

Submission by

YOUTH ADVOCACY CENTRE INC

**On the Sentencing of Sexual Assault and Rape: The Ripple Effect –
Consultation Paper: Issues and Questions**

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Introduction

The Youth Advocacy Centre (YAC) appreciates the opportunity to provide feedback to the Queensland Sentencing Advisory Council's review of sentencing for sexual assault and rape offences.

YAC is a community legal and social welfare agency for children and young people aged 10-18, particularly those involved in, or at risk of involvement in the youth justice and or child protection system or children who are at risk of homelessness or experiencing homelessness.

YAC has only addressed the questions particularly affect children and young people through the operation of the *Penalties and Sentences Act 1992* (Qld) (herein referred to as the 'PSA').

Sentencing purposes, principles, and factors

What are the most important purposes in sentencing a person for sexual assault and rape, and why?

YAC submits that the important purposes in sentencing a person for sexual assault and rape offences are adequately identified in section 9(1) of the *Penalties and Sentences Act 1992* (Qld), namely:

- punishment,
- rehabilitation of the offender,
- personal and general deterrence,
- community denunciation, and
- community protection.

All purposes have a role in determining the sentence for sexual assault and rape offences to balance the competing interests of the victim, the offender and community in arriving at a just punishment.

Should any changes be made to the general or specific purposes a court must consider when sentencing a person for rape or sexual assault?

YAC is of the view that the current framework of section 9 of the *PSA* outlining the general and specific purposes that the Court must consider in sentencing is appropriate. It allows for the Court to exercise its sentencing discretion to ensure sentences reflect the context and circumstances of each case, victim, and the offender.

The protection of community, the protection of the children, deterrence and rehabilitation in sections 9(3) and (6) of the *PSA* is appropriate and should not change. YAC would only suggest that the specific sentencing purposes and principles of sexual offending against children under 16 should be extended to apply to 16 and 17-year-old children.

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?

YAC submits that section 9 of the *PSA* captures the principles and factors that are important in sentencing for sexual assault and/or rape offences. To further add to the current principles and factors should not complicate or fetter the sentencing discretion by narrowing the considerations for sentencing.

Any amendments to the principles and factors should be meaningful and purposeful without inhibiting the Court's discretion.

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

YAC recognises that the current forms of sentencing guidance either through legislation or case law will not always achieve consistency with sentencing. This is attributable to the fact that the circumstances of each case involving rape and sexual assault are never identical.

Sentences are determined on the unique features of each case such as the circumstances of the offending, evidentiary complexities in the case, harm suffered by the victim and background of the offender.

Judicial discretion in sentencing is important to ensure the punishment reflects the broad spectrum of sexual offending behaviours balancing the mitigating and aggravating features of each case. Sentences must vary to reflect 'differences related to the severity, frequency, and form of their use of violence.'^[1]

Relevance of victim age and vulnerability

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?

YAC endorses the current approach for adults sentenced for sexual assault and rape offences against children under 16, particularly the principle that the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.^[2]

Although there is a presumption of imprisonment in these circumstances, the exceptional circumstances provide fairness to the offender to receive a non-custodial sentence where justified.

YAC submits that there needs to be a statutory recognition of victim vulnerability of children.

Children are exceptionally vulnerable to long lasting effects of trauma that impacts all aspects of their development with repercussions in their adult life.^[3] Imprisonment is particularly warranted where there is a significant age disparity between the offender and child and gross breach of trust with sexual offending involving someone whom they have a relationship with i.e. parent or other relative. In such circumstances, the research indicates the higher degree of compounding trauma suffered by a child.^[4]

Additional vulnerabilities arise where the child has a disability or is from a different cultural background. YAC would submit that there would be scope to consider adding victim vulnerability connected to disability and background could be identified as a separate aggravating feature under the PSA.

Good character

Should any changes be made to how good character can be considered by courts as this applies to sexual assault and rape?

YAC submits that the caveat under section 9(6A) of the *PSA* should not be changed in that the court must not have regard to the offender's good character if it assisted the offender in committing a sexual offence against a child under 16 years or a child exploitation material offence.

YAC would support that the good character exemption under section 9(6A) of the *PSA* apply to sexual offences for children under the age of 18 unless there are exceptional circumstances. This is consistent with the common law approach as exemplified in the decision of *R v Manser*.^[5]

Such consistency would be appropriate to align with proposed amendments to the *Criminal Code 1899* (Qld) to insert:

- section 210A, which criminalises unlawful sexual acts with a child aged 16-18 under one's care, supervision, or authority.
- section 229B, which criminalises repeated sexual conduct with a child with a child aged 16-18 under one's care, supervision, or authority.

In other circumstances, the legislation should not remove the Court's ability to consider the lack of criminal history in mitigation as it would fetter the Court's discretion and remove procedural fairness to the sentencing of the offender.

In practice, the weight of good character has more of a relevance where the offender has no criminal history, and the offending has no element of pre-meditation. Courts in Queensland thoroughly scrutinise the integrity of character references.

It is important to understand in sexual assault and rape cases, the Courts give little or no weight to references given by family members or friends of the offender.

Systemic disadvantage and cultural considerations

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

YAC acknowledges that there are a number of cultural considerations of Aboriginal and Torres Strait Islander persons that should be taken into account.

YAC identifies that one cultural consideration is the 'shame' felt by the victim and the complexities involved with offending committed by a family member. In those circumstances, it is difficult to illicit the impact of the offending behaviour given the fear of causing familial conflict particularly where the victim, the offender and their respective families live within the same Aboriginal and Torres Strait Islander community.

Cultural considerations intrinsically linked to the long-term impact of colonisation resulting in intergenerational trauma, discrimination, social and economic disadvantages should also be considered in sentencing. It was recognised by the High Court, in considering an appeal against sentence of an Aboriginal man, stated:

Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision.^[6]

In terms of sentencing, the above cultural matter is an important consideration.

YAC recognises the difficulty in sentencing Aboriginal and Torres Strait Islander people often requires a submission from the Community Justice Group. Such submissions are not often available particularly in remote areas where there an interpreter is required. Alternatively, the impact of being a descendant of a lost generation has made it difficult for an offender to connect with their community.

YAC would endorse changes to section 9 of the *PSA* proposed by the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023* that will require the Court to consider ‘any cultural considerations, including the effect of systemic disadvantage and intergenerational trauma on the offender.’

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

As highlighted in the decision of *R v VN*^[7], the impact of cultural considerations such as importance of reputation within the family and community was a relevant sentencing factor.

YAC would submit cultural considerations include whether they are from a patriarchal or matriarchal system. For instance, women from cultural backgrounds that recognises the dominant role of a husband in a marriage are particularly vulnerable to sexual exploitation and violence.^[8] This may include forced marriages of young people. Such a cultural consideration should be considered in the context of victim vulnerability in sentencing.

History of victimisation

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?

Similar to the effect of s9(10B) of the *PSA* in that where the offender is a victim of domestic violence is a mitigating factor, this should also apply to offenders who are victim of sexual violence or other forms of violence. YAC endorses the Court should consider:

- the effect of the sexual violence or forms of abuse on the offender, unless the court considers it is not reasonable to do so because of the exceptional circumstances of the case; and
- if the commission of the offence is wholly or partly attributable to the effect of such violence on the offender—the extent to which the commission of the offence is attributable to the effect of the violence.

YAC would submit that medical, psychological, or psychiatric assessments should be required by the Courts to connect the person being a victim of sexual violence and to their sexual offending. Where such a connection is evidenced, weight should be given in mitigation of the actual sentence.

YAC notes that it is difficult to articulate the parameters of this particular factor applying because how much weight given to the victimisation of the offender rests at the discretion of the sentencing Judge.

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?

YAC has observed that where s9(4)(c) of the *PSA* is applicable, establishing exceptional circumstances is extremely difficult to establish and negate the imposition of imprisonment as a sentence. The standard of ‘exceptional circumstance’ has a high threshold and this was indicated in the decision of *R v Quick; Ex parte Attorney General*.^[9]

YAC observes that section 9(4)(c) of the *PSA* does not automatically apply where age is not an element such as sexual assault and rape offences.

This issue was exemplified in *DMS v Commissioner of Police*.^[10] The appellant was 48 years of age and charged with sexual misconduct against a complainant aged 15 years and 11 months. The offending involved the appellant:

- putting her right hand down the front of the complainant's underwear and touching the skin on the top of her pubic hairline (Charge 1).
- trying to lift the complainant's underwear again and touching the top of her pubic hairline (Charge 2).

The appellant was charged with sexual assault rather than indecent treatment of a child under 16 years of age. Consequently, section 9(4) of the *PSA* was inapplicable, and the court did not need to find exceptional circumstances existed in order to impose a non-custodial sentence.

A similar approach was applied in the decision of *R v Downs*.^[11]

YAC submits consideration be given to amending the *PSA* so that the sentencing principles in section 9(4)-(6) should apply to all sexual offences where children are under the age of 18 and not limited to sexual offences where the age of being under 16 is an element of the offence. It recognises the vulnerability specifically to all young people and children under 18.

Such consistency is particularly important in light of the pending proposals to insert new provisions under the *Criminal Code 1899* (Qld):

- section 210A, which criminalises unlawful sexual acts with a child aged 16-18 under one's care, supervision, or authority.
- section 229B, which criminalises repeated sexual conduct with a child with a child aged 16-18 under one's care, supervision, or authority.

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 when sentencing a person for a sexual offence against a child under 16 years regardless of when the offence was committed?

YAC would endorse a change as identified above in that the *PSA* so that the sentencing principles in section 9(4)-(6) should apply to all sexual offences where children under the age of 18.

YAC identifies the difficulty in amending the *PSA* to apply to historical offences as it may result in more severe penalties that would have otherwise been imposed at the time the offence occurred.

This would conflict with section 35 of the *Human Rights Act 2019* (Qld), which affords protection against retrospective criminal laws. In particular, subsection 35(2) states:

A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

YAC would urge consideration be given to the adverse impacts that could arise if there was a retrospective application of section 9(4)(a) of the *PSA* to historical sexual offences.

Current approaches to sentencing and sentencing practices

Does sentencing for sexual assault and rape adequately reflect the purposes of sentencing and the seriousness of these offences? Should any changes be made?

YAC has observed that the more recent statutory sentencing reforms have centred on the harm caused to victims and the need for denunciation, community protection and deterrence. Some of the legislative changes as exemplified in s9(4) is prescriptive, limiting the type of sentence that can be imposed.

YAC observes that the context and factual circumstances of rape and sexual assault cases are diverse including the personal antecedents of the offender. The sentences imposed in cases vary and the spectrum of sentences must be broad to accommodate the diversity of offending that occurs.

YAC would not endorse narrowing the legislative framework and approaches to sentencing as it would deny the Judiciary's ability to adequately and fairly impose a sentence that reflects the circumstances of each case.

Penalty and parole options

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

YAC does not support a prescriptive legislative response that implements mandatory sentencing to all types of sexual offences. It will result in sentences focused on deterrence and offenders serving a period of their sentence in prison. Imprisonment does not effectively reduce re-offending or contribute to meaningful rehabilitation.

YAC observes that there would be benefits for additional penalty options, which incorporates different interventions (programs, counselling etc) for those serving a sentence in custody or in the community. This would be appropriate for young adult offenders who would benefit from rehabilitation and possess the potential to be diverted from the criminal justice system.

YAC would endorse the Council's previous 2019 recommendations to change the *PSA* to focus on rehabilitation of the offender, including the introduction of a new forms of community-based orders and allowing for a suspended sentence to be ordered alongside a community-based order when sentencing a person for a single offence.

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

The current types of sentencing orders available do achieve the purposes of sentencing (punishment, denunciation, deterrence, rehabilitation, and community protection).

The benefits of courts having a broad sentencing discretion is the flexibility to fashion sentences that reflect the individual circumstances of the case and the nature of offending. It is important that the

sentencing orders should include dual orders such as combined suspended sentences and community-based orders to allow Courts to incorporate punishment, deterrence and rehabilitation within a sentence.

The existing guidance in the *PSA*, including the imposition of imprisonment that applies to sexual offences against children under 16 provides comprehensive guidance to determining the appropriate sentencing orders. YAC, as previously suggested above, would recommend the operation of section 9(4) of the *PSA* so that actual imprisonment should be imposed for sexual offences against children under the age of 18 unless exceptional circumstances arise.

Information available to courts to inform decision-making.

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?

YAC suggests that for Courts to adequately impose an appropriate sentence, it would be beneficial to have an independent Court psychiatric or psychological assessment to be completed for both the victim and the offender. It would help the Court to better understand:

- the short and long-term harm suffered by the victim.
- if any, whether the offender's mental health issues, intellectual impairments or trauma as a victim of sexual or domestic violence contributed to the offending.

Such information will enable to Courts to effectively fashion the aggravating and mitigating factors of each case.

Understanding victim harm and justice needs

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?

YAC has observed that victims who are children or young people find that the sentencing of adult offenders is inadequate and does not meet their personal expectations.

In some instances, children and young people have articulated that they have been denied to the opportunity to personally be involved in court proceedings. Where they are assessed as being psychologically or psychiatrically competent to give evidence of the impact of the offending, the Court should consider accommodating their wishes.

Victim impact statements are beneficial for understanding the harm caused to the victim.

YAC has observed that for young people from disadvantaged backgrounds, limited education, poor literacy skills and or mental health or impairments it is difficult for them to provide written victim impact statements. Victim Liaison Officers with trauma informed training could provide valuable support to help victims of crime provide such statements.

YAC would submit that consideration should be given to allowing young victims to express their harm through the Court through recorded statements or representations made through a lawyer as an alternative to written victim impact statements.

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

YAC recognises that for some victims they do not wish to undertake criminal proceedings. They should be given the opportunity to pursue effective civil avenues to seek compensation for their harm. In Victoria, victims of sexual offences can seek financial assistance or compensation from the offender through the Victims of Crime Assistance Tribunal.

YAC would advocate for a similar system in Queensland in addition to Victims Assist Queensland scheme. Victims should be given effective civil and criminal avenues to seek justice.

Restorative justice approaches

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?

YAC has observed that in the Childrens Court pre-sentence restorative justice processes have been effective in assisting the Court in determining the appropriate sentence. The willingness to participate in the restorative justice process prior to sentencing is a favourable factor to the offender. This demonstrates to the victim the offender's willingness to see the harm caused to the victim and helps identify the offender's remorse and willingness to repair harm.

YAC does not endorse that the failure to undertake a restorative justice process should be taken as an aggravating feature in sentencing. Sometimes, such processes are not suitable in serious cases or likely to cause further trauma to the victim.

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

Similar to the operations of the restorative justice system within the *Youth Justice Act 1992* (Qld) and other jurisdictions, restorative justice should only occur if the alleged offender has entered a plea of guilty to the offences.^[12]

YAC would submit that restorative justice models would be appropriate where the sexual offending was low level, there is consent from the victim and offender to participate in the process and there is no significant age disparity between the offender and the victim i.e. a child and an adult.

YAC identifies that for restorative justice conferences to be effective considerations needs to be given to:

- a highly skilled and experienced facilitator or convenor,
- preparation of parties which incorporates a trauma-informed framework,
- participant screening relating to suitability and eligibility criteria, and
- flexibility to respond to the circumstances of each case including responsive to participants needs and readiness.^[13]

YAC endorses considerations of incorporating frameworks of the Circles of Support and Accountability ('CoSA') model, which have been proven successful in working with offenders to reduce re-offending. This involves professionals such as probation and parole officers, therapists, police and community support workers providing support to individuals convicted of sexual offences in the community.^[14]

Other issues

How do the anomalies and complexities identified impact sentencing for rape and sexual assault? How might these be overcome?

YAC has observed that at times there are evidentiary issues in relation to the issue of consent and establishing proof for the particulars of the sexual offending. This can result in the downgrading of charges such as rape to carnal knowledge or indecent treatment of a child. This process for victims can be demoralising given that in their eyes the reduced charges does not reflect the full experience that happened to them.

The sense of unjust punishment is further compounded when downgraded charges results in a reduced terms imprisonment imposed by the Court on the adult offender.

Generally, the trauma of the offending, ongoing life altering consequences and suffering experienced by the child or young victim is seen not to be fully commensurate with the punishment imposed by the Courts. This is particularly where the victim has undergone the stressful process of providing evidence in Court, which compounds the psychological and emotional effects of the victim.

Transparency in the proceedings involving regular consultation with the victim would alleviate some of the perceived injustices through the ‘plea bargaining’ processes undertaken by the Queensland Police Service and Director of Public Prosecutions.

References

^[1] Flood, M., Brown, C., Dembele, L., and Mills, K. (2022) *Who uses domestic, family, and sexual violence, how, and why? The State of Knowledge Report on Violence Perpetration*. Brisbane: Queensland University of Technology at page 7.

^[2] *Penalties and Sentence Act 1992* (Qld), section 9(4)(c).

^[3] *Royal Commission on Child Sexual Abuse Final Report Volume 3* at page 27.

^[4] *Royal Commission on Child Sexual Abuse Final Report Volume 3* at page 36.

^[5] *R v Manser* [2010] QCA 32.

^[6] *Bugmy v The Queen* [2013] HCA 37 at para 44.

^[7] *R v VN* [2023] QCA 220.

^[8] Natalie Taylor and Judy Putt, *Adult Sexual Violence in Indigenous and Culturally and Linguistically Diverse communities in Australia, Trends and Issues in Crime and Criminal Justice* (September 2007) at page 3.

^[9] *R v Quick; Ex parte Attorney General* (Qld) [2006] QCA 477

^[10] *DMS v Commissioner of Police* [2020] QDC 345.

^[11] *R v Downs* [2023] QCA 222.

^[12] *Crimes (Restorative Justice) Act 2004* (ACT), section 16(3) and *Youth Justice Act 1992* (Qld), sections 162 & 163.

^[13] Jane Bolitho and Karen Freeman, *The Use and Effectiveness of Restorative Justice in Criminal Justice Systems Following Child Sexual Abuse or Comparable Harms (Report, Royal Commission into Institutional Responses to*

Child Sexual Abuse, (2016) <<http://www.childabuseroyalcommission.gov.au/getattachment/9f328928-a343-4c65-b98e94e3185894c7/Restorative-justice-following-child-sexual-abuse-o>>.

^[14] Kelly Richards, Jodi Death and Carol Ronken, 'What Do Victim/Survivors of Sexual Violence Think about Circles of Support and Accountability?' (2021) 16(6) *Victims and Offenders: An International Journal of Evidence-based Research, Policy and Practice* 893; Kelly Richards and Australia's National Research Organisation for Women's Safety, *Circles of Support and Accountability: An Overview* (Fact sheet, 2020) <<https://www.anrows.org.au/wpcontent/uploads/2020/03/ANORWS-Richards-CoSA-Fact-Sheet.pdf>>.