

22 April 2024

Queensland Sentencing Advisory Council  
GPO Box 2360  
Brisbane Qld 4001

By email: [submissions@sentencingcouncil.qld.gov.au](mailto:submissions@sentencingcouncil.qld.gov.au)

Dear Justice Lyons,

### **Submission to the Review of sentencing for sexual assault and rape offences**

Basic Rights Queensland welcomes the opportunity to provide comment on the Queensland Sentencing Advisory Council's review of sentencing for sexual assault and rape offences.

#### ***About Basic Rights Queensland and Working Women Queensland***

Basic Rights Queensland Inc. (BRQ) is an incorporated non-profit organisation and community legal centre registered with the Australian Charities and Not-for-profits Commission.

BRQ provides free information, advice, advocacy and legal services in Queensland state-wide. BRQ supports vulnerable and disadvantaged people in relation to social security, disability discrimination and to those who experience mental health concerns.

Working Women Queensland (WWQ) is a part of BRQ. WWQ provides provide free advice, support and information for vulnerable women in relation to employment related matters, including sexual harassment and gender discrimination. WWQ employ a team of solicitors, industrial advocates and one social worker who offer a holistic, interdisciplinary approach. WWQ is the only specialist women's employment service of its kind in Queensland.

Basic Rights Queensland and Working Women Queensland receive requests for support and information from people who have experienced sexual assault/s and rape at work. Sexual assault and rape are included in the terminology that is legally defined as sexual harassment.

#### ***Rape and Sexual Assault***

The appalling rates of rape and sexual assault in Australia are confronting and alarming, especially when considering the crime is *grossly* under reported, and under charged. Sexual violence services indicate that the violence associated with sexual crimes is increasing and the age of the victims is decreasing<sup>1</sup>.

*Sexual assault is one of the most under reported crimes, with national statistics finding that 92 per cent of women who experienced sexual assault did not report the incident to police.*<sup>2</sup>

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<sup>1</sup> <https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release#post-release-changes>

<sup>2</sup> <https://statements.qld.gov.au/statements/99154#:~:text=Sexual%20assault%20is%20one%20of,report%20the%20incident%20to%20police.>

BRQ acknowledges the pivotal findings and recommendations from The Women's Safety and Justice Taskforce (The Taskforce) and the action underway by the State Government in responding to the recommendations. The recommendations of The Taskforce included the need for there to be a trauma-informed framework for Queensland legal practitioners and for the Department to support training and education across the justice system. It is important that victims accessing the legal system are not further harmed by the process where possible.

While the stigma and shame associated with reporting sexual crimes may be rooted in gendered, cultural, social and religious beliefs, many people choose not to report sexual crimes for fear of disbelief, further trauma and harm through the process. Rape myths continue to be pervasive. Media reporting and its ongoing reliance on the outdated and irrelevant factors such as clothing and previous sexual behaviours (of the victim) have created barriers and distrust in the legal system's ability to provide justice and safety for victims.

The further harm and trauma that some/many victims experience through the reporting and legal processes has been acknowledged through the introduction and passing of the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Qld)* which seeks to reduce the trauma and harm in relation to evidence and jury directions.

### ***Rape and Sexual Assault at Work***

The Australian Human Rights Commission's (AHRC) landmark *Respect@Work Report* and subsequent *Time for Respect Report* highlight the prevalence of sexual harassment across Australian workplaces and make important recommendations to manage, record and prevent.

In addition to providing important data in relation to the prevalence of sexual harassment and the nature of the harassment in the workplace, it also identified who is most likely to experience sexual harassment and those who are most at risk. Both reports reflected the under reporting of sexual harassment in Australian workplaces, including sexual assault and rape.

The report provides the legal definition of sexual harassment and behaviour definitions, clearly indicating that experiences of sexual assault and rape are included in the wide-arching definition of sexual harassment.

*The Behavioural Definition provided to respondents to the 2022 National Survey captured a broad spectrum of behaviours, ranging from sexually suggestive comments or jokes to actual or attempted rape or sexual assault.*<sup>3</sup>

With 3% of the respondents to the *Time for Respect Report* indicating that their experiences of sexual harassment in the workplace included actual or attempted rape or sexual assault, it is important that the workplace is recognised as a significant place where these crimes occur.

The *Respect@Work Report* identified the experiences of employees who indicated that their experiences of "lower level" sexual harassment in the workplace (such as verbal harassment) subsequently escalated to sexual assault or rape.

Our Watch (the national not-for-profit organisation working in the prevention of violence against women and children) highlights the social context that leads to violence against women, including sexual assault and rape. In addition to gender inequality, it is the *intersection* of additional and other forms of inequality and oppression<sup>4</sup> that is likely to *increase* the vulnerability of women to sexual assault and rape (in the workplace and in the wider community). This submission will explore this correlation further when exploring factors of *vulnerability* in relation to sentencing.

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<sup>3</sup> <https://humanrights.gov.au/time-for-respect-2022>

<sup>4</sup> <https://www.ourwatch.org.au/the-issue/>

31% of Australian women have experienced actual or attempted rape or sexual assault at some point in their lifetime.<sup>5</sup> Where these assaults take place in or are connected to the victim's workplace, they are statistically more likely to make a complaint in relation to the assault than if it did not, including rape or sexual assault.

*actual or attempted rape or sexual assault\* made up 1% of the most recent incidents of workplace sexual harassment, but 62% of these incidents were the subject of a formal report or complaint<sup>6</sup>*

The appallingly high numbers of Australian women who have experienced actual, or attempted, rape or sexual assaults also spotlights the vulnerability and underlying trauma of women in the workplace, and by correlation, a predisposition to a psychosocial injury<sup>7</sup> if they experience further sexual harassment (which include actual, attempted rape and sexual assault) in connection with their work.

As a state-wide service, BRQ is conscious that there is a regional penalty that applies to women living and working in regional areas. In addition to decreased access to healthcare and services, women living regionally and remotely in Queensland have a greater gender pay-gap,<sup>8</sup> and sentencing data demonstrates that geographical location is also a factor in the rate of rape and sexual assault offences. The higher proportional rate of sentenced rape cases from Far North Queensland indicates a strong need for resources to be distributed and prioritised given this alarming anomaly.

*The northern regional areas of Queensland had the highest proportional rate of sentenced rape (MSO) cases. The rate of rape offences in Far North Queensland (123.8) was around 3 times that of the Metropolitan region (39.5).*

### **Sentencing principles and factors**

***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?***

The five purposes for sentencing as outlined in s 9 (1) of the PSA sufficiently outline the purposes and need for sentencing for rape and sexual assault offences.

BRQ supports their intent, including the overlapping and combining rationales and believes them to be in accordance with community expectations and values.

- 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.

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<sup>5</sup> <https://humanrights.gov.au/time-for-respect-2022> - pg 37

<sup>6</sup> <https://humanrights.gov.au/time-for-respect-2022> pg 131

<sup>7</sup> Examples of workers who may be at higher risk

[https://www.worksafe.qld.gov.au/\\_data/assets/pdf\\_file/0025/104857/managing-the-risk-of-psychosocial-hazards-at-work-code-of-practice.pdf](https://www.worksafe.qld.gov.au/_data/assets/pdf_file/0025/104857/managing-the-risk-of-psychosocial-hazards-at-work-code-of-practice.pdf)

<sup>8</sup> <https://www.wgea.gov.au/newsroom/gender-equity-insights-2022-report#:~:text=The%20report%20also%20found%20the,women%20in%20very%20remote%20locations.>

As an organisation that values trauma informed practices, BRQ strongly supports the facilitation of community restorative justice (RJ) programs. BRQ supports its wider adaptation by the Courts in relation to rape and sexual assault matters, to support victims and their wellbeing.

As per the discussion paper, a range of RJ programs have already been recommended to government by The Taskforce and other forums. To date, the practice of its use in sexual violence offences has been limited. While evaluation of other programs in other Australian states and territories (and New Zealand) has been limited, where they have occurred, they have shown to be of value, to the victim, and the offender.

There are some particular points of interest from these findings to BRQ and influence our recommendation. The model Circles of Support and Accountability (CoSA), which the consultation paper indicates has produced positive results, involves trained community *volunteers* who work alongside other professionals (probation officers, police etc) as currently under trial in South Australia.

BRQ finds an aspect of this approach problematic in that the model provides training to undertake this work to community *volunteers*. There is a fundamental principle of using unpaid labour in this context that is challenging given the value we place on the recognition and remuneration of labour, especially women's labour. While community engagement is essential and beneficial in RJ programs, especially in regard to cultural safety and appropriateness, we do not support the expansion of Queensland's RJ practice through the use of unpaid labour.

The New Zealand RJ program, Project Restore, commenced in the 1990s and provides for access to RJ at various stages in the criminal justice process. The program is victim driven, (which BRQ strongly supports for any Queensland RJ programs) and seeks to re-balance *power* between the parties and assist victim healing. Where the health and wellbeing of the victim is supported by RJ, and in recognition of the traumatic nature of the justice system on rape and sexual assault victims, we believe that the use of RJ being accessible for victims *throughout* the legal process in Queensland, as it is in New Zealand, should be considered.

Project Restore is a nation-wide RJ program contracted by the Ministry of Justice and is the sole provider of RJ programs in New Zealand. BRQ supports a consistent and uniform approach in Queensland, thus providing oversight and quality control, in addition to a uniformity of service standards and review mechanisms. Clearly it would be a requirement of any provider to deliver culturally and trauma informed approaches to any RJ program. A state-wide approach to RJ for rape and sexual assault offences will not only provide consistency, but it will also allow for clear oversight and review. BRQ believes RJ programs in Queensland are best managed by the public sector and distanced from private industry and for-profit businesses and providers. Where an outside provider is considered, BRQ recommends strongly that it be limited to the not-for-profit sector.

### ***Other sentencing guidance***

Rape and sexual assault are an abuse or assertion of power (which is explored in the next section of our submission). BRQ supports sentencing guidance that strongly recognises the not only vulnerability and impact of the offence on the victim, but additionally, the imbalance of power between the offender and victim at the time of the offence. An example of where this is made explicit is the Canadian example provided in the discussion paper.

*Court must treat as aggravating (to the extent they apply):*

- *the defencelessness of the victim;*
- *any serious or long-term physical or psychological effect on the victim;*
- *the magnitude of the breach of any relationship of trust between the victim and offender;*

- *threats by the offender to prevent the victim reporting the offending;*
- *deliberate concealment of the offending from authorities. Court must treat as aggravating factors including: that the victim was particularly vulnerable because of his or her age or due to any other factor known to the offender.*

While the terminology used is the word *trust*, its intent is to reflect the power / trust dynamic between the two parties. BRQ recommends that any attempt to further intimidate or prevent the victim from seeking assistance or reporting the event, should be an aggravating factor in sentencing guidelines in Queensland.

### **Relevance of victim age and vulnerability**

BRQ aids and provides support to a range of people including women, culturally and linguistically diverse people, people with a disability, LGBTIQ+ people and First Nations people with workplace, disability, and discrimination issues in and outside of a work context.

As highlighted through the research and the aforementioned reports undertaken by the Australian Human Rights Commission, there is data that indicates that there are inherent characteristics that make people more vulnerable to experiencing actual and attempted rape and sexual assault, including in the workplace:

- *women were almost 4 times more likely to experience actual or attempted rape or sexual assault than men (31%, compared to 8% of men)<sup>9</sup>*
- *Aboriginal and Torres Strait Islander people are more likely than non-Indigenous people to be sexually harassed. Almost 9 in 10 Aboriginal and Torres Strait Islander people (86%) have experienced sexual harassment in their lifetime.<sup>10</sup>*
- *The prevalence of sexual harassment was higher among people who identified as gay, lesbian, bisexual, pansexual, queer, asexual, aromantic, undecided, not sure, questioning, or other, than among those who identified as straight or heterosexual (85%, compared to 75% of those who identified as straight or heterosexual).*
- *non-binary people were 3 times more likely to experience actual or attempted rape or sexual assault than the total population, and more than twice as likely as women (64%, compared to 20% of the total population and 31% of women)<sup>11</sup>*
- *People with a disability were twice as likely to have experienced actual or attempted rape or sexual assault over the course of their lifetime (39%, compared to 18% of people without a disability). Notably, women with a disability were over 3 times more likely to have experienced actual or attempted rape or sexual assault than men with a disability (57%, compared to 16% of people without a disability).<sup>12</sup>*

These statistics indicate that people who hold less positional power in the workplace are more at risk, making them more vulnerable in relation to harm, including sexual violence. The current sentencing guidelines consider a victim's age and vulnerability.

A lack of power or agency in the workplace directly impacts on the likelihood of speaking out, reporting, or seeking to address any systemic factors, especially when they may be in insecure work (casually employed), a low-income worker or they hold a Working Visa. Where an

<sup>9</sup> <https://humanrights.gov.au/time-for-respect-2022> - pg 38

<sup>10</sup> <https://humanrights.gov.au/time-for-respect-2022>

<sup>11</sup> <https://humanrights.gov.au/time-for-respect-2022> - pg 38

<sup>12</sup> <https://humanrights.gov.au/time-for-respect-2022> - pg 42

employee does not have permanent residency, are a migrant and/or have a refugee background the power imbalance and vulnerability of the person is greater.

*In addition to physical and sexual violence, women from migrant and refugee backgrounds are particularly vulnerable to financial abuse, reproductive coercion, and immigration related violence, for example withholding documents, threats of visa cancellation or deportation.*<sup>13</sup>

BRQ propose a broader consideration in relation to sentencing guidelines. In addition to recognising vulnerability of the victim in relation to age, which our organisation supports, that sentencing also recognises additional factors that increase vulnerability and contribute to power imbalances in the workplace.

Vulnerability factors can and do often intersect, which compounds the vulnerability.

*people who experience discrimination because of a cumulative effect of having more than one protected attribute are at greater risk of experiencing discrimination*<sup>14</sup>

BRQ proposes the protected attributes under Queensland Anti-Discrimination law, and any intersection of multiple attributes of disadvantage (as is foreshadowed in the forthcoming *Anti-Discrimination Bill 2024 (Qld)*), be a reference point for the consideration and determination of the vulnerability of the victim, and power imbalance and abuse between the parties.

Age of the victim is currently recognised in sentencing, and this is reflective of the power imbalance between the perpetrator and the victim (in addition to a recognised inability to consent when the victim is under 12). It is our experience that many vulnerable people in the workplace experience sexual violence at work through a power imbalance. This is especially evident where the perpetrator may hold positional power over the employee.

Of additional note, there are certain characteristics that increase the vulnerability of a worker and their likelihood of experiencing sexual violence, such as whether a person has a disability.

*Four out of 5 people with a disability have been sexually harassed on at least one occasion over the course of their lifetime, compared with three quarters of those without disability (83%, compared to 76% of those without a disability).*<sup>15</sup>

The breach of trust, and the abuse of a work-related power dynamic, especially where the victim has one or multiple, and intersecting protected attributes, should be considered and reflected in sentencing.

### **Good character**

BRQ does not support the use of Good Character statements for actual rape, attempted rape or sexual assault charges. In providing the accused to draw upon their social capital, connections, and agency to provide testament to their otherwise good nature reasserts the harmful “good bloke” mythology that continues to excuse their crimes.

While the intent is to allow the accused an opportunity to assert their otherwise “good” character, it places a black and white binary view over a person’s character. It suggests that despite undertaking an act of a sexual assault there is still scope to be recognised as otherwise “good”. If Australia is to combat the pervasive gender-based violence throughout our community, it is important to combat the narrative of the “good bloke”. Maintenance of this inequitable practice whereby the accused can source a favourable account of their character,

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<sup>13</sup> <https://www.ourwatch.org.au/quick-facts/>

<sup>14</sup> [https://www.qhrc.qld.gov.au/\\_data/assets/pdf\\_file/0012/40224/QHRC-Building-Belonging.WCAG.pdf](https://www.qhrc.qld.gov.au/_data/assets/pdf_file/0012/40224/QHRC-Building-Belonging.WCAG.pdf)

<sup>15</sup> <https://humanrights.gov.au/time-for-respect-2022> - pg 41

which holds weight within the system, should not be maintained and BRQ recommend that it should be removed.

A “Good Character” statement also embeds other forms of privilege in the justice system. Offenders with strong family connections, social networks, professional associations, wealth, and friends and/or family with high social status or belonging to “respected” professions are providing praise and reports of *their* positive experiences of the accused through this avenue. The system fails to provide the same opportunities and favour to those accused who are socially disadvantaged, lack economic security or capital wealth, who therefore through no fault of their own, often have less social capital to defend their reputation. This process rewards privilege. By their very nature, these reports are biased, in that they are often written by people who have a vested interest in the penalty being reduced and can be motivated by emotion and/or self-interest.

Importantly the impact and likelihood of further harm and trauma to the victim, their family and friends should be considered in the process of the accused providing the “good character” report.

### ***Systemic disadvantage and cultural considerations***

#### ***Cultural issues impact on Aboriginal and Torres Strait Islander persons that are particularly important in sentencing for rape and/or sexual assault.***

There are many issues that impact on Aboriginal and Torres Strait Islander people that are important to be considered in the sentencing of rape and/or sexual assault in Queensland.

The rate of incarceration of Aboriginal and Torres Strait Islander people in the justice system<sup>16</sup> must be considered given that Australian First Nations people are seven times more likely than non-Indigenous people to be charged with a criminal offence and appear in court.

As of 30 June 2021, the Australian Bureau of Statistics’ preliminary estimates indicate that 984,000 First Nations people were living in Australia, representing 3.8% of the total Australian population, while they represent 4.6% of Queensland’s population<sup>17</sup>.

*...we are the most incarcerated people on the planet. We are not an innately criminal people.*<sup>18</sup>

In Queensland, Aboriginal and Torres Strait Islander people account for almost a quarter of people sentenced for assault and rape, highlighting that First Nations people are more likely to be charged with rape and/or sexual assault offences in the state than non-indigenous people.

It is the position of BRQ that investment in social policy and prevention should be a primary focus. Culturally appropriate consent education must be in schools, where diversion programs are preferable to detention. This is of the utmost significance for First Nations people given the alarming rates of deaths in custody for Aboriginal and Torres Strait Islander people.<sup>19</sup>

It is important that the sentencing process considers the systemic hardships and impact/s of intergenerational trauma on an Aboriginal or Torres Strait islander person and the cultural considerations, systemic disadvantage, and the impact of intergenerational trauma may have had on the offender.

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<sup>16</sup> <https://www.aic.gov.au/publications/sr/sr37>

<sup>17</sup> <https://www.aihw.gov.au/reports/australias-welfare/profile-of-indigenous-australians>

<sup>18</sup> The Uluru Statement of the Heart - <https://ulurustatement.org/the-statement/view-the-statement/>

<sup>19</sup> <https://www.aic.gov.au/publications/sr/sr41>

The passing of the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023* (Qld) introduced the requirement that the court consider the hardship that any sentence would impose on the offender in consideration of an offender's characteristics, including gender, sex, sexuality, age, race, religion, parental status, and disability:

- *require the court to consider, if relevant, the offender's history of abuse or victimisation*
- *require the court to consider probable effect that any sentence or order under consideration would have on any of the person's family or dependants, whether or not the circumstances are 'exceptional'*
- *expand subsection 9(2)(p) to clarify that cultural considerations include the impact of systemic disadvantage and intergenerational trauma on the offender.*<sup>20</sup>

BRQ recommends that this should be mirrored in the recommendations of this review and provide a framework for considering the balance of providing justice and rehabilitation. It is important that the impact of the incarceration may have on the family, dependants and community of the person sentenced.

### ***Cultural considerations applying to people from other culturally and linguistically diverse backgrounds relevant to sentencing for these types of offences.***

BRQ recognises that many people who have a culturally and linguistically diverse (CALD) background experience hardships. Language and cultural differences can affect accessibility to health, education and economic security. We also recognise that religious and cultural customs and laws of their country of origin can influence how local laws and values are perceived. While this does not ever excuse rape and sexual assault, there are circumstances where it *may* be considered relevant in the context of sentencing for these offences.

Exceptional circumstances to be considered in the sentencing guidelines should include whether the person has been psychologically impacted or affected by deeply traumatic events such as significant physical abuse, sexual abuse, experiences of war, persecution, terrorism and experiences as a refugee. It is on the basis of deep trauma and psychological impact that this should be considered, and not solely through the status of being from a culturally or linguistically diverse background.

BRQ strongly supports the provision of translation services and assistance through the legal system for people who experience barriers with language and culture.

### ***History of victimisation***

#### ***Extent that 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.***

As outlined in considering sentencing for people with demonstrable impacts of deep trauma and psychological injuries for CALD offenders, where the offender is a survivor of sexual violence and other forms of abuse, BRQ is of the view that there are some circumstances where this may be a consideration in sentencing. Additionally, BRQ notes the distressing rates of sexual assault in Queensland prisons and the impact of those assaults.

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<sup>20</sup> Hear her voice – Report 2, p 563



*In a survey of people in Queensland prisons, more than 1 in 3 (34%) males and 1 in 5 (20%) females reported having been physically assaulted in prison, and 2.9% of males and 3.8% of females reported a sexual assault (Butler et al. 2010).<sup>21</sup>*

We thank you for the opportunity to participate in this consultation process.

If you would like further information or would like to discuss the submission, please contact Penny Spalding on 1800 358 511 or [REDACTED]

Yours sincerely,

**Basic Rights Queensland**

Per:

[REDACTED]

Eloise Dalton, Acting Director  
Working Women Queensland

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<sup>21</sup> <https://www.aihw.gov.au/reports/prisoners/the-health-of-people-in-australias-prisons-2022/contents/physical-health-status/physical-and-sexual-assaults>