report as part of the work of the Criminal Justice Innovation Office' (now Justice Reform Office in the Department of Justice and Attorney-General).[52]

In a 2022 report, the Council also recommended significant reforms be made to the SVO scheme.[53] These recommendations are discussed in section 10.6.

5.4 Assessing the effectiveness of sentencing interventions

An important guiding principle for the Council for this and previous reviews is that reforms to sentencing laws should be evidence-based with a view to promoting public confidence.

The availability of evidence about how well current sentencing and parole responses in Queensland are meeting the various purposes of sentencing for sexual assault and rape offences (in particular, punishment, denunciation and community protection)[54] is of direct relevance to the Council in determining if current sentencing responses are appropriate or in need of reform.

The Council has drawn on previous literature reviews prepared for the Council during the current and previous reviews[55] to help inform this this aspect of the reference. Findings from these reviews are discussed below.

Imprisonment supports the sentencing purposes of punishment and denunciation, but is unlikely to be an effective deterrent and its rehabilitative potential is limited

'Although imprisonment is undoubtedly effective at punishing offenders and denouncing criminal behaviour, research shows that it is not effective as a deterrent to further offending and it appears to reduce reoffending via incapacitation only to a limited extent.'[56] 'There is consistent evidence that imprisonment has criminogenic effects',[57] with 'the great majority of studies point[ing] to a null or criminogenic effect on subsequent offending'.[58] There are mixed results on the impacts of imprisonment for sexual offenders in reducing sexual reoffending.[59]

Programs for sexual violence (including those delivered in custody) can play an important role in reducing reoffending

'There is a large literature on the effectiveness of offender rehabilitation programming, with consistent international evidence now available that programmes for sexual violence can play an important role in reducing reoffending'.[60] 'A review of treatment programs targeted toward sex offenders delivered by Queensland Corrective Services concluded that these interventions can reduce sexual and nonsexual recidivism.'[61] When sex offender treatment and re-entry programs are used in combination, research has found this to be more effective than program completion alone in reducing the likelihood of breaches and new offences.[62]

Minimum non-parole periods may achieve the sentencing purposes of punishment and denunciation, but do not achieve deterrence and are unlikely to support rehabilitation and long-term community safety

Evidence suggests 'the setting of non-parole periods does not achieve effective deterrence and fails to support rehabilitation but will incapacitate people in prison in the short term and result in longer periods of imprisonment. On this basis they can be considered to achieve the sentencing purposes of punishment and denunciation.'[63] 'More and not less time on parole would allow time to engage in rehabilitative programmes' with 'more effective programmes' being 'those that provide continuity of care (beginning in the prison and continuing once people in prison were released into the community), have higher levels of integrity, target those who are at high-risk and their criminogenic needs, and employ therapeutic community approaches'.[64]

Parole is more effective than unsupervised release in reducing reoffending

Parole is more effective than unsupervised release in reducing recidivism – although there are evidence gaps in assessing the effectiveness of parole for those convicted of sexual offences and the impact of court-ordered parole versus board-ordered parole and particular cohorts.[65] 'The quality of the relationship formed with the parole/community correction officer appears to be a significant indicator of success on parole ...'[66]

With respect to sexual offending, the Queensland Parole System Review cited an evaluation of Queensland Corrective Services' sexual offender treatment programs as evidence that '[p]roper supervision of sex offenders after release from prison' decreases their risk of reoffending.[67] The evaluation found 'if sex offenders were subject to supervision after release from prison, on parole or under the *Dangerous Offenders (Sexual Offenders) Act 2003*, they were less likely to reoffend'.[68] This was the case regardless of whether the person had participated in a sexual offender treatment program.[69]

Electronic monitoring while on parole appears to reduce reoffending cost-effectively

Electronic monitoring appears to reduce recidivism cost-effectively especially when used as a genuine alternative to imprisonment for those who have committed sexual offences who are assessed as high risk.[70] Evidence electronic monitoring has a net-widening effect is 'inconclusive'.[71] Electronic monitoring shows promising results in being effective for those sentenced for a sexual offence, but as this assessment is based on only two evaluations from the US, this should be interpreted with caution.[72]

Probation appears to be effective for those who commit sexual offences

While probation appears to be effective for those who commit sexual offences, the evidence is weak.[73] Factors associated with a higher risk of committing a new criminal offence have been found to include age and prior criminal history: 'older offenders were slightly less likely to be rearrested, while those with a prior arrest as an adult were more likely to reoffend.[74] Sex offenders on probation who had a current substance abuse problem were five times more likely to commit a new offence.[75] Being married, having social supports and being employed full-time were positively associated with remaining successful on probation for longer'. 'Failure appears to be more likely among those with a criminal history or substance abuse issues and may be more likely with low-level supervision and fewer treatment conditions.'[76]

Suspended sentences have a small but significant effect on reducing reoffending compared to imprisonment

Suspended sentences have been found to have a small effect on reducing recidivism compared to imprisonment especially for repeat offenders (although this finding is not specific to those sentenced for sexual offences) and of being of potential benefit for those who are unable to access other orders, such as living in rural and remote areas.[77] Around one-fifth to one-half of all suspended sentences are breached.[78]

Reoffending rates for partially suspended sentences may be higher than for wholly suspended sentences

There is 'no robust research on the effectiveness of partially suspended sentences' and '[w]hat little research exists finds that recidivism rates are higher following a partially suspended sentence than after a wholly suspended sentence'.[79] There is a lack of research on the impact of partially suspended sentences among vulnerable offenders and '[r]ecidivism rates following a partially suspended sentence appear to be lower among older offenders and those with no criminal history, but the evidence for this is weak'.[80]

Intensive correction orders are no more effective than supervised suspended sentences in reducing reoffending but are more effective than short terms of imprisonment

While intensive correction orders have been found of equal benefit as suspended sentences in reducing recidivism, evidence suggests they are more effective than short terms of imprisonment, however there is no evidence on the effectiveness of intensive correction orders among vulnerable cohorts.[81] Although not specific to people convicted of sexual offences, for individuals on these orders, 'reoffending following an intensive correction order appears to be more likely among men, Indigenous [people], those with criminal histories and those classified as high risk'.[82]

Community service appears to reduce reoffending more effectively than a term of imprisonment and a bond, but not as effectively as a fine

Community service appears to reduce recidivism more effectively than a term of imprisonment and a bond, but not as effectively as a fine although this finding is based on studies of those convicted of non-sexual offences.[83] 'There is no evidence on the mechanisms that underlie the effectiveness of this order, and none on the factors that contribute to successful order completion'.[84] There are also 'substantial concerns around the availability of this order among Aboriginal and Torres Strait Islander communities and [people] in rural and remote areas'.[85]

The effectiveness of community correction orders in reducing reoffending may depend on the type and quality of supervision and other conditions

A 2017 study by the Victorian Sentencing Advisory Council on CCOs found:

- People sentenced in the higher courts for whom the CCO was imposed for a sexual offence had a relatively high rate of contravention by further offending (44%), 'most commonly by failing to meet the reporting obligations of being on the Sex Offender Register'.[86]
- Those who were subject to CCOs for 2 years or longer sentenced in the higher courts were 1.7 times more likely to contravene by further offending than those on shorter CCOs.[87] Factors associated with an

increased risk of contravention by further offending were having a prior conviction (with those with prior convictions being 5 times more likely to contravene) and age (with those aged 18 to 24 years nearly twice as likely to contravene by further offending than older offenders).[88]

- There were no differences based on gender or whether the CCO was the principal sentence or combined with imprisonment.[89]
- The findings for CCOs imposed by the Magistrates Court were largely consistent with those for cases sentenced in the higher courts, although in this case offenders whose CCO was combined with imprisonment were more than twice as likely to contravene by further offending than those who CCO was not combined with imprisonment.[90]

The longer-term impact of CCOs on recidivism in Victoria has not been evaluated.

The use of CCOs in New South Wales was explored as part of a New South Wales Bureau of Crime Statistics and Research ('BOCSAR') study which examined the impact of that jurisdiction's 2018 sentencing reforms.[91] The study found while the 2018 reforms had significantly increased the proportion of individuals sentenced to supervision in the community, there was no evidence this was associated with a reduction in reoffending or time to reoffend. However, given '[t]he abundance of evidence to support the effectiveness of community supervision in reducing recidivism', its authors concluded that 'further research into the extent and quality of supervision following the sentencing reforms may be worth pursuing' – further noting the New South Wales Government had announced additional funding in support of supervising offenders in the community and ensuring greater access to rehabilitation programs.[92]

Supervision as a condition can be useful in reducing reoffending provided it is supported by rehabilitation services and support

Many of the orders discussed above, including parole, intensive correction orders and probation, involve supervision. Relevant findings of the literature reviews include:

- 'Evidence shows mixed support for the effectiveness of supervised release. Supervision without adequate rehabilitation services and support – that is focused on enforcement – does not reduce recidivism.'[93] However, when used in combination with rehabilitation programs and services, such as mental health and drug treatment, and housing assistance, supervision is effective in achieving reduced rates of reoffending.[94]
- 'The evidence on high-intensity supervision is mixed, with much of the evidence indicating that its heightened surveillance acts to increase both recidivism and technical violations'.[95] But 'when coupled with therapeutic interventions, high intensity supervision can be effective, especially for high-risk offenders.[96]
- 'Community supervision best reduces recidivism when [it] adheres to the principles of effective correctional intervention and core correctional practices. Supervision that emphasises relapse prevention and assists offenders to identify, avoid, and resist crime opportunities may be more useful for individuals who have sexually offended'.[97]
- 'Although the evidence is sparse, low-intensity supervision, used for low-risk offenders, does not appear to increase recidivism, so may be a cost-effective tool for managing large, low-risk offender cohorts.'[98]

The impacts of fines and other monetary penalties on reoffending for those sentenced for a sexual violence offence is unknown

Due to the focus of the Council's previous reviews, the Council has not examined evidence of the impact of fines and other monetary orders on reoffending as part of its previous reviews.

The review conducted by Griffith University for this review did not find any relevant research literature related to monetary penalties for sexual assault and rape offences.[99] It reports generally there is insufficient evidence to assess the effectiveness of monetary penalties in preventing crime or deterring reoffending.[100]

5.5 Assessing the adequacy of penalty options

5.5.1 Introduction

Current legislation in Queensland requires that in sentencing a person for an offence of a sexual nature committed in relation to children, the sentencing court must impose a sentence of actual imprisonment (including imprisonment, a partially suspended sentence or a combined prison probation order) unless there are exceptional circumstances.[101] This is in addition to a requirement that a court impose a life sentence or indefinite sentence on a person convicted of a repeat serious child sex offence.[102] These provisions were introduced primarily for the purposes of punishment, denunciation, deterrence and community protection.[103]

The requirements that apply when sentencing child sex offences do not apply when sentencing a person for an offence committed against a young person who is 16 or 17 years old or against an adult. However, in the case of rape, the Court of Appeal has recognised it is an inherently violent offence which involves physical harm to another, meaning that the principle that imprisonment is a last resort does not apply.[104]

Almost all custodial sentences for rape (96.4%) and, based on data for the most recent 3-year period (1 July 2020–30 June 2023), over one quarter (28.7%) of sentences for sexual assault[105] involve a sentence of actual imprisonment.[106]

In addition to legislative guidance, the Court of Appeal has identified a range of principles to assist courts in determining the appropriate sentence. This includes, in the case of sexual assault, when it might be appropriate to make a non-custodial order. See Chapter 7 of the *Consultation Paper: Background* for more information.

In the case of sexual offending against children, the Court may also take into account the effect of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) (CPOROPOA).[107] The purpose of the CPOROPO Act is to require particular offenders who commit sexual or other serious offences against children to keep police informed of their whereabouts and other personal details for a period of time after their release into the community. The objective of this scheme is to reduce the likelihood that they will re-offend, and to facilitate the investigation and prosecution of any future offences.[108]

The circumstances in which this scheme applies are discussed in section 9.5.2 of the *Consultation Paper: Background*.

5.5.2 Imprisonment

Rape

The Council's analysis of sentencing outcomes for rape in Queensland over an 18-year data period (2005–06 to 2022–23) found 68.8 per cent of cases resulted in a sentence of imprisonment, with 27.3 per cent of cases resulting in a partially suspended sentence (with the person being sentenced required to spend at some time in actual custody).

Sexual assault

The Council's analysis of sentencing outcomes for sexual assault over the same 18-year data period (2005–06 to 2022–23), discussed in Chapter 4, found 15.4 per cent of cases of non-aggravated sexual assault sentenced in the Magistrates Courts resulted in an imprisonment sentence.

In the higher courts, imprisonment was the third most common outcome for non-aggravated sexual assault (19.4%) and sexual assault aggravated (12.1%). It was the most common outcome for sexual assault aggravated life (42.3%) shared with partially suspended sentences (42.3%).

The use of imprisonment in the higher courts reduced over the 18-year data period, while the use of wholly suspended sentences increased.

Exclusion of sexual offences from court ordered parole

As discussed above in section 5.2 above, a person sentenced to a term of imprisonment for a sexual offence is excluded from court ordered parole.

When court ordered parole was introduced in 2006, the then Minister for Police and Corrective Services in her Second Reading Speech explained that the reason for excluding people sentenced for sexual and serious violent offences from the scheme was due to their higher level of risk.[109]

The high use of partially suspended sentences, discussed below, suggests this has resulted in a displacement effect away from the use of imprisonment to the use of partially suspended sentences to achieve certainty of release.

Time under parole supervision and availability of programs

A high proportion of people sentenced to imprisonment for rape and sexual assault had pre-sentence custody declared as time served under the sentence (69.2% for rape, with a median declared time of about 10 months, and 41.8% for sexual assault with a median declared time of just under 4 months). See *Consultation Paper: Background*, Chapter 8.

Taking into account our findings on where parole eligibility is fixed and median sentence lengths, discussed in section 4.2, the implications for those sentenced for rape and sexual assault who have served substantial time in pre-sentence custody may include:

- limited time for a person to complete programs in custody which are only delivered to sentenced prisoners prior to them reaching their parole eligibility date; and
- for sexual assault in particular, limited time under parole supervision.

See Chapter 8 of the *Consultation Paper: Background* for more information.

5.5.3 Suspended sentences of imprisonment

The nature of suspended sentences

As discussed above in section 5.1, a suspended sentence is a sentence of imprisonment of up to 5 years that can be suspended in whole (wholly suspended) or in part (partially suspended). A person is not liable to serve that part of the imprisonment sentence that is suspended unless they commit an offence punishable by imprisonment.[110]

The courts have long recognised that a suspended sentence is a significant punishment in itself[111] and not a mere exercise in leniency.[112]

A person under a suspended sentence in Queensland is not supervised in the community as part of their sentence. In some cases, courts may use a suspended sentence alongside sentencing the person to a community-based order, such as probation, but this is not possible when sentencing an offender for a single offence.[113]

If the person commits an offence punishable by imprisonment during the operational period, they will have breached the suspended sentence. In that case, a court must determine the appropriate penalty. This may include extending the operational period of the sentence for up to 12 months or ordering that the person serve all or part of the suspended imprisonment.[114] However, a court must order the person to serve the whole of the suspended imprisonment unless it considers it would be unjust to do so, and particular factors are listed to assist courts in making this determination.[115]

The consequences of breaching a suspended sentence are therefore very different to a person on a parole order as it the sentencing court, not the Parole Board, which decides how to respond to the breach.

As discussed in Chapter 9 of the *Consultation Paper: Background*, Queensland Corrective Service does not supervise people on suspended sentences when they are in the community.

Rape

The Council's data analysis shows that for rape cases where rape was the most serious offence sentenced ('MSO'), almost one-third of custodial penalties were suspended sentences (30.8%), with the vast majority of these (88.8%) being partially suspended sentences.

Sexual assault

For non-aggravated sexual assault (MSO), the proportion of cases resulting in a suspended sentence was even higher. For the most recent 3-year period (1 July 2020 to 30 June 2023):

- For cases sentenced in the Magistrates Courts, over one quarter (26.8%) resulted in a wholly suspended sentence, and 6.4 per cent in a partially suspended sentence.
- For cases sentenced in the higher courts, a wholly suspended sentence was the most common penalty outcome, accounting for 45.3 per cent of penalties, with partially suspended sentences being the next most common penalty outcome (18.2%).

Orders made for co-sentenced offences

Of rape (MSO) cases which result in a partially or wholly suspended sentence, nearly three-quarters included co-sentenced offences that were sentenced at the same court event (73.5% and 74.2% respectively):

- For partially suspended sentences, the most common co-sentenced penalty was another partially suspended sentence (75.6%), followed by imprisonment (38.0%) and probation (31.3%).
- For wholly suspended sentences, the most common co-sentenced penalty was another wholly suspended sentence (71.7%), followed by probation (56.5%).

The use of a combined sentence of a wholly or partially suspended sentence ordered alongside probation is significant as it means the person will be under supervision in the community. As discussed above, supervision may be an important means of responding to potential risks of reoffending for some offenders, with the quality and type of supervision being particularly important in reducing the likelihood of reoffending for those at higher risk of committing serious, violent crimes.[116]

The Council's research found that compared to other sexual offences and all sentenced offences, the proportion of cases receiving probation order with a co-sentenced suspended sentence for rape (MSO) was far higher. Almost one-third of partially suspended sentences (31.3%) and over half of wholly suspended sentences (56.5%) imposed in circumstances where the person was sentenced for another offence received a probation order, compared to 20.9 and 31.1 per cent for orders made across all sexual offences and 13.6 and 13.1 per cent across all sentenced offences.

The findings are similar for sexual assault cases. A substantial proportion of sexual assault cases which resulted in a partially or wholly suspended sentence being ordered had co-sentenced offences (ranging from 38.0% of wholly suspended sentences in the higher courts, to 74.0% of partially suspended sentences in the Magistrates Courts).[117] For partially suspended sentences, probation orders were made in just under a quarter (24.3%) of cases sentenced in the Magistrates Courts with co-sentenced offences and 29.1% of these cases sentenced in the higher courts. For wholly suspended sentences, the proportions were slightly lower (22.9% and 21.9% respectively). However, unlike rape, the proportion of wholly suspended sentences made alongside a probation order was lower compared to all sexual offences (31.1%).

Considered together, these findings suggest courts are concerned in certain cases to ensure people sentenced for sexual assault and rape are subject to supervision in the community as part of their sentence, but do not always consider this is best achieved by imposing a sentence of imprisonment with a parole eligibility date.

The data discussed above also illustrates the unintended consequence of excluding sexual offences from court ordered parole. Courts have also made use of combined orders, such as the use of a suspended sentence and probation, where this option is available to provide certainty of release but with the added component of supervision. Imprisonment/parole orders For the same reasons, where appropriate, the court may make a combined imprisonment/probation order.

The Queensland Parole System Review raised concerns that 'it may be that the effect of not allowing the court ordered parole regime to apply to sex offences is to make it less likely that an offender who commits a sex offence is sentenced to a period of imprisonment with subsequent effective supervision and rehabilitation on parole'.[118] It therefore recommended that court ordered parole should apply to a sentence imposed for a sexual offence, given evidence that a period of supervision reduces the risk of reoffending thereby supporting the objective of community safety.[119]

5.5.4 Probation and community service orders

Rape

Probation and community service orders were very rarely imposes for rape offences. Of the 1,818 rape cases sentenced over the 18-year data period which were analysed, only 17 resulted in a probation order being made, and 3 in a community service order. All but one of these cases involved the person sentenced as an adult for rape offences committed when they were a child.

Sexual assault

Over the most recent 3-year data period (1 July 2020 to 30 June 2023), probation was the second most common penalty type after wholly suspended sentences for cases of non-aggravated assault sentenced in the Magistrates Courts, representing 20.0 per cent of all penalties imposed. Community service orders (MSO count) were made in 6.1 per cent of cases. In the higher courts for non-aggravated sexual assault, probation was the fourth most commonly ordered penalty (9.9% of all penalties imposed) while very few (2.6%) involved the making of a community service order or probation as part of a prison/probation order (2.6%).

5.5.5 Monetary orders

As discussed above, almost all sentences for rape are custodial and involve a period of actual imprisonment (96.1%)

However, for sexual assault cases sentenced in the Magistrates Courts over the 18-year data period, just over half of sentences imposed were non-custodial (51.7%). Of the 498 non-custodial penalties, monetary penalties and probation orders were the most common types of non-custodial penalties ordered (40.2% and 39.2% respectively). The median monetary penalty amount was $1,000.

The use of monetary orders (MSO) decreased in the Magistrates Courts over the data period, while sentences of imprisonment and wholly suspended sentences both increased, and partially suspended sentences and community service orders remained stable. For more information, see section 8.3 of the *Consultation Paper: Background*.

As discussed above, a court may also order compensation be paid. If a court considers it is appropriate to make an order for compensation and to impose a fine (or make another order for payment of an amount of money), it must give preference to making an order for compensation if it considers the person cannot pay both.[120]

From 2005–06 to 2022–23, there were 233 compensation orders made for a sexual assault.[121] Compensation orders ranged from $200 to $50,000, with an average of $1,933.91 (median $1,000).

A compensation order was made for 4 rape offences, the average amount being $4,000 (median $2,500). The compensation orders for rape ranged from $1,000 to $10,000.

5.5.6 What happens in other jurisdictions?

Chapter 10 of the *Consultation Paper: Background* discusses different penalty and parole options - including mandatory and presumptive sentencing schemes applying to sexual violence offences - in other Australian and select international jurisdictions.

Penalty options

While all jurisdictions have the discretion to impose a term of imprisonment, the type and mix of other penalty options available differs across jurisdictions. In our previous reviews of community-based sentencing orders and the SVO scheme, we highlighted some of these differences. Examples of different penalty options are set out in Table 4.

Combined orders: The permitted combinations of sentencing orders differs by jurisdictions. In Victoria, for example, a court can combine a sentence of up to one year's imprisonment with a CCO when sentencing a person for one or more than one offence (with some exclusions). The Victorian Sentencing Advisory Council has reported that in the higher courts, sex offences (MSO) represented 9.1 per cent of all cases attracting a combined order of imprisonment with a CCO, over the period 2012 to 2020, representing 170 cases.[122] This compared to 18.5 per cent of all sentenced cases in the higher courts that involved a sexual offence.[123]

Suspended sentences: as in Queensland, most jurisdictions have an option to suspend a sentence of imprisonment.[124] However, suspended sentences are no longer a sentencing option in New South Wales, Victoria and New Zealand. In Western Australia and in England and Wales, unlike in Queensland, there is no power to partially suspend a sentence. In contrast to Queensland, most jurisdictions allow for conditions (called 'requirements' in England and Wales) to be ordered either as part of the order itself or in making a good behaviour order alongside the order for suspension. Suspended sentences have been a focus of sentencing reform in several jurisdictions.[125]

Legislative restrictions or presumptions regarding penalty options: There are several legislative restrictions that have been placed on the types of orders, or presumptions introduced in other jurisdictions that seek to prevent, limit or guide what orders are made by sentencing courts for sexual offences. Legislative presumptions that encourage a court to impose a certain type of order do not necessarily require or encourage a court to order imprisonment. For example, New South Wales introduced a legislative presumption in favour of full-time detention or a supervised order (being an intensive correction order, CCO or conditional release order that is subject to a supervision condition) when sentencing a person for a domestic violence offence (including a sexual offence).[126] A BOCSAR study concluded that this and other sentencing reforms had 'resulted in a substantial increase in the number of supervised orders imposed for adult offenders' as well as a 'small decrease in short prison sentences'.[127]

Table 4: Examples of penalty options available in Australian and select international jurisdictions

Order type	Details
Community Correction Order ('CCO')	**New South Wales, Victoria and Tasmania** have introduced CCOs, which are intended to provide courts with a more flexible for of order that is tailored to the meet the purposes of sentencing and address the underlying causes of offending. The form this order takes differs by jurisdictions.
Community sentence	**England and Wales** have a single generic form of community sentence, to which 13 conditions (requirements) can be attached including: • undertaking unpaid community work, • undertaking a rehabilitation activity (this includes an instruction to participate in activities whose purpose is reparative, such as restorative justice activities), • taking part in a behaviour-change program, • undergoing treatment for drug and alcohol or mental health treatment, and • complying with residence and curfew conditions.
Community payback orders	**Scotland** has a community payback order that requires the person to comply with one or more requirements (conditions) which is commonly made for sexual assault and other non-rape sexual offences and can include unpaid work, compensation or other activities, such as engaging in treatment.[128] Community payback orders were introduced in 2011 to replace community service orders, probation orders and supervised attendance orders.[129]
Conditional suspended sentences	In **England and Wales** suspended sentences may include the same types of conditions as can be made for a community sentence. If they person commits another offence or fails to comply with their conditions, they are liable to serve the original custodial term that was suspended. **Western Australia** also has conditional suspended imprisonment orders with conditions including supervision, participation in programs and curfew conditions.
Extended sentences	In **England and Wales and Scotland**, courts may order extended periods of community supervision on licence (parole) for certain specified violent, sexual and terrorism offences.[130] Rape and sexual assault are specified sexual offences.[131] These provide for the person to be supervised at the end of their custodial term for an extended supervision period as part of their sentence.
Sentences for offenders of particular concern ('SOPC')	In **England and Wales**, this order comprises a custodial term and a mandatory 12-month licence (are on a form of parole) to be served at the end of the custodial term. A SOPC is mandatory when conditions are met.[132]

Parole: The approach to parole varies across jurisdictions. Excluding life and indeterminate sentences, the approaches range from providing courts with full discretion to set any date as the parole eligibility date (as it the case in Queensland, except if the person is declared convicted of an SVO), to a requirement that a set proportion of the head sentence be served or ordered to be served before the person is released or eligible for release on parole.

The parole schemes applying in Australia and select jurisdictions were examined in some detail during our review of the SVO scheme review. See Background Paper 2 prepared for the purposes of the SVO review[133] and Chapter 10 of our *Consultation Paper: Background* for more information.

Other forms of guidance on the use of penalty options: non-legislative forms of guidance also exist as to the use of particular types of sentencing orders, including sentencing guidelines in England and Wales and guidelines judgments. These are discussed in chapter 10 of our *Consultation Paper: Background.*

5.5.7 Stakeholder views

Preliminary submissions

A range of views were expressed in preliminary submissions made about current penalty options available to courts in sentencing.

Some victim support and advocacy services raised concerns about the use of non-custodial and/or suspended sentences – with the Brisbane Rape and Incest Survivors Support Centre ('BRISSC Collective') and the Queensland Sexual Assault Network ('QSAN') suggesting this was often due to 'the offender's standing in the community'[134] as well as a relevant factor where the sentence would lead to deportation.[135] In the circumstances it was submitted: '[t]he perpetrator's comfort and livelihood are put before victim-survivors and community.'[136]

Where the person receives a custodial sentence but is released shortly following conviction, QSAN reported 'many survivors have reported feeling like this is a betrayal of the courts and that no real sentence was given to the offender.'[137]

The Aboriginal and Torres Strait Islander Legal Service supported 'consideration of broader sentencing options, such as those tabled during the QSAC Intermediate Sentencing Options and Parole Project, in lieu of a focus on terms of imprisonment'.[138]

Legal Aid Queensland was among those legal stakeholders which identified limitations of current penalty options, particularly in circumstances where the person is being sentenced for a single charge, noting that in these cases, a court is unable to order a suspended sentence alongside a probation order.[139] While a prison-probation order would provide certainly of release with supervision, it was acknowledged that this form of order still requires the person to serve some time in prison.[140]

Several criminal justice stakeholders identified the current exclusion of sexual offences from the court ordered parole scheme as impacting sentencing practices, resulting in courts making greater use of alternative sentencing options to achieve the same outcome of a fixed release date.[141]

Subject matter expert interviews

Many expert interview participants thought supervision was important for sexual offences,[142] and the exclusion of court ordered parole for sexual offences was impacting sentencing and limited judicial discretion.[143] In the absence of other options, courts may choose to suspend the sentence to ensure certainty of release (or, alternatively, make use of prison-probation orders where this option is available). Several expert interview participants remarked that this results in people on suspended sentences potentially not being under any supervision in the community,[144] with one participant suggesting suspended sentences should 'be a last resort for sexual offending'.[145] Another participant was concerned about how a wholly suspended sentence might look to a victim survivor, with no requirement to perform community service or pay a fine and to be under supervision.[146]

Several expert interview participants supported court ordered parole being extended to sexual offences allowing judges to set a fixed parole release date.[147] This would ensure the person was supervised in the community but also have certainty of release.

One participant expressed their support for courts having a dual discretion to set either a parole release date or parole eligibility date (as previously recommended by the Council – see section 5.3 above) and for the release of those given a parole release date, release being conditional on the completion of relevant courses while in custody.[148] They considered this certainty of release (even if conditional) might translate into more people pleading guilty.[149]

The suggestion regarding release being conditional on program completion may overcome a practical concern raised by another participant who questioned if court ordered parole were extended to sexual offences, what the implications for Corrective Services would be, when a sentenced person is also required to undertake a sexual offending program.[150] They wondered practically how a person might comply with a program requirement if their release date was fixed in the middle of a program.

If court ordered parole were to be extended to sexual offences, some participants supported this being available for longer sentences of imprisonment of greater than 3 years (up to 5 years) noting that many sentences for rape are set well above the 3-year threshold.[151]

The current rigidity of orders was considered by some to be a barrier to achieving sentences that met their intended purposes,[152] with one participant suggesting a new form of community-based order might be more appropriate for some types of sexual offences.[153]

One practitioner commented on the ability to combine a suspended sentence with a probation order or immediate imprisonment of greater than 12 months with probation for a single charge as potentially beneficial providing courts with greater flexibility in sentencing.[154]

Concerns were also raised in relation to breaching a suspended sentence and the limited information that is provided to the court to inform decision making on the appropriate penalty.

5.6 Questions

The Council acknowledges that various issues were raised during preliminary consultations about the current range of sentencing and parole options and the impacts these might be having on sentencing.

During previous reviews, the Council has indicated its strong support for courts to have a range of sentencing options at their disposal to ensure orders can best meet the intended purposes of sentencing and to respond to the individual circumstances of the offence (including the impacts on any victim) and the person being sentenced. As discussed in section 5.3, we have also made several recommendations for reform.

The Council invites feedback on how well the current penalty options, including the conditions that can be attached to relevant orders, are working in meeting the purposes of sentencing, and any potential options for reform to better support this objective.

We also invite feedback on whether any additional guidance is required for courts in deciding what type of sentencing order to make and if so, what changes might be required.

Question: Penalty options

13. How well are current penalty options working in meeting the purposes of sentencing for sexual assault and rape? Should any changes be made?

General considerations

You might think about:

- the current types of sentencing orders available to a court in sentencing for rape and sexual assault;
- whether different types of orders are appropriate for different offences and offences of different levels of seriousness (e.g., rape of a child vs a non-aggravated form of sexual assault of an adult);
- if some types of sentencing orders are very appropriate to meet the purposes of sentencing for rape and/or sexual assault offences or, alternatively, if some orders are not likely to be appropriate at all or only in limited circumstances;
- victim survivors' needs and interests, such as that the person who has harmed them be held accountable and concerns about their safety (see Chapter 7); and
- for imprisonment, the important function parole plays in keeping the community safe.[155]

Legal and other considerations

You might think about:

- whether there are any gaps in the types of penalty options available to courts in sentencing for these offences or in the types of interventions (programs, counselling etc) available to those serving a sentence in custody or in the community;
- the Council's previous recommendations, including the introduction of a new form of community-based order and allowing for a suspended sentence to be ordered alongside a community-based order when sentencing a person for a single offence.

Question: Penalty options – guidance

14. Is the current guidance for courts in deciding what type of sentencing order to make appropriate? Should any changes be made?

General considerations

You might think about:

- whether the types of sentencing orders available are the right kind of orders to achieve the purposes of sentencing (punishment, denunciation, deterrence, rehabilitation and community protection);
- the benefits of courts having a broad discretion (choice) to decide what type of sentence is most appropriate in the individual circumstances of the case;
- existing guidance by the Court of Appeal to sentencing courts about what types of orders are appropriate or inappropriate and the ability to appeal a sentence if an error has been made (including if the sentence is clearly inadequate).

Legal and other considerations

You might think about:

- existing guidance in the PSA, including the presumption to impose a sentence of actual imprisonment that applies to sexual offences against children under 16 (PSA s 9(4)(c));
- existing case law in Queensland regarding the use of certain types of penalties;
- presumptions in legislation in some jurisdictions that certain types of orders should either be made or not made – for example, that an actual term of imprisonment or another form of order involving supervision be ordered unless a different sentencing option is more appropriate (New South Wales model for domestic violence offences).

Chapter 6 Information available to courts to inform decision-making

6.1 Pre-sentence and psychological reports

6.1.1 The current approach

In Queensland, there is no general requirement for a pre-sentence report ('PSR') to be prepared when a court is sentencing an adult. PSRs are documents for a court, normally prepared at a court's request,[1] to provide information about a person and to assist the court in determining the most appropriate form of sentence or other disposition.[2] They may be mandatory or discretionary, but are generally sought to supplement other information before the court about a person's background or the circumstances of the offence.[3] They are additional to any reports that may be obtained by the defence in support of a plea in mitigation[4] (which are also sometimes referred to by Queensland legal practitioners as PSRs).

PSRs prepared by Queensland Corrective Services ('QCS') are not commonly requested or prepared with respect to adults who are sentenced to imprisonment in the higher courts. Specialist medical or psychological reports commissioned by the defence are more commonly submitted. These reports commonly set out a person's background as well as any medical or psychological conditions they suffer from. In some cases, they may also express a view about the defendant's assessed risk of reoffending. The Council is not aware of specialist reports being obligated to use specific assessment tools[5] when undertaking risk assessments.

Predicting the risk level a person may pose in the community on their release from custody and identifying programs that may assist reducing that risk at time of sentence is difficult. Risk factors are both static and dynamic, and even when undertaken with validated tools, the assessment of an individual's risk of committing further serious offences is an imperfect exercise.[6]

The Council's preliminary findings from the sentencing remarks analysis found that PSRs were rarely used in rape cases and not at all in sexual offences cases. However, psychological reports (mostly provided by defence counsel) were more commonplace.

6.1.2 What do other jurisdictions do?

In other Australian jurisdictions, PSRs are commonly required by a court when imposing a sentence for a community-based order[7] such as an intensive correction order,[8] a home detention order[9] or a community correction order.[10]

For example, in the Northern Territory, courts may order pre-sentence reports and receive 'such information as it thinks fit to enable it to impose the proper sentence'.[11] This may involve a Forensic Psychological Assessment.[12] PSRs may include details about the person's social, employment, medical and psychiatric histories, educational background, circumstances of any past offending, any special needs and 'any courses, programs, treatment, therapy or other assistance that could be available to the offender and from which the offender may benefit',[13]

As is the practice in Queensland, defence counsel often provide judges with specialist medical or psychological reports.

6.1.3 Council's previous findings

During the Council's review of the serious violent offences ('SVO') scheme, we heard from stakeholders that while PSRs were often desirable to help judicial officers make informed decisions about a person's risk, there were concerns about making such assessments mandatory. Many stakeholders, including participants in the SVO expert interviews, noted that availability and quality of such assessments across Queensland would be limited and could lead to substantial delays in sentencing. Further, endeavouring to predict offender risk years in advance of a person being eligible for parole was viewed as problematic, with the view being that risk is best assessed at the time the offender is reaching their parole eligibility date.

Pre-sentence and psychological reports: Sentencing remark preliminary findings*

Preliminary observations from the sentencing remarks analysed indicate limited mention of 'pre-sentence reports' ('PSRs'). For rape offences only 6 of the 70 sentencing remarks coded mentioned a PSR being submitted, while there was no mention for sexual assault offences (n=51). It was more likely for a 'psychological report' to be referred to (rape: 16/70; sexual assault: 10/51). It was unclear whether any or all of these reports were obtained by court order (s 344 of the *Corrective Services Act 2006* (Qld)) or by the defence.

In many instances a report was used to establish the person's mental health, either at the time of the offending or their current mental state which might help to inform the sentence:

> The psychologist states that you would face considerable hardship in a custodial environment because of your psychological vulnerabilities and your history of thoughts of deliberate self-harm. Furthermore, your relationships with other people may prove difficult in prison; however, sensibly, your counsel, XXX, did not suggest that a sentence that did not involve any custodial component was appropriate. (MCL5_R1)

Psychological reports were also commonly used to inform the court of an opinion on the person's risk of reoffending and their prospects of rehabilitation:

> In determining the appropriate sentence, I must have primary regard to the impact of your offending, and the protection of the community. The impact of your offending has been enormous. The report that has been provided to me indicates that the writer's opinion is that you are a low-risk of reoffending. Importantly, you are willing and desirous of undertaking courses in prison in order to reduce any risk you have of reoffending. General and personal deterrence are important considerations in the exercise of my discretion. The sentence I impose must deter others who consider sexually abusing children. It must deter you from doing so again, and it must denounce your conduct on behalf of the community.
>
> ... It must also, of course, balance those features against your prospects of rehabilitation, which appear to be good because of your now expressions of regret, your acknowledgment of the impact of your offending, and your desire to undertake courses to reduce any risk of reoffending. (MCM5_R5)

This may be useful for a court in deciding how to structure a sentence and whether supervision is necessary:

> You have been offered multiple opportunities in the form of probation orders to address your offending behaviour, but by virtue of your attitude to those orders and the fact that you reoffended in similar ways, that would suggest, and it is consistent with the report of Dr XXX, that I am sentencing you as an offender who is a medium to high risk of reoffending. The only way to structure your sentence, therefore, will be to structure it such that you would be under the supervision of the parole authorities upon your release, whenever that might be." (RL5_R3)

The absence of a report may hinder a court's ability to assess a person's risk of reoffending:

> As I have indicated, protection of the community, of children, from your risk of reoffending is, in my view, the paramount consideration in determining the appropriate sentence. It is very difficult for me to assess your risk of reoffending because there is no material that has been placed before me, psychiatric or psychological, to indicate what your risk of reoffending might be." (RL5_R3)

A report can be a useful resource for the sentencing court:

> It was quite obvious to me, having regard to the offending,...that there were clearly some psychiatric concerns regarding your behaviour that needed to be the subject of a specialised report and an assessment by a psychiatrist. Both the pre-sentence report and the psychiatric report ... have been particularly helpful. (RL5_R3)

* These results should be interpreted with caution. The findings presented are from the partial coding of sentencing remarks that was completed at the time of the writing. They may be subject to change on completion of the coding and analysis of the full study sample: see section *Consultation Paper: Background*, Chapter 1.

Similar issues were raised by stakeholders during our earlier review of community-based sentencing orders, imprisonment and parole options. Members of the Council's Aboriginal and Torres Strait Islander Panel during that review were among those recommending no change be made to the current requirement for PSRs. They recommended that PSRs should include cultural reports, culturally safe screening, and assessment tools for people with cognitive disability and should consider the impact to the family of the offender if imprisonment were to be imposed.[14]

In that earlier review, we also acknowledged support for the expansion of the availability of PSRs and the court advisory service then operating out of the Brisbane Magistrates Court, noting the benefits identified of this type of pre-sentence advice, including better support being provided to courts in making informed sentencing decisions.[15]

6.1.4 The Women's Safety and Justice Taskforce recommendations

The Taskforce supported the expanded use and availability of PSRs recommending:

> 129. The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence progress amendments to the *Penalties and Sentences Act 1992* and the *Corrective Services Act 2006* to require a court to consider ordering a pre-sentence report when determining whether a community-based order may be suitable for an offender who is otherwise facing a period of imprisonment …
>
> 130. Queensland Corrective Services develop and implement a plan for the sustainable expansion of court advisory services across Queensland to support greater use of pre-sentence reports …[16]

It agreed that 'as part of the expansion of PSRs, QCS would need to build its capacity to provide a trauma-informed and culturally-safe service for the preparation of PSRs'.[17]

The Taskforce suggested that 'legislative amendments should require a court to consider ordering a PSR, and should enable the court to request specific information from QCS'.[18]

The Queensland Government has given its in principle support for the Taskforce's recommendations,[19] and work on the expansion of these services has commenced.[20]

6.1.5 Stakeholder views

Legal stakeholders who participated in subject matter expert interviews identified a need to improve the information available to a court in support of sentencing relating to risk of reoffending.

They told us psychological reports were on the whole mostly useful, helping judicial officers to understand how the sentenced person's personal history and mental health 'affects their moral culpability for their offence'.[21] Practitioners qualified this view by emphasising that the quality of a report is critical[22] and some questioned the weight that can be given to a report based solely on a sentenced person's self-reporting.[23] One practitioner said although PSRs can be ordered by the court, unless there was also a psychiatric evaluation of the person and 'an ability to verify the information which is provided, they're not all that useful'.[24] Others agreed, stating many psychologist reports were 'very deficient'[25] because they were not always 'accurate',[26] they sometimes 'uncritically accept everything a defendant has said'[27] and 'contain no reasoning for the conclusions that are being reached'.[28]

Participants told us that court-ordered reports, and psychological reports more generally, can be expensive and they are 'only worthwhile' if 'directed at particular issues like the risk of reoffending'.[29] One practitioner was critical of the risk of reoffending actuarial tools often used because they were developed overseas a long time ago, so the assessments may not be accurate for the current context.[30]

PSRs prepared by QCS under the *Corrective Services Act 2006 (Qld)*[31] ('CSA') are given to both the prosecution and defence, and concerns were raised about this process when a report contains information that is not in the defendant's interests.[32] Practitioners further noted that defence counsel will generally not submit specialist reports if findings are likely to be adverse to a client, regardless of a report's quality.[33] One practitioner thought PSRs prepared under the CSA were 'the most effective and powerful kind of presentence report' because they were 'impartial' and the court received it 'irrespective of whether or not there's something prejudicial to the accused in there'.[34]

Information identified that would be beneficial for a court to have access to included:

- psychological or psychiatric reports for victims to supplement and support information contained in victim impact statements;[35]
- psychological or psychiatric reports for people sentenced to help a court to understand the possible reasons why a person acted as they did (acknowledging that legal representatives often do seek these reports) [36]

Some practitioners told us it can be difficult to get funding for psychological reports,[37] with one practitioner advising that legally aided funding for these reports often runs out towards the end of the financial year, which can then push a sentence to the new financial year so that a report can be obtained.[38]

Additional challenges in courts having access to psychological and psychiatric reports were discussed for people who identified as being Aboriginal and Torres Strait Islander, including funding issues and the additional time that may be required to produce such reports.[39]

How reports prepared by psychologists are received by sentencing courts and their views of them may differ because psychologists cannot make a medical diagnosis.[40]

6.1.6 Question

The Council's considers that sentencing decisions for sexual assault and rape should be informed by the best available evidence of a person's risk of reoffending. The Council has heard during the preliminary stages of this review that pre-sentence and psychological reports are useful to assist a court to understand a person's risk of reoffending and how the sentenced person's history and mental health have contributed to the offending. We note that typically reports are prepared and submitted by the offender's legal representatives. There may be some concern about their utility when largely based on a person's self-reporting and there can be variation in quality of information included. The Council has noted in previous reviews that there is often limited information about a person's risk of reoffending available to a court at the time of sentence. Although a court may order a pre-sentence report be prepared by QCS,[41] this is not common.[42]

The Council notes that assessing a person's level of risk requires consideration to be given to the seriousness of the offence (the harm to victim and culpability of the offender), as well as the offender's personal history and antecedents. It is therefore important that information about a person's risk, where available, is considered alongside other information presented about the person's individual circumstances to assist the court in arriving at an appropriate sentence.

The Council invites feedback on what type of information is important when sentencing sexual offences to support courts in imposing the most appropriate sentence.

Question: Information to inform sentencing	
15.	**What type of information is important in sentencing sexual assault and rape offences to ensure courts are supported in imposing an appropriate sentence? How well is the current approach working and how could it be improved?**
General considerations *You might think about:* • recommendations made by the WSJ Taskforce to expand the availability of court advisory services across Queensland and the greater use of pre-sentence reports; and • problems and limitations in assessing a person's risk of reoffending and how this might impact sentencing, including human rights considerations.	**Legal and other considerations** *You might think about:* • any issues that apply in practice that might prevent a court having access to relevant information about the person being sentenced and how these might be addressed; and • how medical reports, including psychological reports, are currently used, what information is included in these reports and any barriers to their use (for example, due to associated costs).

6.2 Cultural reports and submissions

6.2.1 Community-justice group submissions

Discussed in section 3.3.4, when a person identifies as an Aboriginal or Torres Strait Islander person, submissions can be made from a community justice group (CJG) representative that are relevant to sentencing. This may include information about the 'offender's relationship to the offender's community' and 'any cultural considerations', which a court must consider.[43] The Court of Appeal has acknowledged that submissions from a CJG representative should be given great weight.[44]

When providing a report (written or oral) to a court for sentencing, the CJG representative must advise the court whether:

- any member of the CJG that is responsible for the submission is related to the offender or the victim; or
- there are any circumstances that give rise to a conflict of interest between any member of the CJG that is responsible for the submission and the offender or victim.[45]

CJGs operate in over 41 Queensland communities[46] and perform a variety of activities to support Aboriginal and Torres Strait Islander peoples, including preparing and presenting sentencing submissions to the Magistrates Court and Murri Court.[47]

The most recent evaluation of CJGs (Phase 2 evaluation) reported:

- In 2021–22, CJGs made 444 sentence submissions [367 oral submissions (83%) and 77 written submissions (17%)],[48] but this was likely to be a significant undercount.[49]
- In 2020–21, CJGs made 587 oral submissions and 190 written submissions.[50]

CJGs are funded to operate in the Magistrates Courts, but the Phase 1 evaluation noted CJGs provide cultural reports to Mount Isa and Thursday Island higher courts.[51] The Women's Safety and Justice Taskforce recommended the District Court consider establishing a Murri Court program within the District Court.[52] This recommendation was supported by the Queensland Government,[53] and progress on implementation of this and other recommendations in 2023–24 will be reported on as part of the Women's Safety and Justice Reform annual report.[54]

The Phase 2 Murri Court evaluation noted advice that CJGs:

> do not provide cultural reports for all defendants in mainstream courts – this will often be decided with the legal representatives and will be affected by whether it is considered that a report will improve the court's ability to make a better decision and whether the defendant is willing to provide information for the report.[55]

The majority of judicial officers reported they were satisfied with the information CJGs were providing, but only half felt satisfied with the information given in respect of locally available alternative options, such as cultural mediation.[56]

In a speech delivered by His Honour Judge Glen Cash QC, his Honour considered 'cultural considerations' is 'appropriately unconstrained'.[57] His Honour considered:

> A very important, and to my mind an underutilised, part of the provision is the requirement to have regard to community programs and services of offenders. Where such programs exist, they will have an important part to play in the rehabilitation of offenders.[58]

His Honour encouraged broader and more imaginative submissions to be made by legal practitioners regarding cultural considerations referred to in the relevant section of the PSA.[59] This might extend, for example, to 'consideration of non-corporal extra-curial punishment (such as exclusion from community or shaming) or … forms of alternative dispute resolution' and factors that might be relevant to assessing a person's level of culpability.[60]

6.2.2 Pathway to Justice Report

The Australian Law Reform Commission (ALRC), in its 2017 *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* report, noted that one of the key factors leading to the introduction of section 9(2)(p) was 'the over representation of Aboriginal and Torres Strait Islander peoples in custody, and the need for greater community-based culturally appropriate options'. [61] This provision 'was intended that submissions from community justice groups would give the sentencing court insight into the 'reasons for the offending behaviour and relevant cultural and historical issues'.[62]

The ALRC referred to a submission from Caxton Legal Centre which noted the limitations of the provision included that it does not require a submission from a CJG to be sought and there is no requirement to recognise or take into account the ongoing systemic background impacting Aboriginal and Torres Strait Islander peoples.[63]

As discussed in section 3.3.4, proposed changes to the PSA implementing recommendations made by the Women's Safety and Justice Taskforce will change this position by requiring courts to take into account, 'if the offender is an Aboriginal or Torres Strait Islander person—any cultural considerations, including the effect of systemic disadvantage and intergenerational trauma on the offender'.[64]

The ALRC's report made 2 recommendations in relation to information provided to a sentencing court about Aboriginal and Torres Strait Islander culture and history. They were that states and territories should:

- introduce 'Indigenous Experience Reports' for Aboriginal and Torres Strait Islander peoples appearing for sentencing superior courts; and
- develop options for the presentation of information about unique systemic and background factors that have an impact on Aboriginal and Torres Strait Islander peoples in courts of summary jurisdiction, including through Elders, community justice groups, community profiles and other means.

6.2.3 What happens in other jurisdictions?

Many jurisdictions in Australia and overseas are required to take cultural considerations into account when sentencing. However, few jurisdictions have legislated that specific cultural reports be produced for the purposes of sentencing.[65] In many cases the 'cultural background' of a person is a matter for inclusion in a pre-sentence report, rather than a report in and of itself.

In Canada, a sentencing judge is required to consider 'sanctions other than imprisonment that are reasonable in the circumstances' and 'the unique situation of the Aboriginal offender'.[66] *Gladue* reports[67] are pre-sentence reports prepared by *Gladue* caseworkers at the request of the judge, defence or Crown. The report contains information about the Indigenous person, their family and community.[68]

In 2018 the Victorian Government funded a project piloting Aboriginal Community Justice Reports over a 5-year period.[69] The reports are modelled on Canada's *Gladue* reports. The Victorian Aboriginal Legal Service is undertaking the project in partnership with the Australasian Institute of Judicial Administration, University of Technology Sydney and Griffith University.[70] The project is also being run in Queensland through Five Bridges Aboriginal and Torres Strait Islander Community Justice Group.

6.2.4 Stakeholder views

Several participants of the Council's subject matter experts interviews told us it was rare for there to be a cultural report, CJG report and/or submission at sentence.[71] Where there was cultural information, legal stakeholders observed that the quality of cultural information placed before the court at sentence for sexual assault and rape varies.[72] Interviewees considered some reasons for this included limited funding, services, practitioners being overworked and the experience of the legal practitioner.[73] Two legal stakeholders also considered where a person was from a First Nations community (either a victim or a person being sentenced), the person may be reluctant to discuss the offence and may experience shame.[74] As explained in one interviewee, 'there was this deeply entrenched culture of you just do not talk about it. It's very – it's considered a very shameful thing to talk about.'[75]

CJG cultural reports and advice were viewed as particularly helpful in more remote areas of the State (such as Cape York and the Torres Strait), with some noting the difficulty in obtaining reports in urban centres, particularly in south-east Queensland.[76] In circumstances where submissions were made by a CJG, these were viewed as very useful because of the additional information about the person's background, offering a different perspective and also providing helpful information about the support they were offering the person as well and programs with which they already engaged or attempting to engage in.[77]

Improvements suggested were to make submissions and cultural reports more readily available across Queensland.[78]

One participant cautioned that in their experience sometimes divisions between families in a discrete community were reflected in the CJG willingness (or not) to speak at court.[79] They suggested that it would be beneficial if a third party, such as the Aboriginal and Torres Strait Islander Legal Service, compiled information 'from other sources within the community so that the defendant's position is properly placed before the court'. Similarly, police should be able to access information about the complainant. The participant noted that both sides would need to be appropriately resourced.

Some interviewees also told us that for other cultural groups, it would be beneficial to have more information about the person being sentenced to better understand their upbringing and background.[80] It was noted that sometimes this information was provided by community leaders. A suggestion was made that this practice should be promoted to defence lawyers to ensure this type of information is able to be provided without the need for a court to suggest this, giving rise to a need for an adjournment.[81]

6.2.5 Question

The Council is committed to improving its awareness and understanding about the impact of sentencing on Aboriginal and Torres Strait Islander peoples, including identifying and addressing the drivers of disproportionate representation.

The Council acknowledges the importance of a sentencing court being made aware of cultural considerations when sentencing a person. The Council is also aware of the important and valued service provided by CJGs, while noting that not every person who identifies as Aboriginal or Torres Strait Islander person will have access to this type of support.

The Council invites feedback on how cultural considerations are being considered at sentence and if there could be any improvements made for Aboriginal and Torres Strait Islander peoples and in supporting those from other cultural backgrounds.

Question: Information to inform sentencing – cultural considerations

16. How well does section 9(2)(p) of the *Penalties and Sentences Act 1992* (Qld) currently allow for courts to take community and cultural considerations into account in sentencing people who identify as being Aboriginal and Torres Strait Islander through submissions made by local community justice groups?

Could any improvements be made to better inform courts in sentencing people who are Aboriginal and Torres Strait Islander or from another cultural background about relevant considerations?

General considerations

You might think about:

- the current requirement for a court in sentencing an Aboriginal or Torres Strait Islander person, to take into account any submissions made by a representative of the community justice group in the person's community relevant to sentencing the person, including the person's relationship to their community and any cultural considerations;
- any barriers to this information being presented to courts to inform sentence.

Legal and other considerations

You might think about:

- any issues with the operation of s 9(2)(p) in practice, including in facilitating community justice group members' submissions;
- how courts can take cultural considerations into account in the absence of such submissions;
- how information about cultural considerations for people who are not Aboriginal or Torres Strait Islander is currently put before the courts to inform sentence and if any improvements could be made.

Chapter 7 Understanding victim harm and justice needs

7.1 Introduction

Understanding the harm caused to a victim is an important part of sentencing as this helps determine the overall seriousness of offence and what sentence should be imposed. That is why principle 3 of the Council's review is 'sentencing outcomes for sexual assault and rape offences should reflect the seriousness of these offences, including their impact on victims, while not resulting in unjust outcomes'. See the *Consultation Paper: Background*, Chapter 11 for more information.

How courts understand the impact of sexual assault and rape offences on victim survivors is reflected not only in the sentencing outcome but also the approach taken by the judicial officer during sentencing. This includes the way judicial officers speak about the impact of the offending on a victim survivor and the extent of references to this.

7.2 Victim survivors' needs, rights and voice in sentencing

For many victim survivors, sexual violence offending can have significant and lasting impacts on their mental and physical health and wellbeing.

The Victorian Law Reform Commission ('VLRC') in its final report on its inquiry into improving the justice system response to sexual violence found that victim survivors have particular justice needs.[1] These were identified as:

- the **need for information** about how the criminal justice system works and what to expect;
- the **need for participation** – to know how their case is progressing and about key decisions and their role in the criminal justice process;
- **having a voice** – being able to tell 'their full story in their own words';
- **validation** – being believed and heard, and having 'a concrete outcome' from reporting the abuse;
- **denunciation and accountability** – having the sexual violence 'clearly condemned' and those responsible facing consequences for their actions; and
- **support** – including in the form of counselling and support during the court process.[2]

Research shows victim survivors' satisfaction with the criminal justice process is affected by how they are treated throughout their journey and not just the outcome of the sentencing.[3] Both procedural justice and substantive justice aspects are important.

Many victim survivors of sexual violence told the Women's Safety and Justice Taskforce ('WSJ Taskforce') they were retraumatised by the justice system.[4] The WSJ Taskforce observed that:

> Therapeutic support and advocacy can help reduce or mitigate some of these aspects, including by reducing the risks of re-traumatisation. Access to support while engaging with the criminal justice system can improve justice outcomes, reduce attrition, and improve victims' overall experience.[5]

7.2.1 Rights of victim survivors

In Queensland, victim survivors have rights under the *Charter of Victims' Rights* ('Charter') in Schedule 1AA of the *Victims of Crime Assistance Act 2009* (Qld) ('VOCA Act') and in sentencing via the *Penalties and Sentences Act 1992* (Qld) ('PSA').

The rights of victims in the Charter include general rights, such as to 'be treated with courtesy, compassion, respect and dignity, taking into account the victim's needs'.[6] They also include specific rights relating to the progress of matters through the criminal justice system, including being kept informed at key stages of the process. In the case of 'eligible persons',[7] they also have rights following sentence to be kept informed about an offender's period of imprisonment, transfer to another facility or escape from custody, and to make written submission to the Parole Board about the granting of parole.

The rights of victim survivors as outlined in the Charter reflect different aspects of procedural justice. Adherence to these principles is important to victim survivors feeling heard and part of the process. Victims' rights to be kept informed at key stages of the criminal justice process are discussed further in section 10.3.3.

7.2.2 Office of the Interim Victims' Commissioner

The Queensland Government has established the Office of the Interim Victims' Commissioner in response to 3 separate inquiries identifying the need for such a body to promote and protect the rights and needs of victims of crime.[8]

The Interim Victims' Commissioner has committed to 'engage with victims of crime, families of victims, victim support services and criminal justice agencies to hear about victims' experiences in the criminal justice system'.[9] The functions of the office include to:

> Raise awareness of the rights of victims of crime and the services available;
>
> Identify, develop and provide additional accessible resources for victims of crime to understand their rights, the criminal justice process and how to access support and assistance; and
>
> Identify the training needs for government agencies to interact with victims in a trauma informed manner.[10]

A permanent Queensland Victims' Commissioner will be appointed by the end of June 2024.

7.2.3 Victim survivors' voice in sentencing

Victim impact statements

When determining an appropriate sentence, Queensland courts must consider any physical, mental or emotional harm done to a victim because of the offence.[11] Courts are informed of the harm caused from the details of the offence/s set out in the statement of fact, prosecutor submissions to the court and, if provided, a victim impact statement ('VIS').[12]

A VIS is a written statement by the victim detailing the harm caused to them from the offence.[13] A VIS is the primary means for victim survivors to tell the court and the person who has harmed them in their own words how the offending behaviour has impacted them. A VIS can also be made by a family member or dependent of a person who has died or suffered harm or as a direct result of intervening to help a person who has died or suffered harm.[14] The victim of an offence may give the prosecutor details about the harm caused for the purposes of informing the sentencing court. If details of harm are provided to the prosecutor, the prosecutor must:

- decide what, if any, details are appropriate to be given to the court; and
- give the appropriate details to the court, whether or not in the form of a VIS.[15]

A VIS should be written only by the victim. It can include details about physical injuries, emotional and financial impacts to the victim and/or their family and how the offence has changed their life. It can also include other documents such as 'medical statements, poems, photographs or drawings if they help [the victim] communicate the effects the crime has had'.[16] However, the VIS should not merely involve a restating of the factual circumstances of the offending (of which details are provided to the sentencing judge by the prosecutor) and should provide the court with further information about the impact of the offending on the victim survivor.

A VIS should only refer to information related to the act of violence the person is actually being sentenced for, not necessarily the original offence charged by police. As a consequence, information that is not allowed to be included in a VIS may be struck out by a prosecutor prior to sentence to ensure that inadmissible evidence is not put before the court.[17] The prosecutor may either blank out the inadmissible evidence themselves or may request for the victim survivor to amend it if there is sufficient time to do so. This might include: details in relation to other crimes committed by the offender, including offences for which the offender may have been charged with, but not yet found guilty of; any medical conditions the victim survivor alleges were caused by the offending which are not supported by medical documentation; anything that is factually incorrect or unsupported by evidence before the court; and the victim survivor's own opinion about the character of the person or the sentence they should receive. Facts stated in a VIS can be accepted and relied upon by the sentencing court, if they are admitted and not challenged.[18] If the facts outlined in the VIS are not admitted by the person being sentenced, or are challenged by them, the sentencing court must be satisfied on the balance of probabilities as to the truth of those facts.[19]

The Queensland Court of Appeal has reiterated that 'facts put forward by the prosecution in the victim impact statement are not to be ignored. They must be given their due weight'.[20] The Victorian Court of Appeal has explained why this is an important sentencing consideration for sexual violence offences:

> Rape is an intensely personal crime. The effects on the victim are not just those that flow from the physical invasion of their person and security, but also from the more intangible loss of their rights and freedoms. This is the significant impact of rape on the victim. It needs to be given proper weight in sentencing; it cannot be overlooked or undervalued.[21]

A victim can request to read all or part of their statement in court or can request for the prosecutor to do so.[22] The purpose of reading the VIS aloud is to provide a 'therapeutic benefit the victim'.[23] Any such request should be granted by the court unless, in all relevant circumstances, it is inappropriate to do so.[24]

Absence of victim impact statement

Sometimes a victim may not want to make statement. The reasons for not making one may be deeply personal to a victim survivor, such as not wanting the perpetrator to know the impact of their offence, fears it would provoke retaliation or provide the offender (or others) with information to use against the victim survivor in future.[25] The WSJ Taskforce noted in Report 2 that often VISs were 'not provided to Magistrates Courts for sentencing'.[26]

The absence of a statement does not 'give rise to an inference that the offence caused little or no harm to the victim.'[27] Chief Justice Bowskill recently observed in a decision of the Court of Appeal:

> Merely because a victim does not wish to provide a victim impact statement does not prevent the court from either acting on a submission that the offence nevertheless may be inferred to have caused harm, nor from forming a view – having regard to the circumstances of the offence – as to whether the offence may have caused harm. For this purpose, “harm” means physical, mental or emotional harm (see s 179I). The express statement in s 179K(5) that an absence of impact “cannot be inferred” necessarily carries with it the notion that the presence of (some, or even significant) impact may be inferred.[28]

However, if there is no VIS, this may be used to distinguish the case from others.[29]

In 2018, the New South Wales Law Reform Commission ('NSWLRC') reviewed VISs and recommended that the provision relating to court’s treatment of an absence of a VIS be strengthened. The original provision was worded the same way as the current Queensland provision, that is, 'the absence of a victim impact statement does not give rise to an inference that an offence had little or no impact on a victim'.[30] The NSWLRC recommended this section be amended to state that the court is prohibited from drawing 'any inference' from the absence of a VIS. This wording was modelled on provisions in the Australian Capital Territory and Northern Territory.[31] This recommendation was accepted and subsequently legislated by the New South Wales Government.[32]

Importance of VIS in sentencing

VISs were introduced to the Australian justice system in the 1980s to 'improve victim’s experiences of the justice process' and to meet their justice needs of participation and having a voice.[33] They have 2 underlying purposes: (1) as an instrumental tool used by judicial officers to identify the harm caused for the purposes of determining the sentence; and (2) as a communicative or expressive tool, providing a victim survivor with the cathartic opportunity to tell the court, offender and public the harm caused to them.[34]

Canadian research has found when victims attend the sentencing hearing, they 'appreciate judicial recognition of their suffering'.[35] However, even when a victim has chosen not to attend the hearing, sentencing remarks which acknowledge a VIS may have a positive effect on victim satisfaction.[36] A 2007 Scottish study found almost two-thirds of victims who submitted a VIS 'affirmed that the statement made them feel better'.[37]

A recent Australian study into VISs in sentencing sexual offences found the nature and level of acknowledgment by judicial officers of victim harm was important in meeting victims’ needs for voice, validation and vindication in sentencing.[38]

The same Australian study revealed there was 'widespread uncertainty' about how VISs can or should be used by the court due to the inconsistency between the instrumental and expressive approaches.[39] The study recommended the *Canadian Multi-Functional Model for Victim Impact Statements* be adapted to the Australian context. The model combines instrumental and expressive approaches to impact statements, 'however where these are inconsistent, it priorities a victim focus, without subordinating due process for the offender'.[40]The Australian research also found there were communication difficulties between victim survivors and justice professionals, including the provision of timely information about their case and the sentencing process.[41]

Victim impact statements: Sentencing remarks preliminary findings*

Based on direct references made in sentencing remarks to VISs, preliminary findings from sentencing remarks analysed indicate that it is slightly more common for a VIS not to be provided than provided. Across rape and sexual assault offences (n=121), VISs were identified in 46.3% of cases. It was more common to see VISs provided for rape offences (57.1%, n=40/70) compared to sexual assault offences (31.4%, n=16/51).

When there was a VIS, the degree to which it was referred to within sentencing remarks varied and there was no uniform approach. In some instances, the magistrate or judge limited their remarks to a simple recognition that a VIS was present. This provided little insight into the harm caused to the victim survivor and how this was considered in determining the sentence. For example:

> I have read the victim impact statement which is exhibit 3. (HCMNC_SA1)

Other times, the victim impact statement was summarised by the court. The length and depth of these summaries varied greatly. Some were in the form of short, general remarks:

> She sets out in her victim impact statement, which is exhibit 9, the consequences of your offending upon her. These include self-harming, suffering significant anxiety, suffering from nightmares, and having difficulties trusting other people. (MCM5_R2)

> The complainant has provided two victim impact statements. She has suffered immeasurably from your callous, cowardly, and degrading acts. She was sickened and terrified during the ordeal. Sadly, she continues to suffer devastating emotional adverse impact. (MCL5_R11)

More commonly, remarks contained greater detail about the harm caused, drawing on content from the victim impact statement:

> There is a victim impact statement before me, which shows that the offending had a significant impact upon the complainant. She was reluctant or scared to disclose the conduct, and kept it to herself, and it has then, after the complaint was made, caused some further problems for the complainant within the family relationship. And so there has been, it would seem to me, a significant psychological impact upon the complainant, as a result of your offending. (HCRNC_SA2)

> The offending has had a profound effect upon the complainant. She wrote a victim impact statement, which is exhibit 3. She read out her statement here in Court and described the terrible impact that your conduct has had upon her life. She has endured pain. She has been traumatised mentally. She feels anxious and fearful. Her symptoms of XXXX have been exacerbated by constant distress. She feels unsafe and insecure. She has become withdrawn, moody and aggressive. Therefore, your rape of the complainant has had a devastating impact upon her. (MCL5_R1)

> Your offending on her has had obvious consequences. I have before me a victim impact statement which speaks of the sorts of impacts which offending of this kind can have on vulnerable young women. It speaks of the emotional impact upon the complainant and upon her family. It speaks of the effect it has had on how she sees herself, as well as others. It details self-loathing that the offending has triggered and the self-harming that she has taken to. It is to her credit that she had the courage to report the offences and to go through the legal process to give evidence, notwithstanding the effects upon her, such effects being evident in her emotionally fragile state whilst she gave evidence, and again today as she read parts of her victim impact statement. (MCL5_R6)

There were also examples of the sentencing judge or magistrate discussing, at length, the harm caused. This included reading out the victim survivors own words from their victim impact statement. However, this approach was not the norm.

In the absence of a victim impact statement, sentencing judges and magistrates nevertheless acknowledged the harm caused by sexually violent offences and the potential for significant long-term consequences:

> Though there's no victim impact statement before me, it would be something that would distress any woman and it would be something that would have, I would expect, a significant effect on any person. (LCMNC_SA4)

> Whilst no victim impact statement has been provided, the reality of sexual assault is that it can have unique and longstanding adverse consequences for victims. His distress at what you did immediately after your offending against him is apparent from the statement of facts. (HCMC_SA8)

> The complainant did not wish to provide a victim impact statement. That is not uncommon in cases of this kind. I have no doubt it would have been a terrifying event for her. She was clearly distressed immediately after the event. She has provided instructions that she wishes to extend the domestic violence protection order for as long as possible and does not wish to vary any of the conditions in it. I have no doubt that the complainant suffered significant emotional harm during the incident. (RM5_R9)

* These results should be interpreted with caution. The findings presented are from the partial coding of sentencing remarks that was completed at the time of the writing. They may be subject to change on completion of the coding and analysis of the full study sample: see the Council's approach outlined in the *Consultation Paper: Background*.

What do other jurisdictions do?

The High Court and Courts of Appeal across Australia all have recognised the increased understanding of the 'long-term harm done to the victim' because of sexual offences.[42] For example, in New South Wales the impact of child sexual abuse does not need to be proven beyond reasonable doubt (the standard of proof which applies in that jurisdiction for proving facts adverse to the accused at sentence)[43] and can be inferred.[44]

As in Queensland, VISs are a common mechanism used by Australian courts to understand the harm caused to a victim. There are differences between jurisdictions as to how the supporting legislative provisions are framed, such as in:

- **South Australia:** A defendant is required to be present in court when a statement is read aloud, unless special reasons exist which make it inappropriate.[45]
- **Northern Territory:** A victim may make an oral or written statement detailing the harm suffered from the offence, which they consent to being presented in court.[46] When a victim does not consent to a VIS[47] or they are incapable of giving consent to a VIS, a prosecutor may instead present a victim report.[48] A court must take into account a VIS or victim report unless a copy has not been provided to the offender.[49]
- **Australian Capital Territory:** For serious offences[50] a prosecutor may request a sentencing adjournment for the preparation of a VIS.[51] The court must grant the adjournment for a reasonable period to allow the statement's preparation unless there are special circumstances not to.[52]
- **Victoria**: The Victorian legislation includes a statement about Parliament's intention that courts have regard to the VIS which 'allows the victim to tell the court about the impact of the offence on the victim' and that a VIS 'is not inadmissible merely because it contains subjective or emotive material'.[53] The entitlement to provide a VIS is independent of the prosecution's role at sentencing and is a principle of the *Victims' Charter* and an entitlement under the *Sentencing Act 1991* (Vic).[54]
- **New South Wales:** Where a primary victim is incapable of preparing a VIS due to 'age, impairment or otherwise', a representative may provide information, prepare a VIS, read a VIS and object to the tendering of a VIS.[55] Anything done by the representative in accordance with the Act is taken to have been done by the victim.[56]
- **Tasmania:** When providing a VIS to the court, a victim may request that they, the prosecutor or a person nominated by the victim read the statement during the sentencing hearing.[57] A court must allow such a request.[58]

7.2.4 Stakeholder views

Preliminary submissions and consultation

Preliminary submissions discussed the harm sexual violence offences cause victims with a strong view by some that sentencing practices did not reflect this in outcomes.[59] For example, the Northern Queensland Women's Legal Service said their clients told them 'the lasting impacts on their lives [from this form of offending] was not reflected in the sentencing process or outcome'.[60]

Similarly, Full Stop Australia told the Council:

> The giving of non-custodial sentences, or low custodial sentences, in sexual violence and child sexual abuse matters can be retraumatising to the victim-survivors of those crimes. It can have significant and lasting impacts on their recovery, by signalling to them that the harm they experienced was not considered serious.[61]

While VISs were not raised as an issue, some victim survivors and support agencies the Council consulted with during early consultation suggested the striking out of non-admissible material from their statement made them feel as if the full story of what happened to them and its impacts was not properly acknowledged at sentence.[62] An example given was where the acts had originally been charged as one offence, such as rape or attempted rape, and the VIS prepared on this basis, but a plea to a lesser charge had been negotiated. This impacted on how useful victims found the making of a VIS to be and their levels of satisfaction with the sentencing process. The issue of plea negotiations is discussed in section 10.3.

Subject matter experts

Several legal stakeholders confirmed difficulties in obtaining VISs and acknowledged that in some cases the victim may not wish to provide one.[63] The absence of these statements and other information (such as psychological and psychiatric reports) was viewed by some as presenting a barrier to ensuring the impacts on the victim were acknowledged in sentencing remarks.[64] This was tempered by a view that the harm caused by sexual violence is well known and it is 'reasonable to infer that [the] offence will have lifelong consequences for that person', even if no statement is provided.[65]

Participants noted that even when a VIS is provided it can be challenging to prove the impacts caused by the offence, where a victim survivor has experienced previous trauma and/or has other personal factors such as a mental illness or substance misuse which cannot be attributed to the offence.[66] Similarly, some participants noted the challenges caused by statements including allegations which must be removed or redacted prior to submission. Practitioners acknowledged this could be very difficult for victim survivors to understand.[67]

One legal practitioner thought there is often an imbalance in what is provided to the court in relation to the impact the offence has had on the victim survivor and the character and antecedents of the defendant.[68] Practitioners commented on the lack of guidance sometimes provided to victim survivors about what to include in a statement about the actual impact of the harms experienced.[69]

The challenges in communicating with victim survivors from Aboriginal and Torres Strait Islander and culturally and linguistically diverse ('CALD') backgrounds were also discussed. Practitioners recognised that some Aboriginal and Torres Strait Islander women have difficulty disclosing what has happened to them because talking about certain topics in front of men it is not culturally appropriate.[70] Similar difficulties may also apply for women from CALD backgrounds.[71] However, the use of interpreters for people from non-English speaking backgrounds in court was seen as effective in ensuring they had a voice in the proceedings.[72]

Practitioners generally agreed that timely receipt of a VIS was important as it gave prosecutors time to review the statement for content that was not appropriate for court and for defence counsel to prepare their client for what they will hear or read during sentencing.[73]

7.3 Trauma-informed and culturally responsive practice

7.3.1 About trauma-informed and culturally responsive practice

Another important aspect to criminal justice responses is ensuring that those who come into contact with victim survivors have a basic understanding of complex trauma and how it impacts people who have experienced sexual assault. Trauma-informed practice is increasingly being recognised as important to achieving more effective and compassionate responses to those who have been victimised. Several recent reports and inquiries in Australia and internationally have identified the need for ongoing training in trauma-informed practices for legal practitioners and judicial officers.[74]

Trauma-informed practice is a 'strengths-based framework which is founded on five core principles – safety, trustworthiness, choice, collaboration and empowerment as well as respect for diversity'.[75]

Being trauma-informed for those involved in the sentencing process involves having 'an understanding of trauma and an awareness of the impact it can have across settings, services and populations'.[76] Adopting this perspective helps courts and others involved in the sentencing process to understand the impacts of particular types of offending behaviour, including sexual assault and rape, on victims, as well as its impacts on defendants.[77] The objective of responding in a trauma-informed way is to reduce, and ideally avoid, further trauma.

As a separate but closely related issue, various reports and inquiries have recommended improving judicial cultural competency in relation to Aboriginal and Torres Strait Islander peoples and CALD groups and increasing awareness of particular issues experienced by the LGBTIQA+ community and experiences of people with a disability.[78] In the context of sexual offending, the need for professional development and training can be viewed as particularly critical given the higher rates of victimisation of these groups, which can be further exacerbated where people experience intersecting forms of discrimination and disadvantage.

The Australian Law Reform Commission ('ALRC') has been asked to consider training and professional development for judges, police, and legal practitioners to enable trauma-informed and culturally safe justice responses as part of its current inquiry into justice responses to sexual violence.[79] The ALRC is due to report by 22 January 2025.

See *Consultation Paper: Background*, section 10.9 for more information.

7.3.2 The Women's Safety and Justice Taskforce findings and recommendations

The Taskforce's Reports 1 and 2 made several recommendations relating to training for legal practitioners, including that:

- the Queensland Government consult with key legal professional bodies with a view to establishing an independent Queensland Judicial Commission based on the model of the New South Wales Judicial College, whose role includes providing professional development for judicial officers;[80]
- a trauma-informed practice framework be developed for Queensland legal practitioners;[81]
- the Department of Justice and Attorney-General ('DJAG') develop a consistent evidence-based and trauma-informed framework to support training and education across all parts of the domestic and family violence and justice system with a focus on domestic and family violence;[82]
- the Supreme and District Courts of Queensland consider developing a sexual assault benchbook to support judicial officers and lawyers in sexual violence cases;[83]
- the Director of Public Prosecutions ('DPP') consider the development of a new operating model for the prosecution of sexual violence cases which should include professional development for staff and lawyers at the DPP, including to support trauma-informed responses to victims of sexual violence;[84]
- judicial officers consider participating in professional development about gendered issues and trauma-informed practice relevant to experiences of women and girls as accused.[85]

The Queensland Government accepted the WSJ Taskforce's recommendations and significant work is underway to implement these recommendations.

The Office of the Independent Implementation Supervisor (OIIS) is charged with independent oversight and reporting on the progress and implementation of the Government Response to the Taskforce's recommendations. The OIIS reports biannually on the progress of this implementation.[86]

7.3.3 Training, resources, and national standards

Queensland judicial officers access a range of different training options, depending on the court they preside in. For example, Magistrates must attend the annual Domestic and Family Violence Conference and higher court judges may attend seminars on vicarious trauma,[87] trauma-informed approaches[88] as well as holding annual conferences. Court.[89]

There are also national standards and bench books for judicial officers which apply to all jurisdictions. **The National Standard for Professional Development for Australian Judicial Officers** requires judicial officers to do 'at least five days each calendar year' of professional development.[90] It has been endorsed by all relevant professional associations of the Australian judiciary.

In Queensland, barristers[91] and legal practitioners[92] are required to undertake continuing professional development ('CPD'), with a certain number of CPD points required per year. The mandatory CPD core areas are practical legal ethics, practice management and business skills, and professional skills.[93] CPD programs delivered by different legal stakeholders for barristers and legal practitioners.[94]

Government legal officers and prosecutors working at the DPP and police prosecutors are not required to undertake CPD,[95] however DJAG strongly recommends government legal officers comply with CPD requirements.

For a list of professional development bodies, training and resources, see the Consultation Paper: Background, section 10.9.

7.3.4 Stakeholder views

Preliminary submissions

Only one preliminary submission expressly raised the issue of judicial training, while several submissions referred to the criminal justice system retraumatising victim survivors through the process of giving evidence and from sentencing outcomes which are viewed as inadequate.[96]

The Queensland Indigenous Family Violence Legal Service ('QIFVLS') recommended the Council consider 'the efficacy of judicial training and awareness regarding trauma-informed practices and cultural competency' when undertaking this review.[97] Citing the Australian Human Rights Commission report, *Wiyi Yani U Thangani*, QIFVLS believes: '[a]ny judicial discretion must be used in conjunction with strong and frequent cultural awareness training, together with an appreciation of historic and current community factors to mitigate against discrimination'.[98]

QIFVLS thought sentencing remarks could inform professional development and training for judicial officers regarding cultural awareness and trauma-informed practices. This was specifically raised in the context of the treatment of women and girls in the sentencing of domestic violence offences but might be equally applicable to the sentencing of sexual violence offences more generally.

Relationships Australia Queensland noted justice responses need to address 'the complex intersection of intergenerational trauma and dispossession' experienced by Aboriginal and Torres Strait Islander peoples so there is 'cultural healing to effectively break the cycle of family violence'.[99]

Subject matter experts

Some participants in expert interviews referred to opportunities to enhance understanding of legal practitioners about the harm caused by sexual violence offending.[100] For example, harm may not be fully appreciated in a rape or sexual assault case because typically there is not the same type of evidence available as for other offences, such as CCTV footage of a car crash or an assault in a public place.[101] There was support for opportunities to explore approaches that might better help legal practitioners and sentencing judges understand the reality of this form of offending both from the perspective of defendants and victim survivors.[102]

One practitioner highlighted the importance of language used in the courtroom and in sentencing remarks, and that practitioners need to be mindful of not using words which minimise or trivialise a victim survivor's experience and/or the offender's conduct.[103] The interviewee referred to comments made by Cardinal George Pell's defence barrister to describe the alleged crimes as 'no more than a plain vanilla sexual penetration case' and suggested remarks like those were unhelpful.

7.4 Questions

The Council recognises the important role victim survivors play in sentencing to help the court assess the level of harm (and therefore seriousness of the offending), as well as to better understand the impact the offending has had on their lives in their own words.

We also acknowledge the findings of recent reviews and inquiries which have found that victim survivor of sexual violence justice needs are varied and criminal justice systems need to improve their responses to ensure these needs are met. Information needed by a victim survivor to prepare themselves for the sentencing process may include:

- the purposes of sentencing and how these relate the circumstances of the person being sentenced;
- the duties of the prosecutor in a sentence hearing;
- the purpose and use of maximum sentences and sentence types;
- the role of victim impact statements; and
- the option of applying for compensation or restitution.

Victim survivors who identify as Aboriginal and Torres Strait Islander or from other cultural backgrounds may also have different needs and the impacts of sexual violence offences may be different.

We invite feedback about how current sentencing processes might be improved to better accommodate the needs and interests of all victim survivors.

The Council also invites views on ways to enhance legal practitioner and judicial officers' understanding about the harm and impact of sexual violence offences and improve the current sentencing process for victim survivors of sexual violence. This may also include the ways legal practitioners and judicial officers interact and communicate with and about victim survivors at a sentencing hearing and in their sentencing remarks.

Question: Understanding victim harm and improving current sentencing processes

17. How well do current processes (including the use of victim impact statements) work in Queensland in making sure the harm to a victim is understood and taken into account in sentencing?

18. What would make the current sentencing process better for people who have been sexually harmed?

General considerations

You might think about:

- commitments made by the Queensland Government in response to the recommendations of the Women's Safety and Justice Taskforce and the Legal Affairs and Safety Committee's inquiry into support provided to victims of crime, including regarding professional development and trauma-informed practice;
- information given to victim survivors prior to and following the sentence, including how to write a VIS and to understand its role in the sentencing process;
- support provided to victim survivors during the sentencing hearing and in giving their VIS, including in-court support; and
- how victim survivors are acknowledged by the sentencing judge in the courtroom and comments made by them addressing victim harm in their sentencing remarks.

Legal and other considerations

You might think about:

- how well sections 9(2)(c), 9(3)(c) and 9(6)(c) of the PSA, which require courts to consider the harm done to a victim and their personal circumstances in sentencing, are working in practice;
- current reform work underway to improve responses to victims of crime and the Queensland Government's commitments to implement reforms including to:
    - develop and pilot a state-wide professional victim advocate service for Queensland for victims of sexual violence to provide individualised, culturally safe, trauma-informed support to victims of sexual violence;
    - review the prosecution of matters referred to the DPP involving victim survivors of sexual violence and, in particular, the role and operation of the DPP's Victim Liaison Officers to ensure that timely and correct information is provided at critical points of the criminal justice process;
    - establish an Office of the Victims Commissioner to provide information to victims of crime to help them understand the criminal justice process and their options.

Question: Understanding victim harm and improving current sentencing processes – victim survivors who are Aboriginal and Torres Strait Islander or from other cultural backgrounds

19. For victim survivors who identify as Aboriginal and Torres Strait Islander or from other cultural backgrounds:

(a) how well is the harm caused to these victims and any cultural considerations being acknowledged and taken into account in sentencing?

(b) what would make the sentencing process better for these victims?

General considerations

You might think about:

- what the particular impacts of sexual violence offending are for victim survivors who identify as Aboriginal and Torres Strait Islander or from other cultural backgrounds, including any cultural impacts;
- the availability of and type of support provided to these victim survivors, including where required, access to interpreter services, and whether support is provided in a culturally safe and appropriate way; and
- the court process and whether there are any specific aspects that make it more difficult for victim survivors to attend or participate in the sentencing hearing (e.g., by being given an option to read their Victim Impact Statement aloud in court or to ask the prosecutor to read it aloud for them).

Legal and other considerations

You might think about:

- any practical issues experienced in ensuring Aboriginal and Torres Strait Islander victim survivors or victim survivors from other cultural backgrounds are supported; and
- existing commitments and reform work underway in response to the Women's Safety and Justice Taskforce and the Legal Affairs and Safety Committee's inquiry into support provided to victims of crime (see above).

Chapter 8 Restorative justice approaches

8.1 Introduction

Restorative justice ('RJ') can describe a range of processes to address harm. These processes:

> generally involve an offender admitting that they have caused the harm and then engaging in a process of dialogue with those directly affected and discussing appropriate courses of action which meet the needs of victims and others affected by the offending behaviour.[1]

A defining aspect of RJ is 'the opportunity for parties directly affected by a crime to come together to acknowledge the impacts and discuss the way forward'.[2] Studies into the use of RJ have consistently reported high levels of satisfaction among victims who choose to participate.[3]

RJ processes were introduced as an alternative to traditional criminal justice options for young offenders — mostly in relation to minor, non-violent offences. However, as discussed in Chapter 10 of the *Consultation Paper: Background*, there has been an increasing range of restorative approaches targeting adult offenders and victims of more serious types of crimes, including sexual violence offences.

RJ approaches can operate at different stages of the criminal justice system. Post-sentence models have been favoured by some as likely to be the most suitable for serious and violent crimes because these processes tend to be 'driven by the needs of the victim, take many months to prepare and use advanced facilitators'.[4] Increasingly, however, it has been recognised that these approaches may also be valuable if used across different stages of the criminal justice process.

8.2 The current position

The Dispute Resolution Branch ('DRB') within the Queensland Department of Justice and Attorney-General ('DJAG') operates an Adult Restorative Justice Conferencing ('ARJC') service for adult offenders, their victims and their respective families and provides support in the aftermath of a criminal offence. The service aims to provide an effective forum for responding to offending behaviour by convening a meeting to discuss what happened, who has been affected and how, as well as what needs to happen to address the harm caused. The service works with parties to ensure a referral is suitable and to prepare them for the meeting, ensuring it is not likely to cause further harm.

This service is currently used primarily as a diversionary option for criminal matters at the pre-trial stage, although an RJ conference can also be requested at other stages of the criminal justice process — including as a pre-sentence and post-sentence option.

All restorative justice processes led by the DRB are conducted under the *Dispute Resolution Centres Act 1990* (Qld) ('DRCA'). The DRCA sets out a range of aspects relating to the provision of dispute resolution services, including secrecy and privilege, which attaches to mediations. The DRB policy also guides all ARJC processes and the conduct of RJ processes in the post-sentence context. A key principle of this policy is that matters should only be initiated by the victim (or secondary victim) of the offence.

8.3 Women's Safety and Justice Taskforce recommendations and Government response

The Women's Safety and Justice Taskforce's ('WSJ Taskforce') in Report Two identified concerns about the current ARJC model operating in Queensland. The absence of a clear framework had led to a 'lack of clarity' about the intended policy objectives and desired outcomes, the operational model's 'intent and purpose' and how 'interacts with the conventional criminal justice system'.[5] The Taskforce was also concerned about the low level of resourcing and its impact on the 'level of visibility and accessibility of ARJC'.[6]

The Taskforce acknowledged that, in response to an earlier recommendation made by the Queensland Productivity Commission, the Queensland Government had committed to develop an updated ARJC model and consider how RJ conferencing in Queensland could be expanded.[7]

The Taskforce referred extensively in its report to stakeholder views about the potential merits of RJ processes and its potential dangers and shortcomings noting that common concerns relate to:

- the risk of victims being re-victimised as a result of underlying power imbalances
- that it may suggest sexual offences are of less importance and a private concern, rather than being condemned in the public sphere
- that it creates an 'inferior' response to sexual offending outside the court processes due to an inability to adequately address problems with the present criminal response, perpetuating the current failings of the criminal justice system.[8]

After considering each of these concerns, it came out in support of expansion of RJ processes in Queensland, on the basis that it 'offers potential of a victim-centric process that can flexibly meet the diverse victim-survivor needs that cannot be met by the criminal justice system'.[9] It concluded on this basis that 'restorative justice should supplement conventional criminal justice processes to expand the range of options available to victim-survivors'.[10]

The Taskforce recommended:

> The Queensland Government, led by the Department of Justice and Attorney-General, develop a sustainable long-term plan for the expansion of adult restorative justice in Queensland and appropriately fund that plan for victim-survivors to access this option throughout the state.[11]

It further suggested that the particular risks associated with RJ for sexual offending and domestic and family violence should:

> be considered specifically in the development of the legislative framework, and a model tested through a dedicated pilot, to enable the safe use of restorative justice in sexual offence cases. Evaluated outcomes of the project are essential to provide an evidentiary basis for any further development or expansion. This model, if successfully evaluated, would then support the development of the necessary skills and processes required for expanding statewide.[12]

In response to the Taskforce's recommendation, the Queensland Government committed to 'explore options for a sustainable long-term plan for the expansion of adult restorative justice services in Queensland'.[13] The Legal Affairs and Safety Committee inquiry into support provided to victims of crime also supported this recommendation.[14]

The DRB is leading the response to this recommendation and $500,000 has been allocated to undertake this project during the 2023–24 financial year.

Three key pieces of work will underpin the project:

1. **Consultation:** A broad range of stakeholders will be invited to share their views on what expansion could look like.
2. **Research:** An external researcher will be engaged to undertake evidence-based research on existing literature and Restorative Justice service delivery locally, interstate and internationally. This research will identify the critical elements that must be considered and incorporated into any options of expansion.
3. **An Options Report:** An external consultant will analyse stakeholder views and the research to provide a comprehensive Options Report for a sustainable long-term plan for the expansion of adult restorative justice services in Queensland. The Options Report will detail options that are sustainable, victim-centric, culturally safe, trauma-informed, and accessible to all Queenslanders. It also will include how those options could be implemented.[15]

In line with the WSJ Taskforce's recommendations, the Options Report will include specific consideration of service delivery to:

- people who have experienced sexual assault;
- people who have experienced domestic and family violence;
- Aboriginal and Torres Strait Islander peoples;
- people living in remote and regional areas and state-wide availability; and
- women as accused persons and offenders.[16]

The Queensland Government's response to Recommendation 90 is due to be delivered in June 2024.

8.4 Reviews in other jurisdictions

As in Queensland, several interstate and international reviews and inquiries have recommended RJ be available more widely for cases involving adults who have perpetrated sexual violence — both as a complementary process to operate alongside traditional criminal justice system responses, and/or as an alternative pathway:

- in **Northern Ireland**, the 2019 Gillen inquiry (an independent review of arrangements around the delivery of justice in serious sexual offences) recommended that: '[a]lternative mechanisms, including an entirely victim-led concept of restorative practice, should be considered both inside the criminal justice system and parallel to it';[17]
- the **Victorian Law Reform Commission**, in a 2021 inquiry into the Victorian justice system's response to sexual offences, recommended that the Victorian Government establish a RJ scheme in legislation that applies to all offences.[18] The Commission recommended the new scheme be available in a range of situations: where a person harmed does not wish to report the harm or to pursue a criminal prosecution; where a harm is reported but there are insufficient grounds to file charges; where charges were filed but the prosecution discontinues the prosecution; after a guilty plea or conviction and before sentencing; after a guilty plea or conviction and in connection with an application for restitution or compensation orders; and at any time after sentencing;[19]
- In **New South Wales**, a 2023 report on complainants' experiences in sexual offence cases recommended the New South Wales Government: '[e]xplore the development of a sexual violence Restorative Justice Service to deliver restorative justice approaches in sexual offence matters';[20]
- The **Commonwealth Senate Legal and Constitutional Affairs References Committee** in its 2023 report on current and proposed national consent laws recommended 'state and territory governments consider establishing a restorative justice pilot program' in addition to a specialist sexual violence court pilot for sexual offending 'to explore more sensitive and trauma-informed approaches to sexual violence in the criminal justice system'.[21]

In January 2024, the Australian Law Reform Commission ('ALRC') commenced work on its inquiry into justice system responses to sexual violence. This referral asks the ALRC to examine a range of issues including alternatives or transformational approaches to criminal justice prosecution, including RJ and specialist court approaches.[22] The ALRC is due to report by 22 January 2025.

8.5 What do other jurisdictions do?

RJ schemes for adult sexual offending exist in the Australian Capital Territory ('ACT') and New Zealand ('NZ'), and to a more limited degree in New South Wales and Victoria,[23] as well as in Belgium, Denmark, Norway, England and Wales, Ireland and Canada.[24] They serve as a supplementary approach to traditional criminal justice responses.

The schemes in the ACT and NZ both are supported by legislation and consider the relevance of RJ processes for sentence:

- **ACT**: the *Crimes (Sentencing) Act 2005* (ACT) requires a court to consider the fact of whether the person has accepted responsibility for the offence under the RJ Act when deciding how the person should be sentenced (if at all).[25] However, a court may not increase the severity of the sentence because the person chose not to take part, or to continue to take part, in RJ.[26] RJ can also be ordered at the time of sentence.[27]
- **NZ:** a court must take into account any outcomes of RJ processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case.[28] The facilitator's report is provided to the sentencing judge, who decides whether to include any agreements made at the RJ conference as part of the sentence.[29] When considering the extent to which any offer, agreement, response, or measure to make amends should be taken into account in sentencing, the court must consider whether or not it was genuine and capable of fulfilment, and whether or not it has been accepted by the victim as expiating or mitigating the wrong.[30]

In England and Wales, participation in RJ processes can form part of a 'rehabilitation activity requirement' which can be attached as a condition to community sentence or suspended sentence.[31] This condition requires the person to comply with any instructions they are given by a responsible officer to participate in activities, which can include those whose purpose is reparative, such as restorative justice activities.

For more detail on these RJ schemes and on the processes now being used in some jurisdictions, see Chapter 10 of the *Consultation Paper: Background*.

8.6 Stakeholder views

During preliminary consultation, there was general support for RJ processes to be available, provided appropriate protections were in place to address issues such as power disparities between victim survivors and perpetrators.

8.6.1 Preliminary submissions

The Justice Reform Initiative ('JRI') recommended the Council consider 'the potential to develop appropriate, victim-centred restorative justice processes for sexual offences'.[32] The JRI acknowledged the different views on whether RJ processes for sexual offences are appropriate, noting the 2010 findings of the Australian Law Reform Commission and New South Wales Law Reform Commission that for sexual offences, RJ processes may not be appropriate due to a power imbalance between the offender and victim which make it difficult to achieve the aims of the process.[33] The JRI referred the Council to 2014 research conducted by the Centre for Innovative Justice ('CIJ') at RMIT University which recommended the development and implementation of RJ conferencing for sexual offending:

> The model the CIJ presents aims to achieve greater justice for more victims and hold more people who commit sexual offences to account. The CIJ argues the damaging and widespread nature of sexual assault requires an appropriately tailored and flexible response from the justice system – one that seeks to tackle and unpack the complicated nature of sexual crimes; to operate as part of the solution, not only to individual offences, but also to the systemic nature of sexual violence.[34]

The Brisbane Rape and Incest Survivors Support Centre ('BRISSC Collective') expressed its support for the 'the exploration of transformative and restorative justice (RJ) methods as alternative/additional forms of justice for victim survivors, where appropriate'[35] and considered this could have several potential benefits:

> This justice pathway may have a greater positive impact on recidivism, community outcomes and victim-survivor mental/physical/emotional health and well-being. This also supports public interest by decreasing recidivism. There is growing evidence that restorative justice could be supportive for a wider range of offences.[36]

However, it recognised: 'these processes will not be suitable or meet justice needs for every case. Emotional and physical harm to survivors needs to be considered and supported.'[37]

Sisters Inside referred to RJ options expressing its support 'for more sentencing options, including Transformative Justice Models' without reliance on court systems.[38] Under this umbrella, they referred to strategies such as mediation and healing circles 'that are undertaken with support to resolve matters that would otherwise be dealt with by the courts'.[39]

8.6.2 Subject Matter Expert interviews

Those who participated in subject matter expert interviews also were generally supportive of exploration of RJ processes to better meet the needs of victim survivors.[40] Some participants specified that process should be explored for lower level sexual offending where an adult was the victim.[41] It was seen as 'a huge missed opportunity particularly for some lower level assaults' against an adult woman where a desired outcome might be an apology and acknowledgement that they have been wronged against.[42] If a perpetrator was willing to engage in the process, it was considered to have an educational value,[43] and be meaningful to their rehabilitation.[44] It may also be less traumatic for the victim than a trial and a quicker way to finalise the matter.[45]

The Council also heard that private mediation has been used in cases of low-level sexual violence. One legal practitioner advised that some private mediators in the Brisbane region work with families to help them work through the offending and its impact on the family, and where appropriate this may be a relevant sentencing factor.[46] Another referred to it being used successfully in cases of sexual assault in the context of a friendship.[47]

Some concerns were raised by participants. One participant was concerned about how meaningful the RJ process would be in circumstances where a person had pleaded guilty for convenience.[48] Another participant noted that the currently adult justice mediation processes (for all offences), causes a significant delay in a matter to be finalised and requires lengthy adjournments for the process to occur.[49]

There were different views on when RJ processes should occur and how this would be relevant to sentences. For example, one participant did not consider it should be a penalty option but could be done pre-sentence to inform the sentencing decision.[50]

Not all participants supported RJ process. One legal practitioner referred to the power imbalances between the complainant and defendant and suggested that it is only available to 'more well-off' individuals to avoid a conviction.[51]

8.7 Questions

The Council acknowledges the Queensland Government's existing commitment to 'explore options for a sustainable long-term plan for the expansion of adult restorative justice services in Queensland'[52] and significant work underway being led by the DRB in DJAG to progress this work.

Given significant work is being led by DJAG to develop this new Queensland adult RJ model, we consider issues regarding the merits of RJ and at what stages of the process it is likely to be best useful is a matter best considered in the context of this broader consultation process.

However, to help inform the further development of any new or expanded model, the Council invites feedback on how RJ processes for adults convicted of rape and sexual assault might be considered at sentence. We also invite views on relevant sentencing considerations that may arise should a new legislative RJ model for adults be introduced in Queensland.

Question: Restorative justice approaches

20. How (if at all) should the outcomes of any restorative justice processes taking place prior to sentence be taken into account at sentence for rape and sexual assault?

21. If a new legislative restorative justice model for adults is introduced in Queensland, what type of sentencing guidance and options do you support being available? What other considerations might be important?

General considerations

You might think about:

- how the outcomes of a restorative justice process might be relevant to the sentence (e.g., as evidence that the person is genuinely sorry for what they did);
- how restorative justice processes are used in other states and territories and in New Zealand [see above and *Consultation Paper: Background*, section 10.8];
- what safeguards might be needed to ensure restorative justice is used or ordered at sentence only where this is appropriate.

Legal and other considerations

You might think about:

- the approach taken in other jurisdictions which have legislative restorative justice models, such as NZ and the ACT;
- whether any legislative guidance should be provided to courts about how the person's participation in any pre-sentence restorative justice process and what they have agreed to do (or have already done) should be taken into account in deciding the sentence;
- the *Youth Justice Act 1992* which provides for pre-sentence referrals and restorative justice orders by way of sentence under ss 175(1)(da)–(db) and relevant requirements;
- whether restorative justice processes should be available as a sentencing option (e.g. as a stand-alone sentencing option, or as a condition of another order made by consent subject to suitability requirements being met); and
- what other considerations might be important, such as protections for victims and to protect information obtained or disclosed at a restorative justice conference.

Chapter 9 Human Rights considerations

9.1 Introduction

The Council has been asked to 'advise whether the legislative provisions that the Queensland Sentencing Advisory Council reviews in the *Penalties and Sentences Act 1992* (Qld) ('PSA') and any recommendations, are compatible with rights protected under the *Human Rights Act 2019* (Qld)' ('HRA').[1] Chapter 5 of the *Consultation Paper: Background*, discusses relevant human rights under the HRA in further detail. The purpose of this section is to discuss if there are any potential issues with existing provisions under the PSA being compatible.

9.1.1 The current position

A statutory provision is compatible with rights if it does not limit a right; or, if it does, that the limitation 'is reasonable and demonstrably justifiable'.[2] The limitation must be reasonable and justified 'in a free and democratic society based on human dignity, equality and freedom.'[3] This includes a consideration of:

> (a) the nature of the human right;
>
> (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
>
> (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
>
> (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
>
> (e) the importance of the purpose of the limitation;
>
> (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
>
> (g) the balance between the matters mentioned in paragraphs (e) and (f).[4]

The HRA came into full effect on 1 January 2020.[5] Legislation and amending provisions introduced prior to the HRA would have had regard to the 'fundamental legislative principles' set out in the *Legislative Standards Act 1992* (Qld). Rights of people charges and convicted of criminal offences.

9.1.2 Rights of people charged and convicted of criminal offences

Rights in the HRA are relevant to sentencing laws, policies, acts and decisions relating to an accused or person sentenced for sexual assault and rape. These include:

- recognition and equality before the law [section 15(2)];
- protection from torture and cruel, inhuman or degrading treatment (section 17);
- cultural rights (section 28);
- right to liberty and right not to be subjected to arbitrary detention (section 29);
- right to a fair hearing (section 31);
- right not to be tried and punished more than once (section 34); and
- right to protection against retrospective criminal laws (section 35).

Right to liberty and right not to be subjected to arbitrary detention

Legislation which has a mandatory element in respect of sentencing, can be viewed as limiting human rights. For example, the requirement for a judge to impose a life sentence or indefinite sentence for a 'repeat serious child sex offence' which now exists in Queensland (discussed at section 5.2.3), may infringe the right to liberty and the right to not be subjected to arbitrary detention.[6]

At the time the mandatory penalty was introduced in 2012 (prior to the HRA), the Explanatory Notes acknowledged:

> A mandatory sentence that cannot be mitigated represents a significant abridgment of traditional rights. However, the effect on the individual must be balanced against the need for community protection. Child sex offenders victimise one of the most vulnerable groups in the community. It is incumbent on the community to provide adequate protection from harm to this group, as they are inherently unequipped to protect themselves from such predation.
>
> The new mandatory sentencing regime is necessary to: denounce repeat child sex offenders; provide adequate deterrence for this cohort of offenders; protect one of the most vulnerable groups of the community; and to enhance community confidence in the criminal justice system.[7]

The QHRC has made previous submissions to this Council which comment on mandatory penalties, drawing attention to the need for significant evidence 'to demonstrate that mandatory minimum sentences are the least restrictive manner of achieving the purposes' of sentencing'.[8]

Right to humane treatment when deprived of their liberty

A person has a right to humane treatment when deprived of their liberty[9] (for example, if held in a watch house or prison). During the Council's previous review of the serious violent offences ('SVO') scheme, feedback from the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships included that the UN Convention on the Rights of People with Disabilities ('the Convention') should also be considered by the Council.[10] Relevant principles set forth in the Convention include accessibility and respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.[11]

Right to protection against retrospective laws

The right to protection against retrospective laws[12] is reflected in the *Criminal Code* (Qld) which protects a person from being punished for an offence unless it was an offence at the time when it was committed or to be punished any greater than the older law allowed (or that the newer law allows).[13]

This right may be limited when new sentencing considerations and schemes are introduced if they apply retrospectively. The mandatory life sentence for a 'repeat child sex offence' is partially retrospective[14] (discussed above).

The Court of Appeal has also noted that generally, amendments to section 9 of the PSA are procedural, meaning they can apply to a person when sentenced and not when the offence was committed.[15] However, the amendment under the PSA [now s 9(4)(c)] requiring a sentence of actual imprisonment be served for a sexual offence when the victim is a child under 16, is not procedural and is not retrospective. This means it only applies to offences committed after its introduction on 26 November 2010.[16] The Court of Appeal has said amendment:

> is not merely procedural; it has a substantive effect, making the imposition of actual imprisonment mandatory in the ordinary case. By doing so, it can be said … to increase the minimum sentence within the meaning of s 180(1) of the *Penalties and Sentences Act*; with the result that the increase should be taken to apply only to offences committed after s 9(5)(b) commenced.[17]

9.1.3 Rights of victim survivors

Rape and sexual assault offences involve a serious breach of human rights for the victim survivors. As discussed in section 7.2.1, the rights of victims in Queensland are recognised in the *Charter of Victims' Rights* in Schedule 1AA of the *Victims of Crime Assistance Act 2009* (Qld). These rights, while recognised as not legally enforceable,[18] are relevant to the assessment of sentencing practices as part of the Council's current review.[19]

Rights set out in the HRA are relevant when considering the impact of rape and sexual assault on victim survivors. These include:

- right to enjoy human rights without discrimination (section 15(2));
- protection from torture and cruel, inhuman or degrading treatment (section 17)
- privacy and reputation (section 25);
- protection of families and children (section 26); and
- right to liberty and security of person (section 29).

In a 2021 report, the then UN Special Rapporteur made the following recommendations in respect of sentencing rape:

> (a) Rape should be sanctioned in a way commensurate with the gravity of the offence, and the use of fines as the only sanction should be abolished;[20]

(b) States should include among aggravating circumstances the following situations: the perpetrator is a current or former spouse or intimate partner, or a family member, or the perpetrator abuses power or authority over the victim; the victim was or was made vulnerable, the victim was a child, or the act was committed in the presence of a child; the act resulted in physical and/or psychological harm for the victim; the act was committed by two or more people; and the act was committed repeatedly, with the use of violence, or with the use or threat of use of a weapon;

(c) States should review and abolish all mitigating circumstances that are not in accordance with human rights standards, especially "marry your rapist" provisions, and cease their application on the basis of gender stereotypes and myths on rape.[21]

9.2 Questions

The Council invites feedback about whether the current forms of statutory guidance that apply under the PSA are compatible with human rights and views about whether any existing limitations are reasonably and demonstrably justifiable.

The Council also invites views on what reforms could be made to improve compatibility with the HRA.

Question: Compatibility with human rights of current sentencing approach	
22.	**Is current statutory guidance to courts in the sentencing of rape and sexual assault compatible with rights protected under the *Human Rights Act 2019* (Qld) and other human rights instruments (e.g., UN Convention on the Rights of Persons with Disabilities)? If any aspects are not compatible, are any existing limitations reasonably and demonstrably justifiable (*Human Rights Act 2019* (Qld) s 13)?**
23.	**What reforms could be made to improve compatibility with the *Human Rights Act 2019* (Qld) and/or to meet the test of being 'reasonably and demonstrably justifiable'?**

Chapter 10 Anomalies, complexities and other issues

10.1 Introduction

In this chapter we discuss some anomalies and complexities involved in sentencing for rape and sexual assault as required under the Terms of Reference.

We also discuss issues raised with the Council during our initial consultations or identified through our analysis. Some are relevant to the Terms of Reference while others touch on related issues, including regarding the operation of the criminal justice system.

10.2 Impact of the SVO scheme

In 2021, the Council reviewed the operation and efficacy of the serious violent offences ('SVO') scheme under Part 9A of the PSA. See *Consultation Paper: Background*, Chapter 6 for more details about the scheme.

The Council's review identified several issues with the operation and application of the SVO scheme.[1] Many of these apply to the sentencing of rape offences, and to a lesser extent, sexual assault offences. The Council found the practical application and operation of the scheme was not consistent with its original intended purposes and is in need of reform.

Finding of this review included:

- **The SVO scheme's application may be impacting on its operation and efficacy:** the scheme is applied differently across the different offence categories. Declarations were overwhelmingly made for 9 offences (of the 60 listed offences), and the majority of offences made were mandatory (72.8% over the 9-year data period). The Council found discretionary declarations were less commonly made for sexual violence offences, suggestive of a complex broader systemic issue that sexual violence offences may be treated differently to offences involving non-sexual violence by legal practitioners and the courts.
- **The SVO scheme delivers on its objectives only in part and to a limited extent:** When implemented in 1997, the scheme was justified on the basis of punishment, denunciation and community protection. While people declared convicted of a serious violent offence must serve a greater proportion of their sentence in custody, the mandatory nature of the scheme compromises the scheme's ability to achieve longer-term community protection.
- **The SVO scheme creates unnecessary complexity and unintended consequences:** the scheme constrains sentencing practices for serious violent offences in several ways, including creating unnecessary complexity and unintended consequences, such as placing downward pressure on head sentences. The scheme was leading to head sentences being reduced because the only way a court can take a person's guilty plea and other factors in mitigation into account, as required by law, is to reduce the length of sentence given the non-parole period is fixed at 80 per cent.
- **The scheme contributes to victim and survivor dissatisfaction when a declaration is not made**: many victims and survivors reported a great sense of relief when an SVO declaration was made. It meant they knew the offender would have to serve at least 80 per cent of the sentence in custody. However, where a declaration was not made, victims and survivors were often angry and frustrated that an offence, which clearly involved serious violence and caused serious harm, was not recognised as such. This can contribute to re-traumatisation if the offence was not recognised as 'seriously violent enough' and subsequent feelings of alienation from the criminal justice process.

To address issues identified, the Council recommended the introduction of a presumptive SVO scheme for sentences of more than 5 years (or 10 years or more for serious drug offences) with discretion when a declaration was made to set the parole eligibility date between 50 and 80 per cent.[2]

The Council's recommendations are under consideration by the Queensland Government.

10.2.1 Stakeholder views

Legal Aid Queensland suggested the Council should consider the impact the SVO scheme, along with other sentencing schemes in the PSA, as part of this review.[3]

Expert interview participants generally agreed that the SVO scheme was continuing to have a distorting effect on sentences and pushing head sentences down.[4] One legal practitioner referred to the Council's previous Terms of Reference as evidencing this and that in their view, generally sentences were 'too low'.[5] Another practitioner told us that while the scheme puts downward pressure on head sentences, it has been helpful in securing guilty pleas in 'matters that may otherwise have been a hard-fought trial' where a person would likely be sentenced to a term of imprisonment of 10 years or more, resulting in a mandatory declaration.[6]

10.3 Plea negotiations

10.3.1 Forms of plea negotiations

The Queensland *Director of Public Prosecution's Guidelines* notes that there is a public interest in the conviction of the guilty person and that the most efficient conviction is through a plea of guilty.[7] As such, early negotiated resolutions in accordance with the Guidelines are encouraged to achieve a just result.[8]

There are several different forms of plea negotiations that may take place between the prosecutor and the defence that can impact on sentencing outcomes, including negotiations about:

- withdrawing charges;
- substituting charges (accepting a guilty plea to a less serious charge);
- rolled up counts (combining like offences into one charge or fewer charges);
- representative counts (having one offence represent a course of conduct);
- fact bargaining (agreement on the summary of facts);
- agreement as to what the prosecutor will submit as part of their sentencing submission (e.g., a non-custodial sentence is within range); and
- diversionary programs (e.g., agreement to plead guilty if the matter is accepted on a diversion program).[9]

The Queensland *Director of Public Prosecution's Guidelines* provides clear guidance for prosecutors regarding the charge negotiation process.[10] While there is this scope for negotiation, the DPP must always proceed with the charges which fairly represent the conduct which can be reasonably proven.[11] This may be necessary in circumstances, for example, where the DPP determines particular elements of the original charged offences cannot be proven, or where new reliable evidence comes to light which reduces the strength of the Crown case.[12] Ultimately, the DPP can only accept a plea of guilty if it is in the general public interest to do so,[13] and cannot accept a plea if it does not reflect the gravity of the provable conduct or would require the prosecutor to distort the evidence.[14]

On the issue of sentencing submissions, section 15 of the *Penalties and Sentences Act 1992* (Qld) ('PSA') expressly provides for a court to receive a submission from the parties stating the sentence, or range of sentences, they consider appropriate for the court to impose (see **Appendix 5**). Although the submissions to be made by the prosecutor may be discussed as part of the plea negotiation process, a sentencing court is not bound to act in accordance with this. Rather, the sentence to be imposed is a matter for the sentencing judge to determine.[15]

10.3.2 How a guilty plea is taken into account

By law, Queensland courts are required to take a person's plea of guilty into account.[16] There are 3 reasons why a guilty plea is generally accepted as justifying a lower sentence than would otherwise be imposed:

- The plea can be a manifestation of remorse or contrition. The Court of Appeal has cautioned that 'on sentencing, an offender's remorse should not be left to inference. If it exists, it should be proved with clarity'.[17]
- The plea has a utilitarian value to the criminal justice system. It saves public time and money.
- In particular cases — especially sexual assault cases, crimes involving children and, often, elderly victims — there is particular value in avoiding the need to call witnesses, especially victims, to give evidence.[18]

As discussed in section 5.2.2, it is a common practice for courts in Queensland to set parole eligibility at the one-third mark in circumstances where the person has pleaded guilty (which represents a one-third reduction from the standard 50% parole eligibility date set by legislation).

While a court *must* by law take the fact a person pleaded guilty into account in sentencing a person and may reduce the sentence it would have imposed had the person pleaded not guilty,[19] any reduction accounting for this, including where parole eligibility is set, depends on the individual facts and circumstances of the case.[20] The extent to which a guilty plea may reduce a sentence that would otherwise have been imposed depends in part on how early or late the plea was entered.[21] It also depends on the individual circumstances of the case. For example, if a person only pleads guilty to an offence after other charges to which he or she was not prepared to plead guilty are withdrawn, it cannot automatically be assumed the person has not pleaded guilty at the earliest opportunity.[22]

The Council's preliminary analysis of sentencing remarks found a defendant's guilty plea was the most commonly referenced factor in mitigation. The value of a guilty plea was explained by sentencing courts in different ways including evidence of cooperation with the administration of justice, acceptance of responsibility for the offending, and sparing the victim from having to give evidence. See *Consultation Paper: Background,* section 7.3.4 for more information.

Our analysis of the minimum time to be spent in custody prior to release or parole eligibility, summarised in section 4.2, also showed clear differences based on whether the person sentenced had pleaded guilty or not guilty.

10.3.3 Victims' rights

Research into plea negotiations in Australia has found that while there are benefits for the administration of justice of plea negotiations and guilty pleas, and to the accused person and victims of crime, there are 'potential disadvantages to victims who may consider that their rights, interests or feelings have been overlooked or disregarded' during this process.[23] They may also feel that the charges to which the offender has pleaded guilty to – and the corresponding sentence imposed – is not proportionate to the harm done to them. [24] Although generally recognised that a successful plea negotiation avoids the need for the victim survivor to face their offender in court and be subjected to a (potentially) distressing cross-examination process, some victim survivors indicate that they would 'prefer a criminal trial over a negotiated outcome to ensure that the harm done to them is heard and vindicated in public, regardless of the associated trauma and the possibility that the accused will be acquitted'.[25]

Negotiations also reduce transparency for the victim, as well as the general public, regarding the criminal justice process.[26] Increased victim survivor participation in the criminal justice process – and the plea negotiation stage more specifically – can enhance their understanding of the process, the compromises that plea negotiations inevitably involve and their perception of fairness of the sentencing outcome.[27] However, some victim survivors may experience greater emotional distress and disruption to their lives with increased interaction with the criminal justice system,[28] and may wish to distance themselves from the process.

The Queensland *Director of Public Prosecution's Guidelines* include advice about what information should be provided to victims in advance of a trial.[29] This includes, if requested by the victim, notice of a decision to substantially change a charge, or not to continue with a charge, or accept a plea of guilty to a lesser charge[30] – consistent with rights recognised under the Charter of Victims' Rights for a victim to be kept informed about these matters.[31]

Notwithstanding this obligation to keep the victim survivor informed, the Women's Safety and Justice Taskforce acknowledged in its *Report Two* that '[t]here are very few options available to victim-survivors to complain if they are on the receiving end of improper conduct by a prosecutor or if they are unsatisfied with how their case has been handled (that is if it has been discontinued or lesser charges applied through plea negotiations)'.[32] The Taskforce recommended changes to improve responses to victim survivors of sexual violence through the criminal justice system, including to ensure timely and up to date information is provided to victim survivors at critical points in the criminal justice process,[33] and to establish internal 'right to review' process of police and prosecutorial decisions for victim survivors of sexual violence.[34] It also recommended that the Director of Public Prosecutions, in consultation with the Queensland Government, consider designing a new operating model for the prosecution of sexual violence cases, including to ensure all staff and lawyers are able to provide trauma-informed responses to victims of sexual violence.[35] These recommendations were supported by the Queensland Government.[36]

10.3.4 Stakeholder views

Issues regarding plea negotiations were raised with us during preliminary consultation. Fighters Against Child Abuse Australia ('FACAA') submitted that 'plea deals need to be limited for rape cases', and that there should be limits in 'how far from the original charge [an offence] can be pleaded down'.[37] FACAA was concerned that plea deals are not 'in line with the principles of justice', they erode public confidence in the justice system and they can rob 'victim survivors of any sense of justice'.[38] The Queensland Sexual Assault Network and the Brisbane Rape and Incest Survivors Support Centre ('BRISSC Collective') also raised concerns with the downgrading of offences, offence severity and offence counts because of guilty pleas.[39]

Service providers raised concerns that victim survivors may feel upset when what they consider to be a late guilty plea (such as the week of or morning of the trial date) is nevertheless taken into account by the sentencing court as a mitigating factor.

While not commenting on plea negotiations, the Justice Reform Initiative observed that it is important for perpetrators to plead guilty, as low conviction rates carry 'a significant risk of further trauma for complainants'.[40]

Several participants of the subject matter interviews similarly commented on the value of a guilty plea and the impacts plea negotiations might have, further noting that courts can only sentence on the basis of the agreed statement of facts and for the offence of which the person was convicted (for example, sexual assault rather than rape).[41] It was acknowledged that this might not reflect what the complainant has said happened. Negotiations may be engaged in to resolve the case by securing a plea of guilty to a lesser charge, which means that when the matter is sentenced, the offence is dealt with on a less serious basis.[42] The alternative might well be not securing a conviction on any charge.

10.4 Cumulative vs concurrent sentences

Another issue often raised in the context of sentencing for sexual violence offences is the issue of cumulative versus concurrent sentences.

When a court sentences a person to imprisonment for more than one offence, the court will say whether some or all of it is to be served concurrently (at the same time) or cumulatively (one after the other). Usually, sentences of imprisonment will be served concurrently unless a mandatory cumulative sentence applies (see section 5.2.3) or the court orders otherwise. For cases involving more than one victim, concurrent sentences can make a victim survivor feel like the offences perpetrated against them do not matter or that they have resulted in no real penalty.

The Royal Commission into Institutional Responses to Child Sexual Abuse considered this issue as part of its inquiry.[43] It noted changing the current presumption in favour of cumulative sentencing 'would be unlikely to provide victims and survivors with any greater comfort'.[44] This was because of the need for courts to apply the totality principle meaning head sentences would likely need to be reduced to avoid a crushing sentence.[45] It instead preferred an approach that would ensure the sentence for each individual offence had those offences been sentenced alone be specified in circumstances where there were multiple discrete episodes of offending and/or multiple victims.[46]

The approach recommended by the Royal Commission largely reflects the current approach in Queensland.[47] Consequently, the Queensland Government, while accepting this recommendation, determined that no further action to implement it is necessary.[48]

10.5 Sentencing factors for child sexual offences

A more technical issue raised by stakeholders during the preliminary stages of the review was the application of sentencing factors in the PSA which courts must apply when sentencing people for sexual offences against children under 16.

As discussed in 3.2, if a person is convicted of sexual assault or rape and the victim is under the age of 16 years there are certain sentencing factors which a court must have primary regard to, such as:

- the person must serve actual imprisonment unless there are exceptional circumstances;
- the age of the child;
- the need to protect the child, or other children, from the risk of the person reoffending;
- the need to deter similar behaviour to protect children;
- the relationship between the offender and the child; and
- anything relevant about the safety of children under 16.[49]

Some offences of a sexual nature against a child have the child's age as an element of the offence.[50] This is not the case for sexual assault and rape. In the case of rape, a child under 12 years at law is incapable of giving consent.[51] For sexual assault, the victim's age is not an element, meaning this is not relevant to establishing the offence. Because a child's age is not an element of the offence, the sentencing considerations under the PSA ss 9(4)-(6) may not automatically apply even if the victim is under 16 years. This point is illustrated in *DMS v Commissioner of Police,*[52] a case in which the facts at sentence were that DMS did not know the victim of an indecent assault was under 16 years at the time of the offence. This meant the sentencing factors in PSA ss 9(4)–(6) did not apply.[53]

Similarly, in *R v Downs*,[54] the applicant was a manager at a pizza store and sexually assaulted 8 employees aged between 15 and 17 years. It was held PSA ss 9(4)-(6) did not to apply as the exact age of the complainants was not known.[55]

The Council also heard concerns that section 9(7) of PSA [which sets out factors to which courts must have primary regard in sentencing a person for a child exploitation material offence] does not have the same focus on the protection of children as section 9(6) does. While protection of the community is clearly very important and relevant (particularly for those who might have a previous history of this form of offending), this section does not appear to place significant weight on that purpose of sentencing.

10.6 *Dangerous Prisoners (Sexual Offenders) Act 2003* scheme

The *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('DPSOA') scheme is a post-sentence scheme aimed at protecting the community by ensuring that sexual offenders who pose a serious danger,[56] because of their risk of re-offending, are either detained in custody or supervised in the community after the completion of their period of imprisonment. See section 9.5.1 of the *Consultation Paper: Background* for more information.

During preliminary consultation, some stakeholders told us they were interested in knowing more about how the existence of this scheme factors into decisions made on sentence.[57] Legal Aid Queensland, referring to data contained in the Council's final report on the SVO scheme,[58] commented:

> 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.[59]

In considering the need for a life sentence rather than a determinate one, the Court of Appeal has said that the existence of the DPSOA scheme 'makes it unnecessary to speculate whether an offender will "probably commit further offences" … at the end of what might otherwise be a sentence for a term of imprisonment less than life'.[60] The existence of the scheme thereby 'obviates [avoids] the need for a sentencing judge to proceed on the basis of speculation as to the "outer limits" of an offender's dangerous potential for further sexual offending'.[61]

A sentencing judge's knowledge that high-risk individuals may be subject to supervision or detention at the end of their sentence has the potential to influence sentencing in a variety of ways. For example, the knowledge of this 'safety net' for higher risk people may mean sentencing judges are less likely to see a need to defer a person's parole eligibility date – particularly beyond the statutory half, including to make a SVO declaration in circumstances where this is not mandatory, which means that parole eligibility is fixed at 80 per cent.

10.7 Other issues

The Council also heard that these issues impact the sentencing of sexual assault and rape offences:

- **Funding, training and resourcing:** For matters dealt with on circuit, difficulties for defendants meeting defence counsel for the first time prior to trial leading to challenges in providing adequate representation. This can be exacerbated for communities in remote locations and in particular, for Aboriginal and Torres Strait Islander offenders.
- **Victim Register:** Queensland Corrective Services manages the victim information register which provides information to eligible persons about key events relating to a person serving a period of imprisonment.[62] While the operation of the register and the information notified is not a sentencing issue, it may impact victim survivors' satisfaction with the sentence.
- **Rape as a particular of the offence of repeated sexual conduct with a child:** potential anomalies in sentencing practices where a person is charged and convicted of the offence of repeated sexual conduct with a child (previously maintaining a sexual relationship with a child) under section 229B of the *Criminal Code Act 1899* (Qld) in circumstances where the conduct involved includes multiple counts of rape compared to outcomes for single counts of rape or multiple counts of rape involving an adult victim.[63]
- **When a person is sentenced for only one offence:** the limited availability of sentencing options (such as a partially or wholly suspended sentence ordered alongside probation or community service) where a person is being sentenced for more than one charge (discussed in Chapter 5).
- **Sentencing historical sexual offences:** the inconsistent application of the requirement in the case of historical sexual offences that the person be sentenced according to the sentencing standards that apply at the time of sentence rather than at the time of the offence (which is a requirement only in sentencing a person for an offence against a child under 16 years) (discussed in section 3.3.8).

10.8 Questions

The Council invites feedback on the issues discussed in this chapter and any other issues that might be considered relevant which impact on sentencing for rape and sexual assault.

There might be other anomalies and complexities not otherwise identified.

The Council invites feedback on any other issues of concern that may impact sentencing practices and outcomes.

Question: Anomalies and other issues	
24.	**How do the anomalies and complexities identified impact sentencing for sexual assault and rape? How might these be overcome?**
25.	**Are there any other issues about sentencing for sexual assault and rape offences that you would like to raise with the Council?**

Appendix 1–Council members and contributors

Queensland Sentencing Advisory Council

Chair	The Honourable Ann Lyons (from 30 October 2023)
	John Robertson (until 8 August 2023)
Deputy Chair	Professor Elena Marchetti (Acting Chair 8 August – 30 October 2023)
Council members	Jo Bryant
	Julie Dick SC
	Matt Jackson
	Debbie Kilroy OAM
	Boneta-Marie Mabo* (until 6 February 2024)
	Philip McCarthy KC
	Katarina Prskalo KC
	Dan Rogers
	Brett Schafferius (from 30 October 2023)
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	Jo Bryant (Senior User) (from 8 February 2024)

* Chair, Aboriginal and Torres Strait Islander Advisory Panel.

Statement on conflicts of interest: Any conflicts arising during Council reviews are managed in accordance with the Council's *Conflicts of Interest Policy*. More information is available on the Council's website.

Appendix 2–Acknowledgments

The Council's inquiries are informed by the knowledge and expertise of its members, research and policy analysis undertaken by staff, and the contributions by key criminal justice agencies, other stakeholders and community members.

The Council would like to acknowledge the contributions of those who made preliminary submissions during the initial phase of the review and provided information and participated in meetings relating to the review.

To assist us to better understand current sentencing practice for rape and sexual assault, the Council held 26 Subject Matter Expert interviews. We would like to thank all interview participants for giving so generously of their time and sharing their extensive knowledge and experience of current law and practice with us. We thank the Supreme, District and Magistrates Courts, the Aboriginal and Torres Strait Islander Service, the Bar Association of Queensland, Legal Aid Queensland, the Office of the Director of Public Prosecutions, the Queensland Law Society, and the Queensland Police Service for supporting this project and for their assistance in identifying participants.

The Council also thanks Court Services Queensland (Department of Justice and Attorney-General), the Dispute Resolution Branch (Department of Justice and Attorney-General), the Office of the Director of Public Prosecutions, the Parole Board Queensland, Queensland Corrective Services, the Queensland Government Statistician's Office (Queensland Treasury), Queensland Police Service and the Supreme Court Library for their assistance in providing data and other information during the preparation of this paper. Without this assistance, much of the analysis in this paper would not have been possible.

The Council sought advice from key contacts in Australia and internationally, from departments of justice and Attorneys-General, prosecution services, legal aid commissions and sentencing councils. These agencies were asked to respond to a series of questions regarding the sentencing of sexual assault and rape offences in their respective jurisdictions and relevant case law. The Council was greatly assisted by information provided by:

- Criminal Law Branch, Legislation, Policy & Programs, Justice and Community Safety Directorate, ACT Government
- New Zealand Law Society
- Northern Territory Legal Aid Commission
- New South Wales Department of Communities and Justice (Secretariat of the New South Wales Law Reform Commission and Sentencing Council and the Policy, Reform and Legislation Branch)
- Scottish Sentencing Advisory Council
- South Australia Office of the Department of Public Prosecutions
- Victorian Sentencing Advisory Council.

It is the Council's practice to establish a Project Board for every review. The Council acknowledges the significant contributions of Project Board members, Elena Marchetti (Project Sponsor), Julie Dick SC, Mathew Jackson, Debbie Kilroy OAM, Boneta-Marie Mabo and Jo Bryant. We thank Board members for generously giving their time during the early stages of the review and helping to guide the questions asked in this Consultation Paper.

Appendix 3–Terms of Reference

TERMS OF REFERENCE

QUEENSLAND SENTENCING ADVISORY COUNCIL

SENTENCING FOR SEXUAL VIOLENCE OFFENCES AND AGGRAVATING FACTOR FOR DOMESTIC AND FAMILY VIOLENCE OFFENCES

I, Shannon Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, having regard to:

- the report of the Special Taskforce on Domestic and Family Violence *Not Now, Not Ever: Putting an end to domestic and family violence in Queensland*;
- amendments made in the *Criminal Law (Domestic Violence) Amendment Act 2015* to the *Domestic and Family Violence Protection Act 2012* to increase the maximum penalties for contravening a domestic violence order and to the *Penalties and Sentences Act 1992* to provide for notations to indicate the domestic and family violence context of criminal offending;
- further amendments made in the *Criminal Law (Domestic Violence) Amendment Act 2016* to the *Penalties and Sentences Act 1992* making domestic and family violence an aggravating factor on sentence;
- the Queensland Sentencing Advisory Council research brief No.1, May 2021, *The impact of domestic violence as an aggravating factor on sentencing outcomes;*
- the report of Women's Safety and Justice Taskforce, *Hear her voice: Report one,* including recommendation 73 of that report;
- the report of Women's Safety and Justice Taskforce, *Hear her voice: Report two;*
- commentary expressing that penalties currently imposed on sentences for sexual assault and rape offences may not always meet the Queensland community's expectations;
- the maximum penalties provided in the Criminal Code for sexual assault and rape offences;
- the general expectation of the Queensland community that penalties imposed on offenders convicted of domestic and family violence offences and sexual assault and rape offences are appropriately reflective of the nature and seriousness of domestic and family violence and sexual violence;
- the need to protect victims from domestic and family violence and sexual violence;
- the need to hold domestic and family violence and sexual violence offenders to account;
- the sentencing principles and purposes of sentencing as outlined in the *Penalties and Sentences Act 1992*
- the need to maintain judicial discretion to impose a just and appropriate sentence in individual cases; and
- the need to promote public confidence in the criminal justice system.

refer to the Queensland Sentencing Advisory Council, pursuant to section 199(1) of the *Penalties and Sentences Act 1992*, a review of sentencing practices for sexual assault and rape offences and the operation and efficacy of section 9(10A) of the *Penalties and Sentences Act 1992*.

1

Scope

In undertaking this reference, the Queensland Sentencing Advisory Council will:

- review national and international research, reports and publications relevant to sentencing practices for sexual assault and rape offences and in sentencing adult offenders for domestic violence offences;

i. *Sentencing practices for sexual assault and rape offences*

- examine the penalties currently imposed on sentences under the *Penalties and Sentences Act 1992* for sexual assault and rape offences and review sentencing practices for these offences including the types of sentencing orders, duration and (any) time ordered to be served in custody prior to the offender being released into the community or being eligible for release on parole;
- determine whether penalties currently imposed on sentence under the *Penalties and Sentences Act 1992* for sexual assault and rape offences adequately reflect community views about the seriousness of this form of offending and the sentencing purposes of just punishment, denunciation and community protection;
- identify any trends or anomalies that occur in sentencing for sexual assault and rape offences;
- assess whether the existing sentencing purposes and factors set out in the *Penalties and Sentences Act 1992* are adequate for the purposes of sentencing sexual assault and rape offenders and identify if any additional legislative guidance is required;
- identify and report on any legislative or other changes required to ensure the imposition of appropriate sentences for sexual assault and rape offences;
- advise on options for reform to the current penalty and sentencing framework to ensure it provides an appropriate response to this type of offending;
- examine relevant offence, penalty, and sentencing provisions in other Australian and international jurisdictions to address offending behaviour relating to sexual assault and rape and any evidence of the impact of any reforms on sentencing practices;

i. Operation and efficacy of section 9(10A) of the Penalties and Sentences Act 1992 and impact of increase in maximum penalties for contravention of a domestic violence order

- review sentencing practices for domestic violence related offences following changes to the *Penalties and Sentences Act 1992* by the *Criminal Law (Domestic Violence) Amendment Act 2016* to make the fact a person is convicted of a domestic violence offence an aggravating factor for the purposes of sentencing, except if it is not reasonable because of the exceptional circumstances of the case;
- advise on the impact of the operation of the aggravating factor in section 9(10A) of the *Penalties and Sentences Act 1992* on sentencing outcomes for all domestic violence related offences including for charges involving non-physical violence and coercive control;
- identify any trends or anomalies that occur in application of the aggravating factor in section 9(10A) of the *Penalties and Sentences Act 1992* or in sentencing for domestic violence-related conduct generally that create inconsistency or constrain the sentencing process;
- examine whether section 9(10A) of the *Penalties and Sentences Act 1992* is impacting victims' satisfaction with the sentencing process and if so, in what way;
- consider how sentencing trends and outcomes for contravention of a domestic violence order may have changed following the 2015 increase in the maximum penalties following amendments by the *Criminal Law (Domestic Violence) Amendment Act 2015* (Qld);

Consultation

- consult with key stakeholders, including but not limited to the judiciary, victims/survivors of domestic and family violence and sexual violence, the legal profession, key First Nations community representatives and organisations, domestic and family violence services, sexual violence advocacy groups, community legal centres and relevant government departments and agencies (e.g. Queensland Police Service and Director of Public Prosecutions);

Impact of recommendations and other matters

- advise on the impact of any recommendation on the disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system;
- advise whether the legislative provisions that the Queensland Sentencing Advisory Council reviews in the *Penalties and Sentences Act 1992,* and any recommendations are compatible with rights protected under the *Human Rights Act 2019*; and
- advise on any other matters relevant to this reference.

The Queensland Sentencing Advisory Council is to provide to the Attorney-General and Minister for Justice, Minister for Women, and Minister for the Prevention of Domestic and Family Violence a report on its examination of:

(i) sentencing practices for sexual assault and rape offences by **16 September 2024**; and
(ii) the operation and efficacy of section 9(10A) of the *Penalties and Sentences Act 1992* and impact of increase in maximum penalties for contravention of a domestic violence order by **30 September 2025**

Dated the 17th day of May 2023

SHANNON FENTIMAN MP
Attorney-General and Minister for Justice, Minister for Women, and Minister for the Prevention of Domestic and Family Violence

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Appendix 4–Submissions and consultation

Consultative Forums and Panel meetings (May 2023 – January 2024)

Date	Agency/Organisation
29 June 2023	Aboriginal and Torres Strait Islander Advisory Panel
11 July 2023	Practitioner Consultation Forum
12 July 2023	Research Consultative Forum
24 August 2023	Aboriginal and Torres Strait Islander Advisory Panel
11 October 2023	Research Consultative Forum
14 November 2023	Practitioner Consultative Forum
30 November 2023	Aboriginal and Torres Strait Islander Advisory Panel
29 February 2024	Aboriginal and Torres Strait Islander Advisory Panel

Subject Matter Expert ('SME') interviews (Nov 2023 – Feb 2024)

A total of 26 interviews were conducted over November 2023 to early February 2024. For more details about the SME interviews, refer to Chapter 1 of *Consultation Paper: Background*.

Participant group	Number of interviews
Judiciary – District Court, Supreme Court and Court of Appeal	6
Judiciary – Magistrates	4
Office of the Director of Public Prosecutions	6
Queensland Police Service – Prosecution Services	2
Legal Practitioners (BAQ, QLS, Legal Aid Queensland and ATSILS)	8

Preliminary submissions

No.	Agency/Organisation
1	Name withheld
2	Small Steps 4 Hannah Foundation
3	The Public Advocate
4	Justice Reform Initiative
5	Queensland Sexual Assault Network (QSAN)
6	Brisbane Rape and Incest Survivors Support Centre (BRISSC Collective)
7	Aboriginal and Torres Strait Islander Legal Service (ATSILS)
8	No to Violence
9	Parole Board Queensland
10	Queensland Indigenous Family Violence Legal Service (QIFVLS)
11	DV Connect
12	Queensland Family & Child Commission (QFCC)
13	Confidential
14	The Salvation Army Australia
15	Confidential
16	Legal Aid Queensland (LAQ)
17	Fighters Against Child Abuse Australia (FACAA)
18	Confidential
19	Confidential
20	North Queensland Women's Legal Service (NQWLS)
21	Womens Legal Service Queensland
22	Relationships Australia Queensland
23	Full Stop Australia (FSA)
24	Confidential
25	Queensland Corrective Services (QCS)
26	Australian Psychological Society
27	Name withheld
28	Sisters Inside Inc

Appendix 5–Sentencing purposes, principles and factors

Penalties and Sentences Act 1992 (Qld): ss 9, 11, 13 & 15

Part 2 Governing principles

9 Sentencing guidelines

(1) The only purposes for which sentences may be imposed on an offender are—

(a) to punish the offender to an extent or in a way that is just in all the circumstances; or

(b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or

(c) to deter the offender or other persons from committing the same or a similar offence; or

(d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or

(e) to protect the Queensland community from the offender; or

(f) a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e).

(2) In sentencing an offender, a court must have regard to—

(a) principles that—

(i) a sentence of imprisonment should only be imposed as a last resort; and

(ii) a sentence that allows the offender to stay in the community is preferable; and

(b) the maximum and any minimum penalty prescribed for the offence; and

(c) the nature of the offence and how serious the offence was, including—

(i) any physical, mental or emotional harm done to a victim, including harm mentioned in information relating to the victim given to the court under section 179K; and

(ii) the effect of the offence on any child under 16 years who may have been directly exposed to, or a witness to, the offence; and

(d) the extent to which the offender is to blame for the offence; and

(e) any damage, injury or loss caused by the offender; and

(f) the offender's character, age and intellectual capacity; and

(g) the presence of any aggravating or mitigating factor concerning the offender; and

(ga) without limiting paragraph (g), whether the offender was a participant in a criminal organisation—

(i) at the time the offence was committed; or

(ii) at any time during the course of the commission of the offence; and

(gb) without limiting paragraph (g), the following—

(i) whether the offender is a victim of domestic violence;

(ii) whether the commission of the offence is wholly or partly attributable to the effect of the domestic violence on the offender; and

(h) the prevalence of the offence; and

(i) how much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences; and

(j) time spent in custody by the offender for the offence before being sentenced; and

(k) sentences imposed on, and served by, the offender in another State or a Territory for an offence committed at, or about the same time, as the offence with which the court is dealing; and

(l) sentences already imposed on the offender that have not been served; and

(m) sentences that the offender is liable to serve because of the revocation of orders made under this or another Act for contraventions of conditions by the offender; and

(n) if the offender is the subject of a community based order—the offender's compliance with the order as disclosed in an oral or written report given by an authorised corrective services officer; and

(o) if the offender is on bail and is required under the offender's undertaking to attend a rehabilitation, treatment or other intervention program or course—the offender's successful completion of the program or course; and

(p) if the offender is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender, including, for example—

(i) the offender's relationship to the offender's community; or

(ii) any cultural considerations; or

(iii) any considerations relating to programs and services established for offenders in which the community justice group participates; and

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(pa) the principle that the court should not refuse to make a community based order for the offender merely because of—

(i) a physical, intellectual or psychiatric disability of the offender; or

(ii) the offender's sex, educational level or religious beliefs; and

(q) anything else prescribed by this Act to which the court must have regard; and

(r) any other relevant circumstance.

(2A) However, the principles mentioned in subsection (2)(a) do not apply to the sentencing of an offender for any offence—

(a) that involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person; or

(b) that resulted in physical harm to another person.

(3) In sentencing an offender to whom subsection (2A) applies, the court must have regard primarily to the following—

(a) the risk of physical harm to any members of the community if a custodial sentence were not imposed;

(b) the need to protect any members of the community from that risk;

(c) the personal circumstances of any victim of the offence;

(d) the circumstances of the offence, including the death of or any injury to a member of the public or any loss or damage resulting from the offence;

(e) the nature or extent of the violence used, or intended to be used, in the commission of the offence;

(f) any disregard by the offender for the interests of public safety;

(g) the past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed;

(h) the antecedents, age and character of the offender;

(i) any remorse or lack of remorse of the offender;

(j) any medical, psychiatric, prison or other relevant report in relation to the offender;

(k) anything else about the safety of members of the community that the sentencing court considers relevant.

(4) Also, in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years or a child exploitation material offence—

(a) the court must have regard to the sentencing practices, principles and guidelines applicable when the sentence is imposed rather than when the offence was committed; and

(b) the principles mentioned in subsection (2)(a) do not apply; and

(c) the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.

(5) For subsection (4)(c), in deciding whether there are exceptional circumstances, a court may have regard to the closeness in age between the offender and the child.

(6) In sentencing an offender to whom subsection (4) applies, the court must have regard primarily to—

(a) the effect of the offence on the child; and

(b) the age of the child; and

(c) the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another; and

(d) the need to protect the child, or other children, from the risk of the offender reoffending; and

(e) any relationship between the offender and the child; and

(f) the need to deter similar behaviour by other offenders to protect children; and

(g) 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; and

(h) the offender's antecedents, age and character; and

(i) any remorse or lack of remorse of the offender; and

(j) any medical, psychiatric, prison or other relevant report relating to the offender; and

(k) anything else about the safety of children under 16 the sentencing court considers relevant.

(6A) However, for subsection (6)(h), the court must not have regard to the offender's good character if it assisted the offender in committing the offence.

(7) In sentencing an offender for a child exploitation material offence, the court must have regard primarily to—

(a) for an offence other than an offence against the Criminal Code, section 228I or 228J—the nature of any material describing or depicting a child that the offence involved, including the apparent age of the child and any activity shown; and

(aa) for an offence against the Criminal Code, section 228I or 228J—the nature of the doll, robot or other object representing or portraying a child that the offence involved, including the apparent age of the child; and

(ab) the offender's conduct or behaviour in relation to the material, doll, robot or other object that the offence involved; and

(ac) any relationship between the offender and the child the subject of the material, or represented or portrayed by the doll, robot or other object, that the offence involved; and

(b) the need to deter similar behaviour by other offenders to protect children; and

(c) 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; and

(d) the offender's antecedents, age and character; and

(e) any remorse or lack of remorse of the offender; and

(f) any medical, psychiatric, prison or other relevant report relating to the offender; and

(g) anything else about the safety of children under 16 the sentencing court considers relevant.

(7AA) However, for subsection (7)(d), the court must not have regard to the offender's good character if it assisted the offender in committing the offence.

(7A) Also, the principles mentioned in subsection (2)(a) do not apply to the sentencing of an offender under part 9D, division 2.

(8) If required by the court for subsection (2)(p), the representative must advise the court whether—

(a) any member of the community justice group that is responsible for the submission is related to the offender or the victim; or

(b) there are any circumstances that give rise to a conflict of interest between any member of the community justice group that is responsible for the submission and the offender or victim.

(9) In sentencing an offender, a court must not have regard to the following—

(a) the offender levy imposed under section 179C;

(b) whether or not the offender—

(i) may become, or is, the subject of a dangerous prisoners application; or

(ii) may become subject to an order because of a dangerous prisoners application.

(9A) Voluntary intoxication of an offender by alcohol or drugs is not a mitigating factor for a court to have regard to in sentencing the offender.

(9B) In determining the appropriate sentence for an offender convicted of the manslaughter of a child under 12 years, the court must treat the child's defencelessness and vulnerability, having regard to the child's age, as an aggravating factor.

(9C) In determining the appropriate sentence for an offender convicted of a relevant serious offence committed in relation to a pregnant person that resulted in destroying the life of the person's unborn child, the court must treat the destruction of the unborn child's life as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case.

(10) In determining the appropriate sentence for an offender who has 1 or more previous convictions, the court must treat each previous conviction as an aggravating factor if the court considers that it can reasonably be treated as such having regard to—

(a) the nature of the previous conviction and its relevance to the current offence; and

(b) the time that has elapsed since the conviction.

(10A) In determining the appropriate sentence for an offender convicted of a domestic violence offence, the court must treat the fact that it is a domestic violence offence as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case.

Examples of exceptional circumstances—

1 the victim of the offence has previously committed an act of serious domestic violence, or several acts of domestic violence, against the offender

2 the offence is manslaughter under the Criminal Code, section 304B

(10B) In determining the appropriate sentence for an offender who is a victim of domestic violence, the court must treat as a mitigating factor—

(a) the effect of the domestic violence on the offender, unless the court considers it is not reasonable to do so because of the exceptional circumstances of the case; and

(b) if the commission of the offence is wholly or partly attributable to the effect of the domestic violence on the offender—the extent to which the commission of the offence is attributable to the effect of the violence.

(11) Despite subsection (10), the sentence imposed must not be disproportionate to the gravity of the current offence.

(12) In this section—

actual term of imprisonment means a term of imprisonment served wholly or partly in a corrective services facility.

child exploitation material offence means any of the following offences—

(a) an offence against the *Classification of Computer Games and Images Act 1995*, section 28 if the objectionable computer game is a child abuse computer game under the Act;

(b) an offence against any of the following provisions of the *Classification of Films Act 1991*—

(i) section 41(3) or 42(3) or (4);

(ii) section 43 if the offence involves a child abuse publication under the Act;

(c) an offence against the Criminal Code, section 228A, 228B, 228C, 228D, 228DA, 228DB, 228DC, 228I or 228J.

domestic violence see the *Domestic and Family Violence Protection Act 2012*, section 8.

relevant serious offence means an offence against—

(a) the following provisions of the Criminal Code—

(i) sections 302 and 305;

(ii) sections 303 and 310;

(iii) section 320;

(iv) section 323;

(v) section 328A;

(vi) section 339; and

(b) the *Transport Operations (Road Use Management) Act 1995*, section 83.

11 Matters to be considered in determining offender's character

(1) In determining the character of an offender, a court may consider—

(a) the number, seriousness, date, relevance and nature of any previous convictions of the offender; and

(b) the history of domestic violence orders made or issued against the offender, other than orders made or issued when the offender was a child; and

(c) any significant contributions made to the community by the offender; and

(d) such other matters as the court considers are relevant.

(2) If oral submissions are to be made to, or evidence is to be brought before, the court about the history of domestic violence orders made or issued against the offender, the sentencing judge or magistrate may close the court for that purpose.

(3) In this section—

domestic violence order means—

(a) any of the following under the *Domestic and Family Violence Protection Act 2012*—

(i) a domestic violence order;

(ii) a police protection notice;

(iii) an interstate order;

(iv) an order that corresponds to an interstate order made under a repealed law of another State;

(v) a New Zealand order; or

(b) a domestic violence order under the repealed *Domestic and Family Violence Protection Act 1989*.

13 Guilty plea to be taken into account

(1) In imposing a sentence on an offender who has pleaded guilty to an offence, a court—

(a) must take the guilty plea into account; and

(b) may reduce the sentence that it would have imposed had the offender not pleaded guilty.

(2) A reduction under subsection (1)(b) may be made having regard to the time at which the offender—

(a) pleaded guilty; or

(b) informed the relevant law enforcement agency of his or her intention to plead guilty.

(3) When imposing the sentence, the court must state in open court that it took account of the guilty plea in determining the sentence imposed.

(4) A court that does not, under subsection (2), reduce the sentence imposed on an offender who pleaded guilty must state in open court—

(a) that fact; and

(b) its reasons for not reducing the sentence.

(5) A sentence is not invalid merely because of the failure of the court to make the statement mentioned in subsection (4), but its failure to do so may be considered by an appeal court if an appeal against sentence is made.

15 Information or submissions for sentence

(1) In imposing a sentence on an offender, a court may receive any information, including a report mentioned in the *Corrective Services Act 2006*, section 344, or a sentencing submission made by a party to the proceedings, that it considers appropriate to enable it to impose the proper sentence.

(1A) Also, without limiting subsection (1), in imposing a sentence on an offender, a court may receive any information, or a sentencing submission made by a party to the proceedings, that the court considers appropriate to enable it to decide—

(a) whether it may make a control order for the offender under part 9D, division 3; or

(b) the appropriate conditions of a control order it must, or may, make for the offender under part 9D, division 3.

(2) An authorised corrective services officer must not, in any information or report, recommend that a fine option order or community based order should not be made for an offender merely because of—

(a) any physical, intellectual or psychiatric disability of the offender; or

(b) the offender's sex, educational level or religious beliefs.

(3) In this section—

sentencing submission, made by a party, means a submission stating the sentence, or range of sentences, the party considers appropriate for the court to impose.

Appendix 6–Summary of select case studies

Table 5: Rape case studies, 2020–2023

Penalty outcome	Offence and defendant characteristics
10 years to life	**Case study 1 (Life imprisonment)** O pleaded guilty to 49 offences, including 18 counts of rape, 1 count of torture, 2 counts of malicious acts intended to cause grievous bodily harm (GBH), 1 count of GBH, 1 count sexual assault with a circumstance of aggravation, and 4 counts of sexual assault of his former partner, V (22 years old). Over a 23-day period, O, 31 years, inflicted severe physical, psychological and sadistic violence on V, to the extent that she almost died from her injuries. O recorded many of his offences on his phone. O had a criminal history, including for domestic violence. The judge determined the offending was so serious that the sentence should not be reduced for O's plea of guilty, nor for his call to 000, which was self-serving and not intended to save V's life. O was given life imprisonment on 5 counts of rape and 2 counts of malicious acts intended to cause GBH. O was also sentenced to the maximum penalty of 14 years for torture. **Case study 2 (12.5 years' imprisonment)** O was convicted by a jury following a trial of 1 count of rape and pleaded guilty to 1 count of assault occasioning bodily harm of V (he also pleaded guilty to 18 summary offences). V was a young woman from overseas and she was working as an au pair. She was exercising in a public location, when O, 27 years, raped her with his penis and violently assaulted her. V suffered significant physical injuries to her face and head and was left by the side of the road. O had an extensive criminal history for violent offences, including in prison and a traumatic childhood which involved physical and sexual abuse. He was assessed by a forensic psychiatrist to be a moderate to high risk of sexual violence reoffending. O was sentenced to 12.5 years meaning he must serve 80 per cent of his sentence before becoming eligible for parole due to the operation of the serious violent offence scheme.
5–10 years	**Case study 3 (9 years' imprisonment)** O was convicted by a jury following a trial of 4 counts of rape, 1 count of sexual assault with a circumstance of aggravation and 1 count of sexual assault of his 22-year-old niece, V. All of the offences were sentenced as domestic violence offences. V was helping O, 49 years, with cleaning at one of his businesses late at night when he locked her in a room and raped her with his fingers and penis, as well as sexually assaulting her. V repeatedly told him no and that she was pregnant. He did not desist. While he assaulted her, O took photos which he threatened to share with V's partner. V suffered physical and emotional trauma from the attack and was diagnosed with PTSD. O had a limited and not relevant criminal history and a good work history. He showed no remorse and did not cooperate with police. O was sentenced to 9 years in custody and no parole eligibility date was set. **Case study 4 (6 years' imprisonment)** O pleaded guilty to raping his 28-year-old daughter, V. After drinking with some friends in her home, V fell asleep on the couch next to her father aged 50 years. She woke up to him penetrating her vagina with his penis. She was scared and pretended to be asleep until it stopped. O continued until he ejaculated. V told her mother the next day and saw a doctor. V reported the offence to police some years later, when O was in jail in New South Wales. O had a relevant criminal history involving sexual offences in New South Wales. He had a dysfunctional upbringing, and he was subjected to child sexual abuse by his family and in a boys' home. O was sentenced to 6 years' imprisonment, which was cumulative to a 4.5 year sentence he was given in New South Wales in 2016. Due to his plea, treatment programs in custody (including for sexual offences) and his ill health, O's parole eligibility was set around 2 years.

< 5 yrs	**Case study 5 (3.5 years' imprisonment suspended after 14 months for 5 years)** O pleaded guilty to 1 count of rape (domestic violence offence) against his 8-year-old stepdaughter, V. O, 31 years, had been in a relationship with V's mother for several years and they had other children together. One day V went to toilet and O followed her. He made her lie on the ground, removed their pants and then forced his penis into her mouth. V's mother came home and found O without his pants holding V's underwear. V's mother immediately went to police, however O made no admissions when interviewed. O had no criminal history and a very limited work history. At 19, O was diagnosed with autism which affected his socialisation skills. O was sentenced to 3.5 years imprisonment, suspended after serving 14 months with an operational period of 5 years. **Case study 6 (3 years' imprisonment wholly suspended for 5 years)** O pleaded guilty to raping his friend, V, at a party during high school. Both O and V were drinking alcohol. V felt sick and went to bed in her room. O, who had turned 18 a few days prior, followed her. Despite her efforts to stop him, he pulled her pants off and forced his penis into her vagina. She forcefully pushed his chest and he stopped. V immediately told a friend who confronted O and told him to apologise. Years later O contacted V on social media and apologised for raping her. V told him how his offending had impacted her life. O called 000 and confessed to the rape and he was arrested by police. O had no criminal history, was young when he offended and had expressed genuine remorse. He also had diagnosed mental illnesses, including schizophrenia, and pleaded guilty at an early stage. O was sentenced to 3 years' imprisonment, wholly suspended for a 5-year operational period.
Non-custodial	**Case study 7 (3 years' probation)** O pleaded guilty to 1 count of rape against his sister, V, which was committed when they were both children. Sometime when O was aged 14 to 16 years and V was aged 8 to 10 years, O climbed into V's bed and forced his penis into her vagina. O stopped when V asked him to. V did not disclose the offending for some years, so O was not charged until he was an adult. V experienced significant emotional harm and the offence had greatly impacted her health and wellbeing. O was diagnosed with ADHD when he was 10 and when he committed the offence, he was also being sexually abused. Before O was sentenced for raping V, the person who sexually abused him was convicted for their offending. O had no criminal history when he committed the offence and because O was a child when he offended, the judge was required to consider both the Youth Justice Act 1992 (Qld) and the PSA when determining a sentence. O was sentenced to probation for 3 years.

Source: Unreported cases identified through the Queensland Wide Inter-linked Courts (QWIC) database and Queensland Sentencing Information Service.

Table 6: Sexual assault case studies, 2020–2023

Penalty outcome	Offence and defendant characteristics
5+ years	**Case study 1 (7 years' imprisonment)** O pleaded guilty to 22 offences against his wife, V, including 1 count of sexual assault, 5 counts of assault occasioning bodily harm (AOBH), 12 counts of common assault and 4 counts of contravention of a domestic violence order (DVO). Barring 5 common assaults, all of the offences were sentenced as domestic violence offences. Over an 18-month period, O perpetrated psychological, physical and sexual violence against V. Some offences were committed in front of V's children and while she was pregnant with O's child. The sexual assault was perpetrated at the end of the relationship and V believed she was going to die during this offending. O knocked V unconscious, restrained her to a bed and sexually assaulted her using his fingers. He then shoved his fingers into her mouth repeatedly until she vomited. O was under a domestic violence order (DVO) for 18 of these offences. O had no criminal history when he committed the offences, there was some delay in proceeding to sentencing (although largely due to O's own actions) and he pleaded guilty. O was sentenced to 7 years' imprisonment. **Case study 2 (5 years' imprisonment, suspended after 351 days for 5 years)** O pleaded guilty to 18 offences committed against his former partner, V (29 years), including 2 counts of strangulation in a domestic setting, 2 counts of sexual assault, 1 count of AOBH and 5 counts of common assault. All of the offences were sentenced as domestic violence offences. O, 54 years, committed most of the offences against V in the same day. He choked her multiple times, including to unconsciousness and while sexually assaulting her. O threatened to rape V while rubbing his penis over her body and pressing his fingers against her anus. O also made numerous threats to kill her and hit and kneed her body and head. O had a criminal history and was on a probation order when he committed these offences. During his 17-month bail period, O complied with the stringent conditions, and completed domestic violence and drug programs. O was sentenced to 5 years' imprisonment, suspended after 351 days for a 5-year period.

1–4 years	**Case study 3 (4 years' imprisonment suspended after 15 months for 5 years)** O pleaded guilty to 15 offences, including 7 counts of sexual assault, 1 count of attempted sexual assault and 1 count of possessing child exploitation material. Over a 9-month period, O sexually assaulted 8 women on 7 separate occasions while they were out walking in the evening. He touched, or sought to touch, their breasts and in one instance masturbated in front of a woman. At times O wore a balaclava to hide his identity and he restrained some of the women and/or physically assaulted them. A psychologist believed O had an undiagnosed neurodevelopment disorder and was cognitively impaired. He pleaded guilty early, and he had a good work history and parental support. O was sentenced to 4 years' imprisonment, suspended after 15 months for a 5-year operational period. He was also sentenced to a 3-year probation order with an additional condition for O to submit to medical, psychological or psychiatric treatment. **Case study 4 (3.5 years imprisonment)** O pleaded guilty to 1 count of burglary by breaking in the night, 1 count of sexual assault and 1 count of stealing against V, aged 30. On the day of the offending, O approached V and her neighbour for a drink. Both women refused and O was seen leaving the unit complex. However, around 1:30 am, V awoke to find O sitting on her bed, touching her vagina under her clothes. V sat up and slapped O's face. O ran away. He had stolen $100 from V's purse and a Samsung tablet. O had a lengthy criminal history, mostly for property offences, he struggled with drug addiction and had had a dysfunctional and disadvantaged upbringing. Although O pleaded guilty, it was a late plea in relation to the sexual assault. O was sentenced to 3.5 years' imprisonment with parole eligibility set after 17 months. **Case study 5 (12 months' imprisonment wholly suspended for 2 years)** O pleaded guilty to 1 count of sexual assault of his friend V, aged 18 years. O (19 years), V and a group of friends attended a race day. At 2am, V told O she wanted to go to her friend's house, but O insisted she instead come to his house. While walking to his home, O stopped V in an alleyway and tried to kiss her. V stopped him. O repeatedly said 'just this one time' then pushed her hard, causing her to fall to the ground. He then pulled his penis from his pants, climbed on top of her and shoved it in her face. V pleaded with him to stop. Another friend was walking past the alley and heard V. The friend saw O on top of V and asked him what he was doing. O ran away. V spoke to police the next day. O lied when interviewed and denied the offending. O had no criminal history and while he lied to police, he pleaded guilty early and was young. He had a good work history, although he lost his job after being charged and was physically and verbally assaulted several times, including by V. V experienced psychological harm from the offence, including disrupted sleep. O was given a 12-month term of imprisonment, wholly suspended for a 2-year operational period.
< 12 months	**Case study 6 (6 months imprisonment, wholly suspended)** O pleaded guilty on the day of trial to one count of sexual assault against his employee, V (32 years). On the day of the offending, O (40 years) and V were working together. In a break between the lunch and dinner service, V and O consumed some alcohol together. O made some sexual advances towards V, who was initially apathetic, but later told O to stop when he put his hand inside her jeans and touched her vagina (uncharged act). O subsequently sat down on a chair, pulled V towards him and straddled her on his lap. O tried to kiss V and put his hands down V's pants and rubbed her V's vagina. V made a preliminary complaint to a friend after she finished work and reported the offending to police three days later. During his interview with police, O admitted to the conduct, but claimed the act was consensual. O had no criminal history, entered a timely plea and it was accepted that the offending was out of character. The sentencing judge accepted that a sentence of actual imprisonment (of 12 months or more) may expose O to deportation. While on bail for 2.5 years, O had also taken steps to rehabilitation, including counselling. O was sentenced to 6 months' imprisonment, wholly suspended for an operational period of 12 months. A conviction was recorded. **Case study 7 (11-month intensive correction order)** O pleaded guilty to 1 count of sexual assault with a circumstance of aggravation against V, a 15-year-old boy. V was in a public toilet when O approached him indicating they should go into a toilet cubicle. V initially left the bathroom, but returned, at which point O pushed V into a cubicle, locked the door and forced V's penis into his mouth. V told O to stop several times and then pushed him away and left the bathroom. However, as O spoke little English and did not understand V, the judge accepted that he had an honest, but not reasonable, belief V was consenting because he had returned to the bathroom. O had been sexually abused as a child for many years by an uncle and was struggling with his sexuality which was not accepted in his country of origin. O did not know V was under 16 years, he had no criminal history, and suffered from mental health issues which affected his ability to problem-solve social interactions. O was sentenced to an 11-month intensive correction order. The judge made an additional condition to the order for O to submit to medical, psychological or psychiatric treatment.

Non-custodial	**Case study 8 (60-hour community service order and compensation order)** O pleaded guilty to 1 count of sexual assault against V, an adult woman. O, 55 years, was at a pub drinking when he met V, who was out drinking with her friends. O was heavily intoxicated, and his behaviour concerned V and pub staff. O grabbed V's bottom, causing her to cry. Police were contacted and O voluntarily attended the station a month later. He denied the offence. O had a minor criminal history and lived with his elderly mother. He had a good work history as a machine operator in agriculture. He had suffered a spinal injury which resulted in opioid use and heavy drinking. O offered to pay V $1000. O was given a 60-hour community service order and a compensation order of $1000 was also made. **Case study 9 ($5000 fine)** O pleaded guilty to 1 count of sexual assault against V, his partner's sister (aged 15-16 years). V was living with O, while her sister was studying and living elsewhere. One night, V had sore legs from playing sport and O, (54 or 55 years old) offered to massage them. V agreed. O started on her legs, but soon convinced V to remove her shirt and pulled her shorts and underwear down so that he could touch her bottom. V was very uncomfortable, and O desisted when he realised this. V told her sister sometime later and it was reported to police. O made early admissions to police and pleaded guilty early as well. The offending impacted V significantly, causing problems with her family relationships. O had no criminal history, a good work history and his offending was seen as out of character. He was sentenced to a $5000 fine.

Source: Unreported cases identified through the Queensland Wide Inter-linked Courts (QWIC) database and Queensland Sentencing Information Service.

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Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023 (Qld)

Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2022 (Qld)

Drugs Misuse Act 1986 (Qld)

Drugs Misuse Regulation 1987 (Qld)

Health and Other Legislation Amendment Bill 2016 (Qld).

Human Rights Act 2019 (Qld)

Justice and Other Legislation Amendment Act 2020 (Qld)

Justice and Other Legislation Amendment Act 2004 (Qld)

Legal Profession Act 2007 (Qld)

Legislative Standards Act 1992 (Qld)

Mental Health Act 2016 (Qld)

Penalties and Sentences Act 1992 (Qld)

Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010 (Qld)

Penalties and Sentences (Serious Violent Offences) Amendment Act 1997 (Qld)

Police Powers and Responsibilities and Other Legislation Amendment Act 2021 (Qld)

Victims of Crime Assistance Act 2009 (Qld)

Youth Justice Act 1992 (Qld)

Australian Capital Territory

Crimes Act 1900 (ACT)

Crimes (Restorative Justice) Act 2004 (ACT)

Crimes (Sentencing) Act 2005 (ACT)

Commonwealth

Crimes Act 1914 (Cth)

Crimes Amendment (Bail and Sentencing) Act 2006 (Cth)

Criminal Code (Cth)

Migration Act 1958 (Cth)

New South Wales

Crimes (Administration of Sentences) Act 1999 (NSW)

Crimes (Domestic and Personal Violence) Act 2007 (NSW)

Crimes (Life Sentences) Amendment Act 1989 (NSW)

Crimes (Sentencing Procedure) Act 1999 (NSW)

Crimes Act 1900 (NSW)

Northern Territory

Criminal Code (NT)

Criminal Justice Legislation Amendment (Sexual Offences) Act 2023 (NT)

Sentencing Act 1995 (NT)

South Australia

Criminal Law Consolidation Act 1935 (SA)

Criminal Law (Sentencing) Act 1988 (SA)

Sentencing Act 2017 (SA)

Statutes Amendment (Sentencing of Sex Offenders) Act 2005

Tasmania

Corrections Act 1997 (Tas)

Sentencing Act 1997 (Tas)

Sentencing Amendment (Assaults on Police Officers) Act 2014 (Tas)

Victoria

Sentencing Act 1991 (Vic)

Victims' Charter Act 2006 (Vic)

Western Australia

Criminal Code (WA)

Criminal Code Act 1913 (WA)

High Risk Serious Offenders Act 2020 (WA)

Misuse of Drugs Act 1981 (WA)

Restraining Orders Act 1997 (WA)

Road Traffic Act 1974 (WA)

Sentence Administration Act 2003 (WA)

Sentencing Act 1995 (WA)

International

Canada

Corrections and Conditional Release Act, SC 1992, c 20

Criminal Code, RSC 1985, c C-46

Prisons and Reformatories Act, RSC 1985, c P-20

England and Wales

Criminal Code (UK)

Criminal Justice Act 1988 (c 33) (UK)

Criminal Justice Act 2003 (c 44) (UK)

Prevention of Crime Act 1953 (c 14) (UK)

Sentencing Act 2020 (c 17) (UK)

Serious Crime Act 2015 (c 9) (UK)

Sexual Offences Act 2003 (c 42) (UK)

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Explanatory Notes, Criminal Law (Two Strike Child Sex Offenders) Amendment Bill 2012 (Qld)

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E-Petition, 'Remove Good Character References for Paedophiles in the Sentencing Procedure of Child Sexual Abuse Cases' < https://www.parliament.nsw.gov.au/lc/pages/closedepetition-details.aspx?q=hjTKTfEbrBjTOpaTYQw-oA

New South Wales, Parliamentary Debates, Legislative Assembly, 10 August 2022, 9050 (Mark Speakman, Attorney-General) referring to the case of R *v Gregory Richardson*—unreported, District Court of New South Wales, Berman DCJ, 20 October 2020

NSW Public Defenders, *The Bugmy Bar Book* (Web Page, 3 May 2023) <https://www.publicdefenders.nsw.gov.au/barbook>.

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Tasmania, *Parliamentary Debates*, House of Assembly, Estimates Committee B, 4 June 2023, 40–1, (Elise Archer, Attorney-General)

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Paper title

The ripple effect refers to the way in which a single action or event can have far reaching consequences.

For a victim survivor of sexual violence, the impact of this offending, including the criminal justice and sentencing process, can have long lasting effects, extending beyond the offence and affect their mental, emotional and physical well-being. These impacts can extend beyond the victim survivor, affecting the victim survivor's relationships, family dynamics and social networks, as well as the community and wider society.

Sexual assault and rape each account for 0.1% of all matters sentenced in Queensland. However, 1 in 5 women and 1 in 16 men report experiencing sexual violence since the age of 15. The Council recognises that sentenced sexual assault and rape offences do not reflect the true extent of this form of offending in the community due to the significant underreporting of these offences and high rates of attrition.

Effective responses to sexual violence require a whole-of-community approach, not only legal reform but challenging harmful beliefs through education and awareness. In doing so, we can work towards minimising the ripple effect of sexual violence.

Paper artwork

Socks are a seemingly harmless, personal everyday item. However, to a victim-survivor of sexual violence, they can represent a pathway to a memory of the traumatic event.

This concept is referenced in the novel *Time Shelter* by Georgi Gospodinov, which talks of normal, everyday things being 'potentially charged with hidden violence' for those who have experienced a traumatic event.

Socks can be used in many different ways in sexual violence cases – to control or restrain a victim, to block access to door, and even to avoid detection. Victims may be forced to leave the scene of a sexual assault without their socks, shoes and other items of clothing – making them feel exposed and stripped of their dignity.

Disclaimer

The content of this paper presents the views of the Queensland Sentencing Advisory Council and does not represent Queensland Government policy. While all reasonable care has been taken in the preparation of this paper, no responsibility or liability is assumed for any errors or omissions or any loss, damage, or injury, financial or otherwise, suffered by any person acting or relying on information contained in or omitted from this publication. This paper follows the Melbourne University Law Review Association Inc, *Australian Guide to Legal Citation* (4th ed., 2018) and reflects the law as at 1 December 2023.

The Queensland Sentencing Advisory Council

The Queensland Sentencing Advisory Council is established by section 198 of the *Penalties and Sentences Act 1992* (Qld). The Council provides independent research and advice, seeks public views and promotes community understanding of sentencing matters. The Council's functions, detailed in section 199 of the Act, include to:

- inform the community about sentencing through research and education;
- engage with Queenslanders to understand their views on sentencing; and
- advise the Attorney-General on matters relating to sentencing, at the Attorney-General's request.

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Endnotes

Chapter 1: Introduction

1 See Women's Safety and Justice Taskforce, 'About the Women's Safety and Justice Taskforce' (Web Page) and Terms of Reference <https://www.womenstaskforce.qld.gov.au/about-us>.
2 Women's Safety Justice Taskforce, H*ear Her Voice, Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022).
3 We note there are different legal definitions of who is a victim adopted for specific purposes, and some of these definitions are broader than that used for the purposes of this paper. See, for example, *Victims of Crime Assistance Act 2009* (Qld) s 5.
4 The term complainant is the person in respect of whom a criminal offence is alleged to have been committed. This term is commonly used in Queensland, including in legislation.
5 See, eg, Oona Brooks and Michele Burman, 'Reporting Rape: Victim Perspectives on Advocacy and Support in the Criminal Justice Process' (2017) 17(2) *Criminology and Criminal Justice* 209 cited in Rhiannon Davies and Lorana Bartels, *The Use of Victim Impact Statements in Sentencing for Sexual Offences: Stories of Strength* (Routledge, London, 2021) 14–15.
6 See especially Victorian Law Reform Commission, *Improving Justice System Responses to Sexual Offences* (Report, September 2021) 7, which makes this same point.
7 Legislative Council Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System: Volume 2* (2022) 575, citing Victorian Aboriginal Legal Service, *Submission 139*, 253.

Chapter 2: Current legal framework

1 *Criminal Code Act 1899* (Qld) sch 1, s 349(2)(a) ('*Criminal Code* (Qld)'). The words 'engages in penile intercourse with' replaced 'has carnal knowledge with or of' on the coming into force of s 17 of the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2003* (Qld).
2 Ibid s 349(2)(b).
3 Ibid s 349(2)(c).
4 Ibid s 349(1).
5 Ibid s 352(1)(a). Note, this provision does not expressly prescribe consent to be an element of the offence of sexual assault. However, assault is an element of the offence and is defined in section 245 as being 'without the other's consent'. See also s 347.
6 Ibid s 352(1)(a).
7 *R v McBride* [2008] QCA 412, [20]; R *v Jones* (2011) 209 A Crim R 379; [2011] QCA 19, [29]–[32]. See also *R v BAS* [2005] QCA 97 [16] citing *R v Harkin* (1989) 38 A Crim R 296 [301].
8 *Criminal Code* (Qld) (n 1) s 352(1)(b).
9 For the definition of a circumstance of aggravation, see ibid s 1.
10 Ibid s 352(3)(a).
11 Ibid s 352(3)(b).
12 Ibid s 352(3)(c).
13 Ibid s 352(2).
14 Prior to 23 September 2016, the age of consent for anal intercourse was 18 years: see *Health and Other Legislation Amendment Bill 2016* (Qld).
15 *Criminal Code* (Qld) (n 1) ss 210, 213, 215, 218A–218B, 219, 223, 228, 229A, 229B–229BC.
16 Ibid s 349(3).
17 See *R v Manning* [2014] QCA 49 [39]—[40], [43] (Morrison JA). Pursuant to s 578(1) of the *Criminal Code* (Qld) (n 1) a person charged with rape may be alternatively convicted of indecent treatment of children (s 210(1)), engaging in penile intercourse with a child under 16 (s 215), abuse of persons with an impairment of the mind (s 216), procuring young person etc. for penile intercourse (s 217(1)), procuring sexual acts by coercion etc. (s 218), incest (s 222) or sexual assault (s 352).
18 Ibid s 348(1).
19 This did not equate to a 'legal' capacity. The amendment brought in the existing case law about an incapacity to consent, for example, due to youth, intellectual impairment or intoxication: Explanatory Notes, Criminal Law Amendment Bill 2000 (Qld) 9.

20 *Criminal Code* (Qld) (n 1) s 349(3).
21 *R v Bevinetto* [2019] 2 Qd R 320 (Sofronoff P, Henry and Crow JJ agreeing); *R v Smith* [2020] QCA 23.
22 Women's Safety Justice Taskforce, *Hear Her Voice, Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) vol 1, 216, rec 43 ('Women's Safety Justice Taskforce').
23 Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld) s 13.
24 Queensland Parliament, Legal Affairs and Safety Committee, *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023* (Report No 63, 57th Parliament, January 2024) rec 1.
25 *Criminal Code* (Qld) (n 1) s 24.
26 *R v Enright* [2023] QCA 89 [90] (Mullins P, Bond JA and Boddice AJA); *R v Stephens* (1994) 76 A Crim R 5, 5, 7 (Pincus, Davies JJA, Lee J); cited in *R v Gill; Ex parte A-G (Qld)* [2004] QCA 139 [5] (de Jersey CJ).
27 Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld) s 14.
28 Ibid, proposed new provision in *Criminal Code* (Qld) (n 1) s 348A(2).
29 Ibid, proposed new provision in *Criminal Code* (Qld) (n 1) s 348A(3).
30 Women's Safety Justice Taskforce (n 22) vol 1, 216, rec 43.

Chapter 3: Sentencing purposes, principles and factors

1 See, eg, *Veen v The Queen* [No 2] 164 CLR 465 ('*Veen [No. 2]*') in which the Court said at [476] that '[t]he purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions' (Mason CJ, Brennan, Dawson and Toohey JJ).
2 *Penalties and Sentences Act 1992* (Qld) s 9(6)(k) ('PSA').
3 Ibid s 9(6)(f).
4 Ibid s 9(6)(g).
5 See, eg, *R v GAW* [2015] QCA 166 [47], [64] (Philippides JA); *R v H* (1993) 66 A Crim R 505, 507, 509–10 (Davies and McPherson JJA and Thomas J); *R v Williams; Ex parte A-G (Qld)* [2014] QCA 346, [58], [73] (McMeekin J, Henry J agreeing); *R v McConnell* [2018] QCA 107 [22] (Fraser JA, Sofronoff P and Philippides JA agreeing); *R v Ruiz; Ex parte A-G (Qld)* [2020] QCA 72 [19] (Sofronoff P, McMurdo and Mullins JJ).
6 See, eg, *R v Quick; Ex parte A-G (Qld)* [2006] QCA 123 [14] (de Jersey CJ); *R v Misi; Ex parte A-G (Qld)* [2023] QCA 34, [4] (Mullins P, Dalton and Flanagan JJA); *R v McConnell* [2018] QCA 107 [22] (Fraser JA, Sofronoff P and Philippides JA agreeing); *R v Teece* [2019] QCA 246 [38] (Philippides JA, Morrison and McMurdo JJA agreeing).
7 Queensland Sentencing Advisory Council, Queensland Sentencing Advisory Council, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld)* (Final Report, 2022).
8 *Criminal Code*, RSC 1985 c C-46, s 718.01 inserted in 2005, c 32, s 24.
9 Ibid s 718.04 inserted in 2019, c 25, s 292.1 in response to the recommendations of a National Inquiry into missing and murdered Indigenous women and girls: National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019) vol 1b, 185 [5.18].
10 *Crimes Act 1914* (Cth) s 16A(2AAA). 'Commonwealth child sex offence' is defined in s 3(1) of that Act to mean an offence against listed provisions of the *Criminal Code Act 1995* (Cth) sch, including relating to child exploitation material offences.
11 Ibid s 16A(2AAA)(b).
12 *Sentencing Act 1991* (Vic) ss 6B, 6D.
13 *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(g); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g); *Sentencing Act 2017* (SA) s 4(1)(c). South Australia lists as the primary purpose of sentencing 'to protect the safety of the community (whether as individual or in general)' to which other purposes are secondary: *Sentencing Act 2017* (SA) s 3.
14 See eg, *Crimes (Sentencing) Act 2005* (ACT) s 11(3)(a) (in considering whether to make an intensive correction order), s 33(1)(f) (general requirement to take into account the effect of the offence on the victims of the offence and their families), s 33(1)(gb)(ii) (requirement to consider the loss or harm caused to a vulnerable victim).
15 Preliminary submission 20 (North Queensland Women's Legal Service) 3.
16 Ibid 2.
17 Preliminary submission 21 (Women's Legal Service Queensland) 1–2.
18 SME Interviews 2, 4, 6, 7, 8, 9, 10, 11, 12, 13.

19 SME Interviews 2, 9, 13, 14. For more information about these interviews, see *Consultation Paper: Background*, section 1.4.3. The findings reported in this paper are preliminary and based on early interviews only. The full findings of this consultation will be reported on in the Council's final report.
20 SME Interviews 2, 6, 8.
21 See, eg, SME Interviews 3, 13.
22 SME Interviews 6, 9, 11.
23 SME Interviews 2, 3, 11. For a discussion of this issue, see section Chapter 6.
24 SME Interview 11.
25 SME Interview 15. See also SME Interview 25.
26 SME Interview 3.
27 For example, if the victim has previously committed an act of serious domestic violence, or several acts of domestic violence against the offender.
28 See Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld) cl 83.
29 *R v Symss* (2020) 3 QR 336, 345 [31] (Sofronoff P, Morrison JA agreeing at [43] and McMurdo JA agreeing at [44]). The High Court of Australia has made statements to this effect in discussing the nature of the approach taken to sentencing in Australia known as 'instinctive synthesis'. See *Wong v The Queen* (2001) 207 CLR 584, 611 [75] ('*Wong*') (Gaudron, Gummow and Hayne JJ cited with approval by Gleeson CJ, Gummow, Hayne and Callinan JJ in *Markarian v The Queen* (2005) 228 CLR 357 at 373–5 [37] ('*Markarian*').
30 *Criminal Code Act 1899* (Qld) sch 1, s 1 ('*Criminal Code* (Qld)').
31 PSA (n 2) s 9(6)(b); *R v CCT* [2021] QCA 278; *R v Thompson* [2021] QCA 29, 13 [45] (Williams J and Philippides JA agreeing).
32 PSA (n 2) s 10: This is determined by considering the nature of the previous conviction, its relevance to the current offence, and the time that has elapsed since the conviction.
33 *R v Stirling* [1996] QCA 342.
34 *R v K* [1993] QCA 425 10 (Davies JA and Thomas J); *R v Benjamin* (2012) 224 A Crim R 40; *R v SDM* [2021] QCA 135, 6 [21] (Mullins JA, Fraser JA and Henry J agreeing); *R v Newman* [2007] QCA 198, 8 [44] (Williams JA and White J agreeing).
35 PSA (n 2) s 9(6)(e); *R v WBM* [2020] QCA 107 [36]–[37] (Applegarth J with Fraser and Mullins JJA agreeing) citing *R v BBP* [2009] QCA 114.
36 In *R v RAZ; Ex parte A-G (Qld)* [2018] QCA 178, 5 [24] Sofronoff P said 'the respondent's position as a magistrate meant that, while he was committing these crimes [sexual offences against a child], he knew very well what his criminal acts were doing to his victim and would continue to do.'
37 PSA (n 2) s 9(10A): Does not apply if the court considers it would be unreasonable to do so due to exceptional circumstances.
38 *R v MBY* [2014] QCA 17, 17 [75] (Morrison JA, Muir JA and Daubney J agreeing) ('*MBY*'); *DPP (Vic) v Dalgliesh (Pseudonym)* (2017) 262 CLR 428, 436 [20], 438 [26], 441 [36] (Kiefel CL, Bell and Keane JJ).
39 *R v Heckendorf* [2017] QCA 59, [31] (McMurdo JA) (Fraser JA, Mullins J agreeing); *R v Robinson* [2007] QCA 349 [29]; *R v Porter* [2008] QCA 203 [29]; *R v Lawrence* [2002] QCA 526, 16 (McMurdo P, Helman and Philippides JJ agreeing)
40 PSA (n 2) s 13. The value of a guilty plea is discussed in section 10.3.2 of this paper.
41 *R v Smith* [2020] QCA 23, 30 [49] (Morrison JA, Holmes CJ and McMurdo JA agreeing) ('*Smith*'); *R v Wallace* [2023] QCA 22, 6 [19] (Bowskill CJ and Bond JA agreeing) ('*Wallace*').
42 PSA (n 2) ss 9(2)(f), 9(3)(h), 9(6)(h); *Ryan v The Queen* (2001) 206 CLR 267 ('*Ryan*'). For a sexual offence to a child under 16 years, the court must not have regard to the person's good character if it assisted the person to commit the offence: PSA (n 2) s 9(6A).
43 *Wallace* (n 41) 6 [19] (Bowskill CJ and Bond JA agreeing); *R v Newman* [2007] QCA 198, 8 [44] (Williams JA and White J agreeing).
44 PSA (n 2) s 9(2)(i); *Smith* (n 41) 30 [49] (Morrison JA, Holmes CJ and McMurdo JA agreeing). PSA (n 2) ss 13A–13B. See also *R v WBT* [2022] QCA 215 [30] (McMurdo and Flanagan JJA and Freeburn J); *R v LAT* [2021] QCA 104 [12] (McMurdo JA, Morrison JA and Burns J agreeing).
45 PSA (n 2) s 9(10B). This was introduced in the *Domestic and Family Violence Protection (Combatting Coercive Control) and Other Legislation Amendment Act 2023* which commenced 23 February 2023.
46 Generally, there needs to be evidence as to the causal connection between the offending being sentenced and an offender's own victimisation: *MBY* (n 38) 16–17 [74]–[75] (Morrison JA, Muir JA and Daubney J agreeing).
47 PSA (n 31) ss 9(2)(g), 9(6)(i); *Smith* (n 41) 30 [49] (Morrison JA, Holmes CJ and McMurdo JA agreeing).
48 *R v D'Arcy* [2001] QCA 325 [167] ('*D'Arcy*').
49 *R v KU; Ex parte A-G (Qld) (No 2)* [2011] 1 Qd R 439, 476–7 [133], [140], 480 [149] (de Jersey CJ, McMurdo P and Keane JA agreeing); *Wallace* (n 41) 6 [19] (Bowskill CJ and Bond JA agreeing); *MBY* (n 38) 13–7

[60]–[76] (Morrison JA, Muir JA and Daubney J agreeing) citing *Bugmy v The Queen* [2013] HCA 37 and *Munda v Western Australia* [2013] HCA 38.

50 See *R v O'Sullivan; Ex parte A-G (Qld); R v Lee; Ex parte A-G (Qld)* (2019) 3 QR 196 [156] (Sofronoff P, Gotterson JA and Lyons SJA) ('*O'Sullivan*') where it was acknowledged 'The perverse morality that exists in prisons means that offenders convicted of crimes against children are liable to suffer brutal attacks.' O'Sullivan was brutally attacked in prison and he must serve his sentence in protective custody, which was a mitigating factor. It was noted in *R v Male*s [2007] VSCA 302 at [51] that 'if they [defence counsel] wish to rely on the factor of protection as a mitigating factor on sentence, in the absence of a Crown concession the mere assertion that a client is in protection will hereafter be treated as insufficient. Counsel will need to make clear to the sentencing court how the particular protection regime is said to make the offender's experience of imprisonment harsher than it would be if those conditions had not been imposed'.

51 PSA (n 2) s 9(2)(f); *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476–7; *R v WBK* (2020) 4 QR 110, 129 [54] (Lyons SJA and Boddice J agreeing).

52 'An offender's ill-health is a mitigating factor in sentencing when imprisonment will impose a greater burden on the offender than on others or where there is a serious risk that imprisonment will impose a greater burden on the offender than others or where there is a serious risk that imprisonment will have a gravely adverse effect on his health': *D'Arcy* (n 48) citing *R v Pope* [32] QCA 318; CA No 271 of 1996, 30 August 1996.

53 Julian V Roberts, 'Punishing More or Less: Exploring Aggravation and Mitigation at Sentencing' in Julian V Roberts, *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 2–5.

54 *Wong* (n 29) 591 [6] (Gleeson CJ).

55 *Hili v The Queen* (2010) 242 CLR 520, 535 [49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

56 Terry Skolnik, 'Criminal Justice Reform: A Transformative Agenda' (2022) *Alberta Law Review Society* 631, 653 citing these arguments in support of the establishment of a permanent sentencing commission in Canada.

57 PSA (n 2) s 199(1)(c).

58 As to the Council's statutory functions, see ibid s 199.

59 *Sentencing Act 2002* (NZ) ss 7–9.

60 *Sentencing Act 2020* (UK) pts 2–13, constitute the 'Sentencing Code': s 1.

61 Ibid s 59(1).

62 Preliminary submission 16 (Legal Aid Queensland).

63 SME Interviews 6, 9, 11.

64 SME Interviews 7, 8, 9, 10.

65 SME Interviews 5, 6, 8, 13, 14.

66 See, eg, SME Interview 14.

67 SME Interview 6.

68 Ibid.

69 SME Interviews 15, 17.

70 SME Interview 15.

71 SME Interview 7.

72 Preliminary submission 17 (Fights Against Child Abuse Australia).

73 Ibid.

74 Preliminary submission 28 (Sisters Inside Inc).

75 PSA (n 2) s 9(10A).

76 Some information on sentencing outcomes for domestic violence rape offences is presented in section 4.2.2.

77 See *R v Libl; A-G (Qld)* [1996] QCA 63, 6 (Fitzgerald P, McPherson JA, Helman J) ('*Libl*'); *R v Cutts* [2005] QCA 30 [22] (McMurdo P) ('*Cutts*'); *R v Stable (a pseudonym)* [2020] QCA 270 [33]–[34] (Sofronoff P and Fraser and Philippides JJA) ('*Stable*').

78 Explanatory Notes, Sexual Offences (Protection of Children) Amendment Bill 2002, 2.

79 *Stable* (n 77) [33] (Sofronoff P, Fraser and Philippides JJA agreeing).

80 See *R v Daniel* [1998] 1 Qd R 499, 515–16; *Libl* (n 77) 6 (Fitzgerald P, McPherson JA, Helman J); *Cutts* (n 77) [22] (McMurdo P); *R v VN* [2023] QCA 220 [30] (Bowskill CJ and Morrison and Dalton JJA); *R v Enright* [2023] QCA 89, [90]–[91].

81 PSA (n 2) ss 9(4), 9(6), 161B(5).

82 Preliminary submission 1 (Name withheld), 1; Preliminary submission 5 (Queensland Sexual Assault Network); Preliminary submission 23 (Full Stop Australia) 2–3.

83 Preliminary submission 12 (Queensland Family & Child Commission) 1.

84 SME Interviews 7, 9, 12

85 SME Interviews 1, 3, 4, 5, 7, 9, 15.

86 SME Interview 5.

87 SME Interviews 5, 12.
88 See, eg, SME Interview 9.
89 SME Interview 7.
90 *Sentencing Act 1997* (Tas) s 11A(1).
91 *Sentencing Act 2002* (NZ) s 9A.
92 Ibid s 9(1)(g).
93 *Criminal Code*, RSC 1985 c C-46, s 718.201.
94 Ibid, ss 718.2(ii), 718.2(ii.1), 718.2(iii), 718.2(iii.1).
95 PSA (n 2) ss 9(2)(f), 9(3)(h), with the exception in s 9(6A).
96 Ibid s 11(1).
97 *Weininger v The Queen* (2003) 212 CLR 629 [58]–[59] (Kirby J)
98 PSA (n 2) s 9(6A) (emphasis added). This section was introduced following recommendation 74 by the Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) ('Royal Commission into Institutional Responses to Child Sexual Abuse').
99 *Ryan* (n 42) [31] (McHugh J).
100 *Melbourne v The Queen* (1991) 198 CLR 1 [34].
101 Queensland, *Director of Public Prosecution's Guidelines* (30 June 2022) 23, 51.
102 Ibid 52.
103 Ibid.
104 PSA (n 2) s 9(6A), inserted by *Criminal Code (child Sexual Offences Reform) and Other Legislation Amendment Act 2020* (Qld) s 53(5). This provision commenced on the day after the date of assent, being 15 September 2020.
105 Royal Commission into Institutional Responses to Child Sexual Abuse (n 98). Ibid 99, rec 74.
106 Legal Affairs and Community Safety Committee (Victorian Government), Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019 (Report 59, 56th Parliament, February 2020), 32–3.
107 Ibid.
108 Ibid 34.
109 Preliminary Submission 17 (Fighters Against Child Abuse Australia) 6.
110 Ibid.
111 Ibid 10.
112 Preliminary Submission 23 (Full Stop Australia) 4.
113 Ibid 4.
114 Preliminary Submission 23 (Full Stop Australia) citing Georgia Roberts, 'Canberra rapist Thomas Earle avoids jail time, sentenced to 300 hours of community service,' ABC, 29 April 2023, available at: <https://www.abc.net.au/news/2023-04-29/rapist-thomas-earle-sentenced-to-three-years-ico/102278630> and Phoebe Hosier and Elise Kinsella, 'Questions arise over character references used to help sex offender Jeffrey 'Joffa' Corfe escape jail time,' ABC, 8 March 2023, available at: <https://www.abc.net.au/news/2023-03-08/court-jeffrey-joffa-corfe-sentence-character-reference-alex-case/102070088>.
115 Preliminary Submission 5 (Queensland Sexual Assault Network).
116 SME Interview 10.
117 SME Interviews 9, 15.
118 SME Interviews 1, 9, 10.
119 SME Interview 7.
120 SME Interview 9. For example, there is a difference between a teenage boy who goes to a party and gets drunk for the first time and commits an offence compared to someone who, in a premeditated way, goes out and targets a victim and commits an offence.
121 SME Interviews 7, 10, 12
122 SME Interviews 9, 11.
123 SME Interviews 2, 11.
124 SME Interviews 3, 4.
125 SME Interviews 8, 10, 11, 16.
126 SME Interview 2.
127 SME Interview 9.
128 Ibid.
129 *Sentencing Act 1991* (Vic) s 5(2)(f); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(f); *Crimes (Sentencing) Act 2005* (ACT) s 33(m); *Sentencing Act 2017* (SA) s 11(1)(d).
130 *Sentencing Act 1991* (Vic) s 5AA; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A); *Crimes (Sentencing) Act 2005* (ACT) s 34; *Sentencing Act 1997* (Tas) s 11A(2)(b); *Sentencing Act 2017* (SA) s 11(4)(c). The Northern Territory has passed legislation which limits good character, see *Criminal Justice Legislation Amendment (Sexual Offences) Act 2023* (NT) s 29.

131 *MAS v The State of Western Australia* [2012] WASCA 36 [86] (Pullin and Mazza JJA agreeing).
132 *Crimes Act* (1914) (Cth) s 16A(2)(ma). This provision was introduced in 2020 with an intention to 'capture scenarios where a person's professional or community standing is used as an opportunity for the offender to sexually abuse children.' Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) (2020) [254].
133 *Sentencing Act 2002* (NZ) s 9(2)(g).
134 *Botha v The Queen* [2015] NZCA 196 [21] ('*Botha*').
135 *King v The Queen* [2015] NZCA 475 [31] (Harrison J, Dobson and Gilbert JJ agreeing) ('*King*') with reference to *Botha* (n 134) [21].
136 E-Petition, 'Remove Good Character References for Paedophiles in the Sentencing Procedure of Child Sexual Abuse Cases' (Web Page) <https://www.parliament.nsw.gov.au/lc/pages/closedepetition-details.aspx?q=hjTKTfEbrBjTOpaTYQw-oA>.
137 Chantelle Al-Khouri, 'Should character references still be used in Australian courts?' *ABC News* (Web Page, 13 September 2023) <https://www.abc.net.au/news/2023-09-13/character-witness-harrison-james-sex-violence-danny-masterson/102846370>.
138 E-Petition (n 136).
139 Attorney-General and Minister for Women Minister for Prevention of Domestic Violence and Sexual Assault, 'NSW Government takes steps to improve justice outcomes for victim-survivors of child sexual assault' (Media Release, 26 July 2023). <https://www.nsw.gov.au/media-releases/nsw-government-takes-steps-to-improve-justice-outcomes-for-victim-survivors-of-child-sexual-assault>
140 E-Petition (n 136).
141 Alexandra Humphries, 'Sexual assault victim wants to stop paedophiles from using character references, lawyers' group pushes back', *ABC News* (Web Page, 1 February 2022) <https://www.abc.net.au/news/2022-01-31/paedophile-john-wayne-millwood-victim-battle-characterwitness/100793004>
142 See Andrew Day, Stuart Ross and Katherine McLachlan, *The Effectiveness of Minimum Non-Parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-Based Approaches to Community Protection, Deterrence and Rehabilitation* (Literature Review, University of Melbourne, August 2021) 12–13 ('*University of Melbourne Literature Review*').
143 Productivity Commission, *Overcoming Indigenous Disadvantage key indicators 2020* (Report 2020), 4.130 citing Our Watch, 'Challenging Misconceptions About Violence Against Aboriginal and Torres Strait Islander Women' (Webpage, 2024) <https://action.ourwatch.org.au/resource/challenging-misconceptions-about-violence-against-aboriginal-and-torres-strait-islander-women/>; Women's Safety and Justice Taskforce, *Hear Her Voice, Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) vol 2, 151 citing 8 Victoria Police, *Policing harm, upholding the right: Victoria police strategy for family violence, sexual offences and child abuse, 2018-2023*, 15.
144 See Dr Harry Blagg, Dr Vickie Hovane and Dorinda Cox, Submission No 121 to *Pathways to Justice* (n 145) (2017) 1; Commission of Inquiry into Queensland Police Services Responses to Domestic and Family Violence, *A Call for Change* (Final Report, 2022) 18.
145 Australian Law Reform Commission, *Pathways to Justice— An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People* (Report No 133, December 2017). See especially: in prison, 93 [3.13]; convicted of an offence, 100 [3.30]; on remand, 102 [3.36]; and women as being over-represented, 105 [3.41].
146 Ibid 185–6 [6.2].
147 See Dr Klaire Somoray, Samuel Jeffs and Anne Edwards, *Connecting the dots: the Sentencing of Aboriginal and Torres Strait Islander Peoples in Queensland* (Queensland Sentencing Advisory Council, Sentencing Profile, 2021), 4–10.
148 *R v Bugmy* (2013) 249 CLR 571, 594 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) ('*Bugmy*').
149 (1992) 76 A Crim R 58.
150 *R v Fernando* (1992) 76 A Crim R 58, 62–3.
151 Bugmy (n 148) 594–5 [43].
152 Ibid 595 [44]
153 Ibid 594 [41].
154 *R v Neal* (1982) 149 CLR 305, 326 cited in *Bugmy* (n 148) 593 [39].
155 PSA (n 2) s 9(2)(p)(ii).
156 *R v SCU* [2017] QCA 198, 11–12 [56], 23 [113] (Sofronoff P).
157 *R v Daniel* [1998] 1 Qd R 499, 531 (Fitzgerald P).
158 Our Watch, 'Challenging Misconceptions About Violence Against Aboriginal and Torres Strait Islander Women' (Web Page, 2024) <https://action.ourwatch.org.au/resource/challenging-misconceptions-about-violence-against-aboriginal-and-torres-strait-islander-women/>.

159 Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld) cl 83(3) ('Coercive Control Amendment Bill').
160 Women's Safety and Justice Taskforce, *Hear Her Voice, Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) vol 2, 561.
161 Ibid.
162 PSA (n 2) s 9(2)(r).
163 [2023] QCA 69.
164 *R v SEB* [2023] QCA 69 [2] (Dalton JA, Boddice JA and Crow J agreeing).
165 Ibid.
166 Ibid [12].
167 See *Bugmy* (n 148). See also *Munda v Western Australia* (2013) 249 CLR 600.
168 *Bugmy* (n 148) 595 [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
169 [2005] NSWCCA 369.
170 *R v MAK* [2005] NSWCCA 369 [56]–[57] (Grove J, McClellan CJ and Hall J agreeing).
171 Ibid [61].
172 *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(m).
173 *Sentencing Act 2017* (SA) s 22(1). The purpose and value of a sentencing conference and an example of what is expressed was discussed in *R v Perry* [2022] SASCA 127, [32]–[58] (Kourakis CJ).
174 *Sentencing Act 2002* (NZ) s 27(1).
175 *Criminal Code*, RSC 1985, c. C-46, s 718.2(e).
176 *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth) commencing 12 December 2006. The relevant Explanatory Memorandum makes clear that the court may take into account an offender's cultural background, should this be appropriate, other than as a mitigating or aggravating factor.
177 Subject to the exception in *Crimes Act 1914* (Cth) s 16A(2)(ma). See Explanatory Notes, Crimes Amendment (Bail and Sentencing) Bill 2006 (Cth), Item 4 Paragraph 16A(2)(m).
178 Preliminary submission 22 (Relationships Australia Queensland).
179 SME Interviews 1, 4
180 SME Interview 4.
181 SME Interview 6.
182 Ibid.
183 Ibid.
184 SME Interview 9.
185 Queensland Parliament, Legal Affairs and Safety Committee, *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023* (Report No. 63, 57th Parliament Legal Affairs and Safety Committee, January 2024 ('Legal Affairs and Safety Committee').
186 For example, QCOSS, Multicultural Australia, QTSILS, QHRC and knowmore cited in ibid 56–7.
187 Submission 30 (North Queensland Women's Legal Service) 10 and submitter 3 as cited ibid 57.
188 Ibid.
189 Ibid. The Department of Justice and Attorney-General responded to these concerns as follows: '[T]hese amendments will not serve to elevate the rights of a particular group over the rights of a complainant in a case involving domestic violence. A sentencing court is required to balance various features in arriving at a sentence. Other features – such as the seriousness of the offence, any injury, damage or loss caused by the offence, and any physical mental or emotional harm - will also be considered and balanced': DJAG, correspondence, 6 November 2023, 135–6 cited in Legal Affairs and Safety Committee (n 185) 58.
190 Ibid.
191 Coercive Control Amendment Bill (n 159) cl 83(3).
192 PSA (n 2) s 9(2)(gb).
193 Ibid ss 9(2)(ga), 9(10B) introduced on *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2022* (Qld) ('*Coercive Control Amendment Act*'). There are also similar amendments to the *Youth Justice Act 1992* (Qld) ('YJA'). Prior to the amendments, this was considered a mitigating factor. See also *R v MacKenzie* [2000] QCA 324; *R v Leslie (a pseudonym)* [2021] QCA 85; *R v Reid* (1998) (Supreme Court of New South Wales Court of Criminal Appeal, 24 July 1998); cf *R v Van Gelder* (2003) 142 A Crim R, Perry J [33]; *JL v The Queen* [2014] NSWCCA 130.
194 *R v AWF* (2000) 2 VR 1. *Bugmy* (n 148). PSA (n 2) s 9(10B).
195 Arie Frieberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (3rd ed, 2014) 311 [4.110]. See *MBY* (n 38) 7–8 [41], 11–12 [51], [53] quoting the sentencing judge's remarks (Morrison JA, Muir JA and Daubney J agreeing).
196 *Coercive Control Amendment Act* (n 193) cl 83(2).
197 Preliminary submission 5 (Queensland Sexual Assault Network); Preliminary submission 11 (DV Connect); Preliminary submission 12 (Queensland Family & Child Commission); Preliminary submission (North Queensland Women's Legal Service).

198 SME Interviews 1, 3, 16,
199 SME Interview 3.
200 SME Interviews 14, 15.
201 Submission 24 (QCOSS) 4, Submission 9 (Multicultural Australia) 9, Submission 10 (Queensland Human Rights Commission) 7, Submission 30 (North Queensland Women's Legal Service) 10 as cited in Legal Affairs and Safety Committee (n 185) 56–7.
202 Submission 4 (BRISSC) to ibid.
203 PSA (n 2) s 9(4)(c) (this was s 9(5) in 2010 when the amendment was made). The Explanatory Notes provided some guidance on what factors a court may consider when determining exceptional circumstances, such as closeness in age between the person being sentenced and child. See Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010, 7.
204 PSA (n 2) s 9(5).
205 *R v Tootell; ex parte Attorney-General (Qld)* [2012] QCA 273 [24].
206 Ibid [24]–[25].
207 *R v BCX* (2015) 255 A Crim R 456 at 465 [35] ('*BCX*'). McMurdo P concurred at [1]. Philippides JA also agreed at [2] that sentencing under PSA (n 2) s 9(4) required an integrated approach. Followed in: *R v Theohares* [2016] QCA 51; *R v Schenk; Ex parte Attorney-General (Qld)* [2016] QCA 131; and *R v Clark* [2016] QCA 173. Cited in *R v HCK* [2023] QCA 65 [40] (Bond JA, McMurdo and Fraser JJA agreeing).
208 See *R v GAW* [2015] QCA 166.
209 See Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect – Consultation Paper – Background* (March 2024) Chapter 7.2 ('*Consultation Paper: Background*').
210 This meant when determining an appropriate sentence, the judge had to consider section 144 of the YJA (n 193).
211 *Criminal Code* (Qld) (n 30) s 210.
212 *Sentencing Act 1995* (NT) s 78F(1). A 'sexual offence' to which this section applies means an offence specified in sch 3: s 3 and included offences against *Criminal Code Act 1983* (NT) sch 1, ss 188(2)(k) (indecent assault) and 192 (sexual intercourse and gross indecency without consent). A court can also make a home detention order after service of part of a term of imprisonment under a partially suspended sentence, meaning that this is a sentencing option that is available in these cases: *R v Bennett* [2021] NTCCA 2.
213 *Sentencing Act 1991* (Vic) s 5(2G). There are some limited exceptions to this. See ss 5(2GA), 10A.
214 Ibid s 3(1) (definition of 'Category 1 offence').
215 Ibid.
216 A 'domestic violence offence' for this purpose has the same meaning as in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ('CDPV Act'): *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3. A 'domestic violence offence' is defined in s 11 of the CDPV Act and includes 'an offence committed by a person against another person with whom the person who commits the offence has (or has had) a domestic relationship' which is also a 'personal violence offence'. The definition of a 'personal violence offence' in s 4 of the Act includes several sexual offences under the *Crimes Act 1900* (NSW) including sexual assault (s 61I), aggravated sexual assault (s 61J), aggravated sexual assault in company (s 61JA), sexual touching (s 61KC), aggravated sexual touching (s 61KD), sexual act (s 61KE), aggravated sexual act (s 61KF), sexual intercourse with a child under 10 (s 66A), sexual intercourse with a child between 10 and 16 (s 66C) as well as sexual touching and sexual act offences where committed against a child (ss 66DA–DF), persistent sexual abuse of a child (s 66EA) and incest (s 78A).
217 This includes an intensive correction order, a community condition correction order or a conditional release order that includes a supervision condition: see *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 4A(1), 4(A)(3).
218 Ibid s 4A(2).
219 *Crimes Act 1961* (NZ) s 128B(2). 'Sexual violation' for these purposes is defined in s 128.
220 Ibid ss 128B(2)–(3).
221 Criminal Code, RSC 1985, c C-46, s 271.
222 Ibid s 273(2).
223 Preliminary submission 17 (Fighters Against Child Abuse Australia).
224 Preliminary submission 28 (Sisters Inside Inc).
225 See, eg, SME Interviews 3, 6, 9.
226 SME Interviews 7, 10.
227 SME Interview 7.
228 Ibid.
229 SME Interview 13.
230 See *Consultation Paper: Background* (n 209) Chapter 7 for more information.
231 SME Interview 8.
232 SME Interview 17.

233 *BCX* (n 207) 463–4 [30] (Burns J, McMurdo P agreeing).
234 See *Consultation Paper: Background* (n 209) section 7.2.
235 See, eg, in Queensland: *R v Wruck* [2014] QCA 39; (2014) 239 A Crim R 111, cited with approval in subsequent cases, including *R v WBB* [2015] QCA 152 [43] Martin J (Gotterson and Philippides JJA agreeing); in NSW: *R v MJR* (2002) 54 NSWLR 368; and in Victoria: *Stalio v The Queen* (2012) 223 A Crim R 261, [46]–[54].
236 Arie Freiberg, Hugh Donnelly and Karen Gelb, *Sentencing for Child Sexual Abuse in Institutional Settings* (Report for the Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, July 2015) 93.
237 Australian Government, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report Parts VII to X and appendices* (2017) 322, rec 76 ('Royal Commission Criminal Justice Report').
238 The Royal Commission found, on average, it took 23.9 years for those who had experienced child sexual abuse to tell someone about that abuse: Australia. Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report*, *Volume 4: Identifying and Disclosing Child Sexual Abuse* (2017) 9.
239 PSA (n 2) s 9(4)(a).
240 See, eg, QDC, 21 April 2023 (Indictment No 2166 of 2023; Indictment No 5844 of 2022); QDC 11 February 2022 (Indictment No 91 of 2021); and QDC, 24 June 2021.
241 *Sentencing Act 2017* (SA) s 68; *Sentencing Act 1997* (Tas) s 11A(3); *Crimes (Sentencing) Act 2005* (ACT) s 34A. The definition of a 'child' is a person aged under 18 years: *Legislation Act 2001* (ACT) dictionary definition of a 'child'.
242 *Crimes (Sentencing Procedure) Act 1999* (NSW).
243 New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 August 2022, 9050 (Mark Speakman, Attorney-General) referring to the case of R *v Gregory Richardson*—unreported, District Court of New South Wales, Berman DCJ, 20 October 2020.
244 Ibid.
245 SME Interview 7.

Chapter 4: Current approach to sentencing and sentencing practices

1 See, eg, Janet Ransley and Kristina Murphy, *Working Paper on the Development of the Queensland Crime Harm Index* (Summary and update of an unpublished report to the Queensland Police Service prepared at the request of the Queensland Sentencing Advisory Council, forthcoming).
2 See, eg, Preliminary Submissions 16 (Legal Aid Queensland), 7 (Aboriginal and Torres Strait Islander Legal Service) and 10 (Queensland Indigenous Family Violence Legal Service).
3 Georgia Brignell and Hugh Donnelly, *Sentencing in NSW: A Cross-jurisdictional Comparison of Full-time Imprisonment* (Judicial Commission of NSW, Research Monograph 39, March 2015).
4 Ibid.
5 *Corrective Services Act 2006* (Qld) s 184(2). If the person is declared convicted of a serious violent offence, however, the person must ordinarily serve 80 per cent of the sentence in custody or 15 years, whichever is less: s 182(2).
6 For a further discussion, see section 5.2.
7 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44. This is expressed as a requirement that once the non-parole period is decided, the balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence unless there are special circumstances: s 44(2). Studies have found that the findings of special circumstances is common, see Patrizia Poletti and Hugh Donnelly, *Special circumstances under s 44 of the Crimes (Sentencing Procedure) Act 1999* (Judicial Commission of New South Wales, Sentencing Trends & Issues No 43, 2013) 1, n 2.
8 Judicial College of Victoria, *Victorian Sentencing Manual* (4th ed, July 2021) 162. An exception is for 'standard sentence offences' (including rape) for which the minimum non-parole period must be at least 60 per cent of the head sentence if the relevant term is less than 20 years, or 70 per cent if the relevant term is 20 years or more, unless the court decides that is in the interests of justice not to do so: *Sentencing Act 1991* (Vic) ss 11A(4)(b)–(c).
9 Jay Gormley et al, *The Methodological Challenges of Comparative Sentencing Research: Literature Review* (prepared for the Scottish Sentencing Council, May 2022).
10 See *Penalties and Sentences Act 1992* (Qld) s 159A ('PSA'). If a person is sentenced to a term of imprisonment, there is a legislative presumption that any time spent in pre-sentence custody be declared as time served under the sentence, but a court still has discretion to make a different order. If a person is sentenced to a wholly suspended sentence, this time cannot be declared. If pre-sentence custody is not declared as time served, the court can take this into account in other ways, such as by reducing the head sentence that might otherwise have been imposed, and/or making a different type of sentencing order.
11 This is required under s 144 of the *Youth Justice Act 1992* (Qld).

12 This includes sentence of imprisonment, partially suspended sentences and combined prison/probation orders. See Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect – Consultation Paper – Background* (March 2024) section 8.2.2 for more information ('*Consultation Paper: Background*).

13 For a discussion of these cases, see ibid.

14 Both differences were found to be statistically significant. Pearson's Chi-Square Test: $\chi 2(4) = 38.92$, $p < .0001$, V=0.15. See ibid, section 8.2.4 for more information.

15 Sentencing remarks from 118 cases of the 131 sentenced in 2022–23, where rape was the MSO, were analysed to obtain details about the offence conduct, victim age and relationship between the offender and victim survivor. For more information about the methodology please see ibid ch 8.

16 This difference was found to be statistically significant. Pearson's Chi-Square Test: $\chi 2(6) = 18.25$, $p < .01$, V=0.28.

17 These differences were not found to be statistically significant.

18 Changes introduced to section 9 PSA (n 10) now mean that a court must treat the fact an offence is a domestic violence offence as an aggravating factor unless the court considers it is not reasonable due to the exceptional circumstances of the case. See PSA s 9(10A) inserted by *Criminal Law (Domestic Violence) Amendment Act 2016* (Qld) s 5. This change came into effect on the data of assent (5 May 2016).

19 This difference was found to be statistically significant. Pearson's Chi-Square Test: $\chi 2(2) = 18.62$, $p < .001$, V=0.11.

20 This difference was not found to be statistically significant.

21 *Corrective Services Act 2006* (Qld) ('CSA') s 184(2). There are exceptions to this.

22 See PSA (n 10) pt 9A and CSA (n 21) s 182.

23 *Criminal Code Act 1899* (Qld) sch 1, s 352(1).

24 Ibid ss 352(2)–(3).

25 Pearson's Chi-Square Test: $\chi 2$ (1) = 25.486, p<.0001.

26 Because the analysis of sexual assault (aggravated) was based on only 16 cases, these findings should be treated with extreme caution.

27 Note: This included a small number of intensive correction orders and rising of the court which are custodial sentences but were excluded from the non-custodial figures.

28 See, for example, Sentencing Advisory Council (Victoria), *Community Attitudes to Offence Seriousness* (2012) in which sexual penetration with a child aged under 12 was ranked in seriousness just below murder, and rape was ranked below this, and at an equivalent level to intentionally cause serious injury. Indecent assault was ranked with offences such as intentionally cause injury and theft. Griffith University has made similar findings based on research undertaken with Queensland community members: Janet Ransley and Kristina Murphy, *Working Paper on the Development of the Queensland Crime Harm Index* (Summary and update of an unpublished report to the Queensland Police Service prepared at the request of the Queensland Sentencing Advisory Council, forthcoming).

29 Preliminary Submission 22 (Women's Legal Service Queensland) 1–2. The BRISSC Collective was also among those who referred to high rates of attrition and low sentencing rates across all sexual offences, including child sexual abuse: Preliminary Submission 6 (BRISSC Collective) 3.

30 Preliminary submissions 5 (Queensland Sexual Assault Network), 6 (BRISSC Collective) and 24 (Full Stop Australia).

31 A similar point was made by the ACT Sexual Assault Prevention and Response Steering Committee in its report*, Listen. Take Action to Prevent, Believe and Heal.* (December 2021) which noted: 'Some victim survivors reported that their knowledge of inadequate sentencing was the reason they did not report to police at all, as the potential outcome was simply not worth the retraumatisation of engaging with the justice system': 41.

32 Preliminary Submission 24 (Full Stop Australia) 2–3.

33 Preliminary Submission 6 (BRISSC Collective) 1.

34 Ibid 3 and Preliminary Submission 5 (Queensland Sexual Assault Network).

35 Preliminary Submission 5 (Queensland Sexual Assault Network).

36 Preliminary Submission 1 (name withheld) emphasis in original.

37 Preliminary Submission 17 (FACAA) 5.

38 Ibid 3.

39 Ibid.

40 Preliminary Submission 21 (NQWLS) 2.

41 Ibid 3.

42 Ibid.

43 Preliminary Submission 24 (Full Stop Australia) 3.

44 SME Interviews 3, 7, 9, 14, 15, 17.

45 SME Interviews 6,9, 15, 17.

46 SME Interviews 13, 20.
47 SME Interviews 7, 23.
48 SME Interview 16.
49 SME Interview 15.
50 SME Interviews 9, 12, 14.
51 SME Interview 7.
52 SME Interview 10.
53 SME Interview 7.
54 Ibid.
55 Ibid.
56 SME Interviews 1, 9.
57 SME Interview 9.
58 Ibid.
59 Ibid.
60 SME Interviews 7, 9.
61 SME Interview 9.
62 SME Interviews 6, 13, 14.
63 SME Interview 9.
64 SME Interview 14.
65 SME Interviews 11, 17.
66 SME Interview 1.
67 SME Interview 11.
68 SME Interview 10.
69 SME Interviews 3, 5, 6, 7, 8, 10, 11, 12, 13, 14.
70 SME Interview 9.
71 SME Interview 8.
72 SME Interview 9.
73 SME Interview 7.
74 SME Interview 9.
75 SME Interview 7.
76 Ibid.
77 Ibid.
78 SME Interview 9.
79 Ibid.
80 SME Interviews 7, 9.
81 SME Interview 9.

Chapter 5: Penalty and parole options

1 *Penalties and Sentences Act 1992* (Qld) ('PSA') pt 3, ss 19(1)(b), 30 (on indictment), 31 (summarily), 32 (instead of imposing another sentence).
2 Ibid ss 44–5.
3 Ibid ss 100–3.
4 Ibid ss 90–4.
5 Ibid s 92(1)(b).
6 Ibid pt 6.
7 Ibid s 144. The limit for the term of imprisonment that can be suspended is 3 years in Magistrates Courts – see *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)') s 552H.
8 See PSA (n 1) s 146–7.
9 Ibid s 144.
10 Ibid s 146.
11 Ibid pt 9. The limit for the term of imprisonment that can be suspended is 3 years in Magistrates Courts - see *Criminal Code* (Qld) (n 7) s 552H.
12 PSA (n 1) s 9(4).
13 Walter Sofronoff KC, *Queensland Parole System Review: Final Report* (Report, 2016) 71 [315] ('Queensland Parole System Review').
14 The relevant provisions regarding parole are in the PSA (n 1) pt 9, div 3.
15 Ibid s 160B.
16 See *Corrective Services Act 2006* (Qld) ('CSA') ss 205(2), 208B(5). The grounds for suspending or cancelling a parole order include that the person poses a serious and immediate risk of harm to another person, is preparing to leave the state without permission or poses and unacceptable risk of committing another offence.
17 PSA (n 1) s 160G.

18 Ibid s 160D.
19 CSA (n 16) s 184(2). Legislated exceptions include where a person is convicted of a serious violent offence under the SVO scheme (in which case parole eligibility is set at 80% or 15 years, whichever is less) and minimum non-parole periods that apply to life sentences: see ss 181, 181A(2), 182(2).
20 PSA (n 1) s 160D.
21 Ibid ss 160C(5), 160D(3). The exceptions to this are: (a) where an offender is sentenced to a period of imprisonment that is more than 3 years if the offender has a current parole eligibility date — in which case the court must fix the date the offender is eligible for parole [s 161C(2)]; and (b) where an offender is sentenced to a period of imprisonment that includes a term of imprisonment for a serious violent offence or sexual offence in circumstances where the offender has a current parole eligibility date or release date — in which case the court must fix the date the offender is eligible for parole: s 161D(2).
22 *R v Hoad* [2005] QCA 92; *R v Norton* [2007] QCA 320; *R v Blanch* [2008] QCA 253; *R v Ungvari* [2010] QCA 134; *R v Hyatt* [2011] QCA 55; *R v Lockley* [2021] QCA 77; *R v Crouch* [2016] QCA 81; *R v DAC* [2023] QCA 53.
23 *R v WBV* [2023] QCA 79 [6] (Boddice JA).
24 Ibid; *R v Granz-Glenn* [2023] QCA 157 [12] (Bond, Flanagan JJA and Bradley J agreeing).
25 *R v Randall* [2019] QCA 25 [37].
26 PSA (n 1) s 9(12).
27 *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld). This is now reflected in ibid s 9(4)(c).
28 Or of counselling, procuring, attempting or conspiring to commit such an offence.
29 CSA (n 16) s 182 ('CSA').
30 PSA (n 1) ss 161E(2), 161E(3).
31 CSA (n 16) s 181A.
32 PSA (n 1) s 161D and sch 1A. A serious child sex offence is an offence against a provision mentioned in schedule 1A, or an offence that involved counselling or procuring the commission of an offence mentioned in schedule 1A, committed — (a) in relation to a child under 16 years; and (b) in circumstances in which an offender convicted of the offence would be liable to imprisonment for life.
33 Date of assent and commencement.
34 It does not matter whether the first offence was committed, or the offender was convicted of the first offence, before or after the commencement of the Bill. The second offence must be committed after the conviction of the first offence: PSA (n 1) s 223.
35 CSA (n 16) s 181. Special rules, however, apply for those convicted of a prescribed offence committed with a serious organised crime circumstance of aggravation: see ss 181(2A)–(2B).
36 Ibid s 181(3).
37 PSA (n 1) ss 161O–161Q.
38 Ibid ss 349(4), 352(4).
39 Ibid s 156A, sch 1.
40 Ibid sch 1.
41 Ibid s 35.
42 Ibid s 35(2). See also *Victims of Crime Assistance Act 2009* (Qld) pt 16 which provides for the State to recover financial assistance from a person.
43 PSA (n 1) ss 36(2), 37(a).
44 Ibid s 43C(1).
45 Ibid s 43B.
46 Queensland Sentencing Advisory Council, *Community-based Sentencing Orders and Parole Options* (Final Report, 2019) rec 9.
47 Ibid rec 17.
48 Ibid rec 37.
49 Ibid rec 47.
50 Ibid rec 48. Examples provided of relevant factors were: (a) whether the offence was committed while the offender was on parole; (b) whether the offender has previously had a parole order cancelled and the reasons for cancellation; (c) the risk posed by the offender of reoffending and the need to protect any members of the community from that risk; (d) the record of compliance of the offender with parole orders and any community based orders; (e) the availability of programs relevant to sexual offending; (f) the likelihood that the person will be released at, or shortly after, the date they would otherwise be eligible for release if a parole eligibility date (rather than a parole release date) is set: ibid 302.
51 Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) ('*Hear Her Voice, Report Two*') rec 127.
52 Queensland Government, *Queensland Government Response to the Report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice - Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) 39.

53 Queensland Sentencing Advisory Council, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld)* (Final Report, 2022).
54 See Terms of Reference, Appendix 3, which expressly refer to these three sentencing purposes.
55 Karen Gelb, Nigel Stobbs and Russell Hogg, *Community-based Sentencing Orders and Parole: A Review of Literature and Evaluations across Jurisdictions* (Prepared for the Queensland Sentencing Advisory Council by Queensland University of Technology, 2019) ('*QUT Literature Review*'), informed by an earlier report prepared by Michelle Sydes, Elizabeth Eggins and Lorraine Mazerolle on 'what works' in corrections for Queensland Corrective Services (2018, unpublished); Andrew Day, Stuart Ross and Katherine McLachlan, *The Effectiveness of Minimum Non-parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-based Approaches to Community Protection, Deterrence, and Rehabilitation* (Prepared for the Queensland Sentencing Advisory Council by The University of Melbourne, August 2021)*; (University of Melbourne Literature Review');* Lacey Schaefer et al, *Sentencing Practices for Sexual Assault and Rape Offences* (Griffith University for Queensland Sentencing Advisory Council, unpublished) *('Griffith University Literature Review'*).
56 *QUT Literature Review* (n 55) 91.
57 *University of Melbourne Literature Review* (n 55) 13.
58 Nagin, Cullen & Jonson 2009 cited in *Griffith University Literature Review* (n 55) 47.
59 *Griffith University Literature Review* (n 55) 47–8.
60 *University of Melbourne Literature Review* (n 55) 19 (references omitted). The *Griffith University Literature Review* (n 55) reached a similar conclusion, citing several relevant systematic reviews and meta-analyses: 62–64.
61 *Griffith University Literature Review* (n 55) 64 citing McKillop et al, *The Effectiveness of Sexual Offender Rehabilitation and Reintegration Programs: Integrating Global and Local Perspectives to Enhance Correctional Outcomes* (University of the Sunshine Coast Sexual Violence Research and Prevention Unit, Research Report August 2019); and Stephen Smallbone and Meredith McHugh, *Outcomes of Queensland Corrective Services Sexual Offender Treatment Programs* (School of Criminology and Criminal Justice, Griffith University, 2010).
62 Mckillop et al (n 61) 82, 84.
63 *University of Melbourne Literature Review* (n 55) 12.
64 Ibid 23.
65 *QUT Literature Review* (n 55) 109.
66 *University of Melbourne Literature Review* (n 55) 23.
67 Queensland Parole System Review (n 13) 102 [504] citing Smallbone and McHugh (n 61).
68 Ibid. The effect was strongest for nonsexual violent recidivism: see Smallbone and McHugh (n 61) x [9], 59.
69 Ibid.
70 *QUT Literature Review* (n 55) xii.
71 Ibid.
72 *Griffith University Literature Review* (n 55) 57.
73 *QUT Literature Review* (n 55) 112.
74 Ibid 141.
75 Ibid.
76 Ibid 146 [4.6.5].
77 Ibid xiii.
78 Ibid 8.
79 Ibid xii.
80 Ibid.
81 Ibid xiii.
82 Ibid.
83 Ibid xiv. The study referred to in support of this finding was focused on adult offenders convicted of aggravated drink-driving (a third or subsequent conviction), drink driving (first or second offence), shoplifting (estimated value under $500) and common assault: see Michelle Morris and Charles Sullivan, *The Impact of Sentencing on Adult Offenders' Future Employment and Re-offending: Community Work Versus Fines* (New Zealand Treasury Working Paper 15/04, June 2015).
84 Ibid xiv.
85 Ibid.
86 Sentencing Advisory Council (Victoria), *Contravention of Community Correction Orders* (2017) 44–5 cited in ibid 149.
87 Ibid.
88 Ibid.
89 Ibid.
90 Ibid 148.

91 Neil Donnelly, Min-Taec Kim, Sara Rahman and Suzanne Poynton, *Have the 2018 NSW Sentencing Reforms Reduced the Risk of Re-offending?* (NSW Bureau of Crime Statistics and Research, Crime Research Bulletin No 246, March 2022), Other reforms included the abolition of suspended sentences and home detention orders and introduction of a new type of Intensive Correction Order.

92 Ibid 20. BOCSAR's Executive Director also identified another reason as being the reforms only had a small impact on the actual rate at which offenders were supervised in the community given the practice of NSW Community Corrections of prioritising supervision for higher-risk offenders: BOCSAR, 'The Impact of the 2018 Sentencing Reforms on Reoffending' (Media Release, 22 March 2022).

93 *QUT Literature Review* (n 55) xvi.

94 Ibid.

95 Ibid.

96 Ibid.

97 *Griffith University Literature Review* (n 55) 53.

98 *QUT Literature Review* (n 55) xvi.

99 *Griffith University Literature Review* (n 55) 53.

100 Ibid.

101 PSA (n 1) s 9(4).

102 Ibid s 161E.

103 See Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect – Consultation Paper – Background* (March 2024) sections 6.5.3, 6.10.2 ('*Consultation Paper: Background*').

104 *R v KU & Ors; Ex parte A-G (Qld) (No 2)* [2008] QCA 154 [157] (de Jersey CJ, McMurdo P and Keane JA) referring to the application of PSA (n 1) s 9(2A) to the offence of rape.

105 This is across all court levels – both Magistrates and higher courts.

106 This includes imprisonment, partially suspended sentences and prison/probation orders. See Appendix 2, supplementary tables to Figures 22 and 24.

107 *R v Bunton* [2019] QCA 214 [27]–[31] (Morrison JA, Sofronoff P and Fraser JA agreeing); *R v Rogers* [2013] QCA 192 [40]–[42].

108 *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) s 3 ('CPOROPO Act').

109 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 March 2006, 941 (Judy Spence, Minister for Police and Corrective Services).

110 PSA (n 1) ss 146–7.

111 *Elliot v Harris (No.2)* (1976) 13 SASR 516; *DPP (Cth) v Carter* [1998] 1 VR 601; *Sweeney v Corporate Security Group* (2003) 86 SASR 425.

112 *Reilly v The Queen* [2010] VSCA 278 [36]; *DPP (Cth) v Carter* [1998] 1 VR 601, 607-8; DPP v *Buhagliar and Heathcote* [1998] 4 VR 540, 547 (Batt and Buchanan JJA).

113 In some Australian jurisdictions with suspended sentence orders, the court can attach additional supervisory, program or community service orders.

114 PSA (n 1) s 147.

115 Ibid ss 147(2)–(3). Factor the court must have regard to include the seriousness of the original offence, including any physical or emotional harm done to a victim and any damage, injury or loss caused by the offender: s 147(3)(b).

116 *University of Melbourne Literature Review* (n 55) 14.

117 See Figure 27 in *Consultation Paper: Background* (n 103) for more information.

118 Queensland Parole System Review (n 13) 102–3 [507].

119 Ibid 103 [508]–[509] and rec 5.

120 PSA (n 1) s 14.

121 Twelve restitution orders were also made for sexual assault offences.

122 Paul McGorrery and Paul Schollum, Combined Orders of Imprisonment with a Community Correction Order in Victoria (Sentencing Advisory Council, Victoria, 2023) 6.

123 Ibid 7, fn 34.

124 Australian Capital Territory, Northern Territory, South Australia, Tasmania, Western Australia and England and Wales. For Commonwealth offences, an equivalent order exists called a recognizance r elease order. See *Crimes Act 1914* (Cth) s 20(1)(b). The Tasmanian Government had a policy intention to phase suspended sentence out. See Sentencing Advisory Council (Tasmania), *Review under Section 2 of the Sentencing Amendment (Phasing Out of Suspended Sentences) Act 2017* (2021) and Tasmania, *Parliamentary Debates*, House of Assembly, Estimates Committee B, 4 June 2023, 40–1, (Elise Archer, Attorney-General).

125 For example, Victoria phased out suspended sentences from 2011 to 2014. The Tasmanian Government also supported a policy of abolishing suspended sentences which led to referrals to the Sentencing Advisory Council of Tasmania calling on advice: see Sentencing Advisory Council (Tasmania), Phasing Out of Suspended Sentences, Consultation Paper (2015); Sentencing Advisory Council (Tasmania), Phasing out of Suspended Sentences (Final Report No 6, March 2016). NSW replaced suspended

sentences, home detention and ICOs in 2018 with a new form of ICO with a maximum length of 2 years for a single offence, or 3 years for an aggregate offence. People subject to these orders are required to submit to supervision by Corrective Services and additional conditions can be imposed. For more information, see NSW Government, Communities and Justice, Sentencing Reform (Web Page, 31 August 2023)<https://dcj.nsw.gov.au/legal-and-justice/laws-and-legislation/policy-reform-and-legislation/sentencing-reform.html>. New Zealand abolished suspended sentences with the coming into effect of its current *Sentencing Act 2002* (NZ). See s 155 of that Act as to transitional arrangements.

126 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 4A.

127 Neil Donnelly, *The Impact of the 2018 NSW Sentencing Reforms on Supervised Community Orders and Short-term Prison Sentences* (NSW Bureau of Crime Statistics and Research, Crime and Justice Statistics Bureau Brief No 148, August 2020).

128 Rachel McPherson et al, Sexual Offences involving Sexual Assault: Literature Review (School of Law, University of Glasgow and Centre for Law, Crime and Justice, School of Law, Strathclyde University submitted to the Sottish Sentencing Council, February 2021) 16. The authors of this review report based on data for 2018–19, these orders were the most common type of sentence for sexual assault and other sexual offences (excluding rape and attempted rape), followed by a prison sentence.

129 See *Criminal Procedure (Scotland) Act 1995* ss 227A–227ZO and sch 13.

130 *Sentencing Act 2020* (UK) ss 254–7 (offenders aged under 18 years), 266-268 where offenders are adults aged 18–21 years and ss 279–82 where offenders are aged 21 years and older; *Criminal Procedure (Scotland) Act 1995* (Scot), 210A

131 *Sentencing Act 2020* (UK) s 306, sch 18, pt 2; *Criminal Procedure (Scotland) Act 1995* (Scot) s 210A(10).

132 *Sentencing Act 2020* (UK) s 278(1). 'Serious terrorism offence' is defined under s 282A.

133 Queensland Sentencing Advisory Council, *Minimum Non-parole Period Schemes for Serious Violent Offences in Australia and Select International Jurisdictions* (Consultation Paper: Background 2, August 2021).

134 Preliminary Submissions 5 (Queensland Sexual Assault Network) and 6 (BRISSC Collective) 3.

135 Preliminary Submission 6 (BRISSC Collective) 3.

136 Ibid.

137 Preliminary Submission 5 (Queensland Sexual Assault Network).

138 Preliminary Submission 7 (Aboriginal and Torres Strait Islander Legal Service) 3.

139 Preliminary Submission 7 (Legal Aid Queensland) 2.

140 Ibid.

141 See, eg, Preliminary Submission 7 (Legal Aid Queensland) and 25 (Queensland Corrective Services).

142 SME Interview 14, 16.

143 SME Interview 6.

144 SME Interviews 1, 4, 11.

145 SME Interview 1, an example of last resort is an offender who will be deported because they have failed the character test and parole would not be appropriate.

146 SME Interview 14.

147 SME Interview 3.

148 SME Interview 7. See also SME Interview 4.

149 SME Interview 7.

150 SME Interview 11.

151 Ibid and SME Interview 4.

152 SME Interview 7.

153 SME Interview 11.

154 SME Interviews 1, 7.

155 See Queensland Parole System Review (n 13) 102.

Chapter 6: Information available to courts to inform decision-making

1 *Corrective Services Act 2006* (Qld) s 344 ('CSA') provides that a court may request a pre-sentence report (PSR) to inform sentencing and section 15 of the *Penalties and Sentences Act 1992* (Qld) states that a court may receive any information that it considers appropriate to enable it to arrive at the appropriate sentence, including a PSR. Queensland Corrective Service ('QCS') is required to give the report to the court within 28 days and provide copies that the court must then provide to the prosecution and the person's lawyers: CSA ss 344(4)–(5). A PSR is taken to be evidence of the matters contained in it and cannot be objected to on the basis that the evidence contained in it is hearsay: CSA s 344(10).

2 Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Lawbook Co, 3rd ed. 2014) 173 [2.190].

3 Ibid.

4 Ibid.

5 For example, The Scottish *Risk for Sexual Violence Protocol* is a validated tool for helping evaluators conduct comprehensive assessments of risk of sexual violence in clinical and forensic settings in Scotland: Risk Management Authority <https://www.rma.scot/wp-content/uploads/2023/01/Risk-for-Sexual-Violence-Protocol-RSVP.pdf>.

6 For example, the specialised risk assessment tools for people who have been convicted of sexual offences were developed overseas and have not been validated for Australia populations, such as Aboriginal and Torres Strait Islander peoples. See Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect – Consultation Paper – Background* (March 2024) ch 8 ('*Consultation Paper: Background*').

7 *Sentencing Act 1995* (NT) s 39B.

8 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17B.

9 *Sentencing Act 1997* (Tas) s 42AC(2)(b).

10 *Sentencing Act 1991* (Vic) s 8A.

11 *Sentencing Act 1995* (NT) ss 103–6.

12 *JF v The Queen* [2017] NTCCA 1, 12–18 [27]–[39] discusses the Forensic Psychological Assessment and pre-sentence reports (requested by the Supreme Court) for the sentencing of the male offender who had pleaded guilty to multiple child sexual offences, including sexual intercourse without consent against his 3-year-old nephew.

13 *Sentencing Act 1995* (NT) s 106.

14 Queensland Sentencing Advisory Council, *Community-based Sentencing Orders, Imprisonment and Parole Options* (Final Report, 2019) 194.

15 Ibid 426.

16 Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two: Women and Girls' Experience Across the Criminal Justice System* (2022) vol 2, 575 ('*Hear Her Voice Report 2*') referring to Queensland Sentencing Advisory Council, *Community-based Sentencing Orders, Imprisonment and Parole Options* (Final Report, 2019) 578, recs 129–30.

17 Ibid.

18 Ibid 577. The type of information the Taskforce suggested might be useful was 'information concerning the offender's parenting responsibilities, domestic and family violence history or other circumstances, how suitable the offender is for particular community-based sentencing, and whether the offender would benefit from particular supports or rehabilitation in the community': ibid.

19 Queensland Government, *Queensland Government Response to the Report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice - Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) 8 ('*Qld Government Response to Taskforce*') 40.

20 Queensland Government, *Women's Safety and Justice Reform Annual Report 2022–23* (May 2023) 7.

21 SME Interviews 3, 11, 13.

22 SME Interview 3.

23 SME Interviews 1, 3, 10.

24 SME Interview 1.

25 SME Interview 10.

26 SME Interview 15.

27 SME Interview 10.

28 SME Interview 14.

29 SME Interview 10, 12, 14.

30 SME Interview 14.

31 CSA (n 1) s 344.

32 SME Interview 7.

33 SME Interviews 7, 17

34 SME Interview 17.

35 SME Interviews 1, 9.

36 SME Interview 9.

37 SME Interview 7.

38 SME Interview 3.

39 SME Interviews 7, 9.

40 SME Interviews 1, 7, 16.

41 Section 15 of the *Penalties and Sentences Act 1992* (Qld) ('PSA') provides for a court to receive any information that it considers appropriate to enable it to arrive at the appropriate sentence, including a pre-sentence report ordered by a court to be prepared by Corrective Services in accordance with section 344 of the CSA (n 1).

42 See QCS, Submission No 11 to Queensland Sentencing Advisory Council, *Community-based Sentencing Orders, Imprisonment and Parole Options* (Final Report, 2019) 10. QCS noted between July 2016 and June 2018, QCS conducted 1,446 PSRs (verbal and written reports) across the state. Over the same period

50,036 admissions for new community based orders were received by QCS, indicating only a small percentage of offenders (2.9%) have pre-sentence reports (PSRs) requested by the courts prior to sentencing to community based orders. This does not include the number of admissions to custody and on this basis, the proportion of offenders for whom a PSR is ordered can be assumed to be even smaller. In contrast to some other jurisdictions, such as Victoria, Queensland does not have a dedicated state-wide court advisory service.

43 PSA (n 41) ss 9(2)(p)(i)–(ii).
44 *R v SCU* [2017] QCA 198, 11–12 [56], 23 [113] (Sofronoff P).
45 PSA (n 41) s 9(8).
46 Queensland Courts, *Community Justice Group Program* (Web Page, 20 September 2023) <https://www.courts.qld.gov.au/services/court-programs/community-justice-group-program>
47 The Myuma Group, *Phase 1 Report: Evaluation of Community Justice Groups* (November 2021), 68 (*'Phase 1 Report'*).
48 The Myuma Group, *Phase 2 Annual Report: Evaluation of Community Justice Groups* (December 2022), 112 (*'Phase 2 Report'*).
49 Ibid 15. *Phase 1 Report* (n 47). The CJGs program has previously been evaluated in 2010, see KPMG, *Evaluation of the Community Justice Groups* (Final Report: November 2010).
50 *Phase 2 Report* (n 48) 112.
51 *Phase 1 Report* (n 47) 79.
52 *Hear Her Voice Report 2* (n 16) rec 122.
53 *Qld Government Response to Taskforce* (n 19) 38.
54 See Department of Justice and Attorney-General, 'Our Progress' (Web Page, 8 February 2024) <https://www.justice.qld.gov.au/initiatives/queensland-government-response-womens-safety-justice-taskforce-recommendations/our-progress>
55 *Phase 2 Report* (n 48) 115.
56 Ibid 117, 120.
57 His Honour Judge Glen Cash KC, 'Customary Law and the Recognition of Systemic Disadvantage in the Sentencing of First Nations Persons' (Paper delivered to the Sunshine Coast Bar Professional Development Day 28 August 2021), 14
58 Ibid.
59 This reference was to PSA (n 41) s 9(2)(p) in its current form which refers to any submissions on cultural considerations and other listed matters made by a representative of the community justice group in the person's community.
60 Ibid 15.
61 Australian Law Reform Commission, *Pathways to Justice - An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report* (Report No. 133, 2017) 190 [6.22].
62 Ibid.
63 Ibid 191 [6.24].
64 See Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld) cl 83.
65 See for example *Crimes (Sentencing) Act 2005* (ACT) s 40A(b).
66 *Criminal Code*, RSC 1985, c C-46, s718.2(e)
67 Named after *R v Gladue* [1999] 1 SCR 688.
68 Grahame McConnell, *Indigenous People and Sentencing in Canada* (Publication No. 2020-46-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 2020) [3.2] 10-11.
69 Victorian Government, *Burra Lotjoa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4* (2018) 39
70 Victorian Aboriginal Legal Service, *Aboriginal Community Justice Reports* (Web Page) <https://www.vals.org.au/aboriginal-community-justice-reports/>
71 SME Interviews 10, 11.
72 SME Interviews 3, 9.
73 SME Interviews 1, 3, 9.
74 SME Interviews 1, 4.
75 SME Interview 4.
76 SME Interviews 6, 9, 23.
77 SME Interview 9.
78 Ibid.
79 SME Interview 6.
80 SME Interview 9.
81 Ibid.

Chapter 7: Understanding victim harm and justice needs

1 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Final Report, September 2021).
2 Ibid 29–32. See also Nicole Bluett-Boyd and Bianca Fileborn, *Victim/survivor-focused Justice Responses and Reforms to Criminal Court Practice: Implementation, Current Practice and Future Directors* (Australian Institute of Family Studies, Research Report No 27, 2014). In addition to the needs identified by the VLRC, the authors identified a need for victims to avoid having to constantly retell their story, being able to give evidence remotely, having the opportunity to confront their perpetrator in a public setting and having closure and a sense of finality to their experience.
3 A summary of relevant research is contained in the Commissioner for Victims' Rights, South Australia, Submission No. 65 to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice* (November 2016) 4.
4 Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two: Women and Girls' Experience Across the Criminal Justice System* (2022) vol 1, 49 ('*Hear Her Voice Report 2*').
5 Ibid 52.
6 *Victims of Crime Assistance Act 2009* (Qld) sch 1AA, cl 1 ('VOCA Act').
7 Defined in the *Corrective Services Act 2006* (Qld) and the *Youth Justice Act 1992* (Qld): see ibid sch 3.
8 *Hear Her Voice Report 2* (n 4); Commission of Inquiry into Queensland Police Services Responses to Domestic and Family Violence, *A Call for Change* (Final Report, 2022); and Queensland Parliament, Legal Affairs and Safety Committee, *Inquiry into Support Provided to Victims of Crime* (Report No 48, 57th Parliament, May 2023).
9 Office of the Interim Victims' Commissioner, 'About' (Web Page, 2024) <https://www.victimscommissioner.qld.gov.au/about>.
10 Ibid.
11 *Penalties and Sentences Act 1992* (Qld) ('PSA') ss 9(2)(c)(i), 9(3)(c), 9(6)(c). See Appendix 5.
12 Ibid pt 10B.
13 Ibid s 1791I.
14 VOCA Act (n 6) ss 5(b)–(c).
15 PSA (n 11) s 179K(3).
16 Victim Assist Queensland, *Preparing a Victim Impact Statement*, 1 <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/6048e39f-617f-415d-9fc0-df5b3a2e991c/victim-assist-victim-impact-statement-factsheet.pdf?ETag=7712fa772962bd9ebd4792b78e1b6ceb>
17 See Office of the Director of Public Prosecutions, *Director's Guidelines* (30 June 2022) 52.
18 *Evidence Act 1977* (Qld) s 132C(2) ('*Evidence Act*'). See *R v Evens; R v Pierce* [2011] 2 Qd R 571 [7] (McMurdo P).
19 Ibid s 132C(3). The degree of satisfaction will vary according to the consequences: s 132C(4).
20 *R v Major; Ex parte A-G (Qld)* [2011] QCA 210, [102] (Fryberg J).
21 *Gray (a pseudonym) v The Queen* [2018] VSCA 163 [53].
22 PSA (n 11) s 179M(2).
23 Ibid s 179M(4).
24 Ibid s 179M(3).
25 Rhiannon Davies and Lorana Bartels, *The Use of Victim Impact Statements in Sentencing for Sexual Offences* (Routledge, 2021) 135, 141.
26 *Hear Her Voice* Report 2 (n 4) 245.
27 PSA (n 11) s 175K(5).
28 *R v Abdullah* [2023] QCA 189, [23] (Bowskill CJ, Flanagan JA and Buss AJA agreeing).
29 *R v Williams; Ex parte A-G (Qld)* [2014] QCA 346. See also *R v Miller* [2012] QCA 168 [22].
30 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 29(3).
31 *Crimes (Sentencing) Act 2005* (ACT) s 53(1)(b); *Sentencing Act* (NT) s 106B(6).
32 NSW Government, *Schedule of Government Response to Recommendations on Victims' Involvement in Sentencing,* 10 and *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30E(5).
33 Davies and Bartels (n 25) 4.
34 Ibid 30.
35 Julian V. Roberts and Marie Manikis, 'Victim Personal Statements: A Review of Empirical Research', Report for the Commissioner for Victims and Witnesses in England and Wales (October 2011) citing Julian V. Roberts and Allen Edgar *Judicial Attitudes to Victim Impact Statements. Findings from a Survey in Four Jurisdictions,* Department of Justice Canada (2006) and Alan Young and Julian V. Roberts, *Research on the role of the victim in the criminal process in Canada*, Department of Justice Canada: Policy Centre for Victim Issues (2001).
36 Ibid 27.
37 Ibid 25 referring to Fiona Leverick et al. *An Evaluation of the Pilot Victim Statement Schemes in Scotland* (2007).

38 Ibid 92–100. As to the potential negative consequences, the study found an 'explicit and detailed reference to victims' vulnerabilities, such as mental health issues, may result in in anti-therapeutic outcomes for victims' even if other aspects addressed victims generally find therapeutic: 98.
39 Davies and Bartels (n 25) 113.
40 Ibid.
41 Ibid 149.
42 *R v Kilic* (2016) 259 CLR 267, 266–7 [21] (Bell, Gageler, Keane, Nettle and Gordon JJ); See also *R v Stable (a pseudonym)* [2020] QCA 270 [33] (Sofronoff P, Fraser and Philippides JJA agreeing); Queensland Crime Commission and Queensland Police Service, *Project Axis, Child Sexual Abuse in Queensland: The Nature and Extent* (June 2000), 42–7.
43 This is the position at common law. See *Strbak v The Queen* (2020) 267 CLR 494, 508 [32] for a discussion of the differences in Queensland under the *Evidence Act* (n 18) s 132C which applies a civil standard of proof (balance of probabilities).
44 *Culbert v The Queen* [2021] NSWCCA 38 - the sentencing judge did not err in find harm disclosed in a VIS greater than ordinarily attaches to child sexual offences. Also see *R v Gavel* [2014] NSWCCA 56 [110].
45 *Sentencing Act 2017* (SA) ss 14(4)–(5).
46 *Sentencing Act 1995* (NT) subdiv 2.
47 The victim must be informed of the contents of the victim report and not object to its presentation: Ibid s 106B(2)(a).
48 Ibid s 106B(2). A person may be incapable of giving consent because of age or physical or mental disability. A victim report may also be produced when a victim cannot be located after reasonable attempts by the prosecutor have been made and there are 'readily ascertainable details of the harm suffered by the victim' that are not already before the court as evidence or as part of a pre-sentence report.
49 Ibid s 106B(8).
50 An offence punishable by imprisonment for longer than 5 years. The ACT equivalent offences to rape and sexual assault all have maximum penalties higher than 5 years: *Crimes (Sentencing) Act 2005* (ACT) s 51A(3).
51 Ibid s 51A(1).
52 Ibid s 51A(2).
53 *Sentencing Act 1991* (Vic) s 8L(4).
54 *Victims' Charter Act 2006* (Vic) s 13; Ibid s 8K–8S.
55 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 30(1)–30(2).
56 Ibid s 30(3).
57 *Sentencing Act 1997* (Tas) s 81A(4).
58 Ibid.
59 Preliminary Submissions 6 (Brisbane Rape and Incest Survivors Support Centre), 17 (Fighters Against Child Abuse Australia), 20 (North Queensland Women's Legal Service).
60 Preliminary Submission 20 (North Queensland Women's Legal Service) 3.
61 Preliminary Submission 23 (Full Stop Australia) 2.
62 Consultation Session, Townsville, 15 February 2024.
63 SME Interviews 8, 9, 10, 11, 12, 14, 16.
64 SME Interviews 9, 17.
65 SME Interview 3.
66 SME Interviews 7, 8
67 SME Interview 15
68 SME Interview 3.
69 SME Interviews 13, 14, 16.
70 SME Interviews 14, 17.
71 SME Interview 14.
72 SME Interview 7.
73 SME Interview 16.
74 See, eg, Amanda-Jane George et al. *Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review*, Attorney-General's Department and Australasian Institute of Judicial Administration (August 2023) 221; Legislative Council Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System* (Report, Vol 1, Parliament of Victoria, 2022) Finding 72, 760; Sir John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, Part 1, 2019) 209; Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I to II* (2017) rec 3, 20.
75 Dr Cathy Kezelman, 'Trauma informed practice', *Mental Health Australia* (Blog Post, 4 February 2021) <https://mhaustralia.org/general/trauma-informed-practice>.

76 Sheryl P Kubiak, Stephanie S Covington and Carmen Hillier 'Trauma-Informed Corrections' in D Springer and A Robert (eds) *Social Work in Juvenile and Criminal Justice Systems* (Charles Thomas, 2017) 92 cited in Katherine McLachlan, 'Same, Same or Different? Is Trauma-informed Sentencing a Form of Therapeutic Jurisprudence?', (2021) 25(1) *European Journal of Current Legal Issues* 738.

77 See McLachlan (n 76).

78 Legislative Council Legal and Social Issues Committee, *Inquiry into Victoria's criminal justice system* (Report, Vol 1, Parliament of Victoria, 2022) Finding 72, 760; *Hear Her Voice Report 2* (n 4) 284.

79 See Australian Law Reform Commission, 'Justice Responses to Sexual Violence', *Current Inquiries* (Web Page, 23 January 2024) <https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/>.

80 Women's Safety and Justice Taskforce, *Hear Her Voice, Report One: Addressing Coercive Control and Domestic and Family Violence in Queensland* (2021) rec 3 ('*Hear Her Voice Report 1*') and *Hear Her Voice Report 2* (n 4) vol 1, rec 68.

81 *Hear Her Voice Report 1* (n 80) vol 1, rec 47; *Hear Her Voice Report 2* (n 4) vol 1, rec 66.

82 Ibid Recommendation 23.

83 *Hear Her Voice Report 2* (n 4) vol 1, rec 73.

84 Ibid vol 1, rec 74.

85 Ibid rec 119. This recommendation also reaffirmed recommendations 3 and 48 of its earlier report concerning the establishment of a Queensland Judicial Commission and a requirement for courts to report on information about judicial officer training and development activities taking place during the reporting period where these were publicly funded in their annual reports.

86 Progress reports are available on the OIIS website <Office of the Independent Implementation Supervisor (oiis.qld.gov.au)>.

87 District court judges attended Vicarious Trauma Awareness and Creating Respectful Workplaces training in 2022: District Court of Queensland, *Annual Report 2021–22* (Annual Report, 2022) 28.

88 Several Supreme court judges attended a presentation on 'A trauma-responsive court approach for domestic and family violence victims' in 2022: Supreme Court of Queensland, *Annual Report 2021–22* (Annual Report, 2022) 10.

89 Both the District and Supreme courts had their annual conferences cancelled in 2021 due to COVID-19: District Court of Queensland (n 87) and Ibid.

90 National Judicial College of Australia, *National Standard for Professional Development for Australian Judicial Officers*.

91 Bar Association of Queensland, *Administration Rules of the Bar Association of Queensland* (14 September 2020).

92 Queensland Law Society, *Queensland Law Society Administration Rule 2005* (Version 5.1)

93 Queensland Law Society, *CPD Guide: Guidelines on CPD Compliance for Queensland Solicitors* (April 2023), 3

94 For example, Queensland Law Society, the Bar Association Queensland and Legal Aid Queensland (noting participation is subject to meeting eligibility criteria).

95 *Legal Profession Act 2007* (Qld) s 44(2).

96 Preliminary Submissions 11 (DV Connect), 17 (Fighters against child abuse Australia), 23 (Full Stop Australia).

97 Preliminary Submission 10 (Queensland Indigenous Family Violence Legal Service) 4.

98 Ibid, referring to Australian Human Rights Commission, *Wiyi Yani U Thangani Report* (2020), 184.

99 Preliminary Submission 22 (Relationships Australia Queensland).

100 SME Interview 9

101 Ibid.

102 Ibid.

103 SME Interview 11.

Chapter 8: Restorative justice approaches

1 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I and II* (2017) 183.

2 Jane Bolitho and Karen Freeman, *The Use and Effectiveness of Restorative Justice in Criminal Justice Systems following Child Sexual Abuse or Comparable Harms* (Report for the Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, 2016) 9.

3 Victorian Law Reform Commission, *The Role of Victims in the Criminal Trial Process* (Report, 2015) [7.238].

4 Jane Bolitho, 'Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice' (2015) 3(2) *Restorative Justice: A International Journal* 256.

5 Women's Safety and Justice Taskforce, *Hear Her Voice – Report Two: Women and Girls' Experience Across the Criminal Justice System* (2022) vol 1, 395 ('*Hear Her Voice Report 2*').

6 Ibid 386.

7 Ibid.
8 Ibid 388.
9 Ibid 394.
10 Ibid.
11 Ibid rec 90.
12 Ibid 395.
13 Queensland Government, *Queensland Government response to the Report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice - Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) 8 ('*Qld Government Response to Taskforce*').
14 Queensland Parliament, Legal Affairs and Safety Committee, *Inquiry into Support Provided to Victims of Crime* (Report No 48, 57th Parliament, May 2023) Recommendation 9.
15 Email from Implementation Manager – Recommendation 90 – Women's Safety and Justice Taskforce, Adult Restorative Justice Conferencing, Dispute Resolution Branch to Manager, Policy, Queensland Sentencing Advisory Council, 13 November 2023.
16 Ibid.
17 John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 9 May 2019) rec 15.
18 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Final Report, September 2021) rec 28 ('*Improving Justice Responses*'). The 2016 Victorian Family Violence Royal Commission had recommended RJ processes be extended to domestic and family violence victims.
19 *Improving Justice Responses* (n 18) recs 29–31.
20 KPMG (in partnership with RMIT's Centre for Innovative Justice), *"This Is My Story. It's Your Case, But It's My Story.": Exploring Justice System Experiences of Complainants in Sexual Offence Matters* (31 July 2023) rec 13.
21 Commonwealth Parliament, Senate, Legal and Constitutional Affairs References Committee, *Current and Proposed Sexual Consent Laws in Australia: Report* (September 2023) viii, rec 9.
22 See Australian Law Reform Commission, 'Terms of Reference' *Justice Responses to Sexual Violence* (Web Page, 23 January 2024) <https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/terms-of-reference/>.
23 For more information, see Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect – Consultation Paper – Background* (March 2024) and *'Hear Her Voice Report 2* (n 5) 388.
24 See *Improving Justice Responses* (n 18) 189 and Appendix E; and Victorian Law Reform Commission, *Sexual Offences: Restorative and Alternative Justice Models* (Issues Paper G, 2021).
25 *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(y).
26 Ibid s 34(1)(h).
27 This is referred to as a 'sentence-related order': ibid s 13.
28 *Sentencing Act 2002* (NZ) ss 8(j), 10(3).
29 New Zealand, Department of Justice, 'How Restorative Justice Works' (Web Page, 19 December 2022) <https://www.justice.govt.nz/courts/criminal/charged-with-a-crime/how-restorative-justice-works/>.
30 *Sentencing Act 2002* (NZ) s 10.
31 *Sentencing Act 2020* (UK) ss 200, 286 and sch 9, pt 2. Parts 2–13 of this Act constitute the '*Sentencing Code*': s 1.
32 Preliminary Submission 4 (Justice Reform Initiative) 3 [6].
33 Ibid 3 [7] citing Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks* (Consultation Paper, April 2010) 559.
34 Ibid 3 [10] citing Centre for Innovative Justice, *Innovative Justice responses to sexual offending – pathways to better outcomes for victims, offenders and the community* (2014).
35 Preliminary Submission 6 (BRISSC Collective) 2.
36 Ibid 2 citing the Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Report, August 2019).
37 Ibid.
38 Preliminary Submission 28 (Sisters Inside Inc) 3.
39 Ibid.
40 SME Interviews 3, 6, 7, 8, 9, 13, 14, 16, 17.
41 SME Interviews 7, 8, 14. SME Interview 10 had doubts on the process for child sexual abused matters.
42 SME Interview 14.
43 Ibid.
44 SME Interview 16.
45 SME Interview 8.
46 SME Interview 2.
47 SME Interview 14.

48 SME Interview 7.
49 SME Interview 13.
50 SME Interview 12.
51 SME Interview 4.
52 *'Qld Government Response to Taskforce'* (n 13) 8.

Chapter 9: Human rights considerations

1 Terms of reference, Appendix 3, 3.
2 *Human Rights Act 2019* (Qld) s 8 ('HRA').
3 Ibid s 13(1).
4 Ibid s 13(2).
5 *Proclamation No 2.—Human Rights Act 2019 (commencing remaining provisions) 2019* (Qld) SL 2019/224. Some provisions commenced on assent (7 March 2019) others on proclamation (1 July 2019) and remaining provisions (1 January 2020).
6 HRA (n 2) s 29.
7 Explanatory Notes, Criminal Law (Two Strike Child Sex Offenders) Amendment Bill 2012 (Qld) 2–3.
8 Queensland Human Rights Commission, Preliminary submission 3 to Queensland Sentencing Advisory Council, *Penalties for Assaults on Public Officers* (9 January 2020) 9 [31].
9 HRA (n 2) s 29. This right was considered in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 in respect of prolonged solitary confinement for a prisoner. *Castles v Secretary to the Department of Justice* (2010) 28 VR 141; [2010] VSC 310 [113] discussed IVF treatment for a woman in a Victorian prison.
10 Preliminary Submission 5 (Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships) to Queensland Sentencing Advisory Council, Serious Violence Offences Scheme Review.
11 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106, (entered into force 3 May 2008).
12 HRA (n 2) s 34.
13 *Criminal Code Act 1899* (Qld) sch 1, s 11, see also *Penalties and Sentences Act 1992* (Qld) s 180.
14 The scheme allows for an offence which happened before commencement (19 July 2012) to be the 'first child sex offence'. The mandatory provision will apply if a subsequent 'serious child sex offence' happens after the scheme has commenced. This means the scheme has a partial retrospective operation.
15 See *R v Truong* [2000] 1 Qd R 663; *R v Hutchinson* [2018] QCA 29.
16 *R v Koster* [2012] QCA 302 [38] Holmes JA (McMurdo P and Applegarth J agreeing on this issue) ('*Koster*'). Introduced by *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld).
17 Ibid [38].
18 *Victims of Crime Assistance Act 2009* (Qld) s 7.
19 The Council notes that during the Legal Affairs and Safety Committee inquiry into support provided to victims of crime, the Committee recommended the Queensland Government consider whether victims' rights should be incorporated into the HRA: Queensland Parliament, Legal Affairs and Safety Committee, *Inquiry into Support provided to Victims of Crime* (Report No 48, 57th Parliament, May 2023) rec 3.
20 In accordance with general comment No. 36 (2018) of the Human Rights Committee, sanctions should exclude the death penalty.
21 Dubravka Simonovic, Special Rapporteur on Violence Against Women and Girls, its Causes and Consequences, *Rape as a Grave, Systematic and Widespread Human Rights Violation, a Crime and a Manifestation of Gender-Based Violence Against Women and Girls*, UN Doc A/HRC/47/26 (19 April 2021), 15 [90].

Chapter 10: Anomalies, complexities and other issues

1 Queensland Sentencing Advisory Council, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld): Final Report* (2022).
2 Ibid recs 2, 9.
3 Preliminary Submission 16 (Legal Aid Queensland) 2.
4 SME Interviews 1, 15.
5 SME Interview 14.
6 SME Interview 1.
7 Queensland, *Director of Public Prosecution's Guidelines* (30 June 2022) 23.
8 Ibid.
9 Asher Flynn and Arie Frieberg, 'Plea Negotiations: An Empirical Analysis', *Trends and Issues in Crime and Criminal Justice* (No 544, Australian Institute of Criminology, April 2018).
10 *Director of Public Prosecution's Guidelines* (n 7) 23–5.

11 Ibid 23.
12 Ibid 24.
13 Ibid 23.
14 Ibid 24.
15 See, eg, *R v Smith* [2022] QCA 55 in which the Court responded to a submission by the applicant that he 'entered a guilty plea on the basis of a deal whereby the sentence would have an upper limit of seven years with a bottom of twenty-four months' and a complaint that 'the Crown did not uphold their end of the agreement' by commenting: 'Of course, there could be no such agreement that would bind the sentencing Judge and, the sentence to be imposed was a matter for the sentencing Judge to assess. This submission should be ignored: [63] (Morrison JA, Fraser and Bond JJA agreeing).
16 *Penalties and Sentences Act 1992* (Qld) ('PSA') s 13. This section is reproduced in Appendix 5.
17 *R v Randall* [2019] QCA 25, 5 [27].
18 *R v Thomson* (2000) 49 NSWLR 383, 386 [3]. This principle has been cited with approval by the Queensland Court of Appeal. See, for example, *R v Bates; R v Baker* [2002] QCA 174, 14 [76] (Atkinson J).
19 Ibid.
20 See, eg, *R v Crouch & Carlisle* [2016] QCA 81, [29] in which the McMurdo P said that judges should continue to 'exercise the sentencing discretion judicially' and that 'whether a sentence warrants mitigation reflected in a parole eligibility, a parole release date or a suspension set after one third of the sentence, or at some other time, will always turn on the particular circumstances of the individual case'. The serious circumstances in a case and overwhelming evidence may mean that no reduction for a plea of guilty is warranted: see *R v Mahony & Shenfield* [2012] QCA 366 [50]–[56] .
21 *R v Bates* [2002] QCA 174, 15 [79] (Atkinson J).
22 *Atholwood v The Queen* (1999) 109 A Crim R 465, 468 (Ipp J) cited in *R v Bates* [2002] QCA 174, 15 [80].
23 Asher Flynn and Arie Freiberg, *Plea Negotiations* (Report to the Criminology Research Advisory Council, Grant CRG 51/13–14, April 2018) 151.
24 Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations: Overlooked and Unimpressed* (Palgrave Studies in Victims and Victimology, 2021) 7.
25 Ibid.
26 Ibid 6.
27 Ibid 8–9.
28 Ibid 11.
29 *Director of Public Prosecution's Guidelines* (n 7) 32–4.
30 Ibid 33.
31 *Victims of Crime Assistance Act 2009* (Qld) sch 1AA, div 2.
32 Women's Safety Justice Taskforce, H*ear Her Voice, Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) vol 1, 246.
33 Ibid rec 47.
34 Ibid rec 50.
35 Ibid rec 74.
36 Queensland Government, *Queensland Government Response to the Report of the Queensland Women's Safety and Justice Taskforce, Hear Her Voice - Report Two: Women and Girls' Experiences Across the Criminal Justice System* (2022) 20, 26.
37 Preliminary Submission 17 (Fighters Against Child Abuse Australia) 3.
38 Ibid 10–11.
39 Preliminary Submissions 5 (Queensland Sexual Assault Network), 6 (BRISSIC Collective).
40 Preliminary Submission 4 (Justice Reform Initiative) 2.
41 See eg, SME Interviews 13 and 14. It is a fundamental principle in sentencing 'that no one should be punished for an offence of which he has not been convicted': *R v De Simoni* (1981) 147 CLR 383, 389 (Gibbs CJ). See also *R v D* [1996] 1 Qd R 363 in which the Court of Appeal observed: 'A person who has only been convicted of an isolated offence is entitled to be punished as for an isolated offence, not on t he basis that the only offence … was not isolated but part of a pattern of conduct with which he or she has not been charged and of which he or she has not been convicted' and that 'it would be intrinsically unfair to charge a person with a single offence and then adduce evidence of other offences': 363 (Fitzgerald P, Byrne and White JJ agreeing).
42 SME Interview 13.
43 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I - II* (2017) 99–100 (*'Criminal Justice Report'*).
44 Ibid.
45 Ibid. See Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect – Consultation Paper – Background* (March 2024) Chapter 6 for more information about the principle of totality.

46 *Criminal Justice Report* (n 43) rec 75.

47 While a sentence for each individual count is specified in Queensland, it is common for court when imposing sentences for several distinct, unrelated offences is to fix a sentence for the most serious offence, which is higher than it would be alone, but takes into account the overall criminality involved in the other offences: see *R v Nagy* [2003] QCA 175. This is an alternative to ordering that sentences be cumulative to achieve a higher sentence.

48 Queensland Government, *Queensland Government Annual Progress Report: Royal Commission into Institutional Responses to Child Sexual Abuse* (December 2018) 17.

49 *Penalties and Sentences Act 1992* (Qld) ss 9(4)–(6) ('PSA').

50 See eg, Indecent treatment of children under 16: *Criminal Code Act 1899* (Qld) sch 1, s 210.

51 Ibid s 349(3).

52 [2020] QDC 345.

53 *DMS v Commissioner of Police* [2020] QDC 345 [8], [11] (McGinness DCJ). DMS was still liable to be a reportable offender under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (Qld) s 5, unless s 5(2) applies: see [33].

54 [2023] QCA 223.

55 *R v Downs* [2023] QCA 223 [3] [45] (Morrison JA, Mullin P and Bond JA agreeing).

56 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13 ('DPSOA'). Serious danger is defined within the legislation to mean that there is an unacceptable risk that the prisoner will commit a serious sexual offence (a) if the prisoner is released from custody; or (b) if the prisoner is released from custody without a supervision order being made.

57 See, eg, Preliminary Submission 25 (Queensland Corrective Services) 1

58 Queensland Sentencing Advisory Council, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld)*, (Final Report, 2022) 93.

59 Preliminary Submission 16 (Legal Aid Queensland) 2.

60 *R v Robinson* [2007] QCA 99 [37] (Keane JA, Williams JA and Muir J agreeing).

61 Ibid.

62 See *Corrective Services Act 2006* (Qld) pt 13, div 1.

63 SME Interview 7. This participant also noted it can be difficult to determine the appropriate factual basis for sentence for offences charged under s 229B following a trial if this is not clear from the jury verdict.