Queensland Sentencing Advisory Council review of sentencing for sexual assault and rape

Submission by Legal Aid Queensland

23 April 2024

Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to the Queensland Sentencing Advisory Council (QSAC) in response to the consultation paper entitled 'Sentencing of Sexual Assault and Rape: the Ripple Effect'.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997,* LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day-to-day application of the law in courts and tribunals. LAQ believes that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

This submission calls upon the experience of our lawyers in Criminal Law Services, regional offices and Public Defender Chambers.

Response to questions

Questions 1 – 11: Sentencing purposes, principles and factors

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

The current purposes of sentencing listed at section 9(1) of the *Penalties and Sentences Act* 1992 (Qld) ('PSA') strike an appropriate balance between reflecting the interests of the victim, the community, and the offender.

These purposes stem from the principles set out in In *Veen [No 2]* (1979) 143 CLR 458, where the court (Mason CJ, Brennan, Dawson and Toohey JJ) said (at 476):

> *The purposes of criminal punishment are various; protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The 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.*

LAQ supports the continued application of this statement in the context of sentencing for sexual assault and rape. LAQ's role in providing representation for offenders pleading guilty

and found guilty of rape and sexual assault provides the perspective that rehabilitation is an important sentencing principle not only for the long-term interests of the offender, but for improving community safety.

As noted in the dissenting judgment of Atkinson J in *R v Willoughby* [2009] QCA 105 at [88] and [89] when discussing the jurisprudence on rehabilitation in the sentencing context:

> *The value of rehabilitation is that it is in the public interest if offenders cease offending after they have been detected or punished as it is in the community's interest that they no longer engage in criminal offending behaviour.*
>
> *Of course, the weight to be attached to the rehabilitation between offending and sentence will vary depending on the circumstances of the case and in a case of serious crime such as this, rehabilitation cannot overwhelm the appropriate sentence to be imposed. But neither can it be said to be irrelevant.*

It is important that the sentencing process does not derogate from the defendant's opportunity to have relevant information placed before the sentencing court. Any changes should not restrict a sentencing court's ability to consider fairly and appropriately matters in the course of their judicial discretion and in accordance with the principles as already set out in section 9 of the PSA. This is consistent with section 15 of the PSA and would ensure compliance with section 31 of the *Human Rights Act 2019* in regard to a fair hearing for the defendant.

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?***

LAQ does not consider that any changes should be made to the general or specific sentencing purposes. Section 9 of the PSA provides a sentencing court with a range of principles and guidelines from which they can draw when sentencing an offender, still retaining discretion as to the weight and relevance of each issue to each case. LAQ observes that section 9 of the PSA has been revised and amended many times, resulting in legislation which is detailed and sometimes prescriptive. It is important to ensure that judicial officers maintain a broad-ranging discretion to reflect the unique features of a case for which sentence must be passed.

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?***

Section 9 in its current form is sufficiently detailed to consider and apply the relevant principles and factors that are prevalent in sexual offences. Relevantly, section 9 specifically addresses punishment, rehabilitation, personal and general deterrence, protection of the community and harm done to the victim. It does not reserve a sentence of imprisonment as a sentence of last resort. It further ensures that any circumstances the court considers relevant can be taken into account. LAQ does not support further amendments, particularly of a prescriptive nature, that could have the effect of restricting the ability of a judicial officer to exercise discretion as to the relevant purposes, guidelines, and principles to have regard to in each case and appropriately reflect in their sentence the specific circumstances of that case.

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

The current forms of sentencing guidance are adequate. Section 9 currently provides an appropriate legislative framework for judicial discretion to operate within, for the purposes of sentencing. The court is further guided by a significant body of case authority for sexual offending, well established through the application of section 9 to differing circumstances. An analysis of a body of case authority is helpfully set out in Chapter 7 of the 'Consultation Paper: Background to this review'. This demonstrates the current provisions of the PSA provide the courts with adequate and appropriate tools to ensure a fair and flexible approach to sentencing on a case-by-case basis weaving and weighing up relevant sentencing purposes and principles.

Section 9 is in the main clear. The case authorities and sentences imposed reflect the legislation (particularly section 9 (2A)) where sexual offending causes physical harm to victims. Reflecting the legislation further the penalties imposed for rape offences consistently involve periods of actual imprisonment.[1] Limiting a judicial officer's ability to structure a sentence to reflect the unique circumstances in each case even further than what is already the case, moving in the direction of mandatory sentencing could result in a greater number of contested matters, resulting in more victims being required to give evidence in criminal proceedings.

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?***

No comment.

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

LAQ is of the view that no changes should be made to how good character can be considered by courts in relation to sexual assault and rape offenders. A sentencing court should impose a sentence having regard to the circumstances of each case and should be equipped to apply a broad discretion in order to do so. Any further amendments would curtail further the ability of judges to engage in the process of instinctive synthesis. On a review of the common law in this area, as outlined in 'Annexure A' the following observations can be made:

i. It is clear the courts when given the opportunity to take into account all the circumstances of the case, do so including the aggravating factors of breach of trust.
ii. Any character or reference material tendered at a sentence hearing is balanced according to the other factors contained in section 9.
iii. There is a need to differentiate from those who come to court with a relevant criminal history or relevant history, with those who do not.

Protective measures are enshrined in the legislation to the effect that if an offender's good character assisted the offender in committing an offence against a child under 16, the court

[1] https://www.sentencingcouncil.qld.gov.au/statistics/type-of-offence/rape

must not take the good character into account.[2] In line with the rest of the PSA, section 9(6A) should not be extended. It would be inconsistent with the remaining provisions under section 16(4) of the PSA.

Sentencing judges are best equipped to balance out evidence of good character with other factors under section 9 of the PSA, including the effects the offending has had on the complainant. Evidence of good character in our experience is appropriately scrutinised by courts. This evidence is regularly in the form of character references. Anecdotally, material that does not identify that the author is aware of the offences the person is charged with, if accepted in that state, in our experience carry little to no weight.

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

LAQ acknowledges there are very important considerations that should apply generally in sentencing offenders from a disadvantaged background and in particular Aboriginal and Torres Strait Islander persons.

Section 9(oa) of the PSA now requires a sentencing court to have regard to issues of disadvantage in respect of Aboriginal and Torres Strait Islander persons. It is important to ensure that amendment and long-established precedent is given proper effect within any proposed reform.

It is important to separate two very distinct issues. On the one hand, First Nations cultures[3] and a connection to culture, strongly support and nurture pro-social behaviour. Sentencing courts should impose sentences that promote connection to culture or limit the disruption of that connection. That is consistent with the recommendations of the Royal Commission into Aboriginal Deaths in Custody.[4]

The traditional cultures[5] of First Nations people are among the oldest surviving cultures in the world. Violence towards women, including sexual violence, is not a part of those cultures. The lived experience of First Nations people is that respecting their cultural beliefs fosters self-identity and accountability. That experience is unsurprisingly supported by research[6].

On the other hand, the systematic disadvantage and intergenerational trauma caused by the destruction, disruption and separation from culture flowing from colonisation, dispossession, and persistent racially discriminatory government policy including the forced removal of children, is a factor to which sentencing courts must have regard in considering the context in which offending occurs and the moral culpability of the offender together with the need to support their rehabilitation.

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[2] Section 9(6A), *Penalties and Sentences Act* (Qld) 1992.
[3] There is no one First Nations culture. Further individuals engage with their culture in different ways.
[4] Recommendations: 92 (prison as a sentence of last resort), 168 – 172 (maintaining connection to community and culture if incarcerated).
[5] Cultural beliefs and practices varied among different language groups.
[6] Lohoar S., Butera N., Kennedy E. (2014) *Strengths of Australian Aboriginal cultural practices in family life and child rearing* Australian Institute of Family Studies, Child Family Community Australia, Paper No 25 2014; Centre for Rural and Remote Mental Health Queensland, Key Directions for a Social, Emotional, Cultural and Spiritual Wellbeing Population Health Framework for Aboriginal and Torres Strait Islander Australians in Queensland (Report, 2009).

The impacts of colonisation, resulting issues with alcohol abuse and the troubling rate of incarceration of Aboriginal and Torres Strait Islander persons is well known. A stark and tragic example of the ongoing impact of discriminatory government policy is the finding that members of the Stolen Generation were 3.3 times more likely to have been incarcerated in the previous 5 years than other members of the Indigenous population who are already overrepresented in the country's prisons.[7]

The 2013 Parliamentary Report on the Value of a justice reinvestment approach to criminal justice in Australia noted the following 'Drivers of high indigenous incarceration rates'[8]:

- High levels of poverty, poor education outcomes and high rates of unemployment, lack of housing and homelessness, family dysfunction and loss of connection to community and culture.
- The lack of access to adequate services such as housing, health and schooling.
- The impact of drug and alcohol abuse on incarceration rates is high, with suggestions that 'alcohol is a factor in up to 90 per cent of all Indigenous contact with the criminal justice system.
- The 'normalisation' of imprisonment. As a consequence, imprisonment loses much of its deterrent effect and becomes a 'rite of passage' for disenchanted young people.

The intergenerational trauma experienced by Aboriginal and Torres Strait Islander persons often manifests in alcohol abuse and now extends to a cohort of a generation of young people affected by Fetal Alcohol Spectrum Disorders (FASD).

It is appropriate that the history and its impacts are formally recognised in sentencing. As the Australian Law Reform Commission noted[9]:

> "…Brennan J observed in Gerhardy v Brown, that formal equality may be "an engine of oppression destructive of human dignity if the law entrenches inequalities in the political, economic, social, cultural or any other field of public life". Achieving substantive and not formal equality before the law includes, for example, the consideration upon sentencing of the unique and systemic factors affecting Aboriginal and Torres Strait Islander offenders. It also includes not only consistency in the provision of sentence options and diversion and support programs across the country, but also ensuring that these are culturally appropriate."

A history of systematic disadvantage and trauma is relevant to an understanding of at least some sexual offending and should therefore frame appropriate criminal justice responses. The integrated theory of sexual offending posits that there is a combination of factors that may render an individual vulnerable to engaging in sexual offending[10]. Impacts of a dysfunctional

[7] Australian Institute of Health and Welfare, Aboriginal and Torres Strait Islander Stolen Generations and Descendants; Numbers, Demographic Characteristics and Selected Outcomes (Report, August 2018).
[8] Parliamentary Report on the Value of a justice reinvestment approach to criminal justice in Australia. Australian Parliament (2013), 4.25 to 4.26
[9] Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, ALRC Report 133.
[10] Ward, T. and Beech, A.R. (2016). The Integrated Theory of Sexual Offending–Revised. In The Wiley Handbook on the Theories, Assessment and Treatment of Sexual Offending, D.P. Boer (Ed.).

childhood on the physical development of the brain, antisocial attitudes learnt in a childhood environment, and a lack of a sense of agency are all potential risk factors.

A 2019 Australian study[11] of the characteristics of youth sex offenders across non-Indigenous and Indigenous offenders found most, "were displaying antisocial attitudes and behaviors [sic] prior to the onset sexual offense", "had a history of substance use", "experienced some type of child abuse or neglect", "reported engaging with an antisocial peer group or network", "identified as having poor engagement with school, with about one third dropping out of school" but that Indigenous youth were impacted by those factors to a greater extent.

The amendment of the PSA to require sentencing courts to have regard to systemic disadvantage and intergenerational trauma experienced by Aboriginal or Torres Strait Islander persons is appropriate.

LAQ supports further amending the PSA to require a court to have regard to systematic disadvantage where it is experienced by any member of the population whilst recognising that there are historical and subsisting present day factors that exacerbate the disadvantage suffered by Aboriginal and Torres Strait Islander persons.

Whilst the amendment is a step in the right direction, its utility is dependent on courts giving it effect. The amendment expands on the jurisprudence of the High Court in *Bugmy v R* (2013) 249 CLR 571[12] ("Bugmy").

A review of the decisions of the Queensland Court of Appeal post Bugmy suggests the principles have had little to no real effect on sentencing in the State. The High Court's decision has been cited on only 6 occasions since 2013[13] and of those decisions only two dissenting opinions have supported the Bugmy principles actually mitigating the sentence outcome.

The following case examples, which were the first two decisions of the court considering Bugmy, involved substantial sentences of imprisonment for serious offences imposed on youthful offenders. Both were denied an earlier release date despite the Bugmy principles applying in addition to a raft of personal factors that might on their own have warranted the relatively modest leniency sought.

In *R v KAL* [2013] QCA 317, the majority, Justices Mullins and Henry, were, "unpersuaded that the sentencing judge's conclusion that there were not special circumstances to enliven the exercise of the power under section 227(2) of the [Youth Justices] Act" to allow a release date at less than 70% of the sentence, having noted, "The sentence proceeded on the basis of the extreme dysfunction and abuse in the applicant's upbringing that had manifested itself in the applicant's polysubstance abuse, mental health problems, behavioural issues and criminal offending, culminating in the serious offences for which he was being sentenced."

The appellant was a 14-year-old Indigenous child sentenced to 4 years detention on his pleas of guilty to serious offences of burglary and rape. The appellant had a history of offences of

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[11] Adams, D., McKillop, N., Smallbone, S., & McGrath, A. (2020). Developmental and Sexual Offense Onset Characteristics of Australian Indigenous and Non-Indigenous Male Youth Who Sexually Offend. Sexual Abuse, 32(8), 958-985.

[12] See also R v Fernando (1992) 76 A Crim R 58.

[13] See R v KAL [2013] QCA 317, R v Craigie [2014] QCA 1, R v MBY [2014] QCA 17, R v Ryan; Ex parte Attorney-General (Qld) [2014] QCA 68, R v O'Malley [2019] QCA 130,

violence for which he had received community-based orders, but no history of sexual offending.

President McMurdo dissented.

In *R v Craigie* [2014] QCA 1, the court proceeded on the basis there was, ""material" which established the applicant's deprived background which was required to be taken into account in mitigation of sentence in the way explained in Bugmy at [37] – [45]. The majority nevertheless declined to interfere with a sentence of 4 years imprisonment with a parole eligibility date set "a month or so" after the usual one third customarily applied to reflect an early plea of guilty.

The appellant pleaded guilty at the earliest available opportunity to the offences. He was only 19 and entitled to the benefit of his youth. He was described as genuinely remorseful and had undertaken courses in custody. It was common ground among the parties to the appeal that the head sentence fell at the upper end of the proper range.

The reasoning of Fraser JA, who was in the majority, suggests the appellant's alcoholism and drug abuse were matters to be weighed against leniency despite those issues resulting from his prejudicial background.

> "[13] It was necessary for the sentencing judge to take all of the circumstances into account. Particularly having regard to the applicant's prior criminal history, alcoholism, and issues with drug abuse, there was no error justifying appellate interference…And there is also no sufficient ground for holding that the minimum custodial period of a month or so longer than one-third of the total period of imprisonment is too long in all of the circumstances, such as to justify a conclusion that the sentence as a whole is manifestly excessive."

Justice Peter Lyons, dissenting, noted:

> "[35] On the other hand, there were other, significant, mitigating factors. Not least of them was the efforts the applicant had made towards his own rehabilitation during his period of pre-sentence custody. In light of that, there is no reason not to accept the applicant's expressions of remorse, itself a mitigating factor. The applicant's significantly disadvantaged background is also a mitigating factor, being relevant to his moral culpability.[5] In my view, the applicant's age at the time of the offending (he was then 19 years old) is also a relevant mitigating factor.
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> [36] Although the sentencing judge referred to these matters, it is not possible to detect that he gave effect to them in imposing the sentence. Having imposed a sentence at the upper end of the range, he then extended the parole eligibility date to a date which was beyond the one-third mark. Neither his sentencing remarks, nor the circumstances of the case, provide an explanation for taking this course.

There is a tendency in the Queensland jurisprudence to regard countervailing factors such as the seriousness of the offence, the need for deterrence and protection of the community as matters overwhelming considerations of entrenched disadvantage. The difficulty with that approach is that those factors are embedded in determining the otherwise appropriate sentence for all serious offences. To treat those universal considerations as overwhelming

consideration of systemic disadvantage is to effectively disregard them rather than to balance them in the mix of relevant factors.

Western Australia first published an Aboriginal Benchbook for Western Australian Courts in May 2002. It is a 264-page resource that provides judicial education regarding culture, disadvantage and their impact in court proceedings including sentencing as well as an extensive record of the relevant jurisprudence. The benchbook cites authority for the following matters as potentially mitigating sentence:

- Circumstances Underlying Alcohol/Substance Use. The general circumstances which give rise to alcohol abuse may be mitigating: *Juli* (1990) 50 A Crim R 31
- Emotional stress arising from interracial tensions: *Neal v The Queen* (1982) 42 ALR 609
- Cultural Dislocation. Difficulties experienced by an Aboriginal person adjusting to city life, including difficulties experienced by an Aboriginal person adjusting to city life, including the forming of addictions to alcohol and drugs: *Harradine v R* (1992) 61 A Crim R 20
- Effect of Removal from Family. Early removal, inability to reconnect with family and consequent suffering of anxiety about his Aboriginal identity: *R v Fuller-Cust* (2002) 6 VR 496
- Socio-Economic Factors. Ethnically-related oppressive socio-economic conditions may be mitigating: *R v "E"* (A Child) (1993) 66 A Crim R 14
- Customary Punishment. The fact or likelihood of customary punishment being inflicted: *Jadurin v R* (1982) 44 ALR 424
- The Wishes of the Aboriginal Community: *Miyatatawuy* (1996) 87 A Crim R 574; *R v Gondarra* [2005] (Unrep, Sup Ct NT, Southwood J, SCC 20407332)
- The Impact of Traditional Belief. Where the reason for the commission of an offence stems from traditional Aboriginal belief or culture: *Shannon v R* (1991) 57 SASR 14; *Goldsmith v R* (1995) 65 SASR 373.

It may be a similar resource developed for Queensland courts will assist ensure the amendment of the Penalties and Sentences Act is given real effect. The Supreme Court of Queensland Equal Treatment Benchbook published in 2016 includes Chapter 10, Aboriginal and Torres Strait Islander People and the Criminal Justice System. The chapter does not identify specific considerations on sentencing Aboriginal and Torres Strait Islander persons or reference to Bugmy or the principles established in that and other cases.

Ultimately, a sentencing court can recognise, be sympathetic to, and endeavour not to compound the effects of systemic disadvantage and intergenerational trauma but has no capacity to address those issues. Addressing those issues requires investment in social infrastructure and supports best managed outside the criminal justice system.

A lack of appropriately funded infrastructure and support particularly in regional and remote communities means that even a well-intentioned sentence designed to give full effect to section 9(oa) may operate to compound disadvantage. For example, contrary to the case examples above, a court will often structure a sentence of imprisonment for a serious offence by imposing a lengthy head sentence but setting an earlier release date to ensure a longer period of supervision on parole to support the offender's rehabilitation. The impacts of systemic disadvantage and a highly dysfunctional childhood are such that an offender will lack the personal capacity and tools to address their offending and achieve rehabilitation without a

great deal of support. Absent those supports, the sentence only serves to expose a disadvantaged person to an almost inevitable risk of breach and further incarceration which serves to entrench their disadvantage.

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

The experiences of many refugee migrants mirror the experience of trauma and entrenched disadvantage experienced by many Aboriginal and Torres Strait Islander persons and the same principles discussed in response to question 7 should be given full effect consistent with principles of equal justice.

Refugees and asylum seekers are exposed to trauma in their own country. The impact of those experiences on mental health may be exacerbated on arrival in Australia, where asylum seekers may face prolonged detention and face significant uncertainty about their future.[14] Children in particular may suffer anxiety, conduct problems, aggressive behaviours, delinquency, and trauma as well as disruption of their education.[15]

Socio-economic disadvantage and population patterns can result in a concentration of young males providing fertile grounds for boredom, frustration, alienation and law-breaking activity"[16]

More broadly, studies suggest adult migrants from a range of countries are "identified as having a higher involvement in criminal activity than the Australian born population. However, it is also noted by researchers that socio-demographic factors and social disadvantage can better explain criminality than membership in the identified ethnic group. Key risk factors include limited English language proficiency, acculturative stress, racism and discrimination, disrupted education and cultural isolation. Protective factors are feelings of safety and support in the community."[17]

The Australian Law Reform Commission considered the intersection of cultural background and the criminal law and recommended section 16A *Crimes Act 1900* (Cth) be amended to require a sentencing courts to have regard to cultural background.[18] The Commonwealth parliament first introduced that measure but it was later repealed and replaced by section 16A(2A)(a) which prohibits regard to "any form of customary law or cultural practice as a reason for excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates".

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[14] Trauma and Grief Network, Refugees and Asylum Seekers: Supporting Recovery from Trauma (Information Sheet, Australian National University, 2013) 1–2; Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, Final Report (March 2012) 113.
[15] Kate E Murray, Graham R Davidson and Robert D Schweitzer, Psychological Wellbeing of Refugees Resettling in Australia: A Literature Review Prepared for the Australian Psychological Society (August 2008) 13–14.
[16] Stephane M Shepherd, Danielle Newton and Karen Farquharson, 'Pathways to Offending for Young Sudanese Australians' (2018) 51 Australian & New Zealand Journal of Criminology 481, 484.
[17] Bartels, L, 2011, Crime prevention programs for culturally and linguistically diverse communities in Australia (Criminology Research Council, Report Number 18).
[18] Multiculturalism and the Law [1992] ALRC Report 57 at 8.14.

The common law, as it applies in Queensland to State offences, does permit a court to have regard to an offender's cultural background in determining the appropriate sentence. In *Neal v The Queen* [1982] HCA 55, Brennan J noted:

> "The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences, courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group."

There can be a connection between cultural norms (or their perversion) and sexual violence. Literature on the issue notes:

- Much of what an individual is today is shaped by the culture that he or she is born in and lives through, acquiring cultural values, attitudes, and behaviours. Culture determines definitions and descriptions of normality and psychopathology. Culture plays an important role in how certain populations and societies view, perceive, and process sexual acts as well as sexual violence.[19]
- Higher rates of sexual violence are expected to be more prevalent in cultures that encourage objectification of women, thus making them appear inferior to men. [20]
- Stereotypes are often internalised from the male dominated sociocultural milieu. Sexual violence can result from a misogynist attitude prevalent in a culture.[21]

It is important that the criminal law and sentencing processes publicly reinforce the social standards of our community, including rejecting negative or misogynistic attitudes towards women. Generally, it will not be appropriate to have regard to cultural attitudes that offend our community standards.

There may however be limited circumstances in which it is appropriate to take into account an offender's inculturation and a court's discretion to do so should not be fettered. For example, a youthful offender whose development and attitudes to women have been subverted by immersion from an impressionable age in a culture or environment that devalues women and condones or trivialises sexual violence might appropriately be thought a better vehicle for rehabilitation than deterrence, particularly if that young person demonstrates a genuine desire to engage in education and rehabilitation.

Further, sentences and the structure of programmes designed to protect the community through rehabilitation should be both culturally informed and sensitive. There is a growing body of evidence that culture is an important factor in achieving treatment and rehabilitation of sexual offenders. It has been noted:

> "One particularly important development within both the mental health and correctional psychology fields has been the increasing use of strength-based approaches. Strength-based approaches involve the identification and development of an individual's strong points; that is, all of the aspects of the

[19] Kalra G, Bhugra D. Sexual violence against women: Understanding cross-cultural intersections. Indian J Psychiatry. 2013 Jul;55(3):244-9.
[20] Daley EM, Noland V. Intimate partner violence in college students: A cross-cultural comparison. Int Electron J Health Educ. 2001;4:35–40.
[21] Kumari R. Rural female adolescence: Indian scenario. Soc Change. 1995;25:177–88.

> individual that are good and positive… a strength-based approach aims to engage the client in a collaborative treatment process so that he or she feels fully involved… an individual's cultural identity may be an important strength. In relation to the GLM [Good Lives model] cultural identity may be particularly important in terms of one's spirituality. According to the GLM, spirituality is broadly defined as "finding meaning and purpose in life" and an individual's cultural identity may be an important aspect of this meaning and purpose. An individual's cultural identity is interwoven with his or her family and community and arguably if an individual's cultural identity is strengthened then their relationships will also be strengthened. Thus, addressing an offender's cultural needs is consistent with current systemic models of crime and of desistance from crime."[22]

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?***

Section 9 of the PSA has very recently been amended to include that a sentencing court must have regard to an offender's history of being abused or victimised with the inclusion of 9(2)(gb)(iii). Prior to this amendment, a court would consider information about an offender being a victim survivor of sexual violence in the context of general sentencing principles and assess the relevance of this information in the case. A sentencing court is best placed to determine what weight should be given to this information. Beyond using this information as a mitigating factor, this information can also be useful in how a court structures a sentence, determining what support an offender might benefit from, with a view to assisting with rehabilitation.

An example of a court applying this information prior to the amendments is the case of *R v B; parte Attorney-General* [1997] 1 Qd R 523. In that case the courts took into account the applicants previous sexual abuse as a child, his low intelligence, remorse, prior suicide attempt resulting in hospitalisation and treatment in justifying a substantial reduction in the ordinarily appropriate sentence. The respondent pleaded guilty to six offences of unlawfully and indecently dealing with a child (who was 10 years old). The sentencing judge imposed six months imprisonment with an order for a year's probation. Ordinarily, the sentencing judge determined that a sentence of three years imprisonment would have been appropriate but given the person's circumstances, a more lenient sentence was warranted. On appeal from the Attorney-General, the court found the case was one in which a custodial sentence was necessary. While the sentence was light, the personal circumstances of the respondent were such that it justified reducing, what would ordinarily have been the appropriate sentence. As such the appeal was dismissed.

Given section 9(2)(gb)(iii) has not been in force for any significant period to consider how it will be applied, including how it will interplay with section 9(4) and the factors in section 9(6) that a court must take into account when sentencing in relation to offences of a sexual nature involving victims under 16, it is difficult to comment on the impact of such change.

[22] Jo Thakker, Cultural Factors in Offender Treatment: Current Approaches in New Zealand, Procedia - Social and Behavioral Sciences, Volume 113, 2014, Pages 213-223,

However, the way that the subsections of 9 are currently worded means the considerations within the amendment may not be given the proper weight it deserves and was intended when sentencing in regard to features of the case when section 9(4) – (6) are relevant. Clarification may be required to ensure those features of the case when section 9(4) comes into play can be given the appropriate weight, adopting perhaps the stronger wording used elsewhere (like in section 9(10)). Further, LAQ does not support the expansion of section 9(4) to a broader age group specifically for offences of rape and sexual assault. That subsection differentiates penalty and considerations of the court where the victim is below the age of consent. There is value in differentiating that category of victim. In instances of rape and sexual assault, the application of section 9(2A) ensures regardless of the age of the victim, that regardless of the defendant's personal history, custodial sentences apply where there has been violence and/or physical harm. That is, the court in those cases is already starting from a position of imposing a jail term.

10. ***How well are 'exceptional circumstances' (section 9(4)(c) of the PSA) working as this applies to sexual assault and rape offences? Should any changes be made?***

The term "exceptional circumstance" for the purposes of section 9(4) is not defined in the legislation.[23] However, authorities offer some guidance as to what features may constitute exceptional circumstances.

The case authorities of *R v Rainbow*[24] and *R v OYJ*[25] are helpful in considering what may constitute exceptional circumstances.

In *R v Rainbow*, the defendant was convicted and sentenced for an offence of rape and received 3 years' probation with the conviction recorded. A special condition was imposed, to submit and comply with any medical, psychiatric, or psychological examination or treatment, as is directed by your probation officer.

The features that demonstrated and given weight to amounting to "exceptional circumstances" related to the defendant and the offence. The defendant was either 18 or 19 years old at the time of the offence. The discovery of the offence and the only basis in which the defendant was charged, were the defendant's admissions he made to a psychologist, to the defendant's partner and eventually to the police. The defendant admitted to inserting his penis momentarily into his child's mouth. The child was 3 months of age.

Other considerations were the psychiatric evidence which confirmed a disadvantaged background. The defendant was a victim of sexual abuse between the ages of 8 and 14 years. It was found this abuse had a profound effect on the defendant's sexual development. The defendant had longstanding mental health issues and presented with a type of symptomology indicative of several psychiatric disorders. It was noted there was a history of self- harm and suicide attempts. Further, the defendant had developed insight into his conduct.

[23] *R v BCX [2015] QCA 188; R v Tootell; Ex parte Attorney-General (Qld) [2012] 273.*
[24] R v Rainbow [2018] QDCSR, 13 December 2018.
[25] R v OYJ [2020] QDCSR 379.

In *R v OYJ* [2020] QDCSR 379, the defendant was convicted and sentenced to a 2-year probation order for five (5) counts of indecent treatment of a child under 16, under 12, and one count of rape. The conviction was not recorded.

There were a number of features considered, with the Court finding that exceptional circumstances existed. In this matter that defendant was aged 13 to 15 years of age at the time of the offences but charged and sentenced at 21 years of age. The offending conduct was noted as serious, the complainant was the defendant's half-sister, he touched her inappropriately, caused the complainant to watch him masturbate, forcing the complainant to perform oral sex. Other features considered were that there was no victim impact statement and no re-offending. There was a suggestion the defendant did necessarily present a risk to young children. In this example it was a combination of features and no evidence of adverse impacts on the complainant that exceptional circumstances were made out.

The statistics from the Queensland Sentencing Advisory Council's report 'Spotlight on Rape'[26], found rape cases sentenced between July 2005 - 2006 and June 2022 - 2023 presented with the following facts:

- 2,445 offenders were sentenced for rape
- 2,078 cases where this was the most serious offence (MSO) (e.g. Repeated sexual conduct)
- 98.7% of adult offenders received a custodial penalty
- the average prison sentence was 6.5 years
- 98.9% of offenders sentenced for rape were male
- the average age of offenders was 31.8 years.

These figures indicate almost all offenders received custodial penalties when sentenced for rape and on average the term of imprisonment was significant. Although it is not clear what percentage of offences involved the application of section 9(4)(c), the high percentage of offenders receiving custodial penalties indicates that the application of section (2A) and section 9(4)(c) are ensuring when it comes to the offence of rape that only in exceptional circumstances are non-custodial sentences imposed. In relation to the offence of rape, these statistics would not support change as the intent of the legislation is being applied by the courts.

It is noted in the consultation paper there is an intention for QSAC to undertake further analysis for a final report. A further analysis would be beneficial to understand the range of other sexual offences captured and of those offences where the victims are under 16 years of age. This data is important to inform if changes need to be made to the current application of "exceptional circumstances". To this extent, an evidence-based approach is recommended.

In the absence of evidence of incorrect application of section 9(4) LAQ does not support change. Further, in the absence of inappropriate application of section 9(4)(c), LAQ does not support any further guidance or prescription in determining what are "exceptional circumstances". The court is best placed to consider all the relevant factors of an individual case applying appropriate community standards of the time.

[26] https://www.sentencingcouncil.qld.gov.au/statistics/type-of-offence/rape .

LAQ supports, as far as possible, maintaining the Courts' sentencing discretion to be able to cater for unique and unexpected situations. Catering for these situations will arguably bring about a fairer and proportionate sentence outcome. Catering for unique and unexpected situations will not occur if "expectational circumstances" become too prescriptive. In maintaining an approach that allows the Courts to consider all the factors of an individual case will also allow for consideration of the changing or evolving community standards relevant at the time of sentence. The current wording allows for consideration of the changing or evolving community standards relevant at the time of sentence.

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?

Following the Royal Commission into Institutional Child Sexual Abuse, it was recommended that all Australian jurisdictions amend their sentence legislation such that sentencing courts have regard to current sentencing practices in relation to sexual offences committed against a child.[27]

This recommendation was largely due to the Commission's finding that applying historical sentencing standards can result in more lenient sentences than what would apply to similar offences if committed today. The previous approach of applying the sentence at the time of the offence was considered not to align with the criminality of the offence as it was not understood, could be distressing for victims, and undermines the community's confidence in the criminal justice system. The Commission found that historical standards were applied in error. However, the Commission maintained that in applying current sentencing standards, the maximum penalty at the time of the offence should not be increased by the current sentencing standards.[28]

In response, the Queensland Government introduced the *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2020*, amending section 9(4)(a) of the PSA.

The intention of this amendment is set out in the Explanatory Notes to the introductory Bill, this is to clarify that child sexual offences should be sentenced according to the current standards while applying the maximum penalties at the time the offence was committed, ensuring that there is a balance between applying procedural fairness and natural justice to the offender while causing minimal distress to victims and not to undermine the community confidence in criminal justice.[29]

As noted in the Consultation Paper, the law has only been in affect for a limited time, without much opportunity for it to be considered by the Court of Appeal. In the absence of evidence to suggest that the courts are not carrying out the intentions of Parliament, or a lack of clarity

[27] Royal Commission into Institutional Responses to Child Sexual Abuse – Criminal Justice Report – recommendation 76.
[28] Ibid see chapter 34.6.3.
[29] Explanatory Notes to *The Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2020*.

or consistency in application, LAQ does not support any changes to section 9(4)(a). In particular, LAQ does not support increasing the age to which section 9(4)(a) applies.

In Queensland in the case of *R v FST* [2023] QDCSR 752 Judge Dearden was tasked with sentencing an offender convicted of historical sexual offences over a 30-year period, committed against four victims aged between 4 and 19 years of age at the time of the offending. His Honour correctly considered the maximum penalties at the time of each group of offending while applying current sentencing standards. Again, in the absence of an issue with the application of the current legislation, LAQ does not support further change.

The sentencing guidelines for section 9 of the PSA considered with authoritative decisions provide sufficient assistance to the Court in imposing sentence for offences that span several years, or decades, without imposing inadequate sentences inconsistent with community expectations.[30] It is submitted that any further amendments to the PSA would continue to unnecessarily erode judicial discretion.

Question 12 – Current approaches to sentencing and sentencing practices

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?

Sentencing for sexual assault and rape offences adequately reflect the purposes of sentencing and the seriousness of these offences and no changes to sentencing options on this basis should be made.

The review of sentences imposed for rape offending by adults shows a broad spread of terms of imprisonment imposed. However, as reported on page 29 of the Consultation Paper, common to almost all such cases is that a custodial sentence, including actual incarceration, was imposed (98.7% of all penalties were custodial and 96.4% required the offender to serve time in prison). In LAQ's experience, most penile/vaginal rape offending is dealt with by sentences of at least six years imprisonment (often extending up to and beyond 10 years – for a snapshot of relevant cases considered, please refer to Annexure B), although there are naturally circumstances in which shorter or longer terms are justified and imposed.

As recognised in the Consultation Paper, "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". Given those observations, it is essential that sentencing courts continue to be permitted to impose a variety of sentences for the offence of rape. The above statistics make clear that the variety in sentencing LAQ refers to is generally a reference to the length of the term of imprisonment imposed and not to the sentencing option preferred.

As the Consultation Paper points out, over a period of 18 years there were only three examples of an adult convicted of rape who did not receive a custodial sentence. The circumstances of

[30] See for example, *R v Wruck* [2014] QCA 39; *R v SAG* [2004] QCA 286; *R v Carlton* [2009] QCA 241; *R v Pham* [2009] 242.

the offending, the circumstances of the offenders, and how long ago those sentences were imposed is unknown by LAQ.

Detention is more often than not also imposed for child perpetrators of this offence. The Consultation Paper, at page 29, also noted that 21 child offenders over 18 years received a non-custodial sentence for rape.

The Consultation Paper, at page 29, notes a trend that "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)". In LAQ's view, one likely explanation for this trend is the inability of a sentencing court to set a parole release date for sexual offending.

If a view is reached that too many suspended terms of imprisonment are being imposed for sexual offending (LAQ does not suggest that there are), the inability to set a parole release date for such offending should be addressed. This is further discussed in the response to question 13.

Mandatory minimums and legislative changes that would narrow judicial sentencing discretion should not be implemented. Being too prescriptive, for example through mandatory sentencing practices, risks unjust sentences being imposed.

The Consultation Paper notes "[t]he median declared time in pre-sentence custody for an imprisonment sentence was about 10 months". 12.4% of offenders (or about 1 in 8) sentenced to a partially suspended sentence were not required to serve more time in custody. A further one third (or 32.7%) of those sentenced to a partially suspended term of imprisonment were required to serve more time than they had already spent on remand. It is not however known what the spread or average period still required to serve in those cases was. For example, it would not be unusual for a judge who is sentencing someone with the median 10 months of presentence custody to a three year term of imprisonment to suspend the sentence after a further two months rather than set a parole eligibility in two months' time due to a concern that the need to apply for parole may mean the offender spends far more time in custody than intended and will end up serving too long a custodial component without a sufficiently lengthy period of supervision on parole. In extreme cases, there is a risk that offenders with parole eligibility dates set for shorter terms of imprisonment will serve the entirety of their sentence in prison to then be released to the community without any supervision.

It is also not known in how many of those cases where suspended sentences were imposed that a concurrent probation order (or some other form of supervision) was imposed on another offence to provide for not only a set date for release from custody but a tangible period of supervision in the community.

In LAQ's experience, it would be an extremely rare case where an adult offender were sentenced to a suspended sentence for penile/vaginal rape, especially where there was not some concurrent supervisory order made.

It is unsurprising that courts would be concerned about the release from jail into the community of offenders with no or only a short period of supervision. Section 3(b) of the PSA states that

the purposes of the Act include providing for a sufficient range of sentences for both the appropriate punishment and rehabilitation of offenders.

The making of serious violent offence declarations in cases where sentences of imprisonment not reaching ten years are made, prove sentencing courts do respond and impose sentences favouring the sentencing principles of punishment, community protection and general deterrence where called for.

Many of these observations equally apply to sexual assault offending.

The seriousness of this type of offending is recognised by sentencing courts. Significantly, the imposition of monetary penalties and good behaviour recognisance orders for such offending has fallen over time (as shown in Figure 2 on page 32 of the Consultation Paper). The imposition of imprisonment for such offending has increased, more than doubling in 18 years (again, see Figure 2). While there have been changes across the years in the proportion of the other types of orders imposed (probation, community service and suspended sentences), the results towards 2023 roughly mirror those nearer to 2005.

Page 36 of the Consultation Paper notes a concern 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." A proportion of those sexual offences not making it to conviction can be explained by not guilty verdicts following trial. A sentencing system which mandates minimums and disincentivises pleas of guilty is likely to lead to more cases being taken to trial and more of such matters resulting in no convictions.

In LAQ's experience, cases where comments are made that sentences can be 'low and inconsistent' are often explained by an incomplete knowledge of the relevant facts of the case and the circumstances of the victim or offender.

Taking the offence of rape as an example, where in most cases the sentence of imprisonment imposed commences at about 6 years with a requirement that actual time is served, and often results in sentences closer to and over 10 years of imprisonment, LAQ does not agree that there are "[m]inimal punitive penalties". Community education should be considered if it is concluded that there is a "community perception that sexual offences have minimal consequence".

There is also a built-in review option within the system if there are reasonable concerns that inadequate penalties have been imposed. The Attorney-General has the right to challenge any sentence considered by them to be too lenient.

The observation made at page 37 of the Consultation Paper that "where a 'substantial penalty' was imposed, it may have potential to result in behavioural change" is questioned. While the community will naturally be protected from repeated sexual offending by an incarcerated offender while they remain in custody, it is unlikely that a sustained reduction of such offending can be achieved through the imposition of lengthier sentences. Such consequences are unlikely to operate on an offender at the time of their offending. LAQ joins in the submissions made by Sisters Inside (also at page 37 of the Consultation Paper) that an introduction of mandatory sentencing or an increase to penalties is unlikely to address the causes of such offending and therefore is unlikely to affect rates of like reoffending.

Questions 13 & 14: Penalty and parole 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?

There is no good reason to prohibit the setting of a parole release date for sexual offending, especially when parole release dates are already prohibited where the period of imprisonment is greater than 3 years. Changes should at least be made to section 160D of the PSA to allow a sentencing court to set a parole release date for sexual offending where the period of imprisonment imposed is no longer than three years in length.

The inability of a sentencing court to set a parole release date for an offence of a sexual nature can limit the court's ability to meet the sentencing principles of rehabilitation and community protection.

As explained in the answer to question 12, one likely explanation for the comparatively greater proportion of "lower-level" sexual offending being dealt with by way of suspended sentences is the inability of sentencing courts to set a parole release date for such offending.

This point is also illustrated on page 35 of the Consultation Paper under the heading 'Outcomes for rape compared to other offences'. The second bullet point notes "the high proportion of partially suspended sentences imposed for rape (30.2%) compared to other offence types" (with exceptions). This is despite the fact that rape "attracted the second highest proportion of sentences involving actual imprisonment" (first bullet point) and "Where imprisonment was ordered, rape had the second longest average sentence length" (third bullet point).

LAQ supports the Council's previous recommendation, set out at 5.3 of the Consultation Paper, particularly the third bullet point ("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, and providing legislative guidance as to whether a parole release date or parole eligibility date should be set in such circumstances"). This change would enable a sentencing court to give certainty of release in appropriate cases where a suspended sentence might otherwise have been preferred. Such an option would be justified either to properly give effect to the sentencing purpose of rehabilitation or where, despite recognising the purposes of denunciation and deterrence, the court cannot reflect the purpose of rehabilitation in sentencing without giving certainty of release.

A sentencing court faced with an offender whose sexual assault offending, for example, justifies a two-year sentence of imprisonment, may in the ordinary course consider requiring the offender to spend eight months incarcerated. However, in circumstances where that offender has 10 months of presentence custody, the court is often called on to decide between two options: immediate suspension of any further term of imprisonment or an immediate parole eligibility date. The latter option would require a parole application to be made and assessed. Such applicants have generally not undertaken any courses addressing sexual offending as they are not available to remand prisoners. With lengthy wait lists for such programs, setting a parole eligibility date becomes an unattractive sentencing option for a court where there is a real risk the offender will serve a much lengthier period incarcerated than considered appropriate. There is even the risk the offender will serve the entirety of the sentence in

custody. Such scenarios are also undesirable as they provide for a reduced or no period supervised in the community following release from prison.

Imprisoning offenders provides temporary protection of the community. History has shown that the sentencing principles of denunciation and deterrence do little to prevent reoffending. Sentencing options which target factors contributing to offending are more likely to be effective.

It is also concerning to LAQ that First Nations people were less likely to receive a partially suspended and more likely to receive a sentence of actual imprisonment (see page 30 of the Consultation Paper). LAQ can only assume this is a product of First Nations people being over-represented on more minor offences and so, when being sentenced for a sexual offence, might present with a criminal history which militates against a conclusion that there are prospects of rehabilitation. LAQ's experience has also been that some First Nations men do not apply for parole and instead serve out their sentences before returning to community. LAQ considers there to be a gap in penalty options, as well as an absence of culturally sensitive programs in small, remote communities.

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

The current guidance for courts in deciding what type of sentencing order to make generally relies on case authorities and expert reports, while balancing the sentencing purposes. For meaningful change to occur, a "re-think" of the traditional sentencing practices would need to be considered without moving away from the principles of sentencing. This would mean change is implemented in a broad way and would also require a genuine "buy in" from a range of stakeholders.

The concept of punishment remains central to sentencing along with other sentencing purposes of rehabilitation, personal and general deterrence, denunciation and protection of the community. How successful an offender will be following a sentencing order should be linked to how well an offender is rehabilitated. Arguably, successful rehabilitation will enhance community safety and lessen the prospects of re-offending.

The current guidance for courts relies on consideration of several matters including the statement of facts and offending conduct, matters in mitigation such as an expert report or psychologist's or psychiatrist's reports, victim impact statements, irreparable damage to the victim such as disease or pregnancy, comparable cases, criminal history, pre-sentence custody.

If change is to be considered on how sentencing is to be approached for sexual assault and rape matters, before arriving at what type of sentencing order should be made, a sentencing court should be provided with information on the availability of specific targeted sex offender courses that could be ordered.

An order that could be made regardless of whether the defendant was being released immediately or a date in the future, or for the exceptional cases attached to a lengthy probation order, or an intensive correction order. Guidance in this context, to inform a sentencing order places value in early intervention strategies for some situations; to provide guidance in deciding the type of sentencing order to best achieve the sentencing purposes.

In considering the sentencing purposes, rehabilitation and imprisonment for example are not mutually exclusive.

If focus is on the cohort of offenders who are not granted bail, this group falls under the management of the prison system and provides a unique opportunity for early intervention and to commence rehabilitation. However, to support early intervention and rehabilitation, changes would need to be made to improve prisoner access to programs where they are on remand in particular circumstances.

Treatment and services should be delivered in a consistent fashion across the correctional centres. This would require a commitment and "buy in" from government to secure adequate financial resources, and commitment from the correctional centres themselves. There will always be a cost in the administration of new innovations. However, if change would achieve better guidance in informing sentencing orders such costs should be catered for.

There is an opportunity for future research into what type of pre-and post-release services can best address outcomes. This would provide a strong evidence base to show what works and what is ineffective. This is information that could better inform the type of sentencing order most appropriate to address both the serious features of the offending and the purpose of sentencing.

Guidance at sentence for post-release intervention strategies would also be beneficial in informing sentencing decisions. LAQ recommends further research into pre and post release intervention services and their efficacy to provide a strong evidence base for sentencing courts about what intervention programs are effective. This research should account for considerations that different cohorts, such as women and First Nations persons may respond better to different intervention services. Information about the availability and effectiveness of early intervention programs would provide necessary guidance to sentencing courts about how to balance the serious features of the offending with the purposes of sentencing.

Questions 15 & 16: Information available to courts to inform decision making

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?***

A central task of judicial officers when considering what sentence to impose is to weigh up the aggravating and mitigating factors of each case carefully in order to arrive at a fair penalty.

Some of the more common factors considered by a judicial officer in such assessments in offences of rape and sexual assault include the following:

- The long-term psychological harm to the victim
- Mental health considerations of the defendant which may impact on moral culpability for the offending
- Risk of re-offending
- The need for treatment/supervision
- Community protection and denunciation

- Mitigating factors such as youth and prospects of rehabilitation.

Some of this information can be presented to the sentencing court through oral submissions during proceedings, medical records and/or pre-sentence reports. The main goal of pre-sentence reports (PSRs) is to assist the court to reach an appropriate sentencing decision by providing relevant information, including mental health history, offending behaviours, the offender's background history, treatment recommendations, and any other matter relevant to sentencing. A PSR can also be used to assess an offender's suitability for particular types of orders involving supervision in the community.

PSRs can be obtained through an order of the court,[31] or through community corrections representatives as part of assessing suitability for community-based orders or providing information on performance on community-based orders. These types of PSRs are more commonly ordered in the Magistrates Court jurisdiction.

For sentence proceedings involving offences of rape and sexual assault PSRs are more commonly sourced independently by defence lawyers acting for a defendant from a relevant expert, most frequently from psychologists or psychiatrists.

PSRs are of particular importance when defence are seeking to demonstrate that exceptional circumstances exist which would enable an offender to receive a sentence which does not require them to serve a period of actual imprisonment. In these cases, defence lawyers would ordinarily seek to obtain an independent report from a psychologist or a psychiatrist.

In legally aided matters the funding of such reports requires the meeting of LAQ Grants Handbook guidelines. These guidelines are more difficult to meet in Magistrates Court matters and as a result few PSRs are sourced in that jurisdiction. Availability of suitably qualified experts to assess defendants and complete reports has in LAQ's experience led to delay in sentence proceedings. This can include defendants remaining on remand for longer periods of time. These delays place a burden on all stakeholders within the criminal justice system as well as victims.

Funding through LAQ is not, as suggested in the Consultation Paper, restricted by financial year. However, the more highly qualified, experienced sought after experts often limit the number of legally aided assessments and reports they conduct per financial year. Once their legally aided quota is reached, bookings cannot be made until the next financial year.

More details regarding the availability of LAQ funding for these reports is set out below under this question. A court ordered PSR is most commonly prepared by a Queensland Corrective Services (QCS) officer. Preparation of a written report involves an interview with the offender, screening of the offender's history with QCS (including any disciplinary matters whilst on remand and compliance with any previous community-based orders), and a review of relevant criminal history and the police court brief prior to the interview.[32] LAQ has concerns about any reforms which would mandate the commission of a court ordered PSR in sexual assault and rape cases. On the current experiences of the scope of these reports and expertise behind

[31] S.344 *Corrective Services Act Qld 2006.*
[32] *Hear Her Voice, report 2 Women's Safety and Justice Taskforce*, volume 2, p. 574, with reference to the letter from Paul Stewart, Commissioner, Queensland Corrective Services to Taskforce Chair, dated 27 May 2022, enclosure, 10-11.

such report writers, they would only provide limited value to a sentencing court in matters of rape and sexual assault. If proper court ordered risk assessments were to be ordered by courts, this should be done in consultation with the parties and when properly resourced.

As noted in the QSAC preliminary findings from the sentencing remarks analysis, court ordered PSRs are rarely used in rape cases, and not at all in sexual offence cases.[33] This is also consistent with LAQ's experience.

The court may order a PSR in the absence of the provision of any independently obtained psychological or psychiatric material by defence or in response to information before it. This may be as a consequence of the judicial officer's desire to obtain information in relation to the risk of re-offending, or to consider whether there may be an underlying mental health condition reducing the moral culpability of an offender which may have a significant impact on the sentence imposed.

> Case study – *R v Brodie Reynolds [2021] QDC 20.05.2021*- 1 x rape (penile/vaginal)– complainant an adult, and 1 x indecent treatment (child under 12) – Plea of guilty- complex mental health issues (ADHD, sexual trauma, ongoing psychotic symptoms, Borderline Personality Disorder, substance misuse disorder) – 3 years pre-sentence custody - Lynch KC DCJ ordered a PSR pursuant to s.344 of the Corrective Services Act to obtain a psychiatric assessment as a consequence of a reference to on-going psychotic symptoms on self-report to the psychologist who had prepared the independent PSR tendered by defence at sentence. Sentence imposed 4 years suspended for 5 years followed by 3 years' probation with a requirement that the defendant undertake a sex offender treatment program.

Recommendations made by the WSJ to expand the availability of court advisory services across Queensland and the greater use of pre-sentence reports.

Well informed Courts will generally make better sentencing decisions. However, the information provided to the Court should be current, accurate and complete. LAQ has concerns that currently, court ordered PSR writers are underfunded and under resourced. If properly funded and implemented, the expanded use of court ordered PSRs could benefit vulnerable offenders, particularly women and girls, ensuring that the court is fully informed of their background and all circumstances leading up to the offence. Having additional funded court advisory positions outside of Brisbane may also assist courts to receive oral reports from QCS about an offender's suitability for community-based orders.

However, before the use of PSRs can be expanded, significant resourcing would need to be allocated to the Department of Justice and Attorney-General to ensure PSRs produced are of an appropriate standard to carry any weight and to limit delay associated with the ordering of such reports. If amendments encouraging increased use by the court are introduced prematurely, timeframes for the provision of the reports will inevitably increase and delays will be incurred. An example of this can be seen in the introduction of fitness and soundness assessments conducted through the Court Liaison Service. Demand far exceeded

[33] QSAC Consultation Paper, *Sentencing of Sexual Assault and Rape: The Ripple Effect*, p.53, 6.1.1.

Queensland Health's resources and towards the end of 2023, the timeframe for assessment of a defendant and provision of a report was between 6 to 8 months.

Care would need to be taken to ensure that PSRs are culturally aware. The ACT is the only jurisdiction that lists cultural background as a PSR matter.[34] Consideration of cultural factors relevant to First Nations persons is necessary to enable judicial officers to have all relevant information pertaining to an individual.[35]

The WSJ also noted that there was a risk that court-ordered PSRs may not be consistently prepared in a trauma-responsive way. Expanded use of PSRs may also disadvantage women if they are not prepared in a trauma-informed way and instead lead to harsher penalties.[36]

Increased use of PSRs could be beneficial to the sentencing process if properly funded and done on the request from, or with the consent of the defence.

Problems and limitations in assessing a person's risk of reoffending and how this might impact sentencing, including human rights considerations.

Risk assessments in court-ordered pre-sentence reports carry an inherent risk to the fair and impartial sentencing process. Assessing an offender's risk is dynamic, not static, and risk can change over time as an offender grows older, receives treatment, or as their attitudes, beliefs and behaviours change. For example, dynamic risk factors, such as substance abuse and pro-criminogenic attitudes, can have a strong impact on the risk of reoffending, but need to be regularly reassessed given the potential to significantly change in what can be a relatively short period of time.

Given this, reliance could only be placed on risk assessments conducted a short time before sentence where a person was being immediately released into the community and by engaging professionals who are experienced in using and analysing risk assessment tools. Risk of re-offending is ever evolving and could change substantially over the 12 months following an initial assessment. For this reason, risk assessments would have limited relevance to sentences where an offender is being sentenced to a further custodial sentence. It would not be accurate or fair to the offender to rely upon a dated risk assessment when considering parole or release in the future.

QCS primarily employs the Static-99R risk assessment tool when assessing risk of male sexual offenders in custody.[37] This risk assessment tool is outdated and has been formulated to assess the risk of recidivism that are predicated on the base rate of recidivism among adult male sexual offenders. It is not designed or employed by QCS to be used when assessing risk of females charged with sexual offences. Given the significantly lower rates of sexual recidivism of female sexual offenders, tools validated for males would statistically grossly overestimate risk among women. Second, the items in these risk assessment tools were

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[34] *Culture, Strengths, and Risk: The Language of Pre-Sentence Reports in Indigenous Sentencing Courts and Mainstream Courts*, (2023) 50 Criminal Justice and Behaviour 76, 78.

[35] Ibid, p.79.

[36] Women's Safety and Justice Taskforce, Hear Her Voice Report 2, Volume 2 p.577.

[37] *Custodial Operations Practice Directive: Offender Pathways*, Ver 7, 15 February 2024, 6 [9].

selected based on their established empirical relationship with recidivism.[38] There are currently no actuarial risk assessment tools available for female sex offenders.[39]

Likewise, studies have found that caution should be applied when using standard risk assessment tools to assess risk of First Nations men charged with a sexual offence.[40] An assessment of the accuracy of the Static – 99R tool in predicting recidivism of sex offenders in Western Australia recommended that this tool should not be used to predict sexual recidivism in First Nations sex offenders. This study found that the Static-99R did not demonstrate acceptable levels of predictive validity for sexual recidivism at either the five- or ten-year mark for First Nations sex offenders in Western Australia.[41] There is some indication that reliance upon the Static-99R a predictor of future risk should be approached with caution when the defendant is not Caucasian.[42]

Risk assessments using the current QCS model for all sexual offenders are at risk of impacting a defendant's right to equality before the law.[43] Under the *Human Rights Act 2019* (HRA), every person is held to be equal before the law and is entitled to the equal protection of the law without discrimination. All laws and policies should be applied equally and not have a discriminatory effect. In maintaining and upholding this right, this may mean it is necessary for lawmakers or the courts to treat different groups differently in order for these groups to have equal protection. Further section 15(4) of the HRA provides individuals with a right to equal protection from discrimination. The current approach to risk assessments is a rigid one, using dated tools. A 'one size fits all' model of assessing risk is not compatible with human rights. To protect and promote human rights any assessments, including risk assessments, should be flexible, culturally aware and able to recognise and incorporate a defendant's particular characteristics.

Further, a risk assessment using tools that may not be accurate in predicting risk of that particular offender, could also engage the right to liberty and security.[44] Every person has the right to be free from arbitrary detention and a person must not be deprived of liberty except on grounds established by law.[45] In practice, a risk assessment by a psychologist is afforded considerable weight by a court when determining sentence. This is unlikely to change. An offender assessed by a psychologist or psychiatrist as 'high risk' could conceivably result in

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[38] Cortoni, Franca & Gannon, Theresa. (2016). The Assessment of Female Sexual Offenders. 10.1002/9781118574003.wattso046.
[39] Poels, V. (2007). Risk Assessment of Recidivism of Violent and Sexual Female Offenders. *Psychiatry, Psychology and Law*, *14*(2), 227–250. https://doi.org/10.1375/pplt.14.2.227, p.244; Cortoni, Franca & Gannon, Theresa. (2016). The Assessment of Female Sexual Offenders. 10.1002/9781118574003.wattso046., p.10
[40] Allan A, Parry CL, Ferrante A, Gillies C, Griffiths CS, Morgan F, Spiranovic C, Smallbone S, Tubex H, Wong SCP. *Assessing the Risk of Australian Indigenous Sexual Offenders Reoffending: A Review of the Research Literature and Court Decisions*. Psychiatr Psychol Law. 2018 Oct 31;26(2):274-294. doi: 10.1080/13218719.2018.1504242. PMID: 31984077; PMCID: PMC6762098.
[41] Caroline Spiranovic, '*The Static-99 and Static-99R Norms Project: Developing Norms Based on Western Australian Sex Offenders*' (2012) *University of Western Australia*, 41.
[42] Simran Ahmed et al, '*Predictive accuracy of Static-99R across different racial/ethnic groups: A meta-analysis*' (2023) Law and Human Behaviour 47(1), 275 – 291 https://psycnet.apa.org/fulltext/2023-54964-019.html .
[43] *Human Rights Act 2019* (Qld) section 15.
[44] *Human Rights Act 2019* (Qld) section 29.
[45] Ibid section 29(1)(2).

their continued incarceration or increase the length of time spent in custody or subject to supervision. Where risk assessments may have limited utility in actually predicting recidivism for certain ethnic and cultural backgrounds, it should be considered whether continued deprivation of liberty, where even partially due to reliance of this assessment is incompatible with human rights for these offenders who are not neurotypical white men. This right may also be invoked where risk assessments are based on incorrect or outdated information about an offender.

An offender's risk may also be difficult to accurately assess where background information is heavily based on self-reporting. It is natural that some offenders will be more reliable historians than others. Many offenders will likely be hesitant to be open and frank with a report writer who is employed by QCS. Even if this report writer is impartial, they are unlikely to be viewed as impartial by all offenders, many of whom will be distrustful and unwilling to engage in discussions of sensitive topics with an employee of QCS. If risk assessments are not based on the best and most accurate information, this again risks impacting an offender's right to liberty and right to equality before the law.

Finally, an assessment of an offender's risk of reoffending prior to sentence will almost inevitably involve a consideration of the nature of the offending behaviour to which they are pleading guilty and their attitudes towards the offending. It is well accepted law that persons may plead guilty to an offence for reasons that extend beyond a belief in their own guilt.[46] In circumstances where there has been a negotiated plea, or where the defendant has chosen to plead guilty for some reason other than a complete acceptance of the prosecution facts it is easy to imagine a situation where this would be an area canvassed during a risk assessment. Should this be articulated in a report available to the Court, a sentencing Judge or Magistrate would be rightly hesitant to proceed to sentence knowing this information. This may also have an impact on the court's assessment as to whether an accused has demonstrated remorse by entering a plea of guilty to an offence which is also a primary relevant consideration[47].

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.

In LAQ's experience there are many reasons why defendants plead guilty. An offender may plead guilty for reasons beyond an acceptance of their own guilt, but for forensic reasons and/or based on legal advice. These circumstances may make obtaining a report futile.

Offenders may not always be the most reliable and consistent historians. An expert preparing a PSR benefits from receiving independent collateral information from other sources, such as from an offender's treating medical, psychological, and/or psychiatric practitioner. Many have often attended upon several different medical centres, psychologists and hospitals. Defence lawyers often experience difficulties obtaining accurate information from clients about where treatment occurred and/or the names of the practitioners. When this information has been disclosed, there are cost and time barriers encountered.

[46] *Meissner v The Queen* (1995) 184 CLR 132.
[47] *Penalties and Sentences Act* (Qld) 1992 ss.9(3)(i) and 9(6)(i).

Funding is a barrier to defence obtaining a pre-sentence report. Treating doctors, psychologists and psychiatrists will typically charge a not insubstantial fee for the provision of a letter or short report detailing treatment or engagement. Practices will also charge a fee for provision of patient files. For legally aided clients, it must be argued why this material is substantially relevant which can often be followed by extended timeframes awaiting a decision as to whether to fund this expense. Clients who are not legally aided must weigh up the financial burden of obtaining this material against the likelihood that it will assist at any sentence.

It is LAQ's experience that clients may instruct against the commissioning of a pre-sentence report where this would significantly delay their matter being finalised, particularly where they are on remand in custody. Material available from government organisations is usually obtained through a right to information[48] or information privacy[49] request, which require original authorities and copies of a client's identification.[50] Many disadvantaged or vulnerable clients do not have identification, which can lead to delays in obtaining material, further disadvantaging them. When the application is submitted the standard processing time is 30 days, though it is not uncommon for the organisation to request further time to comply with this request. Anecdotally, it is the experience of practitioners seeking access to records from Queensland Health and Hospital Services particularly in districts responsible for records held by correctional centres that delays of up to 6 months or more are not uncommon. This delay appears to have been partly attributable to the Covid-19 pandemic but has continued to be an issue subsequently.

This could be addressed by streamlining the right to information/information privacy process, particularly in relation to Queensland Health records. The requirement for the certified identification of a client further impacts already disadvantaged and vulnerable clients, such as offenders in custody, First Nations peoples, those who are homeless and those from culturally and linguistically diverse backgrounds. Where an offender is legally represented, Queensland Health records or material should be able to be obtained when requested by a lawyer with a signed authority from the client, accompanied by proof of the lawyer's employment or qualifications. This would remove some of the procedural and time barriers that prevent relevant medical or psychological material being placed before a sentencing court.

Additional funding could also be provided to increase staff in the RTI/IPA divisions within Queensland Health to assist with the processing of requests for information, particularly in those district areas where there are a high number of correctional centres located in the region.

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).

Medical and psychological reports are most commonly used where an offender has a history of trauma, mental illness or is being sentenced for a serious criminal offence. The content of medical reports will vary widely depending on the type of report. A report detailing an offender's physical disability may be brief, setting out what the disability is and how this

[48] *Right to Information Act 2009* (Qld), Chapter 3.
[49] *Information Privacy Act 2009* (Qld), Chapter 3, Part 1, s.40.
[50] *RTIA*, s.24(3)(a); *IPA*, s.43(3)(a).

impacts day to day life in less than a page. Conversely, a psychiatric report assessing risk may be detailed and lengthy, setting out the offender's background and types of testing undertaken in detail. A neuro-psychological report may also be obtained for an offender with a cognitive impairment, where the report writer undertakes an assessment of an individual's cognitive, emotional and behavioural functioning.

Generally, psychological and psychiatric reports will contain an overview of the offence, the background of the offender including mental or physical health diagnosis, the offender's attitude to the offence, an opinion regarding the connection between an offender's antecedents and the commission of the offence, if any and details of any testing done, if any.

These reports are used to:-

- Provide an assessment of risk, particularly in sexual offences
- Canvass antecedents, particularly where they impact an offender's behaviour or sentencing options, for example if an offender will experience particular hardship in custody
- Attempt to provide an explanation for the offending
- Draw a connection between an offender's mental illness/trauma background and the offending behaviour
- Details of rehabilitation undertaken since the commission of the offence
- Discuss prospects of rehabilitation
- Discuss proposed treatment options and their opined effectiveness.

The barriers to use in sentence proceedings include the outdated nature of the actuarial tools used to assess risk.[51] As discussed above, these risk assessments are not well suited to persons from a First Nations background,[52] or women.[53]

There are limitations in obtaining funding for psychological PSRs for legally aided clients. This is particularly for matters that proceed to sentence in the Magistrates Court, which could include sexual assault offences in certain circumstances[54].

For LAQ to fund a report, a lawyer must certify that: [55]

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[51] Edgely, Michelle. (2007). Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventative Detention of Sex Offenders in Queensland and Western Australia.

[52] Allan A, Parry CL, Ferrante A, Gillies C, Griffiths CS, Morgan F, Spiranovic C, Smallbone S, Tubex H, Wong SCP. Assessing the Risk of Australian Indigenous Sexual Offenders Reoffending: A Review of the Research Literature and Court Decisions. Psychiatr Psychol Law. 2018 Oct 31;26(2):274-294. doi: 10.1080/13218719.2018.1504242. PMID: 31984077; PMCID: PMC6762098.

[53] Poels, V. (2007). Risk Assessment of Recidivism of Violent and Sexual Female Offenders. *Psychiatry, Psychology and Law*, *14*(2), 227–250. https://doi.org/10.1375/pplt.14.2.227; Cortoni, Franca & Gannon, Theresa. (2016). The Assessment of Female Sexual Offenders. 10.1002/9781118574003.wattso046.

[54] *Criminal Code 1899 (*Qld), s.552B(1)(a) an offence of a sexual nature without a circumstance of aggravation if (i)the complainant was 14 years or over at the time of the offence, (ii) the offender has pleaded guilty and (iii) if the maximum term of imprisonment for which the defendant is liable is not more than three years.

[55] Legal Aid Queensland, *Grants Handbook: Pre-sentence report* (2019) <https://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Handbook/What-do-we-fund/Nature-and-extent-of-funding/Criminal-law-1/Expert-reports-in-criminal-law-matters/Pre-sentence-report?

- A client's personal history discloses gross abuse/trauma that may have contributed to their psychological behaviour and provide understanding and reasoning behind their criminal behaviour; or
- The client has revealed details of past and/or present drug or substance abuse that may have caused or contributed to psychological damage or the existence of a psychological condition.

Further, the report *will* have a significant impact on sentence and failure to obtain a report *would* be a possible ground of appeal. It is not sufficient that a lawyer believes that the report *could* impact sentence.

When funding is granted, it can be difficult to locate report writers who will prepare a report on Legal Aid rates and those who do often have delays of several months for appointments. A standard grant of aid provided to a psychologist or a social worker to prepare a report is $678.00. For a neuropsychological report, involving neuropsychological testing, the standard fee paid is $1 642.00[56] and for a psychiatric/medical specialist report the fee is $357.00 p/h capped at 12 hours.[57]

LAQ considers that there would be merit in increasing funding or reviewing the funding guidelines for defence to obtain independently sourced PSRs particularly in relation to serious sexual offences such as rape and sexual assault.

The benefits of such a proposal (as opposed to expanding the use of court ordered PSRs) is the increased ability of a defence practitioner to obtain background material (e.g. previous medical assessments or other medical/psychiatric/psychological material) to better inform the report writer regarding their client's background and prior medical/psychological/psychiatric diagnosis/es. This would reduce the risk of a PSR report writer relying on the self-report from an offender when preparing reports for the court. It also has the potential to provide a more balanced assessment of an offender, given that the collateral information currently available to the PSR report writer is limited to (often negative) information contained by QCS about an offender in the Integrated Offender Management System, including an offender's previous non-compliance with community-based orders and other internal disciplinary matters within the custodial environment.

LAQ recently increased the funding providing to psychiatrists and neuropsychologists, which may in time result in more report writers undertaking work at Legal Aid rates. However, there continues to be a reluctance by psychological, neuro-psychological and psychiatric report writers to accept a retainer to prepare a PSR at LAQ rates. There are also fewer qualified and experienced practitioners outside South-East Queensland which also presents challenges for those seeking to obtain independent PSRs. This continues to create issues with delay in sentence proceedings.

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[56] Legal Aid Queensland, *Grants Handbook: Neuropsychological assessment and report* (2024) https://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Handbook/What-do-we-fund/Nature-and-extent-of-funding/Criminal-law-1/Expert-reports-in-criminal-law-matters/Neuropsychological-assessment-and-report .

[57] Legal Aid Queensland, *Grants Handbook: Psychiatric/medical specialist report* (2024) https://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Handbook/What-do-we-fund/Nature-and-extent-of-funding/Criminal-law-1/Expert-reports-in-criminal-law-matters/Psychiatric-report .

This could also be a risk with any expansion of court ordered PSRs should there be a request from a court to obtain a psychological or psychiatric report. Similar delays have been experienced by practitioners at LAQ in these circumstances.

Removing some of the funding and administrative barriers to accessing collateral information from private medical practitioners and/or government departments would also assist in ensuring the PSR report writers are provided with information that may better inform courts about an offender and improve a court's ability to impose an appropriate sentence particularly for serious sexual offences such as rape and sexual assault.

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?

LAQ supports the legislative requirement to receive submissions from community justice groups. As noted in the response to question 7, the disadvantage experienced by Aboriginal and Torres Strait Islander persons will often be relevant and should be taken into account on sentence.

Those groups require additional funding and support. LAQ's experience is consistent with the findings of The Myuma Group's [58] review of community justice group. The limited resources and funding of community justice groups are insufficient for them to effectively meet the various needs of the communities they serve. Whilst section 9(2)(p) reports undoubtedly assist the court and benefit members of the community appearing in court, anecdotal experience is that their preparation has absorbed resources previously applied to implementing preventative strategies in community and supporting prisoners reintegrate in the community to reduce their risk of recidivism.

Funding community justice groups to work in the community to strengthen pro-social connection to culture and community is an effective justice reinvestment measure that should form part of a suite of measures designed to address systemic disadvantage.

A senior member of LAQ's First Nations Strategy, Ms Margaret Hornagold, has observed that most community justice groups rely on the voluntary work of elderly members of the community who have the richest knowledge of culture and community. She notes that there is often a lack of support to assist in conveying that knowledge most effectively to the courts. She recommends funding younger members of the community to act as liaisons not only to clearly communicate that wealth of important cultural and community knowledge but also to assist elderly members of the community to remain appraised of the changing operation of the criminal justice system so they can understand the context in which they are providing their knowledge.

[58] PHASE 2 ANNUAL REPORT: Evaluation of Community Justice Groups (December 2022).

Additional funding and support for community justice groups must preserve the autonomy of those groups. An early expansive review of the justice group at Kowanyama observed it was:

> "a promising case of self-management achieved with minimal assistance from government, and in many respects without much awareness on the part of government. Ironically, this may in fact be one of the model's greatest strengths. My hope is that, with the opportunities for the extension of the justice group model to other communities, government funding now being available, others will be mindful of the strengths of the Kowanyama justice group based on community ownership, control and autonomy. The significant challenge for the bureaucrats and politicians who oversee this area of program development is to avoid reverting to the familiar habits of seeking to control, incorporate and assimilate"[59]

Questions 17 – 19: Understanding victim harm and justice needs

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?

One of the principal purposes of a victim impact statement is to enable a victim survivor to tell the court and the person who harmed them how the offending behaviour impacted them. Under section 590AB of the *Criminal Code* (Qld), prosecutions have an obligation to make full and early disclosure of all evidence they intend to rely on in the proceeding, which includes victim impact statements. It is LAQ's experience that victim impact statements are disclosed very late in proceedings, often the day before or morning of sentence. This can result in a delay in the proceeding on the day or to a later date. It would be helpful for all the participant and victim impact statements to be provided at an earlier stage. Earlier disclosure would allow more time for an offender to gain meaningful insight and understanding of the impact of their actions prior to sentencing and provide instructions on the accuracy and content of what is contained in the statement.

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

No comment.

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?

No comment.

[59] Chantrill, Paul. (2013). The Kowanyama Aboriginal Community Justice Group and the Struggle for Legal Pluralism in Australia. The Journal of Legal Pluralism and Unofficial Law. 30. 10.1080/07329113.1998.10756497.

Questions 20 & 21: 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?

The use of restorative justice processes for adult defendants is limited to Queensland Adult Restorative Justice Conferencing (formerly Justice Mediation). There is no legislative guidance as to how, if at all, the outcomes of restorative justice processes can be taken into account at sentence.

The Queensland Police Service Operation Procedures Manual (OPM) expressly addresses referrals to Adult Restorative Justice. The preferred policy within the OPMs is to discontinue proceedings if an agreement is reached during the restorative justice process. This policy is expressed as follows:

> *"The completion of a restorative justice conference (ARJC), including finalisation of all terms of the agreement, should result in the discontinuation of the investigation or prosecution of a matter. Continuation of an investigation or prosecution despite a successful ARJC outcome may undermine the value of RJC.*
>
> *Upon being notified by the Dispute Resolution Branch, Department of Justice and Attorney-General the RJC has been successful, the investigating officer or prosecutor is to finalise the matter in the public interest (see s. 3.4.3: 'Factors to consider when deciding to prosecute' of this chapter).*
>
> *Continuing the investigation or prosecution of the matter despite a successful ARJC should only occur if there are exceptional circumstances.*
>
> *If it is determined an investigation or prosecution should proceed despite the completion of an ARJC and the successful fulfillment of the terms of the restorative outcome plan, the participation of the defendant may be submitted as mitigating factors at the sentence hearing."*

As a result of the above, ARJC is currently used as a diversionary option for criminal matters, although can be requested at other stages, including pre-sentence and post-sentence.

Where an ARJC process has taken place prior to sentence, a sentencing court should be able to take into account the outcomes of the process. A sentencing court should be able to take into account participation in the restorative justice process, and whether the terms of an outcome agreement were met, or whether an offender has made progress towards meeting the terms of the agreement. Allowing sentencing courts to take into account the outcome of a restorative justice process would incentivise meaningful engagement in the process. A sentencing court could use its powers to defer sentencing after conviction for a period of time sufficient to determine if the terms of the agreement were met. If the terms of the agreement were not met, a sentencing court would be able to take this into account. However, restorative justice is a voluntary process, and a sentencing court should not increase a sentence because an offender chose not to take part in the process or stopped taking part.

While ARJC is uncommon in the adult jurisdiction, pre-sentence restorative justice referrals are common in Childrens Court matters. The provisions under the *Youth Justice Act* 1992 (YJA) provide a helpful model for what information regarding restorative justice should be considered at sentence. Under section 167(6) of the *YJA,* where a pre-sentence restorative justice referral is made, a sentencing court must have regard to:

a) the child's participation in the relevant restorative justice process; and
b) the child's obligations under the restorative justice agreement; and
c) anything done by the child under the restorative justice agreement; and
d) any information provided by the chief executive about sentencing the child.

Other guidance can be drawn from other jurisdictions. In the ACT, it is a relevant sentencing consideration whether an adult offender accepts responsibility for the offence, or for a less serious offence, that they do not deny responsibility for the offence, under the *Crimes (Restorative Justice) Act 2004*.[60] Under this legislative regime, it is an irrelevant consideration that an offender chose not to take part, or chose not to continue to take party, in restorative justice for the offence.[61] This approach is appropriate to the extent that it reflects the voluntary nature of the process, however it does not explicitly go so far as to legislate the ability for a sentencing court to take into account the agreement and anything done towards it. In New Zealand, a sentencing court must take into account any outcomes of restorative justice that have occurred, or that the court is satisfied are likely to occur.[62] LAQ recommends a model which combines these approaches, which allows a court to explicitly take into account the agreement made and any steps made towards meeting the agreement, but that also reflects the voluntary nature of the process.

21. 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?

The following issues should be considered when developing a model:

1. Whether participating in a restorative justice process is a matter to be taken into account on sentence.
2. If participation in restorative justice is a matter to be taken into account on sentence, any sentencing guidance should ensure sufficient weight is given to participation so as to incentivise engagement.
3. To the extent a proposed model suggests engagement in treatment programs form part of restorative justice outcomes, the extent to which those programs are realistically available, particularly in regional areas.
4. In the context of the criminal justice system, the efficacy of a restorative justice process absent a substantial admission of liability.

The concern that recourse to restorative justice will create a perception that "sexual violence is unimportant and a private concern", is in part addressed by applying the reform broadly

[60] Crimes (Sentencing) Act 2005, section 33(y).
[61] Ibid section 34(h).
[62] Sentencing Act 2002 (NZ) section 8(j).

across the criminal justice system. Any reform should be supported by appropriate community education.

It is essential if such legislative reform was to be undertaken that it be accompanied with significant resources to the Restorative Justice branch of the Department of Justice and Attorney-General to ensure the option is available throughout the state and that delays are minimised (currently there are very limited options for ARJC outside of Brisbane). This could be addressed through the increased use of technology, which would make conferencing more accessible to remote regional areas and also defendants in custody.

There would also need to be significant development of models of conferencing to ensure all persons participating are supported and comfortable in participating. For offences of sexual assault and rape, one of the paramount considerations in developing a model would relate to the mode of participation of the victim during the conference. The YJA provides that a victim can participate in a restorative justice conference either by attending in person or having a representative attend in person, through a pre-recorded communication, or the attendance of a representative from a victims of crime organisation (section 35(1(b)). In the family law jurisdiction mediation is sometimes conducted in a way where a mediator conferences with both parties individually throughout the process, avoiding the need for the parties to communicate directly with one another. Any model should allow options for the attendance of victims either remotely, through pre-recorded communication or through a representative.

The YJA also includes provisions for children and victims to have one or more support persons, including a lawyer, on request (section 34). For a child who identifies as Aboriginal or Torres Strait Islander, the convenor must consider inviting a respected member of the child's community and/or a community justice group representative (34(3)). The convenor must also ensure that the child is informed of their right to legal advice. LAQ would recommend similar provisions be considered for any AJRC model.

LAQ also notes that the Restorative Justice branch of the Department of Justice and Attorney-General should be provided with adequate training to support understanding of First Nations defendants and defendants suffering from disadvantage and complex needs. Under the current model, missing an appointment can lead to the matter being referred back to the court process.

Where a referral to AJRC is refused on the basis that the complainant does not wish to participate, there should be an obligation on the Prosecution that they provide evidence that the complainant has had AJRC, and the court process explained to them. In developing a model, consideration should be given to including alternative mediation models to cater to scenarios where the complainant does not wish to participate.

Questions 22 & 23 – Human Rights considerations

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), section 13)?

Mandatory sentencing is not consistent with the right to liberty, specifically not to be subject to arbitrary detention. Legislation with a mandatory element in respect of sentencing can be viewed as limiting this right. Examples of this in Queensland include mandatory life imprisonment for 'repeat serious child sex offences', and serious violent offence declarations. To a lesser extent, the provision that an offender sentenced for an offence of a sexual nature in relation to a child under 16 years or a child exploitation material offence must serve an actual term of imprisonment unless there are exceptional circumstances significantly fetters judicial discretion for sentencing in these matters.

Caution should be exercised in broadening the categories already captured within section 9(4).

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'?

Any reforms should retain discretion within sentencing and the ability for judicial officers to take into account the defendant's personal circumstances. This is with regard to the fact that incarceration disproportionately disadvantages:

1. People with disabilities (because the prison environment may be harder for them to cope with, compared to persons without disabilities)
2. Aboriginal and Torres Strait Islander persons (because incarceration may infringe their cultural rights e.g., removal from country, community, and cultural ties)

LAQ is concerned that introducing or extending mandatory sentencing and/or removing the ability for the judge to exercise discretion in relation to personal circumstances could impose further serious disadvantage on prisoners who are Aboriginal and/or Torres Strait Islander, and/or people with disabilities, which would be inconsistent with the right to equality before the law (HRA section 15) and cultural rights of Aboriginal and/or Torres Strait Islander persons (HRA section 28).

Questions 24 & 25: Other issues

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

No comment

25. Is there any other issue about sentencing for sexual assault and rape offences that you would like to raise with the Council?

No comment

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ANNEXURE A

***Markarian v The Queen* (2005) 228 CLR 357**

Instinctive synthesis is the proper approach to sentencing which was approved by the High Court in *Markarian v The Queen*[63]*:*

> "… That is not to say that in a simple case, in which, for example, the circumstances of the crime have to be weighed against one or a small number of other important matters, indulgence in arithmetical deduction by the sentencing judges should be absolutely forbidden. An invitation to a sentencing judge to engage in a process of 'instinctive synthesis', as useful as shorthand terminology may on occasions be, is not desirable if no more is said or understood about what that means. The expression 'instinctive synthesis' may then be understood to suggest an arcane process into the mysteries of which only judges can be initiated. The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public. There may be occasions when some indulgence in an arithmetical process will better serve these ends."

***R v Wruck* [2014] QCA 39**

In the Queensland Court of Appeal case of *Wruck*, her Honour Justice Holmes as she then was, observed at [36]:

> "There is no doubt that there are compelling mitigating circumstances in the applicant's favour: his relative youth and sexual immaturity at the time of the offending, his blameless life thereafter over a period of decades, his evident remorse and co-operation in the prosecution. Against that is the egregious breach of trust entailed in the offending: called on in a counselling role to provide the complainant with the male guidance he lacked because of his father's departure, the applicant abused his position utterly, in what were not isolated incidents. The other striking feature of the case, one which would not have been evident had the applicant been dealt with at the time of the offending, is the serious and lasting harm done to the complainant who, in middle age, remained deeply affected by what had occurred."

Wruck supports the proposition that good character is a factor taken into account on sentence. However, it is one that is balanced against the other factors contained in section 9 including the harm caused to the complainant.

***Dick v The Queen* (1994) 75 A Crim R 303**

In Western Australia, the Court of Criminal Appeal considered this issue in *Dick v The Queen* and *R v Petchell*[64]:

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[63] (2005) 228 CLR 357 at 375
[64] Unreported, WA Court of Criminal Appeal, Number 157 of 1992.

> "That, in cases of offences of the nature with which we are concerned (sexual assaults committed by a stepfather against a juvenile), the offender is of otherwise good character is not without relevance but can have little weight. The offences are of such a nature that until brought to light, they generally do not impinge on others and so on their perception of the offender and can co-exist quite comfortably so far as the offender is concerned with an otherwise good character."

***R v Reid; Ex parte Attorney-General (Qld)* [2001] QCA 301**

Reid pleaded guilty to one count of indecent treatment of a child under 16 years along with non-sexual offences. He was sentenced to three years' probation with no conviction recorded.

The Attorney-General appealed on the basis the sentence was manifestly inadequate in that it failed to reflect the gravity of the offences and to sufficiently consider general deterrence, placing too much weight on mitigating factors.

The respondent was 70 years old at sentence and had no previous convictions. He was a well regarded former senior public servant who had been head of protocol in the Premier's Department. Many references were tendered attesting to his outstanding community service and good character. He had been actively involved in his church as a lay preacher since 1948 and has held lay positions in the church at local, State and national level. As a result of these charges, he informed his fellow parishioners of his conduct and resigned from all positions he held in the church.

He has also given outstanding service to the community through the Blue Nursing Association over many years. He was treasurer and chairman of its Sandgate centre from its inception in 1957 until 1998 when it was regionalised. He was made a life member of Blue Nurses in 1983 and was State Treasurer and Queensland Director-General from 1960 till 1990. He was National President of the Australian Council of Community Nursing from 1970 to 1980.[65]

In the light of the respondent's previous good character, which demonstrated that this behaviour was out of character and his significant health problems which contributed to his behaviour according to the undisputed report of Dr Curtis, the respondent in my view need not have been sentenced to a term of actual imprisonment and the concession made by the prosecutor at sentence was fairly and properly made.[66]

***R v D'Arcy* [2000] QCA 425**

D'Arcy was convicted after trial of sexual offences committed 35 years prior. In relation to the sentence appeal, he argued that the sentencing judge erred in not giving adequate weight to mitigating factors. Those mitigating factors included becoming a member of Parliament and having over 100 good character references tendered at his sentence hearing.

McMurdo:

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[65] Page 3.
[66] Page 9.

> [133] the applicant submits the sentencing judge did not give sufficient weight to these references in that his Honour noted that "the weight of the references must be tempered by the fact that they got to know you and respect you without knowledge of these crimes you have committed".
>
> [134] Whilst, as Mr Maher points out, the references were given in the knowledge that the appellant had been convicted of these offences, the learned judge's remarks remain apposite. Nevertheless, the references indicate that the appellant was of good character apart from the commission of these offences. The prosecution did not contend to the contrary other than to point out that there were outstanding charges but none which post-dated 1972. On the evidence before the sentencing court, the judge was obliged to take the appellant's good character since 1972 into account in sentencing, although when the gravity of the offending is looked at, that character evidence can only be a small mitigating factor in the sentencing process: see *Ryan v The Queen* and *R v L; Ex parte Attorney-General*. The learned sentencing judge's comments in themselves do not suggest however that his Honour failed to take into account the appellant's good character evidence.

McPherson P at [147] said:

> I am not, however, persuaded that the appellant's apparently unblemished record since the time when these offences were committed some 30 or more years ago can count for very much in his favour. If it had been known that he had offended in this way, it is certain that he would not have been nominated for or elected to Parliament, or appointed to the high offices of State which he has held, with all the advantages of status and remuneration that they entail. Instead, he has brought shame and disgrace on his party and the Parliament of which he was a member. Taking the risk, as he did, that he would one day be found out does not suggest to me that the appellant has ever had any real appreciation of or remorse for his serious criminal conduct.

Chesterman J regarded delay as being the important factor such that the duration between the offence and prosecution of the offender has become rehabilitated, it may be appropriate to mitigate the sentence.

***Ryan v The Queen* (2001) 206 CLR 267**

Ryan was a priest who pleaded guilty to numerous sexual offending against a number of complainants in connection with his role as a priest. Testimonials were received from former parishioners, priests and others of the accused's good character, reputation and positive works and achievements as a parish priest. The sentencing judge said of Ryan's character that, whatever he had done and achieved, he was not a good man and he could see no good in him, and that his "unblemished character and reputation" did not entitle him to "any leniency whatsoever".

The court held (with Hayne JJ dissenting), that the accused had been entitled to some, though not significant, leniency for his otherwise good character and hence the judge had not applied a proper sentencing principle when he denied the prisoner any leniency on that account.

At 275, McHugh observed that there should be a two step process when determining good character on sentence. First, it must determine whether the prisoner is of otherwise good character. In making this assessment, the sentencing judge must not consider the offences for which the prisoner is being sentenced. Secondly, if a prisoner is of otherwise good character, the sentencing judge must take that fact into account. However, the weight that must be given to the prisoner's otherwise good character will vary according to the circumstances of the case.

***R v Smith* (1981) 7 A Crim R 437**

What weight is to be given to the evidence of good character is a matter for the sentencer. That will in turn depend on the nature of the subject offence. Some offences are of such a nature and seriousness that the previous good character of the offender is of little weight. In *Smith*, Starke J said (at 442):

> What weight it will have depends … on the character of the offence committed. In some cases like armed robbery … the fact of good character would have very little weight at all. In other cases … where a man has lived an honest life and has found himself in circumstances through no fault of his own and fell into temptation, the situation is quite different.

ANNEXURE B

Case authorities considered in response to Question 12 were *R v SDZ* [2023] QCA 30, *R v WBM* [2020] QCA 107 and *R v Wallace* [2023] QCA 22.

In *R v SDZ,* the offender was sentenced for sexual offending he committed against his younger female cousin when he was both a minor and an adult. Given the delay in his prosecution, he was sentenced as an adult for all the offending. When he was about 14 years of age, he had his then 6 year old cousin suck his penis. He was sentenced to 18 months imprisonment for that offending (recognising he was a minor at the time). When he was about 15 and she was 7, he digitally penetrated her vagina. He then indecently dealt with her once the year after that and once again the year after that. Concurrent sentences of imprisonment were imposed for those other offences committed as a minor. The two of them were then together at a house party some 10 years later, when he was 27 and she was 20 years old. They were in a car after leaving the party and SDZ forced his penis into her mouth and then into her vagina. The Court of Appeal determined, noting that the sentences were imposed cumulatively on the 18 month term imposed for the first in time offence (and therefore would have involved some amelioration), that the six years imprisonment imposed on each of the rape offences committed as an adult were not manifestly excessive. SDZ had no prior criminal history and pleaded guilty.

The conviction in *R v WBM* followed a trial. It is a more serious example of rape because it was committed against a child and involved a significant breach of trust. WBM was sentenced to nine years imprisonment for penetrating the vagina of his then seven year old daughter with his penis and tongue and attempting to penetrate her anus with his penis, as well as indecently dealing with her. Among other comparable decisions, the case of *R v P* [2001] QCA 25 was referred to in the judgment. There, a step-father was sentenced to nine years imprisonment for a single rape against the 12 year old complainant. In another case referred to, *R v BBP* [2009] QCA 114, it was said "[t]he range for offending of this kind will therefore extend beyond eight years". WBM was also an example of a case where the court set a parole eligibility date beyond the half way mark (five years instead of four and a half) that would usually follow a conviction after trial.

In *R v Wallace,* the Court of Appeal resentenced a 19 year old indigenous offender with a prejudicial and disadvantaged adolescence and no criminal history to an 11 year period of imprisonment (a serious violent offence declaration was made) for two separate instances of violent offending committed against women in the early hours of a morning. This offending was even more serious because it involved significant violence. Wallace was sentenced to 12 months imprisonment for repeatedly punching and causing significant facial injuries to a woman he had paid for sex. About two hours later, he assaulted a 66 year old woman who was out walking. He was sentenced to 10 years imprisonment to be served cumulatively for the offending against her. He caused her grievous bodily harm (she required surgery to fix fractured facial bones), digitally raped her, attempted to vaginally rape her with his penis (but

was flaccid) and then orally raped her by placing his penis in her mouth. Apart from being young and having no criminal history, Mr Wallace pleaded guilty and was genuinely remorseful. He made admissions to police and entertained suicidal thoughts after his offending. Whilst acknowledging the need at paragraph [13] of that judgment to "consider the particular circumstances of each case, rather than proceed on the basis of formulaic compartmentalisation of offending, or generalisations as to what kind of rape is worse or more serious", that case supports the suggestion that the violent rape of an adult (where grievous bodily harm results) calls for a sentence of at least 10 years, even where, as here, the offender was young, cooperated with police and by pleading guilty, had no criminal history and a prejudicial upbringing. The effected rapes were digital and oral and penile rape was attempted but not completed. It was said at paragraph [17] that *R v Newman*[2007] QCA 198 is authority "for the proposition that in cases where rape and grievous bodily harm are involved, on a plea of guilty, the sentencing range is 10 to 14 years' imprisonment. Youth and lack of prior criminal history support sentencing at the lower end of this range" (footnotes omitted). The judgment also referred to other instances of sentencing for violent rape offences.