

Sentencing sexual assault and rape in Queensland

Information Sheet

Content warning: This document has information about sexual violence offences that some readers may find distressing.

Background

The Attorney-General has asked us (the Council) to review two different aspects of sentencing:

1. sentencing for sexual assault and rape offences, and
2. the operation of the aggravating factor for domestic and family violence offences.

In this information sheet, we explain sexual assault and rape offences. We also look at the key concepts and relevant laws relating to our review.

Read our other information sheet about [domestic violence offence as an aggravating factor](#).

Our review in a snapshot:

As part of the review, we will research how sentencing for the offences of sexual assault and rape is working, including current sentencing practices. These are the only sexual offences the Attorney-General has asked us to examine as part of this review.

What is sexual assault?

Sexual assault is any unwanted sexual behaviour, done without the person's consent (agreement).¹ It is an 'indecent assault' because it involves behaviour that offends against current accepted standards of decency. It can include unwanted kissing and inappropriate sexual touching.

Sexual assault does not need to include contact. It can also include forcing another person commit to an act of gross indecency, or making

a person see it.² For example, if the person masturbates in front of another person.

It can be more serious if it involves penetration, a weapon, or more than one person who commits the offence. These examples where it is more serious are known as a 'circumstance of aggravation'. This means there is a higher maximum penalty.

What are the maximum penalties for sexual assault?

Life imprisonment

- If the person committing the offence is (or pretends to be) armed with a dangerous or offensive weapon or is in company.³
- If the indecent assault involves the person who is assaulted penetrating the offender's vagina, vulva or anus to any extent with a thing that is not a penis.⁴
- If an act of gross indecency is done by a person procured (recruited, enticed or forced) by the offender and includes penetration of the procured person or another, with any thing that is not a penis.⁵

14 years imprisonment

- If the act includes contact of any part of the genitalia or the anus of a person with any part of the mouth of the person.⁶

10 years imprisonment

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

What is rape?

Rape is a serious sexual offence involving penetration of another person without the other person's consent (agreement).

It can be any form of penetration of the vulva, vagina, anus, or mouth without consent.⁷ A person commits rape if, without consent:

- the person has carnal knowledge with or of/engages in penile intercourse with the other person,⁸ 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,⁹ or
- the person penetrates the mouth of the other person with the person's penis.¹⁰

The maximum penalty is **life imprisonment**.¹¹

What is 'consent'?

'Consent' means to agree to the behaviour. It must 'be freely and voluntarily given' by a person 'with the cognitive capacity' to do so.¹²

'Cognitive capacity' means the person knows or understands what they are doing and are agreeing to it.

There can be different ways that consent is not given, and a person can change their mind and withdraw consent.¹³ Under the law, a child under the age of 12 is unable to give consent.¹⁴

What are the laws about sentencing for sexual assault and rape?

The *Penalties and Sentences Act 1992* (Qld) sets out rules and guidelines that courts must follow when sentencing adults convicted of an offence, including for rape or sexual assault.

Purposes of sentencing

The only purposes (or combination of purposes) for imposing a sentence in Queensland are:

1. **Punishment** – to punish the person in a way that is just (fair),
2. **Rehabilitation** – to help a person change their behaviour so they do not commit an offence again,
3. **Deterrence** – to discourage that person and other people from committing the same type of offence by showing them what might happen if they do,

4. **Denunciation** – to express in a formal way that the person's behaviour is unacceptable to the community, and
5. **Protection** – to keep the community safe.¹⁵

As part of our review, we have been asked whether the existing purposes and factors set out in the *Penalties and Sentences Act 1992* (Qld) are adequate.

Read about the purposes and factors of sentencing in chapters 4 and 7 of our sentencing guide [here](#).

Special sentencing principles that apply to sexual assault and rape

Along with the general principles and factors the court thinks about when sentencing, there are also special sentencing principles for sexual assault and rape that can apply:

- **Imprisonment as a last resort does not apply to certain types of offences:** This happens if the offending involved violence (actual or attempted) resulted in physical harm, or the victim was a child under 16 years.¹⁶
- **Special considerations if the offending involved violence (actual or attempted) or resulted in physical harm:** In this situation, there are certain factors a court has to take into account over others. Some of those factors are:
 - whether there is a risk of physical harm to anyone if the person doesn't go to prison
 - the need to protect the community
 - the nature and extent of the violence
 - the personal circumstances of the victim.¹⁷
- **A sentence of actual imprisonment must be given if the victim was a child under 16 years unless there are exceptional circumstances:**¹⁸ The court must take into account factors like the age of the child, the effect of the offence on the child and the need to protect the child, or other children.¹⁹ The court can't take into account the person's good character if it helped them to commit the offence.²⁰

- **If the offence was a 'domestic violence offence', this is aggravating unless there are exceptional circumstances:** This means the offending was more serious because it happened in a domestic and family context.²¹ An example of an exceptional circumstance is if the victim of the offence had committed a serious act or several acts of domestic violence against the person being sentenced.²²

Mandatory sentencing

Usually, a judge or magistrate can decide what sentence to give depending on the case. Mandatory sentencing means a judge or magistrate has no choice.

The types of mandatory sentencing that can apply for the offence of sexual assault and rape are:

- **Parole eligibility date for sexual offences or declared serious violent offences:**²³ This means release from prison is not automatic and the person must apply to the Parole Board Queensland which decides whether to release the person from prison onto parole. This is different to the normal rules that apply.
- **If a 'serious violent offence' declaration is made, parole eligibility is set at 80% of the sentence, or 15 years (whichever is less):**²⁴ A 'serious violent offence', includes an offence of sexual assault and rape.²⁵ This means the person will spend more time in custody before being able to be released on parole than a person without a 'serious violent offence' declaration. They must apply to the Parole Board Queensland which then decides whether to grant parole allowing the person to be released from prison on parole.
- **A 'repeat child sex offence' must be sentenced to life imprisonment or an indefinite sentence:** If a person is convicted of a second 'serious child sex offence', the court must give a sentence of life imprisonment or an indefinite sentence.²⁶ A 'serious child sex offence' is a sexual offence committed against a child under 16 (this includes the offence of sexual assault where the maximum penalty is life imprisonment, and rape).²⁷

- **A 'serious organised crime circumstance of aggravation':** if a person was a participant in a criminal organisation and other certain criteria is met, the court must sentence a term of imprisonment for the offence and an added mandatory term of imprisonment, 'served wholly in a corrective services facility'.²⁸
- **Cumulative sentence for repeat serious offences:** if a person commits certain serious offences (including sexual assault and rape) while they are serving a prison sentence in custody or in the community, any sentence of imprisonment for the new offence must be served cumulatively.²⁹ This means the new sentence will start after the other sentence has finished – they can't serve them at the same time.

Other things we will consider

In our review, we will also:

- look into how other states and territories in Australia sentence these offences (as well as internationally), and
- publish a final report with our findings and recommendations.

How you can be involved

Throughout this review, we will invite feedback from individuals and organisations involved in the criminal justice system.

We will ask you what your views are about current sentencing practices for sexual assault and rape.

We also want to hear from victims-survivors, defendants in cases involving charges of rape or sexual assault and other members of the community.

To be involved and stay up to date on our review, [visit our website](#) or [subscribe to our upcoming newsletter](#).

If this paper has raised any issues for your and you need to talk to someone, support is available:

Lifeline Australia (24 Hours): [13 11 14](tel:131114)

1800RESPECT (24 Hours): [1800 737 732](tel:1800737732)

DV Connect (Womensline) (24 Hours):
[1800 811 811](tel:1800811811)

DV Connect (Mensline) (9.00am–midnight):
[1800 600 636](tel:1800600636)

Sexual Assault Helpline (7.30 am–11.30 pm):
[1800 010 120](tel:1800010120)

13YARN Aboriginal & Torres Strait Islander
Crisis Support (24 Hours): [13 92 76](tel:139276)

Kids Helpline: [1800 55 1800](tel:1800551800)

Relationships Australia: [1300 364 277](tel:1300364277)

Victim Assist Queensland:

[1300 546 587](tel:1300546587) (business hours) or

email VictimAssist@justice.qld.gov.au

- ¹ Section 352(1)(a) of the *Criminal Code Act 1899* (Qld) ('*Criminal Code* (Qld)') does not expressly state that consent is an element of the offence. However, assault is an element and is defined in section 245 as being 'without the other's consent'. See also s 347.
- ² Ibid s 352(1)(b).
- ³ Ibid s 352(3)(a).
- ⁴ Ibid s 352(3)(b).
- ⁵ Ibid s 352(3)(c).
- ⁶ Ibid s 352(2).
- ⁷ Ibid s 349. There have been changes made to the offence of rape and sexual assault over time, including the type of conduct captured. See, in particular, the *Criminal Law Amendment Act 2000* (Qld) which came into effect on 27 October 2000 and expanded the definition of rape to include acts of penetration previously included within the offence of sexual assault. In response to Recommendation 44 of the Women's Safety and Justice Taskforce, *Hear Her Voice Report 2: Women and girls' experiences across the criminal justice system* (2022), the Queensland Government has committed to recognising 'stealthings' as rape. This change is yet to be introduced.
- ⁸ *Criminal Code* (Qld) (n 1) s 349(2)(a). The words 'engages in penile intercourse with' will replace '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 2023* (Qld), which will start on a day to be fixed by proclamation: s 2.
- ⁹ *Criminal Code* (Qld) (n 1) s 349(2)(b).
- ¹⁰ Ibid s 349(2)(c).
- ¹¹ Ibid s 349(1).
- ¹² Ibid s 348(1).
- ¹³ The definition of consent under s 348 was amended on 7 April 2021 following recommendations made by the Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020). See *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld) s 8.
- ¹⁴ *Criminal Code* (Qld) (n 1) s 349(3). In response to Recommendation 43 of the Women's Safety and Justice Taskforce, the Queensland Government committed to amending the definition of consent to an affirmative model. The former Attorney-General confirmed that the new definition would be consent 'must be freely and agreed to'. This reform is still being drafted.
- ¹⁵ *Penalties and Sentences Act 1992* (Qld) ('PSA') s 9(1).
- ¹⁶ Ibid ss 9(2A), (4)(b).
- ¹⁷ Ibid s9(3)(a), (b), (c), (e).
- ¹⁸ Ibid s 9(4)(c).
- ¹⁹ Ibid ss 9(6)(a), (b), (d).
- ²⁰ Ibid s 9(6A).
- ²¹ An offence where the act done would be 'domestic violence' or associated domestic violence under the *Domestic and Family Violence Protection Act 2012* (Qld) or a contravention of a domestic violence order: *Domestic and Family Violence Protection Act 2012* (Qld) s 177(2); *Criminal Code* (Qld) (n 1) s 1.
- ²² PSA (n 15) s 9(10A). An example of an exceptional circumstance provided in s 9(10A) is 'if is the victim of the offence has previously committed an act of serious domestic violence, or several acts of domestic violence, against the offender'.
- ²³ Ibid s 160D.
- ²⁴ *Corrective Services Act 2006* (Qld) s 182(2).
- ²⁵ PSA (n 15) sch 1. For the circumstances where this can apply, see pt 9A.
- ²⁶ Ibid s 161E.
- ²⁷ Ibid s 161D.
- ²⁸ Ibid ss 161Q, 161R.
- ²⁹ Ibid s 156A. A list of offences is in sch 1.